

**STATEMENT OF INTEREST OF DOTCONNECT AFRICA TRUST ON WHETHER
THE DEPARTMENT OF COMMERCE SHOULD RELINQUISH DIRECT
OVERSIGHT OF ICANN**

This Statement of Interest is submitted by DotConnect Africa Trust (“DCA Trust”), a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 and with its principal place of business in Nairobi, Kenya. DCA Trust’s founder and Executive Director is Ms. Sophia Bekele (http://en.wikipedia.org/wiki/Sophia_Bekele) is a United States citizen.

DCA Trust was established and is committed to advancing education in information technology in African society and providing a continental Internet domain name to provide access to Internet services for the people of Africa and for the public good.

In furtherance of these charitable purposes, DCA Trust applied for a new generic top-level domain name (“gTLD”) as part of ICANN’s program to expand Internet gTLDs. DCA Trust’s experience in this context demonstrates that ICANN lacks the institutional maturity and governance structure necessary to give it oversight authority independent of the United States Government for an international resource as critical to today’s economy and social fabric as the Internet.

DCA Trust submitted its application for a new gTLD, .AFRICA, in March 2012, with an endorsement from the United Nations Economic Commission on Africa (“UNECA”) and an initial endorsement from the African Union Commission (“AUC”). The only other applicant for .AFRICA was a South African company called ZA Central Registry (“ZACR”), which submitted its application on the invitation of the AUC. The AUC solicited ZACR as a partner to apply for .AFRICA after failing in its efforts to reserve .AFRICA for the exclusive use of African governments, notwithstanding its endorsement at one stage of DCA Trust’s .AFRICA initiative.

On advice provided by ICANN, the AUC used its position as a member of the Governmental Advisory Commission (“GAC”) to issue a GAC Early Warning objecting to DCA Trust’s application as an unwarranted interference with AUC’s own application via ZACR. It subsequently succeeded in fostering the issuance of GAC Advice advising ICANN to reject

DCA Trust's application for alleged lack of governmental support without permitting it to be reviewed by the geographic names panel, although DCA Trust's application had passed all other stages of review. Despite DCA Trust's repeated efforts to call ICANN's attention to the abuse of the GAC by AUC, ICANN accepted the GAC advice without any investigation into DCA Trust's concerns, and refused to permit DCA Trust's application to proceed.

In good faith and in reliance on the accountability and transparency procedures that ICANN has established, DCA Trust submitted a Request for Reconsideration to the ICANN Board Governance Committee ("BGC"), arguing that ICANN had improperly accepted the GAC advice without further inquiry or investigation. The BGC denied the request but did not address the key issue in DCA Trust's request, which was that ICANN had allowed, if not been complicit in, the abuse of the GAC advisory process for purposes of furthering the interests of an applicant for a new gTLD at the expense of its only competitor, DCA Trust.

DCA Trust turned to ICANN's Independent Review Process ("IRP"), filing a Notice of IRP in October 2013 and an Amended Notice in January 2014.¹ In its Notice, DCA Trust alleges that ICANN has breached its Bylaws, Articles of Incorporation, and local and international law, and requests a declaration confirming these breaches and recommending that ICANN should permit DCA Trust's application to proceed. In January 2014, DCA Trust also requested that ICANN refrain from further action concerning the .AFRICA gTLD while the IRP was pending. ICANN refused to do so.² Because ICANN has tailored the rules that apply to the IRP to funnel any requests for emergency relief to a standing panel that ICANN has failed to put in place, DCA Trust was deprived of a means of seeking such relief to prevent ICANN from continuing to process applications for .AFRICA. The parties are currently in the process of constituting a Panel to hear DCA Trust's claims.

¹ See DCA's Notice of IRP (Oct. 24, 2013) and Amended Notice of IRP (Jan. 10, 2014), attached as Annex A hereto.

² See DCA's Request for Emergency Arbitrator and Interim Measures of Protection (Mar. 28, 2014), attached as Annex B hereto; Letter from Arif Ali to Jeffery LeVee (Mar. 28, 2014), attached as Annex C hereto.

On March 23, 2014, DCA Trust learned that ICANN planned to sign a registry agreement with ZACR in Singapore on March 26, 2014. DCA Trust immediately contacted ICANN to urge it not to take this step, since doing so would deprive DCA Trust of its right to be heard in the IRP and the opportunity to obtain meaningful relief as a result.

ICANN nevertheless signed a registry agreement with ZACR the very next business day, **on March 24**, two days ahead of the schedule it had announced. It then informed DCA Trust of this *fait accompli*.³ That same day, ICANN informed DCA Trust that it could have used procedures for interim relief to try to stop ICANN from proceeding using the same procedures that ICANN has publicly stated are not available for emergency interim relief purposes.

Based on DCA's experience, ICANN is not prepared to take on further regulatory oversight of the Internet, with due regard for its obligations of transparency, accountability, and good faith toward Internet stakeholders. If anything, ICANN has demonstrated that it requires *more* oversight, and more stringent and effective accountability mechanisms, if it is even to continue in the role that it currently plays.

DCA Trust has written letters to US Congress in the past, advocating for continuation of the *status quo* in Internet governance, as well as to refer DCA's complaints and grievances against ICANN to the Subcommittee and appeal for a congressional Ombudsman who might examine irregularities and allegations of illegality in the implementation of the new gTLD program.⁴

³ According to the African press, ICANN's mismanagement of the .africa application process and duplicitous behavior surrounding the IRP has jeopardized not only ICANN's credibility but the success of .africa in general as a unifier and a development initiative. *See, e.g.*, Yohannes Tadesse, "Award of DotAfrica contract to ZACR raises doubts over ICANN's credibility," CIO East Africa, 30 March 2014, <http://www.cio.co.ke/blog/award-of-dotafrika-contract-to-zacr-raises-doubts-over-icann%E2%80%99s-credibility>, attached as Annex D hereto.

⁴ The various letters can be found at DCA's communication website <http://www.dotconnectafrica.org/icann-related-2/uscongress/>.

Annex A

DCA Trust's Notice of IRP (Oct. 24, 2013) and Amended Notice of IRP (Jan. 10, 2014)



NOTICE OF INDEPENDENT REVIEW

Date: October 24, 2013
To: Name (of the party on which this Notice is to be served) ICANN Nationality: USA
Address: Internet Corporation for Assigned Names and Numbers (ICANN), 12025 Waterfront Drive, Ste. 300
City: Los Angeles State/Province: California Country: USA Post Code: 90094-2536
Telephone: +1 310 301 5800 Facsimile: +1 310 823 8649 Email: independentreview@icann.org
Name of Representative: (if known) Mr. John Jeffrey Name of Firm: (if applicable) ICANN General Counsel
Address: Internet Corporation for Assigned Names and Numbers (ICANN), 12025 Waterfront Drive, Ste. 300
City: Los Angeles State/Province: California Country: USA Post Code: 90094-2536
Telephone: +1 310 301 5800 Facsimile: +1 310 823 8649 Email: john.jeffrey@icann.org

The named claimant seeks this independent review in accordance with Article IV, Section 3 of the ICANN Bylaws. The claimant agrees that such Independent Review shall be conducted pursuant to the International Arbitration Rules ("Rules") of the International Dispute Resolution Procedures as supplemented per ICANN's Bylaws.

Nature of the Dispute: (attach additional sheets, if necessary) Request for IRP Panel proceeding of an ICANN Board Action
The Claim or Relief Sought: (the amount, if any) To subject a board decision on a new gTLD application to IRP Panel third-party review as per ICANN Bylaws.
Type of Business: Claimant New gTLD Applicant/Internet DNS Industry
Place of Review Requested: Los Angeles, CA, United States of America

You are hereby notified that copies of this NOTICE are being filed with the INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION at Case Filing Services, 1101 Laurel Oak Road, Suite 100, Voorhess, NJ 08043 email: casefiling@adr.org, with a request that it commence administration of an independent review. Under the rules, you may file a Statement of Defense within the time specified in the rules after notice from the administrator.

Name of Claimant: DotConnectAfrica Trust (DCA Trust) Nationality: Mauritius
Address: (to be used in connection with this case) 1st Floor, River Court, 6 St. Denis Street,
City: Port Louis State/Province: Country: Mauritius Post Code: P.O. Box 1079
Telephone: +(230) 208 9022 Facsimile: +(230) 208 9033 Email: sbekele@dotconnectafrica.org
Name of Representative: (if known) Ms. Sophia Bekele Name of Firm: (if applicable) DotConnectAfrica Trust
Address: 1776 Botelho Drive Suite 302 Walnut Creek California 94597
City: Walnut Creek State/Province: California Country: USA Post Code: 94597
Telephone: +1-925-818-4322 Facsimile: +1-925-935-1589 Email: sbekele@dotconnectafrica.org

To begin proceedings, please send two copies of this notice of independent review, with the filing fee as provided for in the Rules, to the ICDR. Send the original notice to the respondent.

Signature (may be signed by a representative) [Signature] Title: Executive Director/CEO Date: Oct. 24, 2013

**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.¹

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

¹ 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 [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.² 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.³ 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.⁴

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.⁵ DCA intends .AFRICA to serve the diverse needs and purposes of the global internet community, but with

² See Mauritius Revenue Authority response to DCA Trust Application for Registration as a Charitable Trust, 15 July 2010 [Ex. C-5].

³ See Vision and Objective, available at <http://www.dotconnectafrica.org/about/mission-and-objective/> [Ex. C-6].

⁴ See Certificate of Incorporation [Ex. C-7].

⁵ 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.⁶ 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.⁷

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.⁸ 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.⁹ Some of the charitable campaigns already launched include miss.africa and generation.africa.¹⁰

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”¹¹ and is tasked with “carrying

⁶ *Id.*

⁷ *Id.*, pp. 7, 10.

⁸ *Id.*, p. 9.

⁹ *Id.*

¹⁰ *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.

¹¹ 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.”¹²

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”).¹³ 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.¹⁴

12. ICANN is subject to international and local law,¹⁵ and is required to achieve its mission in conformity with the principles expressly espoused in its Bylaws and Articles of Incorporation,

¹² *Id.*

¹³ See ICANN Bylaws, Art. I [Ex. C-10].

¹⁴ 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].

¹⁵ 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.¹⁶

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.¹⁷ Evaluations of applications for new gTLDs are carried out by the New gTLD Program Committee (“NGPC”).¹⁸ In making its decisions, the Board receives input from a number of Supporting Organizations and Advisory Committees established by ICANN’s Bylaws.¹⁹ 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).²⁰ 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.”²¹

IV. SUMMARY OF RELEVANT FACTS

¹⁶ ICANN Bylaws, Art. I, Section 2, “Core (Council of Registrars) Values” [Ex. C-10].

¹⁷ *Id.*, Art. VI, Section 2.

¹⁸ *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.

¹⁹ *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.”

²⁰ *See id.*, Art. XI Section 2.1.

²¹ 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.²² 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.²³ 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.²⁴ The culmination of this process was the decision by the ICANN Board of Directors in June 2011 to launch the New gTLD Program.²⁵

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.²⁶

²² *Id.*, Preamble.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See* Sophia Bekele - ICANNWiki, available at 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.²⁷ During her tenure at ICANN’s GNSO (from 2005 to 2007), Ms. Bekele was instrumental in initiating policy dialogue over International Domain Names (“IDN”).²⁸ 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.²⁹

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.³⁰ AUC endorsed DCA’s intent to apply for the .AFRICA domain name through a letter dated 27 August 2009 directed to Ms. Bekele.³¹ In

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.

²⁷ See *id.*, ICANN Work (PDF p. 2).

²⁸ *Id.*

²⁹ See Sophia Bekele - ICANNWiki, available at 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].

³⁰ UNECA Endorsement Letter to Ms. Bekele dated 8 August 2008 [Ex. C-15].

³¹ AUC Endorsement Letter to Ms. Bekele dated 27 August 2009 [Ex. C-16].

addition to expressing “its endorsement of the DotAfrica ‘.africa’ initiative,”³² AUC offered Ms. Bekele “assistance in the coordination of [DCA’s] initiative with African Ministers and Governments.”³³

18. DCA announced the official launch of the .AFRICA campaign at the AITEC Information Communication Technology summit held in Nairobi, Kenya, on September 7, 2010.³⁴ 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.³⁵

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”)³⁶ and certain members of the African Union DotAfrica Task Force, which is

³² *Id.*

³³ *Id.*

³⁴ 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].

³⁵ 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.].

³⁶ 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”).³⁷

20. Accordingly, the AUC informed the Internet community that it would initiate an Expression of Interest to bidders to be endorsed for .AFRICA.³⁸ 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.³⁹ DCA objected to the request.⁴⁰ ICANN’s official response to the AUC was communicated through a letter from ICANN’s Board Chairman Stephen Crocker dated 8 March 2012,⁴¹ 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

³⁷ 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.

³⁸ See Expression of Interest for the Operation of the DotAfrica [Ex. C-21].

³⁹ African Union Communiqué, “African ICT Ministerial Round-Table on 42nd Meeting of ICANN” [Ex. C-22]

⁴⁰ 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].

⁴¹ 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.⁴²

21. Shortly after the ICANN Meeting in Dakar, the AUC issued a Request for Proposals for the operation of .AFRICA.⁴³ DCA did not participate in this process, as it believed that the AUC had not set up an open, competitive and transparent process.⁴⁴ 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.⁴⁵

22. Thus, two competing applications were submitted for the .AFRICA domain: (i) DCA’s application;⁴⁶ and (ii) AUC/UniForum’s application.⁴⁷

D. ICANN’s Improper Treatment Of The DCA New gTLD Application

23. DCA submitted its application for the .AFRICA gTLD in March 2012.⁴⁸ 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

⁴² *Id.*, p. 3.

⁴³ Request for Proposals by the African Union Commission for the Operation of DotAfrica [Ex. C-25].

⁴⁴ Letter from Ms. Sophia Bekele (DCA) to H.E. Ambassador John Shinkaiye (African Union Commission) dated 30 December 2011 [Ex.C-26].

⁴⁵ See Vika Mpisane – General Manger of the ZA Domain Name Authority (ZADNA), available at <http://www.iweek.org.za/vika-mpisane/> [Ex. C-27].

⁴⁶ DCA New gTLD Application [Ex. C-8].

⁴⁷ New gTLD Application Submitted to ICANN by: UniForum SA (NPC) trading as Registry.Africa (“AUC/UniForum new gTLD Application”), p. 7 [Ex. C-28].

⁴⁸ DCA New gTLD Application [Ex. C-8].

would benefit from .AFRICA.⁴⁹ 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.”⁵⁰ 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.”⁵¹ Proceeds from sales of domain names were to be placed in trust for use in charitable purposes, as already explained in paragraph 9 above.⁵²

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.⁵³ 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.⁵⁴ 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

⁴⁹ *Id.*

⁵⁰ *Id.*, p. 10.

⁵¹ *Id.*, p. 11.

⁵² See *id.*, p. 9.

⁵³ 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).

⁵⁴ 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.⁵⁵ DCA wrote to ICANN requesting that both men recuse themselves from any consideration of the .AFRICA applications.⁵⁶ 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.⁵⁷

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.”⁵⁸ 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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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

⁵⁵ Letter from Ms. Sophia Bekele (DCA) to The CEO of ICANN, dated 18 July 2012 [Ex. C-31].

⁵⁶ *See id.*, *see also* Ex. C-30.

⁵⁷ ICANN Bylaws, Art. V, Section 2 [Ex. C-10].

⁵⁸ 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]

⁵⁹ *Id.*

⁶⁰ Email from LaHatte to Disspain and Silber dated 4 December 2012 [Ex. C-32].

⁶¹ *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.”⁶² 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.⁶³ Mr. LaHatte made the report public, over DCA’s objections and at the urging of Mr. Silber.⁶⁴

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.”⁶⁵ 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”⁶⁶ 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

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *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.”

⁶⁵ ICANN/GAC website, at <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee> (accessed 9 January 2014).

⁶⁶ 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.”⁶⁷ 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.⁶⁸

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.⁶⁹ In other words, while the AUC used UniForum to apply for the .AFRICA on its behalf,⁷⁰ 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.⁷¹ ICANN did not respond.

⁶⁷ *Id.* Several African governments submitted identically worded early warnings in coordination with the AUC [Ex. C-34].

⁶⁸ 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].

⁶⁹ 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].

⁷⁰ AUC/UniForum new gTLD Application, p. 7 [Ex. C-28].

⁷¹ 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”).⁷² 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.⁷³

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.⁷⁴ 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.⁷⁵ UniForum also responded, sending a letter echoing the IO’s concerns and outlining what it saw as the “shortcomings” of DCA’s application.⁷⁶

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

⁷² 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].

⁷³ gTLD Applicant Guidebook (Version 2012-06-04), Art. 3.2.5 [Ex. C-11].

⁷⁴ 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].

⁷⁵ *Id.*

⁷⁶ 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.⁷⁷ 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.⁷⁸ 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.⁷⁹

32. The Objection Filing period for objecting to new gTLD applications closed on 13 March 2013.⁸⁰

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.⁸¹ On 9 April 2013, Mr. Buruchara informed

⁷⁷ 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].

⁷⁸ Independent Objector Comment on Controversial Application .Africa, undated [Ex. C-39].

⁷⁹ *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.”).

⁸⁰ ICANN/New gTLD Site, available at, <http://newgtlds.icann.org/en/program-status/odr> [Ex. C-40].

⁸¹ 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.”⁸²

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.⁸³ 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.”⁸⁴

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.⁸⁵

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.⁸⁶ The Guidebook provides that consensus GAC advice creates a “strong presumption” that an application should not proceed.⁸⁷ However, consensus GAC advice exists only where “any

⁸² GAC Advice Response form for Applicants, dated 8 May 2013, p. 12 (containing screen shot of email) [Ex. C-41].

⁸³ GAC Beijing Communiqué, p. 3 (citation omitted) [Ex. C-43].

⁸⁴ *Id.*, p. 3, n.3 (quoting Module 3.1, gTLD Applicant Guidebook).

⁸⁵ GAC Advice Response form for Applicants, dated 8 May 2013 [Ex. C-41].

⁸⁶ gTLD Applicant Guidebook (Version 2012-06-04), Art. 3.1 at 3-3 [Ex. C-11].

⁸⁷ *Id.*

formal objection” has been made.⁸⁸ 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.⁸⁹

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.⁹⁰

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.⁹¹ 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.⁹²

39. The BGC denied DCA’s request for reconsideration on 1 August 2013.⁹³ In its explanation of the denial, the BGC faulted DCA for not having previously requested that the

⁸⁸ GAC Operating Principles, Principle 47 [Ex. C-44].

⁸⁹ See AUC/UniForum new gTLD Application, at 7 (explaining its selection by AU) [Ex. C-28].

⁹⁰ 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].

⁹¹ DCA Trust’s Reconsideration Request Form dated 19 June 2013 [Ex. C-46].

⁹² *Id.*

⁹³ 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.”⁹⁴ 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.”⁹⁵

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.⁹⁶ 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.⁹⁷ Despite several meetings, no resolution was reached. On 24 October 2013, DCA filed a Notice of Independent Review with the ICDR.⁹⁸

⁹⁴ *Id.*, p. 8.

⁹⁵ 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].

⁹⁶ DCA Notice of Intent, dated 19 August 2013 [Ex. C-49].

⁹⁷ Letter from Ms. Sophia Bekele (DCA) to The President/CEO (ICANN), dated 4 September 2013 [Ex. C-50].

⁹⁸ 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.⁹⁹ Other applicable rules include ICANN's Articles of Incorporation, the gTLD Applicant Guidebook,¹⁰⁰ and ICANN's stated policies regarding conflicts of interest and the code of conduct for ICANN Board members.¹⁰¹ The applicable law is international law and local law, as provided in Article 4 of ICANN's Articles of Incorporation.¹⁰²

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.¹⁰³ 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

⁹⁹ See ICANN's Bylaws [Ex. C-10].

¹⁰⁰ gTLD Applicant Guidebook (Version 2012-06-04) [Ex. C-11].

¹⁰¹ 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].

¹⁰² 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.

¹⁰³ 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.”¹⁰⁴ 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.”¹⁰⁵ 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,”¹⁰⁶ and that it make decisions “by applying documented policies neutrally and objectively, with integrity and fairness.”¹⁰⁷

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

¹⁰⁴ ICANN Articles of Incorporation [Ex. C-9].

¹⁰⁵ ICANN Bylaws [Ex. C-10].

¹⁰⁶ *Id.*, Art. I, § 2.6.

¹⁰⁷ *Id.*, Art. I, § 2.8.

of facts” before it.¹⁰⁸ 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.¹⁰⁹

47. The gTLD Applicant Guidebook similarly includes the possibility that ICANN will reject the GAC advice following an investigation and consultation process.¹¹⁰ ICANN failed to give “duly taken into account”¹¹¹ 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”¹¹² 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;

¹⁰⁸ *Id.*, Art. IV, § 3.4.b.

¹⁰⁹ *Id.*, Art. XI, § 2.1.a, j and k.

¹¹⁰ gTLD Applicant Guidebook (Version 2012-06-04), Art. 3.1 [Ex. C-11].

¹¹¹ ICANN Bylaws, Art. XI, § 2.1. j [Ex. C-10].

¹¹² *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

Annex B

DCA's Request for Emergency Arbitrator and Interim Measures of Protection
(Mar. 28, 2014)

**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**

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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 2013.¹

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

¹ 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.² ICANN, however, summarily refused to do so.³ 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.⁴ 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 2014.⁵

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.⁶ Instead, according to ICANN's website, ICANN *signed its agreement with ZACR the*

² 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.

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

⁴ Email from Alice Munyua (23 March 2014), Annex F hereto.

⁵ 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.

⁶ 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.*⁷ 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.⁸ 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.⁹

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

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.

⁷ 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.

⁸ 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.

⁹ 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:¹⁰

- 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.

¹⁰ 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”).¹¹ 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.¹² ICANN is subject to international and local law,¹³ 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,

¹¹ See ICANN Bylaws, Art. I [Ex. C-10].

¹² 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].

¹³ 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.¹⁴

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.¹⁵ 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,

¹⁴ ICANN Bylaws, Art. I, Section 2, “Core (Council of Registrars) Values” [Ex. C-10].

¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

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”).¹⁹ 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.²⁰ Acting on ICANN’s advice, the AUC set out to achieve the same result through the mechanism of ICANN’s Governmental Advisory Committee

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

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

¹⁸ See DCA’s Amended Notice of IRP, para. 17.

¹⁹ 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://gtldresult.icann.org/applicationstatus/applicationchangehistory/1184>.

²⁰ 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”).²¹ 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.²² 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”²³ 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.”²⁴

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.²⁵

²¹ 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].

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

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

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

²⁵ 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.²⁶ 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.²⁷ 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.²⁸ 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."²⁹ 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.³⁰ In October 2013, DCA filed a Notice of IRP, which it amended in January 2014.³¹ DCA requests a

²⁶ 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].

²⁷ 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].

²⁸ GAC Beijing Communiqué, p. 3 [Ex. C-43].

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

³⁰ 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.³²

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."³³ 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.³⁴ 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

³¹ DCA's Amended Notice of IRP, on file with the ICDR.

³² DCA's Amended Notice of IRP at para. 48.

³³ 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").

³⁴ ICDR Rules, Art. 37(2).

relief protects an existing right; the interim relief is necessary; and it is urgent.³⁵ 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.³⁶ Although the Supplementary Procedures which govern the IRP proceeding exclude the application of Article 37,³⁷ on 24 March 2014, ICANN expressly consented to the application of Article 37 in this proceeding.³⁸ 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.³⁹

³⁵ 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).

³⁶ 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.").

³⁷ 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").

³⁸ 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").

³⁹ 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,⁴⁰ a party to an international dispute resolution process such as this one has a right to preserve the “effectivity of a possible future award.”⁴¹ 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.⁴²

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

⁴⁰ 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.

⁴¹ 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”).

⁴² 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.⁴³ 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.⁴⁴ 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

⁴³ 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").

⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.⁴⁷ The *status quo* includes the relationship between the parties and the rights that each party had when the dispute was submitted for resolution.⁴⁸ Interim relief may compel the parties not only to stay any action that would upset the *status quo*, but in some cases, tribunals

⁴⁵ 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.

⁴⁶ 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.

⁴⁷ *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").

⁴⁸ See *Burlington Resources* at paras. 62, 67 (analyzing *Electricity Company of Sophia* 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*.⁴⁹ In fact, it is in the interest of neither party to “aggravate or exacerbate” the dispute, “thus rendering its solution possibly more difficult.”⁵⁰ 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.⁵¹ 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.⁵²

⁴⁹ 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).

⁵⁰ *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.

⁵¹ 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).

⁵² 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.⁵³ The IRP is meant to be an expedited dispute resolution process.⁵⁴ 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

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

⁵³ 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.

⁵⁴ 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.⁵⁵

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.⁵⁶ This standard is sometimes termed "imminent harm."⁵⁷ 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.

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

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

⁵⁷ *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.”⁵⁸ 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.

⁵⁸ 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

Annex C

Letter from Arif Ali to Jeffery LeVee (Mar. 28, 2014)

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March 28, 2014

BY EMAIL

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Re: ICDR Case 50 117 T 1083 13 DotConnectAfrica Trust (“DCA”) vs. Internet Corporation for Assigned Names and Numbers (“ICANN”)

Dear Jeff:

We write on behalf of our client DCA Trust with reference to your letter of March 24, 2014 and your email to Carolina Cardenas of the ICDR of March 25, 2014. We also write with specific reference to the current debate regarding ICANN’s future role in the governance of the Internet.

As you will undoubtedly appreciate, we are at an important juncture in ICANN’s short history as the entity responsible for oversight and governance of the Internet – our global community’s information and communications superhighway, and by any measure a global resource. Important discussions are underway regarding how and when the United States Department of Commerce may cede further regulatory control of the Internet to ICANN, and Internet stakeholders around the world are watching. Critical questions are being asked regarding whether ICANN has the organizational maturity and structure, governance sophistication, transparency and accountability to take on the role of the Internet’s Regulator. Certainly, if ICANN’s treatment of DCA’s application to serve as the registry operator of the .AFRICA TLD is anything to go by, ICANN is not ready to take on this role.

It is within this context that we address below the main points of your March 24 letter:

1) ICANN did indeed inform DCA on February 5, 2014 that it had no intention of suspending its processing of applications for .AFRICA during the pendency of this proceeding on the premise that in ICANN's view DCA's case is "exceedingly weak." Whether DCA's case is weak or not is not for ICANN to decide, but rather a decision for the Independent Review Panel to make. ICANN has

no authority to serve as judge, jury and executioner. Quite the contrary. The more even-handed course of action would have been for ICANN to suspend further consideration of competing applications for .AFRICA, pending the outcome of these proceedings. This would have been consistent with the new gTLD Guidebook, which recognizes that ICANN should stay its processing of applications where there is a pending dispute or where additional time is required to process one of the applications.¹ ICANN's categorical refusal to respect the spirit of its own rules for processing gTLDs, not to mention the spirit and purpose of the accountability mechanism that it has created to resolve disputes, demonstrates ICANN's unwillingness – and perhaps inability as an institution – to appropriately govern itself or take responsibility for the power with which it has been entrusted.

2) DCA did not respond to the intransigent position you staked out in your February 5 email that ICANN would proceed with ZACR/Uniform's application, notwithstanding the IRP. The tone and content of your email made it self-evident that any further discussion was pointless, and that there was nothing to do except proceed as expeditiously as possible with the full constitution of the Panel and for DCA to seek the Panel's assistance in obtaining interim measures of protection. ICANN, it has now become apparent, has also denied DCA this opportunity.

What is perhaps most surprising about the contents of your February 5 email is the complete absence of any mention of Article 37 of the ICDR Arbitration Rules, providing for the possibility of emergency interim relief; an option that you have only now acknowledged may be pursued by a party in the context of an IRP proceeding. Remarkably, that acknowledgment was provided at 6 p.m. US Eastern time on the same day that ICANN had already executed a registry agreement for the .AFRICA TLD with Uniform/ZACR; that is, the very measure that DCA would have sought to enjoin through the Article 37 process had it been clarified earlier that ICANN was reinstating its availability (e.g., by your making the same acknowledgment in your February 5 email as stated in your March 24 letter). In light of Article 12 of the Supplementary Procedures, in which ICANN derogated from the application of Article 37, can ICANN, in good faith, say that parties wishing to avail of ICANN's Independent Review Process – such as DCA – should somehow be aware that Article 37 emergency relief could nonetheless be pursued? If this is ICANN's view of transparency and predictability in the context of its accountability procedures, serious doubts exist as to whether ICANN can legitimately say it is ready to regulate the Internet fairly, equitably, transparently and non-discriminatorily.

¹ New gTLD Guidelines, Module 1, Section 1.1.2.10, p. 1-13, Figure 1-2, p. 1-14 (“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”).

Jeffrey A. LeVee, Esq.
March 28, 2014
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Weil, Gotshal & Manges LLP

What stands out most clearly from the parties' exchanges to-date is the disparity between, on the one hand, DCA's respect for the procedures ICANN has put into place, and, on the other hand, ICANN's refusal to accord anything like respect for those procedures.

Indeed, the swiftness with which ICANN rushed into a contract with ZACR notwithstanding DCA's request for relief in this IRP raises serious questions as to ICANN's good faith, not only concerning this IRP, but its administration of the entire new gTLD program.

3) Once all of the written submissions, documentary evidence, witness and expert testimony have been considered by the Panel, it is possible that your view of DCA's "case" may turn out to be correct. We certainly take the opposite view and believe very strongly that the facts demonstrate that ICANN violated its own new gTLD guidelines, Articles of Incorporation and Bylaws and applicable principles of international law, as set forth in our Amended Notice of IRP and our Request for Emergency Arbitrator and Interim Measures of Protection, attached hereto.

Sincerely,



Arif H. Ali
Counsel for DCA Trust

Cc: Carolina Cardenas-Soto, ICDR
Professor Catherine Kessedjian
Judge Richard C. Neal

Enclosures

Annex F

Yohannes Tadesse, “Award of DotAfrica contract to ZACR raises doubts over ICANN’s credibility,” CIO East Africa (Mar. 30, 2014)

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Award of DotAfrica contract to ZACR raises doubts over ICANN's credibility

Yohannes Tadesse

March 30, 2014

[\(/blog/award-of-dotafrika-contract-to-zacr-raises-doubts-over-icann's-credibility#disqus_thread\)](#)

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The symbolic signing ceremony that allows the new DotAfrica gTLD to proceed to delegation

The recent ICANN 49 meeting in Singapore saw Akram Atallah, president of ICANN's Global Domains Division (GDD) and Lucky Masilela, CEO of ZA Central Registry (ZACR) participate in a symbolic signing ceremony that allows the new gTLD ".Africa" to proceed to delegation.



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The Announcement by ICANN continues that “This marks the first Registry Agreement signed between ICANN and an African gTLD registry operator.” Indeed everyone expected that DotConnectAfrica (DCA) would have been part of this event. The history of the .africa gTLD started with DotConnectAfrica, who was applauded by ICANN itself initially and traveled the epic route of initiating the domain at ICANN, introducing it and campaigning for its awareness in Africa and the world at large. This was materialized under a united Yes2dotAfrica theme, after obtaining the initial African Union and UNECA endorsement for its application to ICANN.

The announcement has roused mixed feelings within the Internet fraternity, naturally one would have expected excitement, but it comes short of an anticlimax, it is open by and large that dotAfrica process has been dogged with mainstream controversy.

The apprehension on the entire process puts the domain in uncharted territory majorly because the whole process has lacked good will and the transparency that a continental project would attract. This can be explained in the slow manner in which governments have taken up the building of the reserved names list in the past year since ZACR tried to push for it. The South Africa’s ZA Central Registry had initially set a deadline for the first week of February for African governments to submit their lists of important names of sovereign interest and national significance to be merged in the ‘Reserved Names List’ (RNL) process, but was reportedly unsuccessful.

It was reported that only 17 African countries have engaged in the process so far, whereas Africa has over 50 Nations. It appears these 17 countries are reportedly the same ones that presented the GAC early warning against DCA’s application. These 17 countries barely make 30% of Africa’s representation, and if this 30% could be postulated to be the decision makers, then Africa is in serious trouble because the “.africa” registry which will serve the whole continent has not been given a majority nod by countries.

ICANN’s decision to award a registry contract amidst an ongoing International Independent Panel Process (IRP) goes against the premises of fair competition and justice. DCA, it appears, has had to go through a process that was set to jeopardize its application from the onset.

It is said that the entire controversy started with ICANN itself advising the African Union to use Governmental Committee objections to ensure the outcome of the gTLD to their favor,

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when it found that DCA opposed the African Union's request from ICANN to reserve the .africa, owing to the violation of ICANN's own rules, during the ICANN International meeting in Dakar.

Acceptance of this advise was evidenced when DCA received a highly controversial GAC objection, which the ICANN New GTLD committee and the appeal to the ICANN Board Governance Committee indeed accepted and sustained their own advise, denying any reconsideration request of DCA's appeal. ICANN then continued to process Uniforum's application instead of tolling it until DCA's concerns had been satisfactorily addressed.

Accountability and transparency remains to be the biggest bone of contention in the way Africa Union and ICANN managed the process. One cannot help to tie in the two together in terms of how DCA was bullied till the end by both institutions without any regards for their own policies and procedures in place. DCA is likely a victim of premeditated attempt for it not to participate as an applicant in the process at all, as African Union had blocked all paths to allow it to sustain its endorsement, including the reported sabotage to its endorsements by calling institutions that have endorsed DCA. ICANN also blocked DCA's application from proceeding to deny a fair Geographic Panel evaluation rendering its application unable to proceed however, according to its own guidebook, geographic name applicants are afforded a 90 day period, after submission of application to obtain endorsement.

For those applicants that were not approved by ICANN, the ICANN rules stipulate that applicants can either withdraw or go to an IRP, where a close scrutiny of these rules appear to shield ICANN, and put it in an elevated unquestionable position. ICANN's supplementary rules IRP rules No. 12. on Emergency Measures of Protection also do not provide for an applicant to apply for emergency procedure to stop ICANN from processing an application, should the applicant disagree with the decision of the ICANN board.

Such situations put ICANN in a powerful position that applicants may likely face unfair treatment despite the millions of dollars put in an application. Even so, in following up the DCA's site (<http://www.dotconnectafrica.org/icann-related-2/independent-review-process-dca-vs-icann/>) on the IRP proceedings and that of ICANN's (<http://www.icann.org/en/news/irp/dca-v-icann>), not all documents of the proceedings have been posted on the ICANN site. DCA appears to have given ICANN several warnings not to proceed with ZACR contract signing before the signing of the announcement on March 24th 2014.

African Governments also have not become well acquainted with ICANN procedures making it difficult for them to question procedures, it has only been left to few who have been attending ICANN meetings to dictate to the frequently changed ICT government officials what they feel is right for their own interests, and in the “.africa” case, left for those individuals who have already been discredited due to having vested interest in the outcome of the “.africa” gTLD.

Given the way ICANN have controversially managed the DotAfrica process thus far, it’s unlikely there will be a significant number of applicants should there be another new gTLD application round. In the interim, ICANN could save its own credibility by properly investigating the controversial endorsements, the Africa Union RFP process for DotAfrica and also setup a mechanism to investigate GAC’s decisions and rationales.

With all these misgivings towards ICANN, DCA should be in a strong position to come out favorable in IRP process over ICANN.

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