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# BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation

Note: this page is an archive of an old version of the bylaws. The current [ICANN](#) bylaws are always available at:

<https://www.icann.org/resources/pages/governance/bylaws-en>

As amended 11 April 2013

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## ARTICLE I: MISSION AND CORE VALUES

### Section 1. MISSION

The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are

a. Domain names (forming a system referred to as "DNS");

b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and

c. Protocol port and parameter numbers.

2. Coordinates the operation and evolution of the DNS root name server system.

3. Coordinates policy development reasonably and appropriately related to these technical functions.

### Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

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

2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will



necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

## ARTICLE II: POWERS

### Section 1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board. With respect to any matters that would fall within the provisions of [Article III, Section 6](#), the Board may act only by a majority vote of all members of the Board. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of those present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those members present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "all of the members of the Board."

### Section 2. RESTRICTIONS

ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN. Nothing in this Section is intended to prevent ICANN from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

### Section 3. NON-DISCRIMINATORY TREATMENT

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

## ARTICLE III: TRANSPARENCY

### Section 1. PURPOSE

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

## **Section 2. WEBSITE**

ICANN shall maintain a publicly-accessible Internet World Wide Web site (the "Website"), which may include, among other things, (i) a calendar of scheduled meetings of the Board, Supporting Organizations, and Advisory Committees; (ii) a docket of all pending policy development matters, including their schedule and current status; (iii) specific meeting notices and agendas as described below; (iv) information on ICANN's budget, annual audit, financial contributors and the amount of their contributions, and related matters; (v) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (vi) announcements about ICANN activities of interest to significant segments of the ICANN community; (vii) comments received from the community on policies being developed and other matters; (viii) information about ICANN's physical meetings and public forums; and (ix) other information of interest to the ICANN community.

## **Section 3. MANAGER OF PUBLIC PARTICIPATION**

There shall be a staff position designated as Manager of Public Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN, including the Website and various other means of communicating with and receiving input from the general community of Internet users.

## **Section 4. MEETING NOTICES AND AGENDAS**

At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

## **Section 5. MINUTES AND PRELIMINARY REPORTS**

1. All minutes of meetings of the Board and Supporting Organizations (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN Secretary for posting on the Website.

2. No later than 11:59 p.m. on the second business days after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any resolutions passed by the Board of Directors at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the preliminary report made publicly available. The Secretary shall send notice to the Board of Directors and the Chairs of the Supporting Organizations (as set forth in Articles VIII - X of these Bylaws) and Advisory Committees (as set forth in Article XI of these Bylaws) informing them that the resolutions have been posted.

3. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 5.2 above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.

4. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN's principal office, then the next immediately following business day), the minutes shall be made publicly available on the Website; provided, however, that any minutes relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

## **Section 6. NOTICE AND COMMENT ON POLICY ACTIONS**

1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and

c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in [Section 6\(1\)\(b\) of this Article](#), prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

## **Section 7. TRANSLATION OF DOCUMENTS**

As appropriate and to the extent provided in the ICANN budget, ICANN shall facilitate the translation of final published documents into various appropriate languages.

## **ARTICLE IV: ACCOUNTABILITY AND REVIEW**

### **Section 1. PURPOSE**

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in [Article I of these Bylaws](#). The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of [Article III](#) and the Board and other selection mechanisms set forth throughout these Bylaws.

## Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
  - a. one or more staff actions or inactions that contradict established ICANN policy(ies); or
  - b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
  - c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.
3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
  - a. evaluate requests for review or reconsideration;
  - b. summarily dismiss insufficient requests;
  - c. evaluate requests for urgent consideration;

- d. conduct whatever factual investigation is deemed appropriate;
  - e. request additional written submissions from the affected party, or from other parties;
  - f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
  - g. make a recommendation to the Board of Directors on the merits of the request, as necessary.
4. ICANN shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs.
5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:
  - a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or
  - b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
  - c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.
6. To properly initiate a Reconsideration process, all requestors must review and follow the Reconsideration Request form posted

on the ICANN website. at

<http://www.icann.org/en/groups/board/governance/reconsideration>.

Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

7. Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.
8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is the same for all of the requestors. Every requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.
9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the Website.
10. For all Reconsideration Requests that are not summarily dismissed, the Board Governance Committee shall promptly proceed to review and consideration.
11. The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.
12. The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A

requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

13. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor.
14. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.
15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.
16. The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or recommendation. The final recommendation shall be posted on ICANN's website.
17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the



Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. The Board's decision on the recommendation is final.

18. If the requestor believes that the Board action or inaction posed for Reconsideration is so urgent that the timing requirements of the Reconsideration process are too long, the requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (calculated at ICANN's headquarters in Los Angeles, California) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.
19. The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Request, or as soon thereafter as feasible. If the Board Governance Committee does not agree to consider the matter with urgency, the requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.
20. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:
  - a. the number and general nature of Reconsideration Requests received, including an identification if the requests were acted upon, summarily dismissed, or remain pending;
  - b. for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any request pending for more than ninety (90) days;

- c. an explanation of any other mechanisms available to ensure that ICANN is accountable to persons materially affected by its decisions; and
- d. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

### **Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS**

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.
3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.
4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether

the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
  - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
  - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.
6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.
7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN ("the IRP Provider"). The membership of the standing panel shall

be coordinated by the IRP Provider subject to approval by ICANN.

8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this [Section 3](#).
9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.
10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.
11. The IRP Panel shall have the authority to:
  - a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
  - b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
  - c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
  - d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
  - e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
  - f. determine the timing for each proceeding.
12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.

13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.
14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.
15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.
16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.
17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties'

accredited by and under contract to ICANN;

c. Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet; and

d. Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.

2. Each Stakeholder Group is assigned a specific number of Council seats in accordance with [Section 3\(1\) of this Article](#).

3. Each Stakeholder Group identified in [paragraph 1 of this Section](#) and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN Board. Recognition is granted by the Board based upon the extent to which, in fact, the entity represents the global interests of the stakeholder communities it purports to represent and operates to the maximum extent feasible in an open and transparent manner consistent with procedures designed to ensure fairness. Stakeholder Group and Constituency Charters may be reviewed periodically as prescribed by the Board.

4. Any group of individuals or entities may petition the Board for recognition as a new or separate Constituency in the Non-Contracted Parties House. Any such petition shall contain:

a. A detailed explanation of why the addition of such a Constituency will improve the ability of the GNSO to carry out its policy-development responsibilities;

b. A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;

c. A recommendation for organizational placement within a particular Stakeholder Group; and

d. A proposed charter that adheres to the principles and procedures contained in these Bylaws.

Any petition for the recognition of a new Constituency and the associated charter shall be posted for public comment.

5. The Board may create new Constituencies as described in [Section 5\(3\)](#) in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN. In the event the Board is considering acting on its own motion it shall post a detailed explanation of why such action is necessary or desirable, set a reasonable time for public comment, and not make a final decision on whether to create such new Constituency until after reviewing all comments received. Whenever the Board posts a petition or recommendation for a new Constituency for public comment, the Board shall notify the GNSO Council and the appropriate Stakeholder Group affected and shall consider any response to that notification prior to taking action.

## Section 6. POLICY DEVELOPMENT PROCESS

The policy-development procedures to be followed by the GNSO shall be as stated in [Annex A](#) to these Bylaws. These procedures may be supplemented or revised in the manner stated in [Section 3\(4\) of this Article](#).

## ARTICLE XI: ADVISORY COMMITTEES

### Section 1. GENERAL

The Board may create one or more Advisory Committees in addition to those set forth in this Article. Advisory Committee membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.

### Section 2. SPECIFIC ADVISORY COMMITTEES

There shall be at least the following Advisory Committees:

#### 1. Governmental Advisory Committee

a. The Governmental Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and

international agreements or where they may affect public policy issues.

b. Membership in the Governmental Advisory Committee shall be open to all national governments. Membership shall also be open to Distinct Economies as recognized in international fora, and multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee through its Chair.

c. The Governmental Advisory Committee may adopt its own charter and internal operating principles or procedures to guide its operations, to be published on the Website.

d. The chair of the Governmental Advisory Committee shall be elected by the members of the Governmental Advisory Committee pursuant to procedures adopted by such members.

e. Each member of the Governmental Advisory Committee shall appoint one accredited representative to the Committee. The accredited representative of a member must hold a formal official position with the member's public administration. The term "official" includes a holder of an elected governmental office, or a person who is employed by such government, public authority, or multinational governmental or treaty organization and whose primary function with such government, public authority, or organization is to develop or influence governmental or public policies.

f. The Governmental Advisory Committee shall annually appoint one non-voting liaison to the ICANN Board of Directors, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN Nominating Committee.

g. The Governmental Advisory Committee may designate a non-voting liaison to each of the Supporting Organization Councils and Advisory Committees, to the extent the Governmental Advisory Committee deems it appropriate and useful to do so.

h. The Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.



i. The Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.

j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.

## 2. Security and Stability Advisory Committee

a. The role of the Security and Stability Advisory Committee ("SSAC") is to advise the ICANN community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. It shall have the following responsibilities:

1. To communicate on security matters with the Internet technical community and the operators and managers of critical DNS infrastructure services, to include the root name server operator community, the top-level domain registries and registrars, the operators of the reverse delegation trees such as in-addr.arpa and ip6.arpa, and others as events and developments dictate. The Committee shall gather and articulate requirements to offer to those engaged in technical revision of the protocols

# Exhibit B

# gTLD Applicant Guidebook

Version 2012-06-04



4 June 2012

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# *Preamble*

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## *New gTLD Program Background*

New gTLDs have been in the forefront of ICANN's agenda since its creation. The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS.

Currently the namespace consists of 22 gTLDs and over 250 ccTLDs operating on various models. Each of the gTLDs has a designated "registry operator" and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in that TLD. The gTLDs are served by over 900 registrars, who interact with registrants to perform domain name registration and other related services. The new gTLD program will create a means for prospective registry operators to apply for new gTLDs, and create new options for consumers in the market. When the program launches its first application round, ICANN expects a diverse set of applications for new gTLDs, including IDNs, creating significant potential for new uses and benefit to Internet users across the globe.

The program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholder groups—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008. A thorough brief to the policy process and outcomes can be found at <http://gnso.icann.org/issues/new-gtlds>.

ICANN's work next focused on implementation: creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval. This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook. In parallel, ICANN has established the resources needed to successfully launch and operate the program. This process concluded with the decision by the ICANN Board of Directors in June 2011 to launch the New gTLD Program.

For current information, timelines and activities related to the New gTLD Program, please go to <http://www.icann.org/en/topics/new-gtld-program.htm>.



# gTLD Applicant Guidebook

(v. 2012-06-04)

Module 1

4 June 2012

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# Module 1

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## *Introduction to the gTLD Application Process*

This module gives applicants an overview of the process for applying for a new generic top-level domain, and includes instructions on how to complete and submit an application, the supporting documentation an applicant must submit with an application, the fees required, and when and how to submit them.

This module also describes the conditions associated with particular types of applications, and the stages of the application life cycle.

Prospective applicants are encouraged to read and become familiar with the contents of this entire module, as well as the others, before starting the application process to make sure they understand what is required of them and what they can expect at each stage of the application evaluation process.

For the complete set of the supporting documentation and more about the origins, history and details of the policy development background to the New gTLD Program, please see <http://gnso.icann.org/issues/new-gtlds/>.

This Applicant Guidebook is the implementation of Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.

### *1.1 Application Life Cycle and Timelines*

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This section provides a description of the stages that an application passes through once it is submitted. Some stages will occur for all applications submitted; others will only occur in specific circumstances. Applicants should be aware of the stages and steps involved in processing applications received.

#### *1.1.1 Application Submission Dates*

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The user registration and application submission periods open at **00:01 UTC 12 January 2012**.

The user registration period closes at **23:59 UTC 29 March 2012**. New users to TAS will not be accepted beyond this

time. Users already registered will be able to complete the application submission process.

Applicants should be aware that, due to required processing steps (i.e., online user registration, application submission, fee submission, and fee reconciliation) and security measures built into the online application system, it might take substantial time to perform all of the necessary steps to submit a complete application. Accordingly, applicants are encouraged to submit their completed applications and fees as soon as practicable after the Application Submission Period opens. Waiting until the end of this period to begin the process may not provide sufficient time to submit a complete application before the period closes. Accordingly, new user registrations will not be accepted after the date indicated above.

The application submission period closes at **23:59 UTC 12 April 2012**.

To receive consideration, all applications must be submitted electronically through the online application system by the close of the application submission period.

An application will not be considered, in the absence of exceptional circumstances, if:

- It is received after the close of the application submission period.
- The application form is incomplete (either the questions have not been fully answered or required supporting documents are missing). Applicants will not ordinarily be permitted to supplement their applications after submission.
- The evaluation fee has not been paid by the deadline. Refer to Section 1.5 for fee information.

ICANN has gone to significant lengths to ensure that the online application system will be available for the duration of the application submission period. In the event that the system is not available, ICANN will provide alternative instructions for submitting applications on its website.

### ***1.1.2 Application Processing Stages***

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This subsection provides an overview of the stages involved in processing an application submitted to ICANN. Figure 1-1 provides a simplified depiction of the process. The shortest and most straightforward path is marked with bold lines, while certain stages that may or may not be

possible, consult with interested parties to mitigate any concerns in advance.

#### **1.1.2.7 Receipt of GAC Advice on New gTLDs**

The GAC may provide public policy advice directly to the ICANN Board on any application. The procedure for GAC Advice on New gTLDs described in Module 3 indicates that, to be considered by the Board during the evaluation process, the GAC Advice on New gTLDs must be submitted by the close of the objection filing period. A GAC Early Warning is not a prerequisite to use of the GAC Advice process.

If the Board receives GAC Advice on New gTLDs stating that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved. If the Board does not act in accordance with this type of advice, it must provide rationale for doing so.

See Module 3 for additional detail on the procedures concerning GAC Advice on New gTLDs.

#### **1.1.2.8 Extended Evaluation**

*Extended Evaluation is available only to certain applicants that do not pass Initial Evaluation.*

Applicants failing certain elements of the Initial Evaluation can request an Extended Evaluation. If the applicant does not pass Initial Evaluation and does not expressly request an Extended Evaluation, the application will proceed no further. The Extended Evaluation period allows for an additional exchange of information between the applicant and evaluators to clarify information contained in the application. The reviews performed in Extended Evaluation do not introduce additional evaluation criteria.

An application may be required to enter an Extended Evaluation if one or more proposed registry services raise technical issues that might adversely affect the security or stability of the DNS. The Extended Evaluation period provides a time frame for these issues to be investigated. Applicants will be informed if such a review is required by the end of the Initial Evaluation period.

Evaluators and any applicable experts consulted will communicate the conclusions resulting from the additional review by the end of the Extended Evaluation period.



At the conclusion of the Extended Evaluation period, ICANN will post summary reports, by panel, from the Initial and Extended Evaluation periods.

If an application passes the Extended Evaluation, it can then proceed to the next relevant stage. If the application does not pass the Extended Evaluation, it will proceed no further.

The Extended Evaluation is expected to be completed for all applications in a period of approximately 5 months, though this timeframe could be increased based on volume. In this event, ICANN will post updated process information and an estimated timeline.

#### **1.1.2.9 Dispute Resolution**

*Dispute resolution applies only to applicants whose applications are the subject of a formal objection.*

Where formal objections are filed and filing fees paid during the objection filing period, independent dispute resolution service providers (DRSPs) will initiate and conclude proceedings based on the objections received. The formal objection procedure exists to provide a path for those who wish to object to an application that has been submitted to ICANN. Dispute resolution service providers serve as the fora to adjudicate the proceedings based on the subject matter and the needed expertise. Consolidation of objections filed will occur where appropriate, at the discretion of the DRSP.

As a result of a dispute resolution proceeding, either the applicant will prevail (in which case the application can proceed to the next relevant stage), or the objector will prevail (in which case either the application will proceed no further or the application will be bound to a contention resolution procedure). In the event of multiple objections, an applicant must prevail in all dispute resolution proceedings concerning the application to proceed to the next relevant stage. Applicants will be notified by the DRSP(s) of the results of dispute resolution proceedings.

Dispute resolution proceedings, where applicable, are expected to be completed for all applications within approximately a 5-month time frame. In the event that volume is such that this timeframe cannot be accommodated, ICANN will work with the dispute resolution service providers to create processing procedures and post updated timeline information.

#### 1.1.2.10 String Contention

*String contention applies only when there is more than one qualified application for the same or similar gTLD strings.*

String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

Applicants are encouraged to resolve string contention cases among themselves prior to the string contention resolution stage. In the absence of resolution by the contending applicants, string contention cases are resolved either through a community priority evaluation (if a community-based applicant elects it) or through an auction.

In the event of contention between applied-for gTLD strings that represent geographic names, the parties may be required to follow a different process to resolve the contention. See subsection 2.2.1.4 of Module 2 for more information.

Groups of applied-for strings that are either identical or similar are called contention sets. All applicants should be aware that if an application is identified as being part of a contention set, string contention resolution procedures will not begin until all applications in the contention set have completed all aspects of evaluation, including dispute resolution, if applicable.

To illustrate, as shown in Figure 1-2, Applicants A, B, and C all apply for .EXAMPLE and are identified as a contention set. Applicants A and C pass Initial Evaluation, but Applicant B does not. Applicant B requests Extended Evaluation. A third party files an objection to Applicant C’s application, and Applicant C enters the dispute resolution process. Applicant A must wait to see whether Applicants B and C successfully complete the Extended Evaluation and dispute resolution phases, respectively, before it can proceed to the string contention resolution stage. In this example, Applicant B passes the Extended Evaluation, but Applicant C does not prevail in the dispute resolution proceeding. String contention resolution then proceeds between Applicants A and B.



# gTLD Applicant Guidebook

(v. 2012-06-04)

Module 2

4 June 2012

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# Module 2

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## *Evaluation Procedures*

This module describes the evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation. All applicants will undergo an Initial Evaluation and those that do not pass all elements may request Extended Evaluation.

The first, required evaluation is the **Initial Evaluation**, during which ICANN assesses an applied-for gTLD string, an applicant's qualifications, and its proposed registry services.

The following assessments are performed in the **Initial Evaluation**:

- String Reviews
  - String similarity
  - Reserved names
  - DNS stability
  - Geographic names
- Applicant Reviews
  - Demonstration of technical and operational capability
  - Demonstration of financial capability
  - Registry services reviews for DNS stability issues

An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.

**Extended Evaluation** may be applicable in cases in which an applicant does not pass the Initial Evaluation. See Section 2.3 below.

### *2.1 Background Screening*

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Background screening will be conducted in two areas:

- (a) General business diligence and criminal history; and
- (b) History of cybersquatting behavior.

#### 2.2.1.4 Geographic Names Review

Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments or public authorities in geographic names. The requirements and procedure ICANN will follow in the evaluation process are described in the following paragraphs. Applicants should review these requirements even if they do not believe their intended gTLD string is a geographic name. All applied-for gTLD strings will be reviewed according to the requirements in this section, regardless of whether the application indicates it is for a geographic name.

##### 2.2.1.4.1 Treatment of Country or Territory Names<sup>6</sup>

Applications for strings that are country or territory names will not be approved, as they are not available under the New gTLD Program in this application round. A string shall be considered to be a country or territory name if:

- i. it is an alpha-3 code listed in the ISO 3166-1 standard.
- ii. it is a long-form name listed in the ISO 3166-1 standard, or a translation of the long-form name in any language.
- iii. it is a short-form name listed in the ISO 3166-1 standard, or a translation of the short-form name in any language.
- iv. it is the short- or long-form name association with a code that has been designated as “exceptionally reserved” by the ISO 3166 Maintenance Agency.
- v. it is a separable component of a country name designated on the “Separable Country Names List,” or is a translation of a name appearing on the list, in any language. See the Annex at the end of this module.
- vi. it is a permutation or transposition of any of the names included in items (i) through (v). Permutations include removal of spaces, insertion of punctuation, and addition or

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<sup>6</sup> Country and territory names are excluded from the process based on advice from the Governmental Advisory Committee in recent communiqués providing interpretation of Principle 2.2 of the GAC Principles regarding New gTLDs to indicate that strings which are a meaningful representation or abbreviation of a country or territory name should be handled through the forthcoming ccPDP, and other geographic strings could be allowed in the gTLD space if in agreement with the relevant government or public authority.

removal of grammatical articles like “the.” A transposition is considered a change in the sequence of the long or short-form name, for example, “RepublicCzech” or “IslandsCayman.”

- vii. it is a name by which a country is commonly known, as demonstrated by evidence that the country is recognized by that name by an intergovernmental or treaty organization.

#### 2.2.1.4.2 *Geographic Names Requiring Government Support*

The following types of applied-for strings are considered geographic names and must be accompanied by documentation of support or non-objection from the relevant governments or public authorities:

1. An application for any string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166-1 standard.
2. An application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name.

City names present challenges because city names may also be generic terms or brand names, and in many cases city names are not unique. Unlike other types of geographic names, there are no established lists that can be used as objective references in the evaluation process. Thus, city names are not universally protected. However, the process does provide a means for cities and applicants to work together where desired.

An application for a city name will be subject to the geographic names requirements (i.e., will require documentation of support or non-objection from the relevant governments or public authorities) if:

- (a) It is clear from applicant statements within the application that the applicant will use the TLD primarily for purposes associated with the city name; and

- (b) The applied-for string is a city name as listed on official city documents.<sup>7</sup>
3. An application for any string that is an exact match of a *sub-national place name*, such as a county, province, or state, listed in the ISO 3166-2 standard.
  4. An application for a string listed as a UNESCO region<sup>8</sup> or appearing on the “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings” list.<sup>9</sup>

In the case of an application for a string appearing on either of the lists above, documentation of support will be required from at least 60% of the respective national governments in the region, and there may be no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the continent or the region.

Where the 60% rule is applied, and there are common regions on both lists, the regional composition contained in the “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings” takes precedence.

An applied-for gTLD string that falls into any of 1 through 4 listed above is considered to represent a geographic name. In the event of any doubt, it is in the applicant’s interest to consult with relevant governments and public authorities and enlist their support or non-objection prior to submission of the application, in order to preclude possible objections and pre-address any ambiguities concerning the string and applicable requirements.

Strings that include but do not match a geographic name (as defined in this section) will not be considered geographic names as defined by section 2.2.1.4.2, and therefore will not require documentation of government support in the evaluation process.

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<sup>7</sup> City governments with concerns about strings that are duplicates, nicknames or close renderings of a city name should not rely on the evaluation process as the primary means of protecting their interests in a string. Rather, a government may elect to file a formal objection to an application that is opposed by the relevant community, or may submit its own application for the string.

<sup>8</sup> See <http://www.unesco.org/new/en/unesco/worldwide/>.

<sup>9</sup> See <http://unstats.un.org/unsd/methods/m49/m49regin.htm>.

For each application, the Geographic Names Panel will determine which governments are relevant based on the inputs of the applicant, governments, and its own research and analysis. In the event that there is more than one relevant government or public authority for the applied-for gTLD string, the applicant must provide documentation of support or non-objection from all the relevant governments or public authorities. It is anticipated that this may apply to the case of a sub-national place name.

It is the applicant's responsibility to:

- identify whether its applied-for gTLD string falls into any of the above categories; and
- identify and consult with the relevant governments or public authorities; and
- identify which level of government support is required.

Note: the level of government and which administrative agency is responsible for the filing of letters of support or non-objection is a matter for each national administration to determine. Applicants should consult within the relevant jurisdiction to determine the appropriate level of support.

The requirement to include documentation of support for certain applications does not preclude or exempt applications from being the subject of objections on community grounds (refer to subsection 3.1.1 of Module 3), under which applications may be rejected based on objections showing substantial opposition from the targeted community.

#### **2.2.1.4.3** *Documentation Requirements*

The documentation of support or non-objection should include a signed letter from the relevant government or public authority. Understanding that this will differ across the respective jurisdictions, the letter could be signed by the minister with the portfolio responsible for domain name administration, ICT, foreign affairs, or the Office of the Prime Minister or President of the relevant jurisdiction; or a senior representative of the agency or department responsible for domain name administration, ICT, foreign affairs, or the Office of the Prime Minister. To assist the applicant in determining who the relevant government or public authority may be for a potential geographic name, the applicant may wish to consult with the relevant



Governmental Advisory Committee (GAC) representative.<sup>10</sup>

The letter must clearly express the government's or public authority's support for or non-objection to the applicant's application and demonstrate the government's or public authority's understanding of the string being requested and its intended use.

The letter should also demonstrate the government's or public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement with ICANN requiring compliance with consensus policies and payment of fees. (See Module 5 for a discussion of the obligations of a gTLD registry operator.)

A sample letter of support is available as an attachment to this module.

Applicants and governments may conduct discussions concerning government support for an application at any time. Applicants are encouraged to begin such discussions at the earliest possible stage, and enable governments to follow the processes that may be necessary to consider, approve, and generate a letter of support or non-objection.

It is important to note that a government or public authority is under no obligation to provide documentation of support or non-objection in response to a request by an applicant.

It is also possible that a government may withdraw its support for an application at a later time, including after the new gTLD has been delegated, if the registry operator has deviated from the conditions of original support or non-objection. Applicants should be aware that ICANN has committed to governments that, in the event of a dispute between a government (or public authority) and a registry operator that submitted documentation of support from that government or public authority, **ICANN will comply with a legally binding order** from a court in the jurisdiction of the government or public authority that has given support to an application.

#### *2.2.1.4.4 Review Procedure for Geographic Names*

A Geographic Names Panel (GNP) will determine whether each applied-for gTLD string represents a geographic

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<sup>10</sup> See <https://gacweb.icann.org/display/gacweb/GAC+Members>

name, and verify the relevance and authenticity of the supporting documentation where necessary.

The GNP will review all applications received, not only those where the applicant has noted its applied-for gTLD string as a geographic name. For any application where the GNP determines that the applied-for gTLD string is a country or territory name (as defined in this module), the application will not pass the Geographic Names review and will be denied. No additional reviews will be available.

For any application where the GNP determines that the applied-for gTLD string is not a geographic name requiring government support (as described in this module), the application will pass the Geographic Names review with no additional steps required.

For any application where the GNP determines that the applied-for gTLD string is a geographic name requiring government support, the GNP will confirm that the applicant has provided the required documentation from the relevant governments or public authorities, and that the communication from the government or public authority is legitimate and contains the required content. ICANN may confirm the authenticity of the communication by consulting with the relevant diplomatic authorities or members of ICANN's Governmental Advisory Committee for the government or public authority concerned on the competent authority and appropriate point of contact within their administration for communications.

The GNP may communicate with the signing entity of the letter to confirm their intent and their understanding of the terms on which the support for an application is given.

In cases where an applicant has not provided the required documentation, the applicant will be contacted and notified of the requirement, and given a limited time frame to provide the documentation. If the applicant is able to provide the documentation before the close of the Initial Evaluation period, and the documentation is found to meet the requirements, the applicant will pass the Geographic Names review. If not, the applicant will have additional time to obtain the required documentation; however, if the applicant has not produced the required documentation by the required date (at least 90 calendar days from the date of notice), the application will be considered incomplete and will be ineligible for further review. The applicant may reapply in subsequent application rounds, if desired, subject to the fees and requirements of the specific application rounds.

If there is more than one application for a string representing a certain geographic name as described in this section, and the applications have requisite government approvals, the applications will be suspended pending resolution by the applicants. If the applicants have not reached a resolution by either the date of the end of the application round (as announced by ICANN), or the date on which ICANN opens a subsequent application round, whichever comes first, the applications will be rejected and applicable refunds will be available to applicants according to the conditions described in section 1.5.

However, in the event that a contention set is composed of multiple applications with documentation of support from the same government or public authority, the applications will proceed through the contention resolution procedures described in Module 4 when requested by the government or public authority providing the documentation.

If an application for a string representing a geographic name is in a contention set with applications for similar strings that have not been identified as geographical names, the string contention will be resolved using the string contention procedures described in Module 4.

## *2.2.2 Applicant Reviews*

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Concurrent with the applied-for gTLD string reviews described in subsection 2.2.1, ICANN will review the applicant's technical and operational capability, its financial capability, and its proposed registry services. Those reviews are described in greater detail in the following subsections.

### *2.2.2.1 Technical/Operational Review*

In its application, the applicant will respond to a set of questions (see questions 24 – 44 in the Application Form) intended to gather information about the applicant's technical capabilities and its plans for operation of the proposed gTLD.

Applicants are not required to have deployed an actual gTLD registry to pass the Technical/Operational review. It will be necessary, however, for an applicant to demonstrate a clear understanding and accomplishment of some groundwork toward the key technical and operational aspects of a gTLD registry operation. Subsequently, each applicant that passes the technical evaluation and all other steps will be required to complete

a pre-delegation technical test prior to delegation of the new gTLD. Refer to Module 5, Transition to Delegation, for additional information.

### *2.2.2.2 Financial Review*

In its application, the applicant will respond to a set of questions (see questions 45-50 in the Application Form) intended to gather information about the applicant's financial capabilities for operation of a gTLD registry and its financial planning in preparation for long-term stability of the new gTLD.

Because different registry types and purposes may justify different responses to individual questions, evaluators will pay particular attention to the consistency of an application across all criteria. For example, an applicant's scaling plans identifying system hardware to ensure its capacity to operate at a particular volume level should be consistent with its financial plans to secure the necessary equipment. That is, the evaluation criteria scale with the applicant plans to provide flexibility.

### *2.2.2.3 Evaluation Methodology*

Dedicated technical and financial evaluation panels will conduct the technical/operational and financial reviews, according to the established criteria and scoring mechanism included as an attachment to this module. These reviews are conducted on the basis of the information each applicant makes available to ICANN in its response to the questions in the Application Form.

The evaluators may request clarification or additional information during the Initial Evaluation period. For each application, clarifying questions will be consolidated and sent to the applicant from each of the panels. The applicant will thus have an opportunity to clarify or supplement the application in those areas where a request is made by the evaluators. These communications will occur via TAS. Unless otherwise noted, such communications will include a 2-week deadline for the applicant to respond. Any supplemental information provided by the applicant will become part of the application.

It is the applicant's responsibility to ensure that the questions have been fully answered and the required documentation is attached. Evaluators are entitled, but not obliged, to request further information or evidence from an applicant, and are not obliged to take into account any information or evidence that is not made



# gTLD Applicant Guidebook

(v. 2012-06-04)

Module 3

4 June 2012

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# Module 3

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## Objection Procedures

This module describes two types of mechanisms that may affect an application:

- I. The procedure by which ICANN's Governmental Advisory Committee may provide GAC Advice on New gTLDs to the ICANN Board of Directors concerning a specific application. This module describes the purpose of this procedure, and how GAC Advice on New gTLDs is considered by the ICANN Board once received.
- II. The dispute resolution procedure triggered by a formal objection to an application by a third party. This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

This module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination.

All applicants should be aware of the possibility that a formal objection may be filed against any application, and of the procedures and options available in the event of such an objection.

### 3.1 GAC Advice on New gTLDs

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ICANN's Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.

GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns

raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.

The GAC can provide advice on any application. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period (see Module 1).

GAC Advice may take one of the following forms:

- I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.
- II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.
- III. The GAC advises ICANN that an application should not proceed unless remediated. This will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.

Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish the Advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures. The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).



# gTLD Applicant Guidebook

(v. 2012-06-04)

Module 6

4 June 2012



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# Module 6

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## *Top-Level Domain Application - Terms and Conditions*

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

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

gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

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

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.
7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other

materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion. Applicant acknowledges that ICANN will handle personal information collected in accordance with its gTLD Program privacy statement <http://newgtlds.icann.org/en/applicants/agb/program-privacy>, which is incorporated herein by this reference. If requested by ICANN, Applicant will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct these background screening activities. In addition, Applicant acknowledges that to allow ICANN to conduct thorough background screening investigations:
  - a. Applicant may be required to provide documented consent for release of records to ICANN by organizations or government agencies;
  - b. Applicant may be required to obtain specific government records directly and supply those records to ICANN for review;
  - c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization;

- d. Applicant may be requested to supply certain information in the original language as well as in English.
9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.
10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.
11. Applicant authorizes ICANN to:
  - a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;
  - b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.

12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.
13. Applicant understands that ICANN has a long-standing relationship with Jones Day, an international law firm, and that ICANN intends to continue to be represented by Jones Day throughout the application process and the resulting delegation of TLDs. ICANN does not know whether any particular applicant is or is not a client of Jones Day. To the extent that Applicant is a Jones Day client, by submitting this application, Applicant agrees to execute a waiver permitting Jones Day to represent ICANN adverse to Applicant in the matter. Applicant further agrees that by submitting its Application, Applicant is agreeing to execute waivers or take similar reasonable actions to permit other law and consulting firms retained by ICANN in connection with the review and evaluation of its application to represent ICANN adverse to Applicant in the matter.
14. ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process, including the process for withdrawal of applications, at any time by posting notice of such updates and changes to the ICANN website, including as the possible result of new policies that might be adopted or advice to ICANN from ICANN advisory committees during the course of the application process. Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to

such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.

# Exhibit C



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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

----- )  
 )  
 DOTCONNECTAFRICA TRUST, )  
 )  
 Plaintiff, )  
 )  
 vs. )No. BC607494  
 )  
 INTERNET CORPORATION FOR )  
 ASSIGNED NAMES AND NUMBERS )  
 and DOES 1 through 50, )  
 inclusive, )  
 )  
 Defendants. )  
 ----- )

\*\*\*CONTAINS HIGHLY CONFIDENTIAL  
ATTORNEYS' EYES ONLY SECTION\*\*\*

VIDEOTAPED DEPOSITION OF PERSON MOST QUALIFIED OF  
DOTCONNECTAFRICA TRUST  
SOPHIA BEKELE ESHETE  
Los Angeles, California  
Thursday, December 1, 2016  
Volume I

Reported by:  
Melissa M. Villagran, RPR, CLR  
CSR No. 12543  
Job No. 2479429  
PAGES 1 - 290

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

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)  
DOTCONNECTAFRICA TRUST, )  
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Plaintiff, )  
)  
vs. )No. BC607494  
)  
INTERNET CORPORATION FOR )  
ASSIGNED NAMES AND NUMBERS )  
and DOES 1 through 50, )  
inclusive, )  
)  
Defendants. )  
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Videotaped deposition of PERSON MOST QUALIFIED OF  
DOTCONNECTAFRICA TRUST, SOPHIA BEKELE ESHETE, Volume I,  
taken on behalf of Defendants, at 555 Flower Street, Los  
Angeles, California, beginning at 9:42 and ending at  
4:47 p.m. on Thursday, December 1, 2016, before Melissa  
M. Villagran, RPR, CLR, Certified Shorthand Reporter  
No. 12543.

1 APPEARANCES:

2

3 For Plaintiff:

4 BROWN NERI SMITH & KHAN

5 BY: ETHAN J. BROWN

6 Attorney at Law

7 11766 Wilshire Boulevard, Suite 1670

8 Los Angeles, California 90025

9 310.593.9898

10 ethan@bnsklaw.com

11

12 For Defendants:

13 JONES DAY

14 BY: JEFFREY A. LeVEE

15 AMANDA PUSHINSKY

16 Attorneys at Law

17 555 South Flower Street, Fiftieth Floor

18 Los Angeles, California 90071

19 213.489.3939

20 jlevee@jonesday.com

21 apushinsky@jonesday.com

22

23

24

25

Page 3

1 APPEARANCES (continued):

2

3 For Intervener ZACR:

4 KESSELMAN BRANTLY STOCKINGER

5 BY: DAVID W. KESSELMAN

6 Attorney at Law

7 1230 Rosecrans Avenue, Suite 650

8 Manhattan Beach, California 90266

9 310.307.4556

10 dkesselman@kbslw.com

11

12 Videographer:

13 Julian Shine

14

15 Also Present:

16 John O. Jeffrey, Attorney at Law

17 ICANN, General Counsel

18

19

20

21

22

23

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1 Los Angeles, California, Thursday, December 1, 2016

2 9:42

3

4 THE VIDEOGRAPHER: We are on the record at

5 9:42 a.m. on December 1st, 2016. This is the 09:42:17

6 video-recorded deposition of the person most

7 qualified for DotConnectAfrica Trust. My name is

8 Julian Shine, here with court reporter Melissa

9 Villagran. We are here with Veritext Legal

10 Solutions at the request of counsel for defendants. 09:42:34

11 This deposition is being held at 555 South

12 Flower Street in Los Angeles, California.

13 Caption of this case is DotConnectAfrica

14 Trust versus Internet Corporation For Assigned Names

15 and Numbers and does 1 through 50, inclusive, case 09:42:51

16 number BC 607494.

17 Please note that audio and video recording

18 will take place unless all parties agree to go off

19 the record. Microphones are sensitive and may pick

20 up whispers, private conversations, and cellular 09:42:57

21 interference.

22 I am not authorized to administer an oath. I

23 am not related to any party in this action, nor am I

24 financially interested in the outcome in any way.

25 If there are any objections to proceeding, 09:43:19

Page 10

1 please state them at the time of your appearance,  
2 and we will begin with appearances with the noticing  
3 attorney.

4 MR. LE VEE: I'm Jeff LeVee, Jones Day.

5 Counsel for ICANN. 09:43:31

6 MS. PUSHINSKY: Amanda Pushinsky, Jones Day,  
7 counsel for ICANN.

8 MR. KESSELMAN: David Kesselman, counsel for  
9 Intervener, ZACR.

10 MR. BROWN: Ethan Brown on behalf of 09:43:39  
11 DotConnectAfrica Trust.

12 MR. JEFFREY: John Jeffrey, ICANN general  
13 counsel.

14 THE VIDEOGRAPHER: Thank you.

15 The witness will be sworn in and counsel may 09:43:47  
16 begin the examination.

17 THE DEPOSITION OFFICER: Please raise your  
18 right hand.

19 Do you solemnly swear that the testimony you  
20 are about to give will be the truth, the whole  
21 truth, and nothing but the truth, so help you God?

22 THE DEPONENT: Yes.

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SOPHIA BEKELE ESHETE,

having been administered an oath, was examined and testified as follows:

EXAMINATION

BY MR. LE VEE:

Q Would you state your name and spell your last name for the record.

A My name is Sophia Bekele, and my last name is spelled as B-e-k-e-l-e.

09:44:09

Q Have you been deposed before?

A No.

Q Have you had an opportunity to spend a few minutes with your lawyer discussing the procedures of a deposition?

09:44:21

A Yes.

Q And as I recall you listened in on portions of the depositions that have already been taken in this case of the two ICANN witnesses; correct?

A Just one.

09:44:33

Q Oh, just one?

A Yes.

Q Okay. I forgot. For Mr. Attalah.

A Yes.

Q Okay. Real briefly, we are here today

09:44:38

1 remember what the comment was?

2 A Yes. It came to my attention later on.

3 Q Okay. And my understanding is that DCA

4 submitted some comments on various versions of the

5 guidebook; is that correct?

09:49:33

6 A It could be.

7 Q Do you remember one way or the other?

8 A I don't know which particular part, but we

9 were active participants in the --

10 Q In the development of the guidebook?

09:49:43

11 A Yes.

12 Q Okay. Do you remember whether DCA commented

13 on any portion of Module 6?

14 A No.

15 Q No --

09:49:52

16 A We did not.

17 Q Did not. Okay.

18 And you understood that Module 6 was part of

19 the application?

20 A Yes.

09:49:59

21 Q Okay. Did you -- do you recall reading

22 through Module 6, Paragraph 6, and having any

23 understanding at the time you submitted the

24 application of what the paragraph meant?

25 A Not really.

09:50:17

Page 17



1 terms were ones that all of the applicants had to  
2 agree to?

3 A Right.

4 Q Okay. Were you involved in the GNSO process  
5 leading up to the recommendation to proceed with the 09:51:49  
6 new gTLD program?

7 A Yes.

8 Q Okay. And what was your role in that  
9 process?

10 A I was an advisor, policy advisor to the GNSO. 09:51:58

11 Q Okay. And so did you participate either by  
12 phone or in person in meetings?

13 A Yeah.

14 Q Okay. Can you recall how active you were in  
15 that process? 09:52:13

16 A I was active. I participated in all meetings  
17 and all phone calls.

18 Q And was there a particular issue that you  
19 were focused on in conjunction with the GNSO's work?

20 A Yes, many. 09:52:29

21 Q Okay.

22 A It's issue oriented.

23 Q Okay.

24 MR. BROWN: Can I ask you to slow down a  
25 little bit. The questions haven't been 09:52:34

Page 19

1 objectionable, but if I had to insert an objection,  
2 it would be very difficult because it's a -- it's a  
3 very quick back and forth.

4 THE DEPONENT: Okay.

5 MR. BROWN: So just if I can slow you down 09:52:40  
6 just a little bit, it would be helpful to me.

7 THE DEPONENT: All right.

8 BY MR. LE VEE:

9 Q Are there any particular issues -- I know the  
10 GNSO's work was several years ago. As we sit here 09:52:51  
11 today in December of 2016, are there any particular  
12 issues that the GNSO worked on that you remember  
13 paying special attention to?

14 A As I say, I think everything is issue  
15 oriented. It's new for everyone. It's development 09:53:06  
16 of new gTLDs, particularly focusing on -- on policy  
17 development, and I think everything is an issue.  
18 The meetings is all about resolving issues.

19 Q Okay.

20 A I guess. 09:53:26

21 Q How long have you been involved in  
22 ICANN-related activities?

23 A Before my assignment to ICANN, my company  
24 gave services on domain names. So I knew what ICANN  
25 was. And I've been involved with ICANN two years as 09:53:42

Page 20

1 A But I'm -- I have attended a lot.

2 Q Okay. And so you mentioned also that you  
3 have -- that -- that you submitted some public  
4 comments in conjunction with the development of the  
5 guidebook. 09:55:46

6 Were those submitted on behalf of DCA, or  
7 were those submitted on behalf of you personally?

8 A I think most of it was on behalf of me as a  
9 community participant.

10 Q Okay. And do you recall was it more than 09:55:58  
11 five comments? More than ten? Do you recall -- I'm  
12 not asking you for a specific number because I know  
13 it was a few years ago, but roughly how many public  
14 comments you've submitted?

15 A I don't remember really. 09:56:10

16 Q Okay. More -- do you know if it was more  
17 than five?

18 A I don't remember.

19 Q Okay. And when I'm referring to public  
20 comments, you understand that what I'm referring to 09:56:19  
21 is that ICANN would post on it's Web site drafts --

22 A Yes.

23 Q -- of portions of the guidebook, or in some  
24 instances, an entire draft of the guidebook and make  
25 available to the public the ability to comment. 09:56:32

1 And that's what you're referring to?

2 A Yeah.

3 Q Okay. And you understood when you submitted

4 your application that you were agreeing that DCA

5 would be bound by the terms of -- of the whole 09:56:59

6 guidebook?

7 A Yes.

8 Q Okay.

9 Okay. I'm going to change topics, and I -- I  
10 want to talk to you for a while about the role of 09:57:09  
11 the African Union Commission.

12 Are you aware of any reason why the African  
13 Union Commission could not itself have applied for a  
14 new gTLD?

15 MR. BROWN: Objection; calls for a legal 09:57:27  
16 conclusion.

17 THE DEPONENT: I can't speak on behalf of  
18 African Union.

19 BY MR. LE VEE:

20 Q Oh, no. I'm not asking you to speak on 09:57:34  
21 behalf of the commission. I'm asking are you aware  
22 of any reason under the guidebook that the AUC as an  
23 entity could not have been an applicant for a new  
24 gTLD?

25 A I think ICANN has a better relationship. You 09:57:47

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I, SOPHIA BEKELE ESHETE, do hereby declare under penalty of perjury that I have read the foregoing transcript; that I have made any corrections as appear noted, in ink, initialed by me, or attached hereto; that my testimony as contained herein, as corrected, is true and correct.

EXECUTED this \_\_\_\_\_ day of \_\_\_\_\_,  
\_\_\_\_\_, at \_\_\_\_\_, \_\_\_\_\_.  
(City) (State)

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SOPHIA BEKELE ESHETE  
VOLUME I

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I, the undersigned, a Certified Shorthand Reporter of the State of California, Registered Professional Reporter, Certified Live Note Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript [ ] was [ ] was not requested. I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: 12/5/2016



MELISSA M. VILLAGRAN

# Exhibit D

International Centre for Dispute Resolution

**CASE No. Case 50-20-1300-1083**

Between

**DOTCONNECTAFRICA TRUST (DCA TRUST),**  
Claimant

v.

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

---

**WITNESS STATEMENT OF SOPHIA BEKELE ESHETE**

---

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

1. I make this statement based on my own personal knowledge of issues related to the application made by DotConnectAfrica Trust (“DCA”) for rights to .AFRICA, a new generic top-level domain name (“gTLD”), to the Internet Corporation for Assigned Names and Numbers (“ICANN”).

2. I am the founder and executive director of DCA and a champion for DCA’s application for the .AFRICA gTLD. I have devoted the past eight years to an initiative, DotConnectAfrica, to ensure the creation of an Internet domain name space by and for Africa and Africans. I believe that DCA submitted a well-qualified and compelling application for .AFRICA, which was undermined at each stage of the application process by ICANN’s breaches of its Bylaws,



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

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

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

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

<sup>4</sup> Sophia Bekele, ICANNWiki, [http://icannwiki.com/index.php/Sophia\\_Bekele](http://icannwiki.com/index.php/Sophia_Bekele).

method bypassing the formal application process under the New gTLD Program, would be anti-competitive. DCA issued a number of communications in French and English to ICANN and the African public gathered at that event to detail and reinforce its opposition.<sup>51</sup> What happened in Dakar led DCA's supporters to believe that the AUC was intent on trying to use its diplomatic influence to win special treatment from ICANN in order to obtain .AFRICA without any competition. DCA's supporters were very troubled by this plan, hence DCA's spirited opposition at both the African Ministerial Roundtable and subsequent ICANN public forum meeting in Dakar.

61. ICANN did not take any action on the AUC's request to reserve .AFRICA. With the application period for new gTLDs scheduled to open in only a few months' time, DCA wrote to ICANN to request that it respond in writing to the AUC and post its response publicly.<sup>52</sup> Without a public declaration by ICANN that it would not reserve .AFRICA for the AUC, other potential applicants faced the risk that at any time ICANN would announce that it was giving the strings to the AUC. If that happened, every applicant other than the AUC would have wasted a considerable amount of time and resources preparing to apply for an unavailable string.

Although ICANN neither responded to DCA's letter nor the AUC's request, DCA was confident that the AUC's request to reserve a gTLD was improper, and most irregular, so DCA proceeded with preparing and submitting its application for .AFRICA.

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<sup>51</sup> See *id*; *The Illegitimate "African Agenda" for Dakar: Say No to the ARC and the Illegal Cabal Supporting It!*, DCA (12 Oct. 2011), <http://www.dotconnectafrica.org/2011/10/the-illegitimate-african-agenda-dakar-arc-illegal-cabal-supporting-it/#sthash.iGvHYIio.dpuf>; DCA Official Commentary on the African Ministerial Table Outcome (21 Oct. 2011), <http://archive.constantcontact.com/fs053/1102516344150/archive/1108241322041.html> (English) and <http://archive.constantcontact.com/fs053/1102516344150/archive/1108245258976.html> (French); DCA Statement At The AFRICANN meeting On .Africa At Dakar (27 Oct. 2011), <http://archive.constantcontact.com/fs053/1102516344150/archive/1108347659795.html> (English) and <http://archive.constantcontact.com/fs053/1102516344150/archive/1108351920018.html> (French).

<sup>52</sup> Letter from Sophia Bekele, Exec. Director, DCA, to Chief Executive Officer, ICANN (19 Dec. 2011), *available at* <http://www.dotconnectafrica.org/wp-content/uploads/2014/07/Letter-to-ICANN-Board-requesting-an-Official-Public-Answer-to-the-Reserve-names-request-by-African-Union-Commission-19Dec2011.pdf>.

62. I believe that ICANN’s failure to timely respond, whether deliberate or not, disadvantaged DCA in its efforts to garner support from the African governments for its application. The feedback I and other representatives of DCA kept hearing from these governments was that they could not be sure ICANN would reject the AUC’s request to reserve the names, as there had been no official communication from ICANN. It would have been fruitless and potentially politically damaging for the governments to support DCA if ICANN planned to just give the strings to the AUC, as a special favor, as the AUC had requested. This made collecting new endorsements from African governments rather complicated and very difficult for DCA.

63. It was not until 8 March 2012—after the application round for new gTLDs had opened—that ICANN finally issued a formal response, rejecting the AUC’s request.<sup>53</sup> ICANN’s letter informing the AUC that ICANN could not reserve the names for the AUC, advised the AUC that it could use the “Governmental Advisory Committee . . . to raise concerns that an applicant is seen as potentially sensitive or problematic, or to provide direct advice to the Board,” so as to change the outcome of the gTLD.<sup>54</sup> I find it very troubling that ICANN told the AUC—our competitor for the .AFRICA gTLD—how to use the GAC to circumvent the objection procedures established in the AGB.

64. The purpose of the GAC is to provide advice to ICANN on issues of public policy, especially regarding issues where ICANN’s activities or policies intersect with national laws or

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<sup>53</sup> Letter from Steve Crocker, Chairman of Board of Directors, ICANN, to Elham M.A. Ibrahim, Commissioner of Infrastructure and Energy Commission, AUC (8 Mar. 2012), *available at* <https://www.icann.org/en/news/correspondence/crocker-to-ibrahim-08mar12-en> [Ex. C-24].

<sup>54</sup> Letter from Stephen Crocker, Chief Executive Officer, ICANN, to Elham M.A. Ibrahim, Commissioner of Infrastructure and Energy Commission of the African Union Commission (8 Mar. 2012), *available at* <https://www.icann.org/en/news/correspondence/crocker-to-ibrahim-08mar12-en> [Ex. C-24].

international agreements.<sup>55</sup> Membership on the GAC is unregulated and open to “national governments and distinct economies as recognized in international fora,”<sup>56</sup> which makes it an exceedingly political body. By explaining to the AUC how to use the GAC to quash DCA’s competing application for .AFRICA, ICANN essentially told the AUC to use political channels to accomplish its purpose rather than the very procedures ICANN developed to ensure that gTLDs are awarded in a fair, open and transparent process.

65. Not surprisingly, three months after ICANN suggested to the AUC that it use the GAC to object to DCA’s application for .AFRICA, the AUC became a voting member of the GAC.<sup>57</sup> I believe the timing of the AUC becoming a member of the GAC is directly related to its efforts to obtain .AFRICA. I also believe ICANN violated its Articles of Incorporation and Bylaws when it directed, publicly advised and allowed the AUC, as the backer of the competing application for .AFRICA submitted by ZACR, to use the GAC for anti-competitive purposes.

## **X. THE AUC’S APPOINTMENT OF ZACR TO APPLY FOR .AFRICA**

66. Despite ICANN rejecting the AUC’s request to add .AFRICA to its list of reserved names, the AUC continued its efforts to obtain .AFRICA for itself. Subsequently, the AUC shifted its position and issued a request for proposals (“RFP”) for a registry operator,<sup>58</sup> which I believe it did in order to legitimize its plan to award .AFRICA to a preferred registry operator outside of the auspices of the ICANN New gTLD Program. The AUC later announced that it

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<sup>55</sup> See ICANN Governmental Advisory Committee, <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>.

<sup>56</sup> See ICANN Governmental Advisory Committee, <https://gacweb.icann.org/display/gacweb/About+The+GAC>.

<sup>57</sup> GAC Communiqué – Prague, Czech Republic, ICANN (28 June 2012), <https://gacweb.icann.org/display/gacweb/Meeting+44%3A+Prague,+Czech+Republic,+24-29+June+2012>.

<sup>58</sup> Request for Proposals by the African Union Commission for the Operation of Dot Africa, <http://www.au.int/en/content/request-proposals-african-union-commission-operation-dot-africa>.

numbers to all gTLD applications.<sup>77</sup> Each applicant was required to purchase a \$100 ticket in order to participate in the draw. According to ICANN, the numbers would be used to determine the order in which the Initial Evaluation results would be released. Despite DCA drawing number 1,005 and ZACR drawing number 307, ICANN released the results of the Initial Evaluation of DCA’s application on July 3, 2013, and the results of the Initial Evaluation of ZACR’s application on July 12, 2013—9 days *after* releasing DCA’s results and nearly three months *after* the results for application number 307 should have been released based on the purported sequence of evaluations.

90. The fact that ICANN did not evaluate the ZACR application until the results of DCA’s Initial Evaluation were issued and a GAC objection to DCA’s application had been orchestrated seem like a deliberate attempt to allow ZACR to pass Initial Evaluation without competition so that it could simply take advantage of the extended evaluation procedures set forth in the AGB to correct the failings of its application.<sup>78</sup> On a timeline I saw in the AU’s presentation materials from the July 2013 Durban ICANN meeting, ZACR did not appear to have received clarifying questions on its application until after the GAC advice was issued on DCA’s application.<sup>79</sup> This seems to me another instance where ICANN failed to follow its own procedures simply to advance, or deliberately assist, the AUC-supported application to prevail. I believe that ICANN was taking into consideration the fact that the AUC is a political body and had taken to heart the communication from ZACR to the ICANN Independent Objector (“IO”) that he object to DCA’s

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<sup>77</sup> See New gTLD Prioritization Draw 2012, ICANN, <http://newgtlds.icann.org/en/applicants/prioritization-draw>.

<sup>78</sup> *A delayed evaluation “pass” score for .Africa competition*, The Reporter (24 Aug. 2013), <http://www.thereporterethiopia.com/index.php/living-and-the-arts/art/item/880-a-delayed-evaluation-pass-score-for-africa-competition>.

<sup>79</sup> Update on AU dotAfrica (.Africa) Project, Presentation to AfriSIG13 by Dr. Edmund Katiti, Head of NEPAD e-Africa Programme (July 2013), <http://african-ig-school.events.apc.org/wp-content/uploads/sites/2/2013/06/NEPAD-DotAfrica-Presentation.pdf>.

application. If DCA prevailed despite ZACR having been endorsed by the AUC, then the AU would lose faith in ICANN. For these reasons, I and other supporters of DCA believe that ICANN improperly yielded to pressure from the AUC to pass ZACR's application for .AFRICA for political reasons.

## **XII. ICANN ALLOWED THE AUC TO USE THE GAC TO FURTHER ITS GOAL OF RESERVING .AFRICA FOR ITS OWN USE**

91. As I explained above, ICANN suggested to the AUC that although it could not reserve .AFRICA for its own use, it could nevertheless, as a GAC member, use the GAC to object to any application that it deemed to be problematic for any reason. In other words, ICANN gave the AUC a strategy for quashing DCA's application that did not actually require the AUC to meet the stringent standards for filing and prevailing on a "community objection" through the formal objection process set forth in the AGB. I believe that this is another instance where ICANN assisted the AUC in its efforts to promote its favored applicant.<sup>80</sup>

92. The AUC followed ICANN's advice and, after submitting its application for .AFRICA, became a voting member of the GAC. In November 2012, approximately five months after the AUC joined the GAC, the GAC filed an "early warning," objecting to DCA's application for .AFRICA on the basis that it did not meet the minimum requirements of the AGB concerning geographic names. DCA's application received 17 such early warnings, which seem to be based on some kind of form letter, from Comoros, Kenya, Cameroun, DRC, Benin, Egypt; Gabon, Bourkina Faso, Ghana, Morocco, Mali, Uganda, Senegal, South Africa, Nigeria and Tanzania and the African Union itself.<sup>81</sup> DCA objected to the GAC early warning advice, particularly

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<sup>80</sup> ICANN Activities in Africa | Response to African Union Communiqué of October 2011  
<https://www.icann.org/en/news/correspondence/crocker-to-ibrahim-08mar12-en>.

<sup>81</sup> See <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>; Response to the ICANN GAC Early Warning Advice against the .Africa Application Submitted by DotConnectAfrica Trust,

the seemingly inappropriate level of influence ICANN permitted DCA's competitor over the process.

127. The NGPC's acceptance of the GAC objection advice on DCA's application for .AFRICA stopped the processing of DCA's application and permitted ZACR's application to proceed as "not in contention with any other applied-for strings."<sup>105</sup> Given the serious issues DCA has raised with respect to the rendering and acceptance of the GAC's advice and the evaluations performed, I believe the only solution is to stop the entire process. I also would request that ICANN write a letter to the AUC and African heads of state declaring that the application process has been nullified as a result of these irregularities and ICANN's failure to follow its governing documents and the AGB.

128. I strongly believe that nullifying the current process that resulted in ICANN awarding the .AFRICA gTLD to ZACR is the minimum of what should be done towards rectifying the harm suffered by DCA as a result of the Board's failure to abide by ICANN's Articles of Incorporation and Bylaws. Given the degree of misconduct by ICANN Board members and staff, which proved injurious to DCA's application for .AFRICA, I also believe that DCA should be compensated by ICANN for damages suffered. Finally, to ensure that DCA is given the opportunity to compete for the .AFRICA gTLD without prejudice, DCA should be allowed by ICANN to work independently with African governments to commence a new strategy for implementing the .AFRICA new gTLD.

I affirm that the foregoing is true and correct to the best of my knowledge.



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Sophia Eshete Bekele

November 3, 2014  
Walnut Creek, CA

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<sup>105</sup> UniForum New gTLD Program Initial Evaluation Report (12 July 2013), *available at* <http://newgtlds.icann.org/sites/default/files/ier/bqe3so7p3lu2ia8ouwp7eph9/ie-1-1243-89583-en.pdf>.

# Exhibit E





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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES  
CENTRAL DISTRICT

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)  
DOTCONNECTAFRICA TRUST, )  
)  
Plaintiff, )  
)  
vs. )No. BC607494  
)  
INTERNET CORPORATION FOR )  
ASSIGNED NAMES AND NUMBERS )  
and DOES 1 through 50, )  
inclusive, )  
)  
Defendants. )  
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Videotaped deposition of SOPHIA BEKELE  
ESHETE as an individual, Volume I, taken on behalf  
of Defendants, at 555 South Flower Street, Fiftieth  
Floor, Los Angeles, California, beginning at  
9:28 A.M. and ending at 4:35 P.M. on Wednesday,  
September 6, 2017, before LORI SCINTA, RPR,  
Certified Shorthand Reporter No. 4811.

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Page 3

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13 Also Present:

14 AMY STATHOS, Deputy General Counsel, ICANN

15

16 Videographer:

17 WESLEY MACK

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Los Angeles, California,  
Wednesday, September 6, 2017  
9:28 A.M.

THE VIDEOGRAPHER: Good morning. We are on 09:28:45  
record at 9:28 A.M., September 6, 2017. This is the  
video-recorded deposition of Sophia Bekele.

My name is Wesley Mack. I'm here with  
Court Reporter Lori Scinta. We are here from  
Veritext Legal Solutions at the request of counsel 09:29:07  
for the defendant.

This deposition is being held at 555 South  
Flower Street in the City of Los Angeles,  
California.

The caption of this case is 09:29:23  
DotConnectAfrica Trust versus Internet Corporation  
For Assigned -- and Numbers [sic].

I'm sorry -- and Numbers, et al.  
The case number is BC 607494.

Please note that video and video recording 09:29:48  
will take place unless all parties agree to go off  
the record. Microphones are sensitive and may pick  
up whispers, private conversation and cellular  
interference.

I'm not authorized to administer an oath. 09:29:59

1 I'm not related to any party in this action, nor am  
2 I financially interested in the outcome in any way.

3 If there are any objections to the  
4 proceeding, please state them at time of your  
5 appearance, beginning with the noticing attorney. 09:30:15

6 MR. LeVEE: My name is Jeff LeVee. I'm  
7 with Jones Day, counsel for ICANN.

8 MS. PUSHINSKY: Amanda Pushinsky, Jones  
9 Day, for ICANN.

10 MS. STATHOS: Amy Stathos. I'm with ICANN, 09:30:30  
11 deputy general counsel.

12 MR. KESSELMAN: David Kesselman on behalf  
13 of ZACR.

14 MR. BROWN: Ethan Brown on behalf of  
15 DotConnectAfrica Trust. 09:30:39

16 THE VIDEOGRAPHER: Thank you.

17 The witness will be sworn in, and we may  
18 begin the examination.

19  
20 SOPHIA BEKELE ESHETE, 09:30:44

21 having been administered an oath, was examined and  
22 testified further as follows:

23

24 ///

25 ///

1 in conjunction with the IRP?

2 A Correct.

3 Q And did you ordinarily review drafts of  
4 those pleadings before they were filed?

5 A Sometimes. 09:34:27

6 MR. BROWN: Just as a comment, and I don't  
7 want to take up a lot of time with this, but I just  
8 notice there's some highlighting in this. And I  
9 don't know if this is in the original or if this was  
10 something that was added. I just note for the 09:34:38  
11 record that there's -- there is highlighting in the  
12 document that at least it's not obvious to me was in  
13 the original.

14 MR. LeVEE: It's not in the original.  
15 These are highlighting that we did. 09:34:48

16 MR. BROWN: Okay. I just wanted to be  
17 clear for the record what --

18 MR. LeVEE: Thank you.

19 Q So let me just ask you to turn to the first  
20 page in Paragraph 1. 09:35:06

21 And do you see the highlighted portions  
22 where it says:

23 "The IRP has all the  
24 characteristics of an arbitration  
25 under California law and widely 09:35:14

Page 15





1 Q You need to answer "yes" or "no" --

2 A Yes. Yes.

3 Q Okay.

4 And then -- and that was the position that

5 DCA took with the panel in the IRP, correct? 09:36:31

6 A I suppose --

7 MR. BROWN: The document speaks for itself.

8 BY MR. LeVEE:

9 Q Yes.

10 A If the document says. 09:36:39

11 THE REPORTER: Your answer?

12 THE WITNESS: If the document says so. It

13 is what it is.

14 BY MR. LeVEE:

15 Q Okay. Do you recall on any occasion that 09:36:43

16 there was ever a time that your law firm filed a

17 pleading with which you disagreed?

18 A I don't remember.

19 Q At any time did you ever inform the members  
20 of the IRP panel that there was a position that your 09:37:04

21 lawyers had taken with which you disagreed?

22 A Maybe at the end.

23 Q And what was that?

24 A It's not that the lawyers disagree. We  
25 just had a difference. We wanted a different 09:37:25

Page 17

1 THE WITNESS: I don't remember.

2 MR. LeVEE: Okay.

3 THE REPORTER: Again, try to pause.

4 (Discussion off the record.)

5 MR. BROWN: You've got to give me a 09:43:20  
6 chance --

7 (Speaking simultaneously.)

8 THE WITNESS: Okay.

9 MR. BROWN: -- to object. I probably won't  
10 make that many objections, but I do need a moment. 09:43:24

11 BY MR. LeVEE:

12 Q Okay. Let me ask you to turn to Page 19 of  
13 Exhibit 66, Paragraph 44.

14 A 66?

15 Q I'm sorry. Page 19, Paragraph 44. I was 09:43:41  
16 referencing Exhibit 66, which is the whole document  
17 before you.

18 The first sentence of Paragraph 44 says:

19 "In light of the foregoing, DCA

20 submits that the IRP process is an 09:44:00

21 arbitration in all but name."

22 Do you recall DCA taking that position in

23 the IRP?

24 A Yeah, the lawyers did.

25 Q And did you disagree with your lawyers on 09:44:18

Page 24

1 A Yes.

2 Q Okay. And do you remember that the parties  
3 were asked prior to the hearing -- there was a  
4 two-day hearing with witnesses, you testified,  
5 right? 10:05:30

6 A Correct.

7 Q Okay. And ICANN had two witnesses who  
8 testified?

9 A Correct.

10 Q And the lawyers made their presentations? 10:05:35

11 A Sure.

12 Q Okay. And the panel asked a lot of  
13 questions. I remember that much.

14 A Yes.

15 Q And do you remember that in advance of the 10:05:44  
16 hearing, the panel had asked the parties to submit  
17 briefs on the issues that they -- that each of the  
18 parties wanted to be tried?

19 A To be?

20 Q To be the subject of the inquiry. 10:06:01

21 A Okay. I don't remember personally.

22 Q Okay.

23 A Probably directly to the lawyers, right?

24 Q Okay.

25 This brief, DCA's Memorial on the Merits, 10:06:12

Page 42

1 A (No audible response.)

2 THE REPORTER: Is that "yes"?

3 THE WITNESS: Yes.

4 BY MR. LeVEE:

5 Q Okay. And do you remember that you 10:07:24

6 personally testified in the IRP on the topic of the

7 AUC's request that ICANN reserve .AFRICA for the

8 AUC's own use?

9 A Correct.

10 Q Okay. So that's a subject that was 10:07:42

11 addressed in the IRP, right?

12 A Correct.

13 MR. BROWN: And just, again, for the

14 record, I think there's highlighting on here

15 that's --

10:07:53

16 MR. LeVEE: Yes, there is highlighting that

17 we made.

18 MR. BROWN: -- Jones Day highlighting?

19 MR. LeVEE: Yes.

20 MR. BROWN: Okay.

10:07:57

21 BY MR. LeVEE:

22 Q And then, if you would take a look at

23 Paragraph 15 on Page 7, you see that there is a

24 discussion that -- I'm going to read the first

25 highlighted sentence.

10:08:21

Page 44

1 "The application indicated that  
2 the AUC -- and not ZACR -- would  
3 retain the right to reassign the gTLD  
4 registry operations."  
5 Do you see that? 10:08:31  
6 A Yes.  
7 Q And that's a topic that we addressed in the  
8 IRP hearing, right?  
9 A If the document says, yes.  
10 Q Yes. Okay. 10:08:41  
11 And if you'd turn to the next page, you see  
12 in the sub -- the heading E: "ICANN Staff  
13 Inappropriately Coordinated With The Geographic  
14 Names Panel Concerning Applications For .AFRICA."  
15 And so one of the issues you -- you 10:09:07  
16 addressed with the IRP panel was your contention  
17 that ICANN staff coordinated with the geographic  
18 names panel concerning the two applications for  
19 .AFRICA, correct?  
20 A Correct. 10:09:24  
21 Q And that was an issue that you addressed in  
22 your testimony at the IRP?  
23 A Correct.  
24 Q And then, finally, on Page 14, you see  
25 heading H, which we've highlighted. "ICANN's 10:09:41

1 Staff's Efforts to Help ZACR Pass the Geographic  
2 Names Review."

3 One of the issues that you addressed in the  
4 IRP was your allegation that the staff of ICANN  
5 inappropriately helped ZACR pass the geographic 10:09:57  
6 names review, correct?

7 A I'm sorry. My mind went somewhere else.

8 Q That's okay. Let me ask the question  
9 again.

10 A Okay. 10:10:08

11 Q Is it the case that during the IRP, one of  
12 the issues that DCA raised was the alleged efforts  
13 by staff of ICANN to help ZACR pass the geographic  
14 names review?

15 A Correct. 10:10:21

16 Q Okay. And that's something you addressed  
17 in your testimony to the panel?

18 A I don't remember my testimony, but I'm sure  
19 it's transcribed, yes.

20 Q Okay. 10:10:31

21 A It will match, well, whatever was said here  
22 (indicating.)

23 Q My -- my recollection is that you testified  
24 to the panel for a couple of hours, right?

25 A Yeah, I did. 10:10:44

1 Q The panel started by asking you questions  
2 and then I asked questions and then Mr. Ali asked  
3 you questions.

4 Does that sound right?

5 A Correct. 10:10:52

6 Q Okay. And then if you turn to Page 16, you  
7 see the argument section that we've highlighted.  
8 DCA was arguing that ICANN breached its bylaws and  
9 articles of incorporation, right?

10 A Correct. 10:11:14

11 Q And in the subheading A, one of the  
12 breaches that's alleged was by discriminating  
13 against DCA and failing to permit competition for  
14 the DotConnectAfrica gTLD?

15 A Correct. 10:11:33

16 Q Yes.  
17 And then on Page 20, one of the allegations  
18 that DCA made, I'm just going to read that heading,  
19 which is Point 2:

20 "ICANN abused its authority and 10:11:44

21 discriminated against DCA by colluding

22 with the AUC to ensure that the AUC

23 would obtain control over .AFRICA in

24 contravention of the rules for the new

25 gTLD program." 10:11:59

1 That's the accusation that DCA made,  
2 correct?

3 A Very much.

4 Q Yes.

5 I don't want to take the time to read all 10:12:14  
6 the highlighted portion but, as you can see, this is  
7 the brief where you -- where DCA made a number of  
8 the specific allegations that it intended to present  
9 at the hearing.

10 Does that refresh your recollection? 10:12:28

11 A Correct.

12 Q Okay. And then one last one on Page 18,  
13 the highlighting right at the top, Point 1:

14 "ICANN discriminated against DCA  
15 and abused its regulatory authority in 10:12:53  
16 its deferential treatment of the ZACR  
17 and DCA applications."

18 That's an argument that DCA made to the  
19 panel, right?

20 A It appears so. 10:13:04

21 Q Yes.

22 Okay. Do you recall that before you  
23 actually testified in the IRP proceeding, you signed  
24 a witness statement?

25 A I don't -- you can help me. 10:13:50



1 Q Okay. And do you remember -- do you  
2 remember that the panel ruled sometime prior to the  
3 actual live hearing that the -- its declaration  
4 would be binding on the parties?

5 A There used to be arguments back and forth 10:39:04  
6 between you folks, yes.

7 Q Okay. And are you saying you don't  
8 remember one way or the other how the panel came out  
9 on that?

10 A I think they did come out, one of the 10:39:17  
11 procedural arguments, was on the binding, yes. It  
12 reads that. It read that, I remember.

13 Q So your memory is that the panel concluded  
14 that its declaration would be binding on the  
15 parties? 10:39:35

16 A Correct.

17 Q Okay. Do you remember also that there was  
18 a disagreement among the parties as to whether live  
19 witnesses would appear at the hearing?

20 A Correct. 10:39:50

21 Q DCA wanted three witnesses to testify: You  
22 on behalf of DCA; and the two witnesses who had  
23 submitted affidavits or -- in advance of the IRP on  
24 behalf of ICANN?

25 A Correct. 10:40:11

1 Q And that was Ms. Dryden and Mr. Chalabi?

2 A Correct.

3 Q And DCA took the position that it wanted

4 all three of those witnesses to testify, right?

5 A Correct.

10:40:25

6 Q And ICANN took the position that it did not

7 want any witnesses to testify?

8 A Correct.

9 Q And do you recall that the panel ruled that

10 the three witnesses would have to testify?

10:40:34

11 A Correct.

12 Q And you recall that, in fact, we had a

13 hearing and all three of those witnesses did testify

14 live?

15 A Correct.

10:40:46

16 Q Okay. Do you recall that DCA requested

17 that documents be produced in the IRP? In other

18 words, that there be an exchange of documents?

19 A Throughout the whole IRP --

20 Q During -- during the course of the IRP, do

10:41:09

21 you recall that DCA --

22 A Correct.

23 Q -- asked ICANN to produce documents?

24 A Yes.

25 Q Okay. And do you recall that ICANN asked

10:41:16

Page 54

1 DCA to produce documents?

2 A Correct.

3 Q Okay. So both sides exchanged documents

4 prior to the hearing?

5 A Correct.

10:41:24

6 Q Okay. Still looking at Exhibit 71, do you  
7 see on Page 10 in Paragraph 39 that the panel ruled  
8 that the avenues of accountability for applicants  
9 that had disputes with ICANN do not include resort  
10 to the courts.

10:42:13

11 Do you see that?

12 A Yes.

13 Q Okay. And that was one of the decisions  
14 that the panel issued in conjunction with this  
15 declaration on IRP procedure, right?

10:42:24

16 MR. BROWN: Objection. The document speaks  
17 for itself.

18 THE WITNESS: I'm not sure.

19 I don't -- I'm not reading one like that  
20 but the documents say so, yeah.

10:42:32

21 BY MR. LeVEE:

22 Q Okay. Do you remember one way or the other  
23 this issue being addressed by the panel?

24 A No.

25 Q Okay. And do you remember whether DCA

10:42:41

Page 55

1 complaint.

2 So that's covered with the court's  
3 complaint.

4 Q So if the issue relates to ICANN's refusal  
5 to accept, in 2015 or '16, the letters you had 10:53:35  
6 received from UNECA, U-N-E-C-A, or the AUC, that  
7 conduct occurred after the IRP. I understand that.

8 A Yes.

9 Q What I'm asking is: For -- for many of the  
10 issues -- well, you referred to ICANN trying to 10:53:55  
11 reserve the name .AFRICA. That occurred years  
12 before the IRP --

13 A Right.

14 Q -- and was actually the subject of  
15 testimony in the IRP, correct? 10:54:08

16 A Correct.

17 Q Okay. And issues relating to the GAC --

18 A Right.

19 Q -- as an example?

20 That occurred before the IRP and is the 10:54:15  
21 subject of the IRP.

22 A Uh-huh, issues relating to ZACR being  
23 assisted by the ICANN staff is also during the IRP,  
24 pre -- pre-IRP.

25 Q And it was something that was addressed in 10:54:34

1 the testimony before the IRP panel?

2 A Addressed or ruled, I'm not sure, but it  
3 was discussed.

4 Q Yes.

5 Is -- so -- 10:54:47

6 A The ruling that was made by the IRP panel  
7 is relative to the GAC, as you know, right?

8 Q Yes.

9 A Right.

10 Q Let me ask you to take a look at the second 10:55:03  
11 cause of action.

12 So now I'm on Page 16. In Paragraph 74,  
13 you say -- or the complaint says:

14 "ICANN made the following  
15 intentional misrepresentations on its 10:55:19  
16 website and in the guidebook to  
17 plaintiff or to plaintiff's agents or  
18 representatives on which plaintiff  
19 relied to its detriment in applying  
20 for the fee." 10:55:30

21 So A is:

22 "ICANN represented to plaintiff  
23 that plaintiff's application for  
24 .AFRICA would be reviewed in  
25 accordance with ICANN's articles of 10:55:40

Page 66

1 Q Okay. So that was after the guidebook went  
2 into effect?

3 A And then the -- and then the CEP process,  
4 which I -- we don't have to talk about the details.

5 Q Yes. 11:17:05

6 A But that, too.

7 Q You're not saying that on the day you  
8 submitted your application, somebody at ICANN  
9 anticipated that there might be an IRP related to  
10 your application and that ICANN had already decided 11:17:18  
11 that it would not participate in good faith in the  
12 IRP?

13 A No, no. Not that far.

14 Q Right.

15 A Yeah. 11:17:31

16 Q So once you -- you're saying once filed --  
17 I'm sorry, once DCA filed the IRP --

18 A Right.

19 Q -- you think ICANN did not participate in  
20 good faith? 11:17:39

21 A No.

22 Q Okay. And let's talk about -- now, ICANN  
23 did participate in the hearing, right?

24 A Sure.

25 Q And ICANN attended the hearing and brought 11:17:47

1 witnesses, right?

2 A They were forced to.

3 Q Yes. And they did.

4 A Right.

5 Q Yes. 11:17:56

6 A Because they have to comply. That's

7 different between cooperation and compliance,

8 correct?

9 Q I'm just asking factual questions.

10 A Yeah. Okay. 11:18:03

11 Q We can spin it however we want to later.

12 A Right.

13 Q ICANN did attend the meeting, right?

14 A Sure.

15 Q And ICANN did bring two witnesses to the 11:18:10

16 hearing?

17 A Correct.

18 Q And I cross-examined you at the hearing,

19 right?

20 A Yes. 11:18:18

21 Q And you testified?

22 A Yes.

23 Q And you submitted -- we exchanged

24 documents, right?

25 A Correct. 11:18:24

1 Q And there were a lot of pleadings that were  
2 filed. We've looked at some of them earlier today,  
3 right?

4 A Correct.

5 Q And the panel issued a ruling, right? 11:18:32

6 A Right.

7 Q So ultimately, even though ICANN disagreed  
8 with the procedure that the panel adopted, including  
9 whether there would even be witness testimony, ICANN  
10 followed the IRP process as the panel had ordered it 11:18:49  
11 to do, right?

12 A I'm glad they did.

13 Q But they did do it?

14 A They have to do it --

15 Q Yes. 11:18:59

16 A -- I don't know even to respond to such  
17 questions. But --

18 Q Okay.

19 A -- yeah.

20 It's a process that ICANN put itself. It's 11:19:04  
21 obliged to follow, they're forced to follow it and  
22 they followed it.

23 Q And then in Paragraph 17 -- I'm sorry,  
24 Page 17, Paragraph 75b, the second sentence:

25 "After the IRP declaration, ICANN 11:19:19



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I, SOPHIA BEKELE ESHETE, do hereby declare under penalty of perjury that I have read the foregoing transcript; that I have made any corrections as appear noted, in ink, initialed by me, or attached hereto; that my testimony as contained herein, as corrected, is true and correct.

EXECUTED this \_\_\_\_\_ day of \_\_\_\_\_,  
20\_\_\_\_, at \_\_\_\_\_, \_\_\_\_\_.  
(City) (State)

-----  
SOPHIA BEKELE ESHETE  
Volume I

1 I, the undersigned, a Certified Shorthand  
2 Reporter of the State of California, do hereby  
3 certify:

4 That the foregoing proceedings were taken  
5 before me at the time and place herein set forth;  
6 that any witnesses in the foregoing proceedings,  
7 prior to testifying, were duly sworn; that a record  
8 of the proceedings was made by me using machine  
9 shorthand which was thereafter transcribed under my  
10 direction; that the foregoing transcript is a true  
11 record of the testimony given.

12 Further, that if the foregoing pertains to  
13 the original transcript of a deposition in a Federal  
14 Case, before completion of the proceedings, review  
15 of the transcript [ ] was [ ] was not requested.

16 I further certify I am neither financially  
17 interested in the action nor a relative or employee  
18 of any attorney or party to this action.

19 IN WITNESS WHEREOF, I have this date  
20 subscribed my name.

21 Dated: 9/19/2017

22

23



24

LORI SCINTA, RPR

25

CSR No. 4811

# Exhibit F

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

\_\_\_\_\_)  
DOTCONNECTAFRICA TRUST, )  
                  Claimant. )  
v. ) ICDR Case No.  
INTERNET CORPORATION FOR ) 50 2013 00 1083  
ASSIGNED NAMES AND NUMBERS, )  
                  Respondent. )  
\_\_\_\_\_)

HEARING ON THE MERITS  
BEFORE THE PANEL: PRESIDENT BABAK BARIN,  
HONORABLE JUDGE WILLIAM CAHILL, AND  
PROFESSOR CATHERINE KESSEDJIAN  
Friday, May 22, 2015; 9:09 a.m.

Reported by: Cindy L. Sebo, RMR, CRR, RPR, CSR,  
CCR, CLR, RSA, LiveDeposition Authorized Reporter  
Job No.13828

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Hearing on the Merits in the above-styled  
manner, held at the offices of:

Jones Day  
51 Louisiana Avenue Northwest  
Washington, D.C. 20001  
202.879.3939

The proceedings having been reported by  
the Registered Merit Real-Time Court Reporter,  
CINDY L. SEBO, RMR, CRR, RPR, CSR, CLR, RSA, and  
LiveDeposition Authorized Reporter.

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24 Industry

25 CHERINE CHALABY, ICANN Board of Directors

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16

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19 Exhibit Number 2 12 ---

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

2  
3 Washington, D.C.

4 Friday, May 22, 2015; 9:09 a.m.

5  
6 PRESIDENT BARIN: Good morning,  
7 everyone.

8 Welcome to Washington, D.C. Thank  
9 you for joining us this morning.

10 After yesterday's weather, we were  
11 this -- especially for you (indicating),  
12 there's sunshine outside.

13 What we'll do this morning is we'll  
14 start with, I guess, the welcome and the  
15 initial presentations of the Members of  
16 the Panel.

17 I will start to my left,  
18 Professor Kessedjian,  
19 Catherine Kessedjian; to my right,  
20 Retired Judge William Cahill; and myself,  
21 who is President of the Panel,  
22 Babak Barin.

23 I will then ask, if you would,  
24 counsel for each side, to present your  
25 team members and guests that you have in

1                   And ICANN, as the curator of the  
2                   process, said, I accept your application,  
3                   and I am the caretaker of the level playing  
4                   field.

5                   But instead, what did ICANN do? ICANN  
6                   tilted that playing field in favor of one  
7                   of the applicants.

8                   And just so we understand who that  
9                   other applicant is, it is the African Union  
10                  Commission and its agent, UniForum, doing  
11                  business as ZACR.

12                 HONORABLE JUDGE CAHILL: Doing  
13                 business as what?

14                 MR. ALI: As ZACR, Z-A-C-R.

15                 So what we'd like to do in this  
16                 opening presentation is to help you look  
17                 at the record. And, ultimately, the  
18                 eloquence of advocates provides no  
19                 substitute for hard evidence. And that's  
20                 all we ask the Panel to do, is to look at  
21                 the evidence. And we believe the  
22                 evidence makes very clear how that  
23                 playing field was tilted in favor of the  
24                 AUC and ZACR to DCA Trust's disadvantage.

25                 So in that spirit of wanting to be

1           I must say I'm glad that we had such  
2           an impact in hopefully improving the  
3           system, but it doesn't seem that there's  
4           greater clarity that has arisen out of  
5           those further amendments.

6           I see nowhere in the standard  
7           review -- in the language, I see nowhere  
8           the word "deferential."

9           Now, if ICANN had intended for  
10          there -- for you to be applying a  
11          deferential standard review, there's no  
12          reason why that word could not have been  
13          put in, is there? But they didn't put  
14          those words in. They didn't say  
15          "deferential standard review."

16                 Now, what I think should inform your  
17                 decision about an objective standard  
18                 review, or what we might call "a de novo  
19                 standard review," is the following: This  
20                 is the only opportunity that a claimant  
21                 has for independent and impartial review  
22                 of ICANN's conduct, the only opportunity.  
23                 And within the context of that only  
24                 opportunity, that sole opportunity,  
25                 really, there should be a deferential

1 standard review, deference to the  
2 regulator, whose very conduct is being  
3 questioned. I think that that's wrong.

4 So not only do we not have any  
5 specific language in the revised rules  
6 whereby ICANN had previously argued for a  
7 deferential standard review, the  
8 ICM panel said No. ICANN revised the  
9 rules, but they didn't put in the wording  
10 "deferential."

11 But within the context of this  
12 process -- keeping in mind the litigation  
13 waiver, that all applicants are required  
14 to sign a very broad, very strict  
15 litigation waiver that ICANN constantly  
16 invokes and provides it with a protection  
17 from the public courts, and within the  
18 context of a proceeding that ICANN says  
19 has very limited purpose -- we, of  
20 course, contest that -- they ask you to  
21 apply a deferential standard review.

22 Not only do we, ICANN, develop the  
23 rules, we will interpret those rules, and  
24 we will tell you whether or not we are  
25 going to abide by those rules. We change

1           Despite the fact that the  
2           application window opened in January 2012  
3           and despite the fact that DCA Trust  
4           submitted a letter in December 2011  
5           requesting that ICANN respond to the  
6           AUC's petition and inform applicants of  
7           the status of .africa, ICANN failed to  
8           respond to the AUC's petition and inform  
9           applicants of that status until  
10          March 8th, 2012, three months into the  
11          application window for new gTLDs, during  
12          which DCA submitted its application for  
13          .africa.

14                 In its March 2013 response, ICANN  
15                 informed the AUC they could not reserve  
16                 .africa as this would violate the  
17                 Applicant Guidebook.   However, ICANN  
18                 advised the AUC that it could use  
19                 mechanisms, like ICANN's Governmental  
20                 Advisory Committee, or GAC, to play a  
21                 prominent role in determining the outcome  
22                 of any application to these top-level  
23                 domain name strings, .africa and its  
24                 French and Arabic equivalents.

25                         ICANN advised the AUC that by

1 joining the GAC, the AUC could inform  
2 ICANN that there are concerns with an  
3 application via the GAC Early Warning  
4 notice and provide direct advice to the  
5 ICANN Board on any particular  
6 application.

7 ICANN's advice to the AUC that it  
8 could join the GAC is troubling in that  
9 it was not a foregone conclusion that the  
10 AUC could become a GAC member and have  
11 this status required to issue Early  
12 Warnings or participate in GAC advice.

13 According to the ICANN Bylaws,  
14 membership on the GAC is open to national  
15 governments, and the AUC is not a  
16 national government.

17 The Bylaws go on, as you can see  
18 from the highlighting, to indicate that  
19 distinct economies, as recognized in  
20 international fora, multinational  
21 government organizations and treaty  
22 organizations may also join the GAC but  
23 only upon the invitation of the GAC  
24 through its Chair.

25 Moreover, the GAC operating

1 principles clarify that multinational  
2 governmental organizations and treaty  
3 organizations who are invited to  
4 participate in the GAC by its Chair do so  
5 as observers only.

6 Now, what this means is that they do  
7 not have voting rights; they do not issue  
8 Early Warnings; and they do not  
9 participate in GAC advice.

10 HONORABLE JUDGE CAHILL: That's  
11 observers, right?

12 MS. CRAVEN: As observers, they do  
13 not participate in GAC advice.

14 Indeed, looking at the list of GAC  
15 voting members that are not national  
16 governments, as compared to the  
17 organizations that are observers on the  
18 GAC, it really does appear that the AUC  
19 received special treatment in this case.

20 Organizations that are analogous to  
21 the AUC, like the Council of Europe, the  
22 Organization of American States or the  
23 Pacific Islands Forum, are observers.  
24 They do not have voting rights, and they  
25 do not participate in GAC advice.



1           In fact, the sum total of  
2 nongovernment voting members of the GAC  
3 is the European Commission and the  
4 African Union Commission. However, the  
5 European Commission and the African Union  
6 Commission are treated very differently  
7 outside of the ICANN world.

8           While the AU and the EU are both  
9 very important in the relevant regions,  
10 their powers are different. Their  
11 enforcement capabilities with regard to  
12 their members are different. Their  
13 status on the global stage is very  
14 different.

15           For example, the EU actually has the  
16 authority to regulate and legislate over  
17 the sovereign governments which form part  
18 of the European Union. In addition, the  
19 EU creates EU law and has the ability to  
20 enforce this law upon its members.

21           The EU has the authority to sign  
22 international agreements as the EU, and,  
23 perhaps most importantly for our  
24 purposes, the EU has expanded observer  
25 status in the United Nations. This means

1 that the EU, exclusively of all other  
2 international organizations, has the  
3 authority to speak at the UN General  
4 Assembly meetings. It has the sole --  
5 and it is the sole nonstate party to  
6 numerous United Nations agreements.

7 The African Union does not have this  
8 status. The African Union is an  
9 important political organization with a  
10 mission to promote peace, stability and  
11 security in the African continent, but it  
12 has no regulatory authority over African  
13 states. There is no such thing as AU  
14 law, and there is no mechanism to enforce  
15 AU law.

16 Finally, the African Union is a UN  
17 observer, not an expanded observer, an  
18 observer alongside organizations like the  
19 Council of Europe, the Organization of  
20 American States, and the Pacific Islands  
21 Forum, all of which have observer and  
22 nonmember status on the GAC.

23 Now, ICANN has argued that the AUC's  
24 membership as a voting member on the GAC  
25 was a decision purely within the ambit of

1 the GAC. They have said that it was at  
2 the sole discretion of the GAC for the  
3 AUC to join as a voting member.

4 ICANN has argued that its Board had  
5 absolutely nothing to do with the  
6 decision to give the AUC voting rights;  
7 however, two weeks prior to sending its  
8 March 2013 response to the AUC, advising  
9 the AUC that it could use the GAC to  
10 achieve its ends, ICANN shared the draft  
11 of that letter with the GAC Chair,  
12 Ms. Heather Dryden, requesting that she  
13 review and comment upon the draft, which  
14 indicated the AUC could have voting power  
15 as a GAC member, and used that to have a  
16 prominent impact on the outcome of  
17 .africa.

18 And, in fact, after receiving this  
19 advice in the March 8th, 2013 letter, the  
20 AUC did take steps and became a GAC  
21 member by the Toronto GAC meeting in  
22 June 2013. And in November 2013, the GAC  
23 orchestrated the GAC Early Warnings  
24 against DCA's application containing  
25 exactly the anticompetitive purpose --

1 anticompetitive purpose expressed in The  
2 Dakar Communiqué.

3 As you can see from Slide 16, a GAC  
4 Early Warning is intended to allow a  
5 government to indicate to an applicant  
6 that their gTLD application is seen as  
7 potentially sensitive or problematic. It  
8 is merely a notice; it does not result in  
9 any adverse effect upon the application.

10 A GAC Early Warning is essentially  
11 an invitation to the applicant to work  
12 with the affected government so that  
13 problems with the application don't arise  
14 later on in the process.

15 According to the Application  
16 Guidebook, an Early Warning typically  
17 results from a notice to the GAC by one  
18 or more governments that an application  
19 might be problematic because it violates  
20 national law or raises sensitivities.

21 However, the AU's Early Warning did  
22 not relate to policy issues or  
23 sensitivities; instead, the AU's Early  
24 Warning contained three rationales.

25 First, the AU claimed that DCA's

1 application had a lack of geographic  
2 support. This is not a ground for an  
3 Early Warning. This is not a policy  
4 issue. This is actually a matter for the  
5 Geographic Names Panel, which is the  
6 independent body that ICANN specifically  
7 hired and delegated to determine whether  
8 or not geographic applications have the  
9 requisite support to satisfy the  
10 Applicant Guidebook.

11 Second, the AUC complained that  
12 DCA's application was an unwarranted  
13 intrusion on the AUC's self-awarded  
14 mandate to establish .africa.  
15 Essentially, the AU said it wanted the  
16 string, and it did not want DCA to have  
17 it.

18 Finally, the AUC alleged a string  
19 similarity problem. A "string similarity  
20 problem" essentially means that two  
21 applied-for strings are so similar that  
22 it would confuse the DNS system to have  
23 them both in existence.

24 DCA's application, therefore, was  
25 too similar, because it applied for

1 .africa, to the AUC's application for  
2 .africa; and, therefore, DCA's  
3 application should not go forward.

4 This is not a real string similarity  
5 issue; this is, again, an anticompetitive  
6 aim.

7 Again, however, ICANN employs an  
8 independent panel to evaluate string  
9 similarity. So regardless of the purpose  
10 of this string similarity claim, the GAC  
11 Early Warning need not address it.

12 Furthermore, the Early Warning did  
13 not contain any concerns whatsoever about  
14 the policy behind DCA's application. It  
15 didn't touch upon the viability of the  
16 application, the manner in which DCA  
17 proposed to operate .africa in its  
18 application or the impact upon the  
19 African continent if DCA were to be the  
20 custodian of the string .africa.

21 This GAC Early Warning is not a  
22 matter of public policy, which is the  
23 proper ambit of the GAC; instead, it is  
24 merely an anticompetitive document.

25 The anticompetitive Early Warning,

1) however, then translated into the  
2) anticompetitive GAC advice on April 2013.  
3) Again, the purpose of GAC advice, like a  
4) GAC Early Warning, is to address  
5) applications that potentially violate  
6) national law or raise sensitivities. The  
7) purpose is not to simply object to a  
8) competitor.

9) And it's important to understand  
10) that we're looking at a unique situation  
11) here. In no other instance, that we are  
12) aware of, was there an applicant for a  
13) gTLD that was also a member of the GAC.  
14) In no other instance do we have an  
15) applicant who is also a judge.

16) Now, ICANN has maintained that the  
17) GAC advice in DCA's application was  
18) consensus advice; and, therefore, it was  
19) proper for the Board to accept that  
20) advice.

21) As you can see from the slide, the  
22) Applicant Guidebook provides three types  
23) of GAC advice: first, consensus advice;  
24) second, advice that some members on the  
25) GAC may have concerns about an

1 application; and third, advice that  
2 certain amendments should be made to the  
3 application before it should proceed.

4 Consensus advice creates a strong  
5 presumption that the ICANN Board should  
6 not approve the application; however,  
7 this is a strong presumption. It is not  
8 a mandatory requirement that the Board  
9 accept the GAC's decision. And the  
10 factors here that the Claimant maintains  
11 render this advice not consensus advice  
12 should have, at a minimum, prompted the  
13 ICANN Board to conduct due diligence into  
14 the validity of the anticompetitive GAC  
15 advice.

16 First among these factors, the  
17 advisor from Kenya, Mr. Sammy Buruchara,  
18 specifically informed the GAC Chair and  
19 the ICANN CEO, in advance of the GAC  
20 meeting in Beijing in April 2013, the  
21 meeting which produced the GAC advice at  
22 issue here, that Kenya did not wish to  
23 issue the advice on DCA's application.

24 Two days prior to the GAC meeting  
25 from where the advice issued,



1 Mr. Buruchara wrote directly to the  
2 GAC Chair, Ms. Dryden, and to ICANN's  
3 CEO, Fadi Chehadé, informing them that he  
4 could not attend the GAC meeting in  
5 Beijing but that he had concerns about  
6 certain irregularities that had arisen in  
7 the meetings leading up to the GAC  
8 meeting.

9 He informed Ms. Dryden and  
10 Mr. Chehadé that should anyone raise an  
11 objection against DCA's application  
12 through the GAC advice, Kenya objected to  
13 the GAC advice.

14 Redacted - GAC Designated Confidential Information

1

Redacted - GAC Designated Confidential Information

1 Redacted - GAC Designated Confidential Information

8 Now, how that turned into advice on  
9 DCA's application, we don't know.

10 Somehow, the GAC issued advice based  
11 upon the -- the version of text -- or a  
12 version of text that included an  
13 objection to DCA's application. We have  
14 no indication of how this occurred  
15 because the GAC meeting was confidential.

16 Apparently, no minutes were taken.  
17 No one seems to have a recollection of  
18 what happened. Ms. Dryden didn't provide  
19 any enlightening information in her  
20 statement on what actually happened  
21 during that critical meeting from which  
22 the GAC advice issued.

23 Nonetheless, all the GAC members  
24 through the GAC LISTSERV, the GAC's  
25 chairperson and ICANN's CEO were all

1           aware that the Government of Kenya  
2           objected to anticompetitive advice issued  
3           through the GAC.

4           In light of the fact that the advice  
5           was anticompetitive and inconsistent with  
6           the role of the GAC and the purpose of  
7           the GAC advice, in light of the fact that  
8           the Board had notice that Kenya disagreed  
9           with anticompetitive use of the GAC  
10          advice, and in light of the fact that the  
11          GAC Chair, a liaison to the ICANN Board,  
12          had notice that Kenya objected to the  
13          anticompetitive use of the GAC advice,  
14          the NGPC should have at a minimum --  
15          should have considered that this was not  
16          proper consensus advice but, at a  
17          minimum, should have investigated into  
18          the procedural irregularities raised,  
19          particularly because DCA pointed out in  
20          its response, which it was entitled to  
21          send to the NGPC -- in its response to  
22          the GAC advice, submitted on May 8th,  
23          2013, that there were all of these  
24          procedural irregularities and that the  
25          AUC was motivated by political

1           machinations, by an anticompetitive  
2           purpose to acquire this TLD for its own  
3           use, operation and profit.

4           HONORABLE JUDGE CAHILL: I saw in  
5           one of their briefs -- one of ICANN's  
6           briefs that this person from Kenya was --  
7           who was sending e-mails was not the  
8           proper to person to vote on or was not in  
9           the right position, and the person who  
10          was in the right position was in Beijing.  
11          And we don't know what happened. We  
12          don't even know if he was in the room.

13          When you say about, you know, Kenya  
14          objecting to -- through someone who has  
15          not the power to do it, I think that's  
16          their point.

17          MS. CRAVEN: You're absolutely right  
18          that Mr. Buruchara was the GAC advisor,  
19          and ICANN maintains that the GAC  
20          representative is the proper person to --  
21          to represent a government.

22          Now, whether or not -- some  
23          countries seem to have advisors only.  
24          Some countries seem to have  
25          representatives only.

## 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 The witnesses being duly sworn by the  
18 President of the proceedings, BABAK BARIN, to tell  
19 the truth, the whole truth, and nothing but the  
20 truth.

21 Signed this 1st day of June 2015.

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

# Exhibit G

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

\_\_\_\_\_)  
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, May 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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Continued Hearing on the Merits in the  
above-styled manner, held at the offices of:

Jones Day  
51 Louisiana Avenue Northwest  
Washington, D.C. 20001  
202.879.3939

The continued proceedings having been  
reported by the Registered Merit Real-Time Court  
Reporter, CINDY L. SEBO, RMR, CRR, RPR, CSR, CLR,  
RSA, and LiveDeposition Authorized Reporter.

1 A P P E A R A N C E S :

2

3 Attorneys for Claimant:

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14 erin.yates@weil.com

15 -and-

16 MEREDITH CRAVEN, ESQUIRE

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21

22

23

24

25

1 A P P E A R A N C E S (Continued):

2

3 Attorneys for Respondents:

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14 ALSO PRESENT:

15 SOPHIA BEKELE ESHETE, Claimant

16 AMY STATHOS, Deputy General Counsel at  
17 ICANN

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E X H I B I T S

(Exhibits Retained by Counsel.)

HEARING EXHIBITS:	MARKED	ADMITTED
Exhibit Number 4	655	---

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 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



CERTIFICATE OF

CERTIFIED REGISTERED MERIT REAL-TIME COURT REPORTER

I, CINDY L. SEBO, Registered Merit Reporter,  
Certified Real-Time Reporter, Registered  
Professional Reporter, Certified Shorthand Reporter,  
Certified Court Reporter, Certified LiveNote  
Reporter, Real-Time Systems Administrator and  
LiveDeposition Authorized Reporter, do hereby  
certify that the foregoing transcript is a true and  
correct record of the Hearing on the Merits, that I  
am neither counsel for, related to, nor am employed  
by any of the parties to the action; and further,  
that I am not a relative or employee of any attorney  
or counsel employed by the parties thereto, nor  
financially or otherwise interested in the outcome  
of the action.

Signed this 2nd day of June 2015.

---

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

# Exhibit H

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

**ICDR Case No. 50 117 T 1083 13**

DotConnectAfrica Trust, )  
 )  
Claimant, )  
 )  
v. )  
 )  
Internet Corporation for Assigned Names and Numbers, )  
 )  
Respondent. )

**REQUEST FOR EMERGENCY ARBITRATOR AND  
INTERIM MEASURES OF PROTECTION**

Weil, Gotshal, Manges, LLP  
1300 Eye Street, NW, Suite 900  
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Tel: +1 202 682 7000  
Fax: +1 202 857 0940

Counsel for Claimant

## I. INTRODUCTION

1. Pursuant to ICDR Rules 37 and 21, DotConnectAfrica Trust (“DCA”) hereby requests the appointment of an Emergency Arbitrator to decide DCA’s request for interim measures of protection preventing the Internet Corporation for Assigned Names and Numbers (“ICANN”) from completing the delegation of rights to the .AFRICA generic top-level domain name (“gTLD”) to a third party pending the outcome of an ICANN-created accountability procedure known as an Independent Review Process (“IRP”), which DCA invoked in October 2013.<sup>1</sup>

2. The purpose of the IRP is to resolve a dispute arising from ICANN’s failure to abide by its Bylaws, Articles of Incorporation and applicable principles of international law in its processing of DCA’s application for rights to administer the .AFRICA gTLD. ICANN wrongfully rejected DCA’s application based on complaints raised by the partner of the only other applicant for .AFRICA, in contravention of its own procedures and the applicable law. DCA has requested a declaration from the IRP Panel that ICANN violated its Articles of Incorporation and Bylaws by not allowing DCA’s application to complete the full gTLD review process so that it can compete on an equal footing for the rights to the .AFRICA gTLD. DCA

---

<sup>1</sup> See DCA’s Amended Notice of IRP and exhibits thereto, on file with the ICDR; references to numbered exhibits refer to the exhibits submitted with DCA’s Amended Notice. Although the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process (“Supplementary Procedures”) expressly exclude Article 37 from applying in the context of an IRP, on 25 March 2014, ICANN’s counsel, Mr. Jeffrey LeVee, informed the ICDR and DCA for the first time that Article 37’s emergency arbitrator procedures could be invoked because of ICANN’s failure to put in place a standing panel to hear requests for emergency relief, as required by ICANN’s Bylaws and the Supplementary Procedures. See Email from Jeffrey LeVee to Carolina Cardenas-Soto (25 March 2014), Annex A hereto. Prior to Mr. LeVee’s 25 March email, ICANN’s consent to the application of Article 37 is stated nowhere. Indeed, the ICDR itself did not believe that Article 37 applied in the IRP. See Email from Carolina Cardenas-Soto to the parties (25 March 2014) (“[P]lease be advised that there is no Standing Panel yet in place, in addition, Article 37 of the International Rules does not apply, therefore the only option regarding interim measures at this time is to make the application to the IRP panel once constituted.”), Annex B hereto. Nonetheless, on 26 March, DCA accepted ICANN’s consent to the availability of the emergency arbitrator. Email from Marguerite Walter to Carolina Cardenas-Soto (26 March 2014), Annex C hereto.

has also requested that the IRP Panel recommend that DCA's application be permitted to proceed. Any such declaration and recommendation would become moot if ICANN completed the gTLD delegation process .AFRICA to DCA's competitor before DCA can be fully heard in the IRP.

3. In an effort to preserve its rights, in January 2014, DCA requested that ICANN suspend its processing of applications for .AFRICA during the pendency of this proceeding.<sup>2</sup> ICANN, however, summarily refused to do so.<sup>3</sup> On 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA's competitor (a South African company called ZA Central Registry, or "ZACR") on 26 March 2014 in Beijing.<sup>4</sup> This contract (or "registry agreement"), once signed, would be the first step toward delegating the rights to .AFRICA to ZACR. Indeed, ZACR's own website announces its intention to proceed to delegation by early April and to make the .AFRICA gTLD operational by May 2014.<sup>5</sup>

4. Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZACR in light of the fact that this proceeding was still pending.<sup>6</sup> Instead, according to ICANN's website, ICANN *signed its agreement with ZACR the*

---

<sup>2</sup> Letter from Arif Ali to Jeffrey LeVee (22 January 2014) (requesting that ICANN immediately stay processing of all applications for .AFRICA until conclusion of IRP in order to prevent irreparable damage to DCA and IRP process), Annex D hereto.

<sup>3</sup> Email from Jeffrey LeVee to Arif Ali (5 February 2014), Annex E hereto.

<sup>4</sup> Email from Alice Munyua (23 March 2014), Annex F hereto.

<sup>5</sup> Countdown to launch, ZACR, at <https://registry.net.za/launch/> (indicating that .africa will launch with the other ZACR gTLDs on May 1, meaning that all pre-delegation testing and final delegation are expected in advance of May 1, 2014), a screenshot of which is Annex G hereto (taken 28 March 2014). *See also*, Draft – New gTLD Program – Transition to Delegation, New gTLD Guidebook, Module 5, page 5-16, Annex H hereto.

<sup>6</sup> Letter from Arif Ali to Jeffrey LeVee (23 March 2014) (indicating that signature of the Registry Agreement on 26 March, as planned by ICANN, would constitute a violation of DCA's rights and compromise the IRP proceeding), Annex I hereto; *see also*, Letter from Arif Ali to Neil Dundas, Director,

*very next day, two days ahead of plan, on 24 March instead of 26 March.*<sup>7</sup> That *same day*, ICANN then responded to DCA’s request by presenting the execution of the contract as a *fait accompli*, arguing that DCA should have sought to stop ICANN from proceeding with ZACR’s application, as ICANN had already informed DCA of its intention ignore its obligation to participate in this proceeding in good faith.<sup>8</sup> In a particularly cynical maneuver, ICANN for the first time informed DCA that it would accept the application of Article 37 to this proceeding, contrary to the express provisions of the Supplementary Procedures ICANN has put in place for the IRP Process.<sup>9</sup>

5. DCA is entitled to an accountability proceeding with legitimacy and integrity, with the capacity to provide a meaningful remedy. Having created the IRP review process, ICANN is compelled by its Bylaws, Articles of Incorporation, rules and procedures to participate in that process in good faith. In addition, pursuant to its Articles of Incorporation, ICANN is required to comply with local law and international law, which further and independently ensures DCA’s right to such a proceeding. DCA has requested the opportunity to compete for rights to .AFRICA pursuant to the rules that ICANN put into place. Allowing ICANN to delegate .AFRICA to DCA’s only competitor – which took actions that were instrumental in the process

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ZA Central Registry (23 March 2014) (notifying ZACR of the IRP proceeding between ICANN and DCA and informing ZACR that ICANN’s signature of the Registry Agreement would violate DCA’s rights and compromise the IRP proceeding), Annex J hereto.

<sup>7</sup> See ICANN official announcement of the .AFRICA Registry Agreement (24 March 2014) (stating that “[o]n 24 March 2014, ICANN and ZA Central Registry NPC trading as Registry.Africa entered into a Registry Agreement under which ZA Central Registry NPC trading as Registry.Africa operates the .africa top-level domain.”), at <http://www.icann.org/en/about/agreements/registries/africa>, a screenshot of which is Annex K hereto.

<sup>8</sup> Letter from Jeffrey LeVee to Arif Ali (24 March 2014) (informing DCA that ICANN has already proceeded to sign a Registry Agreement with ZACR), Annex L hereto.

<sup>9</sup> Email from Jeffrey LeVee to Carolina Cardenas-Soto (25 March 2014), Annex A hereto.

leading to ICANN's decision to reject DCA's application – would eviscerate the very purpose of this proceeding and deprive DCA of its rights under ICANN's own constitutive instruments and international law.

6. It is clear from the developments of the past five days that ICANN does not consider itself bound to respect DCA's rights or the integrity of this proceeding absent an order from a court or an IRP panel. However, the Panel has not yet been constituted and may not be constituted for some time. Therefore, and in order to ensure the possibility of a remedy resulting from this IRP, protect the procedural integrity of the IRP, and preserve DCA's right under international law to the status quo and to non-aggravation of this dispute, DCA respectfully requests that the Emergency Arbitrator grant the following interim relief:<sup>10</sup>

- a. An order ***compelling ICANN to refrain from any further steps towards delegation of the .AFRICA gTLD***, including but not limited to execution or assessment of pre-delegation testing, negotiations or discussions relating to delegation with the entity ZA Central Registry or any of its officers or agents;
- b. An order ***compelling ICANN to disclose all steps taken thus far towards delegating the .AFRICA gTLD*** to ZACR, including but not limited to the date, location and participants who took part in the signing of the Registry Agreement that ICANN signed with ZACR, dates and descriptions of the events leading from the conclusion of ZACR's Initial Evaluation to the signature of the Registry Agreement and the dates and descriptions of all steps towards delegation taken after the signing of the Registry Agreement up until the date of any order issued by the Emergency Arbitrator; *and*
- c. An order ***compelling ICANN to disclose a truthful approximation of the dates and descriptions of events that would lead from the signing of the Registry Agreement until delegation of the .AFRICA gTLD in the absence of an order*** compelling ICANN to cease processing the ZACR application pending resolution of the IRP.

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<sup>10</sup> In the circumstances, the emergency relief requested is the only relief that DCA can now seek. Had DCA been notified by ICANN earlier of ICANN's willingness to reinstitute the availability of Article 37, DCA could have sought to enjoin the signing of the .AFRICA registry agreement through the emergency arbitrator process.

## II. BACKGROUND OF THE DISPUTE

7. This dispute concerns rights at issue in ICANN’s program to introduce new Top-level Domains (“TLDs”) for the Internet. TLDs appear in the domain names as the string of letters – such as “.com”, “.gov”, “.org”, and so on – following the rightmost “dot” in domain names. ICANN is a non-profit California corporation that is responsible for administering certain aspects of the Internet’s domain name system (“DNS”).<sup>11</sup> ICANN delegates responsibility for the operation of each TLD to a registry operator, which contracts with consumers and businesses that wish to register Internet domain names in such TLD.<sup>12</sup> ICANN is subject to international and local law,<sup>13</sup> and is required to achieve its mission in conformity with the principles expressly espoused in its Bylaws and Articles of Incorporation, including the principles of transparency,

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<sup>11</sup> See ICANN Bylaws, Art. I [Ex. C-10].

<sup>12</sup> There are several types of TLDs within the DNA. The most prevalent TLDs are country-code TLDs (“ccTLDs”) and gTLD’s. The former, ccTLDs, are two-letter TLDs allocated to countries, usually based upon their two-letter ISO codes. In contrast, open gTLDs are privately managed and may include any combination of three or more letters. The original gTLDs were .com, .net, .org, .gov, .mil, and .edu. The first three are open gTLDs and the last three listed are closed gTLDs. Certain categories of potential gTLDs are protected, for example combinations of letters that are similar to any ccTLD and gTLDs on the reserve list included in the new gTLD Guidebook. Under the ICANN New gTLD Program, any “established corporations, organizations or institutions in good standing” may apply for gTLDs. In addition, a new gTLD may be a “community-based gTLD”, which is “a gTLD that is operated for the benefit of a clearly delineated community,” or fall under the category “standard gTLD”, which “can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement.” See gTLD Applicant Guidebook (Version 2012-06-04), Module 1, 1.2.1 “Eligibility” and 1.2.3.1 “Definitions” [Ex. C-11].

<sup>13</sup> See ICANN Articles of Incorporation, Art. 4 [Ex. C-9]; see also *Declaration of the Independent Review Panel in the matter of an Independent Review Process between ICM Registry, LLC and ICANN*, ICDR Case No. 50 117 T 00224 08 (19 February 2010) para. 152 at 70 [Ex. C-12], in which the Panel concluded that “the provision of Article 4 of ICANN’s Articles of Incorporation prescribing that ICANN ‘shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law,’ requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.”



fairness, accountability, and promotion of competition with respect to the Internet's domain name system.<sup>14</sup>

8. In 2012, ICANN initiated a New gTLD Internet Expansion Program to add new generic top-level domain names ("gTLDs") to the Internet. This program represents the first time that ICANN has allowed Internet stakeholders to apply for the creation and administration of new generic top-level domain names since 2003. It has been in the planning stages since 2005 and is the result of considerable dialogue and debate among various Internet stakeholders around the world over several years.<sup>15</sup> Extensive input from experts in the Generic Names Supporting Organization ("GNSO") and four years of public comments and revisions created an expectation that the New gTLD Program would be unbiased and predictable, taking its legitimacy from the years of careful development and the participation of stakeholders and the public. The program was expected to be able to run on its own through predictable and approved examination functions laid out in the New gTLD Program Guidebook and executed by evaluation panels of experts that were entirely separate from the ICANN Board. Because the Internet is a global resource, it is vital that the new gTLD process be carried out in accordance with the rules and procedures that Internet stakeholders so carefully negotiated with ICANN.

9. DCA is one of the applicants participating in the new gTLD expansion program. It is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010,

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<sup>14</sup> ICANN Bylaws, Art. I, Section 2, "Core (Council of Registrars) Values" [Ex. C-10].

<sup>15</sup> According to the website of the new gTLD program, the Generic Names Supporting Organization, a Supporting Organization that provides advice to the ICANN Board, conducted a study from 2005-2007 and produced recommendations to the ICANN Board on implementing a new gTLD program. Based upon the resulting report, ICANN developed the first version of the New gTLD Guidebook in 2008. The Guidebook has gone through several iterations, including at least 5 separate versions, all of which were available for public comment, until the final Applicant Guidebook based on the GNSO recommendations and public comments was produced in June 2012. New Generic Top Level Domains, "About the Program," at <http://newgtlds.icann.org/en/about/program>.

with its principal place of business in Nairobi, Kenya.<sup>16</sup> In 2012, DCA applied to ICANN for the delegation of the .AFRICA gTLD, an Internet resource that is available for delegation under ICANN’s New gTLD Program.<sup>17</sup> Its application was supported by letters of endorsement by the United Nations Economic Commission for Africa and at one stage, the African Union Commission itself.<sup>18</sup>

10. The dispute arises out of ICANN’s breaches of its Bylaws, Articles of Incorporation, and the applicable law and rules in its administration of applications for the .AFRICA gTLD, and specifically, ICANN’s wrongful decision that DCA’s application for .AFRICA should not proceed because of objections raised by the African Union Commission (“AUC”), the partner of DCA’s only competitor for .AFRICA, ZA Central Registry NPC trading as Registry.Africa (“ZACR”).<sup>19</sup> ZACR applied for .AFRICA on the invitation of the AUC, the administrative wing of the African Union, an intergovernmental organization.

11. AUC applied for .AFRICA with ZACR after a failed attempt to reserve the domain name for the exclusive use of African governments.<sup>20</sup> Acting on ICANN’s advice, the AUC set out to achieve the same result through the mechanism of ICANN’s Governmental Advisory Committee

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<sup>16</sup> See Mauritius Revenue Authority response to DCA Trust Application for Registration as a Charitable Trust, 15 July 2010 [Ex. C-5].

<sup>17</sup> See New gTLD Application Submitted to ICANN by: DotConnectAfrica Trust (“DCA New gTLD Application”) [Ex. C-8].

<sup>18</sup> See DCA’s Amended Notice of IRP, para. 17.

<sup>19</sup> ZACR was previously called Uniform, and submitted its application for .AFRICA under that name. See Application Update History, Application ID: 1-1243-89583, at <https://gtdresult.icann.org/applicationstatus/applicationchangehistory/1184>.

<sup>20</sup> Communiqué, African Union Commission, African ICT Ministerial Round-table on 42nd Meeting of ICANN, 11 October 2011, p. 4 (Requesting that ICANN “[i]nclude (.Africa, .Afrique, .Afrikia, ...), and its representation in any other language on the Reserved Names List in order to enjoy the level of special legislative protection, so to be managed and operated by the structure that is selected and identified by the African Union”), Annex M hereto.

(“GAC”).<sup>21</sup> The GAC is composed of representatives of national governments, the European Commission and the African Union Commission. Its role is to provide advice to the ICANN Board on ICANN’s activities as they relate to public policy interests and concerns.<sup>22</sup> Its role does not extend to furthering the position of applicants for new gTLDs.

12. Nevertheless, in November 2012, the AUC filed an Early Warning through the GAC raising objections to DCA’s application for .AFRICA. The AUC “express[ed] its objection” to DCA’s application, arguing that DCA did not have “the requisite minimum support from African governments”<sup>23</sup> and that its application “constitut[ed] an unwarranted intrusion and interference on the African Union Commission’s (AUC) mandate from African governments to establish the structures and modalities for the implementation of the dotAfrica (.Africa) project.”<sup>24</sup>

13. AUC’s Early Warning was accompanied by nearly identically worded Early Warnings allegedly coming from 16 African governments were also submitted. None of these documents were dated or signed; some still had empty blanks and highlighted text, showing that they were form documents presumably prepared by AUC.<sup>25</sup>

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<sup>21</sup> See Letter from ICANN CEO Stephen Crocker to Elham M. A. Ibrahim Commissioner, Infrastructure and Energy Commission for the Operation of DotAfrica (8 March 2012), p. 2-3 (advising the AUC that it would be impermissible to reserve .AFRICA and related strings for the AUC; however the AUC may still have “prominent role in determining the outcome of any application for these top-level domain strings”) [Ex. C-24].

<sup>22</sup> ICANN Bylaws, Art. XI, Section 2, para. 1(a) [Ex. C-10].

<sup>23</sup> GAC Early Warning – Submittal Africa-AUC-42560, dated 20 November 2012, p. 1 [Ex. C-33].

<sup>24</sup> *Id.* Several African governments submitted identically worded early warnings in coordination with the AUC [Ex. C-34].

<sup>25</sup> See, e.g., GAC Early Warning – Submittal \_\_\_\_\_ and cover Letter from Haruna Iddrisu, MP of the Republic of Ghana to Dr. Elham M.A. Ibrahim Commissioner, Infrastructure and Energy, African Union (including highlighted text “Republic of Ghana” on the GAC Advice and asserting in cover letter that Mr. Iddrisu “conveys support for the AUC’s mandate to apply for the DOTAFRICA (.AFRICA) generic top-level domain”) [Ex. C-34].

14. DCA alerted ICANN to AUC's conflict of interest regarding the .AFRICA gTLD, explaining that the AUC was effectively "both an 'endorser' and 'co-applicant' for the name string" of .AFRICA.<sup>26</sup> DCA also pointed out in its response that at least one of the countries supposedly objecting to its application had officially endorsed that very same application.<sup>27</sup> ICANN did not respond.

15. In April 2013, and apparently in response to AUC's Early Warning, the GAC issued advice to ICANN that the DCA application should not be allowed to proceed. The GAC represented this as so-called "consensus" advice representing the unanimous views of GAC members.<sup>28</sup> However, this was untrue, since the GAC Advisor for Kenya, Sammy Buruchara, had informed the GAC in writing before the vote on .AFRICA that "Kenya does not wish to have a GAC advise [sic] on DotConnect Africa Application for .africa delegation."<sup>29</sup> DCA protested, writing to ICANN and attaching emails from Mr. Buruchara demonstrating his objections to the advice against DCA's application. Once again, ICANN ignored DCA's protests and refused to allow DCA's application for .AFRICA to proceed.

16. DCA subsequently filed a Request for Reconsideration, which ICANN rejected.<sup>30</sup> In October 2013, DCA filed a Notice of IRP, which it amended in January 2014.<sup>31</sup> DCA requests a

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<sup>26</sup> DCA Response to ICANN GAC Early Warning Advice, 5 December 2012, p. 4 (objecting that AUC was "both an 'endorser' and 'co-applicant' for the name string" of dotAfrica) [Ex. C-35].

<sup>27</sup> DCA Response to ICANN GAC Early Warning Advice, 5 December 2012 p. 1 (noting that Kenya had endorsed DCA's application, but had also submitted an Early Warning, without explanation) [Ex. C-35]. See Kenya Ministry of Information and Communications Letter of Endorsement dated 7 August 2012 [Ex. C-18].

<sup>28</sup> GAC Beijing Communiqué, p. 3 [Ex. C-43].

<sup>29</sup> GAC Advice Response form for Applicants, dated 8 May 2013, p. 12 (containing screen shot of email) [Ex. C-41].

<sup>30</sup> Recommendation of the board Governance Committee (BGC), Reconsideration Request 13-4 (1 August 2013) [Ex. C1-47].

declaration from the Panel finding ICANN in breach of its Bylaws, Articles of Incorporation, the rules set forth for the new gTLD program, and the applicable law, and recommending that it allow DCA's application to proceed through the application process.<sup>32</sup>

### **III. STANDARD FOR INTERIM MEASURES OF PROTECTION UNDER ARTICLE 21**

17. Article 21 of the ICDR Rules grants broad powers to the Panel and the Emergency Arbitrator to "take whatever interim measures it deems necessary."<sup>33</sup> In order to demonstrate entitlement to interim relief on an emergency basis, a party must indicate the relief requested, explain why it is entitled to the requested interim relief, and demonstrate why the relief is required on an emergency basis.<sup>34</sup> Little other guidance on the applicable standards is available under the ICDR Rules, and the orders and awards of Emergency Arbitrators under Art. 37 are not public.

18. However, it is well settled under international law, as reflected across numerous dispute settlement regimes, that interim emergency relief is appropriate where the decision-maker applied to has *prima facie* jurisdiction over the parties and the dispute; the requested interim

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<sup>31</sup> DCA's Amended Notice of IRP, on file with the ICDR.

<sup>32</sup> DCA's Amended Notice of IRP at para. 48.

<sup>33</sup> ICDR Rules, Art. 21(1) ("At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property"); *see also*, ICDR Rules, Art. 37(5) ("The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property"). *C.f.*, Convention on the Settlement of Investment Disputes between States and Nationals of Other States [Washington Convention], Art. 47 ("Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party"); ICSID Arbitration Rules, Rule 39(1) ("At any time after the institution of proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested and the circumstances that require such measures").

<sup>34</sup> ICDR Rules, Art. 37(2).

relief protects an existing right; the interim relief is necessary; and it is urgent.<sup>35</sup> We address each of these factors in turn below.

***1. The Emergency Arbitrator has Prima Facie Jurisdiction to Award Interim Relief***

19. Under Article 37 of ICDR Rules, an Emergency Arbitrator may be appointed to grant interim relief after a Request for Arbitration has been filed but before a tribunal has been constituted.<sup>36</sup> Although the Supplementary Procedures which govern the IRP proceeding exclude the application of Article 37,<sup>37</sup> on 24 March 2014, ICANN expressly consented to the application of Article 37 in this proceeding.<sup>38</sup> Given the mutual consent of the parties, the fact that DCA has filed an Amended Notice of IRP and the fact that ICANN did not make any jurisdictional objections in its reply to DCA's Notice, the Emergency Arbitrator has *prima facie* jurisdiction to administer interim relief on an emergency basis, including injunctive relief.<sup>39</sup>

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<sup>35</sup> See, e.g., *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009 (interpreting the interim relief provisions under the Washington Convention and the ICSID Rules and laying out the four-part test).

<sup>36</sup> ICDR Rules, Art. 37 (2) ("A party in need of emergency relief prior to the constitution of the tribunal shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief.").

<sup>37</sup> Supplementary Procedures, Art. 12 ("Article 37 of the Rules will not apply") [Ex. C-3]; see also Email from Carolina Cardenas-Soto to Marguerite Walter (25 March 2014) ("Further to our communication below, please be advised that there is no Standing Panel yet in place, in addition, Article 37 of the International Rules does not apply, therefore the only option regarding interim measures at this time is to make the application to the IRP panel once constituted").

<sup>38</sup> Email from Jeffrey LeVee to Carolina Cardenas-Soto (25 March 2014) ("Given that there is no Standing Panel yet in place, ICANN does not have any objection to the ICDR appointing a neutral and allowing that neutral to consider an application from DCA for emergency relief, if DCA chooses to submit such an application").

<sup>39</sup> ICDR Rules, Art. 37(5) ("The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property").

## ***2. DCA is Entitled to the Relief in order to Protect the Rights at Issue in the IRP***

20. DCA is entitled to an order preventing ICANN from further alienating the .AFRICA gTLD through delegation, as well as orders compelling ICANN to provide information as to the status of the delegation of .AFRICA, in order to enable DCA to safeguard its right to seek relief in the IRP. DCA asserts three distinct rights, all of which are recognized under international law.

21. ***First***, DCA is entitled to a dispute resolution process that is capable of providing a meaningful remedy. Under general principles of law, which form part of international law,<sup>40</sup> a party to an international dispute resolution process such as this one has a right to preserve the “effectivity of a possible future award.”<sup>41</sup> When a party enters into a dispute resolution proceeding that is equipped to render a type of relief, that party has a right to protect the object or the ability for that relief to eventually be rendered. At the most basic level, in a dispute over ownership of an asset, a petitioner has a right to ensure that the respondent does not dispose of the asset before the conclusion of the proceeding.<sup>42</sup>

22. In this case, the purpose of the IRP is to allow for an independent review of the ICANN Board’s decisions to remove DCA from competition for .AFRICA in breach of ICANN’s Bylaws, Articles of Incorporation, rules and procedures. DCA filed the IRP in order to address

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<sup>40</sup> See Art. 38 of the Statute of the International Court of Justice (identifying sources of international law). As noted above, a previous IRP Panel has determined that ICANN is bound by international law, including general principles of law such as good faith.

<sup>41</sup> See, e.g., *Burlington Resources*, para. 71 (“Thus, at least prima facie, a right to . . . the protection of the effectivity of a possible future award” could exist under the circumstances). The right to an effective remedy is a general principle of international law, Universal Declaration of Human Rights, Art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”).

<sup>42</sup> See, e.g., UNCITRAL Arbitration Rules, Art. 26 (2010) (“An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to.... (c) Provide a means of preserving assets out of which a subsequent award may be satisfied”).

ICANN's breaches and to obtain a declaration recommending that ICANN permit DCA to compete for .AFRICA. If ICANN succeeds in delegating .AFRICA to a third party before the IRP can conclude, it will unilaterally deprive DCA of the remedy it seeks in the IRP, rendering this proceeding a meaningless exercise.

23. *Second*, DCA is entitled to a dispute resolution process that retains its integrity intact, including a meaningful opportunity to be heard by a panel that is empowered to evaluate the claims and evidence at issue without one party unilaterally taking actions to render the dispute resolution process moot. The delegation of .AFRICA to a third party while this proceeding is pending would prejudice the IRP process itself.<sup>43</sup> If left unchecked, ICANN would effectively deprive the Tribunal of its authority to resolve this dispute according to the IRP process that ICANN itself created. Notably, ICANN has refused to stay its efforts to delegate .AFRICA because it believes DCA's case is too "weak" to justify any delay in delegation.<sup>44</sup> But ICANN is not entitled to substitute its own assessment of the merits of DCA's claims for that of the Tribunal, as it seeks to do by delegating .AFRICA to ZACR before this proceeding is completed.

24. Moreover, until a public announcement was made by someone outside of ICANN concerning ICANN's plan to sign a contract with ZACR on 26 March in Beijing, it was impossible for DCA to ascertain the status of the only other application competing for .AFRICA. Despite ICANN's ostensible commitment to transparency, it posts minimal information on its

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<sup>43</sup> See, e.g., UNCITRAL Arbitration Rules, Art. 26 (2010) ("An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to...(b) Take action that would prevent, or refrain from taking action that is likely to cause...(ii) prejudice to the arbitral process itself").

<sup>44</sup> See Letter from Jeffery LeVee to Arif Ali (5 February 2014) (justifying ICANN's refusal to comply with DCA's demand to stay processing of the .AFRICA applications until the conclusion of the IRP on ICANN's independent and self-serving opinion that DCA's case is "weak").



website concerning that status of its review of applications for new gTLDs.<sup>45</sup> In light of the complete lack of transparency with which gTLDs are delegated, without an order obligating ICANN to provide this information to DCA and the Panel, there will be no way of ensuring that ICANN respects the integrity of this process and DCA's right to be heard by refraining from delegating .AFRICA before this process has come to completion.

25. *Third and finally*, DCA is entitled to maintenance of the *status quo* that existed going into the IRP, as well as the non-aggravation of the dispute between DCA and ICANN.<sup>46</sup> It is a long-recognized principle of international law that parties engaged in a dispute resolution must not proceed outside of the mechanism to alter the *status quo* so as to infringe upon the rights of the other party.<sup>47</sup> The *status quo* includes the relationship between the parties and the rights that each party had when the dispute was submitted for resolution.<sup>48</sup> Interim relief may compel the parties not only to stay any action that would upset the *status quo*, but in some cases, tribunals

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<sup>45</sup> The only information available on the ICANN website about ZACR's application for .AFRICA consists of a page describing ZACR's application status as "In PDT." Application Details, Application ID: 1-1243-89583, at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1184>, a screenshot of which dated 28 March 2014 is Annex N hereto.

<sup>46</sup> See, e.g., *Burlington Resources*, para. 60 (indicating that the "general right to the status quo and to the non-aggravation of the dispute" are "self-standing rights," and when they are threatened, a party is entitled to protection of those rights regardless of its rights according to the substantive merits of the dispute); see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, para. 62.

<sup>47</sup> *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B, No 79, p.199 (outlining the "principle universally accepted by international tribunals...that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute"); see, e.g., UNCITRAL Arbitration Rules, Art. 26 (2010) ("An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to: (a) Maintain or restore the status quo pending determination of the dispute").

<sup>48</sup> See *Burlington Resources* at paras. 62, 67 (analyzing *Electricity Company of Sofia and Bulgaria* and indicating that the status quo protected by the right is the status quo that exists at the time the dispute resolution proceeding commences).

have ordered a party to reverse action taken that upset the *status quo*.<sup>49</sup> In fact, it is in the interest of neither party to “aggravate or exacerbate” the dispute, “thus rendering its solution possibly more difficult.”<sup>50</sup> By signing a Registry Agreement with ZACR, and thus purporting to begin the delegation of the .AFRICA gTLD to ZACR, ICANN has squarely violated this principle and created a situation of competing obligations to DCA and to ZACR.

### **3. *The Interim Relief is Necessary in Order to Protect DCA’s Procedural Rights***

26. The orders requested by DCA are necessary because, without them, DCA will suffer irreparable harm. Necessity under international law generally means that without the requested relief, the complaining party will suffer irreparable harm that cannot be adequately compensated through monetary damages and outweighs the harm that will be suffered by granting the interim relief.<sup>51</sup> The analysis involves both a question of whether the harm may be reduced to monetary compensation and whether the harm suffered by the complaining party without the interim relief is proportionally greater than the harm suffered by the responding party if the relief is granted.<sup>52</sup>

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<sup>49</sup> See, e.g., Partial Award of December 23, 1982, ICC Case No. 3896, 110 Journal du droit international (Clunet), 1983, pp. 914-918 (compelling the respondent to renounce its call of the claimant’s performance guarantees, which respondent called after the arbitration commenced).

<sup>50</sup> *Amco Asia Corp. and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Request for Provisional Measures, ICSID Reports, 1993, p. 412.

<sup>51</sup> See, e.g., UNCITRAL Model Law, Art. 17A (“Harm not adequately repaired by an award of damages is likely to result if the measure is not ordered and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”); see also, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Interim Decision on Confidentiality, 27 October 1997, para. 8 (“the measures are urgently required in order to protect its rights from an injury that cannot be made good by the subsequent payment of damages.”) (applying the reasoning of the Washington Convention Art.47 to NAFTA 1134 in order to rule on interim measures).

<sup>52</sup> See, e.g., *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 156, 158 (“The Tribunal considers that an irreparable harm is a harm that cannot be repaired by an award of damages. . . . However, Claimants have accurately pointed out that the necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures. The Tribunal must thus balance the harm caused to Claimants by the criminal proceedings [which would be stayed by an award of

27. Without an order preventing ICANN from taking further steps to delegate .AFRICA, DCA will be unable to obtain a remedy in this IRP. Operation of .AFRICA is a unique right, and there is no substitute right that could be awarded to DCA. Moreover, it would be impossible to quantify the harm. DCA was created expressly for the purpose of campaigning for, competing for and ultimately operating .AFRICA. DCA has numerous charitable initiatives that are based upon this mission. If it is deprived of the opportunity even to compete to operate .AFRICA, DCA will be unable to accomplish its charitable aims and will be unable to perform its mandate.

28. The discovery orders are also necessary because without the requested information, DCA will be unable to ensure that further damage to its rights is not done by ICANN's continuing to process the ZACR application. The requested discovery orders are necessary to prevent the irreparable harm that will result if DCA is denied an opportunity for a meaningful hearing during the IRP.

29. By contrast, ICANN will suffer no similar harm if the Emergency Arbitrator issues the orders DCA requests. Regardless of the outcome of the IRP, ICANN will be able to delegate .AFRICA.<sup>53</sup> The IRP is meant to be an expedited dispute resolution process.<sup>54</sup> A slight delay in delegation is hardly an undue burden compared to the issues at stake. Primary among those issues are the integrity of the IRP process ICANN has put in place to ensure its accountability and transparency to the global community of Internet stakeholders, and the irreparable harm that would be inflicted on DCA if it loses the chance to compete for .AFRICA without even being

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provisional measures] and the harm that would be caused to Respondent if the proceedings were stayed or terminated.”).

<sup>53</sup> Similarly, ZACR may receive the rights to .AFRICA even if DCA is permitted to compete with it pursuant to ICANN's rules and procedures for the new gTLD program.

<sup>54</sup> ICANN Bylaws, Art. IV, Section 3, para. 18 (providing that the IRP panel should aim to resolve the dispute within six months after the request for IRP is filed) [Ex. C-10].

heard by the Panel. DCA has a right to be heard in a meaningful way in the only proceeding available to review the ICANN Board's decisions. To the extent that ICANN might be in violation of its obligations to ZACR under the Registry Agreement, it should be noted that a Registry Agreement is not a guarantee of delegation; moreover ICANN created the situation where its obligations to its competing stakeholders were in conflict, with full knowledge of the predicament it was creating.<sup>55</sup>

#### ***4. The Interim Relief is Needed Urgently, on an Emergency Basis***

30. Finally, the orders DCA requests are needed urgently, on an emergency basis, because without the order compelling ICANN to stay processing of ZACR's application, DCA will suffer irreparable harm before the IRP process can be concluded and indeed, perhaps before the Panel is constituted. A request for interim measures of protection is considered urgent if, absent the requested measure, an action that is prejudicial to the rights of either party is likely to be taken before such final decision is given.<sup>56</sup> This standard is sometimes termed "imminent harm."<sup>57</sup> In light of ICANN's response to DCA's request that it refrain from signing a Registry Agreement with ZACR – namely, signing the agreement 48 hours ahead of time in order to prevent any effective intervention by DCA – the additional harm DCA seeks to prevent clearly is imminent. Moreover, ZACR claims that it will have received all rights to .AFRICA by April 2014, and will begin operating .AFRICA by May 2014.

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<sup>55</sup> Letter from Arif Ali to Jeffrey LeVee (22 January 2014); Email from Jeffrey LeVee to Arif Ali (5 February 2014).

<sup>56</sup> *Burlington Resources* at 73 (indicating that a question is urgent when that question cannot await the outcome of the proceeding on the merits).

<sup>57</sup> *See, e.g.*, UNCITRAL Arbitration Rules (2010) ("An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to....(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm").

31. The harm DCA seeks to prevent is also imminent because DCA has requested relief in order to protect its procedural rights: the right to a process that has the potential to produce a remedy, the right to a meaningful opportunity to present its case, and the right to maintenance of the status quo existing at the time dispute resolution commenced, without further aggravation of the dispute. Where the integrity of the dispute resolution process itself is at issue, measures requested to protect that process are “urgent by definition.”<sup>58</sup> Thus, DCA is entitled to interim relief to protect its procedural rights to a remedy, a meaningful opportunity to be heard, and the maintenance of its rights under the status quo which existed when DCA brought the IRP.

#### **IV. RELIEF REQUESTED**

32. In light of the foregoing, DCA respectfully requests the appointment of an Emergency Arbitrator under Article 37 of the ICDR Rules, and that said Arbitrator provide interim measures of protection by way of an award pursuant to Article 21 of the Rules as follows:

- An interim award compelling ICANN to stay any further processing of any application for .AFRICA until the IRP has concluded and the Board has made its decision based upon the Panel’s declaration;
- An interim award compelling ICANN to disclose in detail all steps taken to date toward delegating .AFRICA to ZACR, including but not limited to the circumstances of the Registry Agreement’s signature on or before March 24, 2014; and
- An interim award compelling ICANN to disclose in detail all steps remaining towards final delegation of the .AFRICA to ZACR and a truthful representation of the dates on which those steps would be expected to occur if not for an order staying further processing.

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<sup>58</sup> See, e.g., *Millicom International Operations B.V. v. Singapore*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures, (1 Feb 2010) para 153 (“if measures are intended to protect the procedural integrity of the arbitration...they are urgent by definition”).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Arif H. Ali', with a stylized flourish at the end.

Arif H. Ali  
Counsel for Claimant

# Exhibit I

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

**CASE #50 2013 001083**

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**FINAL DECLARATION**

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

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

Represented by Mr. Arif H. Ali, Ms. Meredith Craven, Ms. Erin Yates and Mr. Ricardo Ampudia of Weil, Gotshal & Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

**And**

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

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

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

**IRP Panel**

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



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

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

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

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

74. As previously decided by this Panel, such accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.

75. Such accountability also requires, to use the words of the IRP Panel in the *Booking.com B.V. v. ICANN* (ICDR Case Number: 50-20-1400-0247), this IRP Panel to "objectively" determine whether or not the Board's actions are in fact consistent with the Articles of Incorporation, Bylaws and Guidebook, which this Panel, like the one in *Booking.com* "understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness."

76. The Panel therefore concludes that the "standard of review" in this IRP is a *de novo, objective and independent* one, which does not require any presumption of correctness.

77. With the above in mind, the Panel now turns its mind to whether or not the Board in this IRP acted or failed to act in a manner inconsistent

144. After reading the Parties' written submissions concerning the issue of costs and their allocation, and deliberation, the Panel is unanimous in deciding that DCA Trust is the prevailing party in this IRP and ICANN shall bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider.

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

146. For the avoidance of any doubt therefore, the Panel concludes that ICANN shall be responsible for paying the following costs and expenses:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
- d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.

147. The above amounts are easily quantifiable and the Parties are invited to cooperate with one another and the ICDR to deal with this part of this Final Declaration.

## **V. DECLARATION OF THE PANEL**

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

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

refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

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

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

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

The Panel finally would like to take this opportunity to fondly remember its collaboration with the Hon. Richard C. Neal (Ret. and now Deceased) and to congratulate both Parties' legal teams for their hard work, civility and responsiveness during the entire proceedings. The Panel was extremely impressed with the quality of the written work presented to it and oral advocacy skills of the Parties' legal representatives.

**This Final Declaration has sixty-three (63) pages.**

**Date: Thursday, 9 July 2015.**

**Place of the IRP, Los Angeles, California.**



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Professor Catherine Kessedjian



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Hon. William J. Cahill (Ret.)



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Babak Barin, President

# Exhibit J

**Weil, Gotshal & Manges LLP**

BY E-MAIL

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April 20, 2014

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**Re: ICDR Case 50 2013 00 1083 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation  
for Assigned Names and Numbers (ICANN) – Procedural Proposals**

Dear Mr. President and Members of the Panel,

DCA writes in response to ICANN's letter of today's date concerning the scope of the IRP. We also briefly address ICANN's categorical refusal to stay processing of ZACR's application for .AFRICA until this proceeding has concluded.

*First*, it is telling that ICANN's representations as to the scope of this proceeding focus exclusively on ICANN's Supplementary Procedures. As their title indicates, the Supplementary Procedures only

supplement – and do not replace – the ICDR Rules, which, along with associated guidelines, govern this proceeding. These rules ensure DCA’s right to be fully heard in this proceeding. That right includes the ability to submit a full written submission on the merits of its claims; the right to the documents on which ICANN relies for its defenses; and the right to test ICANN’s witnesses. What ICANN may have intended and what the legal consequences are of the dispute resolution mechanism that ICANN put in place are for the Panel to decide, not for ICANN to dictate.

The Panel should be guided first and foremost by the text of the ICDR Rules and Supplementary Procedures – as opposed to ICANN’s current, self-serving gloss on those rules. The Supplementary Procedures and the ICDR Rules, moreover, ultimately commit the conduct of the IRP to the discretion of the Panel. In exercising such discretion, the Panel should be guided by the cardinal principle set out in the ICDR Arbitration Rules that each party be given a full and fair opportunity to be heard; a principle that must also be viewed in the context of the fact that **these proceedings will be the first and last opportunity that DCA Trust will have to have its rights determined by an independent body.** The principles of fairness and equality set out in the ICDR Arbitration Rules, which have not been derogated from by ICANN, prohibit ICANN from unilaterally altering the substance of the rules that apply to this proceeding now that DCA has invoked the IRP.

*Second*, the Supplementary Procedures do not materially deviate from the rights established under the ICDR Rules, except with respect to the 25-page limit on the parties’ “initial written submissions” and the requirement that hearings be limited to “argument only.”

In particular, and in contrast to what ICANN claims, the Supplementary Procedures provide that:

- There will be “initial written submissions” by each party of no more than 25 pages. The word “initial” confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many and how long the additional written submissions should be (Art. 5);
- “All necessary evidence should” be included with the claimant’s initial written submission. The use of the word “should,” and not “shall,” confirms that it is desirable but not required that all necessary evidence be included with the Notice of IRP (Art. 5). Thus, nothing precludes the claimant from adducing additional evidence to rebut ICANN’s defences, as DCA intends to do;
- The IRP Panel may request additional written submissions from either party, or from third parties, as necessary to render a decision in the matter (Art. 5); and
- As ICANN observes, in the event of an in-person or telephonic hearing, witness statements must be provided in advance and the hearings “shall be” limited to “argument only” (Art. 4). This provision does not expressly prohibit cross-examination of witnesses, however, or their questioning by the Panel. Indeed, it would be highly improper for a party to be allowed to submit witness testimony that could not then subsequently be tested, whether by opposing counsel or the



Panelists. It seems impossible and implausible that this is what ICANN intended or what any Panel could allow. Untested witness testimony is ultimately not worth the paper on which it is written.

The Supplementary Procedures are silent on the issue of document production. The ICDR Rules and Guidelines are the only rules applicable to this issue, giving DCA – and ICANN, should it so desire – the right to seek documents from the other party. The fact that the Supplementary Procedures say nothing about document production should be viewed as allowing document requests to be propounded by the parties, especially where, as here, critical information potentially dispositive of the outcome of these proceedings lies in ICANN possession, custody and control.

The fact that ICANN’s counsel in this case has consistently opposed the operation of the very rules set up by ICANN for the IRP is irrelevant. We understand that ICANN would prefer to avoid the kind of full hearing on the merits that took place in ICM Registry, no doubt because ICANN lost that case. But, even assuming it were true, as ICANN suggests, that it amended the Supplementary Procedures in order to prevent any other party from successfully challenging its actions, the Supplementary Procedures do not restrict the IRP in the manner, or to the extent, that ICANN now argues.

*Third*, we note that, notwithstanding ICANN’s argument that it engaged experts to amend the Supplementary Procedures in order to prevent proceedings such as that in the ICM Registry case, ICANN’s own evidence shows that these experts were engaged to conduct a review of all of ICANN’s accountability mechanisms, including requests for reconsideration and the role of the office of the ombudsman.<sup>1</sup> The need to hold ICANN accountable to its stakeholders has been a recurrent issue for ICANN. Contrary to what ICANN suggests in its letter, the review of ICANN’s accountability procedures appears to have been motivated as much by concerns about providing for genuine accountability as by any concerns about costs, much less concerns about an excess of due process for IRP claimants.<sup>2</sup> In fact, ICANN committed to carrying out reviews of its accountability procedures every three years.<sup>3</sup> The fact that ICANN’s accountability procedures have undergone revisions is irrelevant to the question of the scope of this IRP. The text of the Supplementary Procedures is simply not as restrictive as ICANN would wish in this case.

*Fourth*, while ICANN claims that delaying the delegation of .AFRICA in order to allow for the full hearing and evaluation of the parties’ claims and defences would cause it “severe prejudice,” it does not

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<sup>1</sup> See <http://www.icann.org/en/news/in-focus/accountability/asep> (cited by ICANN in footnote 1 to its letter of 20 April).

<sup>2</sup> See <https://community.icann.org/display/ATRT2/Mandate>.

<sup>3</sup> *Id.*

even attempt to substantiate that claim. It is difficult to see how ICANN would be prejudiced by waiting a few months in order to allow its own IRP process to proceed according to the rules it has chosen. On the contrary, ICANN's alleged commitment to transparency and accountability would be at far greater risk of harm if ICANN were to succeed in imposing a truncated, summary proceeding on DCA and the Panel in this matter.

Nor should the Panel be persuaded to quash DCA's rights in this proceeding in favour of the alleged right of ZACR to obtain full rights to operate .AFRICA before the IRP is complete. ICANN has consistently behaved as if ZACR's rights trumped those of DCA. It is this very conduct that lies at the basis of DCA's claims: it is not for ICANN to decide, for reasons of political expediency or otherwise outside the rules laid down in its Bylaws, Articles of Incorporation, and the new gTLD Guidebook, that one applicant "deserves" a domain name more than another.

*Finally*, ICANN has repeatedly brought attention to the fact that DCA has not submitted a rebuttal to ICANN's Response to DCA's Notice of IRP in order to argue that DCA is incapable of providing such a rebuttal. There is no basis for making such an inference. DCA will provide its rebuttal according to the procedures set forth in the ICDR Rules, the Supplementary Procedures, and the Panel's decision on the procedural schedule in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Arif H. Ali', written in a cursive style.

Arif H. Ali

cc: Carolina Cardenas Soto  
Jeffrey LeVee

# Exhibit K

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

**CASE # 50 2013 001083**

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**DECLARATION ON THE IRP PROCEDURE**

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

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

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

**And**

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

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

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

**IRP Panel:**  
**Babak Barin, *Chair***  
**Prof. Catherine Kessedjian**  
**Hon. Richard C. Neal (Ret.)**

Guidebook; [and] ICANN properly denied DCA's Request for Reconsideration."<sup>7</sup>

13) In short, ICANN argued that in these proceedings, "the evidence establishes that the process worked exactly as it was supposed to work."<sup>8</sup>

14) In the merits part of these proceedings, the Panel will decide the above and other related issues raised by the Parties in their submissions.

### III. PROCEDURAL BACKGROUND LEADING TO THIS DECISION

15) On 24 April 2013, 12 May, 27 May and 4 June 2014 respectively, the Panel issued a Procedural Order No. 1, a Decision on Interim Measures of Protection, a list of questions for the Parties to brief in their 20 May 2014 memorials on the procedural and substantive issues identified in Procedural Order No. 1 ("12 May List of Questions"), a Procedural Order No. 2 and a Decision on ICANN's Request for Partial Reconsideration of certain portions of its Decision on Interim Measures of Protection. The Decision on Interim Measures of Protection and the Decision on ICANN's Request for Partial Reconsideration of certain portions of the Decision on Interim Measures of Protection have no bearing on this Declaration. Consequently, they do not require any particular consideration by the Panel in this Declaration.

16) In Procedural Order No. 1 and the 12 May List of Questions, based on the Parties' submissions, the Panel identified a number of questions relating to the future conduct of these proceedings, including the method of hearing of the merits of DCA Trust's amended Notice of Independent Review Process that required further briefing by the Parties. In Procedural Order No. 1, the Panel identified some of these issues as follows:

**B. Future conduct of the IRP proceedings, including the hearing of the merits of Claimant's Amended Notice of Independent Review Process, if required.**

**Issues:**

- a) Interpretation of the provisions of ICANN's Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process* (together the "IRP Procedure"), including whether or not there should be *viva voce* testimony permitted.
- b) Document request and exchange.
- c) Additional filings, including any memoranda and hearing exhibits (if needed and appropriate).

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<sup>7</sup> *Ibid.*

<sup>8</sup> ICANN's Response to Claimant's Amended Notice, *para.* 6. Underlining is from the original text.

- d) Consideration of method of hearing of the Parties, i.e., telephone, video or in-person and determination of a location for such a hearing, if necessary or appropriate, and consideration of any administrative issues relating to the hearing.

17) In that same Order, in light of: (a) the exceptional circumstances of this case; (b) the fact that some of the questions raised by the Parties implicated important issues of fairness, due process and equal treatment of the parties (“Outstanding Procedural Issues”); and (c) certain *primaie impressionis* or first impression issues that arose in relation to the IRP Procedure, the Panel requested the Parties to file two rounds of written memorials, including one that followed the 12 May List of Questions.

18) On 5 and 20 May 2014, the Parties filed their submissions with supporting material for consideration by the Panel.

#### **IV. ISSUES TO BE DECIDED BY THE PANEL**

19) Having read the Parties’ submissions and supporting material, and listened to their respective arguments by telephone, the Panel answers the following questions in this Declaration:

- 1) Does the Panel have the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?
- 2) If so, what directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?
- 3) Is the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

#### **Summary of the Panel’s findings**

20) The Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings and consequently, it issues the procedural directions set out in paragraphs 58 to 61, 68 to 71 and 82 to 87 (below), which directions may be supplemented in a future procedural order. The Panel also concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

## **(ii) Accountability of ICANN**

35) Consistent with its large and important international responsibilities, ICANN's Bylaws acknowledge a responsibility to the community and a need for a means of holding ICANN accountable for compliance with its mission and "core values." Thus, Article IV of ICANN's Bylaws, entitled "Accountability and Review," states:

"In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws."

36) ICANN's Bylaws establish three accountability mechanisms: the Independent Review Process and two other avenues: Reconsideration Requests and the Ombudsman.

37) ICANN's BGC is the body designated to review and consider Reconsideration Requests. The Committee is empowered to make final decisions on certain matters, and recommendations to the Board of Directors on others. ICANN's Bylaws expressly provide that the Board of Directors "*shall not be bound to follow the recommendations of the BGC.*"

38) ICANN's Bylaws provide that the "charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy [...] or the Independent Review Policy have not been invoked." The Ombudsman's powers appear to be limited to "clarifying issues" and "using conflict resolution tools such as negotiation, facilitation, and 'shuttle diplomacy.'" The Ombudsman is specifically barred from "instituting, joining, or supporting in any way any legal actions challenging ICANN's structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies."

39) The avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS

OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM.”<sup>20</sup>

40) Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate “accountability” remedy for applicants is the IRP.

### **(iii) IRP Procedures**

41) The Bylaws of ICANN as amended on 11 April 2013, in Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), paragraph 1, require ICANN to put in place, in addition to the reconsideration process identified in Section 2, a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.

42) Paragraphs 7 and 8 of Section 2 of the Bylaws, require all IRP proceedings to be administered by an international dispute resolution provider appointed by ICANN, and for that IRP Provider (“IRPP”) to, with the approval of the ICANN’s Board, establish operating rules and procedures, which shall implement and be consistent with Section 3.

43) In accordance with the above provisions, ICANN selected the ICDR, the international division of the American Arbitration Association, to be the IRPP.

44) With the input of the ICDR, ICANN prepared a set of Supplementary Procedures for ICANN IRP (“Supplementary Procedures”), to “supplement the [ICDR’s] International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.”

45) According to the Definitions part of the Supplementary Procedures, “Independent Review or IRP” refers to “the procedure that takes place upon filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN’s Bylaws or Articles of Incorporation”, and “International Dispute Resolution Procedures or Rules” refers to the ICDR’s International Arbitration Rules (“ICDR Rules”) that will govern the process in combination with the Supplementary Rules.

46) The Preamble of the Supplementary Rules indicates that these “procedures supplement the [ICDR] Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws” and Article

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<sup>20</sup> Applicant Guidebook, Terms and Conditions for Top Level Domain Applications, *para.* 6. Capital letters are from the original text.



of accountability and transparency would be disserved by a regime that truncates the usual and traditional means of developing and presenting a claim.

60) The Panel, therefore, orders a reasonable documentary exchange in these proceedings with a view to maintaining efficiency and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them. If the Parties are unable to agree on such a documentary exchange process, the Panel will intervene and, with the input of the Parties, provide further guidance.

61) In this last regard, the Panel directs the Parties attention to paragraph 6 of the ICDR Guidelines, and advises, that it is very “receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.”

#### **b) Additional filings, including memoranda and hearing exhibits**

#### **Parties’ Submissions**

62) In the DCA Trust First Memorial, DCA Trust submits that:

“[The] plain language of the Supplementary Procedures pertaining to written submissions clearly demonstrates that claimants in IRPs are not limited to a single written submission incorporating all evidence, as argued by ICANN. Section 5 of the Supplementary Procedures states that ‘initial written submissions of the parties shall not exceed 25 pages.’ The word ‘initial’ confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many additional written submissions and what page limits should apply.”<sup>30</sup>

63) DCA Trust also submits that, “Section 5 of the Supplementary Procedures [...] provides that ‘[a]ll necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.’ Use of the word ‘should’—and not ‘shall’—confirms that it is desirable, but not required that all necessary evidence be included with the Notice of Independent Review. Plainly, the Supplementary Procedures do not preclude a claimant from adducing additional evidence nor would it make any sense if they did given that claimants may, subject to the Panel’s discretion, submit document requests.”<sup>31</sup>

64) According to DCA Trust, in addition, “section 5 of the Supplementary Procedures provides that ‘the Panel may request additional written submissions from the party seeking review, the Board, the Supporting

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<sup>30</sup> DCA Trust First Memorial, *para.* 57.

<sup>31</sup> *Ibid*, *para.* 58.

what it could say in additional briefing that would refute the materials in ICANN's presentation. [...] The fact that DCA is unable to identify supplemental witnesses six months after filing its Notice of IRP is strong indication that further briefing would not be helpful in this case. Second, as ICANN has explained on multiple occasions, DCA [Trust] has delayed these proceedings substantially, and further briefing would compound that delay [...] as ICANN noted in its letter of 20 April 2014, despite DCA [Trust's] attempts to frame this case as implicating issues 'reach[ing] far beyond the respective rights of the parties as concerns the delegation of .AFRICA,' the issues in this case are in fact extremely limited in scope. This Panel is authorized only to address whether ICANN violated its Bylaws or Articles of Incorporation *in its handling of DCA's Application for .AFRICA*. The parties have had the opportunity to submit briefs and evidence regarding that issue. DCA [Trust] has given no indication that it has further dispositive arguments to make or evidence to present. The Panel should resist DCA's attempt to delay these proceedings even further via additional briefing."<sup>36</sup>

### **The Panel's directions concerning additional filings**

- 68) As with document production, in the face of Article 16 of the ICDR Rules, the Panel is of the view that both Parties ought to benefit from additional filings. In this instance again, while it is possible as ICANN explains, that the drafters of the Supplementary Procedures may have desired to preclude the introduction of additional evidence not submitted with an initial statement of claim, the Panel is of the view that such a result would be inconsistent with ICANN's core values and the Panel's obligation to treat the parties fairly and afford both sides a reasonable opportunity to present their case.
- 69) Again, every set of dispute resolution rules, and every court process that the Panel is aware of, allows a claimant to supplement its presentation as its case proceeds to a hearing. The goal of a fair opportunity to present one's case is in harmony with ICANN's goals of accountability, transparency, and fairness.
- 70) The Panel is aware of and fully embraces the fact that ICANN tried to curtail unnecessary time and costs in the IRP process. However, this may not be done at the cost of a fair process for both parties, particularly in light of the fact that the IRP is the exclusive dispute resolution mechanism provided to applicants.
- 71) Therefore, the Panel will allow the Parties to benefit from additional filings and supplemental briefing going forward. The Panel invites the Parties in this regard to agree on a reasonable exchange timetable. If the Parties are unable to agree on the scope and length of such additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

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<sup>36</sup> *Ibid*, paras. 26 and 27.

*ICM* IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term ‘arbitration’ were removed as part of the Bylaws revisions. *ICM* had argued in the IRP that the use of the word ‘arbitration’ in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the *ICM* IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word ‘arbitration’ in conjunction with the amendments to the Bylaws.”<sup>52</sup>

94) ICANN further submits that:

“[The] amendments to the Bylaws, which occurred following a community process on the proposed IRP revisions, added, among other things, a sentence stating that ‘declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.’ DCA argues that this new language, which does not actually use the word ‘binding,’ nevertheless provides that IRP Panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process, the plain text of the Bylaws, and the reasoned declaration of a prior IRP panel. DCA is wrong.”<sup>53</sup>

95) According to ICANN:

“[The] language DCA references was added to ICANN’s Bylaws to meet recommendations made by ICANN’s Accountability Structures Expert Panel (‘ASEP’). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN’s accountability mechanisms, including the Independent Review process. The ASEP recommended, *inter alia*, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP’s recommendations in this regard were raised in light of the second IRP constituted under ICANN’s Bylaws, where the claimant presented claims that would have required the IRP Panel to [re-evaluate] the declaration of the IRP Panel in the *ICM* IRP. To prevent claimants from challenging a prior IRP Panel declaration, the ASEP recommended that ‘[t]he declarations of the IRP, and ICANN’s subsequent actions on those declarations, should have precedential value.’ The ASEP’s recommendations in this regard did not convert IRP Panel declarations into binding decisions.”<sup>54</sup>

96) Moreover, ICANN argues:

“[One] of the important considerations underlying the ASEP’s work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. That law requires that ICANN’s Board retain the ultimate responsibility for decision-making. As a result, the ASEP’s recommendations were premised on the understanding that the declaration of the IRP Panel is not ‘binding’ on the Board. In any event, a declaration clearly can be both non-binding and precedential.”<sup>55</sup>

97) In short, ICANN argues that the IRP is *not* binding. According to ICANN, “not only is there no language in the Bylaws stating that IRP Panel declarations

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<sup>52</sup> *Ibid*, para. 6.

<sup>53</sup> *Ibid*, para. 7.

<sup>54</sup> *Ibid*, paras. 8 and 9.

<sup>55</sup> *Ibid*, paras. 9 and 10.

are binding on ICANN, there is no language stating that an IRP Panel even may determine if its advisory Declarations are binding.”<sup>56</sup> According to ICANN, words such as “arbitration” and “arbitrator” were removed from the Bylaws to ensure that the IRP Panel’s declarations do not have the force of normal commercial arbitration. ICANN also argues that DCA Trust, “fails to point to a *single piece of evidence* in all of the drafting history of the Bylaws or any of the amendments to indicate that ICANN intended, through its 2013 amendments, to convert a non-binding procedure into a binding one.”<sup>57</sup> Finally, ICANN submits that “it is not within the scope of this Panel’s authority to declare whether IRP Panel declarations are binding on ICANN’s Board...the Panel does not have the authority to re-write ICANN’s Bylaws or the rules applicable to this proceeding. The Panel’s mandate is strictly limited to ‘comparing contested actions of the Board [and whether it] has acted consistently with the provisions of those Articles of Incorporation and Bylaws, and [...] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws’.”<sup>58</sup>

### **The Panel’s Decision on Binding or Advisory nature of IRP decisions, opinions and declarations**

98) Various provisions of ICANN’s Bylaws and the Supplementary Procedures support the conclusion that the Panel’s decisions, opinions and declarations are binding. There is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the Panel either advisory or non-binding.<sup>59</sup>

99) In paragraph 1, the Supplementary Procedures define “Declaration” as the “decisions and/or opinions of the IRP Panel”. In paragraph 9, the Supplementary Procedures require any Declaration of a three-member IRP Panel to be signed by the majority and in paragraph 10, under the heading “Form and Effect of an IRP Declaration”, they require Declarations to be in writing, based on documentation, supporting materials and arguments submitted by the parties. The Supplementary Procedures also require the Declaration to “specifically designate the prevailing party”.<sup>60</sup>

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<sup>56</sup> ICANN letter of 2 June 2014 addressed to the Panel.

<sup>57</sup> *Ibid.* Italics are from the original decision.

<sup>58</sup> *Ibid.*

<sup>59</sup> The Reconsideration process established in the Bylaws expressly provides that ICANN’s “Board *shall not be bound to follow* the recommendations” of the BGC for action on requests for reconsideration. No similar language in the Bylaws or Supplementary Procedures limits the effect of the Panel’s IRP decisions, opinions and declarations to an advisory or non-binding effect. It would have been easy for ICANN to clearly state somewhere that the IRP’s decisions, opinions or declarations are “advisory”—this word appears in the Reconsideration Process.

<sup>60</sup> Moreover, the word “Declaration” in the common law legal tradition is often synonymous with a binding decision. According to Black’s Law Dictionary (7<sup>th</sup> Edition 1999) at page 846, a “declaratory

## VI. DECLARATION OF THE PANEL

129)Based on the foregoing and the language and content of the IRP Procedure, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings.

130)Based on the foregoing and the language and content of the IRP Procedure, the Panel issues the following procedural directions:

(i) The Panel orders a reasonable documentary exchange in these proceedings with a view to maintaining efficacy and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them;

(ii) The Panel permits the Parties to benefit from additional filings and supplemental briefing going forward and invites the Parties to agree on a reasonable exchange timetable going forward;

(iii) The Panel allows a video hearing as per the agreement of the Parties, but reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits; and

(iv) The Panel permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.

If the Parties are unable to agree on a reasonable documentary exchange process or to agree on the scope and length of additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

131)Based on the foregoing and the language and content of the IRP Procedure, the Panel concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

132)The Panel reserves its views with respect to any other issues raised by the Parties for determination at the next stage of these proceedings. At that time, the Panel will consider the Parties' respective arguments in those regards.

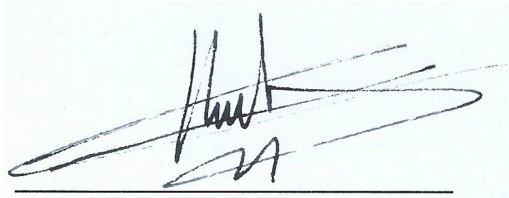
133)The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the hearing of the merits.

This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

This Declaration on the IRP Procedure has thirty-three (33) pages.

Thursday, 14 August 2014

Place of the IRP, Los Angeles, California.



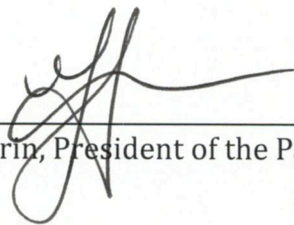
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Professor Catherine Kessedjian



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Hon. Richard C. Neal



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Babak Barin, President of the Panel

# Exhibit L

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

**ICDR Case No. 50 117 T 1083 13**

**EXHIBIT  
66  
9-6-2017**

*Lori Scinta, RPR, CSR 4811*

DotConnectAfrica Trust,

Claimant,

v.

Internet Corporation for Assigned Names and Numbers,

Respondent.

**DCA'S SUBMISSION ON PROCEDURAL ISSUES**

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5 May 2014



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## **I. INTRODUCTION**

1. In accordance with the Panel's Procedural Order No. 1, DotConnectAfrica Trust ("DCA") hereby provides its submission on the procedures for conducting the Independent Review Process ("IRP") it has initiated against the Internet Corporation for Assigned Names and Numbers ("ICANN").<sup>1</sup> This brief addresses the issues raised by the Panel during the 22 April procedural hearing concerning the appropriate procedures for the IRP, as well as their legal effect. As set forth below, under the rules that ICANN has established for the IRP, this IRP is an arbitration, notwithstanding the nomenclature ICANN has devised to distinguish it from ordinary international commercial arbitration proceedings. **The IRP has all the characteristics of an arbitration under California law and widely accepted international arbitral practice and procedure. It is the only third-party and truly independent review process available to applicants for new generic Top-Level Domains ("gTLDs") under ICANN's framework.** In any event, the ICDR Rules and Supplementary Procedures empower the Panel to decide all procedural issues in dispute, such as the number of additional written pleadings and the conduct of the hearing on the merits, including the availability of witness testimony.

## **II. APPLICABLE RULES AND GOVERNING LAW**

2. This IRP is constituted under Article IV, Section 3 of ICANN's Bylaws.<sup>2</sup> It is governed by two complementary sets of procedural rules, the International Dispute Resolution Procedures (the "ICDR Rules")<sup>3</sup> and ICANN's Supplementary Procedures for ICANN IRP.<sup>4</sup> The parties

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<sup>1</sup> See Procedural Order No. 1 (24 Apr. 2014).

<sup>2</sup> See ICANN Bylaws [Amended Notice of IRP, Ex. C-10].

<sup>3</sup> See International Dispute Resolution Procedures, amended and effective as of 1 June 2009, available at [https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTG\\_002037&revision=latestreleased](https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTG_002037&revision=latestreleased) [Ex. C-M-1].

<sup>4</sup> See ICANN Supplementary Procedures for IRP [Amended Notice of IRP, Exhibits C-3 and C-4].

have agreed that the seat of this proceeding is Los Angeles, California.<sup>5</sup> Accordingly, California law and United States federal law constitute the law of the seat and form the relevant legal background for matters of procedure in this IRP.

3. By selecting the ICDR Arbitration Rules, and representing to gTLD applicants that these rules (as modified by the Supplementary Procedures) form the dispute resolution regime applicable to the new gTLD application process, ICANN made a standing offer to applicants that it would agree to be bound by the terms of those rules and the ICDR's guidelines on the conduct of arbitrations, including the ICDR Guidelines for Arbitrators Concerning Exchanges of Information (the "ICDR Guidelines").<sup>6</sup> That offer was accepted by DCA when it initiated these proceedings.<sup>7</sup> ICANN's Supplementary Procedures provide that, in the event of a conflict between the Supplementary Procedures and the ICDR Rules, the Supplementary Procedures govern.<sup>8</sup> Where there is no conflict or where the Supplementary Procedures are silent, the ICDR Rules govern. The merits of the dispute are governed by ICANN's Bylaws and Articles of

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<sup>5</sup> Letter from Jeffrey A. LeVee, Counsel for Respondent, to Carolina Cardenas-Soto, Senior International Case Manager, ICDR (5 Dec. 2013) [Ex. C-M-2].

<sup>6</sup> See ICDR Guidelines for Arbitrators Concerning Exchanges of Information, available at [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_002579](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002579) [Ex. C-M-3].

<sup>7</sup> The system that ICANN has put in place is not dissimilar to the system of "consent" that applies in the context of investor-state arbitration, where binding dispute resolution in respect of breaches of an investment protection treaty or of a municipal investment law is based on a standing offer by the state to arbitrate that is contained in an applicable treaty or investment law. The required agreement to arbitrate is formed when the investor accepts the offer to arbitrate by filing its request to arbitrate.

<sup>8</sup> ICANN Supplementary Procedures for IRP [Amended Notice of IRP, Exhibits C-3 and C-4].

Incorporation,<sup>9</sup> the gTLD Applicant Guidebook,<sup>10</sup> and international and local law, as provided in Article 4 of ICANN's Articles of Incorporation.<sup>11</sup>

### **III. THE INDEPENDENT REVIEW PROCESS HAS ALL THE CHARACTERISTICS OF AN ARBITRATION**

4. Under California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision.<sup>12</sup> Other U.S. state and federal courts have identified similar features as determinative of whether a procedure constitutes an arbitration.<sup>13</sup> Practitioners of international arbitration look to the same core elements in defining an arbitration:

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<sup>9</sup> ICANN Articles of Incorporation [Amended Notice of IRP, Ex. C-9].

<sup>10</sup> gTLD Applicant Guidebook (Version 2012-06-04) [Amended Notice of IRP, Ex. C-11].

<sup>11</sup> See ICANN Articles of Incorporation, Art. 4 [Amended Notice of IRP, Ex. C-9].

<sup>12</sup> See *Cheng-Canindin v. Renaissance Hotel Assoc.*, 57 Cal. Rptr. 2d 867, 874 (Cal. Ct. App. 1996) [Ex. C-M-4]; see also *American Federation of State, County and Municipal Employees v. Metropolitan Water Dist. of Southern California*, 24 Cal. Rptr. 3d 285, 291 (Cal. Ct. App. 2005) [Ex. C-M-5]; *Saeta v. Superior Court*, 11 Cal. Rptr. 3d 610, 614 (Cal. Ct. App. 2004) [Ex. C-M-6]. The FAA does not define "arbitration." Most federal courts have looked to federal law to supply a definition given that the FAA is a federal statute. See, e.g., *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004) (finding that "[a]ssuredly Congress intended a 'national' definition for a national policy") [Ex. C-M-7]. Some Circuit Courts of Appeal, however, including the Ninth Circuit, have held that state law governs. See *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579 (9th Cir. 1987) (applying California law to determine what constitutes an arbitration agreement) [Ex. C-M-8]. But see *Portland General Electric Co. v. U.S. Bank National Assoc.*, 218 F.3d 1085, 1091 (9th Cir. 2000) (Takima, J., concurring) [Ex. C-M-9]; *id.*, at 1091-92 (McKeown, J., specially concurring) (applying state law to define "arbitration" under the FAA because three-judge panel recognized that it was bound by *Wasyf*, but questioning whether *Wasyf* was correctly decided) [Ex. C-M-9].

<sup>13</sup> See, e.g., *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1239 (11th Cir. 2008) (finding that although the presence or absence of one of the following factors will not always be determinative, to determine whether a particular dispute resolution mechanism chosen in a contract is a FAA arbitration, courts should look for "the 'common incidents' of 'classic arbitration,' including (1) an independent adjudicator, (2) who applies substantive legal standards (i.e. the parties' agreement and background contract law), (3) considers evidence and argument (however formally or informally) from each party, and (4) renders a decision that purports to resolve the rights and duties of the parties, typically by awarding damages or equitable relief") [Ex. C-M-10]; *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 350 (3rd Cir. 1997) (noting that "[a]lthough [arbitration] defies easy definition,

[V]irtually all authorities would accept that arbitration is a process by which the parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard.<sup>14</sup>

5. Thus, the mere fact that ICANN has labeled this proceeding an independent review process rather than an arbitration (and the adjudicator of the dispute is called a Panel rather than a Tribunal) does not change the fact that the IRP – insofar as its procedural framework and the legal effects of its outcome are concerned – is an arbitration.<sup>15</sup> As long as the IRP meets the five criteria laid down by California and federal law, it is an arbitration no matter what it is called. We explain below why the IRP meets these criteria.

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the essence of arbitration . . . is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, i.e. to an award made by a third-party arbitrator”) [Ex. C-M-11].

<sup>14</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 246 (2014) [Ex. C-M-12].

<sup>15</sup> See, e.g., *id.*, at 244 (“It is trite law in virtually all developed jurisdictions that the label adopted by the parties themselves for a dispute resolution mechanism is not decisive in determining the true character of that mechanism. That is true in common law jurisdictions (U.S., English and otherwise), as well as civil law jurisdictions.”). Federal and state courts, including California state courts, have reached a similar conclusion. See, e.g., *Painters District Council No. 33 v. Moen*, 181 Cal. Rptr. 17, 18 (Cal. Ct. App. 1982)(citing *General Drivers Union v. Riss & Co.*, 372 U.S. 517, 519 (1963)) (“[T]he failure of the agreement to identify the grievance procedure as ‘arbitration’ is not fatal to its use as a binding mechanism for resolving disputes between the parties.”) [Ex. C-M-13].

### **A. The IRP Panel Is A Third-Party Decision-Maker**

6. As the name “independent review process” indicates, the IRP Panel is an independent, third-party decision-maker; that is, unlike other levels of review for ICANN Board actions, it is independent of ICANN in addition to being independent of DCA.

7. Article 1 of the Supplementary Procedures confirms the Panel’s status as an independent, third-party decision-maker:

IRP PANEL refers to *the neutral(s) appointed to decide the issue(s) presented*. The IRP will be comprised of members of a standing panel identified in coordination with the ICDR. Certain decisions of the IRP are subject to review or input of the Chair of the standing panel. *In the event that an omnibus standing panel: (i) is not in place when an IRP PANEL must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the ICDR; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the ICDR shall identify and appoint one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.*<sup>16</sup>

8. As indicated by this definition, the IRP Panel is a neutral body appointed by the parties and the ICDR to hear the dispute. It therefore qualifies as a third-party decision-maker for purposes of defining the IRP as an arbitration.

### **B. The IRP Panel Was Chosen By The Parties**

9. ICANN’s Bylaws contain its standing offer to arbitrate, through the IRP administered by the ICDR, disputes concerning Board actions alleged to be inconsistent with the Articles of Incorporation or the Bylaws.<sup>17</sup> DCA accepted ICANN’s standing offer to arbitrate by submitting

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<sup>16</sup> ICANN Supplementary Procedures for IRP (emphasis added) [Amended Notice of IRP, Ex. C-3].

<sup>17</sup> See ICANN Bylaws, Art. IV, § 3(1), 3(7) [Amended Notice of IRP, Ex. C-10].

its Notice of Independent Review (the “Notice”) to the ICDR on 24 October 2013.<sup>18</sup> Because ICANN has yet to create a standing IRP panel from which to select panelists, the parties agreed that DCA’s claims would be heard by a three-member panel; that each party would appoint one panelist; and that the two party-appointed arbitrators would select the chairperson.<sup>19</sup> When the two party-appointed panelists were unable to agree on a chairperson, the ICDR made the appointment pursuant to Article 6 of the ICDR Rules.<sup>20</sup> The parties thus chose to submit their dispute to the IRP Panel for resolution, as with any other arbitration.

### **C. There Is A Mechanism For Assuring The Neutrality Of The Decision-Maker**

10. As noted above, the Supplementary Procedures provide that the IRP Panel is to be comprised of “neutral” parties and provide that the panel shall be comprised of members of a standing IRP panel or as selected by the parties under the ICDR Rules.<sup>21</sup>

11. The ICDR Rules also provide that panelists serving under the rules “shall be impartial and independent,” and require them to disclose any circumstances giving rise to “justifiable doubts” as to their impartiality or independence.<sup>22</sup> Under Article 8 of the Rules, a party may challenge a panelist if there are circumstances that give rise to such doubts.<sup>23</sup> In the event that the challenged panelist does not withdraw, the challenge will be decided by the ICDR

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<sup>18</sup> DCA Notice of Independent Review (24 Oct. 2013) [Amended Notice of IRP, Ex. C-51].

<sup>19</sup> See Email from Marguerite Walter to Carolina Cardenas-Soto and Jeffrey LeVee (8 Jan. 2013) [Ex. C-M-14].

<sup>20</sup> ICDR Rules, Art. 6(3) [Ex. C-M-15].

<sup>21</sup> Supplementary Procedures, Art. 1 [Amended Notice of IRP, Ex. C-3] .

<sup>22</sup> ICDR Rules, Art. 7 [Ex. C-M-15].

<sup>23</sup> See *id.*, at Art. 8.



administrator “in its sole discretion.”<sup>24</sup> If the challenge is upheld or the arbitrator withdraws, a replacement arbitrator is to be selected.<sup>25</sup>

12. The IRP therefore contains a mechanism for ensuring the neutrality of the decision-maker, just like any other arbitration.

#### **D. The IRP Provides An Opportunity For Both Parties To Be Heard**

13. The IRP affords both parties an opportunity to be heard, both in writing and orally. Article 5 of the Supplementary Procedures confirms that both parties have an opportunity to be heard by means of written submissions:

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.<sup>26</sup>

14. Article 4 of the Supplementary Procedures further provides that the Panel may hold a hearing in which parties may make oral submissions. In addition, Article 16(1) of the ICDR Rules provides that the Panel may, subject to the other provisions of the ICDR Rules, conduct the proceeding in the manner it deems to be appropriate, “provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to

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<sup>24</sup> *Id.*, at Art. 9.

<sup>25</sup> *See id.*, at Art. 10.

<sup>26</sup> Supplementary Procedures, Art. 5 [Amended Notice of IRP, Ex. C-3]. The other version of the Supplementary Procedures posted to the ICDR website when DCA accepted ICANN’s standing offer to arbitrate likewise gives both parties an opportunity to be heard. The only limitation the other version of the Supplementary Procedures places on hearings is that “[t]he IRP should conduct its proceedings by electronic means to the extent feasible,” but “[w]here necessary, the IRP may conduct telephone conferences.” Supplementary Procedures, Art. 4 [Ex. C-4].

present its case.”<sup>27</sup> Moreover, at the conclusion of the proceedings, the IRP Panel “*shall* make its declaration *solely on* the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party.”<sup>28</sup> In other words, after giving each party an opportunity to be heard, the IRP is limited to making its decision only on the information properly gleaned through these procedures.

### **E. The IRP Decision-Making Process Is Final And Binding**

15. During the procedural hearing held on 22 April, ICANN’s counsel disputed the fact that the IRP is final and binding. As we explained then, however, whatever ICANN may have intended when it created the IRP, it has put in place a binding mechanism for final resolution of disputes over ICANN Board decisions. To the extent that the language of the various instruments drafted by ICANN and governing the IRP is ambiguous on this point, DCA submits that the Panel should construe that language *contra proferentem* and find that the IRP results in a final and binding outcome for the parties.

#### **1. The Independent Review Process is the Final And Only Neutral And Independent Step in an Escalating Set of Accountability and Review Mechanisms**

16. The IRP is the final accountability and review mechanism available to parties materially affected by ICANN Board decisions. The IRP is also the only ICANN accountability mechanism conducted by an independent third-party decision-maker with the power to render a decision resolving the dispute and naming a prevailing party.<sup>29</sup> Thus, the IRP is distinct from the review procedures leading up to it in that it provides for external and independent review of actions taken by ICANN’s Board. In other words, the IRP is not simply another layer of internal

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<sup>27</sup> ICDR Rules, Art. 16(1) [Ex. C-M-15].

<sup>28</sup> See ICANN Bylaws, Art. IV, § 3(18) (emphasis added) [Amended Notice of IRP, Ex. C-10].

<sup>29</sup> See *id.*, at Art. IV § 3(7), (18).

review under ICANN's control, but functions like any other arbitration to exert external review and control on ICANN's activities.

**a. The First Layer Of Review: Reconsideration**

17. The first step in the escalating set of review processes available to parties is reconsideration. Parties may submit a request to ICANN for “reconsideration or review” of an ICANN action or inaction (a “Reconsideration Request”).<sup>30</sup> The process is conducted by the ICANN Board Governance Committee (the “BGC”) and the Board is not bound to follow the BGC’s recommendations.<sup>31</sup> The BGC conducts the review process, weighs the evidence, may even conduct in-person hearings and “makes a final determination or recommendation to the Board” on the Reconsideration Request.<sup>32</sup> If the requestor’s Reconsideration Request is denied, the requestor may escalate the dispute by entering into a “cooperative engagement” process with ICANN or move directly to filing a request for independent review.

18. DCA submitted a Reconsideration Request on 19 June 2013, which BGC denied on 1 August 2013.<sup>33</sup>

**b. The Second Layer Of Review: Cooperative Engagement**

19. ICANN encourages claimants to enter into a “cooperative engagement” process with ICANN for purpose of “resolving or narrowing the issues that are contemplated to be brought to the IRP.”<sup>34</sup> Although the cooperative engagement process is voluntary, if a party requesting

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<sup>30</sup> *Id.*, Art. IV, § 2(2).

<sup>31</sup> *Id.*, at Art. IV, § 2(17).

<sup>32</sup> *Id.*, at Art. IV, § 2(2), (12).

<sup>33</sup> DCA’s Reconsideration Request Form (19 June 2013) [Amended Notice of IRP, Ex. C-46]; Recommendation of the BGC Reconsideration Request 13-4, 1 August 2013 [Amended Notice of IRP, Ex. C-47]. *See also* DCA’s Amended Notice of IRP, paras. 38-39.

<sup>34</sup> ICANN Bylaws, Art. IV, § 3(14) [Amended Notice of IRP, Ex. C-10]. If the parties are unable to resolve their dispute through the cooperative engagement process, the Bylaws urge the parties to participate in a “conciliation

independent review does not first participate “in good faith” in the cooperative engagement and conciliation processes with ICANN, the Bylaws mandate that the future IRP Panel must award to ICANN (if ICANN is the prevailing party) all reasonable fees and costs, including legal fees, incurred in the IRP.<sup>35</sup> This amounts to a potential penalty for not first engaging in these non-binding dispute resolution mechanisms.

20. On 19 August 2013, DCA informed ICANN of its intent to seek relief via the IRP and, at ICANN’s suggestion, participated in the cooperative engagement process with ICANN to try to resolve the issues surrounding DCA’s application.<sup>36</sup> DCA and ICANN met on several occasions as part of the cooperative engagement process but were unable to resolve the dispute. Only after DCA was unable to resolve its issues with ICANN through the cooperative engagement process did DCA file its Notice of Independent Review (the “Notice”).<sup>37</sup>

**c. The Third Layer Of Review: The IRP**

21. The IRP represents a fundamentally different stage of review from those that precede it. Unlike reconsideration or cooperative engagement, the IRP is conducted pursuant to a set of independently developed international arbitration rules (as minimally modified) and administered by a provider of international arbitration services, not ICANN itself. Likewise, the decision-maker is not ICANN, but a Panel comprised of neutral third parties selected by the parties in consultation with the ICDR, or appointed pursuant to the ICDR Rules.

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period” upon filing a request for independent review. Conciliation is similar to the cooperative engagement process, except that it involves a neutral party to help narrow the issues in the request for independent review. Bylaws, Art. IV, § 3(15) [Amended Notice of IRP, Ex. C-10].

<sup>35</sup> *Id.*, at Art. IV, § 3(16).

<sup>36</sup> See DCA Notice of Intent (19 Aug. 2013) [Amended Notice of IRP, Ex. C-49]; Letter from Ms. Sophia Bekele (DCA) to the President/CEO (ICANN) (4 Sept. 2013) [Amended Notice of IRP, Ex. C-50].

<sup>37</sup> See DCA Notice of Independent Review (24 Oct. 2013) [Amended Notice of IRP, Ex. C-51].

22. It is also critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases.<sup>38</sup> Among those conditions was the waiver of all of its rights to challenge ICANN's decision on DCA's application in court.<sup>39</sup> For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available. The very design of this process is evidence that the IRP is fundamentally unlike the forms of administrative review that precede it and is meant to provide a final and binding resolution of disputes between ICANN and persons affected by its decisions.

## **2. The Governing Instruments Of The IRP Confirm That It Is Final And Binding**

23. The governing instruments of the IRP – *i.e.*, the Bylaws, the ICDR Rules, and the Supplementary Procedures – confirm that the IRP is final and binding. The powers of the IRP Panel, and the language used to describe its functions, demonstrate that it is meant to provide a final and binding decision resolving the dispute between the parties.

### **a. The Bylaws Describe The IRP In Terms Indicating It Is A Final And Binding Review**

24. In section 3 of Article IV of ICANN's Bylaws, titled "Accountability and Review," ICANN sets forth the procedures for "Independent Review of Board Actions."<sup>40</sup> This section provides that "[a]ny person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for

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<sup>38</sup> See ICANN gTLD Guidebook (Version 2012-06-04), Module 6 [Amended Notice of IRP, Ex. C-11].

<sup>39</sup> See *id.*, at Module 6-4.

<sup>40</sup> ICANN Bylaws, Art. IV, § 3 [Amended Notice of IRP, Ex. C-10].

independent review of that decision or action.”<sup>41</sup> Requests are referred to an IRP Panel that is charged with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws.”<sup>42</sup>

25. In language echoing the ordinary functions of a court, the Bylaws provide that the IRP Panel has the authority to “summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious” and to “declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.”<sup>43</sup> The power to summarily dismiss claims deemed frivolous or vexatious by the Panel amounts to the power to dismiss claims with prejudice. If the IRP Panel has dismissed a claim, then the Panel’s decision is inherently final and binding because the review stops there.

26. The Bylaws further provide that the IRP Panel “shall make its declaration” and “in its declaration shall specifically designate the prevailing party.”<sup>44</sup> ICANN’s Bylaws are silent on the definition of “declaration.” However, the Supplementary Procedures clarify that “declaration” means the “decisions/opinions of the IRP Panel.” A “decision” or “opinion” connotes judicial finality.

27. Moreover, the Bylaws provide that the declarations of the IRP Panel, and the Board’s subsequent actions on those declarations, “*are final and have precedential value.*”<sup>45</sup> During the hearing on procedural matters, counsel for ICANN dismissed the use of the word “precedential” in the Bylaws as not being indicative that IRP declarations are binding. But as the Panel rightly

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<sup>41</sup> *Id.*, at Art. IV, § 3(2).

<sup>42</sup> *Id.*, at Art. IV, § 3(4).

<sup>43</sup> *Id.*, at Art. IV, § 3(11).

<sup>44</sup> *Id.*, at Art. IV, § 3(18).

<sup>45</sup> *Id.*, at Art. IV, § 3(21) (emphasis added).

noted, the word “precedential” indicates a binding outcome. Definitions of the word “precedent” demonstrate that the use of the word “precedential” in the Bylaws means that IRP Panel declarations are binding. According to Black’s Law Dictionary, precedent refers to “[a] decided case that furnishes a basis for determining later cases involving similar facts or issues.”<sup>46</sup> Similarly, a scholarly article defines precedent as “a means of enforcing rule-of-law values such as continuity and predictability.”<sup>47</sup>

28. This is precisely the function that the Bylaws give IRP declarations when they describe them as “precedential,” *i.e.*, they have a binding and determinative effect on subsequent IRPs in order to provide continuity and predictability in the accountability standards to which ICANN will be held. Critically, the version of the Bylaws in force during the *ICM* IRP did not contain this language, as discussed below. Thus, the *ICM* Panel’s conclusion that its declaration was not binding is not determinative of the effect of this Panel’s declaration under the revised Bylaws.

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<sup>46</sup> Black’s Law Dictionary (9th ed. 2009).

<sup>47</sup> Berkolow, *Much Ado about Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-percolation after Rapanos*, 15 Va. J. Soc. Pol’y & L 299, 306 (2008) [Ex. C-M-16].

**b. The Supplementary Procedures And ICDR Rules Further Confirm The Binding Authority Of The IRP's Declaration**

29. Much of the language in the Supplementary Procedures echoes what is contained in the Bylaws. Together with the ICDR Rules, the Supplementary Procedures confirm that the IRP's declaration has binding effect.

30. The Supplementary Procedures are silent as to the binding effect of the IRP Panel's declaration. Article 10 of the Supplementary Procedures describes the form and function of the Panel's Declaration as follows:

a. Declarations shall be made in writing, promptly by the IRP Panel based on the documentation, supporting materials and arguments submitted by the parties.

b. The declaration shall specifically designate the prevailing party.

c. A declaration may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen circumstances, ICANN will consent to publication of a declaration if the other party so request.

d. Copies of the declaration shall be communicated to the parties by the ICDR.

31. However, the powers granted to the IRP Panel in the Supplementary Procedures indicate that declarations are final and binding. In particular, the Supplementary Procedures, like the Bylaws, grant the IRP Panel the authority to summarily dismiss a request for independent review "where a prior IRP on the same issue has concluded through declaration."<sup>48</sup> In other words, the doctrine of *res judicata* applies to IRP Panel decisions. If the declaration of an IRP Panel can preclude future claims, the declaration necessarily must be final and binding.

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<sup>48</sup> Supplementary Procedures § 6 [Amended Notice of IRP, Ex. C-3].



32. Moreover, and as indicated above, the ICDR Rules apply to all procedural matters not covered by the Supplementary Procedures. Article 27 of the ICDR Rules specifies that an award “shall be final and binding on the parties.” Because the Supplementary Procedures do not state that declarations are not final and binding – and in fact indicate that they are binding because they have *res judicata* effect – Article 27 confirms that the declaration of the Panel is final and binding on DCA and ICANN.

**c. The Language Used in the Bylaws to Describe a Non-Binding Reconsideration Review Mechanism is Different than the Language Used to Describe the IRP**

33. ICANN knows how to design a non-binding advisory process because it did so with the reconsideration process. When the language in the Bylaws for reconsideration is compared to that describing the IRP, it is clear that the declaration of an IRP Panel is intended to be final and binding.

34. For example, the Bylaws provide that the BGC “shall act on a Reconsideration Request on the basis of the written public record” and “shall make a final determination or recommendation.”<sup>49</sup> The Bylaws even expressly state that “**the Board shall not be bound to follow the recommendations**” of the BGC.<sup>50</sup>

35. By contrast, the IRP Panel makes “**declarations**”—defined by ICANN in its Supplementary Procedures as “decisions/opinions”—that “**are final and have precedential value.**”<sup>51</sup> The IRP Panel “shall specifically designate the prevailing party” and may allocate the costs of the IRP Provider to one or both parties.<sup>52</sup> Moreover, nowhere in ICANN’s Bylaws or

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<sup>49</sup> ICANN Bylaws, Art. IV, § 2(14), (16) [Amended Notice of IRP, Ex. C-10].

<sup>50</sup> *Id.*, at Art. IV, § 2(17) (emphasis added).

<sup>51</sup> *Id.*, at Art. IV, § 3(21) (emphasis added).

<sup>52</sup> *Id.*, at Art. IV, § 3(18).

the Supplementary Procedures does ICANN state that the Board shall not be bound by the declaration of the IRP. If that is what ICANN intended, then it certainly could have stated it plainly in the Bylaws, as it did with reconsideration. The fact that it did not do so is telling.

**F. The *ICM* Panel’s Conclusion in *ICM v. ICANN* that its Declaration was “Advisory In Effect” Does Not Control**

36. The panel in *ICM v. ICANN* based its decision that its declaration would not be binding, “but rather advisory in effect,” on specific language in both a *different* set of Bylaws and a *different* set of Supplementary Procedures than those that apply in this dispute.<sup>53</sup> As indicated above, one crucial difference in the Bylaws applicable during *ICM* was the absence of the language describing panel declarations as “final and precedential.”

37. At the time *ICM v. ICANN* was decided, section 3(15) of Article IV of ICANN’s Bylaws provided that “[w]here feasible, the Board shall consider the IRP declaration at the Board’s next meeting.”<sup>54</sup> Despite the *ICM* Panel’s observation that the attributes of the IRP were “suggestive of an *arbitral process* that produces a *binding award*,” the Panel nevertheless found that “[t]his relaxed temporal proviso to do no more than ‘consider’ the IRP declaration, and to do so at the next meeting of the Board ‘where feasible,’ emphasizes that it is not binding.”<sup>55</sup>

38. Following the *ICM* declaration, however, ICANN amended this section of its Bylaws to add a second sentence explaining that the “declarations of the IRP Panel, and the Board’s subsequent action on those declarations, *are final and have precedential value*.”<sup>56</sup> This new

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<sup>53</sup> *ICM Registry LLC, v. ICANN*, ICDR Case No. 50 117 T 00224 08, p. 61 (19 Feb. 2010) [Ex. C-M-17].

<sup>54</sup> ICANN Bylaws, as amended (29 May 2008), Art. IV, Section 3(15) [Ex. C-M-18].

<sup>55</sup> *ICM Registry LLC*, p. 61 [Ex. C-M-17].

<sup>56</sup> ICANN Bylaws, Art. IV, § 3(21) (emphasis added) [Amended Notice of IRP, Ex. C-10].

language undercuts the *ICM* Panel’s analysis. A “decision” or “opinion” that is “final” and has “precedential value” is inherently binding.

39. Interestingly, in finding that the IRP was advisory, the *ICM* Panel also relied on the fact that the Bylaws gave the IRP Panel the authority to “declare,” rather than “decide” or “determine,” whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws.<sup>57</sup> However, the *ICM* Panel did not address the fact that the Supplementary Procedures, which govern the process in combination with the ICDR Rules, defined “declaration” as “decisions/opinions of the IRP.”<sup>58</sup> If a “declaration” is a “decision,” then surely a panel with the authority to “declare” has the authority to “decide.”

40. The *ICM* Panel also found it significant that the Supplementary Procedures adopted for the IRP omitted Article 27 of the ICDR Rules—which specifies that an award “shall be final and binding on the parties.” On that basis, the *ICM* Panel concluded that Article 27 did not apply.<sup>59</sup> ICANN’s Supplementary Procedures, however, were—and continue to be—silent on the effect of an award.<sup>60</sup> In the event there is an inconsistency between the Supplementary Procedures and the ICDR Rules, then the Supplementary Procedures govern; but there is nothing in the applicable rules suggesting that an *omission* of an ICDR Rule means that it does not apply. Indeed, the very same Supplementary Procedures provide that “the ICDR’s International Arbitration Rules . . . will govern the process *in combination with* these Supplementary

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<sup>57</sup> *ICM Registry LLC*, p. 61 [Ex. C-M-17].

<sup>58</sup> Supplementary Procedures §1, copyright (2007) [Ex. C-M-19].

<sup>59</sup> *ICM Registry LLC*, p. 61 [Ex. C-M-17].

<sup>60</sup> See Supplementary Procedures §8, copyright (2007) [Ex. C-M-19]; Supplementary Procedures §10 [Amended Notice of IRP, Ex. C-3].

Procedures.”<sup>61</sup> Furthermore, it is only in the event there is “any inconsistency” between the Supplementary Procedures and the ICDR Rules that the Supplementary Procedures govern.<sup>62</sup>

41. Finally, we note that observers of the *ICM* IRP came away with doubts about the effectiveness of the IRP for various reasons. One was its expense and lengthiness, as mentioned by counsel for ICANN during the 22 April procedural hearing.<sup>63</sup> But of course, one reason the *ICM* proceeding was so expensive was ICANN’s arbitration strategy. (Indeed, ICANN’s insistence on the narrowest possible interpretation of the rules applicable to this proceeding is what led the Panel to request briefing on procedural matters, which undeniably will add to the cost and length of this proceeding as well.) Observers of the *ICM* IRP were troubled by ICANN’s similar strategy in *ICM*:

In addition to the questions raised about limits of the IRP as an accountability mechanism, others questioned how ICANN’s interpretation of the process reflects on ICANN’s commitment to accountability. Some interviewees expressed the belief that ICANN’s interpretation of the IRP – that the process should not entail live testimony, that ICANN should be offered deference under the business judgment rule, and that the IRP’s decision should not be binding on the ICANN Board – was inconsistent with an organization with a mandate to ensure that it is accountable to its stakeholders.<sup>64</sup>

42. ICANN’s unwillingness to submit to genuine accountability procedures continues to trouble the Internet community.<sup>65</sup> Indeed, ICANN has been described as a “troublesome” model

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<sup>61</sup> Supplementary Procedures § 1, copyright (2007) (emphasis added) [Ex. C-M-19].

<sup>62</sup> *Id.*, at § 2.

<sup>63</sup> See Accountability and Transparency at ICANN, An Independent Review, Final Report, The Berkman Center for Internet and Society at Harvard University 123 (20 Oct. 2010) [Ex. C-M-20].

<sup>64</sup> *Id.*, at pp. 123-24

<sup>65</sup> See, e.g., Internet Governance Project, “ICANN’s Accountability Meltdown: A four-part series” (31 Aug. 2013) available at <http://www.internetgovernance.org/2013/08/31/icanns-accountability-meltdown-a-four-part-series/>; “Meltdown IV: How ICANN resists accountability” (18 Sept. 2013) available at <http://www.internetgovernance.org/2013/09/18/meltdown-iv-how-icann-resists-accountability/>.

for Internet governance because “it has monopoly control of a resource space critical to an entire global infrastructure while being completely disconnected from the normal accountability mechanisms that guide and constrain other corporations.”<sup>66</sup>

43. Even if unwittingly, ICANN *has* subjected itself to one accountability mechanism that is genuinely neutral, outside of its control, and capable of providing independent and binding review of ICANN’s actions: the IRP.

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44. In light of the foregoing, DCA submits that the IRP process is an arbitration in all but name. It is a dispute resolution procedure administered by an international arbitration service provider, in which the decision-makers are neutral third parties chosen by the parties to the dispute. There are mechanisms in place to assure the neutrality of the decision-makers and the right of each party to be heard. The IRP Panel is vested with adjudicative authority that is equivalent to that of any other arbitral tribunal: it renders decisions on the dispute based on the evidence and arguments submitted by the parties, and its decisions are binding and have *res judicata* and precedential value. The procedures appropriate and customary in international arbitration are thus equally appropriate in this IRP. But in any event, and as discussed below, the applicable rules authorize the Panel to conduct this IRP in the manner it deems appropriate regardless of whether it determines that the IRP qualifies as an arbitration.

#### **IV. UNDER THE APPLICABLE RULES, THE PANEL HAS THE AUTHORITY TO DECIDE HOW TO CONDUCT THE INDEPENDENT REVIEW PROCESS**

45. The ICDR Rules expressly provide that the Panel “may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and

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<sup>66</sup> Internet Governance Project, “ICANN, Inc.: Accountability and participation in the governance of critical Internet resources” (16 Nov. 2009), available at <http://www.internetgovernance.org/wordpress/wp-content/uploads/ICANNInc.pdf>.

that each party has the right to be heard and is given a fair opportunity to present its case.”<sup>67</sup> It is the Panel—not ICANN—that has the power to decide how to conduct the IRP. The Panel’s discretion is limited only by mandatory law, the ICDR Rules and the Supplementary Procedures.<sup>68</sup> Under the applicable rules, the Panel is expressly authorized to order additional written submissions from the parties; may order document exchange and production; and may examine the parties’ witnesses.

**A. The Supplementary Procedures And ICDR Rules Allow For The Submission of Further Written Pleadings**

46. DCA’s right to be fairly and fully heard in this proceeding includes the right to submit a written memorial on the merits. This right is consistent with the procedures for commencing an IRP and the plain language of the applicable rules.

**1. Only “Notice” is Required To Commence An IRP, Not A Final Written Submission On The Merits**

47. DCA initiated this IRP on 24 October 2013 by filing a one-page form with the heading “Notice of Independent Review” (the “Notice”), as per instructions on ICANN’s website.<sup>69</sup> As indicated in DCA’s Amended Notice of IRP, at the time DCA initiated the IRP, the form available on ICANN’s website consisted of a single page, with space for a signature and date at the bottom.<sup>70</sup> This “first” page of the form does not have a page number on it to indicate that there is a second page. Nevertheless, ICANN later claimed that DCA was required to complete a second page as well, which currently is available on ICANN’s website, and submit a 25-page

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<sup>67</sup> ICDR Rules, Art. 16 [Ex. CM-15].

<sup>68</sup> See Supplementary Procedures [Amended Notice of IRP, Ex. C-3].

<sup>69</sup> See Notice of Independent Review [Amended Notice of IRP, Ex. C-1].

<sup>70</sup> See Amended Notice of IRP, ¶¶ 1 n. 1, 41.

statement of claim.<sup>71</sup> Curiously, this second page is drafted in a different font size than the first page, does not contain a space for a signature, and contains substantial waiver language absent from the single-page document available when DCA filed its Notice in October. DCA submitted this second page with its Amended Notice of IRP in January 2014.<sup>72</sup>

48. The Notice is a simple form that collects basic information about the parties, the nature of the dispute (inviting claimants to “attach additional sheets, if necessary”), the claim or relief being sought and desired place of review.<sup>73</sup> The instructions on what now appears to be page one of the Notice direct claimants “to begin proceedings” by sending two copies of the notice and the filing fee to the ICDR and the original notice to the respondent.<sup>74</sup> Nothing in the applicable rules or pages one or two of the Notice indicate that the form must be accompanied by a claimant’s final (and only) submission on the merits, as ICANN has argued. Indeed, use of the word “notice” on the form suggests that it is a preliminary submission. The form leaves claimants a mere fill-in-the-blank space for describing the nature of the dispute and the claim or relief sought. Such a “notice” to “begin proceedings” can hardly constitute a final submission on the merits.

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<sup>71</sup> See Letter from Jeffrey A. LeVee, Counsel for Respondent, to Carolina Cárdenas-Soto, Senior International Case Manager, ICDR (27 Nov. 2013) [Ex. C-M-21].

<sup>72</sup> See Notice of IRP [Ex. C-2].

<sup>73</sup> See Notice of IRP [Ex. C-1].

<sup>74</sup> *Id.*

## **2. The Additional Requirements Purportedly Imposed By Page Two Of The Notice Form Cannot Displace The Bylaws, Supplementary Procedures, And ICDR Rules**

49. The sudden appearance of a second page to the notice in or around late November 2013 is particularly troubling because the acknowledgments on what ICANN calls the second page of the form contain new language that departs from the Bylaws, the Supplementary Procedures, and the ICDR Rules in a way that appears designed to undermine the effects of the IRP discussed above.

50. For example, the second page of the Notice of Independent Review states, among other things, that the “ICANN Board’s decision on the prior IRP Panel is final and creates precedent for future IRP proceedings.”<sup>75</sup> This language omits the language in the Bylaws concerning the precedential value of the IRP’s declarations, *i.e.*, that “[d]eclarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”<sup>76</sup> Instead, the finality and precedential value is imputed solely to the decisions of the Board, and not the IRP Panel.

51. In addition, the second page of the Notice states that “[i]f the subject matter of the request is on the same issue as a prior IRP proceeding, the Board’s decision on the prior IRP Panel is binding and serves as grounds for summary dismissal of the request for Independent review.”<sup>77</sup> Again, this language appears designed to displace the *res judicata* effect of Panel declarations in order to impute such effect to Board decisions.

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<sup>75</sup> Notice of IRP (emphasis added) [Ex. C-2].

<sup>76</sup> ICANN Bylaws, Art. IV, § 3(21) [Amended Notice of IRP, Ex. C-10].

<sup>77</sup> Notice of IRP [Ex. C-2].



52. Perhaps not coincidentally, language requiring a 25-page submission is also located on the second page of the Notice form.<sup>78</sup> The specific language on page two requiring the claimant to “state specifically the grounds under which the claimant has standing and the right to assert [the] claim,” the requirement that the “decision of the IRP Panel (as reviewed and acted upon by the Board) must be able to stop the harm,” and the provision that “[i]njury or harm caused by third parties as a result of acting in line with the Board’s decision is not a sufficient ground for Independent Review,” is nowhere to be found in the Bylaws or the Supplementary Procedures.<sup>79</sup> These requirements only materialized with the second page of the notice sometime toward the end of November.

53. Regardless of the origin of page two of the notice form, which seems likely to remain indeterminate, DCA submits that it is the Bylaws, the Supplementary Procedures, and the ICDR Rules that govern procedural matters in this IRP. Insofar as the language contained on the disputed second page of the notice form departs from the provisions of those constitutive documents, it is not controlling on this proceeding. Indeed, given the fact that DCA was not aware that a second page of the Notice form—let alone one with new requirements—even existed at the time it accepted ICANN’s standing offer to arbitrate, any additional limitations on its rights purporting to take effect through page two of the notice should be held without effect.

54. Finally, DCA wishes to note that ICANN’ conduct concerning the issue of the second page of the Notice form is typical of its approach to any effort to hold it accountable to Internet stakeholders, including DCA. As the Panel may be aware, ICANN first informed DCA of the existence of the second page of the form in a letter dated 27 November 2013, over a month after

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<sup>78</sup> *See id.*

<sup>79</sup> Compare Notice of IRP [Ex. C-2] with ICANN Bylaws [Amended Notice of IRP, Ex. C-10] and Supplementary Procedures [Amended Notice of IRP, Ex. C-3].

DCA had filed the one-page notice then on ICANN's website.<sup>80</sup> In the letter, ICANN stated that it had not received a request for independent review from DCA as required by the Bylaws and the ICDR Rules, because DCA had only filed the one-page notice form previously on ICANN's website, without the 25-page statement referred to on page two of the form. ICANN requested a copy of these items if they had been filed, but if they had not, it requested that the entire proceeding be dismissed.<sup>81</sup> If ICANN had succeeded in shutting down the IRP on this technical ground (of questionable validity), DCA would have been deprived altogether of its right to seek independent review of ICANN's treatment of its application for .AFRICA since, as ICANN noted in the letter, a request for independent review must be filed within 30 days of the disputed Board action – and ICANN had already required DCA to waive its right to seek relief in court.<sup>82</sup>

55. ICANN subsequently agreed to allow DCA to file an Amended Notice, but repeatedly pressured DCA to do so quickly, objecting to giving DCA additional time to prepare its submission after it had retained counsel on 31 December 2013. ICANN protested the ICDR's decision to grant DCA an additional eight days to file its submission (from 2 January until 10 January). It also objected to DCA's subsequent request for an additional seven days to file the Amended Notice (until 17 January), in part because, it said, there was no need for DCA to be represented by counsel in this proceeding (although of course, ICANN itself had the benefit of such representation).<sup>83</sup>

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<sup>80</sup> See Letter from Jeffrey A. LeVee, Counsel for Respondent, to Carolina Cárdenas-Soto, Senior International Case Manager, ICDR (27 Nov. 2013) [Ex. C-M-21].

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See Email from Jeffrey LeVee to Carolina Cardenas-Soto (8 Jan. 2013) [Ex. C-M-14].

56. ICANN now argues that DCA’s written pleadings in this matter should be limited to the single summary submission that ICANN insisted be submitted under circumstances very unfavorable to DCA. But such a procedure would be inconsistent with the provisions of the Supplementary Procedures and ICDR Rules, particularly Article 16(1) of the ICDR Rules, which requires that the procedural framework of the proceeding provide for equality of arms between the parties.

**B. The Plain Language of the Applicable Rules Contemplate Additional Written Submissions**

57. The plain language of the Supplementary Procedures pertaining to written submissions clearly demonstrates that claimants in IRPs are not limited to a single written submission incorporating all evidence, as argued by ICANN.<sup>84</sup> Section 5 of the Supplementary Procedures states that “initial written submissions of the parties shall not exceed 25 pages.”<sup>85</sup> The word “initial” confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many additional written submissions and what page limits should apply.

58. Section 5 of the Supplementary Procedures also provides that “[a]ll necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.”<sup>86</sup> Use of the word “should”—and not “shall”—confirms that it is desirable, but not required that all necessary evidence be included with the Notice of Independent Review. Plainly, the Supplementary Procedures do not preclude a claimant from adducing additional evidence nor would it make any sense if they did given that claimants may, subject to the Panel’s discretion, submit document requests.

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<sup>84</sup> See Supplementary Procedures § 5 [Amended Notice of IRP, Ex. C-3].

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

59. In addition, section 5 of the Supplementary Procedures provides that the Panel may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.”<sup>87</sup> Thus, the Supplementary Procedures clearly contemplate that additional written submissions may be necessary to give each party a fair opportunity to present its case.

**C. Equal Treatment of the Parties and Fairness Requires that the Parties be Given the Opportunity to Submit Further Briefing on the Merits**

60. At the time DCA filed its Amended Notice of Independent Review, DCA was uncertain about which version of the Supplemental Rules were in effect and applicable to this IRP. One undated version of the Supplementary Procedures, which DCA now understands is no longer in effect, merely provides that the IRP “may request additional written submissions.”<sup>88</sup> The other undated version, however, and the one that ICANN maintains is applicable here, contains the language that “all necessary evidence to demonstrate requestor’s claims . . . *should* be part of the submission.”<sup>89</sup> As we have noted elsewhere, “should” is not mandatory language. In addition, where one party—DCA—lacked the benefit of knowing which set of rules applied to these proceedings, it would be particularly unfair to decide this matter on the merits based on the submissions to date.<sup>90</sup> It would also be inconsistent with Article 16(1) of the ICDR Rules, which requires that the Panel conduct the proceedings such that the parties are “treated with equality” and “given a fair opportunity” to present their case.<sup>91</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> See Supplementary Procedures, § 5 [Amended Notice of IRP, Ex. C-4].

<sup>89</sup> See Supplementary Procedures, § 5 [Amended Notice of IRP, Ex. C-3].

<sup>90</sup> See Amended Notice of Independent Review, para. 1 n. 1.

<sup>91</sup> Supplementary Procedures, Art. 16(1) [Amended Notice of IRP, Ex. C-3].

61. In addition, as explained below, DCA is seeking document production since information potentially dispositive of the outcome of these proceedings is in ICANN's possession, custody or control. Given that these proceedings may be DCA's only opportunity to present and have its claims decided by an independent decision-maker, DCA submits that further briefing on the merits should be allowed following any and all document production in these proceedings.

62. For all of these reasons, it would be premature to decide this matter at this time without further briefing on the merits. In order for the Panel to carry out its duty pursuant to the ICDR Rules to conduct these proceedings such that the parties are "treated with equality" and each party is "given a fair opportunity to present its case," DCA submits that further briefing on the merits is necessary before the Panel can decide this case.

#### **D. The Applicable Rules Provide For An In-Person Or Electronic Hearing**

63. The parties agree that a hearing on the merits is appropriate in this IRP. DCA respectfully requests that the Panel schedule a hearing on the merits after document discovery has concluded and the parties have had the opportunity to file memorials on the merits. Although the Panel clearly has the authority to conduct a hearing in-person, in the interest of saving time and minimizing costs, DCA would agree to a video hearing, as stated during the April 22 hearing on procedural matters.

#### **E. The Applicable Rules Allow Examination Of Witnesses At The Hearing**

64. In April 2013, ICANN amended its Bylaws to limit telephonic or in-person hearings to "argument only."<sup>92</sup> At some point after the *ICM* Panel's 2009 decision in *ICM v. ICANN*, ICANN also revised the Supplementary Procedures to limit hearings to "argument only."<sup>93</sup>

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<sup>92</sup> ICANN Bylaws, Art. IV, § 3(12) [Amended Notice of IRP, C-10].

<sup>93</sup> ICANN Supplementary Procedures, § 4 [Amended Notice of IRP, C-3]

Accordingly, and as ICANN argued at the procedural hearing, ICANN's revised Bylaws and Supplementary Procedures suggest that there is to be no cross-examination of witnesses at the hearing. However, insofar as neither the Supplementary Procedures nor the Bylaws expressly exclude cross-examination, this provision remains ambiguous.

65. Nevertheless, regardless of whether the parties themselves may examine witnesses at the hearing, it is clear that the Panel may do so. Article 16(1) provides that the Panel "may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." It is, moreover, customary in international arbitration for tribunal members to question witnesses themselves – often extensively – in order to test their evidence or clarify facts that are in dispute.

66. In this case, ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided. As long as those documents are withheld from DCA, it is particularly important for that witness testimony to be fully tested by the Panel, if not by the parties. Particularly in light of the important issues at stake in this matter and the general due process concerns raised when parties cannot test the evidence presented against them, DCA strongly urges the Panel to take full advantage of its opportunity to question witnesses. Such questioning will in no way slow down the proceedings, which DCA agrees are to be expedited – but not at the cost of the parties' right to be heard, and the Panel's right to obtain the information it needs to render its decision.

#### **F. Document Production Is Available And Appropriate In This Proceeding**

67. As we have previously explained, by choosing the ICDR Rules, the parties also chose the associated ICDR guidelines including the Guidelines for Arbitrators Concerning Exchanges of

Information.<sup>94</sup> The ICDR Guidelines provide that “[p]arties shall exchange, in advance of the hearing, all documents upon which each intends to rely.”<sup>95</sup> Furthermore, the Panel also may, upon application, “require one party to make available to another party documents in the party’s possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case.”<sup>96</sup> Nothing in the Bylaws or the Supplementary Procedures excludes such document production, leaving the ICDR Rules to cover the field.

68. Given that ICANN relies in its written submission on documents it has not provided, allowing document production in this matter is essential to ensure that the parties are “treated with equality” and are given a “fair opportunity” to present their case.<sup>97</sup> General principles of equality, fairness and due process weigh heavily in favor of allowing document production, particularly where the parties do not have the ability to cross-examine witnesses and test the evidence presented against them. Document production is also important because critical information potentially dispositive of the outcome of these proceedings lies in ICANN’s possession, custody and control. Furthermore, these proceedings are presumptively the first and last opportunity for DCA to have its rights determined by an independent decision-maker. DCA thus urges the Panel to exercise its authority pursuant to the ICDR Rules to “order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate.”<sup>98</sup>

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<sup>94</sup> See Letter from Arif H. Ali, Counsel for Claimants, to Babak Barin, Dr. Catherine Kessedjian and the Hon. Richard C. Neal, the IRP Panel (17 Apr. 2014) [C-M-22]; Letter from Arif H. Ali, Counsel for Claimants, to Babak Barin, Dr. Catherine Kessedjian and the Hon. Richard C. Neal, the IRP Panel (20 Apr. 2014) [C-M-23].

<sup>95</sup> ICDR Guidelines § 2 [Ex. C-M-3].

<sup>96</sup> *Id.*, at § 3(a).

<sup>97</sup> ICDR Rules, Art. 16 [C-M-15].

<sup>98</sup> *Id.*, at Art. 19(3).

V. CONCLUSION

69. Based on the foregoing, DCA respectfully requests that the Panel issue a procedural order declaring that—

- Each party shall have the opportunity to request documents from the other, and to seek an order from the Panel compelling production of documents if necessary;
- Each party shall have the opportunity to submit one additional written pleading on the merits of this dispute;
- There will be a hearing on the merits conducted by videoconference; and
- The Panel retains the discretion to examine witnesses at the hearing.

Respectfully submitted,



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**Counsel for Claimant**

5 May 2014



# Exhibit M

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

**ICDR Case No. 50 2013 00 1083**

DotConnectAfrica Trust,

Claimant,

v.

Internet Corporation for Assigned Names and Numbers,

Respondent.

**DCA'S RESPONSE TO THE PANEL'S QUESTIONS ON PROCEDURAL  
ISSUES**

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20 May 2014

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## I. INTRODUCTION

1. DCA hereby provides its responses to the questions posed by the IRP Panel on 12 May 2014.<sup>1</sup>

## II. THE IRP PANEL HAS THE DISCRETION TO DETERMINE THAT THE IRP IS FINAL AND BINDING PURSUANT TO THE DOCUMENTS GOVERNING THE PROCESS AND CALIFORNIA LAW (Questions 1-9, 12-16)

2. The documents ICANN itself drafted provide the foundation for responding to the Panel's questions.<sup>2</sup> ICANN selected the ICDR to administer the IRP under *both* the Supplementary Procedures and the ICDR Rules.<sup>3</sup> Within this framework, the Panel "may conduct the arbitration in *whatever manner it considers appropriate*, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."<sup>4</sup>

### A. The IRP Is Final and Binding Pursuant to the Documents Governing the IRP Process (Question 16)

3. The IRP Panel's declaration is final and binding according to these governing documents.<sup>5</sup> ICANN gave the IRP Panel the power to "*declare* whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws"<sup>6</sup> and provided that the "*declarations*" of the IRP Panel are "*final and have precedential value*."<sup>7</sup> ICANN is correct that "Section 3 never refers to the IRP panel's declaration as a 'decision' or 'determination,'"<sup>8</sup> but the Supplementary Procedures—*the procedures that ICANN designed to govern the IRP*—define "**declaration**" as "**decisions/opinions of**

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<sup>1</sup> See Questions for the Parties' Representatives to Address in Their Rebuttal Memorials of 20 May 2014 (12 May 2014).

<sup>2</sup> ICANN created the IRP to provide for "independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." ICANN Bylaws, § 3(1) [Amended Notice of IRP, Ex. C-10]. The documents which control the proceeding are the ICANN Bylaws, the ICANN Supplementary Procedures for IRP and the ICDR Rules.

<sup>3</sup> See ICANN Supplementary Procedures for IRP [Amended Notice of IRP, Exhibit C-3]. The Supplementary Procedures provide that, in the event of a conflict between the Supplementary Procedures and the ICDR Rules, the Supplementary Procedures govern. Where there is no conflict or where the Supplementary Procedures are silent, the ICDR Rules govern. See *id.*, at § 2.

<sup>4</sup> ICDR Rules, Art. 16 (emphasis added) [Ex. C-M-15]; see also DCA's Submission on Procedural Issues, para. 45 (5 May 2014).

<sup>5</sup> See DCA's Submission on Procedural Issues, paras. 23-35.

<sup>6</sup> ICANN Bylaws, Art. IV, § 3(11)(c) [Amended Notice of IRP, Ex. C-10].

<sup>7</sup> *Id.*, at Art. IV, § 3(21).

<sup>8</sup> ICANN's Memorandum Regarding Procedural Issues, para. 33.

the IRP PANEL.”<sup>9</sup> By contrast, ICANN used different terminology to describe the reconsideration process in order to leave no doubt that that process is non-binding, specifying that the Board need not follow Board Governance Committee recommendations.<sup>10</sup>

**B. ICANN Submitted Itself to the Jurisdiction of the IRP Panel Because Its Bylaws Contain a Standing Offer to Arbitrate Claims (Question 5)**

4. ICANN’s Bylaws contain its standing offer to arbitrate disputes concerning Board actions, much as some sovereign States provide a standing offer to arbitrate investment disputes in bilateral or multilateral treaties.<sup>11</sup> On 24 October 2013, DCA accepted ICANN’s standing offer to arbitrate by submitting its Notice of Independent Review (the “Notice”) to the ICDR.<sup>12</sup> Thus, this process is consensual.

**C. As The Sole Process Through Which DCA Can Pursue Its Claims Against ICANN, The IRP Must Be Capable Of Providing A Final and Binding Decision In This Matter (Questions 1-6, 12-15)**

5. The New gTLD Applicant Guidebook (the “Guidebook”) shepherds applicants through the new gTLD application and evaluation process.<sup>13</sup> Module 6 of the Guidebook contains eight pages of terms and conditions that an applicant “agrees to . . . without modification” by submitting an application for a gTLD, including significant waivers of rights:<sup>14</sup>

**APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FOR A [SIC] ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . . PROVIDED, THAT APPLICANT MAY**

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<sup>9</sup> ICANN Supplementary Procedures for IRP, § 1 [Amended Notice of IRP, Exhibit C-3]. A decision or opinion connotes finality. *See* BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “opinion” as “[a] court’s written statement explaining its decision in a given case,” and “decision” as “[a] judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case”) [Ex. C-M-24].

<sup>10</sup> *See* ICANN Bylaws, Art. IV, § 2 [Amended Notice of IRP, Ex. C-10]; *see also* DCA’s Submission on Procedural Issues, paras. 33-35 (5 May 2014).

<sup>11</sup> *See* ICANN Bylaws, Art. IV, § 3(1), 3(7) [Amended Notice of IRP, Ex. C-10].

<sup>12</sup> DCA Notice of Independent Review (24 Oct. 2013) [Amended Notice of IRP, Ex. C-51].

<sup>13</sup> *See* ICANN Guidebook (Version 2012-06-04) [Amended Notice of IRP, Ex. C-11].

<sup>14</sup> *Id.*, Module 6.

**UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.<sup>15</sup>**

Applicants also forgo the right to recover “any application fees, monies invested in business infrastructure or other startup costs and any and all profits that applicant may expect to realize from the operation of a registry for the TLD.”<sup>16</sup> In exchange for waiving these significant legal rights, Section 6 of Module 6 grants applicants the right to challenge a final decision of ICANN through the accountability mechanisms set forth in ICANN’s Bylaws, including the IRP.<sup>17</sup>

6. As a result, the IRP is the *sole forum* in which an applicant for a new gTLD can seek independent, third-party review of Board actions. Remarkably, ICANN makes no reciprocal waivers and instead retains all of its rights against applicants in law and equity. ICANN cannot be correct that the IRP is a mere “corporate accountability mechanism.”<sup>18</sup> Such a result would make ICANN—the caretaker of an immensely important (and valuable) global resource—effectively judgment-proof.

7. It is fundamentally inconsistent with California law, U.S. federal law, and principles of international law for ICANN to require applicants to waive all rights to challenge ICANN in court or any other forum and not provide a substitute accountability mechanism capable of producing a binding remedy.<sup>19</sup> Such one-sided terms imposed on parties signing litigation waivers have been flatly rejected by California courts.<sup>20</sup> Where California courts have considered and upheld broad litigation waivers, the

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<sup>15</sup> *Id.*, Module 6(6) (emphasis added).

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> ICANN’s Memorandum Regarding Procedural Issues, para. 19 (5 May 2014). We are not aware of nor has ICANN cited any genuine support for its argument that ICANN would be in violation of California law if the Panel’s decision on whether ICANN acted consistently with its Articles of Incorporation and Bylaws is final and binding on both parties.

<sup>19</sup> California law and United States federal law constitute the law of the seat and form the relevant legal background for matters of procedure in this IRP. The merits of the dispute are governed by ICANN’s Bylaws and Articles of Incorporation, the gTLD Applicant Guidebook, and international and local law, as provided in Article 4 of ICANN’s Articles of Incorporation. *See* DCA’s Submission on Procedural Issues, paras. 2-3 (5 May 2014). In response to the Panel’s **Question 12**, we are not aware of any other case (aside from *ICM v. ICANN*) in which a decision-maker has upheld an arbitration-like proceeding that was non-binding yet foreclosed the claimant from seeking any other remedies.

<sup>20</sup> *See, e.g., Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 987 (Cal. 2003) [Ex. C-M-25]; *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923 (Cal. Ct. App. 1996) [Ex. C-M-26]; *Beynon v. Garden Grove Medical Group*, 161 Cal. Rptr. 146 (Cal. Ct. App. 1980) [Ex. C-M-27].

alternative to court litigation provided by the parties' contract is inevitably a *binding* dispute resolution mechanism.<sup>21</sup> Thus, in order for this IRP not to be unconscionable, it must be binding.

**1. The Principle of *Contra Proferentem* Should Apply to the Terms Governing the IRP Because Section 6 of Module 6 of the Guidebook is an Unenforceable Adhesion Contract (Question 6)**

8. Module 6 of the Guidebook is an adhesion contract under California law.<sup>22</sup> ICANN, the party that holds all of the power to decide who is awarded gTLDs, drafted Module 6 of the Guidebook to apply to all applicants on a “take it or leave it” basis. When an applicant submits its application, the applicant agrees to be bound by the terms and conditions “*without modification.*”<sup>23</sup> Furthermore, DCA had *no other option* to obtain the rights to .AFRICA but to apply to ICANN and be bound by ICANN's terms, including those governing its right to relief in the IRP—the *only* process through which DCA can pursue its claims against ICANN.

9. California law supports applying the principle of *contra proferentem* to adhesion contracts, particularly in situations such as this where there is a significant imbalance of power between the parties.<sup>24</sup> Accordingly, all ambiguities in the documents governing the IRP should be construed against ICANN.

**2. The Panel May Limit the Application of Certain Terms Governing the IRP Because the Agreement to Use the IRP is Procedurally and Substantively Unconscionable (Questions 1-6, 12-15)**

10. If the Panel were to find that the IRP were a non-binding procedure that wholly replaces any right of applicants to seek redress against ICANN in any other forum, this proceeding would be unconscionable under California law. A contractual clause or agreement is unenforceable under

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<sup>21</sup> See, e.g., *Little v. Auto Stiegler, Inc.*, 63 P.3d 979 [Ex. C-M-25]; *Saika v. Gold*, 56 Cal. Rptr. 2d 922 [Ex. C-M-26]; *Beynon v. Garden Grove Medical Group*, 161 Cal. Rptr. 146 [Ex. C-M-27] (each upholding the arbitration clause, absent the portion providing for appeal).

<sup>22</sup> An ‘adhesion contract’ is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1159 (N.D. Cal. 2012) [Ex. C-M-28]; *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000) [Ex. C-M-29]; see, e.g., *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 925 (Cal. Ct. App. 1996) [C-M-26].

<sup>23</sup> ICANN Guidebook (Version 2012-06-04), Module 6 [Amended Notice of IRP, Ex. C-11].

<sup>24</sup> See *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1173 (N.D. Cal. 2002) [Ex. C-M-30]; *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6 (Cal. Ct. App. 1989) [Ex. C-M-31].

California law if it is both procedurally and substantively unconscionable.<sup>25</sup> “California courts apply a ‘sliding scale’ analysis in making this determination . . . the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”<sup>26</sup>

11. Procedural unconscionability arises from the manner of negotiation.<sup>27</sup> While there is no consensus among California courts that an adhesion contract is *ipso facto* procedurally unconscionable, at a minimum, adhesion contracts notify courts that a contract may be procedurally unconscionable.<sup>28</sup> Courts have found that “negotiations” where one party has no real negotiating power—like DCA when it submitted its application for a new gTLD—are oppressive for purposes of procedural unconscionability under California law.<sup>29</sup>

12. California courts recognize a heightened degree of procedural unconscionability where there is a lack of disclosure of terms to the weaker party or when the weaker party is bound to terms that are subject to change at the discretion of the stronger party.<sup>30</sup> As we have argued elsewhere, the language ICANN used in the documents governing the IRP suggests that the IRP Panel’s decision is final and binding on ICANN.<sup>31</sup> Yet ICANN now denies that the impression it has given applicants is correct. In addition, ICANN reserved all rights to modify its Bylaws at any time during the gTLD application process.<sup>32</sup> While ICANN has not modified the IRP process in the Bylaws since DCA filed its

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<sup>25</sup> See *Pokorny v. Quixtar*, 601 F.3d 987, 996 (9th Cir. 2010) (citing *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1072 (9th Cir. 2007) [Ex. C-M-32]).

<sup>26</sup> *Id.* (quoting *Davis v. O’Melveny & Myers*, 485 F.3d at 1072).

<sup>27</sup> See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 179 L. Ed. 2d 742 (2011) [Ex. C-M-33]; *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013) [Ex. C-M-34].

<sup>28</sup> See *Roman v. Superior Court*, 92 Cal. Rptr. 3d 153, 161 (Cal. Ct. App. 2009) [Ex. C-M-35]; see generally *Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1160 (N.D. Cal. 2012) [Ex. C-M-28]; *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th at 113 [Ex. C-M-29].

<sup>29</sup> See, e.g., *Pokorny v. Quixtar, Inc.*, 601 F.3d at 996 (describing the “oppression” element of procedural unconscionability) [Ex. C-M-32].

<sup>30</sup> See *Chavarria v. Ralphs Grocery Co.*, 733 F.3d at 923 [Ex. C-M-34].

<sup>31</sup> See DCA’s Submission on Procedural Issues, paras. 23-35 (5 May 2014).

<sup>32</sup> ICANN Bylaws, Art. XIX [Amended Notice of IRP, Ex. C-10].



application, ICANN did modify the IRP proceeding in December 2012, *after* the application period for new gTLDs had opened and closed.<sup>33</sup>

13. The terms of the Guidebook are “oppressive” because applicants like DCA have no opportunity to negotiate the terms and conditions. ICANN is uniquely positioned to distribute TLDs, and applicants wishing to operate one have literally no other market to turn to in order to operate a TLD on the public Internet.<sup>34</sup> Because all individuals wishing to operate a new gTLD were required to sign an application in 2012 waiving all their legal rights against ICANN, Module 6 is clearly oppressive under California law. Similarly, because ICANN reserves the sole right to modify the terms of that waiver by modifying its IRP procedures under the Bylaws and Supplementary Procedures, applicants signing Module 6 are subject to an element of surprise. Finally, in this case, DCA was subject to surprise because ICANN has argued an interpretation of its IRP rules that contradicts the reasonable reading that IRP procedures will be “final and binding.” Thus, Section 6 of Module 6 and the IRP procedures are procedurally unconscionable.

14. The terms of Section 6 of Module 6 and the IRP as interpreted by ICANN are also substantively unconscionable because the nature of the terms is so unjustifiably one-sided that it “shocks the conscience.”<sup>35</sup> Courts determine substantive unconscionability on a case-by-case basis; however, terms which have been found substantively unconscionable include (i) a one-sided obligation that the weaker party utilize alternative dispute resolution, while the stronger party retains all legal rights;<sup>36</sup> (ii) a clause

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<sup>33</sup> The application period for new gTLDs opened on 12 January 2012, and all applications were required to be submitted by the closing date of 20 April 2012. See “New gTLD Program,” ICANNwiki.com, [http://icannwiki.com/index.php/New\\_gTLD\\_Program](http://icannwiki.com/index.php/New_gTLD_Program). Meanwhile, ICANN modified its Bylaws on 16 March 2012, 20 December 2012, 11 April 2013 and 7 February 2014. The 20 December 2012 modification resulted in significant changes to the IRP process.

<sup>34</sup> Notably, however, the lack of negotiation of Module 6 of the Guidebook could be considered equally oppressive for the purposes of procedural unconscionability under California law, even if there were an alternate provider for TLDs. See *Pokorny v. Quixtar, Inc.*, 601 F.3d at 997 [Ex. C-M-32].

<sup>35</sup> *Chavarria v. Ralphs Grocery Co.*, 733 F.3d at 923 [Ex. C-M-34].

<sup>36</sup> See *Pokorny v. Quixtar, Inc.*, 601 F.3d at 1001 [Ex. C-M-32]; *Nyulassy v. Lockheed Martin Corp.*, 16 Cal.Rptr.3d at 307 [Ex. C-M-36]; *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 63 P.3d 979 (2003) [Ex. C-M-25]; *Saika v. Gold*, 49 Cal. App. 4th 1074, 56 Cal. Rptr. 2d 922 (1996) [C-M-26]; *Beynon v. Garden Grove Medical Group*, 100 Cal.App.3d 698, 161 Cal. Rptr. 146 (1980) [Ex. C-M-27].

which allows the stronger party to unilaterally modify the terms of the arbitration agreement;<sup>37</sup> (iii) an obligation that the weaker party initially utilize a non-binding mechanism that provides the stronger party a “free peek” at the weaker party’s evidence;<sup>38</sup> (iv) stringent time limits imposed only on the weaker party;<sup>39</sup> and (v) an effect that is binding only on the weaker party.<sup>40</sup> ICANN’s interpretation of the rules governing this proceeding implicates *every single one of these factors*. To highlight a few—

- Applicants surrender all rights to bring suit against ICANN and must utilize the IRP process, whereas ICANN retains all legal rights against applicants;<sup>41</sup>
- ICANN reserves the power to unilaterally alter the IRP process;<sup>42</sup>
- ICANN effectively forces applicants to give ICANN a “peek” at their cases, by imposing fee sanctions on applicants who do not utilize the cooperative engagement process prior to filing an IRP;<sup>43</sup>
- Strict time limits apply to applicants: applicants must file their case within 30 days of the Board decision they wish to challenge, and according to ICANN, applicants must present their entire case in the IRP in their initial request for an IRP Panel;<sup>44</sup> and
- The IRP process is binding on applicants, but ICANN argues it is not binding on ICANN.<sup>45</sup>

15. California courts have ruled non-binding arbitration agreements similar to what ICANN claims the IRP is unconscionable.<sup>46</sup> Under California law, where a court or a tribunal determines that a contract term is unconscionable, the deciding body may (i) refuse to enforce the contract as a whole, (ii) enforce the remainder of the contract without the unconscionable clause or (iii) limit any unconscionable clause

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<sup>37</sup> See *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 998 (9th Cir. 2010) [Ex. C-M-32].

<sup>38</sup> *Id.*, at 998; *Nyulassy v. Lockheed Martin Corp.*, 16 Cal.Rptr.3d at 307 [Ex. C-M-36].

<sup>39</sup> See *Pokorny v. Quixtar, Inc.*, 601 F.3d at 999 [Ex. C-M-32]; *Nyulassy v. Lockheed Martin Corp.*, 16 Cal.Rptr.3d at 307 [Ex. C-M-36].

<sup>40</sup> See *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 63 P.3d 979 (2003) [Ex. C-M-25]; *Saika v. Gold*, 49 Cal. App. 4th 1074, 56 Cal. Rptr. 2d 922 (1996) [Ex. C-M-26]; *Beynon v. Garden Grove Medical Group*, 100 Cal.App.3d 698, 161 Cal. Rptr. 146 (1980) [Ex. C-M-27].

<sup>41</sup> ICANN Guidebook (Version 2012-06-04), Module 6 [Amended Notice of IRP, Ex. C-11].

<sup>42</sup> ICANN Bylaws, Art. XIX [Amended Notice of IRP, Ex. C-10].

<sup>43</sup> *Id.*, Art. IV § 3(16).

<sup>44</sup> *Id.*, Art. IV § 3(3).

<sup>45</sup> *Id.*, Art. IV § 3(11) (“The IRP Panel shall have the authority to...summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious”).

<sup>46</sup> See, e.g., *Pokorny v. Quixtar, Inc.*, 601 F.3d 987 [Ex. C-M-32].

to avoid an unconscionable result.<sup>47</sup> The IRP can function as an effective accountability mechanism if this Panel limits the application of the unconscionable terms to avoid an unconscionable result.<sup>48</sup>

### **III. INTERNATIONAL PRINCIPLES OF DUE PROCESS APPLY TO THE IRP BECAUSE IT WAS DEvised AS A MECHANISM TO HOLD ICANN ACCOUNTABLE IN A GLOBAL CONTEXT (Questions 10-11, 17-19)**

16. Pursuant to general principles of international law, DCA has a right to view and rebut the evidence presented by ICANN against it.<sup>49</sup> These same principles give tribunals great latitude to structure a procedure in order to establish the truth of a case.<sup>50</sup> Pursuant to ICANN's Articles of Incorporation, the ICANN IRP proceeding must accord with these general principles.<sup>51</sup>

#### **A. The Procedures ICANN Argues Should Apply in the IRP Are More Restrictive of DCA's Procedural Due Process Rights than Other Major Sets of International Arbitration Rules (Questions 17-18)**

17. More specifically, the Bylaws indicate that ICANN must respect fundamental principles of fairness.<sup>52</sup> According to ICANN's interpretation, it has crafted the IRP so as to deprive claimants of common procedural rights. For example, no other major set of international arbitration rules requires a claimant to submit all evidence supporting its claim with the initial filing.<sup>53</sup> None of the other major sets of international arbitration rules preclude live testimony or cross-examination of witnesses.<sup>54</sup>

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<sup>47</sup> See Cal. Civil Code Sec. 1670.5. Section 1670.5 of the California Civil Code gives tribunals the authority to examine whether an arbitration or other alternative dispute resolution clause is unconscionable pursuant to California law, just as it provides the authority to examine the unconscionability of any other contract clause [Ex. C-M-37]. See also, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d at 919 (holding that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), does not prevent California courts from applying section 1670.5 of the California Code to determine the unconscionability of arbitration agreements) [Ex. C-M-34].

<sup>48</sup> DCA's position is consistent with the general preference of courts to read the contract so as to exclude the unconscionable portion, unless doing so would achieve an unconscionable result or unless doing so is impossible given the prevalence of substantive and procedural unconscionability throughout the entire contract. See, e.g., *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 987 (Cal. 2003) [Ex. C-M-25]; *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923 (Cal. Ct. App. 1996) [Ex. C-M-26]. California courts will invalidate the entire arbitration agreement if two conditions are satisfied: (i) there are multiple unlawful provisions and (ii) the unconscionability is so rampant that there is no way for the court to remove the unconscionable "taint" from the agreement. *Armenariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 124 (Cal. 2000) [Ex. C-M-29].

<sup>49</sup> According to the principle of *audi alteram partem*, "whenever there is such new evidence, alteration of the legal basis of the claim or amendment of the original submission, the other party is always assured of an opportunity to reply thereto, or comment thereon." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 295 (2006) [Ex. C-M-38].

<sup>50</sup> See *id.*

<sup>51</sup> See ICANN Articles of Incorporation, Art. 4 [Amended Notice of IRP, Ex. C-9].

<sup>52</sup> See ICANN Bylaws, Art. I § 2 [Amended Notice of IRP, Ex. C-10].

<sup>53</sup> See ICDR Rules, Art. 2(2), (3)(e) [Ex. C-M-15]; International Chamber of Commerce Arbitration Rules [hereinafter, ICC Rules], Art. 4(3)(c) [Ex. C-M-39]; the United Nations Commission on International Trade Law Arbitration Rules [hereinafter, the UNCITRAL

18. ICANN, however, is asking this Panel, to conduct a one-sided process that—if we accept ICANN’s interpretation of the terms of the IRP—severely limits DCA’s opportunity to gather evidence, test the evidence presented against it and present its case.<sup>55</sup>

**B. Document Production is Necessary and Appropriate, In Light of the Restrictions on Procedural Due Process Argued for by ICANN (Question 19)**

19. The IRP Panel has the authority to order the production of documents in these proceedings, and DCA respectfully requests that it do so.<sup>56</sup> ICANN seeks a decision on the merits with the deck stacked against DCA, even relying on documents it has not provided. While DCA agrees that these proceedings should be expedited, they should not be a one-sided process.

**C. Harvard’s Berkman Center Report on ICANN’s Accountability Structure (Question 10)**

20. The Berkman Center has made available some of the materials it used in preparing its report on its website.<sup>57</sup> The Panel may wish to consult, *inter alia*, Professor Jack Goldsmith’s reflections on the IRP process based on his knowledge of the *ICM* case,<sup>58</sup> and the history of the new gTLD process.<sup>59</sup>

**IV. CONCLUSION**

21. Based on the foregoing, DCA respectfully requests that the Panel issue a procedural order declaring that—

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Rules], Art. 3(3)(e)(f) [Ex. C-M-40]; JAMS Comprehensive Arbitration Rules & Procedures, Rule 9(a)-(b) (1 Oct. 2010) [Ex. C-M-41]. Although the UNCITRAL Rules permit a claimant to submit its written submission and all supporting evidence with its notice, the rules do not require it. UNCITRAL Rules, Art. 20(1), (4) [Ex. C-M-40].

<sup>54</sup> See ICC Rules, Art. 25(3), (5) [Ex. C-M-39]; UNCITRAL Rules, Arts. 17(3), 28(2) [Ex. C-M-40]; JAMS Comprehensive Arbitration Rules & Procedures, Rules 21-22 (1 Oct. 2010) [Ex. C-M-41].

<sup>55</sup> We note here in response to the Panel’s **Question 11** that, even in advisory proceedings such as those before the International Court of Justice, interested parties are provided an opportunity to make submissions. Similarly, arbitral tribunals increasingly permit submissions by third parties who may have an interest in the outcome of a dispute, and UNCITRAL has recently promulgated rules on transparency in investor-State arbitration encouraging this practice, among others. See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective as of 1 April 2014), available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> (accessed 19 May 2014).

<sup>56</sup> See DCA’s Submission on Procedural Issues, paras. 67-68 (5 May 2014).

<sup>57</sup> See <http://cyber.law.harvard.edu/pubrelease/icann/> (accessed 19 May 2014).

<sup>58</sup> <http://cyber.law.harvard.edu/pubrelease/icann/pdfs/Jack%20Goldsmith%20on%20ICANN-final.pdf> (noting, among other things, that the IRP process is flawed, but permits fully developed hearings with cross-examination of witnesses, particularly where the facts are complex and the stakes high) (accessed 19 May 2014).

<sup>59</sup> [http://cyber.law.harvard.edu/pubrelease/icann/pdfs/AppendixC\\_gTLDs.pdf](http://cyber.law.harvard.edu/pubrelease/icann/pdfs/AppendixC_gTLDs.pdf) (accessed 19 May 2014).

- The Panel has the authority to strike out any unconscionable element of the IRP framework imposed by ICANN;
- Each party shall have the opportunity to request documents from the other, and to seek an order from the Panel compelling production of documents if necessary;
- Each party shall have the opportunity to submit one additional written pleading on the merits of this dispute;
- There will be a hearing on the merits conducted by videoconference; and
- The Panel retains the discretion to examine witnesses at the hearing.

Respectfully submitted,



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Arif H. Ali  
Marguerite C. Walter  
Erica Franzetti  
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# Exhibit N

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BY E-MAIL

May 29, 2014

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Hon. Richard C. Neal (Ret.)  
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**Re: ICDR Case 50 2013 00 1083 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation  
for Assigned Names and Numbers (ICANN) – Excerpts from ICM Memorial on the Merits**

Dear Mr. President and Members of the Panel:

Pursuant to the Panel's Procedural Order No. 2, we attach excerpts from the Claimant's submission in the *ICM Registry LLC v. ICANN*<sup>1</sup> Internal Review Process ("IRP").<sup>2</sup> DCA nonetheless maintains that the parties' submissions on procedural matters in *ICM v. ICANN* are not relevant to this proceeding

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<sup>1</sup> ICM Registry LLC, v. ICANN, ICDR Case No. 50 117 T 00224 08.

<sup>2</sup> Ex. C-M 48.

because ICANN's Bylaws and the Supplementary Procedures have been amended since the *ICM* case was decided.<sup>3</sup>

Indeed, ICANN has amended its Bylaws and Supplementary Procedures several times since the *ICM* declaration, including on April 11, 2013, when the requirement for a standing IRP panel was added. Significantly, the version of the Bylaws that applies in this dispute includes new language describing IRP panel declarations as "final" and having "precedential value"<sup>4</sup> and granting new, judicial-like powers to IRP panels such that IRP panel declarations have a *res judicata* effect.<sup>5</sup> Given the crucial differences between the language in effect in the *ICM* IRP and now, the procedural arguments of the parties in that matter are not relevant to the Panel's decision on the procedural matters at issue in this dispute.

Furthermore, the waivers and releases that ICM agreed to in its 2004 sponsored top-level domain name ("sTLD") application did not deprive ICM of access to local courts, unlike the waivers and releases DCA was required to accept when it submitted its application for a new generic top-level domain name application ("gTLD") in 2012. The 2004 waivers released ICANN only from liability for misinterpretations of the information submitted by ICM in the application or by third parties in relation to ICM's application.<sup>6</sup> In contrast, as a condition of applying for a gTLD, DCA unilaterally surrendered ***all of its rights to challenge ICANN in court or any other forum outside of the accountability mechanisms in ICANN's Bylaws.***<sup>7</sup> As a result, the IRP is the *sole forum* in which DCA can seek

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<sup>3</sup> See DCA's Submission on Procedural Issues, paras. 36-43 (5 May 2014).

<sup>4</sup> See ICANN Bylaws, Art. IV, § 3(21) [Amended Notice of IRP, Ex. C-10]; see also DCA's Submission on Procedural Issues, paras. 36-38 (5 May 2014).

<sup>5</sup> See DCA's Submission on Procedural Issues, para. 31 (5 May 2014).

<sup>6</sup> The version of the waivers and releases in the New sTLD Application in 2004 stated that, "By checking this box the applicant (or, if there are multiple applicants, each applicant) understands that difficulties encountered by ICANN in verifying, elaborating on, supplementing, analyzing, assessing, investigating, or otherwise evaluating any aspect within or related to this application may reflect negatively on the application. In consideration of the review of the application conducted on behalf of ICANN, the applicant (or, if there are multiple applicants, each applicant) hereby waives liability on the part of ICANN (including its officers, directors, employees, consultants, attorneys evaluators, attorneys, accountants, and agents, hereinafter jointly referred to as 'ICANN Affiliated Parties') for its (or their) actions or inaction in verifying the information provided in this application or in conducting any other aspect of its (or their) evaluation of this application. The applicant (or, if there are multiple applicants, each applicant) further waives liability and formally agrees to fully indemnify ICANN and the ICANN Affiliated Parties on the part of any third parties who provide information to ICANN or ICANN Affiliated Parties in connection with the application." ICANN, New sTLD Application (15 Dec. 2003), *available at* <http://archive.icann.org/en/tlds/new-stld-rfp/new-stld-application-partb-15dec03.htm>.

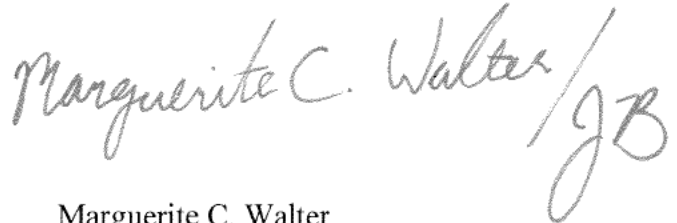
<sup>7</sup> See DCA's Response on Procedural Issues, paras. 5-6 (20 May 2014). ICANN, on the other hand, waived none of these rights, creating an unconscionable inequality between the parties. See *id.* paras. 7, 14.



independent, third-party review of the actions of ICANN's Board of Directors.<sup>8</sup> If the Panel were to determine that this IRP was non-binding, DCA would effectively be deprived of any remedy.

Finally, according to the terms of ICANN's Bylaws in effect between 2008 and 2010 and according to the *ICM* IRP Declaration itself, the *ICM* decision was *non-binding*.<sup>9</sup> Accordingly, while the Panel certainly may refer to the *ICM* Declaration as a persuasive source, ICANN cannot now argue that a proceeding that was non-binding has precedential effect on this Panel.

Sincerely,

A handwritten signature in cursive script that reads "Marguerite C. Walter" followed by the initials "JB" written in a larger, stylized font.

Marguerite C. Walter

cc: Jeffrey LeVee

Enclosures

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<sup>8</sup> *See id.*

<sup>9</sup> *ICM Registry LLC, v. ICANN, ICDR Case No. 50 117 T 00224 08, p. 61 (19 Feb. 2010) [Ex. C-M-17].*

# Exhibit O

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July 1, 2015

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## Re: DCA v. ICANN, ICDR Case No. 50-20-1300-1083

Dear Mr. Chairman and Members of the Panel:

DotConnectAfrica Trust ("DCA") makes this submission on costs, pursuant to the Panel's Procedural Order No. 10.

### **DCA Prevails in the IRP Proceeding**

DCA submits that should it prevail in this Independent Review Process ("IRP"), the Internet Corporation for Assigned Names and Numbers ("ICANN") should be responsible for all of the costs of this IRP, including the interim measures proceeding.<sup>1</sup> This is consistent with ICANN's Bylaws and

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<sup>1</sup> On March 23, 2014, DCA learned via email from a supporter of ZA Central Registry ("ZACR"), DCA's competitor for .AFRICA, that ZACR would sign a registry agreement with ICANN in three days' time (March 26) to be the registry operator for .AFRICA. The very same day, we sent a letter on behalf of DCA to ICANN's counsel asking ICANN to refrain from executing the registry agreement with ZACR in light of the pending IRP proceedings. See DCA's Request for Emergency Arbitrator and Interim Measures of Protection, Annex I (28 Mar. 2014). Instead, ICANN entered into the registry agreement with ZACR the very next day—two days ahead of schedule. See *id.*, Annex K. Later that same day, ICANN responded to DCA's request by treating the execution of the contract as a *fait accompli* and, for the first time, informed DCA that it would accept the application of Rule 37 of the 2010 International Centre for Dispute Resolution International Arbitration Rules ("ICDR Rules"), which provides for emergency measures of protection, even though ICANN's Supplementary Procedures for ICANN Independent Review Process expressly provide that Rule 37 does not apply to IRPs. A few days later, on March 28, 2014, DCA filed a Request for Emergency Arbitrator and Interim Measures of Protection with the ICDR. ICANN responded to DCA's request on April 4, 2014. An emergency arbitrator was appointed by the ICDR; however, the following week, the original panel was fully constituted and the parties' respective submissions were submitted to the Panel for its review on April 13, 2014. After a teleconference with the parties on April 22 and a telephonic hearing on May 5, the Panel ruled that "ICANN must immediately refrain from any further processing of any application for .AFRICA" during the pendency of the IRP. Decision on Interim Measures of Protection, ¶ 51 (12 May 2014).

Supplementary Procedures, which together provide that in ordinary circumstances, the party not prevailing shall be responsible for all costs of the proceeding.<sup>2</sup> Although ICANN's Supplementary Procedures do not explain what is meant by "all costs of the proceeding," the ICDR Rules that apply to this IRP<sup>3</sup> provide that "costs" include the following:

- (a) the fees and expenses of the arbitrators;
- (b) the costs of assistance required by the tribunal, including its experts;
- (c) the fees and expenses of the administrator;
- (d) the reasonable costs for legal representation of a successful party; and
- (e) any such costs incurred in connection with an application for interim or emergency relief pursuant to Article 21.<sup>4</sup>

Specifically, these costs include all of the fees and expenses paid and owed to the International Centre for Dispute Resolution ("ICDR"), including the filing fees DCA paid to the ICDR (totaling \$4,750), all panelist fees and expenses, including for the emergency arbitrator, incurred between the inception of this IRP and its final resolution, legal costs incurred in the course of the IRP, and all expenses related to conducting the merits hearing (*e.g.*, renting the audiovisual equipment for the hearing, printing hearing materials, shipping hard copies of the exhibits to the members of the Panel).

Although in "extraordinary" circumstances, the Panel may allocate up to half of the costs to the prevailing party, DCA submits that the circumstances of this IRP do not warrant allocating costs to DCA should it prevail.<sup>5</sup> The reasonableness of DCA's positions, as well as the meaningful contribution this IRP has made to the public dialogue about both ICANN's accountability mechanisms and the

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<sup>2</sup> See ICANN Bylaws, Art. IV, § 3.18 ("The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider . . .") [Ex. C-10]; Supplementary Procedures for ICANN Independent Review Process, Rule 11 ("The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings . . .") [hereinafter ICANN Supplementary Procedures] [Ex. C-3].

<sup>3</sup> The definition of "costs" in the ICDR Rules applies because they govern the IRP "in combination with" ICANN's Supplementary Procedures. ICANN Supplementary Procedures, Rule 11 [Ex. C-3].

<sup>4</sup> International Centre for Dispute Resolution, International Dispute Resolution Procedures, International Arbitration Rules, Art. 31 (1 June 2010) [hereinafter ICDR Rules] [Ex. C-M-15].

<sup>5</sup> ICANN Bylaws, Art. IV, § 3.18 ("[I]n an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest.") [Ex. C-10]; ICANN Supplementary Procedures, Rule 11 ("[U]nder extraordinary circumstances the IRP Panel may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.") [Ex. C-3]; see also Martin F. Gusy, James M. Hosking & Franz T. Schwartz, A Guide to the ICDR International Arbitration Rules 273 (2011) (noting that although the reference to "taking into account the circumstances of the case" in the ICDR Rules—the very same language ICANN adopted in its Supplementary Procedures—"has been interpreted to refer to the relative success or failure of each of the parties, the conduct of the parties during the arbitration, and the nature of the parties (such as whether an individual, corporation, or sovereign entity)," it is "in reality . . . a very fact-specific determination and the tribunal can take into account whatever other 'circumstances of the case' it determines relevant") [Attachment 1].

appropriate deference owed by ICANN to its Governmental Advisory Committee, support a full award of costs to DCA.<sup>6</sup>

DCA is a charitable trust, and does not have the litigation “war chest” that is at ICANN’s disposal.<sup>7</sup> The monies that DCA has expended on these proceedings to protect its rights have impacted its ability to pursue the Trust’s charitable objectives. To the best of DCA’s knowledge, this IRP was the first to be commenced against ICANN under the new rules, and as a result there was little guidance as to how these proceedings should be conducted. Indeed, at the very outset there was controversy about the applicable version of the Supplemental Rules as well as the form to be filed to initiate a proceeding. From the very outset, ICANN adopted positions on a variety of procedural issues that have increased the costs of these proceedings. In DCA’s respectful submission, ICANN’s positions throughout these proceedings are inconsistent with ICANN’s obligations of transparency and the overall objectives of the IRP process, which is the only independent accountability mechanism available to parties such as DCA.

### **ICANN Prevails in the IRP Proceeding**

In the event ICANN prevails in this IRP, DCA submits that ICANN should be responsible for 50 percent of the costs of the IRP, except for costs relating to the interim measures proceeding, ICANN’s Request for Partial Reconsideration,<sup>8</sup> ICANN’s request for the Panel to rehear the proceedings,<sup>9</sup> and the evidentiary treatment of ICANN’s written witness testimony in the event it refused to make its witnesses

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<sup>6</sup> See, e.g., Declaration on the IRP Procedure ¶ 52 (14 Aug. 2014) (declaring that the Panel has the “power to interpret and determine the IRP Procedure as it relates to the future conduct of the proceedings”); *id.*, ¶ 59, 60 (ordering “reasonable documentary exchange” in part because “ICANN’s espoused goals of accountability and transparency would be disserved by a regime that truncates the usual and traditional means of developing and presenting a claim”); *id.*, ¶ 113 (finding that “the need for a minimum adequate remedy is indisputably more important where, as in this case, the party arguing that there is no compulsory remedy is the party entrusted with a special, internationally important and valuable operation”); *id.*, ¶ 115 (observing that “the Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, and b) the IRP process touted by ICANN as the ‘ultimate guarantor’ of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN;” *id.*, ¶ 131 (declaring that its declarations are “binding” on the parties).

<sup>7</sup> We understand that each gTLD applicant is funding a portion of ICANN’s legal costs through the \$185,000 per application fee each applicant has paid to ICANN. See, e.g., Maija Palmer, *ICANN to Expand Domain Despite Web of Protest*, Financial Times (10 Jan. 2012), <http://www.ft.com/cms/s/0/37cd6cf8-2745-11e1-864f-00144feabdc0.html#axzz3eeddW4Xj> (“Around \$60,000 from each application will be set aside to fight any lawsuits arising from the domain name process.”); Andrew Nusca, *China Gets Nod from ICANN for 2013 Confab*, CNET (25 June 2012), <http://www.cnet.com/news/china-gets-nod-from-icann-for-2013-confab/> (quoting Chairman of the ICANN Board of Directors Stephen Crocker as saying that ICANN “chose to set aside \$60,000 out of every application” for a total of approximately “\$120 million, or somewhere in that range” that would be “fenced off” for yet to be determined purposes, which Mr. Crocker acknowledged could include legal expenses).

<sup>8</sup> See ICANN’s Response to the Panel’s 12 May 2014 Decision and Request for Partial Reconsideration (20 May 2014).

<sup>9</sup> See ICANN’s Letter to the Panel (26 Feb. 2015).

available for questioning during the merits hearing,<sup>10</sup> *all of which ICANN should be responsible for in full.*<sup>11</sup>

ICANN's conduct in this IRP supports such a finding. ICANN increased the duration and expense of this IRP by—

- Failing to appoint a standing panel;<sup>12</sup>
- Entering into a registry agreement with DCA's competitor for .AFRICA during the pendency of this IRP, thereby forcing DCA to request interim measures of protection in order to preserve its right to a meaningful remedy;<sup>13</sup>
- Attempting to appeal declarations of the Panel on procedural matters where no appeal mechanism was provided for under the applicable procedures and rules;<sup>14</sup> and
- Refusing, only a couple of months prior to the merits hearing, to make its witnesses available for *viva voce* questioning at the hearing.<sup>15</sup>

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<sup>10</sup> See Procedural Order No. 6 (1 Apr. 2015); ICANN's Letter to the Panel (8 Apr. 2014).

<sup>11</sup> For the sake of completeness, DCA notes that it participated in good faith in the Cooperative Engagement Process with ICANN prior to filing its Request for Independent Review Process and, therefore, should not be responsible for ICANN's fees and costs under Section 3.16 of Article IV of ICANN's Bylaws or Rule 11 of ICANN's Supplementary Procedures. See Exhibits C-10 and C-3.

<sup>12</sup> See Decision on Interim Measures of Protection ¶¶ 29 (12 May 2014) (“[T]he Panel is of the view that this Independent Review Process could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws . . . and Supplemental Procedures . . . , which require the creation of a standing panel.”).

<sup>13</sup> See Decision on Interim Measures of Protection ¶¶ 31, 51 (12 May 2014) (“[T]he Panel is unanimously of the view that a stay ruling . . . is in order in this proceeding” and that “ICANN must immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same.”).

<sup>14</sup> See Decision on ICANN's Request for Partial Consideration ¶¶ 9-12 (4 June 2014) (“[T]he Panel is of the unanimous view that ICANN's request must be denied for two reasons. First, there is nothing in ICANN's Bylaws, the International Dispute Resolution Procedures of the ICDR . . . or the Supplementary Procedures of ICANN . . . that in any way address the Panel's ability to address ICANN's Request. . . . Moreover, ICANN has not pointed to any clerical, typographical or computation error or shortcoming in the Panel's decision and it has not requested an interpretation of the Panel's Decision based on any ambiguity or vagueness. To the contrary, ICANN has asked the Panel to reconsider its prior findings with respect to certain references in its Decision that ICANN disagrees with, on the basis that those references are in ICANN's view, inaccurate. Second, even if the Panel were to reconsider based on any provision or rule available . . . after deliberation, the Panel would still conclude that ICANN failed to follow its own Bylaws . . . in the context of addressing which of the Parties should be viewed as responsible for the delays associated with DCA Trust's Request for Interim Measures of Protection.”); Declaration on ICANN's Request for Revisiting of the 14 August 2014 Declaration on the IRP Procedure Following the Replacement of Panel Member ¶¶ 16, 18, 21 (24 Mar. 2015) (“After deliberation and careful consideration . . . , the Panel is unanimously of the view that it is not necessary for it to reconsider or revisit its 2014 Declaration. . . . [T]he Hon. William J. Cahill (Ret.), who was appointed to this Panel following the resignation, and shortly thereafter, passing away of the Hon. Richard C. Neal (Ret.), has carefully read and considered the various submissions of the Parties and the decisions rendered in this IRP, including the original panel's 2014 Declaration, and he is in full agreement with the Declaration's content and conclusions.”).

Mr. Chairman and Members of the Panel  
July 1, 2015  
Page 5

**Weil, Gotshal & Manges LLP**

ICANN did not prevail on a single one of these points. Considering this, ICANN's treatment of DCA throughout the New gTLD Program and the various accountability mechanisms DCA invoked, and ICANN's demonstrated lack of commitment to the very accountability mechanism it created, DCA submits that this is an "extraordinary" circumstance in which ICANN should be held responsible for a portion of the costs, even if it prevails in this IRP.

Respectfully submitted,

Arif H. Ali

A handwritten signature in black ink, appearing to read 'Arif H. Ali', with a stylized flourish at the end.

Counsel for Claimant

cc: Jeffrey A. LeVee, Esq., Jones Day  
Carolina Cardenas-Venino, International Centre for Dispute Resolution

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<sup>15</sup> See Procedural Order No. 6, ¶ 2(2) (1 Apr. 2015) (requesting written submissions from the parties on the evidentiary treatment by the Panel of the witness statements in the event of no cross-examination by the parties or *viva voce* questions asked by the Panel during the hearing).

# Exhibit P





## Resources

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# Approved Board Resolutions | Special Meeting of the ICANN Board

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16 Jul 2015

## 1. Main Agenda

### a. [DotConnectAfrica Trust \(DCA\) v. ICANN IRP Final Declaration](#) *Rationale for Resolutions 2015.07.16.01 – 2015.07.16.05*

## 1. Main Agenda

### a. [DotConnectAfrica Trust \(DCA\) v. ICANN IRP Final Declaration](#)

Whereas, on 9 July 2015, an independent review panel ("Panel") issued a final Declaration ("Declaration") in the independent review proceedings (IRP) initiated by DotConnectAfrica Trust (DCA), in which DCA sought relief relating to Board action or inaction on its application for .AFRICA.

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

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

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

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

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in

connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington D.C.

e) As a result of the above, the administrative fees of the ICDR totalling US\$4,600 and Panelists' compensation and expenses totalling US\$403,467.08 shall be born entirely by ICANN, therefore, ICANN shall reimburse DCA Trust the sum of US\$198,046.04.

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

Whereas, the independent review process is an integral ICANN accountability mechanism that helps support ICANN's multistakeholder model, and the Board thanks the Panel for its efforts in this IRP, and would like to specifically honor the memory of former panelist Hon. Richard C. Neal, who passed away during the proceedings.

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

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

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

1. ICANN shall continue to refrain from delegating the .AFRICA gTLD;
2. ICANN shall permit DCA's application to proceed through the remainder of the new gTLD application process as set out below; and
3. ICANN shall reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

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

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

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

Resolved (2015.07.16.05), in the event that DCA's application for .AFRICA

successfully passes the remainder of the evaluation process, at that time or before, the Board will consider any further advice or information received from the GAC, and proceed as necessary, balancing all of the relevant material information and circumstances. Should the Board undertake any action that may be inconsistent with the GAC's advice, the Board will follow the established process set out in the Bylaws (see ICANN Bylaws, Article XI, Section 2.1).

### *Rationale for Resolutions 2015.07.16.01 – 2015.07.16.05*

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

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

As provided in [Article IV](#), Section 3 of the Bylaws, any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. The Panel is charged with comparing the contested Board actions to the Articles of Incorporation and Bylaws, and declaring whether the Board acted consistently with the provisions of those Articles of Incorporation and Bylaws. The Panel must apply a defined standard of review to the IRP request focusing on:

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

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

Additionally, the Board will communicate with the GAC and attempt to ascertain whether the GAC wishes to refine its advice concerning DCA's application for .AFRICA and/or provide the Board with further information regarding that advice and/or otherwise address the concerns raised in the Declaration. The Board will consider any response the GAC may choose to provide, and proceed as necessary, balancing all of the relevant material information and circumstances. Should the Board undertake any action that may be inconsistent with the GAC's advice, the Board will follow the established processes set out in the Bylaws. As required by the Bylaws, if the Board

decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

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

1. The IRP is an integral ICANN accountability mechanism that helps support ICANN's multistakeholder model. The Board considers the principles found in ICANN's accountability mechanisms to be fundamental safeguards in ensuring that ICANN's bottom-up, multistakeholder model remains effective, and ICANN achieves its accountability and transparency mandate. The Board has carefully considered the Declaration, and in taking its action the Board, as did the Panel, takes specific note of the following regarding the independent review process and its obligations for accountability and transparency:
  - ICANN is bound by its own Articles of Incorporation to act fairly, neutrally, non-discriminatorily and to enable competition. (Decl. ¶ 94.)
  - ICANN is also bound by its own Bylaws to act and make decisions "neutrally and objectively, with integrity and fairness." (Decl. ¶ 95.)
  - As set out in Article IV (Accountability and Review) of ICANN's Bylaws, in carrying out its mission as set out in its Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of the Bylaws. (Decl. ¶ 97.)
2. ICANN has a signed Registry Agreement with ZA Central Registry NPC trading as Registry.Africa (ZACR) under which ZACR is authorized to operate the .AFRICA top-level domain. Parties affected by these resolutions have had, and may continue to have, the ability to challenge or otherwise question DCA's application through the evaluation and other processes.
3. The Board considered the community-developed processes in the New gTLD Program Applicant Guidebook (Guidebook). According to Section 3.1 of the Guidebook, the GAC may provide public policy advice to the ICANN Board on any application, which the Board must consider. When the GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed, it "will create a strong presumption for the ICANN Board that the application should not be approved." In its 11 April 2013 Beijing Communiqué, the GAC [stated](#) it had reached consensus on GAC Objection Advice for .AFRICA application number 1-1165-42560, thereby creating a strong presumption for the ICANN Board that this application should not proceed through the program. Additionally, in its 25 June 2014 London Communiqué, the GAC [stated](#) that "Consistent with the new gTLD applicant guidebook, the GAC provided consensus advice articulated in the April 11 2013 communiqué that the DotConnectAfrica (DCA) application number 1-1165-42560 for dot Africa should not proceed. The GAC welcomes the June 2013 decision by the New gTLD Program Committee to accept GAC advice on this application."

The Guidebook does not require the Board to engage the GAC in a dialogue about its advice when consensus has been reached, or question the GAC how such consensus was reached. The acceptance of the GAC advice on this

matter was fully consistent with the Guidebook. Notably, however, the Board has requested additional information from the GAC when the Board thought it needed more information before taking a decision, both before and during the New gTLD Program. Here, the NGPC did not think it required additional information from the GAC. Further, in addition to the GAC advice, the Board also had DCA's response to that advice, which the NGPC considered before accepting the GAC advice. Notwithstanding the Guidebook, the Panel has suggested that, ". . . the GAC made its decision without providing any rationale . . ." (Decl. ¶ 104), and ". . . the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust's application." (Decl. ¶ 113).

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

On balance, the Board has determined that permitting DCA's application to proceed through the remainder of the new gTLD application evaluation process is the best course of action at this time. Doing so helps promote ICANN's ability to make a decision concerning DCA's application for .AFRICA by applying documented procedures in the most transparent, neutral and objective manner possible, while also recognizing the importance of ICANN's accountability mechanisms. Completion of the application evaluation would allow DCA's application to undergo the same review processes as other gTLD applicants, and is not inconsistent with the GAC's advice. Further, completing the evaluation will provide additional relevant information for ICANN to consider as part of any final determination as to whether DCA's application for .AFRICA should proceed beyond initial evaluation.

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

There may also be additional costs to ICANN the extent any party challenges this decision. This action will have no impact on the security, stability or resiliency of the domain name system.

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

- Dakar Communiqué (27 October 2011) (<https://gacweb.icann.org/download/attachments/27132037/Communique%20Dakar%20-%2027%20October%202011.pdf?version=1&modificationDate=1323819889000&api=v2>)
- Letter from Stephen Crocker to Elham M.A. Ibrahim (<https://www.icann.org/en/system/files/correspondence/crocker-to-ibrahim-08mar12-en.pdf>)
- African Union Communiqué (<https://www.icann.org/resources/files/african-union-communication-2011-10-21-en>)

- DotConnectAfrica Trust's application for .AFRICA (<https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1276?t:ac=1276>)
- ZACR's application for .AFRICA (<https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1184?t:ac=1184>)
- Letter from Heather Dryden to Stephen Crocker (17 June 2012) re: Processing of Applications for New Generic TopLevel Domain (<https://www.icann.org/en/news/correspondence/dryden-to-crocker-17jun12-en>)
- Letter from Stephen Crocker to Heather Dryden (27 July 2012) re: Processing of applications for New Generic Top-Level Domains (<http://www.icann.org/en/system/files/correspondence/crocker-to-dryden-27jul12-en.pdf>)
- GAC Early Warnings filed against DCA's application for .AFRICA
  - African Union Commission: <https://gacweb.icann.org/download/attachments/27131927/Africa-AUC-42560.pdf?version=1&modificationDate=1353382039000&api=v2>
  - Comoros: <https://gacweb.icann.org/download/attachments/27131927/Africa-KM-42560.pdf?version=1&modificationDate=1353384893000&api=v2>
  - Kenya: <https://gacweb.icann.org/download/attachments/27131927/Africa-KE-42560.pdf?version=1&modificationDate=1353389367000&api=v2>
  - Cameroon: <https://gacweb.icann.org/download/attachments/27131927/Africa-CM-42560.pdf?version=1&modificationDate=1353430788000&api=v2>
  - DRC: <https://gacweb.icann.org/download/attachments/27131927/Africa-CD-42560.pdf?version=2&modificationDate=1353432869000&api=v2>
  - Benin: <https://gacweb.icann.org/download/attachments/27131927/Africa-BJ-42560.pdf?version=1&modificationDate=1353433003000&api=v2>
  - Egypt: <https://gacweb.icann.org/download/attachments/27131927/Africa-EG-1-42560.pdf?version=1&modificationDate=1353378092000&api=v2>
  - Gabon: <https://gacweb.icann.org/download/attachments/27131927/Africa-GA-42560.pdf?version=1&modificationDate=1353451525000&api=v2>
  - Burkina Faso: <https://gacweb.icann.org/download/attachments/27131927/Africa-BF-42560.pdf?version=1&modificationDate=1353451829000&api=v2>
  - Ghana: <https://gacweb.icann.org/download/attachments/27131927/Africa-GH-42560.pdf?version=1&modificationDate=1353451997000&api=v2>
  - Mali: <https://gacweb.icann.org/download/attachments/27131927/Africa-ML-42560.pdf?version=1&modificationDate=1353452174000&api=v2>
  - Uganda: <https://gacweb.icann.org/download/attachments/27131927/Africa-UG-42560.pdf?version=1&modificationDate=1353452442000&api=v2>
  - Senegal: <https://gacweb.icann.org/download/attachments/27131927/Africa-SN-42560.pdf?version=1&modificationDate=1353452452000&api=v2>
  - South Africa: <https://gacweb.icann.org/download/attachments/27131927/Africa-ZA-89583.pdf?version=1&modificationDate=1353452595000&api=v2>
  - Nigeria: <https://gacweb.icann.org/download/attachments/27131927/Africa-NG-2-42560.pdf?version=1&modificationDate=1353378092000&api=v2>



- Tanzania: <https://gacweb.icann.org/download/attachments/27131927/Africa-TZ-42560.pdf?version=1&modificationDate=1353452982000&api=v2>
- DCA Response to GAC Early Warning (<http://www.dotconnectafrica.org/wp-content/uploads/2012/12/Response-to-the-ICANN-GAC-Early-Warning-Advice-against-the-.Africa-Application-Submitted-by-DotConnectAfrica-Trust.pdf>)
- GAC Beijing Communiqué (11 April 2013) (<https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>)
- DCA Response to GAC Advice in Beijing Communiqué (<http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1165-42560-en.pdf>)
- NGPC Resolution 2014.06.04.NG01 (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a>)
- The NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué (4 June 2013) (<https://www.icann.org/en/groups/board/documents/new-gtld-resolution-annex-1-04jun13-en.pdf>)
- DCA Trust Reconsideration Request 13-4 and attachments (<https://www.icann.org/en/groups/board/governance/reconsideration/13-4/request-dca-trust-19jun13-en.pdf>)
- BGC Recommendation on Reconsideration Request 13-14 (<https://www.icann.org/en/groups/board/governance/reconsideration/13-4/recommendation-dca-trust-01aug13-en.pdf>)
- NGPC Action Adopting BGC Recommendation on Reconsideration Request 13-4 (<https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13aug13-en.htm#1.c>)
- GAC London Communiqué (25 June 2014) (<https://www.icann.org/en/system/files/correspondence/gac-to-board-25jun14-en.pdf>)
- DCA Response to GAC Advice in London Communiqué (<http://newgtlds.icann.org/sites/default/files/applicants/11aug14/gac-advice-response-1-1165-42560.pdf>)
- NGPC Resolution 2014.09.08.NG02 (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-09-08-en-1.b>)
- The NGPC Scorecard - GAC Advice (London, Singapore, Buenos Aires, Durban, Beijing): Actions and Updates (as of 8 September 2014) (<https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf>)
- Letter from Steve Crocker to Heather Dryden re: NGPC Meeting of 8 September 2014 (<https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-10sep14-en.pdf>)
- All briefs, declarations, and supporting documents filed by DCA Trust and ICANN in the Independent Review Proceeding *DCA Trust v. ICANN* (<https://www.icann.org/resources/pages/dca-v-icann-2013-12-11-en>)
- Letter from Akram Atallah to Neil Dundas (13 July 2015) re: Final Declaration in the DotConnectAfrica Trust (DCA) Independent Review Proceeding (IRP) (<https://www.icann.org/en/system/files/correspondence/atallah-to-undas-13jul15-en.pdf>)

- Letter from Dr. Elham M.A. Ibrahim to Steve Crocker (14 July 2015) re: Independent Review Panel (IRP) recommendation on the matter between DCA and ICANN related to Dot Africa gTLD  
(<https://www.icann.org/en/system/files/correspondence/ibrahim-to-crocker-14jul15-en.pdf>)
- Letter from Lucky Masilela to Steve Crocker (15 July 2015) re: ZACR Response on the Independent Review Process (IRP) Final Declaration  
(<https://www.icann.org/en/system/files/correspondence/masilela-to-crocker-15jul15-en.pdf>)

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

Published on 16 July 2015



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ICANN Blog

#### Who We Are

Get Started  
Learning  
Participate  
Groups  
Board  
President's Corner  
Staff  
Careers  
Newsletter  
Public Responsibility

#### Contact Us

Locations  
Global Support  
Security Team  
PGP Keys  
Certificate Authority  
Registry Liaison  
Specific Reviews  
Organizational Reviews  
Complaints Office  
Request a Speaker  
For Journalists

#### Accountability & Transparency

Accountability Mechanisms  
Independent Review Process  
Request for Reconsideration  
Ombudsman  
Empowered Community

#### Governance

Documents  
Agreements  
Specific Reviews  
Annual Report  
Financials  
Document Disclosure  
Planning  
KPI Dashboard  
RFPs  
Litigation  
Correspondence

#### Help

Dispute Resolution  
Domain Name Dispute Resolution  
Name Collision  
Registrar Problems  
WHOIS



# Exhibit Q

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 COUNTY OF LOS ANGELES

3 DEPARTMENT 53

HON. HOWARD HALM, JUDGE

4  
5 DOTCONNECTAFRICA TRUST,

) NO. BC607494

6 PLAINTIFF,

7 VS.

8 INTERNET CORPORATION FOR ASSIGNED  
9 NAMES AND NUMBERS,

10 DEFENDANT.  
11 \_\_\_\_\_)

12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 WEDNESDAY; FEBRUARY 28, 2018

14  
15 APPEARANCES:

16  
17 FOR THE PLAINTIFF:

18 BROWN NERI SMITH & KHAN, LLP  
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28 (APPEARANCES CONTINUED ON THE NEXT PAGE.)

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APPEARANCES CONTINUED:

FOR THE DEFENDANT:

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JEFFREY A. LEVEE  
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KERI LOGAN, CSR 12608  
OFFICIAL PRO TEMPORE REPORTER  
JOB NUMBER:

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1 CASE NO: BC607494  
2 CASE NAME: DOTCONNECTAFRICA TRUST V.  
3 INTERNET CORPORATION FOR  
4 ASSIGNED NAMES & NUMBERS  
5 LOS ANGELES, CALIFORNIA WEDNESDAY, FEBRUARY 28, 2018  
6 DEPARTMENT NO: 53 HON. HOWARD HALM, JUDGE  
7 APPEARANCES: (AS HERETOFORE NOTED.)  
8 REPORTER: KERI LOGAN, CSR NO. 12608  
9 TIME: MORNING SESSION

10  
11 (THE FOLLOWING PROCEEDINGS  
12 TOOK PLACE IN OPEN COURT:)

13  
14 THE COURT: OKAY. PLEASE STATE YOUR APPEARANCES.

15 MR. BROWN: ETHAN BROWN, SIR, OF BROWN, NERI, SMITH  
16 AND KHAN, LLP FOR PLAINTIFF DOTCONNECTAFRICA TRUST.

17 MR. LEVEE: GOOD MORNING, YOUR HONOR, ON BEHALF OF  
18 ICANN, I'M JEFF LEVEE OF JONES DAY. WITH ME IS ERIN  
19 BURKE, AMANDA PUSHINSKY AND KELLY OZUROVICH.

20 THE COURT: OKAY. WE'RE HERE TODAY FOR PHASE ONE  
21 JUDICIAL ESTOPPEL. I JUST RECEIVED A STIPULATION OF FACTS  
22 FOR JUDICIAL ESTOPPEL FILED.

23 BEFORE WE GO THERE, COURT SHOULD NOTE THAT WE  
24 HAVE A COURT REPORTER, KERI LOGAN. WELCOME BACK TO  
25 DEPARTMENT 53. THE COURT HAS SIGNED THE ORDER THAT  
26 APPOINTS YOU AS A COURT REPORTER PRO TEM.

27 OKAY. AND HAVE A SEAT COUNSEL, PLEASE.

28 ALL RIGHT. SO I BRIEFLY WENT THROUGH THE

1 MR. BROWN: YES, I WOULD, YOUR HONOR. THANK YOU.

2 THE COURT: PLEASE PROCEED.

3 MR. BROWN: OUR SLIDES, I THINK SHOULD BE ON YOUR  
4 MONITOR AT THIS POINT. I HOPE THEY ARE.

5 MAY IT PLEASE THE COURT. I REPRESENT  
6 PLAINTIFF, DOTCONNECTAFRICA TRUST. I WANT TO TAKE JUST A  
7 MOMENT TO INTRODUCE MY CLIENT. DCA OR DOTCONNECTAFRICA  
8 TRUST, WE REFER TO THEM GENERALLY AS DCA, IS A NONPROFIT  
9 ORGANIZATION ESTABLISHED UNDER THE LAWS OF THE REPUBLIC OF  
10 MAURITIUS OFF THE COAST OF AFRICA IN JULY OF 2010.

11 DCA TRUST WAS FORMED WITH A CHARITABLE  
12 PURPOSE, OF AMONG OTHER THINGS, ADVANCING INFORMATION  
13 TECHNOLOGY AND EDUCATION IN AFRICA AND PROVIDING THE  
14 CONTINENT INTERNET DOMAIN NAME DOTAFRICA.

15 DCA IS RUN BY SOPHIA BEKELE, WHO'LL MEET  
16 TODAY. SHE IS GOING TO BE OUR FIRST WITNESS. I  
17 UNDERSTAND SHE'S GOING TO BE THE FIRST WITNESS CALLED BY  
18 ICANN ACTUALLY AND SHE WILL BE A WITNESS FOR US AS WELL.

19 MS. BEKELE IS IN THE AUDIENCE HERE TODAY, BACK  
20 HERE. SHE'S THE FOUNDER AND CEO. SHE'S AN ENTREPRENEUR  
21 WITH EXPERTISE IN BUSINESS STRATEGY AND INFORMATION  
22 TECHNOLOGY AND COMMUNICATIONS. I THINK IT IS IMPORTANT TO  
23 NOTE THAT SHE WAS BORN IN AFRICA. SHE WAS RAISED IN  
24 ETHIOPIA AND ENGLISH IS NOT HER FIRST LANGUAGE, ALTHOUGH  
25 YOU WILL FIND SHE IS QUITE ARTICULATE. AND SHE HAS NO  
26 LEGAL TRAINING AT ALL SO WHEN -- I THINK THIS IS IMPORTANT  
27 TO KEEP IN MIND WHEN ICANN INSISTS THAT SHE BE HELD TO  
28 LEGAL POSITIONS THAT WERE TAKEN YEARS AGO.

1 LOTS AND LOTS AND LOTS OF OTHER THINGS, MODULE 6, WHICH IS  
2 THE COVENANT NOT TO SUE, WHICH YOU HAVE SEEN BOTH IN THE  
3 CONTEXT OF THE MOTION FOR SUMMARY JUDGMENT AND THE CONTEXT  
4 OF ICANN'S OPENING STATEMENTS TODAY.

5 MY CLIENT ALSO PAID A NON-REFUNDABLE \$185,000  
6 APPLICATION FEE FOR THE RIGHT TO SEEK DOTAFRICA.

7 BETWEEN MAY OF 2012 AND MARCH OF 2013, DCA'S  
8 APPLICATION PASSES ALL CATEGORIES OF THE INITIAL  
9 EVALUATION PROCESS, EXCEPT FOR GEOGRAPHIC NAMES REVIEW,  
10 WHICH WAS NOT COMPLETED AT THE TIME OF THE NEXT SET OF  
11 EVENTS THAT OCCURRED.

12 IN APRIL 11 OF 2013, ICANN'S GOVERNMENT  
13 ADVISORY COMMITTEE, THE SO-CALLED GAC, WHICH YOU WILL HEAR  
14 ABOUT TODAY IN THE TRIAL, ISSUES ADVICE RECOMMENDING THAT  
15 ICANN NOT ALLOW DCA'S APPLICATION TO PROCEED.

16 ON JUNE 4 OF 2013, ICANN BOARD NEW GTLD  
17 PROGRAM COMMITTEE POSTED NOTICE THAT IT DECIDED NOT TO  
18 ACCEPT DCA'S TRUST APPLICATION AS A RESULT OF THE GAC  
19 ADVICE.

20 IN JUNE 19, 2013, DCA FILES A REQUEST FOR  
21 RECONSIDERATION BY THE ICANN BOARD OF GOVERNMENT  
22 COMMITTEE, THE BGC. LOTS OF ACRONYMS IN THIS CASE,  
23 UNFORTUNATELY, BUT YOU WILL HAVE TO GET A LITTLE BIT  
24 FAMILIAR WITH.

25 ON AUGUST 1ST, 2013, BGC DENIES DCA'S REQUEST  
26 FOR RECONSIDERATION AND THEN DCA AND ICANN ENTER INTO A  
27 COOPERATIVE ENGAGEMENT PROCESS, WHICH IS ANOTHER ATTEMPT  
28 TO WORK THROUGH THE ISSUES AND REACH AN AMICABLE SOLUTION,

1 GOING TO TAKE THE POSITION THAT IT ONLY HAD TO FOLLOWING  
2 THE IRP RULING IF IT WANTED TO. IT DON'T KNOW THAT THE  
3 BOARD WAS GOING TO IGNORE THE IRP DECISION THAT IT WAS  
4 BINDING AND TAKE THE POSITION THAT IRPS IN THE FUTURE WERE  
5 NOT BINDING. IT DIDN'T KNOW THAT IT WAS AN ILLUSORY  
6 PROCESS.

7 IT KNEW IT NOW. IT KNEW IT AFTER IT WENT  
8 THROUGH THE PROCESS AND DIDN'T GET THE RELIEF. IT WON THE  
9 IRP, BUT IT DIDN'T REALLY GET THE RELIEF THAT IT WANTED.  
10 IT KNEW, MY CLIENT KNEW THEN THAT GOING THROUGH A SECOND  
11 IRP WOULD ULTIMATELY BE FUTILE.

12 NOW, ONE THING THAT'S IMPORTANT HERE IS AT THE  
13 SUMMARY JUDGMENT HEARING ALREADY, THE COURT HAS ALREADY  
14 LOOKED AT MODULE 6. IT IS ALREADY LOOKED AT THE COVENANT  
15 NOT TO SUE OR THE WAIVER, WHATEVER YOU WANT TO CALL IT AND  
16 REACHED A RULING THAT THE SCOPE OF THAT WAIVER DOES NOT  
17 COVER FRAUD OR INTENTIONAL MISCONDUCT, SAYING THOSE THINGS  
18 ARE ACTUALLY PROCEDURAL. THEY ARE NOT RELATED TO THE  
19 PROCESS IN ITSELF, BUT ARE APT TO TAKE ICANN OUTSIDE THE  
20 PROCESS GOVERNED BY ITS BYLAWS.

21 WHAT THAT MEANS IN THIS CASE, THEREFORE, IS  
22 THAT ANY CLAIMS THAT DO NOT LIE IN FRAUD OR WILFULL INJURY  
23 ARE BARRED BY THE COVENANT, BUT THOSE THAT DO NOT ARE NOT.

24 SO MY CLIENT DIDN'T HAVE THE BENEFIT OF THIS  
25 RULING WHEN IT MADE ITS STATEMENTS IN THE IRP. IT DIDN'T  
26 KNOW HOW COURT WAS GOING TO LOOK AT THE WAIVER. AND WHAT  
27 IS REALLY IMPORTANT HERE IS THAT YOUR HONOR HAS RULED THAT  
28 THIS WAIVER THAT ALL APPLICANTS ARE FORCED TO SIGN, WE HAD



1 Q AND YOU HAVE A BACHELOR'S DEGREE IN BUSINESS  
2 ANALISIS AND INFORMATION SYSTEMS, CORRECT?

3 A CORRECT.

4 Q AND YOU HAVE A MASTER'S DEGREE IN BUSINESS  
5 ADMINISTRATION AND MANAGEMENT AND INFORMATION SYSTEMS,  
6 CORRECT?

7 A CORRECT.

8 Q AND YOU HAVE A HOME IN NORTHERN CALIFORNIA,  
9 CORRECT?

10 A CORRECT.

11 Q HOW LONG HAVE YOU HAD A HOME IN NORTHERN  
12 CALIFORNIA?

13 A MORE -- NEARLY 20-SOMETHING YEARS.

14 Q AND YOU'VE BEEN DEPOSED TWICE IN THIS CASE SO  
15 FAR, RIGHT?

16 A YES, BY ICANN.

17 Q YES. BY ME?

18 A YES.

19 Q AND HAVE YOU SEEN TRANSCRIPTS OF EITHER OF  
20 THOSE DEPOSITIONS?

21 A YES.

22 Q DID YOU -- YOU DID NOT ISSUE ANY CORRECTIONS  
23 TO ANY OF YOUR TRANSCRIPTS, CORRECT?

24 A I DON'T REMEMBER, BUT I DID REVIEW IT. THERE  
25 MAY HAVE BEEN CORRECTIONS ON THE FIRST ONE.

26 Q DO YOU RECALL THE CORRECTIONS WERE SERVED FROM  
27 COUNSEL, BUT I NEVER RECEIVED ANY?

28 A I DON'T.

1 Q LET ME DISCUSS BRIEFLY YOUR BACKGROUND AS IT  
2 RELATES TO ICANN. YOU HAVE BEEN ACTIVELY INVOLVED IN THE  
3 ICANN COMMUNITY SINCE 2005, RIGHT?

4 A CORRECT.

5 Q AND ICANN HAS SOMETHING CALLED A GENERIC NAME  
6 SUPPORTING ORGANIZATION, RIGHT?

7 A CORRECT.

8 Q AND WOULD YOU SAY THAT THE GNSO WAS THE ICANN  
9 SUPPORTING ORGANIZATION THAT WAS INVOLVED IN THE DECISION  
10 TO RECOMMEND TO THE ICANN BOARD THAT ICANN EMBARK IN THIS  
11 NEW GTLD PROGRAM TO EXPAND THE NUMBER OF TOP-LEVEL DOMAINS  
12 ON THE INTERNET?

13 A CORRECT.

14 Q YOU WERE INVOLVED IN THE GNSO, RIGHT?

15 A I WAS AN ADVISER, YES.

16 Q YOU WERE POLICY ADVISER TO THE GNSO?

17 A CORRECT.

18 Q AND DURING THE YEARS LEADING UP TO THE  
19 SUBMISSION OF YOUR APPLICATION FOR THE TOP-LEVEL DOMAIN  
20 KNOWN AS DOTAFRICA, YOU WOULD SAY YOU WERE PRETTY ACTIVE  
21 IN THE GNSO, WOULD YOU SAY THAT?

22 A CORRECT.

23 Q AND YOU ATTENDED BOTH THEN AND SUBSEQUENTLY  
24 MANY OF THE MEETINGS OF THE ICANN BOARD, RIGHT?

25 A ICANN SOCIETIES, NOT NECESSARILY ICANN BOARD.  
26 I AM NOT PART OF THE BOARD.

27 Q OKAY. I DIDN'T SAY YOU WERE PART OF THE  
28 BOARD, BUT YOU UNDERSTAND THAT THE BOARD OF THE ICANN

1 MEETS THREE OR FOUR TIMES A YEAR AND THEY HAVE THESE  
2 MEETINGS ALL OVER THE WORLD, RIGHT?

3 A CORRECT.

4 Q AND DURING THE YEARS PRIOR TO THE TIME DCA  
5 SUBMITTED ITS APPLICATION, YOU WOULD ROUTINELY ATTEND  
6 THE -- AND BE PRESENT IN THE CITIES WHERE THOSE MEETINGS  
7 WERE HELD, RIGHT?

8 A I WAS PRESENT DURING THE INTERNATIONAL  
9 MEETINGS OF ICANN.

10 Q YES, THAT WAS WHAT I WAS REFERRING TO.  
11 THOSE MEETINGS WERE THREE OR FOUR TIMES A  
12 YEAR, RIGHT?

13 A SOMETHING LIKE THAT.

14 Q AND NOW LET'S SKIP AHEAD TO THE APPLICATION.  
15 SO, LET'S CONFIRM THAT YOUR COMPANY, DCA, SUBMITTED AN  
16 APPLICATION TO ICANN FOR THE TOP-LEVEL DOMAIN KNOWN AS  
17 DOTAFRICA, RIGHT?

18 A CORRECT.

19 Q YOU UNDERSTOOD THAT THE APPLICATION WOULD BE  
20 EVALUATED PURSUANT TO A DOCUMENT THAT ICANN HAD DEVELOPED  
21 WHICH IT CALLED THE APPLICANT GUIDEBOOK, RIGHT?

22 A CORRECT.

23 Q AND, IN FACT, YOU PERSONALLY WERE AN ACTIVE  
24 PARTICIPANT IN THE DEVELOPMENT OF THE APPLICANT GUIDEBOOK,  
25 CORRECT?

26 A CORRECT.

27 Q AND DRAFTS OF THE GUIDEBOOK, ICANN WOULD  
28 PUBLISH DRAFTS OF THE GUIDEBOOK ONLINE SO THAT PEOPLE

1 THEY WERE MISMARKED.

2 THE WITNESS: SAME PAGE?

3 MS. COLIN: WHICH JOINT EXHIBIT IS THAT? NEVER  
4 MIND.

5 MR. LEVEE: YOU MEAN FOR THE TRANSCRIPT?

6 MS. COLIN: IT'S NOT AN EXHIBIT.

7 BY MR. LEVEE:

8 Q NOW, ARE YOU ON PAGE 206?

9 A YES.

10 Q LINE 14, I ASKED,

11 (READING:)

12 BECAUSE AS A RESULT OF  
13 THE BOARD ACCEPTING THE  
14 GAC'S ADVICE THAT YOUR  
15 APPLICATION NOT PROCEED,  
16 ICANN STOPPED WORKING ON  
17 YOUR APPLICATION, RIGHT?  
18 (AS READ.)

19 AND YOU ANSWERED, "RIGHT."

20 AND THEN THE NEXT QUESTION,  
21 SO THE GEOGRAPHIC REVIEW  
22 NAMES PANEL NEVER GOT TO  
23 FINISH THE WORK ON YOUR  
24 APPLICATION IN 2013  
25 BECAUSE THEY WERE TOLD  
26 TO STOP? (AS READ.)

27 AND YOUR ANSWER WAS, "RIGHT."

28 A RIGHT. MAY I CLARIFY? BECAUSE THIS

1 DEPOSITION WAS TAKEN POST-IRP. SO THE EVIDENCE OF FACTS  
2 THAT YOU ARE MENTIONING AND I AM SAYING RIGHT TO CAME  
3 AFTER, RIGHT, BECAUSE AT THE TIME THAT THE BOARD STOPPED  
4 THE APPLICATION I HAVE NO PREVIEW OR NO WAY TO KNOW THAT  
5 THE BOARD INSTRUCTED THE GEOGRAPHIC NAMES TO STOP. SO I  
6 WOULDN'T KNOW THE EXACTLY THE WORK THEY HAVE DONE ON THE  
7 APPLICATION, CORRECT?

8 MR. LEVEE: YOUR HONOR, I AM GOING TO MOVE TO  
9 STRIKE THAT. I HAVE NO IDEA WHAT THAT SAID. COUNSEL CAN  
10 ELICIT.

11 THE COURT: ALL RIGHT. THE MOTION IS GRANTED.

12 JUST ANSWER THE QUESTION THAT IS ASKED,  
13 PLEASE.

14 BY MR. LEVEE:

15 Q NOW, ACCORDING TO THE GUIDEBOOK, WHEN A  
16 TOP-LEVEL DOMAIN CONSISTED OF A GEOGRAPHIC TERRITORY, SUCH  
17 AS AFRICA, THE APPLICATION HAD TO HAVE THE SUPPORT OF 60  
18 PERCENT OF THE COUNTRIES OF THE CONTENT OF AFRICA, RIGHT?

19 A CORRECT.

20 Q AND AFTER YOU LEARNED THAT DCA'S APPLICATION  
21 WOULD NOT PROCEED, I AM TALKING ABOUT 2013 NOW, DCA  
22 SUBMITTED A RECONSIDERATION REQUEST TO ICANN'S BOARD,  
23 RIGHT?

24 A YES.

25 Q OKAY. AND A RECONSIDERATION REQUEST IS  
26 AVAILABLE TO ASK THE BOARD TO REVIEW THE ACTIONS OF THE  
27 ICANN -- OF THE ICANN BOARD BUT ALSO ACTIONS OF ICANN  
28 STAFF?

1 A CORRECT.

2 Q AND SO DCA SUBMITTED A RECONSIDERATION REQUEST  
3 TO THE ICANN BOARD, RIGHT?

4 A CORRECT.

5 Q AND THE BOARD DENIED DCA'S APPLICATION?

6 A CORRECT.

7 Q AND THEREAFTER, IS WHEN DCA FILED THE IRP,  
8 CORRECT?

9 A CORRECT.

10 Q NOW, LET'S TALK A LITTLE BIT ABOUT THE IRP.  
11 WHEN YOU INITIATED THE IRP, YOU SUBMITTED A FILING TO THE  
12 INTERNATIONAL CENTER FOR DISPUTE RESOLUTION, THE ICDR,  
13 RIGHT?

14 A YES.

15 Q THAT'S THE INTERNATIONAL ARM OF THE AMERICAN  
16 ARBITRATION ASSOCIATION?

17 A CORRECT.

18 Q AND THAT WAS IN OCTOBER OF 2013, YES?

19 A CORRECT.

20 Q THE IRP PANEL'S FINAL DECLARATION WAS ISSUED  
21 IN EARLY JULY OF -- ACTUALLY, YOU SUBMITTED IT IN OCTOBER  
22 OF -- YES, OCTOBER 2013 -- STRIKE THAT. START AGAIN.

23 THE IRP PANEL'S FINAL DECLARATION WAS ISSUED  
24 IN JULY OF 2015, RIGHT?

25 A YES.

26 Q SO THE PROCESS OF THE IRP TOOK ABOUT 20  
27 MONTHS, RIGHT?

28 A CORRECT.

1 HIS PRACTICE.

2 Q SO YOU DON'T KNOW ONE WAY OR THE OTHER?

3 A I DIDN'T CHECK IF THEY HAVE -- WHERE THEIR  
4 OFFICES ARE.

5 Q DID YOU EVER ASK ANY OF THE LAWYERS THAT YOU  
6 WORKED WITH WHETHER THEY COULD GET ANY OPINIONS FROM ANY  
7 OF THE LAWYERS THAT THEY HAD IN CALIFORNIA IF THEY HAD  
8 ANY?

9 A DURING THE IRP.

10 Q YES.

11 A NO.

12 Q DO YOU KNOW WHETHER, JUST ASSUME FOR THE  
13 MOMENT THAT WEIL GOTSHAL HAS AN OFFICE IN PALO ALTO THAT  
14 WAS OPENED 15 OR 20 YEARS AGO. DID YOU EVER ASK THAT ANY  
15 LAWYER FROM WEIL GOTSHAL'S CALIFORNIA OFFICE BE INVOLVED  
16 IN THE IRP?

17 A I WOULD NOT. I DID NOT GO TO THE LAW FIRM. I  
18 WENT TO THE PERSON THAT HAS EXPERTISE AND UNDERSTAND THE  
19 IRP PROCESS AND HAS WON CASES AGAINST ICANN. SO I WENT  
20 AFTER THE LAWYER NOT AFTER THE LAW FIRM.

21 MR. LEVEE: YOUR HONOR, COULD I ASK THE WITNESS  
22 ACTUALLY TO ANSWER MY QUESTION.

23 THE COURT: I THINK SHE ANSWERED QUESTION.

24 MR. LEVEE: OKAY.

25 BY MR. LEVEE:

26 Q LET ME STATE IT THIS WAY. DO YOU KNOW WHETHER  
27 ANY OF THE LAWYERS FROM WEIL GOTSHAL'S CALIFORNIA OFFICE,  
28 ASSUMING THERE IS ONE, WERE IN ANY WAY INVOLVED IN

1 A YES, THAT'S MY SIGNATURE.

2 Q AND THE PURPOSE OF THAT DOCUMENT WAS TO  
3 PROVIDE THE IRP PANEL UNDER OATH THE THINGS YOU WANT THE  
4 IRP TO CONSIDER DURING THE COURSE OF THE IRP, CORRECT?

5 A RIGHT.

6 Q OKAY. WE'RE GOING TO COME BACK TO THAT IN A  
7 MINUTE.

8 LET ME ASK YOU ABOUT THE FINAL DECLARATION.  
9 THAT'S EXHIBIT 43. THIS IS THE IRP'S FINAL DECLARATION,  
10 RIGHT? IT'S 63 PAGES LONG, EXHIBIT 43.

11 A YES.

12 Q IT'S ALREADY ADMITTED INTO EVIDENCE.  
13 AND IT HELD THAT DCA WAS THE PREVAILING PARTY,  
14 CORRECT?

15 A CORRECT.

16 Q AND THE PANEL SAID THAT ICANN SHOULD CONTINUE  
17 TO REFRAIN FROM DELEGATING THE DOTAFRICA GTLD AND PERMIT  
18 DCA FROM REMAINDER OF THE NEW GTLD PROCESS?

19 A CORRECT.

20 Q AND AS WE DISCUSSED, THE PANEL ALSO AWARDED  
21 DCA ITS COSTS?

22 A ACCORDING TO THE IRP, YES.

23 Q SO DCA RECEIVED FROM ICANN THE MONEY THAT THE  
24 PANEL TOLD ICANN TO REIMBURSE DCA, RIGHT?

25 A CORRECT.

26 Q OKAY. AND ICANN'S BOARD, ABOUT A WEEK LATER,  
27 CONSIDERED THE DECLARATION OF THE PANEL, RIGHT?

28 A THEY WROTE THE WORDING, YES.



1 MR. LEVEE: YOUR HONOR, CAN I MOVE TO STRIKE THAT.

2 THE WITNESS: YES.

3 THE COURT: MOTION IS GRANTED. YOUR ATTORNEY WILL  
4 ASK YOU THESE QUESTIONS.

5 THE WITNESS: THANK YOU.

6 BY MR. LEVEE:

7 Q NOW, ONCE ICANN RETURNED YOUR APPLICATION TO  
8 PROCESSING, YOU RECEIVED, THAT IS DCA RECEIVED SOME  
9 CLARIFYING QUESTIONS RELATING TO THE GEOGRAPHIC NAMES  
10 REVIEW, CORRECT?

11 A YES.

12 Q I AM NOT GOING TO GO INTO ANY DETAIL ON THAT.  
13 AND DCA ELECTED NOT TO SUBMIT TO ICANN  
14 ANYTHING NEW. DCA SAID, WE HAD LETTERS THAT WE SUBMITTED  
15 WITH OUR APPLICATION AND THOSE ARE SUFFICIENT.  
16 ESSENTIALLY THAT'S WHAT DCA SAID, RIGHT?

17 A YES, WE HAD HAD AN APPLICATION.

18 Q AND THEN ICANN SAID, WELL, WE ARE GOING TO PUT  
19 YOU IN SOMETHING CALLED EXTENDED EVALUATION. WE ARE GOING  
20 TO GIVE IT ONE MORE TRY, RIGHT?

21 A YES.

22 Q SO THEY SENT YOU A SECOND SET OF CLARIFYING  
23 QUESTIONS TELLING YOU THAT YOUR LETTER'S OF SUPPORT WERE  
24 INSUFFICIENT, UNDER THE GUIDELINE, RIGHT?

25 A WHICH WERE THE SAME IS AS THE FIRST ONE.

26 Q YOU MEAN THE CLARIFYING QUESTIONS WERE THE  
27 SAME?

28 A YEAH.

1 Q AND AGAIN, DCA ELECTED NOT TO SUBMIT NEW  
2 LETTER OF SUPPORT AND SAID, WE GAVE YOU LETTERS WITH OUR  
3 APPLICATION AND THOSE LETTERS WERE GOOD ENOUGH.

4 A WE CLARIFIED TO THE SAME QUESTIONS THEY ASKED  
5 US. WE GAVE THEM THE SAME ANSWERS.

6 Q AND YOUR ANSWER WAS THAT THE PREVIOUS LETTERS  
7 WITH YOUR APPLICATION WERE GOOD ENOUGH?

8 A YES.

9 Q OKAY. AND SO ICANN THEN COMMUNICATED TO DCA  
10 THAT -- THAT ITS APPLICATION WOULD NOT PROCEED BECAUSE IT  
11 HAD FAILED THE GEOGRAPHIC NAMES REVIEW?

12 A CORRECT.

13 Q NOW, WE DISCUSSED EARLIER THAT A PARTY CAN  
14 FILE A REQUEST FOR RECONSIDERATION OF BOARD AND STAFF  
15 ACTIONS, CORRECT?

16 A YES.

17 Q AND SO IN 2013, WHEN THE BOARD RULED FOLLOWING  
18 THE GAC ADVICE, THE FIRST THING DCA DID WAS FILE A REQUEST  
19 FOR RECONSIDERATION, RIGHT?

20 A CORRECT.

21 Q AND IT LOST THAT REQUEST, RIGHT?

22 A YES.

23 Q I NEED YOU TO BE AUDIBLE.

24 A YES.

25 Q AND AFTER THAT IT FILED THE IRP?

26 A CORRECT.

27 Q BUT IN 2005 AND 6, AFTER YOU WERE TOLD THAT  
28 YOUR LETTERS DID NOT PASS THE GEOGRAPHIC NAMES REVIEW, YOU

1 A NO, NOT ON GEOGRAPHIC NAME PART.

2 Q DID -- I'M SORRY. WE LOST YOUR SLIDE THERE  
3 FOR A MOMENT.

4 MS. COLIN: I'M SORRY, WHAT EXHIBIT WAS THAT?

5 MR. BROWN: IT WAS 12, PAGE 18.

6 BY MR. BROWN:

7 Q DOES ANYTHING HERE AT THE TOP OF PAGE 18 REFER  
8 TO WHETHER DCA INSTITUTE A LAWSUIT IN REGARD TO DECISIONS  
9 MADE BY PERSONS OTHER THAN THE ICANN BOARD?

10 A IN THAT HIGHLIGHTED VERSION?

11 Q YEAH, IN THE HIGHLIGHTED SECTION. DOES IT SAY  
12 ANYTHING ABOUT WHETHER DCA COULD BRING A PROCEEDING IN  
13 REGARDS TO ACTIONS TAKEN BY PERSONS OTHER THAN THE ICANN  
14 BOARD?

15 A NO.

16 Q LET ME TAKE YOU TO EXHIBIT 17, WHICH I BELIEVE  
17 IS THE NEXT DOCUMENT THAT IS REFERRED TO IN YOUR TESTIMONY  
18 WITH MR. LEVEE. LET ME TURN TO PAGE 6 OF THAT DOCUMENT.  
19 I BELIEVE WE LOOKED AT THE INFORMATION UNDER PARAGRAPH 4.

20 DO YOU SEE WHERE IT SAYS UNDER CALIFORNIA LAW  
21 AND APPLICABLE FEDERAL LAW, THIS IRP QUALIFIES AS AN  
22 ARBITRATION. DO YOU SEE THAT?

23 A YES.

24 Q AND DO YOU SEE WHERE IT SAYS, THE FIFTH PRONG  
25 OF THAT IS A BINDING DECISION?

26 A YES.

27 Q DO YOU SEE THAT?

28 AT THE TIME OF -- AS YOU WERE GOING THROUGH

1 THE IRP PROCESS, DID YOU HAVE A BELIEF AS TO WHETHER OR  
2 NOT THE IRP WAS A BINDING -- WAS A BINDING -- WOULD MAKE A  
3 BINDING DECISION AT THAT POINT IN TIME

4 A WE -- THROUGH THE PROCESS, NO, NOT UNTIL THE  
5 PROCEDURAL DELIBERATIONS WERE TAKING PLACE.

6 Q AND AT SOME POINT IN TIME DID THE PANEL MAKE A  
7 DECISION AS TO WHETHER ITS RULING WOULD BE BINDING?

8 A YES.

9 Q DID YOU SUBSEQUENTLY COME TO FIND OUT AFTER  
10 THE -- AFTER THE IRP DECISION AS TO WHETHER ITS DECISION  
11 WAS ACTUALLY BINDING ON ICANN?

12 A NO. YES, IT WASN'T BINDING. THE DECISION WAS  
13 BINDING FROM THE ICANN -- FROM THE PANEL.

14 Q OKAY.

15 A THEY ISSUED A BINDING DECISION.

16 Q DID YOU COME TO FIND OUT WHETHER ICANN  
17 ACTUALLY TREATED THAT DECISION AS BINDING AT SOME POINT?

18 A NO, IT WAS VERY OBVIOUS THEY DIDN'T TREAT IT  
19 AS BINDING.

20 Q HOW DID YOU COME TO FIND THAT OUT?

21 A EVEN THROUGH ALL THE DELIBERATIONS, DURING THE  
22 IRP, THE COUNSEL FOR ICANN HAS ARGUED IT IS NOT BINDING  
23 AND ALL THE PROCEDURAL RULINGS THAT TOOK PLACE, ICANN HAS  
24 OPPOSED IT AND, YOU KNOW, THE PANEL HAS OVERRULED AND --  
25 AND ISSUED A BINDING DECISION.

26 EVEN AT THE END TOWARDS THE TIME THAT THE  
27 PANEL WAS GOING TO ISSUE THE DECLARATION, THE ICANN  
28 COUNSEL HAS ACTUALLY WRITTEN OR SUBMITTED A LETTER TO --

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 COUNTY OF LOS ANGELES

3 DEPARTMENT 53

HON. HOWARD HALM, JUDGE

4  
5 DOTCONNECTAFRICA TRUST,

) NO. BC607494

6 PLAINTIFF,

7 VS.

8 INTERNET CORPORATION FOR ASSIGNED  
9 NAMES AND NUMBERS,

10 DEFENDANT.  
11 \_\_\_\_\_ )

12  
13 REPORTER'S CERTIFICATE

14  
15 I, KERI A. LOGAN, CSR NO. 12608, OFFICIAL PRO  
16 TEMPORE REPORTER OF THE SUPERIOR COURT OF THE STATE OF  
17 CALIFORNIA, COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT  
18 I DID CORRECTLY REPORT THE PROCEEDINGS CONTAINED HEREIN  
19 AND THAT THE FOREGOING PAGES, COMPRISE A FULL, TRUE, AND  
20 CORRECT TRANSCRIPT OF THE PROCEEDINGS AND TESTIMONY TAKEN  
21 IN THE MATTER OF THE ABOVE-ENTITLED CAUSE ON  
22 FEBRUARY 28, 2018.

23  
24 DATED THIS 1ST DAY OF MARCH, 2018.

25  
26  
27 

28 \_\_\_\_\_  
KERI A. LOGAN  
OFFICIAL PRO TEMPORE REPORTER

# Exhibit R

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 COUNTY OF LOS ANGELES

3 DEPARTMENT 53 HON. HOWARD HALM, JUDGE

4  
5 DOTCONNECTAFRICA TRUST, ) NO. BC607494  
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY; MARCH 1, 2018

APPEARANCES:

FOR THE PLAINTIFF:

BROWN NERI SMITH & KHAN, LLP  
ETHAN J. BROWN  
SARA COLON  
11601 WILSHIRE BOULEVARD, SUITE 2080  
LOS ANGELES, CALIFORNIA 90025

FOR THE INTERVENOR:

KESSELMAN BRANTLY STOCKINGER, LLP  
DAVID W. KESSELMAN  
1230 ROSECRANS AVENUE, SUITE 690  
MANHATTAN BEACH, CALIFORNIA 90266

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

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APPEARANCES CONTINUED:

FOR THE DEFENDANT:

JONES DAY  
JEFFREY A. LEVEE  
ERIN L. BURKE  
KELLY OZUROVICH  
AMANDA PUSHINSKY  
555 S. FLOWER STREET, 50TH FLOOR  
LOS ANGELES, CALIFORNIA 90071

KERI LOGAN, CSR 12608  
OFFICIAL PRO TEMPORE REPORTER  
JOB NUMBER: 143369



I N D E X

WITNESS NAME	PAGE
SOPHIA BEKELE	
CROSS (RESUMED) BY MR. BROWN .....	2
REDIRECT BY MR. LEVEE .....	26
RECORD BY MR. BROWN .....	50
CHRISTINE WILLET	
DIRECT BY MS. BURKE .....	54
DIRECT (RESUMED) BY MS. BURKE .....	86
CROSS BY MR. BROWN .....	89
REDIRECT BY MS. BURKE .....	125
AKRAM ATALLAH	
DIRECT BY MR. BROWN .....	128
CROSS BY MR. LEVEE .....	133

E X H I B I T S

EXHIBIT	PAGE
54 MARKED FOR IDENTIFICATION	46
147 MARKED FOR IDENTIFICATION	96
131 MARKED FOR IDENTIFICATION	117

1 CASE NO: BC607494  
2 CASE NAME: DOTCONNECTAFRICA TRUST V.  
3 INTERNET CORPORATION FOR  
4 ASSIGNED NAMES & NUMBERS  
5 LOS ANGELES, CALIFORNIA THURSDAY, MARCH 1, 2018  
6 DEPARTMENT NO: 53 HON. HOWARD HALM, JUDGE  
7 APPEARANCES: (AS HERETOFORE NOTED.)  
8 REPORTER: KERI LOGAN, CSR NO. 12608  
9 TIME: MORNING SESSION

10  
11 (THE FOLLOWING PROCEEDINGS  
12 TOOK PLACE IN OPEN COURT:)

13  
14 THE COURT: ALL RIGHT. WE ARE ON THE RECORD IN THE  
15 CASE OF DCA VERSUS ICANN, CASE NO. BC607494. COUNSEL ARE  
16 PRESENT. MS. BEKELE IS ON THE WITNESS STAND, AND I  
17 BELIEVE THAT COUNSEL FOR THE PLAINTIFF IS EXAMINING.

18 MR. BROWN: YES, YOUR HONOR. I AM READY TO START.  
19 I -- JUST ONE VERY BRIEF HOUSEKEEPING MATTER. I NOTED  
20 THAT WE HAD NEGLECTED TO MAKE A PRINTOUT OF OUR OPENING  
21 SLIDES FOR YOU. IF YOU WOULD LIKE THAT, I AM HAPPY TO  
22 PROVIDE IT TO YOU.

23 THE COURT: OKAY.

24  
25 SOPHIA BEKELE,

26 THE WITNESS HEREIN, CALLED AS A WITNESS, HAVING  
27 BEEN PREVIOUSLY DULY SWORN, RESUMED THE STAND AND  
28 TESTIFIED FURTHER AS FOLLOWS:

1 ENDORSEMENTS PROPERLY WERE INTERVENED BY ICANN STAFF AND  
2 GUIDED TO ON HOW TO EVALUATE OUR APPLICATION VERSUS --  
3 VERSUS THE COMPETITION.

4 Q THERE IS A LOT THERE. I JUST WANT TO UNPACK  
5 IT JUST A LITTLE BIT. OKAY?

6 A OKAY.

7 Q AFTER THE IRP YOUR -- IS IT CORRECT THAT YOUR  
8 APPLICATION WENT BACK INTO CONSIDERATION BY THE GEOGRAPHIC  
9 REVIEW PANEL?

10 A CORRECT.

11 Q AND DID YOU SUBSEQUENTLY COME TO LEARN THAT  
12 THAT PANEL, IN YOUR VIEW, TREATED YOUR APPLICATION AND ITS  
13 ENDORSEMENTS DIFFERENTLY THAN IT TREATED ZACRS?

14 A YES.

15 MR. LEVEE: OBJECTION. LEADING.

16 THE COURT: IT'S OVERRULED.

17 THE WITNESS: YES, THEY DID.

18 BY MR. BROWN:

19 Q WHAT IS THE BASIS OF YOUR BELIEF THAT YOUR  
20 APPLICATION ENDORSEMENTS WERE TREATED DIFFERENTLY THAN  
21 ZACR?

22 A FIRST OF ALL, IN PRINCIPLE, THE COMPANY THAT  
23 WAS EVALUATING OUR APPLICATION DURING THE IRP DISCOVERY WE  
24 WERE -- WERE FOUND TO NOT BE INDEPENDENT, WERE FOUND TO  
25 HAVE BIAS ON ZACR'S APPLICATION DUE TO THE INTERFERENCE OF  
26 THE ICANN STAFF. AND THEN WE WROTE TO ICANN REQUESTING OR  
27 POINTING OUT THE SAME THING AFTER THE IRP. THEY DID NOT  
28 CHANGE THE INDEPENDENT EVALUATION FIRM. THE SAME PEOPLE

1 A YES, I DID.

2 Q HOW LONG DID YOU LIVE THERE?

3 A UNTIL I WAS 16.

4 Q AND WAS ENGLISH YOUR FIRST LANGUAGE?

5 A NO.

6 Q WHEN DID YOU COME TO THE U.S.?

7 A I DON'T REMEMBER, BUT --

8 Q APPROXIMATELY HOW OLD WERE YOU?

9 A WHEN I WAS 16 I CAME HERE.

10 Q DO YOU HAVE ANY LEGAL TRAINING AT ALL?

11 A LEGAL?

12 Q LEGAL.

13 A NO.

14 Q HAVE YOU EVER BEEN INVOLVED, OTHER THAN THIS,  
15 OTHER THAN THE ACTIONS RELATING TO THE ICANN EVENTS, HAVE  
16 YOU EVER BEEN INVOLVED IN ANY LAWSUITS IN THE U.S.?

17 A NO.

18 Q DID YOU HAVE ANY EXPERIENCE WHATSOEVER IN  
19 EVALUATING THE ENFORCEABILITY OR SCOPE OF LITIGATION  
20 WAIVERS?

21 A NO.

22 Q WHERE IS DCA LOCATED?

23 A DCA IS LOCATED IN THE COUNTRY OF AFRICA CALLED  
24 MAURITIUS, THAT'S WHERE THE HEADQUARTERS IS AND WE HAVE  
25 THE OPERATION IN KENYA, NAIROBI, KENYA.

26 Q CAN YOU JUST TELL ME JUST GENERALLY WHAT DCA  
27 DOES?

28 A DCA WAS SET UP SOMEHOW IN 2007, TO PROVIDE

1 THROUGH?

2 A NO, WE REQUESTED VARIOUS TIMES WHAT THE STATUS  
3 IS, THEY NEVER GAVE US THE STATUS OF OUR -- OUR SCORES FOR  
4 THE GEOGRAPHIC NAME.

5 Q DID THE -- DID THE DCA APPLICATION, WAS IT A  
6 HALTED AT THE TIME OF THE GAC ADVICE, WHEN THE GAC ADVICE  
7 WAS ACCEPTED?

8 A NO, WE WERE INFORMED THROUGH THE EMAIL  
9 COMMUNICATIONS THAT DURING THE BEIJING MEETING WHERE THEY  
10 HAD THE GAC ADVICE, THEY SENT US INFORMATION SAYING YOUR  
11 APPLICATION WILL NOT PROCESS ANYMORE BECAUSE DUE TO THE  
12 GAC ADVICE.

13 Q THE APPLICATION WAS HALTED AT THAT POINT IN  
14 TIME?

15 A YES.

16 Q THAT HALT PREVENTED -- DID THAT HALT --

17 A PUBLISHING OFF THE GEOGRAPHIC NAME SCORES.

18 Q SO THAT HALTING PREVENTED THE COMPLETION OF  
19 THE GEOGRAPHIC NAME REVIEW?

20 A RIGHT.

21 Q AND WAS THE DECISION TO HALT THE FINAL  
22 DECISION AND PUBLICATION OF THE GEOGRAPHIC NAMES REVIEW,  
23 WAS THAT A DECISION THAT WAS MADE BY GAC OR MADE BY ICANN?

24 A MADE BY ICANN.

25 Q WAS IT A DECISION THAT YOU AGREED WITH?

26 A NO, THE NGCP, WHICH IS A SUBGROUP OF THE ICANN  
27 BOARD, REVIEWS INDIVIDUAL APPLICATIONS TO PASS AND FAIL OR  
28 TO GET INPUT FROM THE VARIOUS EVALUATION PANEL AND THEN

1 THROUGH A SERIES OF CONTRACTS AND PROGRAMS WITH CONTRACTED  
2 PARTIES WHICH WE CALL REGISTRY OPERATORS AND REGISTRARS.

3 Q WHEN DID YOU START WORKING FOR ICANN?

4 A OCTOBER 1ST, 2012.

5 Q AND WHEN YOU STARTED, WHAT WAS YOUR TITLE?

6 A MY TITLE WAS GENERAL MANAGER OF THE NEW GLTD  
7 PROGRAM.

8 Q AND CAN YOU EXPLAIN TO THE COURT VERY  
9 GENERALLY, WHAT IS THE NEW GLTD PROGRAM?

10 A SO NEW GLTD STANDS FOR NEW GENERIC TOP-LEVEL  
11 DOMAIN. IT IS A PROGRAM THAT WAS INTENDED TO PROVIDE FOR  
12 THE EXPANSION OF THE TOP LEVEL OF THE INTERNET.

13 Q WE HAVE HAD SOME DISCUSSION IN PASSING, BUT TO  
14 CLARIFY, WHAT IS A TOP-LEVEL DOMAIN?

15 A SO MOST PEOPLE ARE FAMILIAR WITH .COM OR .GOV.  
16 IT IS REALLY ANYTHING THAT'S TO THE RIGHT OF THE DOT.

17 Q AND WHAT ARE SOME EXAMPLES OF NAMES THAT HAVE  
18 BEEN ADDED SINCE THE NEW GLTD PROGRAM?

19 A THE NEW GLTD PROGRAM HAS ADDED NAMES LIKE  
20 .SHOP, .GOOGLE, .OSAKA.

21 Q WHAT YEARS DID THE GTLD PROGRAM LAUNCH?

22 A SO THE ICANN BOARD ADOPTED POLICY  
23 RECOMMENDATIONS FOR PROGRAM IN 2008.

24 Q LET ME STOP YOU FOR A MOMENT. WHO WROTE OR  
25 MADE THOSE POLICY RECOMMENDATIONS?

26 A THE ICANN COMMITTEE, THIS MULTI-STAKEHOLDER,  
27 PEOPLE FROM ALL OVER THE WORLD.

28 Q WE HAVE HEARD THAT REFERRED TO A COUPLE TIMES

1 THE ICANN COMMUNITY. CAN YOU DESCRIBE FOR THE COURT A  
2 LITTLE BIT MORE WHAT THAT IS EXACTLY?

3 A SO THE ICANN COMMITTEE IS THIS VERY LARGE SET  
4 OF VOLUNTEERS WHO SPAN FROM ALL AREAS OF THE WORLD AND  
5 THEY REPRESENT VARIETY OF INTERESTS, GOVERNMENTAL  
6 INTERESTS, BUSINESS INTERESTS, INTELLECTUAL PROPERTY  
7 INTERESTS. IT INCLUDES PEOPLE WITH EDUCATION BACKGROUNDS,  
8 AND VARIOUS PUBLIC POLICY INTERESTS.

9 Q AND DO THOSE VARIOUS COMMUNITIES, AS WE HAVE  
10 DESCRIBED THEM, HOW DID THEY -- HOW DID THEY PLAY INTO THE  
11 ADOPTION OR THE FORMATION REALLY OF THE NEW GLTD PROGRAM?

12 A SO THAT COMMUNITY IS STRUCTURED INTO -- ICANN  
13 HAS SEVEN ASPECTS OF THE ICANN COMMUNITY. SOME ARE CALLED  
14 SUPPORTING ORGANIZATIONS THAT DEVELOP POLICY  
15 RECOMMENDATIONS AND SOME ARE CALLED ADVISORY COMMITTEES  
16 AND THEY ADVISE THE ICANN BOARD.

17 Q GO AHEAD.

18 A AND SPECIFICALLY ABOUT NEW GLTDS, THERE'S A  
19 ONE SUPPORT ORGANIZATION CALLED THE GENERIC NAMES  
20 SUPPORTING ORGANIZATION OR THE GNSO AND THEY ARE THE BODY  
21 THAT DEVELOPED THE POLICY RECOMMENDATIONS BEHIND THE NEW  
22 GLTD PROGRAM.

23 Q WE WILL BE TALKING A LITTLE BIT MORE ABOUT  
24 SOME SPECIFICS OF THAT PROGRAM, BUT BEFORE WE MOVE OFF  
25 YOUR BACKGROUND, WHEN YOU STARTED WITH ICANN, WHAT WERE  
26 YOUR JOB RESPONSIBILITIES?

27 A I WAS RESPONSIBLE FOR THE DAY-TO-DAY OPERATION  
28 OF THE NEW GLTD PROGRAM.

1 Q GENERALLY, WHAT SORTS OF THINGS DID THAT  
2 INVOLVE?

3 A IT INCLUDED THE ADMINISTRATION OF THE  
4 EVALUATION OF ALL OF THE APPLICATIONS TO THE PROGRAM,  
5 COORDINATING WITH ALL OF THE EXPERT PANELS THAT ICANN HAD  
6 HIRED TO PERFORM THOSE EVALUATIONS. COMMUNICATING WITH  
7 THE APPLICANTS WHEN THEY HAD QUESTIONS ABOUT THEIR  
8 APPLICATION.

9 Q HOW LONG DID YOU HOLD THE GENERAL MANAGER  
10 TITLE?

11 A I HAD THAT TITLE FOR OVER A YEAR.

12 Q AND THEN DID IT CHANGE OR DID YOUR POSITION  
13 CHANGE?

14 A SOMETIME IN EARLY 2014, MY TITLE WAS  
15 EXPANDED -- MY TITLE WAS CHANGED TO REFLECT MY EXPANDED  
16 DUTIES.

17 Q WHAT WAS THE NEW TITLE?

18 A IT IS VICE PRESIDENT OF GLTD OPERATIONS.

19 Q AND UNDER THAT NEW TITLE, DID YOU CONTINUE TO  
20 HAVE EVERY DAY RESPONSIBILITY FOR THE GLTD PROGRAM?

21 A I DID.

22 Q WHAT WERE THE ADDITIONAL RESPONSIBILITIES YOU  
23 TOOK ON?

24 A ADDITIONALLY, I TOOK ON RESPONSIBILITY FOR  
25 PROVIDING SERVICE DELIVERY AND SUPPORT TO ICANN'S  
26 CONTRACTED PARTIES TO THESE REGISTRY OPERATORS AND  
27 REGISTRARS.

28 Q I WANT TO GO BACK TO SOME DISCUSSION ABOUT THE



1 GTLD PROGRAM. I CUT YOU OFF AS YOU WERE STARTING TO TELL  
2 US, YOU WERE ANSWERING MY QUESTION WHEN DID IT LAUNCH.  
3 YOU HAD DESCRIBED HOW THERE WAS A POLICY ADOPTED BY THE  
4 ICANN BOARD. I BELIEVE YOU SAID IN 2011; IS THAT CORRECT?

5 A SO THERE WAS THE POLICY BEHIND THE PROGRAM WAS  
6 ADOPTED IN 2008 BY THE ICANN BOARD.

7 Q I'M SORRY, MY MISTAKE.

8 A THEN THE COMMITTEE WORKED WITH ICANN STAFF  
9 COLLABORATIVELY OVER MANY YEARS TO DEVELOP WHAT WE HAVE  
10 BEEN DESCRIBING CALLED "THE APPLICANT GUIDEBOOK" AND THAT  
11 WAS ADOPTED BY THE BOARD IN 2011.

12 Q WHEN WERE APPLICATIONS FOR THE NEW GTLD  
13 PROGRAM FIRST ACCEPTED?

14 A APPLICATIONS WERE BEGUN TO BE ACCEPTED IN  
15 JANUARY OF 2012.

16 Q WAS THERE A WINDOW DURING WHICH APPLICANTS  
17 COULD APPLY?

18 A YES.

19 Q WHAT WAS THAT WINDOW?

20 A THERE WAS AN APPLICATION WINDOW BETWEEN --  
21 FROM JANUARY THROUGH MAY OF 2012.

22 Q YOU MENTIONED A MOMENT AGO, BUT JUST TO MAKE  
23 SURE THE RECORD IS CLEAR, IS THERE A SET OF RULES THAT  
24 GOVERNS THE NEW GTLD PROGRAM?

25 A YES.

26 Q AND WHAT IS THAT CALLED?

27 A THE APPLICANT GUIDEBOOK.

28 Q CAN YOU, AGAIN, GENERALLY FOR THE COURT

1 DESCRIBE THE SORTS OF THINGS THAT ARE INCLUDED IN THE --  
2 LET ME GET IT RIGHT NOW, APPLICANT GUIDEBOOK?

3 A SURE. SO THE APPLICANT GUIDEBOOK IS OVER 300  
4 PAGES LONG. IT INCLUDES A SET OF -- IT DESCRIBES THE  
5 PROCESS FOR APPLYING TO THE PROGRAM. IT INCLUDES THE  
6 PROCESS THAT WAS TO BE FOLLOWED FOR THE EVALUATION OF THE  
7 PROGRAM. IT INCLUDED THE APPLICATION QUESTIONS ITSELF.  
8 AMONG OTHER THINGS, IT INCLUDED A COPY OF THE REGISTRY  
9 AGREEMENT THAT APPLICANTS WOULD HAVE TO SIGN IF THEY WERE  
10 APPROVED TO BE A REGISTRY OPERATOR AND THEN IT ALSO  
11 INCLUDED THE TERMS AND CONDITIONS OF THE PROGRAM AND MUCH  
12 MORE.

13 Q EARLIER TODAY WHEN MS. BEKELE WAS TESTIFYING,  
14 SHE DESCRIBED -- USED THE PHASE CONSENSUS DRIVEN. DO YOU  
15 AGREE THAT THE GUIDEBOOK CAME ABOUT THROUGH A CONSENSUS  
16 DRIVEN PROCESS?

17 A I WOULD. MAY I DESCRIBE?

18 Q YES, PLEASE.

19 A SO THE GUIDEBOOK WAS DRAFTED OVER SEVERAL  
20 YEARS AND PORTIONS OF THE GUIDEBOOK WERE WRITTEN BY STAFF,  
21 PUBLISHED AND RECEIVED PUBLIC COMMENT.

22 ICANN, IN ITS WORK, HAS A PROCESS WE CALL  
23 "PUBLIC COMMENT PROCESS" IN WHICH MATERIALS ARE PUBLISHED  
24 AND THE GENERAL PUBLIC AS WELL AS THOSE MEMBERS OF THAT  
25 ICANN COMMUNITY I DESCRIBED ARE INVITED TO COMMENT ON THE  
26 MATERIALS BEING -- BEING PUBLISHED AND DEVELOPED. SO  
27 THIS -- THIS GUIDEBOOK WAS DEVELOPED THROUGH THAT TYPE OF  
28 A CONSENSUS APPROACH.

1 BY MS. BURKE:

2 Q YOU MENTIONED THAT ICANN WAS EMBARKED ON NEW  
3 PROCESS. DO YOU KNOW IF BEFORE THE PROCESS STARTED OR  
4 BEFORE THE APPLICATION PERIOD OPENED, DID ICANN HAVE IN  
5 MIND A NUMBER OF APPLICATIONS IT THOUGHT IT MIGHT RECEIVE?

6 A THE GUIDEBOOK WAS WRITTEN AND DEVELOPED  
7 PRESUMING THAT WE RECEIVE ABOUT 500 APPLICATIONS.

8 Q HOW MANY APPLICATIONS DID ICANN RECEIVE?

9 A MANY MORE. WE RECEIVED 1,930, NEARLY 2,000  
10 APPLICATIONS.

11 Q YOU MENTIONED QUICKLY, BUT I WANT YOU TO STEP  
12 THROUGH FOR US AT A GENERAL LEVEL. WHAT ARE SOME OF THE  
13 STEPS INVOLVED IN PROCESSING OR FOR AN APPLICATION TO BE  
14 PROCESSED THROUGH THE NEW GLTD PROGRAM?

15 A SO ONE OF THE FIRST EARLY THINGS WE DID WITH  
16 EVERY APPLICATION IS WE -- IN ORDER TO PROCESS THEM AS  
17 EFFICIENTLY AND EFFECTIVELY, WE WANTED TO PRIORITIZE THOSE  
18 APPLICATIONS, SO WE HELD A PRIORITIZATION DRAW IN WHICH  
19 APPLICANTS RECEIVED A PRIORITY NUMBER THAT LED TO THE  
20 SEQUENTIAL PROCESSING OF THE APPLICATION.

21 THEN EVERY APPLICATION WENT THROUGH WHAT WE  
22 CALL "INITIAL EVALUATION" AND THE INITIAL EVALUATION  
23 INCLUDED ABOUT FIVE EVALUATIONS. IT INCLUDED A BACKGROUND  
24 SCREENING ABOUT THE CRIMINAL HISTORY AS WELL AS CYBER  
25 SQUATTING OR BAD BEHAVIOR IN THE INTERNET FOR THE  
26 APPLICANT AND THE MEMBERS.

27 IT INCLUDED A FINANCIAL EVALUATION, A  
28 TECHNICAL EVALUATION, SOMETHING WE CALL A "DNS

1 EVALUATION," A VERY TECHNICAL DESCRIPTION OF HOW THE TLD  
2 WILL BE OPERATED AND THEN FINALLY EVERY APPLICATION GOES  
3 THROUGH A SERIES OF STRING REVIEWS, THE LAST OF WHICH WE  
4 HAVE BEEN TALKING ABOUT THE GEOGRAPHIC NAMES PANEL  
5 EVALUATION.

6 Q DOES EVERY APPLICATION GO THROUGH GEOGRAPHIC  
7 NAMES EVALUATION?

8 A YES.

9 THE COURT: JUST A MINUTE, GENERALLY, RIGHT, IN  
10 YOU'RE NOT TALKING SPECIFIC DOT X, RIGHT?

11 THE WITNESS: CORRECT.

12 THE COURT: OKAY. THANK YOU.

13 BY MS. BURKE:

14 Q DOES EVERY EVALUATION GO THROUGH GEOGRAPHIC  
15 NAMES REVIEW?

16 A YES, IT DID.

17 Q WHY?

18 A WELL, SO SOME APPLICANTS KNEW THEY WERE  
19 APPLYING FOR A STRING THAT DENOTED A REGION OR A CITY, BUT  
20 SOME APPLICANTS APPLIED FOR STRINGS THAT WERE ON A RESERVE  
21 LIST OF NAMES THAT COULDN'T BE DELEGATED. OTHERS APPLIED  
22 FOR STRINGS THAT THEY DIDN'T EVEN REALIZE WERE A REGION OR  
23 GEOGRAPHIC NAME SOMEWHERE IN THE WORLD THAT THEY WEREN'T  
24 FAMILIAR WITH.

25 Q THE FIRST PART OF GEOGRAPHIC NAMES EVALUATION  
26 ANSWERS THAT QUESTION; IS THAT CORRECT?

27 A THAT'S CORRECT.

28 Q WHAT -- WHAT IS THE REST OF GEOGRAPHIC NAMES

1 EVALUATION FOR THOSE THAT ARE IDENTIFIED TO BE GEOGRAPHIC  
2 NAMES?

3 A SO AFTER DETERMINING WHETHER OR NOT THE STRING  
4 IS A GEOGRAPHIC NAME, THEN THE NEXT ITEM THE PANEL LOOKS  
5 AT IS DO THEY HAVE ADEQUATE SUPPORT. SO LOOKING FOR  
6 LETTERS OF SUPPORT OR NONOBJECTIONS BY THE RELEVANT  
7 AUTHORITY. AND THEN FINALLY, THEY LOOK TO VERIFY THOSE  
8 LETTERS WITH THE PARTY THAT PROVIDED THEM.

9 Q SO A GEOGRAPHIC NAME THAT INVOLVES MORE THAN  
10 ONE LOCAL GOVERNMENT, FOR EXAMPLE, WHAT IS THE STANDARD  
11 THAT THE APPLICANT HAD TO MEET?

12 A THE APPLICANT GUIDEBOOK REQUIRED THAT  
13 APPLICANT'S APPLICATION FOR REGIONS OR IN THIS CASE A  
14 CONTINENT REQUIRED APPROVAL LETTERS OF SUPPORT OR  
15 NONOBJECTIONS FROM 60 PERCENT OF THE COUNTRIES OR RELEVANT  
16 AUTHORITIES UNDER THAT UMBRELLA.

17 Q ARE YOU AWARE -- HOW MANY APPLICATIONS WERE  
18 THERE FOR DOTAFRICA?

19 A THERE WERE TWO APPLICATIONS.

20 Q WE HAVE BEEN TALKING ABOUT DCA'S APPLICATION  
21 AND THE OTHER APPLICANT WAS WHOM?

22 A ZACR.

23 Q AND OTHER THAN THE APPLICATIONS FOR DOTAFRICA,  
24 DID ANY OTHER APPLICATION FOR A GEOGRAPHIC NAME INVOLVE  
25 MORE THAN ONE RELEVANT GOVERNMENT OR LOCAL GOVERNMENT?

26 A NOT THAT I RECALL.

27 Q WHY IS THE 60 PERCENT SUPPORT OR NONOBJECTION  
28 REQUIREMENT IMPORTANT FOR A GEOGRAPHIC NAME?

1 A DURING THE APPLICATION WINDOW IN 2012.

2 Q ONCE YOU JOINED ICANN, DID YOU ASSUME  
3 RESPONSIBILITIES RELATED TO DCA'S APPLICATION FOR  
4 DOTAFRICA?

5 A I DID.

6 Q GENERALLY, AGAIN, WHAT WERE THOSE?

7 A TO ENSURE THE EVALUATION OF THE APPLICATION BY  
8 ALL THE RELEVANT PANELS RESPONSIBLE FOR THE  
9 PRIORITIZATION, COORDINATING THE RESULTS OF ALL THOSE  
10 EVALUATION PANELS, COMMUNICATING THE RESULTS THROUGH  
11 REPORTS TO THE APPLICANT AND PUBLICLY.

12 Q JUST TO BE CLEAR, YOU'RE PERSONALLY NOT  
13 PERFORMING EVERY SINGLE ONE OF THOSE. YOU HAVE A STAFF;  
14 IS THAT CORRECT?

15 A YES. YES.

16 Q YOU OVERSEE THE STAFF IN THOSE FUNCTIONS?

17 A THAT'S CORRECT.

18 Q WAS DCA'S APPLICATION PUT THROUGH THE PHASES  
19 OF THE APPLICATION PROCESS YOU DESCRIBED?

20 A IT WAS.

21 Q WE HAVE HEARD A LOT ABOUT GAC ADVICE THAT WAS  
22 ISSUED IN 2013. LET ME ASK, DID DCA'S APPLICATION  
23 COMPLETE ALL THE PROCESSES PRIOR TO THE GAC ADVICE BEING  
24 ISSUED IN 2013?

25 A NO, IT HAD NOT.

26 Q WHICH, IF ANY, HAD IT NOT COMPLETED?

27 A THE GEOGRAPHIC NAMES PANEL REVIEW WAS STILL IN  
28 PROCESS.

1 THE CONSENSUS ADVICE ABOUT DCA'S DOTAFRICA APPLICATION?

2 A THE BOARD HAD A MEETING AND CONSIDERED THAT  
3 ADVICE AND ULTIMATELY THEY ADOPTED ADVICE FROM THAT  
4 COMMUNIQUE.

5 Q AND TO BE CLEAR, AT THE TIME THAT THE BOARD  
6 VOTED TO ACCEPT THE GAC ADVICE, HAD DCA'S APPLICATION  
7 COMPLETED GEOGRAPHIC NAMES REVIEW?

8 A NO, IT HAD NOT.

9 Q HAD IT COMPLETED INITIAL EVALUATION IN TOTAL?

10 A NO, IT HAD NOT.

11 Q HAD ICANN EVER TOLD DCA AT THAT POINT, UP  
12 UNTIL THAT POINT WHEN THE GAC ADVICE WAS ADOPTED BY THE  
13 BOARD, THAT THE DCA'S APPLICATION HAD PAST GEOGRAPHIC  
14 NAMES REVIEW?

15 A WE HAD NOT.

16 Q DID ICANN INFORM DCA AT SOME POINT THAT IT HAD  
17 CEASED PROCESSING ITS APPLICATION?

18 A YES, WE DID.

19 Q APPROXIMATELY WHEN WAS THAT AROUND?

20 A IT WAS SHORTLY AFTER THE BOARD RESOLUTION  
21 ADOPTING THE GAC ADVICE, SO I BELIEVE IT WAS EARLY 2013,  
22 EARLY -- I'M SORRY, EARLY JULY OF 2013.

23 Q AND IS THAT PART --

24 THE COURT: EXCUSE ME. WHEN WAS -- I HAVE HERE  
25 THAT IN APRIL OF 2014, GAC PROVIDED THE ADVICE IN A  
26 WRITTEN COMMUNIQUE. IS THAT WRONG?

27 THE WITNESS: APRIL 2013.

28 THE COURT: '13. OKAY. ALL RIGHT. OKAY.

1 A YES, I HAVE.

2 Q I'VE PUT IN FRONT OF YOU A BINDER WHICH HAS  
3 SOME OF THE EXHIBITS THAT HAVE BEEN MARKED IN THIS TRIAL.  
4 IF YOU WOULD TURN TO EXHIBIT 43, PLEASE, AND YOUR HONOR, I  
5 BELIEVE WE ALSO PROVIDED A COPY OF THAT BINDER TO YOU.

6 ONCE YOU'RE AT EXHIBIT 43, I SPECIFICALLY  
7 WOULD LIKE TO LOOK AT -- STARTING AROUND PARAGRAPH 148  
8 WHICH IS ON PAGE 61 OF THE EXHIBIT.

9 OKAY. FIRST OF ALL, CAN YOU READ FOR THE  
10 COURT WHAT THE TITLE OF THIS SECTION IS, RIGHT ABOVE  
11 PARAGRAPH 148?

12 A "DECLARATION OF THE PANEL."

13 Q AND YOU'VE READ THIS BEFORE, CORRECT?

14 A I HAVE.

15 Q CAN YOU SUMMARIZE FOR US WHAT IT STATES IN  
16 PARAGRAPH 148?

17 A IT SAYS THAT THE PANEL DETERMINED THAT THE  
18 ACTIONS AND INACTIONS OF THE BOARD WITH RESPECT TO THE DCA  
19 APPLICATION FOR DOTAFRICA WERE INCONSISTENT WITH THE  
20 ARTICLES OF INCORPORATION AND BYLAWS OF ICANN.

21 Q DOES THAT PARAGRAPH REQUIRE OR RECOMMEND ANY  
22 ACTION BY ICANN?

23 A NO, IT DOES NOT.

24 Q OKAY. LET'S GO TO PARAGRAPH 149. CAN YOU  
25 SUMMARIZE FOR THE COURT WHAT THAT PARAGRAPH STATES?

26 A IT STATES THAT ICANN SHOULD CONTINUE TO  
27 REFRAIN FROM DELEGATING THE DOTAFRICA GLTD AND PERMIT  
28 DCA'S APPLICATION TO PROCEED THROUGH THE REMAINDER OF THE



1 NEW GTLD APPLICATION PROCESS.

2 Q DOES THAT PARAGRAPH 149 REQUIRE ANY ACTION ON  
3 THE PART OF THE BOARD?

4 A YES.

5 Q LET'S LOOK AT PARAGRAPH 150. CAN YOU  
6 SUMMARIZE WHAT THAT PARAGRAPH ADDRESSES?

7 A IT DIRECTED THAT ICANN NEEDED TO PAY THE FEES  
8 AND COSTS FOR DCA.

9 Q WOULD THAT PARAGRAPH REQUIRE ANY ACTION BY THE  
10 BOARD OF ICANN?

11 A YES.

12 Q FINALLY, PARAGRAPH 151, CAN YOU SUMMARIZE FOR  
13 US WHAT THAT PARAGRAPH STATES?

14 A IT SAYS THAT BOTH DCA AND ICANN SHOULD BE  
15 RESPONSIBLE FOR THEIR OWN EXPENSES AND LEGAL  
16 REPRESENTATION.

17 Q DOES THAT PARAGRAPH REQUIRE ANY ACTION BY THE  
18 BOARD?

19 A IT DOES NOT.

20 Q UNDER THE HEADING AND IN THE -- UNDER THE  
21 HEADING "DECLARATION OF THE PANEL," DOES THE IRP PANEL SAY  
22 ANYTHING ABOUT THESE DECLARATIONS BEING BINDING?

23 A IT DOES NOT.

24 Q DID THE ICANN BARRED TAKE ANY ACTIONS IN  
25 RESPONSE TO THE FINAL DECLARATION?

26 A YES, THEY DID.

27 Q HOW DO YOU KNOW WHAT THEY DID?

28 A I READ THE RESOLUTION, THE BOARD RESOLUTION

1 ADOPTING THE DECLARATION.

2 Q IN THAT SAME BINDER THERE SHOULD BE A TAB  
3 MARKED EXHIBIT 144. CAN YOU TURN WITH ME THERE?

4 A YES.

5 Q DO YOU RECOGNIZE THAT?

6 A YES.

7 Q WHAT IS IT, PLEASE?

8 A IT LOOKS LIKE A PRINTOUT FROM ICANN'S WEBSITE  
9 OF THE AGENDA OF A BOARD MEETING AND RESOLUTION OF THE  
10 MATTER OF THE DCA IRP.

11 Q IF WE -- I'M SORRY. IF YOU LOOK AT THE BOTTOM  
12 OF THE FIRST PAGE CONTINUING TO THE SECOND PAGE, DOES THAT  
13 RESTATE THE PARAGRAPHS THAT WE JUST READ FROM THE PANEL'S  
14 FINAL DECLARATION?

15 A YES, IT DOES.

16 Q AND THEN CAN YOU SEE A PART OF THIS OR A SPOT  
17 IN THIS WHERE THE RESOLUTION IS ACTUALLY STATED?

18 A YES.

19 Q WHERE IS THAT?

20 A AFTER THE WHEREAS IS THE RESOLUTION IS AT THE  
21 TOP OF PAGE 3, IT STARTS WITH "RESOLVED."

22 Q IF YOU COULD READ FOR US WHAT THAT SAYS, I'LL  
23 BREAK THEM DOWN. JUST READ THE INTRODUCTION IN NO. 1  
24 FIRST, PLEASE.

25 A (READING:)  
26 RESOLVED. THE BOARD HAS  
27 CONSIDERED THE ENTIRE  
28 DECLARATION AND HAS

1 DETERMINED TO TAKE THE  
2 FOLLOWING ACTIONS BASED  
3 ON THAT CONSIDERATION.  
4 (AS READ.)

5 Q AND WHAT IS THE FIRST NO. 1?

6 A (READING:)  
7 NUMBER 1, ICANN, SHALL  
8 CONTINUE TO REFRAIN FROM  
9 DELEGATING THE DOTAFRICA  
10 GLTD. (AS READ.)

11 Q AND WAS THAT ONE OF THE RECOMMENDATIONS THAT  
12 THE BOARD MADE IN ITS FINAL DECLARATION?

13 A IT WAS ONE OF THE RECOMMENDATIONS THAT THE IRP  
14 MADE.

15 Q LET ME RESTATE THE QUESTION SO THE RECORD IS  
16 CLEAR.

17 WAS THAT ONE OF THE RECOMMENDATIONS THAT THE  
18 IRP PANEL MADE IN ITS FINAL DECLARATION?

19 A YES, IT WAS.

20 Q DID ICANN CHANGE ANYTHING ABOUT THE WORDING OF  
21 WHAT THE IRP PANEL RECOMMENDED?

22 A NO, THEY DID NOT.

23 Q LET'S MOVE ONTO NO. 2. CAN YOU READ THAT FOR  
24 US, PLEASE?

25 A (READING:)  
26 ICANN SHALL PERMIT DCA'S  
27 APPLICATION TO PROCEED  
28 THROUGH THE REMAINDER OF

1) THE NEW GLTD APPLICATION

2) PROCESS AS SET OUT

3) BELOW. (AS READ.)

4) Q AND IF IT IS EASIER YOU CAN LOOK ACROSS THE  
5) PAGE WHERE IT REQUOTED THE DECLARATION. DID THAT LANGUAGE  
6) MIRROR THE LANGUAGE OF THE RECOMMENDATION MADE BY THE IRP  
7) PANEL?

8) A YES, IT DID.

9) Q FINALLY, WHAT WAS THE THIRD RESOLUTION OF THE  
10) BOARD?

11) A (READING:) .

12) ICANN SHALL REIMBURSE

13) DCA FOR THE COSTS OF THE

14) IRP AS SET FORTH IN

15) PARAGRAPH 150 OF THE

16) DECLARATION. (AS READ.)

17) Q DID THE BOARD NEED TO MAKE A DECISION ABOUT  
18) WHETHER THE IRP DECISION WAS BINDING IN ORDER TO IMPLEMENT  
19) THE PANEL'S FINAL DECLARATION?

20) A NO.

21) Q DID THE BOARD ADOPT THE IRP PANEL'S  
22) RECOMMENDATION IN FULL?

23) A YES, THEY DID.

24) Q YOU READ THIS RESOLUTION; IS THAT CORRECT?

25) A I HAVE.

26) Q AT OR NEAR THE TIME THAT IT WAS PASSED?

27) A YES, I DID.

28) Q WHAT DID YOU AND YOUR STAFF DO IN RESPONSE TO

1 THIS BOARD RESOLUTION?

2 A WE TOOK ACTION TO IMPLEMENT THE ACTIONS THE  
3 BOARD DIRECTED.

4 Q WHAT SPECIFICALLY DID YOU DO?

5 A SO SPECIFICALLY, WE CONTINUED TO HOLD OFF  
6 DELEGATING DOTAFRICA TO ANY PARTY. ALSO, AS WE REINSTATED  
7 THE DCA APPLICATION BACK INTO THE EVALUATION PROCESS, BACK  
8 TO THE POINT OF WHICH IT HAD CEASED PROCESSING IN 2013.

9 Q LET'S GET CLEAR ABOUT THIS. DID YOU RESTART  
10 DCA'S APPLICATION FROM THE BEGINNING OF THE INITIAL  
11 REVIEW?

12 A NO, WE DID NOT.

13 Q WHERE EXACTLY DID YOU START IT OR RESTART IT?

14 A WE PUT IT BACK RIGHT WHERE IT HAD LEFT OFF  
15 WITH THE REMAINING PANEL THAT WAS NEEDED TO COMPLETE  
16 INITIAL EVALUATION, WHICH WAS REMAINING AT THAT TIME WAS  
17 GEOGRAPHIC NAMES PANEL REVIEW.

18 Q AND WHY IS IT, TO BE CLEAR, THAT'S WHERE STAFF  
19 FELT THAT IT NEEDED TO PUT THE APPLICATION?

20 A BECAUSE THAT'S WHAT THE IRP DECLARATION AND  
21 THE BOARD RESOLUTION SAID.

22 Q WHAT SPECIFICALLY -- WHAT WERE THE WORDS THEY  
23 USED THAT LED YOU TO BELIEVE THAT?

24 A WELL, IT SAYS,

25 (READING:)

26 ICANN SHALL PERMIT DCA'S

27 APPLICATION TO PROCEED

28 THROUGH THE REMAINDER OF

1 THE NEW GLTD APPLICATION

2 PROCESS AS SET OUT

3 BELOW. (AS READ.)

4 SO THE REST OF THE PROCESS BEING GEOGRAPHIC

5 NAMES PANEL EVALUATION IS THE NEXT STEP.

6 Q DO YOU KNOW WHETHER, IN FACT, THE GEOGRAPHIC

7 NAMES REVIEW PANEL RESUMED ITS EVALUATION OF DCA'S

8 APPLICATION?

9 A YES, THEY DID.

10 Q HOW DO YOU KNOW THAT?

11 A BECAUSE MY TEAM AND I HAD TO DIRECT THEM TO DO

12 SUCH.

13 Q WHAT WAS THE RESULTS OF THE GEOGRAPHIC REVIEW

14 PANEL'S EVALUATION?

15 A SO THE PANEL IN ITS -- RESUMED ITS INITIAL  
16 EVALUATION OF DCA'S APPLICATION AND THEY PROVIDED A SET OF  
17 CLARIFYING QUESTIONS WHICH WE -- MY TEAM CONVEYED TO THE  
18 APPLICANT.

19 Q IS THAT PART OF THE REGULAR PROCESS WHEN

20 EVALUATING GEOGRAPHIC NAMES?

21 A YES, IT IS.

22 Q WAS THAT THE SAME PROCESS THAT WAS FOLLOWED IN

23 OTHER APPLICANT'S APPLICATION EVALUATIONS?

24 A YES. I MEAN, FOR ZACR GOT CLARIFYING

25 QUESTIONS, ALMOST -- ALMOST EVERY GEOGRAPHIC NAMES

26 APPLICATION RECEIVED CLARIFYING QUESTIONS AND NEEDED TO

27 GET UPDATED LETTERS OF SUPPORT OR NON-OBJECTIONS THAT MET

28 ALL OF THE CRITERIA THAT THE PANEL REQUIRED.

1 Q WHEN THE PANEL DECIDED TO ISSUE CLARIFYING  
2 QUESTIONS, WHAT ROLE, IF ANY, DID ICANN STAFF PLAY? I'M  
3 SORRY, LET ME BE SPECIFIC TO DCA THIS TIME. COME BACK TO  
4 THE SPECIFICS.

5 A SURE. WE RECEIVED THE CLARIFYING QUESTIONS  
6 FROM THE PANEL AND WE PASS THEM ALONG TO THE APPLICANT AND  
7 WE ASKED THEM TO RESPOND TO THOSE QUESTIONS.

8 Q DID THOSE CLARIFYING QUESTIONS IDENTIFY  
9 SPECIFIC DEFICIENCIES FOR THE APPLICANT FOR DCA?

10 A YES. THE GEOGRAPHIC NAMES, CLARIFYING  
11 QUESTIONS, IN GENERAL, BUT SPECIFICALLY FOR DCA WOULD CALL  
12 OUT FOR EACH LETTER OF SUPPORT, WHICH OF THE CRITERIA WERE  
13 INSUFFICIENT.

14 Q AFTER THE STAFF PAST ON THE CLARIFYING  
15 QUESTIONS TO DCA, WHAT HAPPENED NEXT?

16 A SO IN THIS CASE DCA RESPONDED WITH A WRITTEN  
17 STATEMENT SAYING THAT THEY CONSIDERED THE MATERIALS  
18 PREVIOUSLY PROVIDED TO BE SUFFICIENT.

19 Q WHEN YOU SAY "PREVIOUSLY PROVIDED," WHAT ARE  
20 YOU REFERRING TO?

21 A THE LETTERS OF SUPPORT THAT WERE PROVIDED WITH  
22 THE ORIGINAL APPLICATION BACK IN 2012.

23 Q ARE THOSE THE LETTERS THAT THE CLARIFYING  
24 QUESTIONS WERE ADDRESSING?

25 A YES, THEY WERE.

26 Q WHEN YOU RECEIVED A RESPONSE FROM DCA, WHAT  
27 DID YOU DO?

28 A WE PASSED THAT RESPONSE BACK TO THE PANEL.

1 Q WHAT WAS THE PANEL'S ULTIMATE RESPONSE?

2 A SO THEY RESPONDED SAYING THAT DCA DID NOT PASS  
3 THE GEOGRAPHIC NAMES EVALUATION.

4 Q WHAT DID STAFF DO AT THAT POINT?

5 A SO WE TOOK THAT RESPONSE. WE COMPILED IT WITH  
6 THE RESULTS OF ALL OF THE OTHER INITIAL EVALUATION PANEL  
7 RESULTS AND PRODUCED AN INITIAL EVALUATION REPORT, WHICH  
8 WAS SHARED WITH THE -- SENT TO THE APPLICANT AND  
9 PUBLISHED.

10 Q AT THAT TIME WAS ANY OTHER OPTION OR  
11 INFORMATION GIVEN TO THE APPLICANT, TO DCA?

12 A SO AT THAT TIME THE REPORTS SAYS THAT THEY DID  
13 NOT PASS GEOGRAPHIC NAMES EVALUATION AND THAT THEY WERE  
14 ELIGIBLE FOR EXTENDED EVALUATION.

15 Q WAS ISSUING THAT SORT OF REPORT ON AN INITIAL  
16 EVALUATION, PART OF THE STANDARD PROCESS THAT ICANN  
17 FOLLOWED WITH GTLD APPLICATIONS?

18 A YES, WE DID THAT WITH EVERY APPLICATION  
19 THAT -- THAT GOT TO THAT POINT, YES.

20 Q AND WAS IT ALSO PART OF THE STANDARD PROCESS  
21 AT ICANN TO OFFER EXTENDED EVALUATION?

22 A YES, IF -- IF THEY WERE ELIGIBLE, IF THEY HAD  
23 NOT PASSED INITIAL EVALUATION AND YET THEY WERE STILL  
24 ELIGIBLE THEY COULD GO TO EXTENDED EVALUATION.

25 Q DID DCA CHOOSE TO GO TO EXTENDED EVALUATION?

26 A THEY DID.

27 Q WHAT HAPPENED ONCE THEY MADE THAT CHOICE?

28 A SO THEN WE INFORMED -- WE -- ICANN STAFF, MY



1 TEAM, WE INFORMED THE GEOGRAPHIC NAMES PANEL THAT THE  
2 APPLICANT WAS CONTINUING.

3 AT THAT POINT THE -- AS WITH COMMON PRACTICE  
4 WITH EXTENDED EVALUATION, THE GEOGRAPHIC NAMES PANEL  
5 ISSUED CLARIFYING QUESTIONS, AGAIN, TO THE APPLICANT TO  
6 EXPLAIN WHAT WAS DEFICIENT OR INSUFFICIENT IN THE  
7 MATERIALS THAT HAD BEEN PREVIOUSLY PROVIDED.

8 Q IN THIS CASE, WE HEARD TESTIMONY EARLIER THAT  
9 THE CLARIFYING QUESTIONS WERE IDENTICAL OR VERY SIMILAR TO  
10 THE ONES GIVEN DURING THE INITIAL EVALUATION. WHY WAS  
11 THAT?

12 A BECAUSE THE MATERIAL PROVIDED HAD NOT CHANGED  
13 AND SO THE PANEL'S EVALUATION OF SUFFICIENCY OR  
14 INSUFFICIENCY HAD NOT CHANGED.

15 Q DID DCA RESPOND TO THOSE ADDITIONAL CLARIFYING  
16 QUESTIONS?

17 A THEY RESPONDED VERY SIMILARLY AS DURING  
18 INITIAL EVALUATION, STATING WITH A WRITTEN STATEMENT  
19 SAYING THAT THE MATERIALS THAT HAD BEEN SUBMITTED  
20 ORIGINALLY IN 2012 WITH THE APPLICATION WERE SUFFICIENT  
21 FROM THEIR PROSPECTIVE.

22 Q DID THEY EVER SUBMIT ADDITIONAL OR NEW LETTERS  
23 ADDRESSING THE DEFICIENCIES IDENTIFIED?

24 A NO.

25 THE COURT: WE ARE GOING TO TAKE A RECESS AT THIS  
26 TIME. WE ARE GOING TO RETURN AT 1:30.

27 COURT IS IN RECESS.

28 MS. BURKE: THANK YOU, YOUR HONOR.

(NOON RECESS TAKEN.)

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1 CASE NO: BC607494  
2 CASE NAME: DOTCONNECTAFRICA TRUST V.  
3 INTERNET CORPORATION FOR  
4 ASSIGNED NAMES & NUMBERS  
5 LOS ANGELES, CALIFORNIA THURSDAY, MARCH 1, 2018  
6 DEPARTMENT NO: 53 HON. HOWARD HALM, JUDGE  
7 APPEARANCES: (AS HERETOFORE NOTED.)  
8 REPORTER: KERI LOGAN, CSR NO. 12608  
9 TIME: AFTERNOON SESSION

10  
11 (THE FOLLOWING PROCEEDINGS  
12 TOOK PLACE IN OPEN COURT:)

13  
14 THE COURT: ALL RIGHT. WE'RE BACK ON THE RECORD IN  
15 DCA VERSUS ICANN, CASE NO. BC607494. COUNSEL ARE PRESENT  
16 AND THE WITNESS HAS RESUMED THE WITNESS STAND AND COUNSEL  
17 YOU MAY PROCEED.

18 MS. BURKE: THANK YOU, YOUR HONOR.

19  
20 DIRECT EXAMINATION (RESUMED)

21 BY MS. BURKE:

22 Q MS. WILLETT, I WANT TO TAKE YOU BACK TO A TERM  
23 YOU USED DURING YOUR EARLIER TESTIMONY. YOU ANSWERED A  
24 QUESTION I BELIEVE THAT INCLUDING THE PHRASE THAT YOU  
25 "PUBLISHED THE INITIAL EVALUATION REPORT."

26 CAN YOU EXPLAIN FOR THE COURT WHAT IT MEANS  
27 WHEN YOU SAY YOU "PUBLISHED A DOCUMENT"?

28 A SURE. SO ON ICANN.ORG'S WEBSITE, WE HAVE A

1 Q AND ONE OF THOSE IS AN OMBUDSMAN. DO YOU  
2 RECALL THAT?

3 A YES.

4 Q IS THE OMBUDSMAN IN A POSITION TO MAKE ANY  
5 KIND OF BINDING RULING THAT IS ENFORCEABLE BY ICANN?

6 A THE OMBUDSMAN MAKES A RECOMMENDATION TO THE  
7 ICANN BOARD.

8 Q AND THE ICANN BOARD DOESN'T HAVE TO FOLLOW  
9 THAT, DOES IT?

10 A NO.

11 Q AND THE REQUEST FOR RECONSIDERATION, THAT'S A  
12 DECISION THAT'S MADE BY THE BOARD OR A COMMITTEE OF THE  
13 BOARD?

14 A THAT'S CORRECT.

15 Q THERE'S NO INDEPENDENT DETERMINATION OUTSIDE  
16 OF ICANN FOR THAT, IS THERE?

17 A THAT'S CORRECT.

18 Q AND WITH RESPECT TO THE IRP PRIOR TO THE DCA'S  
19 IRP, ICANN TOOK THE POSITION THAT IRPS WERE NOT BINDING,  
20 RIGHT?

21 A I HAVE HEARD THAT, YES.

22 Q AND THEY TOOK THE POSITION DURING THE  
23 DOTAFRICA IRP FOR DCA THAT IRPS WOULD NOT BE BINDING,  
24 RIGHT?

25 A I HAVE HEARD THAT THESE LAST TWO DAYS.

26 Q IT IS ALSO THE CASE THAT SUBSEQUENT TO THE DCA  
27 IRP THAT ICANN CONTINUED TO TAKE THE POSITION THAT IRPS  
28 ARE NOT BINDING, CORRECT?

(PROCEEDINGS WERE ADJOURNED.)

\* \* \* \* \*

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1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 COUNTY OF LOS ANGELES

3 DEPARTMENT 53

HON. HOWARD HALM, JUDGE

4  
5 DOTCONNECTAFRICA TRUST,

) NO. BC607494

6 PLAINTIFF,

7 VS.

8 INTERNET CORPORATION FOR ASSIGNED  
9 NAMES AND NUMBERS,

10 DEFENDANT.  
11 \_\_\_\_\_ )

12  
13 REPORTER'S CERTIFICATE

14  
15 I, KERI A. LOGAN, CSR NO. 12608, OFFICIAL PRO  
16 TEMPORE REPORTER OF THE SUPERIOR COURT OF THE STATE OF  
17 CALIFORNIA, COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT  
18 I DID CORRECTLY REPORT THE PROCEEDINGS CONTAINED HEREIN  
19 AND THAT THE FOREGOING PAGES, COMPRISE A FULL, TRUE, AND  
20 CORRECT TRANSCRIPT OF THE PROCEEDINGS AND TESTIMONY TAKEN  
21 IN THE MATTER OF THE ABOVE-ENTITLED CAUSE ON MARCH 1,  
22 2018.

23  
24 DATED THIS 2ND DAY OF MARCH, 2018.

25  
26  
27 

28 \_\_\_\_\_  
KERI A. LOGAN  
OFFICIAL PRO TEMPORE REPORTER

# Exhibit S

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)  
Independent Review Panel**

**CASE # 50 2013 001083**

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

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

Represented by Mr. Arif H. Ali, Ms. Marguerite C. Walter and Ms. Erin Yates of Weil, Gotshal & Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A., and Ms. Meredith Craven of Weil, Gotshal & Manges LLP located at 767 Fifth Avenue, New York, NY 10153, U.S.A.

**And**

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

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

Claimant and the Respondent are hereafter jointly referred to as the "Parties".

**PROCEDURAL ORDER No. 3**

1. This Procedural Order No. 3 is rendered after considering the Parties' written submissions dated 30 August 2014 and following a telephone conference call with their representatives on 1 September 2014.
2. The Parties shall adhere going forward to the following timetable agreed upon in part among themselves and in other respects completed with the Panel's assistance and direction:
  - a. Simultaneous exchange of request for documents by **2 September 2014 at 12 p.m. Eastern Time, 9:00 a.m. Pacific**



- Time.**<sup>1</sup> Request for documents shall be made taking into consideration ICANN's Bylaws, the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process, the International Dispute Resolution Procedures of the ICDR (Amended and Effective 1 June 2009), the ICDR Guidelines for Arbitrators concerning Exchanges of Information, and where appropriate, taking guidance from the IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010) (together the "IRP Procedure Guidelines");
- b. Objections to request for documents, if any, shall be filed in accordance with the IRP Procedure Guidelines by **9 September 2014**, close of business in the location of each party's representative;
  - c. Voluntary production of documents and any application to the Panel for request for documents shall be submitted by **16 September 2014**, close of business in the location of each party's representatives;
  - d. Production of documents ordered to be produced by the Panel shall be completed by **2 October 2014**;
  - e. Exchange and filing of witness statements in accordance with the IRP Procedure Guidelines and this Procedural Order No. 3 shall be completed by **3 November 2014** for DCA Trust and **3 December 2014** for ICANN;
  - f. Exchange and filing of briefs in accordance with the IRP Procedure Guidelines and this Procedural Order No. 3 shall be completed by **3 November 2014** for DCA Trust and **3 December 2014** for ICANN. The briefs shall not exceed **30 pages**;
  - g. Notification of names and other contact details relating to the witnesses in accordance with the IRP Procedure Guidelines and this Procedural Order No. 3 shall be submitted by **26 November 2014 at 12 p.m. Eastern Time/9 a.m. Pacific Time**;
  - h. Confirmation of names of witnesses to be examined at the hearing in accordance with the IRP Procedure Guidelines and this Procedural Order No. 3 shall be submitted by **5 December 2014 at 12 p.m. Eastern Time/9 a.m. Pacific Time**.
3. The Panel will endeavor to deliver its decision on the Parties' request for documents following their application of 16 September 2014 by or shortly after **25 September 2014**. Should the Panel require additional time to deliver its decision in that regard, it will then provide the Parties,

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<sup>1</sup> This date has already passed, and the Parties have already presumably, completed their exchange.

if appropriate, with additional time to comply with the production of documents contemplated in paragraph 2 (d) above.

4. There will be a prehearing conference call with the Parties on **6 December 2014 at 11 a.m. Eastern Time, 8 a.m. Pacific Time and 5 p.m. Paris Time**. The Parties will be provided with an appropriate agenda for the conference call in advance of the call.
5. The in-person hearing for this proceeding is fixed to take place in Washington, D.C. on **19 and 20 December 2014**. Details concerning the location, and start and finish times for the hearing will be provided to the Parties in due course.
6. The following additional directions are set out by the Panel to assist the Parties' representatives. If either Claimant or Respondent has any comments with respect to this paragraph 6, they are invited to send the same to the Panel for consideration as soon as possible and certainly no later than by **5 September 2014 at 12 p.m. Eastern Time/9 a.m. Pacific Time**;

- i) Extensions of time shall be granted by the Panel in its discretion, in exceptional cases only and provided that a request is submitted before or, if not possible, immediately after the event preventing a party from complying with a given deadline.
- ii) All notifications, submissions and communications from the Parties to the Panel may be made by email. Exhibits shall be submitted in electronic format (preferably as searchable PDF files) simultaneously with the submission they accompany, by email and/or posted on the dedicated existing FTP server. Unless otherwise directed by the Panel, it shall not be necessary for the Parties to submit hard copies of their notifications, submissions, communications or exhibits.
- iii) The Parties shall send copies of correspondence between them to the Panel only if it pertains to a matter in which the Panel is required to take some action, or be apprised of some relevant event.

**Written submissions**

- iv) The paragraphs of all written submissions shall be numbered consecutively and the submissions shall include a table of contents.

- v) For each of their submissions, the Parties will clearly indicate the evidence they invoke in support of any assertion or argument: including any documents (with indication of the page and paragraphs), witness statement etc. that they rely upon.
- vi) After exchange of briefs, neither party shall be allowed to make any new allegations or present any new documentary evidence, as well as written witness statements, unless that party submits a reasoned request to the Panel showing that it had, without fault, no possibility or reason to make such new allegation or to offer such new evidence previously. The Panel shall decide on the admissibility and merits of such a request.

### **Documentary evidence**

- vii) The written submissions shall be accompanied by the documentary evidence and the testimonial evidence relied upon by Claimant and Respondent, respectively, including any bylaw, legislation, doctrine and case law relied upon by them.
- viii) The hearing documents shall be submitted in the following form:
  - a. all exhibits shall be numbered consecutively;
  - b. the number of each exhibit containing a document submitted by Claimant shall be preceded by the letter "C-#" and the number of each exhibit containing a document submitted by Respondent shall be preceded by the letter "R-#";
- ix) All documentary evidence submitted to the Panel shall be deemed true and complete, including evidence submitted in the form of copies, unless a party disputes its authenticity;

### **Witness Statements**

- x) Each witness statement shall:
  - a. contain the name and address of the witness, his or her relationship to any of the Parties (past and present, if any) and a description of his or her qualifications;
  - b. contain a full and detailed description of the facts, and the source of the witness' information as to those facts, sufficient to serve as that witness' evidence in the matter in dispute;

- c. contain an affirmation of the truth of the statement; and
  - d. be signed by the witness and give the date and place of signature.
- xi) If a party disputes the evidence put forward by a witness, it should request the presence of that witness at the hearing for cross-examination, as provided in section 6 (xii);
  - xii) Each party shall notify the other party, with a copy to the Panel, of the names of the witnesses of the other party whom that party wishes to cross-examine at the hearing, within the time limit determined by the Panel in this Procedural Order No. 3;
  - xiii) Being duly informed of the date of the hearing, the Parties will immediately after the receipt of this Procedural Order No. 3, or at least, as quickly as possible, inform their potential witnesses of the relevant dates set out in this Order to secure their presence at the hearing and avoid any disruption of the procedural calendar;
  - xiv) Witnesses shall be summoned by the party, which relies on their evidence. If a witness fails to attend at the hearing after having been duly notified to do so without a valid reason, the Panel shall in its discretion draw the necessary inferences and reach appropriate conclusions;
  - xv) The admissibility, relevance, weight and materiality of the evidence offered by a witness or a party shall be determined by the Panel;

**Witness hearing**

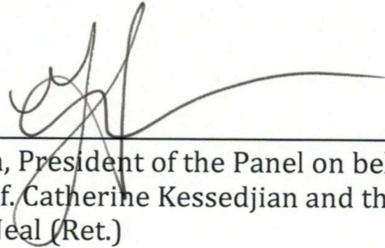
- xvi) The procedure for examining witnesses at the in-person hearing in Washington, D.C. shall be as follows:
  - a. Witnesses will be heard after a short opening statement by the party producing the witness and subsequently by the opposing party;
  - b. Unless otherwise agreed by the Parties, the order of appearance of witnesses will be decided by the Panel at the prehearing conference call or before;
  - c. Each witness shall first be invited to confirm or deny his or her written statement;
  - d. The Panel shall have the right to examine any witness and to interject with any questions it may have during the

- examination by counsel. The Panel shall also ensure that each party has the opportunity to re-examine a witness with respect to any questions asked by the Panel;
- e. After a short introduction by the party producing the witness, the other party shall proceed to cross-examine the witness, followed by a re-examination by the party producing the witness. The scope of re-examination shall be limited to matters that have arisen in the cross-examination only.
  - f. The Panel shall at all times have complete control over the procedure in relation to a witness giving oral testimony, including the right to limit or exclude any question to, or to refuse to a party to examine a witness when it considers that the factual allegation(s) on which the witness is being examined is (are) sufficiently proven by exhibits or other witnesses or that the particular witness's examination as such is irrelevant, immaterial or duplicative.
- xvii) Witnesses will not be heard under oath but the President shall draw their attention to the fact that the Panel requests them to tell the truth, the entire truth and nothing but the truth and shall ask them to confirm that they will comply with this request.
- xviii) Witnesses of fact may not be present in the hearing room during the examination of other witnesses of fact, unless the Parties agree otherwise. This rule, however, does not apply to Parties' representatives who have the right to remain in the hearing room at all times except during the examination of the Parties' representative(s) of the other party.
- xix) Unless expressly authorized or requested by the Panel, documents may only be submitted together with the written submissions, which refer to them. In particular, new documents shall not be admitted at the hearing, save for exceptional circumstances as determined by the Panel. In such circumstance, the other party shall be afforded sufficient opportunity to study and make observations on the new document.
- xx) The hearing shall be transcribed by a stenographer if the Parties agree. The retaining and engagement of the stenographer will be done directly by the Parties.

This Procedural Order No. 3 has seven (7) pages and it may be amended or supplemented and the procedures for the conduct of this proceeding modified, pursuant to such further directions or Procedural Orders as the Panel may from time to time issue. The members of the Panel have all reviewed this Procedural Order No. 3 and agreed that the President may sign it alone on their behalf.

Place of IRP, Los Angeles, California.

Dated 5 September 2014.

A handwritten signature in black ink, appearing to be 'B. Barin', written over a horizontal line. The signature is fluid and cursive.

Babak Barin, President of the Panel on behalf of himself, Prof. Catherine Kessedjian and the Hon. Richard C. Neal (Ret.)

# Exhibit T



21 February, 2013

**The Honorable Senator John 'Jay' Rockefeller IV  
Chairman of the United States Senate Committee on  
Commerce, Science and Transportation**

113<sup>th</sup> United States Congress  
531 Hart Senate Office Building  
Washington D.C. 20510,  
USA

**The Honorable Greg Walden  
Chairman of the House Sub-Committee on Communications and Technology  
United States House of Representatives**

113<sup>th</sup> United States Congress  
Rayburn House Office Building 2125  
Washington D.C. 20510  
USA

Dear Senator Rockefeller, Honorable Chairman Walden and Congressional Leaders,

**Subject: *New generic Top-Level Domain Program (gTLD) for Global Internet Expansion - Need for Direct Congressional Oversight & Recommendation for the Appointment of an Independent Counsel as Congressional new gTLD Ombudsman to Investigate & Report to Congress on Matters of Illegality and Irregularities in new gTLD Program of ICANN***

We begin by extending our congratulations to you Senator Rockefeller, Chairman Walden, and other honorable senators, distinguished congressional leaders and representatives on their recent re-election and commencement of the very important duties of state and selfless public service as Leaders and Members of the 113<sup>th</sup> United States Congress. We note with profound pride and appreciation that Congress continues to be the very foundation of the American Republic, and remains as the enduring citadel of freedom and bulwark of democratic governance for nearly 250 years; and the present crop of leaders, as represented by your esteemed selves, have continued in the same tradition of the Founding Fathers of the United States. In this day and age, the U.S. Congress not only serves ordinary Americans, but, as a guarantor of human rights and democratic freedoms, also serves people of good will all over the world.

DotConnectAfrica Trust ('DCA Trust') is an independent, non-profit and non-partisan organization that is constituted under the Laws of the Republic of Mauritius, and its main charitable objects are: (a) for the advancement of education in information technology to the African society; and (b) in connection with (a) to provide the African society with a continental Internet domain name to have access to Internet services for the people of Africa as a purpose beneficial to the public in general.





Again, we note with a deep sense of thankfulness that many international development assistance programs for education, health sector improvements and general trade competitiveness; including bilateral aid grants given by the United States Government to different African countries often include a significant Internet and ICT component, plus much-needed funds for computerization and staff training. Many Africans continue to benefit from these significant life-changing initiatives that underscore America's enduring role as a force for good in the world.

DCA Trust has participated in the new gTLD program of the Internet Corporation for Assigned Names and Numbers (ICANN) during the application window that opened on 12<sup>th</sup> January 2012, and closed on 30<sup>th</sup> May 2012. **We have submitted an application (ID: 1-1165-42560) for the .Africa new generic Top-Level Domain.** The other competing applicant for the same .Africa new gTLD name string is UniForum ZA Central Registry from South Africa (Application ID: ID: 1-1243-89583).

The evaluations of the applications is currently in progress and submitted applications are now being reviewed by the various Evaluation Panels constituted by ICANN prior to final approval and gTLD delegation decisions that would be made by the ICANN new gTLD Program Committee and the ICANN Board.

**Our organization has been a huge supporter of ICANN as it undertakes the onerous task of fulfilling its purpose, mission and strategic mandate of the technical management and administration of the Internet; its multi-stakeholder model of Global Internet Governance, and the ICANN new gTLD program.**

However, we now strongly believe that the program is fraught with certain conceptual difficulties that have made it rather impossible for us to seek redress and accountability by relying solely on the mechanisms that are available to applicants within the new gTLD program. Nevertheless, as the new gTLD decision milestones draw inexorably closer, and as **our issues remain unaddressed and unresolved**, we are now compelled to escalate our matter to Congress hoping that a solution may be found at the very top echelon of U.S. leadership.

### ***Why we are escalating to Congress***

If any aspect of the new gTLD program has become prone to irregularities for whatever reason; or if an applicant has been found or suspected to be the beneficiary of an act (or acts) of illegality, there is no means to demand thorough accountability within the new gTLD program. The program has been designed in such a way that an applicant (participating in the program) cannot sue ICANN on the basis of its application or matters relating to the



new gTLD program, **thus constricting any possible avenues of legal redress for any aggrieved applicant.** Since applicants are constrained to work only within the confines of the limited accountability mechanisms in-built into the new gTLD program, and to pursue dispute resolution within the prescribed (or what one would term as circumscribed) procedures; **it is even more difficult to commence legal proceedings in matters of corruption and ethical transparency since these are not recognized within the new gTLD program, thus making it possible for any applicant that has committed any acts of illegality to go scot-free,** if ICANN fails to demand accountability from the erring/miscreant applicant. Indeed, it is quite troubling to note that an aggrieved new gTLD applicant has no guarantee of justice or legal avenues to seek justice and redress under these circumstances.

Before going ahead to submit our recommendation to Congress, we believe that it is pertinent to highlight the salient points of our case against UniForum ZA Central Registry, the other competing applicant for .Africa gTLD, **whom we believe is the beneficiary of wholesale illegality in the process of winning the endorsement of the African Union (AU) Commission for the .Africa geographic Top-Level Domain name.** The AU Commission is the inter-governmental political organization that has the African countries as its member states.

### ***The Bases of Our Complaints and Grievances against UniForum***

Our multifarious complaints against UniForum are indeed very profound, and are all fundamentally related to ethical transparency and accountability, especially regarding their purported endorsement for the .Africa gTLD, and how they misrepresented their application in a manner that we really believe is fraudulently deceptive and manifestly misleading; **to the extent that UniForum contrived to obtain a highly valuable endorsement for a geographic name string under the pretext that it would be submitting an application on behalf of the African Community, but after obtaining the endorsement from the African Union Commission, not only failed to prepare and submit a Community TLD application for .Africa,** but also failed, rather deliberately, to acknowledge the same African Community in its application that was submitted to ICANN for the .Africa gTLD name. DCA Trust believes that this was a very serious infraction on the part of UniForum ZA Central Registry.

The way the new gTLD program process has been designed only gives room for public comments that have to be made on submitted applications; for such issues to be taken into account by the ICANN Evaluation panels evaluating the new gTLD applications, and formal objections to be filed – on only four (4) different and specific grounds - against an application with a Dispute Resolution Service Provider.



Thus, apart from the public comments and the formal Objection filing, there is no mechanism within the ICANN new gTLD program to address grievances that are related to what one would consider lack of ethical transparency and accountability or illegality in the process of winning an endorsement; and how an aggrieved party such as DCA Trust would seek redress or ensure that an applicant such as UniForum that has actually submitted a fraudulent application can be truly held accountable by the authorities.

***Honorable Senators & Congressional Leaders,***

DCA Trust has already raised its issues through official communications to ICANN and the African Union Commission a few months ago, but as at the time of writing this particular letter, no indication has been received to reassure us that our legitimate complaints have been taken into proper consideration towards either disqualifying the application that was submitted by UniForum ZA Central Registry; or whether any process of accountability has been set-up by the African Union Commission or the African Internet Community to demand official accountability from UniForum ZA Central Registry regarding why it failed to submit an application for the .Africa gTLD on behalf of the African Community as it was supposed to; based on its supposed endorsement and letter of appointment from the AU Commission. **The matter has been further complicated by the fact that the African Union has mainstreamed itself as part of the 'structure' that is also applying for the .Africa new gTLD** (based on the UniForum application) thus making it both an endorser and, quite presumptuously, *albeit* unjustifiably so, a co-applicant for the same new gTLD name that it is endorsing, any apparent ethical conflicts and moral incongruities notwithstanding.

Therefore, our thinking at this stage is that the AU Commission and the African Internet Community have not tried to hold UniForum accountable simply because they are in collusion with them in the apparent subversion of due process and unlawful assistance that created room for (or led to) UniForum receiving the endorsement under corrupt circumstances. For example, the AU official Communiqué in late March 2012 notes, *inter alia*, that:

***“The Task Force and the assigned consultants provided the needed support to the ISD to launch the dotAfrica tender process to select a competent Registry Operator. Accordingly, the AU Commission selected UniForum SA (the ZA Central Registry Operator or ZACR), to administer and operate dotAfrica gTLD on behalf of the African community. The endorsement of the ZACR is the only formal endorsement provided by the African Union and its member’s states. The endorsement follows the evaluation of proposals submitted in December 2011, which attracted local and international registries interested in managing dotAfrica gTLD. The evaluation was conducted by a team of experts selected by the African Union.”***



However, information that is now available to DCA Trust indicates that there **was actually no tender process as such that attracted local and international registries which led to a transparent process of endorsing and selecting UniForum as registry operator**, since UniForum was simply recommended by the African Top-Level Domains (AfTLD) organization; in other words, the name of UniForum was simply put forward to the AU Commission for consideration as the registry operator for .Africa. This assertion is buttressed by the information that we have excerpted from a document circulated by Ms. Rebecca Wanjiku, a member of the .Africa Registry Project Committee who is involved on the side of UniForum and has been attempting to write an 'official history' of .Africa, which witnesses that:

*“The AUC RFP made it clear that AUC wanted African ccTLDs to play a crucial role in implementing .Africa. The AUC wanted .Africa run by an African operator using an African technology. This forced AfTLD to do an immediate review of its bid. Mpisane says that it was out of this reality that he personally (in his capacity as AfTLD Chairman at the time) lobbied the AfTLD Directors, key AfTLD members African community to find a suitable registry partner and investor from Africa. There was only one African registry operator that had a registry technology that met ICANN's registry requirements. That is how, with the support of the African Internet Community, the ZA Central Registry (UniForum SA), which runs an EPP registry system, was put forward to work with the community, especially AfTLD, to send a proposal to the AUC. The ZACR bid, which had the express backing of individual African ccTLDs, AfTLD and key African community members, got the approval of the AUC.”*

Mr. Vika Mpisane was reportedly interviewed by Ms. Rebecca Wanjiku on August 14, 2012. It was during this interview that the above revelation was made. Even though the document that we have referred to is not yet unpublished, a draft version of it has been made available to a cross section of people in the AfrICANN Community for review.

Clearly, there is a very manifest discrepancy between the official claim conveyed in the AU Communiqué regarding a supposititious tender process that local and international registries had participated in, and the apparent intervention of Mr. Vika Mpisane (then Chairman of AfTLD) and Chairperson of the South African Domain Names Authority (ZADNA) who actively lobbied on behalf of, and for the name of UniForum ZA Central



Registry to be put forward in a proposal to the African Union Commission in the illegal subversion of what was supposed to be an open and competitive tender process.

**Therefore, we also make bold to assert that abuse of office, influence-peddling and jingoism have also played a huge, yet very unpalatable, role in this matter, since Mr. Vika Mpisane, as a South African official, had acted, *albeit* rather injudiciously, to project the interest and benefit of UniForum ZA Central Registry as a South African organization.**

DCA Trust is indeed scandalized by these things that have happened, and most Africans would also feel quite embarrassed by the occurrence of such pervasive irregularities and the *'dirty linen of illegality'* that is now being aired unfortunately.

### ***The Need for Accountability***

Therefore, from what we now know based on the above, the entire process that led to the selection and appointment of UniForum by the AU Commission was fraught with lack of ethical transparency and accountability, and we boldly declare that the process was actually corrupted by the involvement of the AfTLD and the members of the AU Task Force on DotAfrica. **There is preponderant evidence to now suggest that UniForum ZA Central Registry was not appointed by the African Union Commission based on the outcome of a truly transparent and accountable RFP-based tender process.** DCA Trust has always maintained that the entire process was fraught with illegality, and this has been further vindicated by what we now know regarding the subversion of the process by Mr. Vika Mpisane, and his cohorts in the African Internet Community.

**The subsequent appointment received by UniForum through a process that we believe was corrupted provided UniForum with further advantages that also allowed it to obtain additional letters of endorsement from different African Countries to enable it satisfy the requirement of governmental support necessary for applying for a geographical TLD.** We therefore believe that if UniForum is not held accountable for its actions, as the beneficiary of a corrupt process, that enabled it win unfair advantages in the new gTLD program; then an applicant that has benefitted from a willfully corrupt process, that has also submitted a misleading and fraudulent application will also, having reneged on the commitment implicit in its endorsement, would, in the full view of the entire world, also win the mandate for the management, administration and operation of the .Africa gTLD from the Internet Corporation for Assigned Names and Numbers, a U.S.-based organization.



### ***Our Recommendation to Congress***

Therefore, against the backdrop that the processing of new gTLD application is now going towards speedy approval and finalization, DotConnectAfrica Trust believes that UniForum should be held accountable now. **We are hereby appealing directly to the United States Senate as the Upper House of the United States Congress, its Judiciary Committee, and other important Congressional committees that have a relevant stake in a successful outcome of the new gTLD process; to give the necessary approval and official impetus for the establishment of a new gTLD Program Ombudsman that would handle and look into different forms of grievances reported by new gTLD applicants; and investigate any forms of alleged irregularities and acts of illegality committed by applicants, especially of the sort that DCA Trust has outlined against its direct competitor for the .Africa gTLD, UniForum ZA Central Registry.**

The new gTLD Ombudsman will be authorized by Congress with the powers of an Independent Counsel to investigate and adjudicate on issues of illegality that have been reported regarding new gTLD matters. This way, the United States Congress can maintain full **ethical, legal and administrative oversight** of the entire new gTLD program to ensure **that U.S. laws regarding corruption by foreign organizations are not broken whilst also ensuring that some organizations like DCA Trust are not unfairly victimized and denied because of the illegal actions perpetrated by others.**

### ***Why Congress Must Act Now***

At a time when other disaffected countries are challenging and questioning the United States' continuing role in Global Internet Governance, and asking that this responsibility should now be entrusted to the United Nations, it is important that any new Internet Expansion Initiative such as the new gTLD program be seen as an important test of mettle for ICANN, and for this organization that is under (the IANA) contract to the United States Government to deliver such a new gTLD program successfully. Any failure will be roundly seen as ICANN's inability to demonstrate to the global community of nations that it is a competent U.S.-based institution that can handle Global Internet Governance and question why this *status quo* must be preserved. Needless to re-emphasize this would cause many to also question the United States' continuing leadership role in these matters. **Therefore, we believe that this calls for the swift intervention of Congress as the only respected and empowered institution that can save the day by appointing an Independent Counsel as new gTLD Ombudsman that will look into any acts of illegality and probe any irregularities to ensure that there is thorough accountability within the new gTLD program and in the process, also ensure that an important new gTLD such as .Africa is not delegated by ICANN to an applicant that has benefitted from an RFP process that lacked**



**openness and transparency.** The new .Africa gTLD is now generally seen by many watchers and observers as an important test case of a highly controversial domain name, and how it is decided, and to whom it is eventually delegated by ICANN shall be used as a referential touchstone in judging the overall integrity and transparency of the decision-making processes associated with the new gTLD program.

Thanking you in anticipation as we count on the esteemed intervention and the earnest acceptance of our recommendation and subsequent action by Congress.

Most respectfully yours,

*Sbekele*

Ms. Sophia Bekele, B.S., M.B.A., C.I.S.A, C.C.S, CGEIT

For: DotConnectAfrica Trust (An Applicant for the .Africa gTLD) Application ID: 1-1165-42560

cc: **The Honorable Senator Patrick Leahy  
Chairman of the U.S. Senate Committee on  
the Judiciary**  
113<sup>th</sup> Congress  
Dirksen Senate Office Building 224  
Washington D.C. U.S.A.

113<sup>th</sup> Congress  
Washington D.C. U.S.A.

cc: **The Honorable Frank R. Wolf  
Chairman of the House Sub-Committee on  
Commerce, Justice, Science and Related  
Agencies**  
**U.S. House of Representatives**  
113<sup>th</sup> Congress  
The Capitol H-309  
Washington D.C. U.S.A.

cc: **U.S. Senate Committee on Commerce,  
Science and Transportation  
Sub-Committee on Communications,  
Technology and the Internet**  
113<sup>th</sup> Congress  
Russell Senate Office Building 254  
Washington D.C. U.S.A

Cc: **The Honorable Chris Smith  
Chairman of the House Sub-Committee on  
Africa, Global Health, Global Human  
Rights, and International Organizations**  
**U.S. House of Representatives**  
113<sup>th</sup> Congress  
Cannon House Office Building 259  
Washington D.C. U.S.A.

cc: **U.S. Senate Sub-Committee on Commerce,  
Justice, Science and Related Agencies**  
113<sup>th</sup> Congress  
The Capitol S-128  
Washington D.C. U.S.A.

cc: **U.S. Senate Committee on Foreign  
Relations  
Sub-Committee on African Affairs**  
113<sup>th</sup> Congress  
Dirksen Senate Office Building 446  
Washington D.C. U.S.A.

Cc: **The Honorable Howard Coble  
Chairman of the House Sub-Committee on  
Courts, Intellectual Property and the  
Internet**  
**U.S. House of Representatives**  
113<sup>th</sup> Congress  
Cannon House Office Building 517  
Washington D.C. U.S.A.

cc: **The Honorable Mrs. Nancy Pelosi  
Minority Leader**  
**U.S. House of Representatives**





cc: **H. E. Senator John Kerry**  
**Secretary of State**  
U.S. Department of State  
Washington D.C. U.S.A

cc: **H. E. Ambassador Johnnie Carson**  
**Assistant Secretary**  
**Bureau of African Affairs**  
U.S. Department of State  
Washington D.C. , U.S.A

cc: **The Honorable Larry Strickland**  
**Assistant Secretary**  
**National Technology & Information**  
**Administration (NTIA)**  
US Department of Commerce  
Washington D.C. U.S.A

cc: **H. E. Ambassador (Dr.) Susan Rice**  
**United States Ambassador & Permanent**  
**Representative to the United Nations**  
United States Mission to the United Nations  
New York, U.S.A

cc: **The Honorable Thomas C. Power**  
**Chair, Committee on Technology, and**  
**Deputy Chief Technology Officer of the**  
**United States for Telecommunications**  
Office of Science and Technology Policy  
Executive Office of the President of the  
United States, Washington D.C. U.S.A

cc: **H.E. Dr. Nkosazana Dlamini-Zuma**  
**Chairperson of the African Union**  
**Commission**  
Addis Ababa, Ethiopia

cc: **Dr. Stephen Crocker**  
**Chairman of the Board**  
**Internet Corporation for Assigned Names**  
**and Numbers (ICANN)**  
Marina Del Rey, CA U.S.A

cc: **Mr. Fadi Chehade**  
**President and CEO**  
**Internet Corporation for Assigned Names**  
**and Numbers (ICANN)**  
Marina Del Rey, CA U.S.A

**Other ICANN Officials copied in this Communication:**

cc: Cherine Chalaby, Chair, New gTLD Program Committee  
cc: Heather Dryden, Chair, Government Advisory Committee  
cc: Christine Willett, General Manager, New gTLD Program  
cc: The Honorable Suzanne Sene, U.S. Representative to ICANN Government Advisory Committee  
cc: Dr. Olivier M.J. Crépin-Leblond, Chair, ICANN At Large Advisory Committee  
cc: Mandy Carver, Global Stakeholder Engagement Executive Director  
cc: Sally Costerton, Senior Advisor to the President — Global Stakeholder Engagement  
cc: John Jeffrey, ICANN General Counsel  
cc: Chris LaHatte, ICANN Ombudsman  
cc: Professor Alain Pellet, Independent Objector for the ICANN new gTLD Program  
cc: Dr.Tarek Kamel, ICANN Sr. Advisor to CEO (ICANN Africa Strategy)



# Exhibit U

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

**ICDR Case No. 50 117 T 1083 13**

DotConnectAfrica Trust, )  
 )  
Claimant, )  
 )  
v. )  
 )  
Internet Corporation for Assigned Names and Numbers, )  
 )  
Respondent. )

**AMENDED NOTICE OF INDEPENDENT REVIEW PROCESS**

Weil, Gotshal, Manges, LLP  
1300 Eye Street, NW, Suite 900  
Washington, DC 20005  
Tel: +1 202 682 7000  
Fax: +1 202 857 0940

Counsel for Claimant

## I. INTRODUCTION

1. DotConnectAfrica Trust (“DCA”) hereby submits its Amended Notice of Independent Review Process (“Amended Notice”) concerning a dispute with the Internet Corporation for Assigned Names and Numbers (“ICANN”) pursuant to Article 4, Section 3 of ICANN’s Bylaws, the International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR”), and the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process.<sup>1</sup>

2. The dispute, as detailed below, arises out of (1) ICANN’s breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”); and (2) ICANN’s wrongful decision that DCA’s application for .AFRICA should not proceed. ICANN’s administration of the New gTLD Program and its decision on DCA’s application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN’s Articles of

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<sup>1</sup> DCA provides this Amended Notice without prejudice to its right to supplement or amend its claims during the IRP proceeding and its right to further elaborate upon and substantiate the factual and legal positions set forth herein. DCA notes that ICANN’s website directs claimants to file a single form in order to initiate an IRP. See <https://www.icann.org/en/news/in-focus/accountability/reconsideration-review> [Ex. C-1]. When DCA filed its Notice of IRP on 24 October 2013, the form apparently consisted of one page, although it now appears to consist of two pages. See *id.* The second page of the form is provided as [Ex. C-2]. DCA’s decision to amend its Notice is also occasioned by a lack of clarity as to the Supplemental Rules that apply to this proceeding; among other things, there are two different versions of the rules posted at the ICDR website. Compare Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process available at <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf> [Ex. C-3] with Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process available at [http://www.icdr.org/icdr/faces/i\\_search/i\\_rule/i\\_rule\\_detail?doc=ADRSTG\\_002001&\\_afLoop=198933175693625&\\_afWindowMode=0&\\_afWindowId=120w78jccs\\_53#%40%3F\\_afWindowId%3D120w78jccs\\_53%26\\_afLoop%3D198933175693625%26doc%3DADRSTG\\_002001%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D120w78jccs\\_109](http://www.icdr.org/icdr/faces/i_search/i_rule/i_rule_detail?doc=ADRSTG_002001&_afLoop=198933175693625&_afWindowMode=0&_afWindowId=120w78jccs_53#%40%3F_afWindowId%3D120w78jccs_53%26_afLoop%3D198933175693625%26doc%3DADRSTG_002001%26_afWindowMode%3D0%26_adf.ctrl-state%3D120w78jccs_109) [Ex. C-4]. In discussions with counsel for ICANN, it appears that ICANN intends to rely upon the former. These and other procedural issues remain to be clarified with the Panel.

Incorporation and Bylaws. ICANN's violations materially affected DCA's right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program.

## **II. THE PARTIES' CONTACT INFORMATION**

### **A. Claimant**

3. The Claimant in this dispute is DotConnectAfrica Trust (previously defined as "DCA").

DCA's contact details are as follows:

Sophia Bekele  
DotConnectAfrica Trust  
1776 Botelho Drive Suite 305  
Walnut Creek CA 94597

DCA is a charitable trust organized under Mauritian law.

4. DCA is represented in these proceedings by:

Arif H. Ali (arif.ali@weil.com)  
Marguerite Walter (marguerite.walter@weil.com)  
Erica Franzetti (erica.franzetti@weil.com)  
Weil, Gotshal, Manges, LLP  
1300 Eye Street, NW, Suite 900  
Washington, DC 20005  
Tel: +1 202 682 7000  
Fax: +1 202 857 0940

### **B. Respondent**

5. The Respondent is the Internet Corporation for Assigned Names and Numbers (previously defined as "ICANN"). ICANN's contact details are:

Fadi Chehadé, CEO  
John Jeffrey, General Counsel  
Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536  
Tel: +1 310 301 5800  
Fax: +1 310 823 8649

6. ICANN is represented in these proceedings by:

Jeffrey A. LeVee (jlevee@jonesday.com)

Jones Day, LLP  
555 South Flower Street  
Fiftieth Floor  
Los Angeles, CA 90071  
Tel: +1.213.243.2572  
Fax: +1.213.243.2539

### **III. BACKGROUND OF THE INTERESTED PARTIES**

#### **A. DotConnectAfrica Trust**

7. DCA is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 (ID CT8710DCA90) with its registry operation – DCA Registry Services (Kenya) Limited (“DCA Registry Ltd.”) – as its principal place of business in Nairobi, Kenya.<sup>2</sup> DCA was formed with the charitable purpose of advancing education in information technology in African society; and (b), in connection with (a), providing a continental Internet domain name to provide access to Internet services for the people of Africa and for the public good.<sup>3</sup> In connection with these purposes, DCA established DCA Registry Ltd. and put in place formal agreements for the necessary technical infrastructure to support the operations of the registry.<sup>4</sup>

8. DCA applied to ICANN for the delegation of the .AFRICA gTLD, an Internet resource that is available for delegation under the New gTLD Program of ICANN.<sup>5</sup> DCA intends .AFRICA to serve the diverse needs and purposes of the global internet community, but with

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<sup>2</sup> See Mauritius Revenue Authority response to DCA Trust Application for Registration as a Charitable Trust, 15 July 2010 [Ex. C-5].

<sup>3</sup> See Vision and Objective, available at <http://www.dotconnectafrica.org/about/mission-and-objective/> [Ex. C-6].

<sup>4</sup> See Certificate of Incorporation [Ex. C-7].

<sup>5</sup> See New gTLD Application Submitted to ICANN by: DotConnectAfrica Trust (“DCA New gTLD Application”) [Ex. C-8].

special focus on promoting Internet use in Africa.<sup>6</sup> DCA believes that, while there is no clearly delineated, organized and pre-existing community that is targeted by the .AFRICA gTLD, the .AFRICA gTLD creates a unique opportunity for Africa to develop its own locally hosted gTLD registry, which will facilitate the marketing, innovation and branding of business, products and services, and ultimately consolidate the “African Brand” on the global Internet platform.<sup>7</sup>

9. If successful, DCA will re-delegate or assign the new gTLD registry agreement (the “New gTLD Registry Agreement”) to be signed with ICANN to DCA Registry Ltd. as registry operator with responsibilities for technical operations, administration, sales, marketing and other commercial management of the .AFRICA gTLD registry.<sup>8</sup> Any surpluses generated by the DCA Registry operation will accrue directly to the trust fund and shall be duly appropriated and transferred to the DCA Charitable Trust and utilized for charitable purposes.<sup>9</sup> Some of the charitable campaigns already launched include miss.africa and generation.africa.<sup>10</sup>

## **B. ICANN**

10. ICANN is a non-profit corporation established under the laws of the State of California on 30 September 1998 and headquartered in Marina del Rey, California. ICANN was established “for the benefit of the Internet community as a whole”<sup>11</sup> and is tasked with “carrying

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, pp. 7, 10.

<sup>8</sup> *Id.*, p. 9.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* The miss.africa program is a gender-focused initiative targeted mainly at female youth in Africa to increase their personal involvement in early technology use with a view to improving their digital self-awareness and empowerment. Generation.africa is a youth focused program aiming to empower a new generation of Internet users in Africa by encouraging their involvement in discussions that define and increase their common stake-holdings in the development and evolution of the Internet.

<sup>11</sup> ICANN Articles of Incorporation, Art. 4 [Ex. C-9].

out its activities in conformity with relevant principles of international law and applicable international conventions and local law.”<sup>12</sup>

11. As set forth in its Bylaws, ICANN is responsible for administering certain aspects of the Internet’s domain name system (“DNS”), which includes coordinating the introduction of new Top-level Domains (“TLDs”).<sup>13</sup> TLDs appear in the domain names as the string of letters – such as “.com”, “.gov”, “.org”, and so on – following the rightmost “dot” in domain names. ICANN delegates responsibility for the operation of each TLD to a registry operator, which contracts with consumers and businesses that wish to register Internet domain names in such TLD.<sup>14</sup>

12. ICANN is subject to international and local law,<sup>15</sup> and is required to achieve its mission in conformity with the principles expressly espoused in its Bylaws and Articles of Incorporation,

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<sup>12</sup> *Id.*

<sup>13</sup> See ICANN Bylaws, Art. I [Ex. C-10].

<sup>14</sup> There are several types of TLDs within the DNA. The most prevalent TLDs are country-code TLDs (“ccTLDs”) and gTLD’s. The former, ccTLDs, are two-letter TLDs allocated to countries, usually based upon their two-letter ISO codes. In contrast, open gTLDs are privately managed and may include any combination of three or more letters. The original gTLDs were .com, .net, .org, .gov, .mil, and .edu. The first three are open gTLDs and the last three listed are closed gTLDs. Certain categories of potential gTLDs are protected, for example combinations of letters that are similar to any ccTLD and gTLDs on the reserve list included in the new gTLD Guidebook. Under the ICANN New gTLD Program, any “established corporations, organizations or institutions in good standing” may apply for gTLDs. In addition, a new gTLD may be a “community-based gTLD”, which is “a gTLD that is operated for the benefit of a clearly delineated community,” or fall under the category “standard gTLD”, which “can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement.” See gTLD Applicant Guidebook (Version 2012-06-04), Module 1, 1.2.1 “Eligibility” and 1.2.3.1 “Definitions” [Ex. C-11].

<sup>15</sup> See ICANN Articles of Incorporation, Art. 4 [Ex. C-9]; see also *Declaration of the Independent Review Panel in the matter of an Independent Review Process between ICM Registry, LLC and ICANN*, p. 69 [Ex. C-12], in which the Panel concluded that “the provision of Article 4 of ICANN’s Articles of Incorporation prescribing that ICANN ‘shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law,’ requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.”

including transparency, fairness, accountability, and promotion of competition with respect to the Internet’s domain name system.<sup>16</sup>

13. ICANN is managed by a Board of Directors (“Board”), which consists of sixteen voting directors and five non-voting liaisons from around the globe.<sup>17</sup> Evaluations of applications for new gTLDs are carried out by the New gTLD Program Committee (“NGPC”).<sup>18</sup> In making its decisions, the Board receives input from a number of Supporting Organizations and Advisory Committees established by ICANN’s Bylaws.<sup>19</sup> Among the Advisory Committees that provide input to the Board is the Governmental Advisory Committee (“GAC”), which is composed of representatives of a number of national governments, distinct economies, and multinational government organizations and treaty organizations (as observers).<sup>20</sup> The role of the GAC in the New gTLD Program is to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”<sup>21</sup>

#### **IV. SUMMARY OF RELEVANT FACTS**

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<sup>16</sup> ICANN Bylaws, Art. I, Section 2, “Core (Council of Registrars) Values” [Ex. C-10].

<sup>17</sup> *Id.*, Art. VI, Section 2.

<sup>18</sup> *See* New gTLD Program Committee, available at <http://www.icann.org/en/groups/board/new-gtld>. The NGPC is composed of all ICANN Board members who are not conflicted by interests in gTLDs. According to the NGPC’s page on the ICANN website, there are eleven voting members and two non-voting liaisons to the board who are considered non-conflicted and make up the NGPC.

<sup>19</sup> *See, e.g.*, ICANN Bylaws [Ex. C-10], Art. VIII, “Address Supporting Organization”; Art. IX “Country-Code Names Supporting Organization”; Art. X, “Generic Names Supporting Organization”; Art. XI “Advisory Committees.”

<sup>20</sup> *See id.*, Art. XI Section 2.1.

<sup>21</sup> gTLD Applicant Guidebook (Version 2012-06-04), Module 3.1 [Ex. C-11].



### **A. The New gTLD Program**

14. In October 2007, the Generic Names Supporting Organization (“GNSO”), a group that advises on global internet policy at ICANN, completed policy development work on new gTLDs and approved 19 recommendations aimed at, *inter alia*, fostering diversity, encouraging competition and enhancing the utility of the DNS.<sup>22</sup> Representatives from a wide variety of stakeholder groups, including governments, business, individuals and the technology community, were engaged for several months in discussions that included the selection criteria that should be applied to new gTLDs and how gTLDs should be allocated.<sup>23</sup> Based on the community-developed policy for new gTLDs, ICANN worked along with the Internet community to create an application and evaluation process for new gTLDs that is aligned with the GNSO policy recommendations.<sup>24</sup> The culmination of this process was the decision by the ICANN Board of Directors in June 2011 to launch the New gTLD Program.<sup>25</sup>

### **B. The Foundation Of The .AFRICA Domain Name**

15. The .AFRICA gTLD initiative was launched under the leadership of DCA’s founder and CEO Sophia Bekele Eshete (“Ms. Bekele”), a business and corporate executive, entrepreneur, activist and international policy adviser on information communication technologies.<sup>26</sup>

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<sup>22</sup> *Id.*, Preamble.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See* Sophia Bekele - ICANNWiki, available at [http://icannwiki.com/index.php/Sophia\\_Bekele](http://icannwiki.com/index.php/Sophia_Bekele) [Ex. C-13]. Born and raised in Ethiopia, Ms. Bekele has long been engaged in efforts related to the promotion of information communication technologies in Africa. One of Ms. Bekele’s start-ups was CBS International, a private California-based firm engaged in technology transfer to emerging economies. CBS International set up an Ethiopian IT company that was successfully awarded a bid for a government contract to build an integrated information network infrastructure for the Ethiopian Parliament. In

16. The idea of a domain name that would enable a united and coordinated branding of the African Continent arose while Ms. Bekele was serving on ICANN’s Council of the GNSO.<sup>27</sup> During her tenure at ICANN’s GNSO (from 2005 to 2007), Ms. Bekele was instrumental in initiating policy dialogue over International Domain Names (“IDN”).<sup>28</sup> Following IDN work for ICANN and the global internet community, Ms. Bekele turned her focus to the .AFRICA domain name initiative, travelling to various African countries and globally advocating the benefits of a .AFRICA gTLD for the African continent.<sup>29</sup>

17. As part of DCA’s efforts to launch the .AFRICA domain, DCA obtained the endorsement of two of the most important African intergovernmental organizations, the United Nations Economic Commission for Africa (“UNECA”) and the African Union Commission (“AUC”). UNECA expressed its endorsement through a letter dated 8 August 2008 sent to Ms. Bekele expressing “support” for DCA’s “‘dotafrica’ initiative” and DCA’s intention to apply to ICANN for the delegation of the gTLD .AFRICA.<sup>30</sup> AUC endorsed DCA’s intent to apply for the .AFRICA domain name through a letter dated 27 August 2009 directed to Ms. Bekele.<sup>31</sup> In

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addition, Ms. Bekele has served on several United Nations-sponsored committees and initiatives where she represented the private sector in discussions about the economic development of Africa.

<sup>27</sup> See *id.*, ICANN Work (PDF p. 2).

<sup>28</sup> *Id.*

<sup>29</sup> See Sophia Bekele - ICANNWiki, available at [http://icannwiki.com/index.php/Sophia\\_Bekele](http://icannwiki.com/index.php/Sophia_Bekele) [Ex. C-13]. Among the benefits of the .AFRICA gTLD, DCA emphasized that the new gTLD would facilitate cross-border knowledge sharing and research partnerships with key knowledge end users, allow users to express membership in the larger Pan African and African community, enhance regional identity and global presence, and generate surplus profit to benefit projects of sustainability in Africa. See also, 1bn people, 54 countries, 1 domain [Ex. C-14].

<sup>30</sup> UNECA Endorsement Letter to Ms. Bekele dated 8 August 2008 [Ex. C-15].

<sup>31</sup> AUC Endorsement Letter to Ms. Bekele dated 27 August 2009 [Ex. C-16].

addition to expressing “its endorsement of the DotAfrica ‘.africa’ initiative,”<sup>32</sup> AUC offered Ms. Bekele “assistance in the coordination of [DCA’s] initiative with African Ministers and Governments.”<sup>33</sup>

18. DCA announced the official launch of the .AFRICA campaign at the AITEC Information Communication Technology summit held in Nairobi, Kenya, on September 7, 2010.<sup>34</sup> Since then, DCA has continued to work towards and obtain support from several stakeholders, including African governments, businesses and community organizations in the region to apply to ICANN for the delegation of the .AFRICA TLD.<sup>35</sup>

### **C. AUC Becomes DCA’s Competitor For The Delegation Of The .AFRICA Domain**

19. After DCA’s official announcement of the .AFRICA campaign, other groups began to express interest in the .AFRICA domain, including the Africa Top Level Domain Organization (“AfTLD”)<sup>36</sup> and certain members of the African Union DotAfrica Task Force, which is

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> DotConnectAfrica launched its official ".AFRICA" campaign at the AITEC ICT Summit <http://www.prlog.org/10916169-dotconnectafrica-launched-its-official-africa-campaign-at-the-aitec-ict-summit.html> [Ex. C-17].

<sup>35</sup> The Yes2dotafrica Campaign is part of DCA’s on-going effort to create awareness of the benefits of a dotAfrica name and do a public outreach. DCA’s .AFRICA initiative was also endorsed by the Internationalized Domain Resolution Union (“IDRU”) and the Ministry of Information and Communications of Kenya. *See* IDRU Endorsement Letter to Ms. Bekele dated 5 December 2010 and the Ministry of Information and Communications of Kenya’s Endorsement Letter to Ms. Bekele dated 7 August 2012 [Ex. C-18.].

<sup>36</sup> The AfTLD is an association of managers of African ccTLDs. According to its website, AfTLD’s mission is to partner with international, national and African stakeholders to market and “achieve excellence among African ccTLDs.” *See* AfTLD – Our Mission, available at <http://www.aftld.org/about/?pg=233005> [Ex. C-19].

comprised of members of the African internet community, mainly ccTLD managers and officers of AfTLD and the African Network Information Center (“AfriNIC”).<sup>37</sup>

20. Accordingly, the AUC informed the Internet community that it would initiate an Expression of Interest to bidders to be endorsed for .AFRICA.<sup>38</sup> In addition, on 21 October 2011, at the African Ministerial Round-Table that met in Dakar, Senegal, during the 42nd ICANN meeting, the AUC requested that ICANN reserve the .AFRICA name and its representations in any other language in the List of Top Level Domain names, as well as allow the AUC to delegate the .AFRICA gTLD to an organization to be selected by AUC.<sup>39</sup> DCA objected to the request.<sup>40</sup> ICANN’s official response to the AUC was communicated through a letter from ICANN’s Board Chairman Stephen Crocker dated 8 March 2012,<sup>41</sup> in which ICANN refused to reserve the .AFRICA gTLD to AUC. ICANN stated that to do so would be against ICANN’s rules for the New gTLD Program. However, ICANN informed the AUC that it could avail itself of the “robust protections” in the New gTLD Guidebook, including raising concerns

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<sup>37</sup> For a list of the members on the African Union Task Force, see “Dot.Africa gTLD Project: Branding the African Continent on the Cyberspace and Providing African Community with a Continental Mark on the Internet”, 6 November 2010 [Ex.C-20]. According to its website (<http://www.afrinic.net/en/about-us>), AfriNIC is the Regional Internet Registry for Africa, which is “responsible for the distribution and management of Internet number resources such as IP addresses and ASN (Autonomous System Numbers) for the African region.” Its global counterparts include the regional registry for Europe, RIPE-NCC; the regional registry for Asia and the Pacific region, APNIC; ARIN the regional registry for North America; and LACNIC, serving Latin America and the Caribbean.

<sup>38</sup> See Expression of Interest for the Operation of the DotAfrica [Ex. C-21].

<sup>39</sup> African Union Communiqué, “African ICT Ministerial Round-Table on 42nd Meeting of ICANN” [Ex. C-22]

<sup>40</sup> See Yes2dotAfrica Campaign Triumphs at ICANN-42 meeting in Dakar Senegal! Available at, <http://www.prlog.org/11722365-yes2dotafrica-campaign-triumphs-at-icann-42-meeting-in-dakar-senegal.html> [Ex. C-23].

<sup>41</sup> Letter from Stephen Crocker (ICANN CEO) to Elham M.A. Ibrahim (Commissioner, Infrastructure and Energy Commission of the African Union Commission), dated 8 March 2012, [Ex. C-24].

about the .AFRICA gTLD applications through the GAC and objecting formally to .AFRICA applications on “community” grounds.<sup>42</sup>

21. Shortly after the ICANN Meeting in Dakar, the AUC issued a Request for Proposals for the operation of .AFRICA.<sup>43</sup> DCA did not participate in this process, as it believed that the AUC had not set up an open, competitive and transparent process.<sup>44</sup> UniForum South Africa (“Uniforum”), a South African company trading as UniForum ZA Central Registry, was appointed based on the recommendation of Mr. Vika Mpisane, Head of the South African Domain Names Authority. At the time the appointment was made, Mr. Mpisane was also Chairperson of the AfTLD.<sup>45</sup>

22. Thus, two competing applications were submitted for the .AFRICA domain: (i) DCA’s application;<sup>46</sup> and (ii) AUC/UniForum’s application.<sup>47</sup>

#### **D. ICANN’s Improper Treatment Of The DCA New gTLD Application**

23. DCA submitted its application for the .AFRICA gTLD in March 2012.<sup>48</sup> In its application, DCA explained that although .AFRICA would serve the African community, it was not a community-based application because it was too difficult to define the community that

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<sup>42</sup> *Id.*, p. 3.

<sup>43</sup> Request for Proposals by the African Union Commission for the Operation of DotAfrica [Ex. C-25].

<sup>44</sup> Letter from Ms. Sophia Bekele (DCA) to H.E. Ambassador John Shinkaiye (African Union Commission) dated 30 December 2011 [Ex.C-26].

<sup>45</sup> See Vika Mpisane – General Manger of the ZA Domain Name Authority (ZADNA), available at <http://www.iweek.org.za/vika-mpisane/> [Ex. C-27].

<sup>46</sup> DCA New gTLD Application [Ex. C-8].

<sup>47</sup> New gTLD Application Submitted to ICANN by: UniForum SA (NPC) trading as Registry.Africa (“AUC/UniForum new gTLD Application”), p. 7 [Ex. C-28].

<sup>48</sup> DCA New gTLD Application [Ex. C-8].

would benefit from .AFRICA.<sup>49</sup> DCA envisioned .AFRICA as a domain name open to “all things that relate to Africa, in a way that presents vast opportunities for all those who are interested in Africa for any possible number of reasons.”<sup>50</sup> It intended to offer domain names in the .AFRICA gTLD at US\$10.00 apiece, which it contrasted with the US\$80.00 per month price for ccTLDs that had hitherto prevented the development of “meaningful content in Africa’s Internet space.”<sup>51</sup> Proceeds from sales of domain names were to be placed in trust for use in charitable purposes, as already explained in paragraph 9 above.<sup>52</sup>

### **1. ICANN Brushed Aside DCA’s Concerns Regarding Conflicts Of Interest On The Part of New gTLD Committee Members**

24. When UniForum’s application became public in June 2012, DCA realized that two of the members of the ICANN Board who would be involved in taking decisions on the .AFRICA applications had potential or actual conflicts of interest with regard to these applications. Mike Silber, a member of the ICANN Board from South Africa, was the treasurer and director of the ccTLD co.za, which has long been administered by UniForum.<sup>53</sup> He was also a member of the Board of Directors of the South African Domain Names Authority, which had supported the establishment of South African (.za) Central Registry, a part of UniForum S.A.<sup>54</sup> Similarly, Australian Chris Disspain was CEO of a company affiliated with ARI Registry Services, which provided consulting services to the South African Domain Names Authority with respect to the

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*, p. 10.

<sup>51</sup> *Id.*, p. 11.

<sup>52</sup> See *id.*, p. 9.

<sup>53</sup> Office of the Ombudsman, Case 12-00241, In a matter of a Complaint by Sophia Bekele for DotAfrica, Report dated 10 December 2012 [Ex. C-29] (identifying Silber’s affiliation); AUC/UniForum New gTLD Application [Ex. C-28] (confirming its administration of .za).

<sup>54</sup> Letter from Ms. Sophia Bekele (DCA) to The CEO of ICANN, dated 18 July 2012 [Ex. C-30].

establishment of the South African (.za) Central Registry.<sup>55</sup> DCA wrote to ICANN requesting that both men recuse themselves from any consideration of the .AFRICA applications.<sup>56</sup> ICANN's Ombudsman, Chris LaHatte, investigated. The Ombudsman reports directly to the ICANN Board and is charged with providing an independent, impartial review of facts relating to complaints about ICANN.<sup>57</sup>

25. Mr. LaHatte published a report finding that there was “no disqualifying conflict of interest, or indeed any conflict of interest at all, is present in the actions of both Chris Disspain and Mike Silber.”<sup>58</sup> Mr. LaHatte based his conclusion on the fact that ICANN Board meeting minutes allegedly showed that neither Mr. Silber nor Mr. Disspain had been involved in any Board discussions of the .AFRICA application.<sup>59</sup> Before finalizing his report, Mr. LaHatte sought input from DCA, which requested that he recommend that Messrs. Silber and Disspain recuse themselves from any consideration of the .AFRICA domain name in order to avoid conflicts of interest in the future.<sup>60</sup> Upon concluding his investigation, Mr. LaHatte provided for comment a draft report to DCA and Messrs. Silber and Disspain, as well as with John Jeffrey, the General Counsel for ICANN.<sup>61</sup> DCA requested that Mr. LaHatte include language recommending the two directors recuse themselves from making decisions about the .AFRICA applications. Following consultation with Messrs. Silber, Disspain and Jeffrey, Mr. LaHatte did not recommend recusal but instead observed in his report that it was “likely this complaint has

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<sup>55</sup> Letter from Ms. Sophia Bekele (DCA) to The CEO of ICANN, dated 18 July 2012 [Ex. C-31].

<sup>56</sup> *See id.*, *see also* Ex. C-30.

<sup>57</sup> ICANN Bylaws, Art. V, Section 2 [Ex. C-10].

<sup>58</sup> Office of the Ombudsman, Case 12-00241, In a matter of a Complaint by Sophia Bekele for DotAfrica, Report dated 10 December 2012 [Ex. C-29]

<sup>59</sup> *Id.*

<sup>60</sup> Email from LaHatte to Disspain and Silber dated 4 December 2012 [Ex. C-32].

<sup>61</sup> *Id.*

led to increased awareness of the possibilities of conflict of interest, which the Board will carefully consider in terms of the existing policy about conflict, when the issue arises.”<sup>62</sup> Mr. LaHatte indicated that Ombudsman’s reports were usually either anonymous or not public, but he would publish the particular report, absent objection from any of the concerned parties.<sup>63</sup> Mr. LaHatte made the report public, over DCA’s objections and at the urging of Mr. Silber.<sup>64</sup>

## **2. The AUC Used The GAC To Urge ICANN Not To Accept DCA’s Application**

26. In November 2012, the AUC filed an Early Warning about DCA’s application for .AFRICA before the GAC. As already indicated, the role of the GAC is “to provide advice to ICANN on issues of public policy, and especially where there may be an interaction between ICANN’s activities or policies and national laws or international agreements.”<sup>65</sup> In this case, however, the Early Warning was made by the AUC as a member of the GAC – despite the fact that the AUC was also part of the UniForum bid – DCA’s only competitor for the .AFRICA TLD.

27. In the Early Warning, the AUC “express[ed] its objection” to DCA’s application, arguing that DCA did not have “the requisite minimum support from African governments”<sup>66</sup> and that its application “constitut[ed] an unwarranted intrusion and interference on the African Union Commission’s (AUC) mandate from African governments to establish the structures and

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* “Given that the complainant continues to give her spurious allegations significant prominence in her email ‘newsletter’ in in [sic] the DCA website, I would respectfully request that the report be made public.”

<sup>65</sup> ICANN/GAC website, at <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee> (accessed 9 January 2014).

<sup>66</sup> GAC Early Warning – Submittal Africa-AUC-42560, dated 20 November 2012, p. 1 [Ex. C-33].



modalities for the implementation of the dotAfrica (.Africa) project.”<sup>67</sup> In other words, the AUC objected to any competition at all as an “unwarranted intrusion and interference” with its own application – but cloaked the objection in the guise of a governmental policy concern, not the concern of a competitor for .AFRICA.<sup>68</sup>

28. DCA pointed out AUC’s conflict of interest regarding the .AFRICA gTLD in a response to ICANN, in which it objected that the AUC was effectively “both an ‘endorser’ and ‘co-applicant’ for the name string” of .AFRICA.<sup>69</sup> In other words, while the AUC used UniForum to apply for the .AFRICA on its behalf,<sup>70</sup> it simultaneously used its status as a member of the GAC to create obstacles for DCA’s competing application. DCA also pointed out in its response that at least one of the countries supposedly objecting to its application had officially endorsed that very same application.<sup>71</sup> ICANN did not respond.

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<sup>67</sup> *Id.* Several African governments submitted identically worded early warnings in coordination with the AUC [Ex. C-34].

<sup>68</sup> We note that ICANN itself had previously informed AUC that acting through the GAC would be another way to achieve its goal of reserving the dotAfrica domain name for its own control. ICANN Letter of 8 March 2012 to AUC at 2 (explaining that ICANN could not place dotAfrica on the Reserved Names List, but adding that “protections exist that will allow the African Union and its member states to play a prominent role in determining the outcome of any application for these top-level domain name strings,” followed by explanation of GAC Early Warning notice system) [Ex. C-24].

<sup>69</sup> DCA Response to ICANN GAC Early Warning Advice, 5 December 2012, p. 4 (objecting that AUC was “both an ‘endorser’ and ‘co-applicant’ for the name string” of dotAfrica) [Ex. C-35].

<sup>70</sup> AUC/UniForum new gTLD Application, p. 7 [Ex. C-28].

<sup>71</sup> DCA Response to ICANN GAC Early Warning Advice, 5 December 2012 p. 1 (noting that Kenya had endorsed DCA’s application, but had also submitted an Early Warning, without explanation) [Ex. C-35]. See Kenya Ministry of Information and Communications Letter of Endorsement dated 7 August 2012 [Ex. C-18].

### 3. ICANN's Independent Objector Sought To Object To The DCA Application, Even Though The AUC Had Already Done So Through The GAC

29. The new gTLD program created a new position within the ICANN framework, the Independent Objector (“IO”).<sup>72</sup> Pursuant to the new gTLD Guidebook, the IO “acts solely in the best interests of the public who use the global Internet” to object to applications that have limited public interest and/or lack the support of the community to which the domain names are directed, but where no other party has lodged or is willing to lodge an objection.<sup>73</sup>

30. Toward the end of December 2012, the IO sent DCA and UniForum an email indicating he would investigate a potential community objection to .AFRICA.<sup>74</sup> DCA replied in January 2013, explaining, *inter alia*, that any objection on its part would be superfluous in light of the GAC Early Warning, and that a community objection would be unwarranted since DCA’s application was for a geographic name, not a community-based name, and it would be difficult to define an African community in any event.<sup>75</sup> UniForum also responded, sending a letter echoing the IO’s concerns and outlining what it saw as the “shortcomings” of DCA’s application.<sup>76</sup>

31. In his responding comments, posted on his website, the IO acknowledged that DCA’s application was for a geographic name string. He nevertheless expressed the view that it was “unlikely” that DCA’s application could succeed in light of the opposition to its application by the AUC given that the AU has 54 member states – ignoring the fact that DCA could obtain

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<sup>72</sup> gTLD Applicant Guidebook (Version 2012-06-04), Art. 3.2.5 [Ex. C-11]. Professor Alain Pellet was chosen as the IO in May 2012. See <http://www.icann.org/en/news/announcements/announcement-14may12-en.htm> [Ex. C-36].

<sup>73</sup> gTLD Applicant Guidebook (Version 2012-06-04), Art. 3.2.5 [Ex. C-11].

<sup>74</sup> See Letter from Ms. Sophia Bekele (DCA) to Alain Pellet (Independent Objector for ICANN), dated 20 January 2013, p. 1 (referring to email received from IO) [Ex. C-37].

<sup>75</sup> *Id.*

<sup>76</sup> Letter from Neil Dundas (UniForum) to Messr. Alain Pellet (Independent Objector for ICANN) dated 18 January 2013 [Ex. C-38].

endorsements from governments with or without the AU, as indeed it already had.<sup>77</sup> He acknowledged, however, that if DCA’s application passed initial review, it would be “assigned to a contention set” – that is, it would have to negotiate with UniForum, assuming its application also passed initial review, to resolve who would receive the right to administer .AFRICA.<sup>78</sup> The IO did not file an objection against DCA’s application, recognizing that it would be inappropriate to do so where another interested party could do so.<sup>79</sup>

32. The Objection Filing period for objecting to new gTLD applications closed on 13 March 2013.<sup>80</sup>

#### **4. The GAC Issued Advice Recommending That ICANN Reject DCA’s Application**

33. In April 2013, the GAC held a meeting in Beijing during which it considered, *inter alia*, offering objection advice on new gLTD applications, including that of DCA. While the meeting was ongoing, DCA became aware that discussions of its application were being led, in part, by Ms. Alice Munyua, a former GAC representative of Kenya who was no longer authorized to speak on behalf of the Kenyan government, while the actual Kenyan representative, Sammy Buruchara, had been unable to attend the meeting.<sup>81</sup> On 9 April 2013, Mr. Buruchara informed

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<sup>77</sup> Moreover, the Guidebook anticipates that governments and other public authorities may endorse more than one candidate. *See* gTLD Applicant Guidebook, pp. 2-22 (referring to situations in which multiple applications have “documentation of support from the same government or public authority”) [Ex. C-11].

<sup>78</sup> Independent Objector Comment on Controversial Application .Africa, undated [Ex. C-39].

<sup>79</sup> *Id.*, (“[I]t is the public policy of the IO not to make an objection when a single established institution representing and associated with the community having an interest in an objection can lodge such an objection directly.”).

<sup>80</sup> ICANN/New gTLD Site, available at, <http://newgtlds.icann.org/en/program-status/odr> [Ex. C-40].

<sup>81</sup> GAC Advice Response form for Applicants, dated 8 May 2013, pp. 10-13 [Ex. C-41]. Mr. Buruchara was formerly the Chair of DCA and was appointed to represent Kenya on the GAC in March 2013. *See* “Mr. Sammy Buruchara, Former Chair of DCA Appointed as the Kenyan GAC Advisor to ICANN,” 15 March 2013, DomainNewsAfrica, at <http://domainnewsafrica.com/mr-sammy-buruchara-former-chair-of-dca-appointed-as-the-kenyan-gac-advisor-to-icann> [Ex. C-42].

the GAC Secretariat by email, with a copy to Fadi Chehadé, the President and CEO of ICANN, that Ms. Munyua no longer represented the Kenyan government and that “Kenya does not wish to have a GAC advise [sic] on DotConnect Africa Application for .africa delegation.”<sup>82</sup>

34. Nevertheless, on 11 April 2013, the GAC issued a communiqué in which it informed the ICANN Board that it had reached “consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook” on DCA’s application.<sup>83</sup> The GAC thus “advise[d] ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.”<sup>84</sup>

#### **5. ICANN Accepted The Beijing GAC Advice Without Further Examination, Despite The Irregularities That Gave Rise To It**

35. DCA submitted a GAC Advice Response Form in which, *inter alia*, it informed the ICANN Board of the dispute over Kenya’s representative and position with respect to DCA’s application during the Beijing GAC meeting.<sup>85</sup>

36. Under the rules set forth in the new gTLD Guidebook, there are three forms of GAC advice that may be given regarding new gTLD applications, including consensus GAC Advice.<sup>86</sup> The Guidebook provides that consensus GAC advice creates a “strong presumption” that an application should not proceed.<sup>87</sup> However, consensus GAC advice exists only where “any

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<sup>82</sup> GAC Advice Response form for Applicants, dated 8 May 2013, p. 12 (containing screen shot of email) [Ex. C-41].

<sup>83</sup> GAC Beijing Communiqué, p. 3 (citation omitted) [Ex. C-43].

<sup>84</sup> *Id.*, p. 3, n.3 (quoting Module 3.1, gTLD Applicant Guidebook).

<sup>85</sup> GAC Advice Response form for Applicants, dated 8 May 2013 [Ex. C-41].

<sup>86</sup> gTLD Applicant Guidebook (Version 2012-06-04), Art. 3.1 at 3-3 [Ex. C-11].

<sup>87</sup> *Id.*

formal objection” has been made.<sup>88</sup> In this instance, the Kenyan representative had objected to the proposed advice against the DCA application in an email sent, not only to the GAC, but to the President and CEO of ICANN, before the advice was adopted by the GAC in its 11 April 2013 communiqué. Moreover, ICANN was aware that the AUC had offered GAC Early Warning advice objecting to DCA’s application, and that the AUC was in fact DCA’s competitor for .AFRICA, as indicated in UniForum’s application.<sup>89</sup>

37. Nevertheless, on 4 June 2013, the ICANN Board NGPC posted a notice that it had accepted the advice from the Beijing Communiqué, including the decision not to accept DCA’s application.<sup>90</sup>

#### **6. ICANN Denied DCA’s Request For Reconsideration Without Acknowledging The Conflict Of Interest At The Heart Of DCA’s Complaint**

38. On 19 June 2013, DCA filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), arguing that ICANN had improperly accepted the Beijing GAC advice without further inquiry or investigation.<sup>91</sup> DCA argued that ICANN should have carried out further due diligence, such as consulting an expert as provided for in the Guidebook, in order to properly evaluate the GAC advice from Beijing.<sup>92</sup>

39. The BGC denied DCA’s request for reconsideration on 1 August 2013.<sup>93</sup> In its explanation of the denial, the BGC faulted DCA for not having previously requested that the

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<sup>88</sup> GAC Operating Principles, Principle 47 [Ex. C-44].

<sup>89</sup> See AUC/UniForum new gTLD Application, at 7 (explaining its selection by AU) [Ex. C-28].

<sup>90</sup> NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué, ANNEX 1 to NGPC Resolution No. 2013.06.04.NG01, 4 June 2013 [Ex. C-45].

<sup>91</sup> DCA Trust’s Reconsideration Request Form dated 19 June 2013 [Ex. C-46].

<sup>92</sup> *Id.*

<sup>93</sup> Recommendation of the Board Governance Committee (BGC) Reconsideration Request 13-4, 1 August 2013 [Ex. C-47].

NGPC consult with an expert. It also explained its view that the Guidebook’s reference to the fact that the Board “may” consult with an expert indicated a discretionary power that could not be the basis for an argument that ICANN had not followed its own procedures. In reaching this conclusion, it reasoned that “[t]here is no requirement to seek input from independent experts in this situation, therefore no material information was missing.”<sup>94</sup> The BGC made no reference to the fact that the GAC advice was not rendered by consensus, or that it was effectively made by a competitor to DCA.

40. DCA’s application has never been rejected; instead, it is listed on ICANN’s website as “incomplete.”<sup>95</sup>

#### **7. DCA Trust Engaged In The Cooperative Engagement Process, To No Avail**

41. On 19 August 2013, DCA informed ICANN of its intent to seek relief before an Independent Review Panel under ICANN’s Bylaws.<sup>96</sup> At ICANN’s suggestion, between August and October 2013, DCA participated in a Cooperative Engagement Process (“CEP”) with ICANN to try to resolve the issues surrounding DCA’s application.<sup>97</sup> Despite several meetings, no resolution was reached. On 24 October 2013, DCA filed a Notice of Independent Review with the ICDR.<sup>98</sup>

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<sup>94</sup> *Id.*, p. 8.

<sup>95</sup> The gTLD Applicant Guidebook provides that an application be considered incomplete when an applicant does not produce the required documentation of support, but only *after* being notified and given a timeframe of no less than 90 days from the date of notice to provide the documentation. gTLD Applicant Guidebook, Sections 2.2.1.4.4 (at 2-21) and 2.3.1. ICANN never followed this procedure with respect to DCA’s application. Instead, it simply stopped the application from proceeding any further [Ex. C-48].

<sup>96</sup> DCA Notice of Intent, dated 19 August 2013 [Ex. C-49].

<sup>97</sup> Letter from Ms. Sophia Bekele (DCA) to The President/CEO (ICANN), dated 4 September 2013 [Ex. C-50].

<sup>98</sup> DCA Notice of Independent Review, dated 24 October 2013 [Ex. C-51].

## V. APPLICABLE RULES AND GOVERNING LAW

42. This IRP is constituted under Article IV, Section 3 of ICANN's Bylaws.<sup>99</sup> Other applicable rules include ICANN's Articles of Incorporation, the gTLD Applicant Guidebook,<sup>100</sup> and ICANN's stated policies regarding conflicts of interest and the code of conduct for ICANN Board members.<sup>101</sup> The applicable law is international law and local law, as provided in Article 4 of ICANN's Articles of Incorporation.<sup>102</sup>

## VI. SUMMARY OF ICANN'S BREACHES

43. The ICANN Board committed numerous breaches of its Articles, Bylaws, and other applicable rules of conduct in its treatment of DCA's application for .AFRICA, which DCA outlines briefly below, subject to its right to amend or supplement its claims at a later date.<sup>103</sup> These breaches also constituted breaches of applicable principles of international law and local law.

### A. ICANN Breached Its Articles Of Incorporation And Its Bylaws By Failing To Provide Procedural Fairness And Failing To Permit Competition For The .AFRICA gTLD

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<sup>99</sup> See ICANN's Bylaws [Ex. C-10].

<sup>100</sup> gTLD Applicant Guidebook (Version 2012-06-04) [Ex. C-11].

<sup>101</sup> ICANN Conflicts of Interest Policy, available at, <http://www.icann.org/en/groups/board/governance/coi> [Ex. C-52]; ICANN Code of Conduct for Board members, available at, <http://www.icann.org/en/groups/board/governance/code-of-conduct> [Ex. C-53].

<sup>102</sup> Art. 4, ICANN Articles of Incorporation [Ex. C-9]. Article 4 provides:

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and Bylaws, through open and transparent process that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

<sup>103</sup> ICDR Arbitration Rules, Article 4: "During the arbitral proceedings, any party may amend or supplement its claim, counterclaim or defense, unless the tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties or any other circumstances."

44. Under Article 4 of its Articles of Incorporation, ICANN is required to operate for the benefit of the Internet community as a whole, “through open and transparent processes that enable competition and open entry in Internet-related markets.”<sup>104</sup> ICANN’s Bylaws likewise provide that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”<sup>105</sup> The Core Values set forth in ICANN’s Bylaws include the requirement that ICANN “introduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial in the public interest,”<sup>106</sup> and that it make decisions “by applying documented policies neutrally and objectively, with integrity and fairness.”<sup>107</sup>

45. ICANN breached these obligations by, *inter alia*:

- Failing to follow its own procedures for handling alleged conflicts of interest on the part of Board members;
- Failing to protect DCA from conflicts of interest on the NGPC;
- Ignoring conflicts of interest giving rise to the AUC GAC Early Warning and the Beijing Communiqué; and
- Permitting, if not supporting, the AUC’s efforts to eliminate competition for the .AFRICA gTLD by quashing DCA’s application through various mechanisms put in place by ICANN (including the IO and the GAC).

**B. ICANN Breached Its Articles Of Incorporation And Its Bylaws By Giving Excessive Deference To The GAC, Thus Failing To Exercise Due Diligence And Care In Having A Reasonable Amount Of Facts Before It**

46. Under Article IV of ICANN’s Bylaws, the IRP Panel is to evaluate, among other things, whether the Board exercised appropriate “due diligence and care in having a reasonable amount

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<sup>104</sup> ICANN Articles of Incorporation [Ex. C-9].

<sup>105</sup> ICANN Bylaws [Ex. C-10].

<sup>106</sup> *Id.*, Art. I, § 2.6.

<sup>107</sup> *Id.*, Art. I, § 2.8.



of facts” before it.<sup>108</sup> The Board and the NGPC failed to exercise such due diligence in care by giving excessive deference to the GAC advice produced thanks to the efforts of DCA’s competitor, the AUC. In doing so, ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook, all of which provide that GAC advice is to have an advisory role relating to public policy matters, and not a decision-making role.<sup>109</sup>

47. The gTLD Applicant Guidebook similarly includes the possibility that ICANN will reject the GAC advice following an investigation and consultation process.<sup>110</sup> ICANN failed to give “duly taken into account”<sup>111</sup> to the Beijing GAC advice; instead, it simply adopted that advice wholesale. As such, ICANN also failed to “exercise independent judgment in taking the decision”<sup>112</sup> to accept the GAC advice and to put DCA’s application on hold. ICANN’s breaches in this regard include:

- Failing to take account of or respond to DCA’s concerns regarding the AUC GAC Early Warning;
- Ignoring protests of the Kenya representative that indicated that the Beijing GAC Advice was not consensus advice;
- Adopting the Beijing GAC Advice as if it were consensus advice, although it was not;
- Failing to investigate the questions raised about the Beijing GAC Advice;
- Failing to enter into discussions with the GAC when it provided its non-consensus advice, as required by the Guidebook;
- Failing to take account of the fact that both the AUC GAC Early Warning and the Beijing GAC Advice concerning .AFRICA were the product of DCA’s only competitor for the .AFRICA gTLD;

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<sup>108</sup> *Id.*, Art. IV, § 3.4.b.

<sup>109</sup> *Id.*, Art. XI, § 2.1.a, j and k.

<sup>110</sup> gTLD Applicant Guidebook (Version 2012-06-04), Art. 3.1 [Ex. C-11].

<sup>111</sup> ICANN Bylaws, Art. XI, § 2.1. j [Ex. C-10].

<sup>112</sup> *Id.*, Art. IV, § 3.4.c.

- Permitting an applicant for a new gTLD to use the GAC framework as a means of sabotaging the application of its only competitor; and
- Failing to give DCA an opportunity to provide further documentation of support for its application, as required by the Guidebook.

**VII. RELIEF REQUESTED**

48. Based on the foregoing, DCA respectfully requests that the Panel issue a declaration:

- Finding that ICANN breached its Articles of Incorporation, its Bylaws, the gTLD Applicant Guidebook, and its own stated policies on conflicts of interest, ethics, and the Board code of conduct;
- Requiring that ICANN permit DCA's application to proceed;
- Awarding DCA its costs in this proceeding; and
- Awarding such other relief as the Panel may find appropriate or DCA may request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Arif H. Ali', with a stylized flourish at the end.

Arif H. Ali  
Counsel for Claimant

# Exhibit V

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

**ICDR Case No. 50 2013 00 1083**

DotConnectAfrica Trust,

Claimant,

v.

Internet Corporation for Assigned Names and Numbers,

Respondent.

**DCA'S MEMORIAL ON THE MERITS**

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3 November 2014

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delegated: they are reserved for special use.<sup>23</sup> In making this request, the AUC was asking ICANN to treat it like a national government, which has exclusive rights to its two-letter country code TLD (“ccTLD”) (e.g., “.za” for South Africa), seeking to have .AFRICA treated as a continental ccTLD, treatment not contemplated in either the gTLD program or the ccTLD system.<sup>24</sup> If ICANN granted the AUC’s request and allowed only the AUC to choose the registry operator(s) for each string, the AUC would gain exclusive control over the operation of .AFRICA without going through the new gTLD application process at all.

13. ICANN rejected the AUC’s request to reserve .AFRICA in March 2012.<sup>25</sup> However, in the same letter ICANN also instructed the AUC on how to use the GAC to achieve the desired result by other means—advice the AUC proceeded to follow in order to eliminate DCA’s application from competition for .AFRICA.<sup>26</sup> In a letter dated 8 March 2012, ICANN Board Chairman Stephen Crocker explained to the AUC that although ICANN could not reserve .AFRICA for the AU’s use because the Reserved Names list was already closed, the AUC could “play a prominent role in determining the outcome of any application” for .AFRICA: first, as a “public authorit[y] associated with the continent,” the AUC could block a competing application by filing “one written statement of objection;” second, the AUC could file a Community Objection (a type of formal objection recognized by ICANN and decided by an independent evaluator); or finally, the AUC could utilize the GAC to combat a competing application for .AFRICA.<sup>27</sup>

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<sup>23</sup> The full list of Reserved Names is available at <https://www.icann.org/sites/default/files/packages/reserved-names/ReservedNames.xml>.

<sup>24</sup> ICANN did not respond to the AUC’s request until 8 March 2012, just one month before the gTLD application deadline was due to close, meaning that for the bulk of the application cycle, African governments remained under the impression that .AFRICA and related names might be reserved for the AUC’s use.

<sup>25</sup> See Witness Statement of S. Bekele at ¶¶ 61-63.

<sup>26</sup> See Letter from Stephen Crocker to Elham M.A. Ibrahim, p. 2 (8 March 2012), [Ex. C-24].

<sup>27</sup> Letter from Stephen Crocker to Elham M.A. Ibrahim, p. 2 (8 March 2012), [Ex. C-24].

October 2012, having completed an initial review of the endorsements for each application, Mr. McFadden explained to ICANN staff that if the endorsements of regional organizations like the AUC and UNECA were not applied towards the 60% requirement, then neither DCA nor ZACR would have sufficient geographic support.<sup>40</sup> InterConnect recommended that ICANN (a) take the endorsement letters from regional authorities like the AUC and UNECA into account for both applicants and (b) contact the AUC directly to determine whether the AUC wished to endorse either, both or neither applicant.<sup>41</sup> ICANN, however, disagreed with InterConnect's view that UNECA should be considered as a regional organization,<sup>42</sup> although Mr. McFadden explained that UNECA was an intergovernmental African regional organization and should qualify as a relevant public authority on the same basis as the AU.<sup>43</sup> ICANN thus determined that only the AUC endorsements (and not the UNECA endorsements) would be taken into account for the geographic evaluation for both applications.<sup>44</sup>

#### **F. GAC Objection Advice On .AFRICA**

18. Meanwhile, having used its new position as a GAC member to coordinate a GAC Early Warning, the AUC began preparing GAC advice against DCA's application.

19. Prior to the ICANN meeting in Beijing in April 2013, Redacted - GAC Designated Confidential Information

GAC advisor, Sammy Buruchara, was unable to attend the

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<sup>40</sup> Email from Mark McFadden to Larisa Gurnick (25 October 2012), [Ex. C-71] (indicating that of the Redacted - GAC Designated Confidential Information

Similarly, DCA had endorsements from the AUC and UNECA, both organizations that ICANN considered irrelevant to geographic support). *Compare* Redacted - GAC Designated Confidential Information [Ex. C-72] *with* InterConnect CQ Matrix for DCA [Ex. C-73] ( Redacted - GAC Designated Confidential Information ).

<sup>41</sup> Email from Emily Taylor to Trang Nguyen and Cheri Bolen (10 May 2013), [Ex. C-74]; Email from Mark McFadden to Larisa Gurnick (15 Mar. 2013), [Ex. C-68], *see also* Email from Mark McFadden to Trang Nguyen et al. (26 April 2013) [Ex. C-75] (draft contact request to the AUC).

<sup>42</sup> InterConnect CQ Matrix for ZACR [Ex. C-72]; InterConnect CQ Matrix for DCA [Ex. C-73].

<sup>43</sup> Email from Mark McFadden to Cheri Bolen and Trang Nguyen (30 May 2013), [Ex. C-70].

<sup>44</sup> Email from Emily Taylor to Trang Nguyen and Cheri Bolen (10 May 2013), [Ex. C-74]; Email from Trang Nguyen to Mark McFadden (26 April 2013) [Ex. C-76]; Email from Trang Nguyen to Emily Taylor (15 May 2013) [Ex. C-77].



GAC meeting in person, but was informed that at a meeting of the GAC and ICANN Board on 9 April 2013, Alice Munyua, Kenya’s former GAC advisor and a member of the ZACR Steering Committee as well as a GAC representative for the AUC, made a statement purportedly on behalf of Kenya denouncing DCA’s application for .AFRICA.<sup>45</sup> Mr. Buruchara wrote to the GAC Chairperson Heather Dryden later that evening to inform her that Ms. Munyua no longer represented Kenya and that Kenya did not share her viewpoints on .AFRICA.<sup>46</sup>

20. Redacted - GAC Designated Confidential Information

Mr. Buruchara, who explained that Kenya supported the AUC’s application for .AFRICA but did not think it was appropriate for the AUC to utilize the GAC to eliminate competition.<sup>47</sup>

21. Redacted - GAC Designated Confidential Information

<sup>48</sup> Redacted - GAC Designated Confidential Information

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<sup>45</sup> See Transcript of Beijing GAC-ICANN Board meeting, p. 19-23 (9 April 2013), [Ex. C-78] (recording Ms. Munyua’s comments on behalf of Kenya, followed by comments from an AUC Representative thanking Ms. Munyua for her comments and indicating that Ms. Munyua attended the Beijing meeting as “one of the AUC [GAC] representatives”).

<sup>46</sup> [Ex. C-79]. The email apparently bounced back from Ms. Dryden’s inbox Redacted - GAC Designated Confidential Information Kenya’s GAC Representative Michael Katundu forwarded the email to Ms. Dryden’s personal address, as well as copying the GAC distribution list. See [Ex. C-80]. (10 April 2013), [Ex. C-81].

<sup>47</sup> [Ex. C-82] Redacted - GAC Designated Confidential Information

<sup>48</sup> Compare [Ex. C-83] with Redacted - GAC Designated Confidential Information Ex. C-84] [Ex. C-85] [Ex. C-86]

therefore incorrect in asserting that Mr. Buruchara ultimately endorsed the advice against .AFRICA; he did not.<sup>50</sup> Nonetheless, the GAC Communiqué of 11 April 2013 purported to offer *consensus advice* that DCA’s application should not proceed (the “GAC Objection Advice”).<sup>51</sup>

22. DCA responded to the GAC Advice on 8 May 2013, indicating that it would be inappropriate for ICANN to allow the AUC to utilize the GAC to eliminate DCA, the AUC’s only competitor for .AFRICA. DCA submitted a list of nine points for the ICANN Board to consider in evaluating the GAC Objection Advice, explaining that (i) it was anticompetitive, contravening both the ICANN Bylaws and the GAC Operating Principles; (ii) the GAC is a policy body and is not empowered to perform the GNP evaluation, as it purported to do; (iii) ZACR also failed to satisfy the 60% geographic requirement, and it would be inappropriate to treat the applications differently; (iv) the GAC Objection Advice was not consensus advice, because Kenya objected to it; and (v) the GAC Objection Advice was untimely under the AGB.<sup>52</sup>

23. On 4 June 2013, the NGPC held a meeting to “consider accepting the GAC Advice.”<sup>53</sup> The meeting minutes show no evidence that the NGPC considered any of DCA’s nine points before

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<sup>49</sup> Redacted - GAC Designated Confidential Information [Ex. C-87]

<sup>50</sup> See ICANN’s Response to Claimant’s Amended Notice, ¶ 38 (“representatives of several other African countries criticized Mr. Buruchara’s statements and strongly encouraged Mr. Buruchara to change his position stated in these two emails, which he did.”) [hereinafter, “ICANN Response”].

<sup>51</sup> GAC Communiqué – Beijing, China (11 April 2013), [Ex. C-43] (“The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the [AGB] on the following applications: 1. The application for .africa (Application number 1--1165--42560)”). GAC advice may take three forms: (i) consensus advice that a particular application should not proceed, which creates a “strong presumption for the ICANN Board that the application should not be approved,” (ii) non-consensus advice that the GAC has concerns about a particular application, about which the Board “is expected to enter into a dialogue with the GAC to understand the scope of the concerns” and “is also expected to provide a rationale for its decision,” and (iii) non-consensus advice that an application should not proceed unless remediated, which raises a strong presumption that a particular application should be disqualified unless the applicant implements a remediation method set forth in the AGB. AGB, Module 3.1.I.-III [Ex. C-11].

<sup>52</sup> See generally GAC Advice Response Form for Applicants (8 May 2013), [Ex. C-41].

<sup>53</sup> Despite ICANN’s claims that the NGPC met “multiple times” to discuss the advice on DCA, see ICANN Response at ¶ 20, the 4 June meeting of the NGPC was the only meeting which took place after DCA had an opportunity to respond to

accepting the GAC Advice.<sup>54</sup> Both Mike Silber and Chris Disspain, whom DCA had previously complained had conflicts of interest with respect to .AFRICA, were present and voted to accept the GAC Objection Advice against DCA.<sup>55</sup>

24. At the time the NGPC accepted the GAC advice on DCA’s application, ICANN had not yet finalized CQs from InterConnect for either applicant. DCA would never receive CQs from InterConnect because on 7 June 2013, within three days of the NGPC accepting the GAC Objection Advice, ICANN staff instructed InterConnect to discontinue work on DCA’s application.<sup>56</sup>

### **G. DCA’s Request For Reconsideration By The NGPC**

25. DCA filed a Request for Reconsideration (“RFR”)<sup>57</sup> on 19 June 2013, requesting that the NGPC reconsider its acceptance of the GAC Advice. Specifically, DCA argued that, because the GAC Advice was structured as an objection, the NGPC should have exercised its discretionary power to consult an independent expert of the kind designated to hear objections under the Dispute Resolution framework.<sup>58</sup> The AGB provides this option to the ICANN Board; moreover, DCA argued that a

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the Advice. *See* Minutes of NGPC Meeting (8 May 2013), [Ex. C-88] (indicating that the Board discussed the GAC Advice on .AFRICA, but also noting that the applicant response window closed on 10 May 2013, so the Board could not take any action with regard to individual applications until after the window closed). To the extent that the NGPC did, as ICANN claims, discuss the advice on DCA’s application “multiple times,” it did so without investigating any of DCA’s concerns. Furthermore, in contrast to the detailed discussions the NGPC had on other matters at the 4 June meeting, the discussion of the Advice on DCA is summarized in all of three sentences. *See* Minutes of NGPC Meeting (4 June 2013), [Ex. R-4]

<sup>54</sup> *See* Minutes of NGPC Meeting, p. 2 (4 June 2013), [Ex. R-4] (“The Committee *discussed accepting* the GAC (Governmental Advisory Committee) advice regarding application number 1-1165-42560 for .AFRICA and application number 1-1936-2101 for .GCC.”) (emphasis added).

<sup>55</sup> *See* Amended Notice of IRP, at ¶¶ 24-25 for details on the conflicts of interest and the Ombudsman’s investigation, which found on 12 December 2012 that, utilizing a definition of conflicts of interest as relates to judges and arbitrators rather than board members, Mike Silber and Chris Disspain were not conflicted with regard to .AFRICA, because *the board had yet to take any decisions with regard to .AFRICA*. Nonetheless, Mr. Silber and Mr. Disspain both updated their conflicts of interest statements on 18 December 2012 to include the conflicts that DCA identified. Witness Statement of Sophia Bekele at ¶¶ 104-124.

<sup>56</sup> Email from Cheri Bolen to Mark McFadden (7 June 2013), [Ex. C-89]. *See also* Chronology, [Ex. C-61]

<sup>57</sup> ICANN’s Bylaws provide the Reconsideration Request as a mechanism “by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.” The RFR includes reconsideration of Board or Staff action, but must be filed within 15 days of the posting of the minutes of the action on ICANN’s website. For RFRs relating to Board actions, the BGC reviews the RFR and provides a recommendation, and the NGPC thereafter determines whether to adopt the BGC recommendation. *See generally* Bylaws, Art. IV § 2, [Ex. C-9].

<sup>58</sup> DCA Trust Reconsideration Request Form (19 June 2013), p. 4-5, [Ex. C-46].

56. For these reasons, DCA respectfully requests that the Panel declare that—

- The Board violated ICANN’s Articles of Incorporation, Bylaws and general principles of international law by—
  - Discriminating against DCA and wrongfully assisting the AUC and ZACR to obtain rights to the .AFRICA gTLD;
  - Failing to apply ICANN’s procedures in a neutral and objective manner, with procedural fairness when it accepted the GAC Objection Advice against DCA; and
  - Failing to apply its procedures in a neutral and objective manner, with procedural fairness when it approved the BGC’s recommendation not to reconsider the NGPC’s acceptance of the GAC Objection Advice against DCA;
- As a result of each of these violations, ICANN must—
  - Cease all preparations to delegate the .AFRICA gTLD to ZACR and rescind its contract with ZACR;
  - Permit DCA’s application to proceed through the remainder of the new gTLD application process; and
  - Compensate DCA for the costs it has incurred in applying for .AFRICA, including the \$185,000 DCA paid in order to apply (and which ICANN has retained), as well as other costs DCA incurred in preparing its application;
- DCA is the prevailing party in this IRP and, consequently, shall be entitled to its costs in this proceeding; and
- DCA is entitled to such other relief as the Panel may find appropriate under the circumstances described herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Arif H. Ali', with a stylized flourish at the end.

Arif H. Ali  
Counsel for Claimant