

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

ICDR Case No. 50 2013 00 1083

DotConnectAfrica Trust,

Claimant,

v.

Internet Corporation for Assigned Names and Numbers,

Respondent.

DCA'S MEMORIAL ON THE MERITS

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

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GLOSSARY

AU	African Union
AUC	African Union Commission
AGB	Applicant Guidebook
BGC	Board Governance Committee
CQs	clarifying questions
ccTLD	country code top-level domain
DNS	Domain Name System
DCA	DotConnectAfrica Trust
gTLD	Generic top-level domain
GNP	Geographic Names Panel
GAC	Governmental Advisory Committee
ICANN	Internet Corporation for Assigned Names and Numbers
NGPC	New gTLD Program Committee
NTIA	National Telecommunications & Information Administration
RFR	Request for Reconsideration
UNECA	United Nations Economic Commission on Africa
ZACR	ZA Central Registry

I. INTRODUCTION

1. DotConnectAfrica Trust (“DCA”) was formed as a not-for-profit organization for the purpose of applying for the right to operate the generic top-level domain (“gTLD”) .AFRICA. At each stage of the process, DCA has worked diligently to follow the rules and procedures promulgated by the Internet Corporation for Assigned Names and Numbers (“ICANN”). However, although ICANN has put in place rules that ostensibly regulate the delegation of new gTLDs in order to ensure that rights to new gTLDs are awarded transparently and as the result of fair competition among applicants, ICANN not only ignored these rules with respect to DCA’s application, but actively worked to ensure that a different applicant, UniForum SA, now known as ZA Central Registry (“ZACR”),¹ would obtain the rights to .AFRICA. Instead of functioning as a disinterested regulator of a fair and transparent gTLD application process, ICANN used its authority and oversight over that process to assist ZACR and to eliminate its only competitor, DCA, from the process. As a result, ICANN deprived DCA of the right to compete for .AFRICA in accordance with the rules ICANN has established for the new gTLD program, in breach of the AGB and ICANN’s Articles of Incorporation and Bylaws.

2. DCA submits with this memorial the Witness Statement of Sophia Bekele Eshete, founder and executive director of DCA.

II. STATEMENT OF RELEVANT FACTS

A. The New gTLD Program and Geographic Names

3. The purpose of the New gTLD Program, launched in 2011, is to allow private organizations to apply to manage TLDs pursuant to a standard Registry Agreement with ICANN. It is governed by the new gTLD Applicant Guidebook (“AGB”), which establishes a detailed process for evaluating applications for new gTLDs, including specific criteria against which applications should be judged.²

¹ For the sake of consistency, we refer to the applicant as “ZACR” throughout this Memorial.

² See AGB, Module 2 [Ex. C-11].

ICANN must review each application for completeness and post the non-confidential portions of each application to its website for public review and comment. ICANN provides any comments it receives within the 60-day period following the posting of the application to independent evaluators, who perform the initial evaluation of the application.³ In addition, the AGB requires that all applications be reviewed for reference to geographic regions; applications for strings deemed “geographic” demonstrate the support of at least 60% of the governments of the relevant region.⁴

4. All complete applications undergo a period of “Initial Evaluation,” in which six separate panels created by ICANN assess each application against criteria relating to the applied-for string (the “String Review”) and the applicant’s technical, operational and financial capabilities to operate a registry (the “Applicant Review”).⁵ ICANN also performs background checks on each entity applying for a gTLD and the individuals named in the application.⁶ The String Similarity⁷ and Geographic Names reviews are performed by independent, third-party panels designated by ICANN.⁸ Applicants are not permitted to communicate directly with evaluators, though evaluators may request clarifying information from particular applicants by submitting “clarifying questions” (“CQs”) to ICANN, which ICANN then

³ AGB, Module 1.1.2.3 [Ex. C-11].

⁴ Compare AGB Version 1, 2.1.1.4.1 (24 October 2008), [Ex. C-54] (“In the case of an application for a string which represents a continent or UN region, evidence of support, or non-objection, will be required from a substantial number of the relevant governments and/or public authorities associated with the continent or the UN region.”) with AGB, Module 2.1.1.4.1, [Ex. C-11] (“documentation of support will be required from at least 60% of the respective national governments in the region, and there may be no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the continent or the region.”).

⁵ See AGB, Module 1.1.2.5 [Ex. C-11]. See generally Draft New gTLD Evaluation Program – Evaluation Process [Ex. C-55] (excerpt from AGB, Module 1).

⁶ See *id.*

⁷ *I.e.*, review for the probability of user confusion with similar existing strings, applied-for TLDs, or Reserved Names. See *infra* at ¶ 13 for more on the Reserved Names List.

⁸ AGB, Module 2.4, [Ex. C-11] (“A number of independent experts and groups play a part in performing the various reviews in the evaluation process.”); *id.* at 2.4.2 (“ICANN has selected qualified third-party providers to perform the various reviews...”); *id.* at 2.4.3 et. sec. (detailing the Code of Conduct and Conflict of Interest Guidelines for evaluators).

transmits to the applicant.⁹ An application must pass each of these six reviews to pass Initial Evaluation.

B. The GAC's Role In ICANN's Evaluation Process New gTLD Applications

5. During the 60-day public comment period for applications, ICANN's Governmental Advisory Committee ("GAC") also has the opportunity to comment on applications. The GAC's purpose 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."¹⁰ Membership on the GAC is open to representatives of all national governments and, at the invitation of the GAC through its chair, "[e]conomies as recognized in the international fora, and multinational governmental organizations and treaty organizations."¹¹ Under the New gTLD Program, the GAC may issue an "Early Warning" concerning an application, which is meant to notify an applicant that one or more governments view the application as "potentially sensitive or problematic" from a public policy standpoint.¹²

6. Parties who meet the standing requirements set forth in the AGB may file objections to an application on any one, or combination, of four exclusive grounds for up to two weeks after ICANN has posted the results of its "Initial Evaluation" of the application.¹³ Unlike comments, formal objections filed against an application are reviewed and decided by third-party dispute resolution

⁹ See AGB, Module 2.2.2.3, [Ex. C-11]; see also ICANN, Clarifying Questions, <http://newgtlds.icann.org/en/applicants/clarification-questions>.

¹⁰ Bylaws, Art. XI, § 2.1.a. [Ex. C-10]; see also AGB, Module 3.1 [Ex. C-11]. The limitation of the GAC to an advisory role that does not determine ICANN's policy or decision-making was purposeful, since ICANN was created precisely in order to ensure that Internet infrastructure and governance would be free of governmental control. See Expert Report of Dr. Milton Mueller, §§ 4.1-4.1.2, 5.4, [Ex. C-56], *ICM Registry v. ICANN*, ICDR Case No. 20 117 T 00224 08 (19 Feb. 2010) [Ex. C-12].

¹¹ Bylaws, Art. XI, § 2.1.b [Ex. C-10].

¹² AGB, Module 1.1.2.4 [Ex. C-11].

¹³ The four grounds are: (i) "string confusion" (the applied for string is confusingly similar to another string), (ii) "legal rights" (the applied for string infringes on the rights of the objector), (iii) "limited public interest" (the applied for string is contrary to generally accepted legal norms of morality and public order) or (iv) "community objection" (there is substantial opposition to an application from a significant portion of a clearly delineated community). AGB, Module 3.2.1 [Ex. C-11].

providers appointed by ICANN. The initial review is not suspended as a result of ICANN's receipt of comments, GAC Early Warning Advice or formal objections relating to an application.¹⁴

7. During the formal objection period, the GAC also may provide "public policy advice" directly to the Board on any application that may be considered by the Board during the evaluation process.¹⁵ The AGB provides that GAC advice "is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities."¹⁶ According to the AGB, the Board's receipt of GAC advice "will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process)."¹⁷

8. Following the close of the objection period, any formal objections are ruled upon by independent experts, and any GAC advice relating to a particular application is considered by the Board. If neither applies, then the applicant either proceeds towards negotiating a registry agreement with ICANN to operate the applied for string or, if multiple applicants passed Initial Evaluation, enters into a process called "contention" to identify the prevailing applicant.¹⁸

9. As explained below, with respect to applications for .AFRICA, ICANN allowed the GAC to be used as a vehicle for the issuance of advice against DCA's application by DCA's only competitor for .AFRICA, the African Union ("AU"), ensuring that rights to .AFRICA would be delegated to the chosen proxy of the African Union Commission (the "AUC"), ZACR.

¹⁴ *Id.* at Module 1.1.2, 1.1.2.4, 1.1.2.6 [Ex. C-11].

¹⁵ *Id.* at Module 1.1.2.7 [Ex. C-11].

¹⁶ *Id.* at Module 3.1 [Ex. C-11].

¹⁷ *See id.*

¹⁸ *See generally* AGB, Module 4 [Ex. C-11].

C. DCA’s Early Campaign for Africa

10. When DCA’s founder and executive director, Sophia Bekele, began to solicit interest in the .AFRICA TLD in 2006, ICANN had not yet settled on the final AGB requirements, including what would be required of applicants for geographic gTLDs. Ms. Bekele began by targeting regional organizations for endorsements, reasoning that the regional organizations’ endorsements would either count toward 100% of the geographic support requirement or would provide backing to solicit endorsements from individual governments.

11. From 2006 to 2008, Ms. Bekele engaged with numerous African multinational organizations responsible for prompting development in Africa, including the AU, the United Nations Economic Commission on Africa (“UNECA”), and the African Development Bank.¹⁹ Ms. Bekele obtained endorsements for her “DotConnectAfrica Initiative” to apply to ICANN for the right to operate .AFRICA from the Executive Secretary of UNECA in 2008 and from the Chairman of the AUC in 2009.²⁰ DCA officially launched the .AFRICA campaign in 2010.²¹

D. ICANN’s Advice To The AUC On Reserving .AFRICA For Its Own Use

12. Prior to the opening of the new gTLD application period, ICANN received a request from the AUC—despite having endorsed DCA’s campaign for .AFRICA—to reserve the exclusive rights to .AFRICA and its French and Arabic equivalents for itself as an international organization made up of government representatives.²² Strings on ICANN’s Reserved Names List, however, can *never* be

¹⁹ See Witness Statement of S. Bekele at ¶¶ 27- 34 for a description of this engagement.

²⁰ See UNECA Endorsement Letter to Ms. Bekele (8 August 2008), [Ex. C-15]; AUC Endorsement Letter to Ms. Bekele (27 August 2009), [Ex. C-16]. During Ms. Bekele’s meetings with the AUC Chairman Jean Ping regarding .AFRICA, Dr. Ping asked Ms. Bekele her opinion on which Department within the AUC ought to coordinate with her on the .AFRICA project. Ms. Bekele suggested that the Department of Infrastructure and Energy had the requisite authority, based upon an analysis performed by the UN Working Group on Internet Governance, and Chairman Ping put Ms. Bekele in touch with Commissioner Elham Ibrahim to work out the details of the African Union endorsement under his name. See Witness Statement of Sophia Bekele, at ¶¶ 30, 33-34; Emails between Sophia Bekele and Elham Ibrahim (31 July-3 August 2009), [Ex. C-57]. See also Oxfam International Liaison Office with the African Union, 2 “African Union Compendium,” 104-05 (2014), [Ex. C-58] (explaining the role of the AUC Department of Infrastructure and Energy).

²¹ See Amended Notice of IRP at ¶ 18.

²² African ICT Ministerial Round-Table on 42nd Meeting of ICANN (21 October 2011), [Ex. C-22].

delegated: they are reserved for special use.²³ In making this request, the AUC was asking ICANN to treat it like a national government, which has exclusive rights to its two-letter country code TLD (“ccTLD”) (e.g., “.za” for South Africa), seeking to have .AFRICA treated as a continental ccTLD, treatment not contemplated in either the gTLD program or the ccTLD system.²⁴ If ICANN granted the AUC’s request and allowed only the AUC to choose the registry operator(s) for each string, the AUC would gain exclusive control over the operation of .AFRICA without going through the new gTLD application process at all.

13. ICANN rejected the AUC’s request to reserve .AFRICA in March 2012.²⁵ However, in the same letter ICANN also instructed the AUC on how to use the GAC to achieve the desired result by other means—advice the AUC proceeded to follow in order to eliminate DCA’s application from competition for .AFRICA.²⁶ In a letter dated 8 March 2012, ICANN Board Chairman Stephen Crocker explained to the AUC that although ICANN could not reserve .AFRICA for the AU’s use because the Reserved Names list was already closed, the AUC could “play a prominent role in determining the outcome of any application” for .AFRICA: first, as a “public authorit[y] associated with the continent,” the AUC could block a competing application by filing “one written statement of objection;” second, the AUC could file a Community Objection (a type of formal objection recognized by ICANN and decided by an independent evaluator); or finally, the AUC could utilize the GAC to combat a competing application for .AFRICA.²⁷

²³ The full list of Reserved Names is available at <https://www.icann.org/sites/default/files/packages/reserved-names/ReservedNames.xml>.

²⁴ ICANN did not respond to the AUC’s request until 8 March 2012, just one month before the gTLD application deadline was due to close, meaning that for the bulk of the application cycle, African governments remained under the impression that .AFRICA and related names might be reserved for the AUC’s use.

²⁵ See Witness Statement of S. Bekele at ¶¶ 61-63.

²⁶ See Letter from Stephen Crocker to Elham M.A. Ibrahim, p. 2 (8 March 2012), [Ex. C-24].

²⁷ Letter from Stephen Crocker to Elham M.A. Ibrahim, p. 2 (8 March 2012), [Ex. C-24].

14. Shortly after receiving ICANN’s advice to use the GAC to obtain .AFRICA, the AUC joined the GAC,²⁸ and the GAC requested an extension to file early warnings against new gTLD applications.²⁹ In November 2012, the AUC and GAC representatives from 16 other countries filed substantially identical Early Warnings, complaining that DCA’s application was problematic because it was in competition with the ZACR application, for which the AUC was a co-applicant.³⁰ DCA filed a response pointing out that the Early Warning did not touch upon any permissible reason for objecting to DCA’s application.³¹

15. Meanwhile, having been chosen by the AUC to apply for .AFRICA on its behalf, ZACR submitted an application for the .AFRICA gTLD to ICANN with the AUC listed as a co-applicant.³² The application indicated that the AUC—and not ZACR—would retain the right to reassign the gTLD registry operations.³³ ZACR, however, did not have letters of support from regional governments. Instead, it filed letters endorsing the AUC’s Reserved Names initiative, along with declarations made by the AUC regarding its intention to reserve .AFRICA for its own use along with its appointment

²⁸ GAC Communiqué – Prague, Czech Republic, p. 1 (28 June 2012), [Ex. C-59].

²⁹ Letter from Heather Dryden to Stephen Crocker, p. 2 (17 June 2012), [Ex. C-60]. The AGB required the GAC to submit early warnings by the close of the public comment period on August 1, 2012, *see* AGB, Module 1.1.2.4. The AGB also required that the GAC file Advice against any application no later than the close of the Objection Filing Period on 13 March 2013, *see* AGB, Module 3.1; 1.1.2.6. *See generally* Chronology of ICANN’s Actions During the New gTLD Process [hereinafter “Chronology”], [Ex. C-61].

³⁰ *See* Amended Notice of IRP at ¶¶ 26-27. *See also* GAC Early Warnings, [Exs. C-33, C-34]. Shortly after the applications were published, ICANN also created an African Strategy Working Group (“ASWG”) to increase ICANN’s engagement with African internet users and almost exclusively appointed individuals connected to the ZACR application to manage the group and dictate ICANN’s engagement with Africa. *See* Witness Statement of Sophia Bekele at ¶¶ 48-50, 54-56, 68-74; African Internet Community, [Ex. C-62].

³¹ *See* DCA Response to GAC Early Warning, 4-5 (5 December 2012), [Ex. C-35].

³² *See* New gTLD Application Submitted to ICANN by: UniForum SA (NPC) trading as Registry.Africa (13 June 2012), q. 18 (a), [Ex. C-28] (“The African Union Commission (AUC) has, on behalf of its member states, officially appointed UniForum SA to apply for and launch the dotAfrica TLD.”); *id.* at q. 22, 29 (3) (describing various rights reserved to the AUC and aspects of TLD operations that the AUC will administer).

³³ *See id.* at q. 22 (7) (“It should be noted that the AUC shall retain all rights relating to the dotAfrica TLD, including in particular, intellectual property and other rights to the registry databases required to ensure the implementation of the agreement between the AUC and the ZACR, and the right to re-designate the registry function.”) [Ex. C-28].

letter from the AUC as evidence of such support.³⁴ Only five letters submitted by ZACR actually referenced the company by name.³⁵ In other words, the ZACR application was, for all intents and purposes, the AUC's application, and the purpose of it was to reserve .AFRICA for the AUC's use.

E. ICANN Staff Inappropriately Coordinated With The Geographic Names Panel Concerning Applications For .AFRICA

16. ICANN not only advised the AUC on how to control the delegation of .ARICA, but it also coordinated with the ostensibly independent Geographic Names Panel ("GNP") evaluators in order to ensure that ZACR's application would pass review. In July 2012, ICANN distributed Geographic Names Panel guidelines to InterConnect Communications ("InterConnect"), the organization that ICANN contracted to perform the string similarity and geographic review during the Initial Evaluation.³⁶ These guidelines instructed InterConnect not to apply the endorsements of regional organizations toward the 60% geographic requirement in the AGB.³⁷

17. In late August 2012, Mark McFadden³⁸ of InterConnect contacted ICANN staff to ask whether it would be possible to treat the applications for .AFRICA differently than other applications because both applicants relied on regional organizations for their endorsements, suggesting that ICANN and InterConnect determine which types of endorsements would be acceptable for these applications.³⁹ In

³⁴ Redacted - Confidential Application Information [Ex. C-63]. See Oliver Tambo Declaration (5 November 2009), [Ex. C-64]; Abuja Declaration (7 August 2010), [Ex. C-65].

³⁵ See Redacted - Confidential Application Information, [Ex. C-66] Redacted - Confidential Application Information

³⁶ Geographic Names Panel – ICANN New gTLD Program (10 July 2012), [Ex. C-67].

³⁷ *Id.* at 2, [Ex. C-67]. See also AGB, Module 2.2.1.4.2.

³⁸ Mr. McFadden is eminently qualified in the technical aspects of the DNS and his role in the string similarity evaluation is not questioned. However, neither Mr. McFadden nor InterConnect appear to have had any experience or expertise in international affairs. See Email from Mark McFadden to Larisa Gurnick (15 Mar. 2013), [Ex. C-68] (containing inaccurate assessments based upon incomplete research on the African Union and AUC).

³⁹ Emails between Mark McFadden and Anne Yamashita (31 August-9 September 2012), [Ex. C-69]. Indeed, ICANN and InterConnect appear to have worked very closely together on the evaluation of the applications for .AFRICA. In one email, Mr. McFadden recalls having brought "problems" relating to the two applications for .AFRICA to ICANN's attention in the fall of 2012 and adds, "Since then, there have been many conversations between ICANN and the Geographic Names panels and our evaluations have changed in certain places." Email from Mark McFadden to Cheri Bolen and Trang Nguyen (30 May 2013), [Ex. C-70].

October 2012, having completed an initial review of the endorsements for each application, Mr. McFadden explained to ICANN staff that if the endorsements of regional organizations like the AUC and UNECA were not applied towards the 60% requirement, then neither DCA nor ZACR would have sufficient geographic support.⁴⁰ InterConnect recommended that ICANN (a) take the endorsement letters from regional authorities like the AUC and UNECA into account for both applicants and (b) contact the AUC directly to determine whether the AUC wished to endorse either, both or neither applicant.⁴¹ ICANN, however, disagreed with InterConnect's view that UNECA should be considered as a regional organization,⁴² although Mr. McFadden explained that UNECA was an intergovernmental African regional organization and should qualify as a relevant public authority on the same basis as the AU.⁴³ ICANN thus determined that only the AUC endorsements (and not the UNECA endorsements) would be taken into account for the geographic evaluation for both applications.⁴⁴

F. GAC Objection Advice On .AFRICA

18. Meanwhile, having used its new position as a GAC member to coordinate a GAC Early Warning, the AUC began preparing GAC advice against DCA's application.

19. Prior to the ICANN meeting in Beijing in April 2013,

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Kenya's GAC advisor, Sammy Buruchara, was unable to attend the

⁴⁰ Email from Mark McFadden to Larisa Gurnick (25 October 2012), [Ex. C-71] (indicating that of the Redacted - Confidential Application Information

Similarly, DCA had endorsements from the AUC and UNECA, both organizations that ICANN considered irrelevant to geographic support). *Compare* Redacted - Confidential Application Information [Ex. C-72] *with* InterConnect CQ Matrix for DCA [Ex. C-73] (Redacted - Confidential Application Information).

⁴¹ Email from Emily Taylor to Trang Nguyen and Cheri Bolen (10 May 2013), [Ex. C-74]; Email from Mark McFadden to Larisa Gurnick (15 Mar. 2013), [Ex. C-68], *see also* Email from Mark McFadden to Trang Nguyen et al. (26 April 2013) [Ex. C-75] (draft contact request to the AUC).

⁴² Redacted - Confidential Application Information [Ex. C-72]; InterConnect CQ Matrix for DCA [Ex. C-73].

⁴³ Email from Mark McFadden to Cheri Bolen and Trang Nguyen (30 May 2013), [Ex. C-70].

⁴⁴ Email from Emily Taylor to Trang Nguyen and Cheri Bolen (10 May 2013), [Ex. C-74]; Email from Trang Nguyen to Mark McFadden (26 April 2013) [Ex. C-76]; Email from Trang Nguyen to Emily Taylor (15 May 2013) [Ex. C-77].

GAC meeting in person, but was informed that at a meeting of the GAC and ICANN Board on 9 April 2013, Alice Munyua, Kenya’s former GAC advisor and a member of the ZACR Steering Committee as well as a GAC representative for the AUC, made a statement purportedly on behalf of Kenya denouncing DCA’s application for .AFRICA.⁴⁵ Mr. Buruchara wrote to the GAC Chairperson Heather Dryden later that evening to inform her that Ms. Munyua no longer represented Kenya and that Kenya did not share her viewpoints on .AFRICA.⁴⁶

20. Redacted - GAC Designated Confidential Information

Mr. Buruchara, who explained that Kenya supported the AUC’s application for .AFRICA but did not think it was appropriate for the AUC to utilize the GAC to eliminate competition.⁴⁷

21. Redacted - GAC Designated Confidential Information

⁴⁸ Redacted - GAC Designated Confidential Information

⁴⁵ See Transcript of Beijing GAC-ICANN Board meeting, p. 19-23 (9 April 2013), [Ex. C-78] (recording Ms. Munyua’s comments on behalf of Kenya, followed by comments from an AUC Representative thanking Ms. Munyua for her comments and indicating that Ms. Munyua attended the Beijing meeting as “one of the AUC [GAC] representatives”).

⁴⁶ [Ex. C-79]. The email apparently bounced back from Ms. Dryden’s inbox Redacted - GAC Designated Confidential Information Kenya’s GAC Representative Michael Katundu forwarded the email to Ms. Dryden’s personal address, as well as copying the GAC distribution list. See [Ex. C-80]. See

[Ex. C-81].

⁴⁷ [Ex. C-82] Redacted - GAC Designated Confidential Information

⁴⁸ Compare [Ex. C-83] with Redacted - GAC Designated Confidential Information [Ex. C-84]

[Ex. C-85]

[Ex. C-86]

therefore incorrect in asserting that Mr. Buruchara ultimately endorsed the advice against .AFRICA; he did not.⁵⁰ Nonetheless, the GAC Communiqué of 11 April 2013 purported to offer *consensus advice* that DCA’s application should not proceed (the “GAC Objection Advice”).⁵¹

22. DCA responded to the GAC Advice on 8 May 2013, indicating that it would be inappropriate for ICANN to allow the AUC to utilize the GAC to eliminate DCA, the AUC’s only competitor for .AFRICA. DCA submitted a list of nine points for the ICANN Board to consider in evaluating the GAC Objection Advice, explaining that (i) it was anticompetitive, contravening both the ICANN Bylaws and the GAC Operating Principles; (ii) the GAC is a policy body and is not empowered to perform the GNP evaluation, as it purported to do; (iii) ZACR also failed to satisfy the 60% geographic requirement, and it would be inappropriate to treat the applications differently; (iv) the GAC Objection Advice was not consensus advice, because Kenya objected to it; and (v) the GAC Objection Advice was untimely under the AGB.⁵²

23. On 4 June 2013, the NGPC held a meeting to “consider accepting the GAC Advice.”⁵³ The meeting minutes show no evidence that the NGPC considered any of DCA’s nine points before

⁴⁹ Redacted - GAC Designated Confidential Information [Ex. C-87]

⁵⁰ See ICANN’s Response to Claimant’s Amended Notice, ¶ 38 (“representatives of several other African countries criticized Mr. Buruchara’s statements and strongly encouraged Mr. Buruchara to change his position stated in these two emails, which he did.”) [hereinafter, “ICANN Response”].

⁵¹ GAC Communiqué – Beijing, China (11 April 2013), [Ex. C-43] (“The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the [AGB] on the following applications: 1. The application for .africa (Application number 1--1165--42560)”). GAC advice may take three forms: (i) consensus advice that a particular application should not proceed, which creates a “strong presumption for the ICANN Board that the application should not be approved,” (ii) non-consensus advice that the GAC has concerns about a particular application, about which the Board “is expected to enter into a dialogue with the GAC to understand the scope of the concerns” and “is also expected to provide a rationale for its decision,” and (iii) non-consensus advice that an application should not proceed unless remediated, which raises a strong presumption that a particular application should be disqualified unless the applicant implements a remediation method set forth in the AGB. AGB, Module 3.1.I.-III [Ex. C-11].

⁵² See generally GAC Advice Response Form for Applicants (8 May 2013), [Ex. C-41].

⁵³ Despite ICANN’s claims that the NGPC met “multiple times” to discuss the advice on DCA, see ICANN Response at ¶ 20, the 4 June meeting of the NGPC was the only meeting which took place after DCA had an opportunity to respond to

accepting the GAC Advice.⁵⁴ Both Mike Silber and Chris Disspain, whom DCA had previously complained had conflicts of interest with respect to .AFRICA, were present and voted to accept the GAC Objection Advice against DCA.⁵⁵

24. At the time the NGPC accepted the GAC advice on DCA's application, ICANN had not yet finalized CQs from InterConnect for either applicant. DCA would never receive CQs from InterConnect because on 7 June 2013, within three days of the NGPC accepting the GAC Objection Advice, ICANN staff instructed InterConnect to discontinue work on DCA's application.⁵⁶

G. DCA's Request For Reconsideration By The NGPC

25. DCA filed a Request for Reconsideration ("RFR")⁵⁷ on 19 June 2013, requesting that the NGPC reconsider its acceptance of the GAC Advice. Specifically, DCA argued that, because the GAC Advice was structured as an objection, the NGPC should have exercised its discretionary power to consult an independent expert of the kind designated to hear objections under the Dispute Resolution framework.⁵⁸ The AGB provides this option to the ICANN Board; moreover, DCA argued that a

the Advice. *See* Minutes of NGPC Meeting (8 May 2013), [Ex. C-88] (indicating that the Board discussed the GAC Advice on .AFRICA, but also noting that the applicant response window closed on 10 May 2013, so the Board could not take any action with regard to individual applications until after the window closed). To the extent that the NGPC did, as ICANN claims, discuss the advice on DCA's application "multiple times," it did so without investigating any of DCA's concerns. Furthermore, in contrast to the detailed discussions the NGPC had on other matters at the 4 June meeting, the discussion of the Advice on DCA is summarized in all of three sentences. *See* Minutes of NGPC Meeting (4 June 2013), [Ex. R-4]

⁵⁴ *See* Minutes of NGPC Meeting, p. 2 (4 June 2013), [Ex. R-4] ("The Committee *discussed accepting* the GAC (Governmental Advisory Committee) advice regarding application number 1-1165-42560 for .AFRICA and application number 1-1936-2101 for .GCC.") (emphasis added).

⁵⁵ *See* Amended Notice of IRP, at ¶¶ 24-25 for details on the conflicts of interest and the Ombudsman's investigation, which found on 12 December 2012 that, utilizing a definition of conflicts of interest as relates to judges and arbitrators rather than board members, Mike Silber and Chris Disspain were not conflicted with regard to .AFRICA, because *the board had yet to take any decisions with regard to .AFRICA*. Nonetheless, Mr. Silber and Mr. Disspain both updated their conflicts of interest statements on 18 December 2012 to include the conflicts that DCA identified. Witness Statement of Sophia Bekele at ¶¶ 104-124.

⁵⁶ Email from Cheri Bolen to Mark McFadden (7 June 2013), [Ex. C-89]. *See also* Chronology, [Ex. C-61]

⁵⁷ ICANN's Bylaws provide the Reconsideration Request as a mechanism "by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board." The RFR includes reconsideration of Board or Staff action, but must be filed within 15 days of the posting of the minutes of the action on ICANN's website. For RFRs relating to Board actions, the BGC reviews the RFR and provides a recommendation, and the NGPC thereafter determines whether to adopt the BGC recommendation. *See generally* Bylaws, Art. IV § 2, [Ex. C-9].

⁵⁸ DCA Trust Reconsideration Request Form (19 June 2013), p. 4-5, [Ex. C-46].

summary decision was not appropriate given the huge investment made by DCA and the extremely political nature of the contention between DCA and the AUC.

26. The BGC considered DCA's RFR at two Board meetings. On 14 July 2013, the BGC considered a draft recommendation that was apparently drafted before the BGC deliberated the RFR. Mr. Silber abstained from the discussion; Mr. Disspain did not.⁵⁹

27. On 1 August 2013, the BGC met again to finalize its recommendation,⁶⁰ indicating that DCA had not identified material that the NGPC did not consider during its discussion of the GAC Advice, and if DCA wanted the NGPC to consult an independent expert, DCA should have raised that in its Response to the GAC Advice. Furthermore, the BGC argued that the independent expert was a discretionary measure. According to the BGC, the AGB merely required the Board to (i) post the GAC Advice publicly, (ii) allow 21 days for DCA to respond, and (iii) consider the Advice and the Response as soon as possible.⁶¹ Finally, the BGC found that DCA did not show that the outcome would have been different if an independent expert had been consulted; so the BGC recommended that the NGPC deny DCA's RFR.

28. On 13 August 2013, the NGPC met and decided to accept the BGC's recommendation that it *approve its own* 4 June 2013 decision to accept the GAC Advice.⁶²

⁵⁹ See Minutes of BGC Meeting (14 July 2013), [Ex. C-117]. Three days later, the NGPC met again and apparently determined *sua sponte* that it was necessary to clarify that no one who voted to accept the GAC Advice on .AFRICA at the prior meeting was conflicted. Consequently, the NGPC asked itself if any member who voted previously had felt conflicted, and all members confirmed that they did not believe they were conflicted. See Minutes of NGPC Meeting (17 July 2013), p. 9 [Ex. R-5].

⁶⁰ See Minutes of BGC Meeting (1 August 2013), [Ex. C-90].

⁶¹ BGC Recommendation, p. 9 (1 August 2013), [Ex. C-47]. See generally Chronology [Ex. C-61].

⁶² See Minutes of NGPC Meeting (13 August 2013), [Ex. C-91]. Mr. Silber abstained from the vote; whereas Mr. Disspain did not. The only other attorney on ICANN's Board, Ms. Olga Madruga-Forti, also apparently left the NGPC meeting before the vote. Ms. Madruga-Forti resigned from the ICANN Board in October 2014. See Kieren McCarthy, "Another ICANN Board member resigns," The Register (16 October 2014), available at <http://www.theregister.co.uk/2014/10/16/second-icann-board-member-quits/>.

H. ICANN Staff's Efforts To Help ZACR Pass The Geographic Names Review

29. After removing DCA from competition for .AFRICA, ICANN decided that endorsement by the AUC could account for *full geographic support* for ZACR, thus enabling it to pass evaluation. *The same ICANN staffers then drafted a letter for the AUC endorsing ZACR, which the AUC was to submit back to ICANN for "evaluation"* by ICANN in its review of ZACR's application.⁶³ The AUC then submitted the letter, with minor changes, to the ICANN Board.⁶⁴ In response to emails from ICANN pressuring InterConnect to rush the process, Mr. McFadden did not even wait until the letter was reviewed according to normal procedures before sending a verification notice to Commissioner Ibrahim, working over the July 4 holiday in order to ensure that the verification went out by Friday, 5 July, as ICANN requested.⁶⁵ Part of the rush seems to have been acting to move ZACR's application forward before DCA could react to the quashing of its own application: Mr. McFadden stated in an email to ICANN that he was monitoring the press "on the .dotafrica application," adding, "so far, so good, I think. The ball is now in Sophia's court – if she wants to invoke Independent Review, then good luck to her."⁶⁶ Within six days of the AUC reverting ICANN's draft back to the ICANN CEO,

⁶³ Email from Trang Nguyen to Mark McFadden (25 June 2013), [Ex. C-92]; Trang Nguyen, "AU Template Letter," [Ex. C-92] (399-400).

⁶⁴ Compare Trang Nguyen, "AU Template Letter," [Ex. C-92] to Redacted - Confidential Application Information [Ex. C-93]; See also Redacted - Confidential Application Information [Ex. C-94].

⁶⁵ See Email from Trang Nguyen to Mark McFadden (3 July 2013) (asking, "can you let me know if the review and verification communication can go out this Friday?"). See also Email from Trang Nguyen to Mark McFadden (26 June 2013), [Ex. C-95]; Email from Mark McFadden to Trang Nguyen (4 July 2013), [Ex. C-96]; Email from Mark McFadden to Trang Nguyen (8 July 2013), [Ex. C-97] (comprising correspondence from ICANN asking InterConnect to rush ZACR's evaluation). ICANN's insistence that InterConnect rush through its evaluation of ZACR's application following the elimination of DCA from competition led InterConnect to suggest that "when ICANN has internal deadlines that depend on evaluation panels, it would be very helpful in the future to discuss those deadlines with panelists to see if they are achievable." Email from Mark McFadden to Cheri Bolen (7 June 2013), [Ex. C-89].

⁶⁶ Email from Mark McFadden to Trang Nguyen (4 July 2013), [Ex. C-96]. ICANN acted with the same blatantly obstructive alacrity earlier this year, when it signed a contract with ZACR two days ahead of schedule in order to make it impossible for DCA to obtain provisional relief preventing it from doing so, as DCA had warned it was about to do. See generally Request for Emergency Arbitrator and Interim Measures of Protection ¶¶ 3-4.

ZACR had passed its GNP evaluation, and just three days later, ZACR passed Initial Evaluation and entered into the contracting phase with ICANN.⁶⁷

III. LAW APPLICABLE TO THESE PROCEEDINGS

30. The version of ICANN's Articles of Incorporation and its Bylaws in effect at the time DCA filed its Request for IRP applies to these proceedings.⁶⁸ ICANN's agreement with the U.S. Department of Commerce, National Telecommunications & Information Administration ("NTIA"), the "Affirmation of Commitments," is also instructive, as it explains ICANN's obligations in light of its role as regulator of the Domain Name System ("DNS").⁶⁹ The standard of review is a *de novo* "independent review" of whether the actions of the Board violated the Bylaws, with focus on whether the Board acted without conflict of interest, with due diligence and care, and exercised independent judgment in the best interests of ICANN and its many stakeholders.⁷⁰

31. All of the obligations enumerated in these documents are to be carried out *first* in conformity with "relevant principles of international law" and *second* in conformity with local law.⁷¹ As explained by Dr. Jack Goldsmith in his Expert Report submitted in *ICM v. ICANN*, the reference to

⁶⁷ See Email from Mark McFadden to Trang Nguyen (9 July 2013), [Ex. C-98] (informing ICANN that ZACR passed the GNP); New gTLD Program Initial Evaluation Report, Application ID 1-1243-89583 (12 July 2013), [Ex. C-99] (recording ZACR's passing the initial evaluation). See generally Chronology [Ex. C-61].

⁶⁸ Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (21 November 1998) [hereinafter, the "Articles of Incorporation"] [Ex. C-9]; Bylaws of the Internet Corporation for Assigned Names and Numbers (11 April 2013) [hereinafter, the "Bylaws"] [Ex. C-10].

⁶⁹ Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers (30 September 2009) [hereinafter, the "Affirmation of Commitments"] [Ex. C-100]. The Articles of Incorporation, Bylaws, and Affirmation of Commitments shall together be referenced as the "Governing Documents."

⁷⁰ Bylaws, Art. IV § 3 (4), [Ex. C-10]. See also, *ICM v. ICANN*, ¶¶ 136, 152 (19 Feb. 2010), [Ex. C-12] ("the actions and decisions of the ICANN Board are not entitled to deference whether by application of the "business judgment" rule or otherwise; they are to be appraised not deferentially but objectively.").

⁷¹ See *ICM v. ICANN*, ¶ 140 (19 Feb. 2010) [Ex. C-12] ("In the view of the Panel, ICANN, in carrying out its activities 'in conformity with the relevant principles of international law,' is charged with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law."); see also, *id.* at ¶ 141 ("The paramount principle in play is agreed by both parties to be that of good faith...").

“principles of international law” in ICANN’s Articles of Incorporation should be understood to include both customary international law and general principles of law.⁷²

IV. ARGUMENT: ICANN BREACHED ITS BYLAWS AND ARTICLES OF INCORPORATION

32. By preventing DCA’s application from proceeding through the new gTLD review process and by coordinating with the AUC and others to ensure that the AUC obtained the rights to .AFRICA, ICANN breached its obligations of independence, transparency and due process contained in its Articles of Incorporation and Bylaws, including its obligation to conduct itself consistent with its duty of good faith under relevant principles of international law.⁷³

A. ICANN Breached Its Articles Of Incorporation And Bylaws By Discriminating Against DCA And Failing To Permit Competition For The .AFRICA gTLD

33. ICANN’s Bylaws and Articles of Incorporation prohibit it from discriminating against any party and require it to apply its “standards, policies, procedures or practices” equitably, unless for a “substantial or reasonable” cause—such as the promotion of effective competition.⁷⁴ ICANN is similarly committed to make decisions in a neutral and fair manner, without favoring any one party over another,⁷⁵ and ICANN is required to implement its policies neutrally and objectively.⁷⁶ Finally, ICANN has an obligation, enumerated in its governing documents and in the Affirmation of Commitments to actively promote and encourage competition in the DNS.⁷⁷ Principles of

⁷² Expert Report of Jack Goldsmith, ¶¶ 23-25, *ICM v. ICANN*, [Ex. C-12].

⁷³ See generally Articles of Incorporation, ¶ 4, [Ex. C-9]; Bylaws, Art. I, Section 2, “Core (Council of Registrars) Values,” [Ex. C-10].

⁷⁴ Bylaws, Art. II § 3, [Ex. C-10].

⁷⁵ *Id.* at Art. I § 2(8) (“Making decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

⁷⁶ *Id.* at Art. III § 1 (“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”).

⁷⁷ Affirmation of Commitments, Cl. 3, [Ex. C-100] (“This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination”); *id.* at Cl. 9.3 (“Promoting competition, consumer trust, and consumer choice:

international law, including the principle of good faith and the customary international law minimum standard of treatment of aliens, include prohibition on discrimination.⁷⁸ Discrimination occurs when similarly placed parties are treated differently without justification.⁷⁹ The general principle of good faith, which includes the prohibition on abuse of rights, also requires ICANN not to abuse its authority in carrying out its activities.⁸⁰ The Board itself undertook to promote the AUC's attempts to secure .AFRICA; and despite repeated notifications submitted by DCA, the Board turned a blind eye to the actions its staff took to ensure that the AUC would prevail in acquiring .AFRICA.

ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion.”).

⁷⁸ See, e.g., Nicolas F. Diebold, “Standards of Non-Discrimination in International Economic Law,” 60 Int’l & Comp. L.Q. 831, 831 (2011), [Ex. C-101] (“The principle of non-discrimination...has become a central pillar of modern international economic law.”); Edwin Borchard, “The ‘Minimum Standard’ of the Treatment of Aliens,” 38 Mich. L. Rev. 445 (1940), [Ex. C-102] (describing minimum standard of treatment to include equality before law and non-discriminatory treatment).

⁷⁹ *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16 (Award of 2 October 2006) ¶ 442, [Ex. C-103]. The principle of non-discrimination is found throughout numerous legal systems. For example, it is treated under the rubric of equality of treatment by the European Court of Justice. The ECJ has held that the principle of equality of treatment is a fundamental principle of European Community law. The principle of equal treatment means that comparable situations may not be treated differently unless the difference in treatment is objectively justified. See *Joint Cases 117/76 and 16/77 Ruckdeschel* 1977 E.C.R. 1753, [Ex. C-104]; see also *Case 810/79 Uberschar v. Bundesversicherungsanstalt für Angestellte* 1980 E.C.R. 2747, ¶ 16, [Ex. C-105]. The EC, like the United States and most other jurisdictions with developed procurement systems, has particularly emphasized the importance of non-discrimination in the awarding of public contracts. See, e.g., Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Work Contracts, Public Supply Contracts and Public Service Contracts, OJ 2004 L 134 at 114, [Ex. C-106]. The principle of non-discrimination also features prominently in jurisprudence concerning allegations that states have treated foreign investments discriminatorily in breach of treaty obligations and/or the international minimum standard. See, e.g., *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) ¶ 402, [Ex. C-107] (confirming that discriminatory measure is “illegal” “under general international law”); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (21 Jan. 2010), ¶ 221, [Ex. C-108] (defining discrimination and citing cases).

⁸⁰ See Expert Report of Jack Goldsmith, ¶¶ 35-37 [Ex. C-109] (stating that “core meaning [of the prohibition on abuse of rights] is that the exercise of legal discretion or legal rights must be made in good faith” and outlining the scope of the prohibition in international law).

1. ICANN Discriminated Against DCA And Abused Its Regulatory Authority In Its Differential Treatment Of The ZACR And DCA Applications

34. ICANN discriminated against DCA and abused its regulatory authority over new gTLDs by treating it differently from other new gTLD applicants without justification or any rational basis—particularly relative to DCA’s competitor ZACR—and by applying ICANN’s policies in an unpredictable and inconsistent manner so as to favor DCA’s competitor for .AFRICA. ICANN staff repeatedly disparaged DCA and portrayed it as an illegitimate bidder for .AFRICA, and the Board failed to stop the discriminatory treatment despite protests from DCA.⁸¹

35. Moreover, ICANN staff worked with InterConnect to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation, even going so far as to draft a letter supporting ZACR for the AUC to submit back to ICANN. While ICANN staff purported to hold DCA to the strict geographic support requirement set forth in the AGB, once DCA was removed from contention for .AFRICA, ICANN staff immediately bypassed these very same rules in order to allow ZACR’s application to pass the GNP evaluation. After DCA’s application was pulled from processing on 7 June 2013, ICANN staff directed InterConnect to equate the AUC’s support for ZACR’s application as support from **100% of African governments**.⁸² This was a complete change of policy for ICANN, which had insisted (until DCA’s application was no longer being considered) that the AUC endorsement was not material to the geographic requirement.⁸³

36. However, none of the AUC statements ZACR submitted were adequate endorsements under the AGB, either. ICANN staff then took the remarkable step of **drafting the AUC endorsement letter in**

⁸¹ See *supra* at ¶¶ 13, 16-17, 23, 29; Witness Statement of S. Bekele at 48-50.

⁸² ICANN Response at ¶ 41; AGB, Module 2.2.1.4.2(4), [Ex. C-11].

⁸³ See *supra* at ¶¶ 16-17, 29; Email from Anne Yamashita to Leo Abruzzese et al (10 July 2012), [Ex. C-110]. See also Geographic Names Panel – ICANN New gTLD Program, Q. 10 (10 July 2012) [Ex. C-67]; Email from Emily Taylor to Trang Nguyen (10 May 2013) [Ex. C-74]; Emails between Emily Taylor and Trang Nguyen (26 April 2013-14 May 2013) [Ex. C-76]; Email from Trang Nguyen to Emily Taylor (8 May 2013), [Ex. C-111] (indicating ICANN’s continued insistence that the support of public authorities shall not count towards the AGB’s 60% geographic support requirement).

*order to enable ZACR to pass review.*⁸⁴ The Director of gTLD Operations, Trang Nguyen, personally composed an endorsement letter corresponding to all the AGB requirements for Commissioner Ibrahim’s signature.⁸⁵ Once Commissioner Ibrahim responded with a signed, stamped copy of the letter incorporating minor additions, ICANN staff rushed to pass ZACR’s application just over one week later.⁸⁶

37. In its Response to the GAC Advice rendered against its application, DCA raised concerns that the two .AFRICA applications had been treated differently, though at the time it had no idea of just how far ICANN was going or would go to push ZACR’s application through the process.⁸⁷ Apparently the NGPC failed to make any inquiry into those allegations. .AFRICA was discussed at one meeting only, and there is no rationale listed for the NGPC’s decision in the “Approved Resolutions” for the 4 June 2013 meeting.⁸⁸ An adequate inquiry into ICANN staff’s treatment of DCA’s and ZACR’s application—even simply asking the Director of gTLD Operations whether there was any merit to DCA’s concerns—would have revealed a pattern of discriminatory behavior against DCA and special treatment by both ICANN staff and the ICANN Board in favor of ZACR’s application.⁸⁹

⁸⁴ It is particularly ironic that ICANN has defended itself in this IRP by arguing that DCA’s claims are “not a basis to change the rules. ICANN argues that if it ignored the geographic names requirements at DCA’s request, it would be violating the Guidebook.” ICANN Response at ¶ 41; *see also id.* at ¶ 12. Despite the fact that the AGB actually contains a sample government support letter, ICANN Staff felt it necessary to spoon-feed a specific letter of support for the AUC to sign. *See id.*, Attachment to Module 2.

⁸⁵ *See supra* at ¶ 29; email from Trang Nguyen to Mike McFadden (25 June 2013), [Ex. C-92]; Trang Nguyen, “AU Template Letter,” [Ex. C-92].

⁸⁶ Thereafter, ICANN staff represented that they had actually followed the AGB requirements in ZACR’s Initial Evaluation report. *See* New gTLD Program Initial Evaluation Report, Application ID 1-1243-89583 (12 July 2013), [Ex. C-99] (informing ZACR that “your application falls within the criteria for a geographic name contained in the Applicant AGB Module 2.2.1.4”). *See also*, Section 2.2.1.4.2 [Ex. C-11] (requiring applications for strings listed as a UNESCO region or continent to provide “documentation of 60% of the respective *national governments* in the region”). *Cf.* Version 1 of the AGB, 2.2.1.4.2 [Ex. C-54] (including the support of public authorities as a requirement).

⁸⁷ *See supra* at ¶ 22; *see generally* Response of DCA to the GAC Advice (8 May 2013), Ex. C-[41].

⁸⁸ *See* Approved Resolution – Meeting of the New gTLD Program Committee (4 June 2013), Ex. R-4 (containing no mention of the advice on .AFRICA at all). The NGPC Scorecard merely quotes the AGB language indicating that consensus advice creates a “strong presumption for the ICANN Board that the application should not be approved.” *See* NGPC Scorecard, 2 (6 June 2013), [Ex. C-45].

⁸⁹ *See, e.g., supra* at ¶¶ 13, 16-17, 23, 29 (demonstrating the pattern of discrimination).

38. In all of these acts and omissions, ICANN breached the AGB and its own Articles of Incorporation and Bylaws, which require it to act in good faith, avoid discriminating against any one party, and ensure open, accurate and unbiased application of its policies.⁹⁰ Furthermore, ICANN breached principles of international law by failing to exercise its authority over the application process in good faith and committing an abuse of right by ghost-writing an endorsement letter for ZACR and the AUC, and then decreeing that the letter was all that would be needed for ZACR to pass. Finally, the Board’s failure to inquire into the actions of its staff, even when on notice of the myriad of discriminatory actions, violates its obligation to comply with its Bylaws with appropriate care and diligence.⁹¹

2. ICANN Abused Its Authority And Discriminated Against DCA By Colluding With The AUC To Ensure That The AUC Would Obtain Control Over .AFRICA, In Contravention Of The Rules For The New gTLD Program

39. ICANN also abused its authority and discriminated against DCA by cooperating with the AUC in order to ensure that the AUC would effectively reserve .AFRICA for its own use, even as ICANN was accepting applications for .AFRICA. As outlined above, ICANN instructed the AUC—which was not a member of the GAC at the time—on how to use ICANN’s objection procedures and GAC advice mechanism to “play a prominent role in determining the outcome of any application” for .AFRICA.⁹² ICANN expressly informed the AUC that it could use the GAC “to raise concerns that an applicant is seen as potentially sensitive or problematic, or provide direct advice to the Board.”⁹³ Not surprisingly, the AUC promptly became a member of the GAC and a few months later, issued the “Early Warning”

⁹⁰ See Articles of Incorporation, ¶ 4 [Ex. C-9]; Bylaws Arts. I § 2(7), I § 2(8), II § 3, III § 1 [Ex. C-10].

⁹¹ See Bylaws Art. IV § 3 (4) [Ex. C-10].

⁹² Letter from Dr. Stephen Crocker, chairman of the Board, ICANN, to Elham M.A. Ibrahim, Commissioner, Infrastructure and Energy Commission, AUC (8 Mar. 2012) [Ex. C-24].

⁹³ *Id.* at p. 2.

against DCA's application that culminated in the GAC Objection Advice which halted DCA's progress.

40. ICANN's instructions to the AUC as to how to bypass ICANN's own rules for reserving names for special use breached the AGB by facilitating the AUC's avoidance of the AGB evaluation procedure and by treating the gTLD .AFRICA as a ccTLD, enabling the AUC to benefit from special treatment.⁹⁴ In addition, ICANN's instructions violated ICANN's Articles of Incorporation and Bylaws by effecting an inequitable and inaccurate application of ICANN's AGB policies.⁹⁵ The AUC made clear to ICANN that it wanted to reserve .AFRICA for its own use and prevent any other actor from operating the domain name. In effect, it wished to remove .AFRICA availability under the new gTLD process. This was not possible under the applicable rules, and placing .AFRICA on the Reserved Name list at that point would have attracted scrutiny. Instead, ICANN instructed the AUC on how to achieve the same result, using the GAC's advice mechanism.⁹⁶ Such instruction was a breach of ICANN's obligation to carry out its activities in good faith and was a cynical abuse of ICANN's position as the alleged regulator of the New gTLD Program in order to allow the AUC to game the system and gain control of .AFRICA on the sly.

41. ICANN's willingness to assist the AUC in achieving its goals is all the more irregular given that the AU is not a government, and the GAC is only meant to communicate advice concerning *government policy interests* to the Board. Although the AU is composed of government

⁹⁴ See AGB, Module 1 [Ex. C-11] (indicating that the AGB details "the process for applying for a new generic top level domain"; the AGB does not contemplate any other process); *id.* at Module 2 (indicating that "all applicants will undergo an Initial Evaluation and those that do not pass all elements may request Extended Evaluation"). The AGB does not provide a process for ccTLD applications, and a gTLD application specifically cannot be eliminated by a government's ccTLD application for the same string. See *id.* at 2.2.1.1.1 ("A gTLD application that has successfully completed all relevant evaluation stages, including dispute resolution and string contention, if applicable, and is eligible for entry into a registry agreement will be considered complete, and therefore would not be disqualified by a newly-filed IDN ccTLD request").

⁹⁵ See Articles of Incorporation, ¶ 4 [Ex. C-9]; Bylaws Arts. I § 2(8), II § 3, III § 1 [Ex. C-10].

⁹⁶ By joining the GAC, the AUC also avoided actually having to demonstrate to an independent third-party dispute resolution provider that it could meet the standing requirements for bringing a community objection and satisfy its burden of proof. See *generally* AGB, Module 3.2.2.4 [Ex. C-11] (detailing the standing requirements and burden of proof to sustain a community objection).

representatives, the AUC has no governmental powers, nor was it evident prior to the AUC's joining the GAC that it could participate as a voting member. The only other non-government with voting powers on the GAC at the time was the European Union Commission (which, unlike the AUC, has regulatory authority over its member states).⁹⁷ But the AUC is fundamentally different from the EUC: the EU is a supra-national governmental and regulatory body with the power to regulate the activities of its Member States. By contrast, the AU is simply an international organization with no power to regulate its members.⁹⁸ None of the other African public authorities similarly situated to the AU, including UNECA and the New Partnership for Africa's Development, are on the GAC as members, but as non-voting GAC observers. Likewise, comparable regional public authorities such as the Organization of Islamic Cooperation and the Organization of American States are non-voting GAC observers, not voting GAC members.⁹⁹ In fact, other GAC members have protested the special treatment accorded to the AUC as an international organization (as opposed to a national government, like other GAC members).¹⁰⁰

42. Furthermore, ICANN's Bylaws provide that membership on the GAC is only open to "multinational governmental organizations and treaty organizations" at the "invitation" of the GAC

⁹⁷ See List of GAC Representatives, [Ex. C-112].

⁹⁸ Unlike the EU, the AU has no power to legislate, and its mandatory power is extremely limited. The AU can impose sanctions on its members for violating the principles in the AU's Constitutive Act, for unconstitutional changes of government and for failure to pay membership dues. *See* Oxfam International Liaison Office with the African Union, 2 "African Union Compendium," 132-133 (2014), [Ex. C-58]. Furthermore, although the AU Assembly of Heads of State and Government votes on decisions that are theoretically binding on Member States, "there is no consistent mechanism to track the implementation of the AU decisions by Member States at national levels." *Id.* at 131.

⁹⁹ Letter from Dr. Stephen Crocker, chairman of the Board, ICANN, to Elham M.A. Ibrahim, Commissioner, Infrastructure and Energy Commission, AUC (8 Mar. 2012) [Ex. C-24].

¹⁰⁰ The only other international organization that is a member rather than an observer of the GAC is the European Union Commission; *see* List of GAC Representatives, [Ex. C-112]. *See also*, GAC Communique Overview at 14:30:00 (15 October 2014), available at <http://la51.icann.org/en/schedule/wed-gac-communique-overview> (comments of the United States GAC Representative during an hour-long discussion at ICANN 51 in Los Angeles, CA, concerning the voting rights of multinational organizations in the GAC and considering amendments to the GAC Operating Principles); *id.* at 18:20:00 (comments of the Australian representative to the GAC).

through its chair (at the time, Heather Dryden).¹⁰¹ Dr. Crocker’s letter to the AUC thus provided it not only with a strategy for accomplishing its goal of reserving .AFRICA for itself, but implicit assurance that there would be a spot for the AUC on the GAC—even though the GAC is comprised entirely of governments or supra-governmental organizations like the EU, and not international organizations such as the AU.¹⁰² ICANN’s advice that the AUC should use the GAC to achieve its goals concerning .AFRICA was therefore abusive even if one were to assume that ICANN should cater to government interests—which it should not. On the contrary, while ICANN has a duty to take into account advice from governments as communicated through the GAC, it is obligated to investigate and evaluate such advice before exercising its own judgment as to the appropriate action to take.¹⁰³ This duty is even more important when the proffered advice is not consensus advice—which ICANN knew,

Redacted - GAC Designated Confidential Information and, after the Beijing GAC meeting, DCA itself.¹⁰⁴

¹⁰¹ Bylaws Art. XI § 2(1)(b), [Ex. C-10] (“Membership [on the GAC] shall also be open to Distinct Economies as recognized in international fora and multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee through its Chair.”). DCA has been unable to obtain details on exactly how the AUC became a voting member of the GAC, and to what extent ICANN – whose Board Member Heather Dryden was at that time Chair of the GAC – may have facilitated its accession to GAC membership. However, prior to the ICANN Board sending its response to the AUC, Ms. Dryden reviewed the draft letter. *See* Email from Chris Mondini to Heather Dryden (24 Feb. 2012), [Ex. C-113].

¹⁰² The AUC has no mandate to legislate for and bind its members; rather, the AUC serves an administrative role for the AU. By way of example, the AUC “represents the Union and defends its interests, elaborates draft common positions of the Union, prepares strategic plans and studies for the consideration of the Executive Council, elaborates, promotes, coordinates and harmonises the programs and policies of the Union with those of the [Regional Economic Communities], ensures the mainstreaming of gender in all programmes and activities of the Union...”. Oxfam International Liaison Office with the African Union, 2 “African Union Compendium,” 75, 76-78 (2014), [Ex. C-58].

¹⁰³ Bylaws Art. XI § 2(1)(j) - (k), [Ex. C-10] (“The advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the [GAC] advice, it shall so inform the [GAC] and state the reasons why it decided not to follow the advice.”); AGB, Module 3.1, [Ex. C-11] (ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raise in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.”). *See also*, *ICM v. ICANN* at ¶ 150 [Ex. C-12] (opining that the Board must duly take GAC advice into account but may not give undue deference such that the Board violates ICANN’s neutral, fair and objective policies).

¹⁰⁴ *See supra* at ¶¶ 19, 21-22. AGB, Module 3.1 (II), [Ex. C-11] (“The GAC advises ICANN that there are concerns about a particular application “dot-example.” The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.”).

43. These breaches by ICANN were fatal to DCA’s application. It was as a direct result of these breaches that DCA’s application was wrongfully removed from competition and ZACR’s application was rushed through the evaluation process, which it passed only because ICANN itself wrote its one and only endorsement letter to which ICANN then gave its stamp of approval.

B. The NGPC Breached ICANN’s Articles Of Incorporation And Bylaws By Failing To Apply ICANN’s Procedures In A Neutral And Objective Manner, With Procedural Fairness, When It Accepted The GAC Objection Advice Against DCA

44. The decision of the NGPC, acting pursuant to the delegated authority of the ICANN Board, to accept the purported “consensus” GAC Objection Advice, violated ICANN’s Articles of Incorporation and Article III § 1 of its Bylaws, requiring transparency, consistency and fairness.¹⁰⁵ ICANN ignored the serious issues raised by DCA and others with respect to the rendering and consideration of the GAC Objection Advice, breaching its obligation to operate “to the maximum extent possible in an open and transparent manner and consistent with procedures designed to ensure fairness.”¹⁰⁶ It also breaches ICANN’s obligation under Article 4 of its Articles of Incorporation to abide by principles of international law, including good faith application of rules and regulations and the prohibition on the abuse of rights.¹⁰⁷

45. The NGPC gave undue deference to the GAC and failed to investigate the serious procedural irregularities and conflicts of interest raised by DCA and others relating to the GAC’s Objection Advice on .AFRICA. ICANN had a duty under principles of international law to exercise good faith

¹⁰⁵ Articles of Incorporation ¶ 4, [Ex. C-9]; Bylaws, Art. III, § 1 [Ex. C-10] (“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.”).

¹⁰⁶ Bylaws, Art. III, § 1 [Ex. C-10] (“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.”).

¹⁰⁷ *See supra* n. 80 (indicating that the core of the prohibition on abuse of rights is the obligation to act in good faith when exercising legal discretion or legal rights). *See also*, BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 107, 119 (“Where the right confers upon its owner a discretionary power, this must be exercised honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others. . . . They must not be exercised fictitiously so as to evade such obligations or rules of law, or maliciously so as to injure others. Violations of these requirements of the principle of good faith constitute abuses of right”) (quoted in Expert Report of Jack Goldsmith, ¶¶ 37 [Ex. C-114].

and due diligence in evaluating the GAC advice rather than accepting it wholesale and without question, despite having notice of the irregular manner in which the advice was rendered. Importantly, ICANN was well aware that the AUC was using the GAC to effectively reserve .AFRICA for itself, pursuant to ICANN's own advice that it should use the GAC for that purpose and contrary to the New gTLD Program objective of enhancing competition for TLDs. The AUC's very presence on the GAC as a member rather than an observer demonstrates the extraordinary lengths ICANN took to ensure that the AUC was able to reserve .AFRICA for its own use notwithstanding the new gTLD application process then underway.

1. The NGPC Should Have Investigated Questions About The GAC Objection Advice Being Obtained Through Consensus

46. The ICANN Board and staff members had actual knowledge of information calling into question the notion that there was a consensus among the GAC members to issue the advice against DCA's application, prohibiting the application of the rule in the AGB concerning consensus advice (which creates a "strong presumption" for the Board that a particular application "should not proceed" in the gTLD evaluation process).¹⁰⁸ The irregularities leading to the advice against DCA's application included proposals offered by Alice Munyua, who no longer represented Kenya as a GAC advisor at the time, and the fact that the

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The GAC emails referenced in Ms. Dryden's witness statement clearly show that Kenya accepted the text only insofar as it supported the AUC's endeavor and not insofar as it objected to DCA's application.¹¹⁰ Finally, the ICANN Board knew very well that the AUC might attempt to use the GAC

¹⁰⁸ AGB, Module 3.1.I [Ex. C-11]

¹⁰⁹ See *supra* at ¶¶ 19-21. See also Transcript of Beijing GAC-ICANN Board meeting, 19-23 (9 April 2013), [Ex. C-78].

¹¹⁰ The Operating Principles of the GAC and its practice of taking no roll call, keeping no record of the discussions at its meetings, and excluding the input on *internet policy* of countries whose representatives clearly express their viewpoints utilizing the *internet forum* provided for that purpose, but cannot on all occasions attend the in-person meetings, is not at issue in this IRP. However, particularly in light of frequent complaints by GAC representatives that they cannot even obtain visas to enter the countries where ICANN schedules its meetings—and therefore the GAC meetings,—the propriety of this method of operation is truly questionable. See ICANN Response ¶ 39, n. 56-57 for a description of how the GAC operates. See also Declaration of H. Dryden at ¶¶ 11-12.

in an anticompetitive manner, since it was ICANN itself that informed the AUC it could use the GAC to achieve that very goal.¹¹¹

47. At a bare minimum, this information put ICANN Board and staff members on notice that further investigation into the rationale and support for the GAC's decision was necessary. During the very meeting wherein the NGPC accepted the Objection Advice, the NGPC acknowledged that due diligence required a conversation with the GAC, even where the advice *was* consensus advice.¹¹² The evidence shows that ICANN simply decided to push through the AUC's appointed applicant in order to allow the AUC to control .AFRICA, as it had previously requested.

2. The NGPC Should Have Consulted With An Independent Expert About The GAC Advice Given That The AUC Used The GAC To Circumvent the AGB's Community Objection Procedures

48. Even if the GAC's Objection Advice could be characterized as "consensus" advice, the NGPC's failure to consult with an independent expert about the GAC's Objection Advice was a breach of ICANN's duty to act to the "maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."¹¹³ The AGB specifically provides that when the Board is considering any form of GAC advice, it "may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures."¹¹⁴

¹¹¹ See *supra* at ¶¶ 12-14; see also Letter from Dr. Stephen Crocker, chairman of the Board, ICANN, to Elham M.A. Ibrahim, Commissioner, Infrastructure and Energy Commission, AUC (8 March 2012), [Ex. C-24] (recommending that the AUC utilize the GAC to have an impact on the outcome of .AFRICA).

¹¹² Bylaws, Art. III, § 1. [Ex. C-10]; see also Minutes of NGPC Meeting (4 June 2013), Ex. C-[114]. Although with regard to other gTLDs raised by the GAC, the NGPC confirmed that "the committee is expected to enter into a dialogue with the GAC, regardless of whether the advice is consensus or not," and the NGPC did consult the GAC on other strings discussed at the same meeting, the NGPC did not similarly consult with the GAC on .AFRICA.

¹¹³ Bylaws, Art. III, § 1 [Ex. C-10] ("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.").

¹¹⁴ AGB, Module 3.1 [Ex. C-11].

49. Given the unique circumstances surrounding the applications for .AFRICA—namely that one applicant was the designee of the AUC, which wanted to control .AFRICA without competition—ICANN should not have simply accepted GAC Objection Advice, proposed and pushed through by the AUC. If it was in doubt as to how to handle GAC advice sponsored by DCA’s only competitor for .AFRICA, it could have and should have consulted a third-party expert in order to obtain appropriate guidance. Its failure to do so was, at a minimum, a breach of ICANN’s duty of good faith and the prohibition on abuse of rights under international law.¹¹⁵ In addition, in light of the multiple warning signs identified by DCA in its Response to the GAC Objection Advice and its multiple complaints to the Board, failure to consult an independent expert was certainly a breach of the Board’s duty to ensure its fair and transparent application of its policies and its duty to promote and protect competition.¹¹⁶

C. The NGPC Breached ICANN’s Articles Of Incorporation And Bylaws By Failing To Apply Its Procedures In A Neutral And Objective Manner, With Procedural Fairness, When It Approved The BGC’s Recommendation Not To Reconsider The NGPC’s Acceptance Of The GAC Objection Advice against DCA

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

1. The NGPC Reviewed Its Own Decision

51. First, the NGPC’s decision not to review its own acceptance of the GAC Objection Advice lacks procedural fairness, because the NGPC literally reviewed its own decision to accept the Objection Advice. It is a well-established general principle of international law that a party cannot be

¹¹⁵ See Articles of Incorporation, Cl. 4, [Ex. C-9].

¹¹⁶ Bylaws Arts. I § 2(6), I § 2(7), I § 2(8), II § 3, III § 1, [Ex. C-10]; Affirmation of Commitments Cls. 3 (c), 9.3 [Ex. C-100].

the judge of its own cause.¹¹⁷ No independent viewpoint entered into the process. In addition, although Mr. Silber recused himself from the vote on .AFRICA, he remained present for the entire discussion of .AFRICA, and Mr. Disspain apparently concluded that he did not feel conflicted, so both participated in the discussion and Mr. Disspain voted on DCA's RFR.

52. Second, the participation of the BGC did not provide an independent intervention into the NGPC's decision-making process, because the BGC is primarily a subset of members of the NGPC. At the time the BGC made its recommendation, the majority of BGC members were also members of the NGPC.¹¹⁸

2. The NGPC Did Not Exercise Due Diligence And Care In Accepting The BGC's Recommendation

53. Finally, the Board did not exercise due diligence and care in accepting the BGC's recommendation, because the BGC recommendation essentially proffered the NGPC's inadequate diligence in accepting the GAC Objection Advice in the first place, in order to absolve the NGPC of the responsibility to look into any of DCA's grievances in the context of the Request for Review. The basis for the BGC's recommendation to deny was that DCA did not state proper grounds for reconsideration, because failure to follow correct procedure is not a ground for reconsideration, and DCA did not identify the actual information an independent expert would have provided, had the NGPC consulted one.¹¹⁹ Thus, the BGC essentially found that the NGPC did not fail to take account of material information, because the NGPC did not have before it the material information that would have been provided by an independent expert's viewpoint. The BGC even claimed that if DCA had wanted the NGPC to exercise due diligence and consult an independent expert, DCA should have

¹¹⁷ BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 279-289 [Ex. C-116].

¹¹⁸ See Overlaps of the ICANN BGC and ICANN NGPC, [Ex. C-115]

¹¹⁹ Recommendation of the BGC – Reconsideration Request 13-4, p. 6-7 (1 August 2013), [Ex. C-47].

made such a suggestion in its Response to the GAC Objection Advice.¹²⁰ Applicants should not have to remind the Board to comply with its Bylaws in order for the Board to exercise due diligence and care.

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

V. CONCLUSION

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

¹²⁰ *Id.* at 9-10.

56. For these reasons, DCA respectfully requests that the Panel declare that—

- The Board violated ICANN’s Articles of Incorporation, Bylaws and general principles of international law by—
 - Discriminating against DCA and wrongfully assisting the AUC and ZACR to obtain rights to the .AFRICA gTLD;
 - Failing to apply ICANN’s procedures in a neutral and objective manner, with procedural fairness when it accepted the GAC Objection Advice against DCA; and
 - Failing to apply its procedures in a neutral and objective manner, with procedural fairness when it approved the BGC’s recommendation not to reconsider the NGPC’s acceptance of the GAC Objection Advice against DCA;
- As a result of each of these violations, ICANN must—
 - Cease all preparations to delegate the .AFRICA gTLD to ZACR and rescind its contract with ZACR;
 - Permit DCA’s application to proceed through the remainder of the new gTLD application process; and
 - Compensate DCA for the costs it has incurred in applying for .AFRICA, including the \$185,000 DCA paid in order to apply (and which ICANN has retained), as well as other costs DCA incurred in preparing its application;
- DCA is the prevailing party in this IRP and, consequently, shall be entitled to its costs in this proceeding; and
- DCA is entitled to such other relief as the Panel may find appropriate under the circumstances described herein.

Respectfully submitted,

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

Arif H. Ali
Counsel for Claimant