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6 Attorneys for Plaintiff
7 RUBY GLEN, LLC

8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA

10
11 RUBY GLEN, LLC

12 Plaintiff,

13 vs.

14 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS
15 AND DOES 1-10

16 Defendant.

Case No.: 2:16-cv-05505-PA-AS

[Hon. Percy Anderson
Courtroom 15]

**REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF
PLAINTIFF RUBY GLEN, LLC'S
OPPOSITION TO DEFENDANT
INTERNET CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS' MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

[Filed concurrently with Opposition to
Motion to Dismiss]

**Hearing Date: November 28, 2016
Hearing Time: 1:30 p.m.
Courtroom: 15**

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1 **I. INTRODUCTION**

2 Plaintiff RUBY GLEN, LLC (“Plaintiff”) respectfully requests the Court take
3 judicial notice of the following documents in support of its Opposition to Defendant
4 Internet Corporation for Assigned Names and Numbers’ (“ICANN”) Motion to Dismiss
5 Plaintiff’s First Amended Complaint, pursuant to Rule 201 of the Federal Rules of
6 Evidence. For ease of convenience, true and correct copies of the documents identified
7 below are attached as exhibits herewith.

8 A. Letter from United States Senators Ted Cruz, Michael S. Lee, and Sean
9 Duffy to Acting Assistant Attorney General Renata B. Hesse, dated
10 August 12, 2016 (the “Letter”), available at
11 [https://www.cruz.senate.gov/files/documents/Letters/20160812_DOJ-](https://www.cruz.senate.gov/files/documents/Letters/20160812_DOJ-ICANNLetter.pdf?)
12 [ICANNLetter.pdf?](https://www.cruz.senate.gov/files/documents/Letters/20160812_DOJ-ICANNLetter.pdf?);

13 B. Reconsideration Request by Ruby Glen, LLC and Radix FZC, Request
14 16-9, dated July 17, 2016 (the “Reconsideration Request”), a copy of
15 which is available at
16 [https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-](https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-request-redacted-17jul16-en.pdf)
17 [glen-radix-request-redacted-17jul16-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-request-redacted-17jul16-en.pdf);

18 C. Final Declaration of the Independent Review Panel for the International
19 Centre for Dispute Resolution, Case #50 2013 001083, dated July 31,
20 2015 (the “IRP Declaration”), a copy of which is available at
21 [https://www.icann.org/en/system/files/files/final-declaration-2-redacted-](https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf)
22 [09jul15-en.pdf](https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf); and

23 D. ICANN’s “New gTLD Program Auctions guidelines,” a copy of which is
24 available at <https://newgtlds.icann.org/en/applicants/auctions>.

25 **II. LEGAL STANDARD**

26 This Court “may judicially notice a fact that is not subject to reasonable dispute.”
27 Fed. R. Evid. 201(b). Thus, matters presented to the Court, but not contained in the
28 pleadings, may be noticed on a motion to dismiss when they are “generally known

1 within the trial court’s territorial jurisdiction[] or [] can be accurately and readily
2 determined from sources whose accuracy cannot reasonably be questioned.” *Id.* See
3 also *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (“On a motion
4 to dismiss, we may take judicial notice of public record outside the pleadings.”). “The
5 court can take judicial notice of matters of public record, such as pleadings in another
6 action and records and reports of administrative bodies.” *Von Koenig v. Snapple Bev.*
7 *Corp.*, 713 F. Supp. 2d 1066, 1073 (E.D. Cal. 2010).

8 Each of the exhibits submitted herewith is appropriate for judicial notice in
9 considering ICANN’s Motion to Dismiss, especially in light of the fact that Plaintiff
10 could amend the FAC to explicitly incorporate these exhibits. See *Von Koenig*, at 1073
11 (noting that a plaintiff can incorporate a document into its complaint by attaching it to
12 the complaint, or “a document . . . may be incorporated by reference into a complaint”).

13 Upon information and belief, The Letter is a “matter of public record,” as it is a
14 publicly available correspondence between United States Senators and the Acting
15 Assistant Attorney General. Similarly, the IRP Declaration is a “matter of public
16 record,” as a public decision concerning ICANN action.

17 The FAC incorporates the Reconsideration Request into the complaint by
18 reference. See FAC ¶¶ 50. Similarly, the FAC incorporates ICANN’s New gTLD
19 Program Auctions guidelines by reference. See FAC ¶ 52(e). There is no dispute
20 regarding the accuracy or authenticity of the attached exhibits.

21 **III. CONCLUSION**

22 Plaintiff respectfully requests that the Court take judicial notice of the documents
23 attached hereto as Exhibits A through D, and consider both the existence of the
24 documents, and the content contained therein, in ruling on Plaintiff’s concurrently filed
25 Opposition to ICANN’s Motion to Dismiss.

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Dated: November 7, 2016

By: s/ Paula L. Zecchini
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CERTIFICATE OF SERVICE

Pursuant to L.R. 5-3, I hereby certify that on November 7, 2016, I electronically filed the foregoing documents: Request for Judicial Notice in Support of Plaintiff Ruby Glen, LLC’S Opposition to Defendant Internet Corporation For Assigned Names and Numbers’ Motion to Dismiss First Amended Complaint, with the Clerk of the Court by using the CM/ECF system and that foregoing document is being served on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF:

Eric P Enson
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s/ Maria VandenBosch
MARIA VANDENBOSCH

“EXHIBIT A”

United States Senate

WASHINGTON, DC 20510

August 12, 2016

The Honorable Renata B. Hesse
Acting Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20230

Dear Acting Assistant Attorney General Hesse:

The National Telecommunications and Information Administration (NTIA) in the Department of Commerce (DOC) is considering whether to relinquish its oversight of the process for registering Internet domain names. As part of its oversight responsibility, the NTIA oversees the Internet Corporation for Assigned Names and Numbers (ICANN), which reviews and approves requests to register, delete, or modify top-level domain names, and Verisign, Inc. which administers the changes that ICANN approves by making the necessary additions, deletions, or modifications to the authoritative root zone file—i.e., the list of domain names and corresponding IP addresses.¹ Verisign's responsibilities in managing the authoritative root zone file are governed by Cooperative Agreement No. NCR 92-18742 with the United States Government.²

In addition to administering the authoritative root zone file, Verisign exercises exclusive control of the registry for .com domain names. Verisign's right to manage the .com registry and, in particular, the fee Verisign charges for registering .com domain names are governed by the .com Registry Agreement between Verisign and ICANN³ as well Amendment 32 to the Cooperative Agreement between NTIA and Verisign.⁴ Both the .com Registry Agreement and the Cooperative Agreement contain an important provision that limits Verisign's ability to increase prices in the .com Top Level Domain (TLD). Neither the Cooperative Agreement nor the .com Registry Agreement are scheduled to expire until November 30, 2018. Yet despite the fact that both agreements are nowhere near expiration, ICANN, Verisign, and the NTIA are working to, in effect, amend both agreements to provide a six-year extension to Verisign—to 2024—to manage the .com registry in conjunction with the proposed plan to transition domain name

¹ National Telecommunications and Information Administration. Verisign Cooperative Agreement No. NCR-9218742. Web. <<https://www.ntia.doc.gov/page/verisign-cooperative-agreement>>.

² National Telecommunications and Information Administration. Verisign Cooperative Agreement No. NCR-9218742. Web. <<https://www.ntia.doc.gov/page/verisign-cooperative-agreement>>.

³ Atallah, Akram. "Root Zone Management Transition Update: Preservation of Security, Stability and Resiliency." The Internet Corporation for Assigned Names and Numbers, 28 June 2016. Web. <<https://www.icann.org/news/blog/root-zone-management-transition-update-preservation-of-security-stability-and-resiliency>>.

⁴ National Telecommunications and Information Administration. Verisign Amendment 32 to Cooperative Agreement No. NCR-9218742. Web. <https://www.ntia.doc.gov/files/ntia/publications/amendment_32_11292012.pdf>

oversight responsibility from the NTIA to ICANN. According to the NTIA, the “root zone management aspects of the IANA functions contract [between the NTIA and ICANN] are ‘inextricably intertwined’ with the Cooperative Agreement.”⁵ The proposed amendment to the .com Registry Agreement is currently on ICANN’s website for public comment, which is set to close on August 12, 2016 and will be followed by the release of an ICANN staff report on August 26, 2016.⁶

If the .com Registry Agreement is extended to 2024 and the NTIA subsequently relinquishes its oversight of the process for registering Internet domain names, it appears that the Department of Justice (DOJ) may be prevented from having meaningful input into the prices that Verisign charges for registering a domain name within the .com domain for an extended period. We therefore write to urge the DOJ to conduct a thorough competition review of the agreement before any oversight transition is undertaken and any agreement extension is approved.

As background, Verisign has had exclusive control of the .com registry since acquiring Network Solutions on March 7, 2000 for \$21 billion.⁷ As part of this acquisition, Verisign obtained the exclusive right to control and profit from the operation of the .com registry, which Network Solutions had maintained since entering into a Cooperative Agreement with the United States Government in 1993.⁸ Because of Verisign’s exclusive control of the .com registry—a responsibility that benefitted an arrangement between ICANN and the NTIA—American businesses and consumers with an interest in registering or renewing a .com domain name have had no meaningful competitive alternatives within the .com registry marketplace.

In effect, Verisign’s government-approved control of the .com registry allows it to operate as a monopoly—a fact that has not gone unnoticed in the financial services industry and the stock market. For example, in 2013, financial research and publishing company, StreetAuthority, declared that Verisign “had a virtual monopoly on Internet domains” that gives it “unrivaled power” in “the fastest-growing industry in the world—the Internet.”⁹ Brian Katz, Chief Investment Officer of The Colony Group similarly observed in 2009 that Verisign “holds a legal monopoly on the DNS industry” that “adds to the appeal of [Verisign’s] business model” because “[v]irtually every business requires a unique web site for competitive reasons.”¹⁰ More recently, on June 29, 2016, Seeking Alpha published an analysis stating that “VeriSign’s

⁵ Atallah, Akram. “Root Zone Management Transition Update: Preservation of Security, Stability and Resiliency.” The Internet Corporation for Assigned Names and Numbers, 28 June 2016. Web. <<https://www.icann.org/news/blog/root-zone-management-transition-update-preservation-of-security-stability-and-resiliency>>.

⁶ Papac, Krista. “Public Comment on Proposed Amendment to .COM Registry Agreement.” The Internet Corporation for Assigned Names and Numbers, 30 June 2016. Web. <<https://www.icann.org/public-comments/com-amendment-2016-06-30-en>>.

⁷ VeriSign, Inc. Verisign Acquires Network Solutions to Form World’s Largest Provider of Internet Trust Services. N.p., 7 Mar. 2000. Web. <<https://investor.verisign.com/secfiling.cfm?filingid=950103-00-362&cik=>>.

⁸ National Science Foundation. Network Information Services Manger(s) for NSFNET and the NREN: INTERNIC Registration Services Cooperative Agreement No. NCR-9218743. 1 Jan. 1993. Web. <<http://archive.icann.org/en/nsi/coopagmt-01jan93.htm>>.

⁹ StreetAuthority. “Profit From A ‘Monopoly On The Internet’ With 100% Upside.” Editorial. NASDAQ.com, 6 Nov. 2013. Web. <<http://www.nasdaq.com/article/profit-from-a-monopoly-on-the-internet-with-100-upside-cm297233>>.

¹⁰ Interview. VeriSign Is Brian Katz’s Highest Conviction Holding - Here’s Why. Seeking Alpha, 29 Dec. 2009. Web. <<http://seekingalpha.com/article/180092-verisign-is-brian-katzs-highest-conviction-holding-heres-why>>.

exclusive contract with the Internet Corporation for Assigned Names and Numbers (ICANN) gives the company a significant barrier to entry for competitors”¹¹ and characterizing Verisign as a “regulated monopoly.”

To put Verisign’s unique position into perspective, the fourth quarter of 2015 closed with approximately 314 million domain name registrations across *all* TLDs.¹² The .com and .net TLDs, both exclusively operated and controlled by Verisign, accounted for approximately 139.8 million domain names in the fourth quarter of 2015. Simply put, 44.5 percent of all registrants across the entire Internet pay Verisign to secure or renew a .com or .net domain name. Verisign’s exclusive control of .com and .net allowed the company to end 2015 with cash, cash equivalents, and marketable securities of \$1.9 billion, an increase of \$491 million compared to 2014.¹³

Verisign has achieved a 61.5 percent operating margin¹⁴ despite the Government’s imposition of a mandatory price cap on registration fees. When ICANN and Verisign last negotiated the renewal of the .com registry agreement in 2012, the parties reached an agreement that not only would have extended Verisign’s exclusive control of the .com registry for six years but would have also enabled Verisign to increase the cost of registration fees by as much as seven percent per year in four out of six years of the agreement. This agreement, which, in effect, pre-authorized rate increases without any showing of justification or reasonableness, understandably raised concerns among the public that led the DOJ, along with the DOC, to initiate a competition review. This review resulted in a mandatory \$7.85 price cap until the end of the .com registry agreement in 2018.

In light of ICANN and Verisign’s history, the unique nature of the .com registration market, and its susceptibility to anti-competitive outcomes that could harm businesses and consumers, the public would be well served by continuing and active oversight. As Acting Assistant Attorney General Deborah Garza explained in a 2008 letter to the NTIA:

We also concluded that existing gTLDs likely would not become a competitive threat to .com registrations because the network effects that make .com registrations so valuable to consumers will be difficult for other TLDs to overcome. Due to a first-mover advantage and high brand awareness, .com registrations account for the overwhelming majority of gTLD registrations. As a result, when users do not know the TLD in which a domain is registered, they most often simply append ‘.com’ to a product or a company name when attempting to find the desired website. This phenomenon creates a strong preference for .com. Accordingly there will continue to be a need for Section 7.3 of the .com registry agreement [which sets price conditions for domain name registrations and registry services] to replace the discipline that market

¹¹ Better Investor Co. “Verisign: Time To Make Some Real Money.” Seeking Alpha, 29 June 2016. Web. <<http://seekingalpha.com/article/3985169-verisign-time-make-real-money>>.

¹² The Domain Name Industry Brief. Rep. no. Volume 1- Issue 13. Verisign, Apr. 2016. Web. <<http://www.verisign.com/assets/domain-name-report-april2016.pdf>>.

¹³ VeriSign, Inc. Verisign Reports Fourth Quarter and Full Year 2015 Results. N.p., 11 Feb. 2016. Web. <<https://investor.verisign.com/releasedetail.cfm?releaseid=954588>>.

¹⁴ VeriSign, Inc. Verisign Reports Fourth Quarter and Full Year 2015 Results. N.p., 11 Feb. 2016. Web. <<https://investor.verisign.com/releasedetail.cfm?releaseid=954588>>.

competition does not provide in this setting, as well as continuing DOC oversight of the .com registry under the Cooperative Agreement [between Verisign and the United States Government], which precludes VeriSign from amending or renewing the .com agreement without DOC approval.¹⁵

Given these concerns, it appears that American businesses, consumers, and all those who rely upon a .com domain for communication and commerce will be ill-served by a process that precludes the DOJ from considering the appropriateness of Verisign receiving an extension of its critical monopoly control over .com for another six years. It is especially imperative to conduct the review before the proposed transition of oversight responsibility is executed because it is unclear whether or not the Government will retain the authority to conduct such a review in 2024 if the transition is completed. A robust and formal competition review would allow the Government, policy-makers and, most importantly, the public, to assess Verisign's pricing practices since the last review and to determine whether the current price cap is artificially high as some have suggested in the past. For example, in 2012, the Internet Commerce Association suggested that Verisign's price cap be reduced to \$5.86.¹⁶

A competition review is also timely and necessary in light of Verisign's recent efforts to increase its presence in the global domain marketplace. According to reports, Verisign has used a subsidiary, Nu Dot Co LLC, to place a successful \$135 million bid to secure the exclusive right to operate the new .web registry.¹⁷ There is a strong belief within the domain name industry that Verisign's bid to secure the .web registry may have been undertaken to protect its position in the .com market from additional competition.^{18 19}

The DOJ has a responsibility to ensure that there is adequate competition in the domain registry market. We therefore respectfully request that you respond to the following questions no later than 5:00 pm on August 15, 2016:

- (1) Has the DOJ conducted a competition review of Verisign's .com Registry Agreement with ICANN to assist the NTIA in determining whether the agreement should be extended to 2024? If so, please provide a complete copy and summary of the review.
- (2) If not, will the DOJ conduct a competition review of the .com Registry Agreement before the agreement is extended and the NTIA transfers its oversight authority to ICANN? Please explain.

¹⁵ Garza, Deborah A., Acting Assistant Attorney General, Antitrust Division, Department of Justice, "Re: ICANN's Draft RFP for New GTLDs." Letter to Meredith Baker, Acting Assistant Secretary for Communications and Information, National Telecommunications and Information Administration. 3 Dec. 2008. Web. <<https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>>.

¹⁶ Corwin, Philip. "ICA To DOC: Slash .Com Pricing by \$2+, and Tie Future Price Hikes to CPI." Internet Commerce Association, 27 Nov. 2012. Web. <<http://www.internetcommerce.org/SlashDotComPricing/>>.

¹⁷ Murphy, Kevin. "Verisign Confirms It Did Fund \$135 Million .web Bid." Domain Incite. N.p., 1 July 2016. Web. <<http://domainincite.com/20833-verisign-confirms-it-did-fund-135-million-web-bid>>.

¹⁸ Andrew Allemann. "Why Verisign Paid \$135 Million for the .web Top Level Domain." Domain Name Wire, 29 July 2016. Web. <<http://domainnamewire.com/2016/07/29/verisign-paid-135-million-web-top-level-domain/>>.

¹⁹ Berkens, Michael. "Thoughts About Verisign's \$135 Million Dollar .Web Acquisition & What It Means For Domainers." The Domains, 31 July 2016. Web. <<http://www.thedomains.com/2016/07/31/thoughts-verisigns-135-million-dollar-web-acquisition-means-domainers/>>.

Please contact Sean McLean (Senator Cruz), Andy Reuss (Senator Lee), and Ryan McCormack (Congressman Duffy) of our staffs if there are any questions regarding this request.

Sincerely,



Ted Cruz
Chairman
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts
Senate Committee on the Judiciary



Michael S. Lee
Chairman
Subcommittee on Antitrust, Competition Policy
and Consumer Rights
Senate Committee on the Judiciary



Sean P. Duffy
Chairman
Subcommittee on Oversight and Investigations
House Financial Services Committee

EXHIBIT “B”

[PLEASE NOTE EMERGENCY REQUEST FOR RELIEF CONTAINED IN SECTION 9]

Reconsideration Request by Ruby Glen, LLC and Radix FZC

Regarding Staff Action Taken in Response to Concerns Raised by Multiple Members of the .WEB/.WEBS Contention Set in Relation to Apparent Discrepancies in the Application of Contention Set Member, NU DOT CO LLC

Introductory Summary

Ruby Glen, LLC and Radix FZC (on behalf of its applicant affiliate DotWeb Inc.), applicants for the .WEB/.WEBS gTLD contention set (hereinafter, the "Applicants"), submit this Request for Reconsideration (the "Request") to provide ICANN with an opportunity to correct the actions and inactions of its staff (collectively, the "Staff Action") that (a) violate established ICANN policy and guidelines, (b) materially affect the rights of the contention set members, and (c) compromise the integrity of ICANN's administration of the .WEB/.WEBS auction.

The Staff Action at issue arises from apparent discrepancies in the application of NU DOT CO LLC ("NDC") to participate in the upcoming .WEB/.WEBS contention set auction. Specifically, on June 7, 2016, when explaining NDC's decision to forego agreement to resolve the .WEB/.WEBS contention set prior to ICANN auction (as it had done before with its other applied-for gTLDs), NDC stated that (a) Nicolai Bezsonoff, who is identified as NDC's Secondary Contact, Manager, and COO, is "no longer involved with [NDC's] applications" and (b) there were "several other[]" new members of the NDC "board" not listed in its application. NDC also advised of a potential change in the ownership and/or leadership of NDC.¹ Noting that NDC's statements directly

¹ In the time since NDC made these statements, Applicants have learned of speculation within the industry that NDC has sold its application to Neustar, Inc. or Verisign, Inc. See e.g., Kevin Murphy, *Is Verisign .web applicant's secret sugar*

contradict information contained in its application, Applicants and other members of the contention set diligently reached out to alert both ICANN staff and the ICANN ombudsman to the apparent changes in leadership and/or control of NDC.

On July 13, 2016, in response to the concerns raised by multiple .WEB applicants, ICANN staff issued a statement acknowledging that it had received multiple requests to investigate “potential changes of control of [NDC]” and postpone the .WEB/.WEBS auction of last resort. Despite the gravity of the concerns raised by these applicants, ICANN staff summarily dismissed the requests with a blunt three-line statement that ICANN had “investigated the matter” and “found no basis to initiate the application change request process or postpone the auction.” Notably, ICANN’s statement made no mention of having conducted an inquiry into (a) Mr. Bezsonoff’s current status, if any, with NDC; (b) any new board members or managers not listed in the application; or (c) any change in ownership or leadership of NDC.

The decision by ICANN staff to forego a full and transparent investigation into the material representations made by NDC is a clear violation of the principles and procedures set forth in the ICANN Articles of Incorporation and Bylaws (the “ICANN Bylaws”) and the ICANN gTLD Applicant Guidebook (the “Applicant Guidebook”). Indeed, the unceremonious nature of the statement provided by ICANN raises serious issues as to the thoroughness of any investigation undertaken by ICANN staff and the impartiality with which ICANN administers its own guidelines and policies. The curt

daddy?, DOMAIN INCITE (July 14, 2016) <http://domainincite.com/20748-is-verisign-web-applicants-secret-sugar-daddy>. Although Applicants are unaware of the legitimacy of these reports, they cannot help but observe that such a transfer would explain NDC’s statements regarding an apparent change of control and its decision to deviate from prior auction behavior by pushing the .WEB/.WEBS contention set to an ICANN auction of last resort.

dismissal also provokes suspicion as to whether the inherent conflict of interest presented by the benefit to ICANN of conducting an auction of last resort impacted the manner in which NDC's change of leadership and control was "investigated."

The Staff Action has placed ICANN in a position of having to defend against questions of accountability and self-interest in the face of clearly contradictory statements provided by a gTLD applicant in the .WEB/.WEBS contention set. Applicants respectfully request that the Board remedy the missteps presented by the Staff Action and restore integrity to the transparency, accountability mechanisms, and rules upon which Applicants relied in applying to participate in the .WEB/.WEBS auction.

1. Requester Information

Name: Ruby Glen, LLC ("Ruby Glen")

Address: c/o Donuts Inc., Contact Information Redacted

Email: Contact Information Redacted

Counsel: Alvaro Alvarez – Donuts Inc. SVP, General Counsel & Secretary

Name: Radix FZC on behalf of applicant affiliate DotWeb Inc. ("Radix")

Address: c/o Brijesh Joshi, Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

Applicants seek reconsideration of (a) ICANN's determination that it "found no basis to initiate the application change request process" in response to the contradictory statements of NDC and (b) ICANN's improper denial of Applicants' (and at least one other .WEB applicant's) request to postpone the .WEB/.WEBS auction, currently scheduled for July 27, 2016. The requested postponement would have provided ICANN and the .WEB/.WEBS applicants the time necessary to conduct a full and transparent investigation into material discrepancies in NDC's application and its eligibility as a contention set member.

4. Date of action/inaction:

July 13, 2016. The Staff Action was set forth in a statement from Christine Willett, Vice President of gTLD Operations for ICANN to the members of the .WEB/.WEBS contention set.

5. On what date did you become aware of the action or that action would not be taken?

July 13, 2016. Notice of the Staff Action was provided to the .WEB/.WEBS contention set members via electronic mail.

6. Describe how you believe you are materially affected by the action or inaction:

Applicants and other members of the .WEB/.WEBS contention set, with the exception of NDC, continue to be adversely affected by ICANN's (a) failure to thoroughly investigate the issues raised by NDC's own statements and (b) refusal to postpone the .WEB/.WEBS auction of last resort to allow for a full and transparent investigation into the apparent discrepancies in NDC's .WEB/.WEBS application.

Applicants applied for the .WEB gTLD in reliance on ICANN's representations that, in accordance with well-established ICANN policies and procedures, the application, evaluation, and auction processes would be administered in a fair and transparent manner. Applicants also relied on ICANN's representations that applicants would be held accountable for the accuracy of their submissions. Just as Applicants understood that they were bound to the obligations set forth in the Applicant Guidebook to preserve a level playing field, Applicants understood and relied upon ICANN's representations that each of the other members of the contention set would be required to abide by the same obligations. By failing to hold NDC accountable for its own contradictory statements, ICANN has placed all other .WEB applicants in a situation where they will be forced to bid against a party that has violated ICANN guidelines by being less than transparent as to changes in its ownership and/or leadership and, as a result, may be subject to disqualification.

Proceeding to the ICANN auction of last resort now would also ensure that Applicants and the remaining members continue to face an unsettled result. Applicants anticipate that if NDC is the successful bidder at the .WEB/.WEBS auction, multiple members of the contention set will renew their calls for ICANN to investigate and perhaps even take legal action to enforce their rights. This is especially true if it later comes to light that there was any truth to the rumors that NDC has sold or otherwise transferred its interest in the .WEB application to an ineligible third party—rumors that could be easily vetted by ICANN in the process of investigating NDC's recent and undisputed statements at issue in this Request. There exists the very real likelihood that ICANN will be forced to unwind the transaction, further delaying the release of the

.WEB/.WEBS gTLD to the public, eroding ICANN's legitimacy and reputation, and causing ICANN and the members of the contention set to expend additional time, money, and resources in resolving an issue that could have easily been addressed at this juncture with a modest delay.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

The damage caused by ICANN's failure to adhere to the accountability and transparency mechanisms by which it agreed to administer the .WEB/.WEBS auction is not limited to Applicants and the members of the contention set. As stated above, it is more than likely that absent an investigation into the contradictory statements made by NDC, a successful bid by NDC at an auction of last resort will ultimately be challenged by way of an appeal within the ICANN process, a multi-party lawsuit filed in the court system, and potentially, an antitrust review conducted by the U.S. Department of Justice. By proceeding with the .WEB/.WEBS auction, in the face of admissions by NDC and other credible evidence of discrepancies in NDC's application and an apparent change of control, leadership and/or ownership, there is a strong likelihood of a further and more significant delay in releasing these domains, thereby adversely affecting the public at large.

More fundamentally, ICANN's decision to forego a harmless postponement of the .WEB/.WEBS auction to conduct a transparent investigation into these issues does nothing to dispel questions surrounding ICANN's ability to be accountable and transparent in its administration of the gTLD program—questions that were raised recently by a federal court in California regarding the .AFRICA gTLD. The ramifications

of yet another breakdown in ICANN's transparency and accountability obligations will further harm ICANN and the Internet community at large by (a) broadening the public perception that ICANN lacks either the ability or the willingness to effectively combat the appearance of disparate treatment among gTLD applicants and (b) advising gTLD applicants that there will be neither penalty nor recourse for failing to abide by the obligations set forth in the Application Guidebook. Each of these results will severely affect ICANN, the Internet community, and the public at large.

8. Detail of Board or Staff Action – Required Information

The Staff Action at issue arises from apparent discrepancies in NDC's .WEB/.WEBS application and recent statements regarding an apparent change of control, leadership and/or ownership over its application. As relevant here, Section 1.2.7 of the Applicant Guidebook requires an applicant to notify ICANN of any changes to its application; the failure to do so can result in the denial of an application. See e.g., Applicant Guidebook at § 1.2.7 (stating ongoing duty to update "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant"); § 6.1 (confirming that "[a]pplicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading"). Similarly, under Section 6.10 of the Applicant Guidebook, an applicant may not "resell, assign, or transfer any of applicant's rights or obligations in connection with the application"; violating this provision may result in the disqualification of an active application. *Id.* at § 6.10. As set forth below, there is significant evidence that NDC may have violated each of these guidelines.

On June 13, 2012, NDC submitted application number 1-1296-36138 for the

.WEB/.WEBS contention set. Among other things, the application required NDC to provide “the identification of directors, officers, partners, and major shareholders of that entity.” See Applicant Guidebook at § 1.2.1. As relevant here, NDC provided the following response to Sections 7 and 11 of the application:

Secondary Contact

7(a). Name

Mr. Nicolai Bezsonoff

7(b). Title

Manager

Applicant Background

11(a). Name(s) and position(s) of all directors

Jose Ignacio Rasco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

11(b). Name(s) and position(s) of all officers and partners

Jose Ignacio Rasco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

By submitting its application for the .WEB gTLD and electing to participate in the .WEB/.WEBS auction, NDC expressly agreed to the terms and conditions set forth in the Applicant Guidebook as well as ICANN’s Auction Rules for New gTLDs (“Auction Rules”), including specifically, and without limitation, Sections 1.2.1, 1.2.7, 6.1 and 6.10

of the Applicant Guidebook.

On June 7, 2016, Ruby Glen contacted NDC to inquire as to whether NDC might reconsider its then-recent decision to forego resolution of the .WEB/.WEBS contention prior to ICANN's auction of last resort.² In response, NDC stated that its position had not changed. NDC also advised, however, that Nicolai Bezsonoff, who is identified on NDC's .WEB application (see above) as Secondary Contact, Manager, and COO, is "no longer involved with [NDC's] applications." NDC also made statements indicating a potential change in the ownership of NDC, including an admission that the board of NDC had changed to add "several others." The email communication³ containing these statements is set forth in pertinent part below:

|
From: Jose Ignacio Rasco <r@straat.co>
Subject: Re: .web
Date: June 7, 2016 at 11:32:17 AM EDT
To: Jon Nevett <jon@donuts.email>
Cc: Juan Diego Calle <j@straat.co>

Jon,

[Redacted]

Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our program and Juan sits on the board with me and several others.

[Redacted]

Best,
Jose

Noting that (a) NDC's statements appeared to directly contradict information in

² To the extent it may be relevant to this Request, NDC applied for 13 gTLDs in the New gTLD Program. As of the date of this submission, nine of those gTLDs were resolved with NDC's agreement to participate in a private resolution. NDC did not become the registry operator for any of the gTLDs it resolved to date. The auction for the .WEB gTLD is the first auction in which NDC has pushed for an ICANN auction of last resort.

³ An unredacted copy of the embedded email was previously provided by Ruby Glen to the ICANN Ombudsman.

NDC's .WEB application and (b) strong direct and circumstantial evidence shows that NDC has either resold, assigned or transferred its rights in the application in violation of its duties under the Applicant Guidebook, Ruby Glen diligently contacted ICANN staff in writing with the discrepancy on or about June 22. Ruby Glen also formally raised the issue with the ICANN Ombudsman on or about June 30, 2016. It also discussed the matter with ICANN staff and the Ombudsman at ICANN's most recent meeting in Helsinki, Finland. At the time of submission of this Request, Ruby Glen's most recent correspondence with the ICANN Ombudsman, dated July 10, 2016, in which it provided further information related to the statements made by NDC, remains unanswered.

At every opportunity, Ruby Glen raised the need for a postponement of the .WEB/.WEBS auction to allow ICANN (and the other applicants) time to investigate and address the contradictory representations made by NDC in relation to its pending application and status as an auction participant. On July 11, 2016, Radix (on behalf of DotWeb Inc.) and Schlund Technologies GmbH, each members of the .WEB/.WEBS contention set, sent correspondence to ICANN stating their own concerns in proceeding with the .WEB/.WEBS auction as currently scheduled. The correspondence stated:

We support a postponement of the auction, to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.

On July 13, 2016, ICANN issued a statement denying the collective request of multiple members of the .WEB/.WEBS contention set to postpone the July 27, 2016 auction to allow for a full and transparent investigation into apparent discrepancies in the NDC application, as highlighted by NDC's own statements. Without providing any

detail, ICANN simply stated as follows:

Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.

ICANN's decision did not address the manner or scope of the claimed investigation nor did it specifically address whether specific inquiry was made into (a) Mr. Bezsonoff's current status, if any, with NDC, (b) the identity of "several other[]" new and unvetted members of NDC's board or (c) any change in ownership—the very issues raised by NDC's own statements.

As set forth more fully in Section 10, *infra*, the brief statement provided by ICANN in response to the applicants' concerns—without any explanation to resolve the issues presented by NDC's provision of contradictory information or to address the failure to grant the requested postponement—is inconsistent with ICANN's stated commitment to accountability and transparency in the auction process, and innumerable provisions of the rules and regulations governing ICANN's administration of the New gTLD Program.

9. What are you asking ICANN to do now?

Applicants respectfully request ICANN (1) delay the ICANN auction of last resort for the .WEB/.WEBS contention set on an emergency basis and (2) conduct a thorough and transparent investigation into the apparent discrepancies and/or changes in NDC's .WEB/.WEBS application in accordance with ICANN's Bylaws (including ICANN's guiding principles to ensure transparency, openness and accountability), the Auction Rules, and the Applicant Guidebook.

A. Urgent Request for Immediate Stay of .WEB/.WEBS Auction

In light of the rapidly approaching .WEB/.WEBS auction date, Applicants request

a stay of the pending .WEB/.WEBS auction of last resort until (45) days after the issuance of a ruling on the merits of this Request. This Request for stay is supported by the factual background underlying the Staff Action, the grounds upon which the Request is based, and the ongoing harm to the affected parties. See *supra* Sections 6-8 and *infra* Section 10.

More to the point, the stay requested by Applicants is mandated by ICANN's own rules governing Auction Eligibility given the pendency of (a) Ruby Glen's complaint to the ICANN Ombudsman and (b) this Request. As plainly stated on ICANN's "New gTLD Program Auctions", a string contention set will be eligible to enter into a New gTLD Program auction only where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms.**" See ICANN's New gTLD Program Auctions page, available at <https://newgtlds.icann.org/en/applicants/auctions> (emphasis added).⁴

Pursuant to Article IV of ICANN's Bylaws, entitled "Accountability and Review of ICANN's By-Laws," both the ongoing Ombudsman investigation and the Reconsideration Request process constitute ICANN Accountability Mechanisms. As

⁴ Applicants are aware of the position taken by ICANN with regard to a similar argument advanced in connection with the "DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC) RECONSIDERATION REQUESTS 16-1 AND 16-2" dated 25 February 2016. As an initial matter, Applicants believe that the position taken by ICANN in response to Requests 16-1 and 16-2 is limited to the facts presented by the underlying request, which are wholly distinguishable from those presented here. Specifically, Applicants' Request is supported by (a) good cause, as established by NDC's own contradictory statements, and (b) Applicants' diligent efforts to address this issue in the month and half preceding the July 27, 2016 auction date. Moreover, Applicants respectfully disagree with ICANN's awkward attempt to rewrite the phrase "enter into a New gTLD Program Auction" as "enter[] into the auction process." ICANN's argument in support of the proffered interpretation is contradicted not only by the plain language of the Auction Eligibility statement, but also by ICANN's historical administration of the New gTLD Program. It is also unlikely to pass legal muster.

such, ICANN must refrain from proceeding with the .WEB/.WEBS auction until the resolution of Ruby Glen's Ombudsman complaint, this Request and any other ICANN Accountability Mechanisms that may currently be in process or outstanding.

The stay is further supported by the fact that NDC's statements have called into question whether, under the New gTLD Auction Bidder Agreement for the .WEB/.WEBS contention set (the "ICANN Auction Agreement"), NDC meets the standard of a "Qualified Applicant." In light of these questions, the requested stay will also allow ICANN the opportunity to "conduct due diligence on the Qualified Applicant...in an effort to ensure compliance with all applicable laws, regulations and rules governing the [ICANN auction of last resort]." See ICANN Auction Agreement at § 2.7.

Applicants' request to stay the .WEB/.WEBS auction of last resort for an additional (45) days after the issuance of a ruling on the merits of this Request will provide the members of the contention set, as well as ICANN, with a reasonable opportunity to re-engage with each other in advance of the auction and give ICANN the time it needs to conduct the investigation this matter deserves. As addressed above, the failure to grant the requested stay will have wide-ranging repercussions that extend far beyond the .WEB/.WEBS auction.

B. Request for ICANN to Conduct Thorough Investigation into Issues Raised by NDC's Contradictory Statements

Concurrent with the above request, Applicants ask ICANN to utilize the broad investigatory controls described in the Applicant Guidebook—notably, those under Sections 6.8 and 6.11 that seemingly exist precisely for situations such as this—to investigate (a) changes in Mr. Bezsonoff's status, if any, with NDC and (b) changes in

the control, ownership, or leadership of NDC since the time of NDC's original gTLD application. Such inquiry should include, at the very least, interviews with Mr. Bezsonoff and all other individuals identified in Section 11 of NDC's application.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

Applicants are approved members of the .WEB/.WEBS contention set, with a scheduled auction for July 27, 2016. As approved members, and as set forth more fully throughout this Request, Applicants have been "adversely affected by ... one or more staff actions or inactions that contradict established ICANN policy." ICANN Bylaws, Art. IV, § 2.2(a). Specifically, the Staff Action was taken in contradiction of various policy provisions contained in ICANN's Bylaws (including ICANN's guiding principles to ensure transparency, openness and accountability), the Auction Rules, and the Applicant Guidebook, all of which require a full and transparent investigation into the discrepancies presented by NDC's application and its current status as an auction participant.

A. The Staff Action Contradicted Established Policy By Failing to Utilize the Broad Investigative Powers at ICANN's Disposal in Investigating NDC's Potential Violation of Guidelines Contained in the Applicant Guidebook

As set forth in the Applicant Guidebook, ICANN has broad authority to investigate all applicants who apply to participate in the New gTLD Auction Program. This investigative authority, willingly provided by each applicant as part of the terms and

conditions set forth in the guidelines contained in the Applicant Guidebook, is set forth in relevant part below:

8. ... In addition, **Applicant acknowledges that [sic] to allow ICANN to conduct thorough background screening investigations:**

...

c. **Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization; ...**

...

11. **Applicant authorizes ICANN to:**

a. **Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;**

b. **Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession . . .**

See Applicant Guidebook at §§ 6.8, 6.10 (emphasis added).

ICANN's obligation to conduct a thorough investigation is necessary to ensure the integrity of the auction process and the existence of a level playing field among the ultimate members of a contention set. Background investigations into "applicants (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any all others acting on [their] behalf)" also ensure that each applicant is capable of administering any new gTLD that it may secure at auction, thereby benefiting the public at large. See Applicant Guidebook, § 6 at Introduction. This information also allows ICANN to determine whether an entity applicant, or an individual associated with an entity applicant, has engaged in the *automatically disqualifying* conduct set forth in Section 1.2.1 of the Applicant Guidebook. Indeed, ICANN requires those submitting a

gTLD application to provide warranties as to the truth and accuracy of their representations, even going so far as to mandate a continuing obligation to notify ICANN of “any change in circumstances that would render any information provided in the application false or misleading.” See *id.* at 1.

In spite of the above, when faced with recent statements by NDC that expressly contradict those contained in its gTLD application—and directly affect its ability to participate in the .WEB/.WEBS auction—ICANN appears to have engaged in only a cursory examination of the issue. The only available conclusion is that the Staff Action was taken without attention to, in contravention of, and with apparent disregard for its obligation to investigate the veracity of the representations made by NDC and its potential changes of control, leadership, and/or ownership.⁵

In light of the noted deficiencies identified in relation to the Staff Action, Applicants respectfully request ICANN now take the time to engage in a full and transparent investigation into material discrepancies in NDC’s application and its status as a contention set member and postpone the .WEB/.WEBS auction, currently scheduled for July 27, 2016. All .WEB/.WEBS applicants deserve to participate in an auction with transparency as to the competition and integrity as to the process.

B. The Staff Action Contradicted Established Policy By Failing to Adhere to the Transparency and Accountability Guidelines Set Forth in ICANN’s Bylaws

⁵ Because the Staff Action also contradicted established policy relating to transparency, as set forth *infra*, Applicants are unfortunately forced to presume that a thorough background investigation of the nature described in Sections 6.8 and 6.11 of the Applicant Guidebook did not occur during the course of the decision-making process.

In addition to ICANN's failure to adhere to the specific guidelines established for the administration of gTLD auctions, the Staff Action (and the events leading thereto) were taken in contravention of multiple provisions of the ICANN Bylaws, all of which require ICANN to administer the .WEB/.WEBS auction process with transparency, accountability, good faith and fair dealing. Collectively, these violations not only provide a solid basis for granting this Request but also revive serious doubts as to ICANN's ability to process and manage the New gTLD Program in a transparent and accountable manner.

i. The Staff Action Contradicts ICANN Bylaws, Art. I, § 2.8:

Article 1, section 2.8 of ICANN's Bylaws requires ICANN to “[m]ak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness.” As set forth above, ICANN obligates each applicant who seeks to participate in the gTLD auction process to affirm that the statements and representations contained in the application are true and accurate; applicants also undertake a continuing obligation to update their application when changes in circumstance affect an application's accuracy. See Applicant Guidebook at § 6.1. In turn, ICANN represents to the applicants that it will safeguard the entire gTLD application process, including any auctions of last resort, by taking steps to diligently investigate the information provided by each applicant to ensure its accuracy. By failing to engage in a thorough, open and transparent investigation of the contradictory statements made by NDC in relation to its application, as well as an apparent change of control with potential antitrust implications, the Staff Action plainly—and *inexplicably*—failed to reach its decisions by “applying documented policies neutrally and objectively, with integrity and fairness.” See ICANN Bylaws, Art. I,

§ 2.8.

ii. The Staff Action Contradicts ICANN Bylaws, Art. I, § 2.9:

Article 1, section 2.9 of ICANN's Bylaws requires ICANN to "[act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected." In undertaking only a cursory examination of the contradictory statements made by NDC and the apparent change in NDC's rights to its application, the Staff Action failed to balance ICANN's interest in a swift resolution of the concerns raised by the members of the .WEB/.WEBS contention set with its obligation to obtain sufficient assurances and information from the individuals and entities at the center of the statements made by NDC; at the very least, ICANN staff should have conducted interviews with Mr. Bezsonoff and all other individuals identified in Section 11 of NDC's application prior to reaching its conclusion.

iii. The Staff Action Contradicts ICANN Bylaws, Art. I, § 2.10

Article 1, section 2.10 of ICANN's Bylaws requires ICANN to "[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness." By failing to make use of the processes established in Sections 6.8 and 6.10 to the Applicant Guidebook in investigating an admitted failure by NDC to abide by its continuing obligation to update its application, ICANN staff disregarded the very accountability mechanisms put in place to serve and protect not only the Internet community but the public at large. This error was compounded by the cursory dismissal of the concerns raised by multiple members of the .WEB/.WEBS contention set relating to the accuracy of the representations made in NDC's application. By failing to apprise

the members of the contention set as to the manner and scope of the investigation conducted by ICANN staff, ICANN failed to ensure that it would hold itself accountable to any gTLD applicant, let alone the broader Internet community.

iv. The Staff Action Contradicts ICANN Bylaws, Art. II, § 3:

Article II, section 3 of ICANN's Bylaws states that "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." There can be no questioning the fact that the Staff Action resulted in disparate treatment in favor of NDC. On one hand, there are clear statements from NDC that representations made in its application are, at best, misleading and there is ample evidence that NDC has either resold, assigned or transferred all or some of its rights to the application. On the other hand, when pressed by multiple members of the contention set to fully investigate the matter, ICANN provided only a conclusory statement that raises more questions than it resolves. To the extent it had reason to engage in such disparate treatment of the members of the .WEB/.WEBS contention set, ICANN failed to provide such a reason in reaching the determinations at issue in this Request. Certainly, Applicants can think of no "substantial and reasonable cause," to justify the Staff Action. *Id.* at ICANN Bylaws, Art. II, § 3.

v. The Staff Action Contradicts ICANN Bylaws, Art. III, § 1:

Article 3, section 1 ICANN's Bylaws states the "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." Over the course of its

existence, ICANN has repeatedly prevailed upon the stakeholders in the ICANN policy process to trust that it will administer its obligations in a fair and transparent manner. The continued trust of ICANN's stakeholders, however, can only extend as far as ICANN is willing to honor its stated commitments to accountability and transparency in every aspect of its work.

If any situation demanded the full transparency to which ICANN has repeatedly committed itself, it must certainly be the one presented here, where a single, hasty backroom decision effectively ensures that the proceeds from the .WEB/WEBS auction will flow to ICANN under an unfortunate cloud of suspected conflicts of interest and disparate treatment. Applicants respectfully request that ICANN reconsider the Staff Action and provide relief in the manner set forth in Section 8 of its Request.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Applicants have joined together to submit this Request. Moreover, as of date of the submission of this Request, Applicants are aware that other members of the .WEB/WEBS contention set also may join in Applicants' Request. With the exception of NDC, both the circumstances of this Request and the harm described herein is the same for Applicants and all other contention members.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

DATED: 17 July 2016

Respectfully submitted,

/ama/

Alvaro Alvarez

SVP, General Counsel & Secretary
Donuts Inc.

/bj/

Brijesh Joshi

Director, Radix FZC, on behalf of its
applicant affiliate DotWeb Inc.

EXHIBIT “C”

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

CASE #50 2013 001083

FINAL DECLARATION

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

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

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

And

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

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

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

IRP Panel

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

I. BACKGROUND

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

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

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

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

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

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

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

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

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

12. Second, even if the Panel were to reconsider based on any provision or rule available, its findings with respect to those passages complained of by ICANN as being inaccurate in its Decision – namely paragraphs 29 to 33 – after deliberation, the Panel would still conclude that ICANN has failed to follow its own Bylaws as more specifically explained in the above paragraphs, in the context of addressing which of the Parties should be viewed as responsible for the delays associated with DCA Trust's Request for Interim Measures of Protection. It is not reasonable to construe the By-law proviso for consideration by a provider-appointed *ad hoc* panel when a standing panel is not in place as relieving ICANN indefinitely of forming the required standing panel. Instead, the provider appointed panel is properly viewed as an interim procedure to be used before ICANN has a chance to form a standing panel. Here, more than a year has elapsed, and ICANN has offered no explanation why the standing panel has not been formed, nor indeed any indication that formation of that panel is in process, or has begun, or indeed even is planned to begin at some point.

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

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

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

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

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

[...]

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

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

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

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

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

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

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

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

[...]

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

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

[...]

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

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

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

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

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

33. Finally, ICANN advanced that:

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

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

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

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

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

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

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

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

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

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

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

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

[...]

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

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

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

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

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

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

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

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

[...]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And to declare that:

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

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

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

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

48. ICANN also submitted that:

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

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

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

[...]

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

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

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

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

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

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

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

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

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

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

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

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

III. THE ISSUES RAISED AND THE PANEL'S DECISION

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

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

Answer: Yes.

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

Answer: Yes.

3. Who is the prevailing party in this IRP?

Answer: DCA Trust

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

Answer: ICANN, in full.

Summary of Panel's Decision

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

Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

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

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

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

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

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

63. According to DCA Trust:

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

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

64. In response, ICANN submits that:

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

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

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

- 65. For the following reasons, the Panel is of the view that the standard of review is a *de novo*, objective and independent one examining whether the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws.
- 66. ICANN is not an ordinary California nonprofit organization. Rather it has a large international purpose and responsibility to coordinate and ensure the stable and secure operation of the Internet's unique identifier systems.
- 67. Indeed, Article 4 of ICANN's Articles of Incorporation require ICANN to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets." ICANN's Bylaws also impose duties on it to act in an open, transparent and fair manner with integrity.
- 68. ICANN's Bylaws (as amended on 11 April 2013) which both Parties explicitly agree that applies to this IRP, reads in relevant parts as follows:

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

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

[...]

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

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

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

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

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

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

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

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

DCA Trust's Position

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

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

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

80. According to DCA Trust:

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

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

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

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

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

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

82. According to DCA Trust:

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

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

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

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

Confidential Information

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

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

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

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

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

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

84. According to DCA Trust:

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

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

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

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

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

85. Finally, DCA Trust pleads that:

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

ICANN's Position

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

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

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

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

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

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

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

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

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

88. According to ICANN:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Similarly, Operating Principle 40 provides:

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

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

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

26. Redacted - GAC Designated Confidential Information

And, tellingly, DCA did not to submit a declaration from Mr. Buruchara, which might have provided context or support for DCA's argument.

27. Redacted - GAC Designated Confidential Information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

90. According to ICANN:

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

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

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

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

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

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

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

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

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

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

91. Finally, ICANN submits:

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

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

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

The Panel's Decision

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

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

Section 2. CORE (Council of Registrars) VALUES

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

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

[...]

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

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

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN (Internet Corporation for Assigned Names and Numbers) body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

ARTICLE II: POWERS

Section 1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.

Section 3. NON-DISCRIMINATORY TREATMENT

ICANN (Internet Corporation for Assigned Names and Numbers) shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by

substantial and reasonable cause, such as the promotion of effective competition.

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. [Underlining and bold is that of the Panel]

97. As set out in Article IV (Accountability and Review) of ICANN's Bylaws, in carrying out its mission as set out in its Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of the Bylaws.
98. As set out in Section 3 (Independent Review of Board Actions) of Article IV, "any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and casually connected to the Board's alleged violation of the Bylaws or Articles of Incorporation, and not as a result of third parties acting in line with the Board's action."
99. In this IRP, among the allegations advanced by DCA Trust against ICANN, is that the ICANN Board, and its constituent body, the GAC, breached their obligation to act transparently and in conformity with procedures that ensured fairness. In particular, DCA Trust criticizes the ICANN Board here, for allowing itself to be guided by the GAC, a body "with apparently no distinct rules, limited public records, fluid definitions of membership and quorums" and unfair procedures in dealing with the issues before it.
100. According to DCA Trust, ICANN itself asserts that the GAC is a "constituent body." The exchange between the Panel and counsel for ICANN at the in-person hearing in Washington, D.C. is a living proof of that point.

HONORABLE JUDGE CAHILL:

Are you saying we should only look at what the Board does? The reason I'm asking is that your -- the Bylaws say that ICANN and its constituent bodies shall operate, to the maximum extent feasible, in an open and transparent manner. Does the constituent bodies include, I don't know,

GAC or anything? What is "constituent bodies"?

MR. LEVEE:

Yeah. What I'll talk to you about tomorrow in closing when I lay out what an IRP Panel is supposed to address, the Bylaws are very clear. Independent Review Proceedings are for the purpose of testing conduct or inaction of the ICANN Board. They don't apply to the GAC. They don't apply to supporting organizations. They don't apply to Staff.

HONORABLE JUDGE CAHILL:

So you think that the situation is a -- we shouldn't be looking at what the constituent -- whatever the constituent bodies are, even though that's part of your Bylaws?

MR. LEVEE:

Well, when I say not -- when you say not looking, part of DCA's claims that the GAC did something wrong and that ICANN knew that.

HONORABLE JUDGE CAHILL:

So is GAC a constituent body?

MR. LEVEE:

It is a constituent body, to be clear --

HONORABLE JUDGE CAHILL:

Yeah.

MR. LEVEE:

-- whether -- I don't think an IRP Panel -- if the only thing that happened here was that the GAC did something wrong --

HONORABLE JUDGE CAHILL:

Right.

MR. LEVEE:

-- an IRP Panel would not be -- an Independent Review Proceeding is not supposed to address that, whether the GAC did something wrong.

Now, if ICANN knew -- the Board knew that the GAC did something wrong, and that's how they link it, they say, Look, the GAC did something wrong, and ICANN knew it, the Board -- if the Board actually knew it, then we're dealing with Board conduct.

The Board knew that the GAC did not, in fact, issue consensus advice. That's the allegation. So it's fair to look at the GAC's conduct.

101. The Panel is unanimously of the view that the GAC is a constituent body of ICANN. This is not only clear from the above exchange between the Panel and counsel for ICANN, but also from Article XI (Advisory Committees) of ICANN's Bylaws and the Operating Principles of the GAC. Section 1 (General) of Article XI of ICANN's Bylaws states:

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

Section 2, under the heading, Specific Advisory Committees states:

There shall be at least the following Advisory Committees:

1. Governmental Advisory Committee

a. The Governmental Advisory Committee should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues. [Underlining is that of the Panel]

Section 6 of the preamble of GAC's Operating Principles is also relevant. That Section reads as follows:

The GAC commits itself to implement efficient procedures in support of ICANN and to provide thorough and timely advice and analysis on relevant matters of concern with regard to government and public interests.

102. According to DCA Trust, based on the above, and in particular, Article III (Transparency), Section 1 of ICANN's Bylaws, therefore, the GAC was bound to the transparency and fairness obligations of that provision to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness", but as ICANN's own witness, Ms. Heather Dryden acknowledged during the hearing, the GAC did not act with transparency or in a manner designed to insure fairness.

Mr. ALI:

Q. But what was the purpose of the discussion at the Prague meeting with respect to AUC? If there really is no difference or distinction between voting/nonvoting, observer or whatever might be the opposite of observer,

or the proper terminology, what was -- what was the point?

THE WITNESS:

A. I didn't say there was no difference. The issue is that there isn't GAC agreement about what are the -- the rights, if you will, of -- of entities like the AUC. And there might be in some limited circumstances, but it's also an extremely sensitive issue. And so not all countries have a shared view about what those -- those entities, like the AUC, should be able to do.

Q. So not all countries share the same view as to what entities, such as the AUC, should be able to do. Is that what you said? I'm sorry. I didn't --

A. Right, because that would only get clarified if there is a circumstance where that link is forced. In our business, we talk about creative ambiguity. We leave things unclear so we don't have conflict.

103. As explained by ICANN in its Closing Presentation at the hearing, ICANN's witness, Ms. Heather Dryden also asserted that the GAC Advice was meaningless until the Board acted upon it. This last point is also clear from examining Article I, Principle 2 and 5 of ICANN GAC's Operating Principles. Principle 2 states that "the GAC is not a decision making body" and Principle 5 states that "the GAC shall have no legal authority to act for ICANN".

MR. ALI:

Q. I would like to know what it is that you, as the GAC Chair, understand to be the consequences of the actions that the GAC will take --

HONORABLE JUDGE CAHILL:

The GAC will take?

MR. ALI:

Q. -- the GAC will take -- the consequences of the actions taken by the GAC, such as consensus advice?

HONORABLE JUDGE CAHILL:

There you go.

THE WITNESS:

That isn't my concern as the Chair. It's really for the Board to interpret the outputs coming from the GAC.

104. Ms. Dryden also stated that the GAC made its decision without providing any rationale and primarily based on politics and not on potential violations of national laws and sensitivities.

ARBITRATOR KESSEDJIAN:

So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?

THE WITNESS:

I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --

HONORABLE JUDGE CAHILL:

But you also want to check to see if the countries are following the right -- following the rules, if there are reasons for rejecting this or it falls within the three things that my colleague's talking about.

THE WITNESS:

The practice among governments is that governments can express their view, whatever it may be. And so there's a deference to that.

That's certainly the case here as well.

105. ICANN was bound by its Bylaws to conduct adequate diligence to ensure that it was applying its procedures fairly. Section 1 of Article III of ICANN's Bylaws, require it and its constituent bodies to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. The Board must also as per Article IV, Section 3, Paragraph 4 exercise due diligence and care in having a reasonable amount of facts in front of it.

106. In this case, on 4 June 2013, the NGPC accepted the GAC Objection Advice to stop processing DCA Trust's application. On 1 August 2013, the BGC recommended to the NGPC that it deny DCA Trust's Request for Reconsideration of the NGPC's 4 June 2013 decision, and on 13 August 2013, the NGPC accepted the BGC's recommendation (i.e., the NGPC declined to reconsider its own decision) without any further consideration.

107. In this case, ICANN through the BGC was bound to conduct a meaningful review of the NGPC's decision. According to ICANN's Bylaws, Article IV, Section 2, the Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The [BGC] shall have the authority to, among other things, conduct whatever factual investigation is deemed appropriate, and request additional written submissions from the affected party, or from others.

108. Finally, the NGPC was not bound by – nor was it required to give deference to – the decision of the BGC.

109. The above, combined with the fact that DCA Trust was never given any notice or an opportunity in Beijing or elsewhere to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice, and that the Board of ICANN did not take any steps to address this issue, leads this Panel to conclude that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were not procedures designed to insure the fairness required by Article III, Sec. 1 above, and are therefore inconsistent with the Articles of Incorporation and Bylaws of ICANN.

110. The following excerpt of exchanges between the Panel and one of ICANN's witnesses, Ms. Heather Dryden, the then Chair of the GAC, provides a useful background for the decisions reached in this IRP:

PRESIDENT BARIN:

But be specific in this case. Is that what happened in the .AFRICA case?

THE WITNESS:

The decision was very quick, and --

PRESIDENT BARIN:

But what about the consultations prior? In other words, were -- were you privy to --

THE WITNESS:

No. If -- if colleagues are talking among themselves, then that's not something that the GAC, as a whole, is -- is tracking or -- or involved in. It's really those interested countries that are.

PRESIDENT BARIN:

Understood. But I assume -- I also heard you say, as the Chair, you never want to be surprised with something that comes up. So you are aware of -- or you were aware of exactly what was happening?

THE WITNESS:

No. No. You do want to have a good sense of where the problems are, what's going to come unresolved back to the full GAC meeting, but that's -- that's the extent of it.

And that's the nature of -- of the political process.

Redacted - GAC Designated Confidential Information

HONORABLE JUDGE CAHILL:

Okay.

THE WITNESS:

-- that question was addressed via having that meeting.

PRESIDENT BARIN:

And what's your understanding of what -- what the consequence of that decision is or was when you took it? So what happens from that moment on?

THE WITNESS:

It's conveyed to the Board, so all the results, the agreed language coming out of GAC is conveyed to the Board, as was the case with the communiqué from the Beijing meeting.

PRESIDENT BARIN:

And how is that conveyed to the Board?

THE WITNESS:

Well, it's a written document, and usually Support Staff are forwarding it to Board Staff.

ARBITRATOR KESSEDJIAN:

Could you speak a little bit louder? I don't know whether I am tired, but I --

THE WITNESS:

Okay. So as I was saying, the document is conveyed to the Board once it's concluded.

PRESIDENT BARIN:

When you say "the document", are you referring to the communiqué?

THE WITNESS:

Yes.

PRESIDENT BARIN:

Okay. And there are no other documents?

THE WITNESS:

The communiqué --

PRESIDENT BARIN:

In relation to .AFRICA. I'm not interested in any other.

THE WITNESS:

Yes, it's the communiqué.

PRESIDENT BARIN:

And it's prepared by your staff? You look at it?

THE WITNESS:

Right --

PRESIDENT BARIN:

And then it's sent over to --

THE WITNESS:

-- right, it's agreed by the GAC in full, the contents.

PRESIDENT BARIN:

And then sent over to the Board?

THE WITNESS:

And then sent, yes.

PRESIDENT BARIN:

And what happens to that communiqué? Does the Board receive that and say, Ms. Dryden, we have some questions for you on this, or --

THE WITNESS:

Not really. If they have questions for clarification, they can certainly ask that in a meeting. But it is for them to receive that and then interpret it and -- and prepare the Board for discussion or decision.

PRESIDENT BARIN:

Okay. And in this case, you weren't asked any questions or anything?

THE WITNESS:

I don't believe so. I don't recall.

PRESIDENT BARIN:

Any follow-ups, right?

THE WITNESS:

Right.

PRESIDENT BARIN:

And in the subsequent meeting, I guess the issue was tabled. The Board meeting that it was tabled, were you there?

THE WITNESS:

Yes. I don't particularly recall the meeting, but yes.

[...]

ARBITRATOR KESSEDJIAN:

Can I turn your attention to Paragraph 5 of your declaration?

Here, you basically repeat what is in the ICANN Guidebook literature, whatever. These are the exact words, actually, that you use in your declaration in terms of why there could be an objection to an applicant -- to a specific applicant. And you use three criteria: problematic, potentially violating national law, and raise sensitivities.

Now, I'd like you to, for us -- for our benefit, to explain precisely, as concrete as you can be, what those three concepts -- how those three concepts translate in the DCA case. Because this must have been discussed in order to get this very quick decision that you are mentioning. So I'd like to understand, you know, because these are the criteria -- these are the three criteria; is that correct?

THE WITNESS:

That is what the witness statement says, but the link to the GAC and the role that I played in terms of the GAC discussion did not involve me interpreting those three things. In fact, the GAC did not provide rationale for the consensus objection.

ARBITRATOR KESSEDJIAN:

No.

But, I mean, look, the GAC is taking a decision which -- very quickly -- I'm using your words, "very quickly" -- erases years and years and years of work, a lot of effort that have been put by a single applicant. And the way I understand the rules is that the -- the GAC advice -- consensus advice against that applicant are -- is based on those three criteria. Am I wrong in that analysis?

THE WITNESS:

I'm saying that the GAC did not identify a rationale for those governments that put forward a string or an application for consensus objection. They might have identified their reasons, but there was not GAC agreement about those reasons or -- or -- or -- or rationale for that. We had some discussion earlier about Early Warnings. So Early Warnings were issued by individual countries, and they indicated their rationale. But, again, that's not a GAC view.

ARBITRATOR KESSEDJIAN:

So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?

THE WITNESS:

I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --

HONORABLE JUDGE CAHILL:

But you also want to check to see if the countries are following the right -- following the rules, if there are reasons for rejecting this or it falls within the three things that my colleague's talking about.

THE WITNESS:

The practice among governments is that governments can express their view, whatever it may be. And so there's [...] deference to that. That's certainly the case here as well. The -- if a country tells -- tells the GAC or says it has a concern, that's not really something that -- that's evaluated, in the sense you mean, by the other governments. That's not the way governments work with each other.

HONORABLE JUDGE CAHILL:

So you don't go into the reasons at all with them?

THE WITNESS:

To issue a consensus objection, no.

HONORABLE JUDGE CAHILL:

Okay. ---

[...]

PRESIDENT BARIN:

I have one question for you. We spent, now, a bit of time or a considerable amount of time talking to you about the process, or the procedure leading to the consensus decision.

Can you tell me what your understanding is of why the GAC consensus objection was made finally?

[...]

But in terms of the .AFRICA, the decision -- the issue came up, the agenda -- the issue came up, and you made a decision, correct?

THE WITNESS:

The GAC made a decision.

PRESIDENT BARIN:

Right. When I say "you", I mean the GAC.

Do you know -- are you able to express to us what your understanding of the substance behind that decision was? I mean, in other words, we've spent a bit of time dealing with the process.

Can you tell us why the decision happened?

THE WITNESS:

The sum of the GAC's advice is reflected in its written advice in the communiqué. That is the view to GAC. That's -- that's --

[...]

ARBITRATOR KESSEDJIAN:

I just want to come back to the point that I was making earlier. To your Paragraph 5, you said -- you answered to me saying that is my declaration, but it was not exactly what's going on. Now, we are here to --

at least the way I understand the Panel's mandate, to make sure that the rules have been obeyed by, basically. I'm synthesizing. So I don't understand how, as the Chair of the GAC, you can tell us that, basically, the rules do not matter -- again, I'm rephrasing what you said, but I'd like to give you another opportunity to explain to us why you are mentioning those criteria in your written declaration, but, now, you're telling us this doesn't matter.

If you want to read again what you wrote, or supposedly wrote, it's Paragraph 5.

THE WITNESS:

I don't need to read again my declaration. Thank you. The header for the GAC's discussions throughout was to refer to strings or applications that were controversial or sensitive. That's very broad. And –

ARBITRATOR KESSEDJIAN:

I'm sorry. You say the rules say problematic, potentially violate national law, raise sensitivities. These are precise concepts.

THE WITNESS:

Problematic, violate national law -- there are a lot of laws -- and sensitivities does strike me as being quite broad.

[...]

ARBITRATOR KESSEDJIAN:

Okay. So we are left with what? No rules?

THE WITNESS:

No rationale with the consensus objections.

That's the -- the effect.

ARBITRATOR KESSEDJIAN:

I'm done.

HONORABLE JUDGE CAHILL:

I'm done.

PRESIDENT BARIN:

So am I.

111. The Panel understands that the GAC provides advice to the ICANN Board on matters of public policy, especially in cases where ICANN activities and policies may interact with national laws or international agreements. The Panel also understands that GAC advice is developed through consensus among member nations. Finally, the Panel understands that although the ICANN Board is required to consider GAC advice and recommendations, it is not obligated to follow those recommendations.

112. Paragraph IV of ICANN's Beijing, People's Republic of China 11 April 2013 Communiqué [Exhibit C-43] under the heading "GAC Advice to the ICANN Board" states:

IV. GAC Advice to the ICANN Board

1. New gTLDs

a. GAC Objections to the Specific Applications

i. The GAC Advises the ICANN Board that:

i. The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:

1. The application for .africa (Application number 1-1165-42560)

[...]

Footnote 3 to Paragraph IV.1. (a)(i)(i) above in the original text adds, "Module 3.1: The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved." A similar statement in this regard can be found in paragraph 5 of Ms. Dryden's 7 February 2014 witness statement.

113. In light of the clear "Transparency" obligation provisions found in ICANN's Bylaws, the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust's application.

114. The Panel would have had a similar expectation with respect to the NGPC Response to the GAC Advice regarding .AFRICA which was expressed in ANNEX 1 to NGPC Resolution No. 2013.06.04.NG01 [Exhibit C-45]. In that document, in response to DCA Trust's application, the NGPC stipulated:

The NGPC accepts this advice. The AGB provides that “if GAC advised ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved. The NGPC directs staff that pursuant to the GAC advice and Section 3.1 of the Applicant Guidebook, Application number 1-1165-42560 for .africa will not be approved. In accordance with the AGB the applicant may withdraw [...] or seek relief according to ICANN’s accountability mechanisms (see ICANN’s Bylaws, Articles IV and V) subject to the appropriate standing and procedural requirements.

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

116. As indicated above, there are perhaps a number of other instances, including certain decisions made by ICANN, that did not proceed in the manner and spirit in which they should have under the Articles of Incorporation and Bylaws of ICANN.

117. DCA Trust has criticized ICANN for its various actions and decisions throughout this IRP and ICANN has responded to each of these criticisms in detail. However, the Panel, having carefully considered these criticisms and decided that the above is dispositive of this IRP, it does not find it necessary to determine who was right, to what extent and for what reasons in respect to the other criticisms and other alleged shortcomings of the ICANN Board identified by DCA Trust.

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

118. In the conclusion of its Memorial on the Merits filed with the Panel on 3 November 2014, DCA Trust submitted that ICANN should remove ZACR’s application from the process altogether and allow DCA’s application to proceed under the rules of the New gTLD Program, allowing DCA up to 18 months to negotiate with African governments

to obtain the necessary endorsements so as to enable the delegation and management of the .AFRICA string.

119. In its Final Request for Relief filed with the Panel on 23 May 2015, DCA Trust requested that this Panel recommend to the ICANN Board that it cease all preparations to delegate the .AFRICA gTLD to ZACR and recommend that ICANN permit DCA's application to proceed through the remainder of the new gTLD application process and be granted a period of no less than 18 months to obtain Government support as set out in the AGB and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA.

120. DCA Trust also requested that this Panel recommend to ICANN that it compensate DCA Trust for the costs it has incurred as a result of ICANN's violations of its Articles of Incorporation, Bylaws and AGB.

121. In its response to DCA Trust's request for the recommendations set out in DCA Trust's Memorial on the Merits, ICANN submitted that this Panel does not have the authority to grant the affirmative relief that DCA Trust had requested.

122. According to ICANN:

48. DCA's request should be denied in its entirety, including its request for relief. DCA requests that this IRP Panel issue a declaration requiring ICANN to "rescind its contract with ZACR" and to "permit DCA's application to proceed through the remainder of the application process." Acknowledging that it currently lacks the requisite governmental support for its application, DCA also requests that it receive "18 months to negotiate with African governments to obtain the necessary endorsements." In sum, DCA requests not only that this Panel remove DCA's rival for .AFRICA from contention (requiring ICANN to repudiate its contract with ZACR), but also that it rewrite the Guidebook's rules in DCA's favor.

49. IRP Panels do not have authority to award affirmative relief. Rather, an IRP Panel is limited to stating its opinion as to "whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" and recommending (as this IRP Panel has done previously) that the Board stay any action or decision, or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel. The Board will, of course, give extremely serious consideration to the Panel's recommendations.

123. In its response to DCA Trust's amended request for recommendations filed on 23 May 2015, ICANN argued that because the Panel's authority is limited to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from

recommending how the Board should then proceed in light of the Panel's declaration.

124. In response, DCA Trust submitted that according to ICANN's Bylaws, the Independent Review Process is designed to provide a remedy for "any" person materially affected by a decision or action by the Board. Further, "in order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation.

125. According to ICANN, "indeed, the ICANN New gTLD Program Committee, operating under the delegated authority of the ICANN Board, itself [suggests] that DCA could seek relief through ICANN's accountability mechanisms or, in other words, the Reconsideration process and the Independent Review Process." Furthermore:

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

126. After considering the Parties' respective submissions in this regard, the Panel is of the view that it does have the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook.

127. Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws states:

ARTICLE IV: ACCOUNTABILITY AND REVIEW
Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

11. The IRP Panel shall have the authority to:

d. recommend that the Board stay any action or decision or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

128. The Panel finds that both the language and spirit of the above section gives it authority to recommend how the ICANN Board might fashion a remedy to redress injury or harm that is directly related and causally connected to the Board's violation of the Bylaws or the Articles of Incorporation.

129. As DCA Trust correctly points out, with which statement the Panel agrees, "if the IRP mechanism – the mechanism of last resort for

gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.”

130. Use of the imperative language in Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws, is clearly supportive of this point. That provision clearly states that the IRP Panel has the authority to recommend a course of action until such time as the Board considers the opinion of the IRP and acts upon it.
131. Furthermore, use of the word “opinion”, which means the formal statement by a judicial authority, court, arbitrator or “Panel” of the reasoning and the principles of law used in reaching a decision of a case, is demonstrative of the point that the Panel has the authority to recommend affirmative relief. Otherwise, like in section 7 of the Supplementary Procedures, the last sentence in paragraph 11 would have simply referred to the “declaration of the IRP”. Section 7 under the heading “Interim Measures of Protection” says in part, that an “IRP PANEL may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration.”
132. The scope of Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws is clearly broader than Section 7 of the Supplementary Procedures.
133. Pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws, therefore, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust’s application to proceed through the remainder of the new gTLD application process.

3) Who is the prevailing party in this IRP?

134. In its letter of 1 July 2015, ICANN submits that, “ICANN believes that the Panel should and will determine that ICANN is the prevailing party. Even so, ICANN does not seek in this instance the putative effect that would result if DCA were required to reimburse ICANN for all of the costs that ICANN incurred. This IRP was much longer [than] anticipated (in part due to the passing of one of the panelists last summer), and the Panelists’ fees were far greater than an ordinary IRP, particularly because the Panel elected to conduct a live hearing.”

135.DCA Trust on the other hand, submits that, “should it prevail in this IRP, ICANN should be responsible for all of the costs of this IRP, including the interim measures proceeding.” In particular, DCA Trust writes:

On March 23, 2014, DCA learned via email from a supporter of ZA Central Registry (“ZACR”), DCA’s competitor for .AFRICA, that ZACR would sign a registry agreement with ICANN in three days’ time (March 26) to be the registry operator for .AFRICA. The very same day, we sent a letter on behalf of DCA to ICANN’s counsel asking ICANN to refrain from executing the registry agreement with ZACR in light of the pending IRP proceedings. See DCA’s Request for Emergency Arbitrator and Interim Measures of Protection, Annex I (28 Mar. 2014). Instead, ICANN entered into the registry agreement with ZACR the very next day—two days ahead of schedule. [...] Later that same day, ICANN responded to DCA’s request by treating the execution of the contract as a *fait accompli* and, for the first time, informed DCA that it would accept the application of Rule 37 of the 2010 [ICDR Rules], which provides for emergency measures of protection, even though ICANN’s Supplementary Procedures for ICANN Independent Review Process expressly provide that Rule 37 does not apply to IRPs. A few days later, on March 28, 2014, DCA filed a Request for Emergency Arbitrator and Interim Measures of Protection with the ICDR. ICANN responded to DCA’s request on April 4, 2014. An emergency arbitrator was appointed by the ICDR; however, the following week, the original panel was fully constituted and the parties’ respective submissions were submitted to the Panel for its review on April 13, 2014. After a teleconference with the parties on April 22 and a telephonic hearing on May 5, the Panel ruled that “ICANN must immediately refrain from any further processing of any application for .AFRICA” during the pendency of the IRP. Decision on Interim Measures of Protection, ¶ 51 (12 May 2014).

136.A review of the various procedural orders, decisions, and declarations in this IRP clearly indicates that DCA Trust prevailed in many of the questions and issues raised.

137.In its letter of 1 July 2015, DCA Trust refers to several instances in which ICANN was not successful in its position before this Panel. According to DCA Trust, the following are some examples, “ICANN’s Request for Partial Reconsideration, ICANN’s request for the Panel to rehear the proceedings, and the evidentiary treatment of ICANN’s written witness testimony in the event it refused to make its witnesses available for questioning during the merits hearing.”

138.The Panel has no doubt, as ICANN writes in its letter of 1 July 2015, that the Parties’ respective positions in this IRP “were asserted in good faith.” According to ICANN, “although those positions were in many instances diametrically opposed, ICANN does not doubt that DCA believed in the credibility of the positions that it took, and

[ICANN believes] that DCA feels the same about the positions ICANN took.”

139. The above said, after reading the Parties’ written submissions concerning the issue of costs and deliberation, the Panel is unanimously of the view that DCA Trust is the prevailing party in this IRP.

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

140. DCA Trust submits that ICANN should be responsible for *all* costs of this IRP, including the interim measures proceeding. Among other arguments, DCA Trust submits:

This is consistent with ICANN’s Bylaws and Supplementary Procedures, which together provide that in ordinary circumstances, the party not prevailing shall be responsible for all costs of the proceeding. Although ICANN’s Supplementary Procedures do not explain what is meant by “all costs of the proceeding,” the ICDR Rules that apply to this IRP provide that “costs” include the following:

- (a) the fees and expenses of the arbitrators;
- (b) the costs of assistance required by the tribunal, including its experts;
- (c) the fees and expenses of the administrator;
- (d) the reasonable costs for legal representation of a successful party; and
- (e) any such costs incurred in connection with an application for interim or emergency relief pursuant to Article 21.

Specifically, these costs include all of the fees and expenses paid and owed to the [ICDR], including the filing fees DCA paid to the ICDR (totaling \$4,750), all panelist fees and expenses, including for the emergency arbitrator, incurred between the inception of this IRP and its final resolution, legal costs incurred in the course of the IRP, and all expenses related to conducting the merits hearing (*e.g.*, renting the audiovisual equipment for the hearing, printing hearing materials, shipping hard copies of the exhibits to the members of the Panel).

Although in “extraordinary” circumstances, the Panel may allocate up to half of the costs to the prevailing party, DCA submits that the circumstances of this IRP do not warrant allocating costs to DCA should it prevail. The reasonableness of DCA’s positions, as well as the meaningful contribution this IRP has made to the public dialogue about both ICANN’s accountability mechanisms and the appropriate deference owed by ICANN to its Governmental Advisory Committee, support a full award of costs to

DCA.

[...]

To the best of DCA's knowledge, this IRP was the first to be commenced against ICANN under the new rules, and as a result there was little guidance as to how these proceedings should be conducted. Indeed, at the very outset there was controversy about the applicable version of the Supplemental Rules as well as the form to be filed to initiate a proceeding. From the very outset, ICANN adopted positions on a variety of procedural issues that have increased the costs of these proceedings. In DCA's respectful submission, ICANN's positions throughout these proceedings are inconsistent with ICANN's obligations of transparency and the overall objectives of the IRP process, which is the only independent accountability mechanism available to parties such as DCA.

141. DCA Trust also submits that ICANN's conduct in this IRP increased the duration and expense of this IRP. For example, ICANN failed to appoint a standing panel, it entered into a registry agreement with DCA's competitor for .AFRICA during the pendency of this IRP, thereby forcing DCA Trust to request for interim measures of protection in order to preserve its right to a meaningful remedy, ICANN attempted to appeal declarations of the Panel on procedural matters where no appeal mechanism was provided for under the applicable procedures and rules, and finally, ICANN refused only a couple of months prior to the merits hearing, to make its witnesses available for viva voce questioning at the hearing.

142. ICANN in response submits that, "both the Bylaws and the Supplementary Procedures provide that, in the ordinary course, costs shall be allocated to the prevailing party. These costs include the Panel's fees and the ICDR's fees, [they] would also include the costs of the transcript."

143. ICANN explains on the other hand that this case was extraordinary and this Panel should exercise its discretion to have each side bear its own costs as this IRP "was in many senses a first of its kind." According to ICANN, among other things:

This IRP was the first associated with the Board's acceptance of GAC advice that resulted in the blocking of an application for a new gTLD under the new gTLD Program;

This was the first IRP associated with a claim that one or more ICANN Board members had a conflict of interest with a Board vote; and

This was the first (and still only) IRP related to the New gTLD Program that involved a live hearing, with a considerable amount of debate associated with whether to have a hearing.

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

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

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

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

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

V. DECLARATION OF THE PANEL

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

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

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

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

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

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

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

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

Date: Thursday, 9 July 2015.

Place of the IRP, Los Angeles, California.



Professor Catherine Kessedjian



Hon. William J. Cahill (Ret.)



Babak Barin, President

EXHIBIT “D”



New Generic Top-Level
Domains

NEW GTLD PROGRAM AUCTIONS

News & Views

28 July 2016 – Results Available for 27 July 2016 Auction

An Auction to resolve one (1) New generic Top-Level Domain (gTLD) contention set was held on 27 July 2016. The result may be viewed on the Auction Results page. The Auction Schedule is also updated as of 28 July 2016.

- Read the [Announcement \(/en/announcements-and-media/announcement-28jul16-en\)](/en/announcements-and-media/announcement-28jul16-en)
- View the [Auction Results Page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults)
- View the [Auction Schedule \(/en/applicants/auctions/schedule-28jul16-en.pdf\)](/en/applicants/auctions/schedule-28jul16-en.pdf) [PDF, 263 KB] as of 28 July 2016

Understanding Auctions

Overview

Contention sets are groups of applications containing identical or confusingly similar applied for gTLD strings. Contention sets must be resolved prior to the execution of a Registry Agreement for an applied-for gTLD string. An ICANN facilitated auction is a last resort for resolving string contention sets, as described in the [Applicant Guidebook \(AGB\) \(/en/applicants/agb\)](/en/applicants/agb) section 4.3.

Auctions will be conducted over the Internet using a procedure known as an *ascending-clock* auction, where the auctioneer successively increases the start-of-round and end-of-round prices, on a per auction round basis. Applicants within the contention set must submit bids to indicate their willingness to pay an amount within the defined price range in the auction round. As the price of the auction rounds increase, applicants may successively choose to exit the auction. When a sufficient number of applications have exited the auction process, so that the remaining application(s) are no longer in contention with one another, and all the relevant string(s) can be delegated as gTLDs, the auction will be deemed concluded. At this point, prevailing applicants that remained in the auction will pay the finalized price and proceed toward delegation.

The total amount of funding resulting from auctions, will not be known until all relevant applications have completed this step. Auction proceeds will be reserved and earmarked until the uses of funds are determined by the Board through consultation with the community. [Click here \(/en/applicants/auctions/proceeds\)](/en/applicants/auctions/proceeds) to view the current status of the Auction proceeds and costs.

- [Summary of Auction Development and Management Agreement with Power Auctions, \(Updated 7 October 2014 to include Indirect Contention Auctions\) \(/en/applicants/auctions/summary-development-management-agreement-07oct14-en.pdf\)](/en/applicants/auctions/summary-development-management-agreement-07oct14-en.pdf) [PDF, 113 KB]
- [Summary of Auction Vendor Selection \(/en/applicants/auctions/summary-vendor-selection-10mar14-en.pdf\)](/en/applicants/auctions/summary-vendor-selection-10mar14-en.pdf) [PDF, 288 KB]

Auction Eligibility

A string contention set will be eligible to enter into a New gTLD Program Auction under the following circumstances only:

- All active applications in the contention set have:
 - Passed evaluation
 - Resolved any applicable GAC advice
 - Resolved any objections
 - No pending ICANN Accountability Mechanisms
- Each applied-for gTLD in the contention set is:
 - Not classified as "High-Risk" per the Name Collision Occurrence Management Plan

Auction Resources

- [Bidder Auction Training Videos \(/en/announcements-and-media/video/tutorials/auctions\)](/en/announcements-and-media/video/tutorials/auctions)
- [Auction Schedule as of 28 July 2016 \(/en/applicants/auctions/schedule-28jul16-en.pdf\)](/en/applicants/auctions/schedule-28jul16-en.pdf) [PDF, 263 KB]
- [New gTLD Auction Rules v.2014.11.03 \(/en/applicants/auctions/rules-03nov14-en.pdf\)](/en/applicants/auctions/rules-03nov14-en.pdf) [PDF, 240 KB]
- [New gTLD Auction Rules: Indirect Contention Edition v.2015.02.24 \(/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf\)](/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf) [PDF, 267 KB]
- [Auction Date Advancement/Postponement Request Form \(/en/applicants/auctions/date-advancement-postponement-form-02jun14-en.pdf\)](/en/applicants/auctions/date-advancement-postponement-form-02jun14-en.pdf) [PDF, 182 KB]
- [New gTLD Auction Bidder Agreement v.2014.04.03 \(/en/applicants/auctions/bidder-agreement-03apr14-en.pdf\)](/en/applicants/auctions/bidder-agreement-03apr14-en.pdf) [PDF, 177 KB]
- [New gTLD Auction Bidder Agreement Supplement \(/en/applicants/auctions/bidder-agreement-supplement-24feb15-en.pdf\)](/en/applicants/auctions/bidder-agreement-supplement-24feb15-en.pdf) [PDF, 60 KB] (FOR INDIRECT CONTENTION ONLY)
- [Bidder Form v.2014.02.26 \(/en/applicants/auctions/bidder-form-26feb14-en.pdf\)](/en/applicants/auctions/bidder-form-26feb14-en.pdf) [PDF, 53 KB]
- [Bidder Designation Form v.2014.02.26 \(/en/applicants/auctions/bidder-designation-form-26feb14-en.pdf\)](/en/applicants/auctions/bidder-designation-form-26feb14-en.pdf) [PDF, 39 KB]
- [Anticipated timeline for an Auction \(/sites/default/files/timeline-25aug14-en.pdf\)](/sites/default/files/timeline-25aug14-en.pdf) [PDF, 46 KB]
- [Auction Results Page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults)
- [Auction Proceeds Page \(/en/applicants/auctions/proceeds\)](/en/applicants/auctions/proceeds)
- [Indirect Contention Deck \(/en/applicants/auctions/indirect-contention-03dec14-en.pdf\)](/en/applicants/auctions/indirect-contention-03dec14-en.pdf) [PDF, 2.22 MB]
- [Updated Indirect Contention Deck \(/en/applicants/auctions/indirect-contention-08dec15-en.pdf\)](/en/applicants/auctions/indirect-contention-08dec15-en.pdf) [PDF, 336 KB]

Questions?

- **Applicants:** Submit an inquiry via the [Customer Portal \(https://myicann.secure.force.com/\)](https://myicann.secure.force.com/)
- **Non-Applicants:** Email us at [newgtld@icann.org \(mailto:newgtld@icann.org\)](mailto:newgtld@icann.org)

News Archive

22 July 2016 – Auction on 27 July 2016

An Auction, facilitated by Power Auctions LLC, the Auction Manager, will be held on 27 July 2016 at 13:00 UTC. The Auction will resolve string contention for one contention set. After the Auction is complete, results will be posted to the Auction Results page.

- Read the [Announcement \(https://www.icann.org/news/announcement-2-2016-07-22-en\)](https://www.icann.org/news/announcement-2-2016-07-22-en)

9 May 2016 – Updated Auction Schedule

The Auction Schedule is updated as of 9 May 2016. Additional Auctions may be scheduled based on eligibility.

- View the Auction Schedule as of [9 May 2016 \(/en/applicants/auctions/schedule-09may16-en.pdf\)](/en/applicants/auctions/schedule-09may16-en.pdf) [PDF, 370 KB]

27 April 2016 – Updated Auction Schedule

The Auction Schedule is updated as of 27 April 2016. Additional Auctions may be scheduled based on eligibility.

- View the Auction Schedule as of [27 April 2016 \(/en/applicants/auctions/schedule-27apr16-en.pdf\)](/en/applicants/auctions/schedule-27apr16-en.pdf) [PDF, 369 KB]

25 February 2016 – Updated Auction Schedule

The Auction Schedule is updated as of 25 February 2016. Additional Auctions may be scheduled based on eligibility.

- View the [Auction Schedule \(/en/applicants/auctions/schedule-25feb16-en.pdf\)](/en/applicants/auctions/schedule-25feb16-en.pdf) as of 25 February 2016 [PDF, 372 KB]

27 January 2016 – Results Available for 27 January 2016 Auction

An Auction to resolve one (1) New generic Top-Level Domain (gTLD) contention set was held on 27 January 2016. The result may be viewed on the Auction Results page. The Auction Schedule is also updated as of 27 January 2016.

- Read the [Announcement \(/en/announcements-and-media/announcement-27jan16-en\)](/en/announcements-and-media/announcement-27jan16-en)
- View the [Auction Results Page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults)
- View the [Auction Schedule \(/en/applicants/auctions/schedule-27jan16-en.pdf\)](/en/applicants/auctions/schedule-27jan16-en.pdf) [PDF, 264 KB] as of 27 January 2016

22 January 2016 – Auction on 27 January 2016

An Auction, facilitated by Power Auctions LLC, the Auction Manager, will be held on 27 January 2016 at 16:00 UTC. The Auction will resolve string contention for one contention set. After the Auction is complete, results will be posted to the Auction Results page. The Auction Schedule is updated as of 22 January 2016 to reflect eligible contention sets.

- Read the [Announcement \(/en/announcements-and-media/announcement-22jan16-en\)](/en/announcements-and-media/announcement-22jan16-en)
- View the [Auction Schedule \(/en/applicants/auctions/schedule-22jan16-en.pdf\)](/en/applicants/auctions/schedule-22jan16-en.pdf) [PDF, 264 KB] as of 22 January 2016

18 November 2015 – Results Available for 18 November 2015 Auction

An Auction to resolve one (1) New generic Top-Level Domain (gTLD) contention set was held on 18 November 2015. The result may be viewed on the Auction Results page. The Auction Schedule is also updated as of 18 November 2015.

- Read the [Announcement \(/en/announcements-and-media/announcement-18nov15-en\)](/en/announcements-and-media/announcement-18nov15-en)
- View the [Auction Results Page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults)
- View the [Auction Schedule \(/en/applicants/auctions/schedule-18nov15-en.pdf\)](/en/applicants/auctions/schedule-18nov15-en.pdf) [PDF, 509 KB] as of 18 November 2015

11 November 2015 – Auction on 18 November 2015

An Auction, facilitated by Power Auctions LLC, the Auction Manager, will be held on 18 November 2015 at 13:00 UTC. The Auction will resolve string contention for one contention set. After the Auction is complete, results will be posted to the Auction Results page. The Auction Schedule is updated as of 30 October 2015 to reflect eligible contention sets.

- Read the [Announcement \(/en/announcements-and-media/announcement-11nov15-en\)](/en/announcements-and-media/announcement-11nov15-en)
- View the [Auction Schedule \(/en/applicants/auctions/schedule-30oct15-en.pdf\)](/en/applicants/auctions/schedule-30oct15-en.pdf) [PDF, 368 KB] as of 30 October 2015

30 October 2015 – Updated Auction Schedule

The Auction Schedule is updated as of 30 October 2015. Additional Auctions may be scheduled based on eligibility.

- View the [Auction Schedule \(/en/applicants/auctions/schedule-30oct15-en.pdf\)](/en/applicants/auctions/schedule-30oct15-en.pdf) [PDF, 370 KB] as of 30 October 2015

30 September 2015 – Updated Auction Schedule

The Auction Schedule is updated as of 30 September 2015. Additional Auctions may be scheduled based on eligibility.

- View the [Auction Schedule \(/en/applicants/auctions/schedule-30sep15-en.pdf\)](/en/applicants/auctions/schedule-30sep15-en.pdf) [PDF, 256 KB] as of 30 September 2015

17 August 2015 – Updated Auction Schedule

The Auction Schedule is updated as of 17 August 2015. Additional Auctions may be scheduled based on eligibility.

- View the [Auction Schedule \(/en/applicants/auctions/schedule-17aug15-en.pdf\)](/en/applicants/auctions/schedule-17aug15-en.pdf) [PDF, 256 KB] as of 17 August 2015

20 July 2015 – Updated Auction Schedule

The Auction Schedule is updated as of 20 July 2015. Additional Auctions may be scheduled based on eligibility.

- View the [Auction Schedule \(/en/applicants/auctions/schedule-20jul15-en.pdf\)](/en/applicants/auctions/schedule-20jul15-en.pdf) [PDF, 254 KB] as of 20 July 2015

13 May 2015 – Updated Auction Schedule

The Auction Schedule is updated as of 13 May 2015. Additional Auctions may be scheduled based on eligibility.

- View the [Auction Schedule \(/en/applicants/auctions/schedule-13may15-en.pdf\)](/en/applicants/auctions/schedule-13may15-en.pdf) as of 13 May 2015 [PDF, 252 KB]

23 April 2015 – Updated Auction Schedule

The Auction Schedule is updated as of 23 April 2015. Additional Auctions may be scheduled based on eligibility.

- View the [Auction Schedule \(/en/applicants/auctions/schedule-23apr15-en.pdf\)](/en/applicants/auctions/schedule-23apr15-en.pdf) as of 23 April 2015 [PDF, 251 KB]

25 March 2015 – Results Available for 25 March 2015 Auction

An Auction to resolve two (2) new generic Top-level Domain (gTLD) strings was held on 25 March 2015. The result may be viewed on the Auction Results page.

- Read the [Announcement \(/en/announcements-and-media/announcement-25mar15-en\)](/en/announcements-and-media/announcement-25mar15-en)

- View the [Auction Results Page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults)

23 March 2015 – Auction on 25 March 2015 and Updated Auction Schedule

An Auction, facilitated by Power Auctions LLC, the Auction Manager, will be held on 25 March 2015 at 13:00 UTC. The Auction will resolve string contention for two contention sets. After the Auction is complete, results will be posted to the Auction Results page. The Auction Schedule is updated as of 23 March 2015 to reflect eligible contention sets.

- Read the [Announcement \(/en/announcements-and-media/announcement-23mar15-en\)](/en/announcements-and-media/announcement-23mar15-en)
- View the [Auction Schedule \(/en/applicants/auctions/schedule-23mar15-en.pdf\)](/en/applicants/auctions/schedule-23mar15-en.pdf) as of 23 March 2015 [PDF, 251 KB]

6 March 2015 – Updated Auction Schedule

The Auction Schedule is updated as of 6 March 2015 to reflect eligible contention sets as well as the addition of an Auction Date for indirect contention.

- View the [Auction Schedule \(/en/applicants/auctions/schedule-06mar15-en.pdf\)](/en/applicants/auctions/schedule-06mar15-en.pdf) as of 6 March 2015 [PDF, 253 KB]

25 February 2015 – Results Available for 25 February 2015 Auction

An Auction to resolve one (1) new generic Top-level Domain (gTLD) string was held on 25 February 2015. The result may be viewed on the Auction Results page.

- Read the [Announcement \(https://www.icann.org/news/announcement-2015-02-26-en\)](https://www.icann.org/news/announcement-2015-02-26-en)
- View the [Auction Results Page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults)

24 February 2015 – Public Comment Report and Rules for Indirect Contention Auctions Available

ICANN has released its Report of Public Comments for the New gTLD Auction Rules: Indirect Contention Edition as well as the redline and final versions of the rules. An update to the Bidder Agreement has also been made.

- [Go to the Public Comments Page \(https://www.icann.org/public-comments/new-gtld-auctions-indirect-contention-2014-11-14-en\)](https://www.icann.org/public-comments/new-gtld-auctions-indirect-contention-2014-11-14-en)
- [View Report of Public Comments \(https://www.icann.org/en/system/files/files/report-comments-new-gtld-auctions-indirect-contention-24feb15-en.pdf\)](https://www.icann.org/en/system/files/files/report-comments-new-gtld-auctions-indirect-contention-24feb15-en.pdf) [PDF, 417 KB]
- [New gTLD Auction Rules: Indirect Contention Edition v.2015.02.24 \(/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf\)](/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf) [PDF, 267 KB]
- [REDLINE New gTLD Auction Rules: Indirect Contention Edition v.2015.02.24 \(/en/applicants/auctions/rules-indirect-contention-redline-24feb15-en.pdf\)](/en/applicants/auctions/rules-indirect-contention-redline-24feb15-en.pdf) [PDF, 271 KB]
- [New gTLD Auctions Bidder Agreement Supplement \(/en/applicants/auctions/bidder-agreement-supplement-24feb15-en.pdf\)](/en/applicants/auctions/bidder-agreement-supplement-24feb15-en.pdf) [PDF, 60 KB] (FOR INDIRECT CONTENTION ONLY)

19 February 2015 – Auction on 25 February 2015 and Updated Auction Schedule

An Auction, facilitated by [Power Auctions LLC, \(https://www.powersauctions.com/\)](https://www.powersauctions.com/) the Auction Manager, will be held on 25 February 2015 at 20:00 UTC. The Auction will resolve string contention for one contention set. After the Auction is complete, results will be posted to the [Auction Results page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults). The Auction Schedule is updated as of 19 February 2015 to reflect eligible contention sets and accommodated postponement requests.

- Read the [Announcement \(/en/announcements-and-media/announcement-19feb15-en\)](/en/announcements-and-media/announcement-19feb15-en)
- View the [Auction Schedule as of 19 February 2015 \(/en/applicants/auctions/schedule-19feb15-en.pdf\)](/en/applicants/auctions/schedule-19feb15-en.pdf) [PDF, 284 KB]

16 January 2015 – Updated Auction Schedule

The Auction Schedule is updated as of 16 January 2015 to reflect eligible contention sets and accommodated postponement requests.

- [View the Auction Schedule as of 16 January 2015 \(/en/applicants/auctions/schedule-16jan15-en.pdf\)](/en/applicants/auctions/schedule-16jan15-en.pdf) [PDF, 252 KB]

14 January 2015 – Public Comment Closed: New gTLD Auction Rules for Indirect Contention

ICANN opened a public comment period to gather community input regarding the auction rules for indirect contention. Comments were due by 13 January 2015 at 23:59 UTC. Comments will be reviewed and a summary and analysis report will be published. Once the Auction Rules are finalized, auctions for contention sets with indirect contention will be scheduled. ICANN thanks all those who participated.

- [View Submitted Comments \(http://forum.icann.org/lists/comments-new-gtld-auctions-indirect-contention-14nov14/\)](http://forum.icann.org/lists/comments-new-gtld-auctions-indirect-contention-14nov14/)

17 December 2014 – Results Available for 17 December 2014 Auction

An Auction to resolve two (2) new generic Top-level Domain (gTLD) strings was held on 17 December 2014. The result may be viewed on the Auction Results page.

- Read the [Announcement \(https://www.icann.org/news/announcement-3-2014-12-17-en\)](https://www.icann.org/news/announcement-3-2014-12-17-en)
- View the [Auction Results Page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults)

15 December 2014 – Auction on 17 December 2014 and Updated Auction Schedule

An Auction, facilitated by [Power Auctions LLC, \(https://www.powersauctions.com/\)](https://www.powersauctions.com/) the Auction Manager, will be held on 17 December 2014 at 13:00 UTC. The Auction will resolve string contention for two contention sets. After the Auction is complete, results will be posted to the [Auction Results page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults). The Auction Schedule is updated as of 12 December 2014 to reflect eligible contention sets and accommodated postponement requests, and revised 2015 Auction Dates.

- Read the [Announcement \(/en/announcements-and-media/announcement-15dec14-en\)](/en/announcements-and-media/announcement-15dec14-en)
- View the [Auction Schedule as of 12 December 2014 \(/en/applicants/auctions/schedule-12dec14-en.pdf\)](/en/applicants/auctions/schedule-12dec14-en.pdf) [PDF, 253 KB]

19 November 2014 – Results Available for 19 November 2014 Auction

An Auction to resolve one (1) new generic Top-level Domain (gTLD) string was held on 19 November 2014. The result may be viewed on the Auction Results page.

- Read the [Announcement \(/en/announcements-and-media/announcement-2-19nov14-en\)](/en/announcements-and-media/announcement-2-19nov14-en)
- View [Auction Results Page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults)

14 November 2014 – Public Comment Invited and Indirect Auctions Webinar

ICANN has opened a public comment period on the detailed rules for Auctions involving Contention Sets containing Indirect Contention relationships.

- [Go to the Public Comment page \(https://www.icann.org/public-comments/new-gtld-auctions-indirect-contention-2014-11-14-en\)](https://www.icann.org/public-comments/new-gtld-auctions-indirect-contention-2014-11-14-en)

ICANN will also host a Webinar on the topic on 3 December 2014 at 17.00 UTC. The webinar will provide an overview of the rules and highlight several examples of how the rules will be applied in an auction.

- [Web Conference information \(/en/announcements-and-media/webinars\)](/en/announcements-and-media/webinars)
- [Indirect Contention Deck \(/en/applicants/auctions/indirect-contention-03dec14-en.pdf\)](/en/applicants/auctions/indirect-contention-03dec14-en.pdf) [PDF, 2.22 MB]

13 November 2014 – Auction on 19 November 2014 and Updated Auction Schedule

An Auction, facilitated by [Power Auctions LLC, \(https://www.powerauctions.com/\)](https://www.powerauctions.com/) the Auction Manager, will be held on 19 November 2014 at 20:00 UTC. The Auction will resolve string contention for one contention set. After the Auction is complete, results will be posted to the [Auction Results page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults). The Auction Schedule is updated as of 13 November 2014 to reflect eligible contention sets and accommodated postponement requests.

- Read the [Announcement \(/en/announcements-and-media/announcement-13nov14-en\)](/en/announcements-and-media/announcement-13nov14-en)
- View the [Auction Schedule as of 13 November 2014 \(/en/applicants/auctions/schedule-13nov14-en.pdf\)](/en/applicants/auctions/schedule-13nov14-en.pdf) [PDF, 253 KB]

3 November 2014 – New gTLD Auction Rules Update

The Auction Rules were recently updated to address feedback provided by the community over the course of several Auctions. The Auction Manager intends to provide an "early bidding" option prior to the standard 30 minutes of Round 1. Please find the latest version in the link below.

- View the [New gTLD Auction Rules v.2014.11.03 \(/en/applicants/auctions/rules-03nov14-en.pdf\)](/en/applicants/auctions/rules-03nov14-en.pdf) [PDF, 240 KB]
- View the [REDLINE New gTLD Auction Rules v.2014.09.30 to 2014.11.03 \(/en/applicants/auctions/rules-redline-03nov14-en.pdf\)](/en/applicants/auctions/rules-redline-03nov14-en.pdf) [PDF, 243 KB]

22 October 2014 – Results Available for 22 October 2014 Auction

An Auction to resolve three (3) new generic Top-level Domain (gTLD) strings was held on 22 October 2014. The results may be viewed on the Auction Results page.

- Read the [Announcement \(/en/announcements-and-media/announcement-22oct14-en\)](/en/announcements-and-media/announcement-22oct14-en)
- View [Auction Results Page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults)

20 October 2014 – Auction on 22 October 2014

An Auction, facilitated by Power Auctions LLC, the Auction Manager, will be held on 22 October 2014 at 16:00 UTC. The Auction will resolve string contention for three contention sets. Within seven days after the Auction is complete, results will be posted to the Auction Results page.

- Read the [Announcement \(/en/announcements-and-media/announcement-20oct14-en\)](/en/announcements-and-media/announcement-20oct14-en)
- View [Current Contention Set Status Page \(https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus\)](https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus)

10 October 2014 – Updated Auction Schedule

The Auction Schedule is updated as of 10 October 2014 to reflect eligible contention sets as well as accommodated postponements, which were provided to those where each member of the contention set requested a postponement. In addition, April and May 2015 Auction Dates have been added to the Planned Auction Date chart.

- View the updated [Auction Schedule as of 10 October 2014 \(/en/applicants/auctions/schedule-10oct14-en.pdf\)](/en/applicants/auctions/schedule-10oct14-en.pdf) [PDF, 241 KB]

30 September 2014 – New gTLD Auction Rules Update

The Auction Rules were recently updated to clarify the use of the Auction Date Advancement/Postponement Request Form. The form is due at least 45 days prior to a scheduled Auction Date. In addition, clarification is added to the default process. If a Winner is declared in default, any remaining Bidder that withdraws its Application from the New gTLD Program will not be eligible to receive an offer to have its Application accepted. Please find the latest version in the link below.

- View the [New gTLD Auction Rules v.2014.09.30 \(/en/applicants/auctions/rules-30sep14-en.pdf\)](/en/applicants/auctions/rules-30sep14-en.pdf) [PDF, 328 KB]
- View the [REDLINE New gTLD Auction Rules v.2014.05.19 to 2014.09.30 \(/en/applicants/auctions/rules-redline-30sep14-en.pdf\)](/en/applicants/auctions/rules-redline-30sep14-en.pdf) [PDF, 241 KB]

17 September 2014 – Results Available for 17 September 2014 Auction

An Auction to resolve three (3) new generic Top-level Domain (gTLD) strings was held on 17 September 2014. The results and Auction Reports may be viewed on the Auction Results page.

- Read the [Announcement \(/en/announcements-and-media/announcement-2-17sep14-en\)](/en/announcements-and-media/announcement-2-17sep14-en)
- View [Auction Results Page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults)

11 September 2014 – Auction on 17 September 2014 and Updated Auction Schedule

An Auction, facilitated by [Power Auctions LLC \(http://www.powersauctions.com/\)](http://www.powersauctions.com/), the Auction Manager, will be held on 17 September 2014 at 13:00 UTC. The Auction will resolve string contention for three contention sets. After the Auction is complete, results will be posted to the [Auction Results page \(https://gtldresult.icann.org/application-result/applicationstatus/auctionresults\)](https://gtldresult.icann.org/application-result/applicationstatus/auctionresults). The Auction Schedule is updated as of 11 September 2014 to reflect eligible contention sets and accommodated postponement requests.

- Read the [Announcement \(/en/announcements-and-media/announcement-11sep14-en\)](/en/announcements-and-media/announcement-11sep14-en)
- View the [Auction Schedule as of 11 September 2014 \(/en/applicants/auctions/schedule-11sep14-en.pdf\)](/en/applicants/auctions/schedule-11sep14-en.pdf) [PDF, 250 KB]

11 August 2014 – Updated Auction Schedule

The Auction Schedule is updated as of 11 August 2014. This version is updated to reflect the 2015 Auction Dates for January, February, and March. Also reflected is the finalization of the Name Collision Occurrence Management Framework as it pertains to the Auction Schedule. Because the Framework is now finalized, postponement requests on this basis will no longer be accommodated.

- View the [Auction Schedule as of 11 August 2014 \(/en/applicants/auctions/schedule-11aug14-en.pdf\)](/en/applicants/auctions/schedule-11aug14-en.pdf) [PDF, 252 KB]

10 July 2014 – Auction Date Advancement/Postponement Request Form

The Auction Date Advancement Form is updated to provide the option to request a postponement of the Auction Date. ICANN may accommodate one postponement request per contention set provided all members of the contention set request the postponement. For additional details on the process, please view the form below:

- View the [Auction Date Advancement/Postponement Request Form \(/en/applicants/auctions/date-advancement-postponement-form-10jul14-en.pdf\)](/en/applicants/auctions/date-advancement-postponement-form-10jul14-en.pdf) [PDF, 191 KB]

30 June 2014 – Updated Auction Schedule

The Auction Schedule is updated as of 30 June 2014. This version is updated to reflect the accommodated postponement requests due to the anticipated timeline for the finalization of the Name Collision Occurrence Management Framework.

- Read the [Announcement \(/en/announcements-and-media/announcement-30jun14-en\)](/en/announcements-and-media/announcement-30jun14-en)
- View the [Auction Schedule as of 30 June 2014 \(/en/applicants/auctions/schedule-30jun14-en.pdf\)](/en/applicants/auctions/schedule-30jun14-en.pdf) [PDF, 311 KB]

4 June 2014 – Results of First Auction

On 4 June 2014 ICANN through its authorized auction services provider, [Power Auctions LLC \(http://www.powerauctions.com/\)](http://www.powerauctions.com/), completed the first auction to resolve a contention set for a new generic Top-level Domain (gTLD) string. Beijing Tele-info Network Technology Co., LTD. prevailed in the auction for the winning price of \$600,000.

- View the [Announcement \(/en/announcements-and-media/announcement-3-04jun14-en\)](/en/announcements-and-media/announcement-3-04jun14-en)
- View the [Auction Results \(http://www.icann.org/sites/default/files/tlds/xn--vuq861b/xn--vuq861b-auction-results-04jun14-en.pdf\)](http://www.icann.org/sites/default/files/tlds/xn--vuq861b/xn--vuq861b-auction-results-04jun14-en.pdf) [PDF, 225 KB]

29 May 2014 – Updated Auction Schedule

The Auction Schedule is updated as of 29 May 2014. This version is updated to reflect the accommodated postponement requests due to the anticipated timeline for the finalization of the Name Collision Occurrence Management Framework.

- View the [Auction Schedule as of 29 May 2014 \(/en/applicants/auctions/schedule-29may14-en.pdf\)](/en/applicants/auctions/schedule-29may14-en.pdf) [PDF, 307 KB]

19 May 2014 – New gTLD Auction Rules Update

The Auction Rules were recently updated. Please find the latest version in the link below. The current version and a redline copy of the prior version are also available in the Auction Resources section of the New gTLD Microsite.

- View the [New gTLD Auction Rules v.2014.05.19 \(/en/applicants/auctions/rules-19may14-en.pdf\)](/en/applicants/auctions/rules-19may14-en.pdf) [PDF, 242 KB]
- [REDLINE New gTLD Auction Rules v.2014.05.06 to 2014.05.19 \(/en/applicants/auctions/rules-redline-19may14-en.pdf\)](/en/applicants/auctions/rules-redline-19may14-en.pdf) [PDF, 246 KB]

8 May 2014 – New gTLD Auction Schedule, Advancement Request Form and Bidder Training Videos

The first Auction Event is scheduled for 4 June 2014. Auction notifications have been issued to members of eligible contention sets. There are also several new and updated items below and also available in the Auction Resources section of the New gTLD Microsite.

[Read the Announcement \(/en/announcements-and-media/announcement-08may14-en\)](/en/announcements-and-media/announcement-08may14-en)

- [View the Auction Schedule as of 6 May 2014 \(/en/applicants/auctions/schedule-06may14-en.pdf\)](/en/applicants/auctions/schedule-06may14-en.pdf) [PDF, 285 KB]

- [View the Auction Date Advancement Request Form \(/en/applicants/auctions/date-advancement-form-06may14-en.pdf\)](/en/applicants/auctions/date-advancement-form-06may14-en.pdf) [PDF, 216 KB]
- [View the New gTLD Auction Rules v.2014.05.06 \(/en/applicants/auctions/rules-06may14-en.pdf\)](/en/applicants/auctions/rules-06may14-en.pdf) [PDF, 291 KB]
- [Watch the Bidder Auction Training Videos \(/en/announcements-and-media/video/tutorials/auctions\)](/en/announcements-and-media/video/tutorials/auctions)

24 April 2014 – Wilmington Trust named as the escrow provider for Auctions

ICANN and Power Auctions LLC are pleased to announce Wilmington Trust, National Association (Wilmington Trust) as the escrow provider for the New gTLD Auctions. Module 4 of the Applicant Guidebook prescribes Auctions as the method of last resort to resolve string contention. Participation in an auction requires the bidders to submit a deposit prior to the Auction; these deposits establish the bidding limits for the bidder in the Auction. Wilmington Trust will hold the deposits in escrow until the Auction completes.

- [Read the Announcement \(/en/announcements-and-media/announcement-3-24apr14-en\)](/en/announcements-and-media/announcement-3-24apr14-en)

9 April 2014 – Updated Bidder Agreement and Resources

ICANN released an updated Bidder Agreement for New gTLD Auctions that addresses concerns raised during ICANN 49 in Singapore. The Auction Rules have been updated to align with new clauses in the Bidder Agreement. Applicants that submitted Bidder Agreement version 2014-02-26 prior to 9 April 2014 should execute the Bidder Agreement Amendment (current version under Auction Resources) and submit to ICANN via a Customer Portal case.

- [Read the Announcement \(/en/announcements-and-media/announcement-09apr14-en\)](/en/announcements-and-media/announcement-09apr14-en)
- [New gTLD Auction Bidder Agreement Amendment v.2014.04.03 \(/en/applicants/auctions/bidder-agreement-amendment-03apr14-en.pdf\)](/en/applicants/auctions/bidder-agreement-amendment-03apr14-en.pdf) [PDF, 83 KB]
- [REDLINE gTLD Auction Bidder Agreement 2014.02.26 to 2014.04.03 \(/en/applicants/auctions/bidder-agreement-redline-03apr14-en.pdf\)](/en/applicants/auctions/bidder-agreement-redline-03apr14-en.pdf) [PDF, 54 KB]

3 April 2014 – New gTLD Auction Rules

- [New gTLD Auction Rules v.2014.04.03 \(/en/applicants/auctions/rules-03apr14-en.pdf\)](/en/applicants/auctions/rules-03apr14-en.pdf) [PDF, 229 KB]
 - [REDLINE New gTLD Auction Rules 2014.02.26 to 2014.04.03 \(/en/applicants/auctions/rules-redline-03apr14-en.pdf\)](/en/applicants/auctions/rules-redline-03apr14-en.pdf) [PDF, 233 KB]

19 March 2014 – New gTLD Auction Schedule and Intent to Auction Notifications initiated

The schedule of the upcoming Auctions for unresolved contention sets is now available. The first Auction Event is scheduled for 4 June 2014. Auction notifications have been issued to members of eligible contention sets. Applicants must submit the required bidder materials within 28 days of receiving an Intent to Auction notification.

- [Read the Announcement \(/en/announcements-and-media/announcement-19mar14-en\)](/en/announcements-and-media/announcement-19mar14-en)
- [View the Auction Schedule as of 19 March 2014 \(/en/applicants/auctions/schedule-19mar14-en.pdf\)](/en/applicants/auctions/schedule-19mar14-en.pdf) [PDF, 376 KB]

5 March 2014 – Public Comment Report Available: New gTLD Auction Rules

ICANN reviewed the community's feedback and will implement several updates to the Auction Rules documents.

- [View Public Comment Report \(http://www.icann.org/en/news/public-comment/report-comments-new-gtld-auction-rules-05mar14-en.pdf\)](http://www.icann.org/en/news/public-comment/report-comments-new-gtld-auction-rules-05mar14-en.pdf) [PDF, 176 KB]

26 February 2014 – Updates to Auction Resources

- [REDLINE New gTLD Auction Rules 2013.12.12 to 2014.02.26 \(/en/applicants/auctions/rules-redline-26feb14-en.pdf\)](#) [PDF, 333 KB]
- [REDLINE gTLD Auction Bidder Agreement 2013.12.12 to 2014.02.26 \(/en/applicants/auctions/bidder-agreement-redline-26feb14-en.pdf\)](#) [PDF, 176 KB]

5 February 2014 – Public Comment Closed: New gTLD Auction Rules

ICANN opened a public comment period to gather community input regarding the auction rules and other auction materials. Comments were due by 4 February 2014 at 23:59 UTC. Once finalized, Auctions will be conducted to assist applicants in resolving string contention.

- [View Submitted Comments \(http://forum.icann.org/lists/comments-new-gtld-auction-rules-16dec13/\)](#)

7 November 2013 – New gTLD Auctions Webinar Materials

Date/Time: 7 November 2013, 22:00 – 23:00 UTC

An in-depth discussion on the Auctions process and what to expect.

- [Web Conference Recording \(https://icann.adobeconnect.com/p92v9ntg5px/\)](#)
- [Teleconference Recording \(http://audio.icann.org/new-gtlds/webinar-auctions-07nov13-en.mp3\)](#) [MP3, 15.2 MB]
- [Presentation \(/en/applicants/auctions/webinar-07nov13-en.pdf\)](#) [PDF, 354 KB]

7 November 2013 – Auctions Webinar

An in-depth discussion on the Auctions process, including an overview, proposed timeframes and deadlines, and preliminary key rules. ICANN will also gather community input on process elements that will affect parties preparing for Auction.

- [Web Conference Recording \(https://icann.adobeconnect.com/p92v9ntg5px/\)](#)
- [Teleconference Recording \(http://audio.icann.org/new-gtlds/webinar-auctions-07nov13-en.mp3\)](#) [MP3, 15.2 MB]
- [Presentation \(/en/applicants/auctions/webinar-07nov13-en.pdf\)](#) [PDF, 354 KB]
- [Trademark Clearinghouse Rights Protection Mechanism Requirements FAQs \(/en/about/trademark-clearinghouse/rpm-requirements-faqs-12nov13-en.pdf\)](#) [PDF, 56 KB]

31 October 2013 – Preliminary Auction Rules

The preliminary New gTLD Program Auction Rules are based on section 4.3.1 of the Applicant Guidebook. This near final version should be reviewed by applicants who are likely to utilize ICANN's New gTLD Program Auction process to resolve string contention. They are being published prior to finalization to facilitate applicant's auction preparations and will be finalized as soon as is operationally feasible.

- [Download the Rules \(/en/applicants/auctions/prelim-rules-31oct13-en.pdf\)](#) [PDF, 235 KB]

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