

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

ICDR Case No. 50 117 T 1083 13

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

AMENDED NOTICE OF INDEPENDENT REVIEW PROCESS

Weil, Gotshal, Manges, LLP
1300 Eye Street, NW, Suite 900
Washington, DC 20005
Tel: +1 202 682 7000
Fax: +1 202 857 0940

Counsel for Claimant

I. INTRODUCTION

1. DotConnectAfrica Trust (“DCA”) hereby submits its Amended Notice of Independent Review Process (“Amended Notice”) concerning a dispute with the Internet Corporation for Assigned Names and Numbers (“ICANN”) pursuant to Article 4, Section 3 of ICANN’s Bylaws, the International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR”), and the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process.¹

2. The dispute, as detailed below, arises out of (1) ICANN’s breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”); and (2) ICANN’s wrongful decision that DCA’s application for .AFRICA should not proceed. ICANN’s administration of the New gTLD Program and its decision on DCA’s application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN’s Articles of

¹ DCA provides this Amended Notice without prejudice to its right to supplement or amend its claims during the IRP proceeding and its right to further elaborate upon and substantiate the factual and legal positions set forth herein. DCA notes that ICANN’s website directs claimants to file a single form in order to initiate an IRP. See <https://www.icann.org/en/news/in-focus/accountability/reconsideration-review> [Ex. C-1]. When DCA filed its Notice of IRP on 24 October 2013, the form apparently consisted of one page, although it now appears to consist of two pages. See *id.* The second page of the form is provided as [Ex. C-2]. DCA’s decision to amend its Notice is also occasioned by a lack of clarity as to the Supplemental Rules that apply to this proceeding; among other things, there are two different versions of the rules posted at the ICDR website. Compare Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process available at <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf> [Ex. C-3] with Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process available at http://www.icdr.org/icdr/faces/i_search/i_rule/i_rule_detail?doc=ADRSTG_002001&_afLoop=198933175693625&_afWindowMode=0&_afWindowId=120w78jccs_53#%40%3F_afWindowId%3D120w78jccs_53%26_afLoop%3D198933175693625%26doc%3DADRSTG_002001%26_afWindowMode%3D0%26_adf.ctrl-state%3D120w78jccs_109 [Ex. C-4]. In discussions with counsel for ICANN, it appears that ICANN intends to rely upon the former. These and other procedural issues remain to be clarified with the Panel.

Incorporation and Bylaws. ICANN's violations materially affected DCA's right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program.

II. THE PARTIES' CONTACT INFORMATION

A. Claimant

3. The Claimant in this dispute is DotConnectAfrica Trust (previously defined as "DCA").

DCA's contact details are as follows:

Sophia Bekele
DotConnectAfrica Trust
1776 Botelho Drive Suite 305
Walnut Creek CA 94597

DCA is a charitable trust organized under Mauritian law.

4. DCA is represented in these proceedings by:

Arif H. Ali (arif.ali@weil.com)
Marguerite Walter (marguerite.walter@weil.com)
Erica Franzetti (erica.franzetti@weil.com)
Weil, Gotshal, Manges, LLP
1300 Eye Street, NW, Suite 900
Washington, DC 20005
Tel: +1 202 682 7000
Fax: +1 202 857 0940

B. Respondent

5. The Respondent is the Internet Corporation for Assigned Names and Numbers (previously defined as "ICANN"). ICANN's contact details are:

Fadi Chehadé, CEO
John Jeffrey, General Counsel
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
Tel: +1 310 301 5800
Fax: +1 310 823 8649

6. ICANN is represented in these proceedings by:

Jeffrey A. LeVee (jlevee@jonesday.com)

Jones Day, LLP
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071
Tel: +1.213.243.2572
Fax: +1.213.243.2539

III. BACKGROUND OF THE INTERESTED PARTIES

A. DotConnectAfrica Trust

7. DCA is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 (ID CT8710DCA90) with its registry operation – DCA Registry Services (Kenya) Limited (“DCA Registry Ltd.”) – as its principal place of business in Nairobi, Kenya.² DCA was formed with the charitable purpose of advancing education in information technology in African society; and (b), in connection with (a), providing a continental Internet domain name to provide access to Internet services for the people of Africa and for the public good.³ In connection with these purposes, DCA established DCA Registry Ltd. and put in place formal agreements for the necessary technical infrastructure to support the operations of the registry.⁴

8. DCA applied to ICANN for the delegation of the .AFRICA gTLD, an Internet resource that is available for delegation under the New gTLD Program of ICANN.⁵ DCA intends .AFRICA to serve the diverse needs and purposes of the global internet community, but with

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

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

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

⁵ See New gTLD Application Submitted to ICANN by: DotConnectAfrica Trust (“DCA New gTLD Application”) [Ex. C-8].

special focus on promoting Internet use in Africa.⁶ DCA believes that, while there is no clearly delineated, organized and pre-existing community that is targeted by the .AFRICA gTLD, the .AFRICA gTLD creates a unique opportunity for Africa to develop its own locally hosted gTLD registry, which will facilitate the marketing, innovation and branding of business, products and services, and ultimately consolidate the “African Brand” on the global Internet platform.⁷

9. If successful, DCA will re-delegate or assign the new gTLD registry agreement (the “New gTLD Registry Agreement”) to be signed with ICANN to DCA Registry Ltd. as registry operator with responsibilities for technical operations, administration, sales, marketing and other commercial management of the .AFRICA gTLD registry.⁸ Any surpluses generated by the DCA Registry operation will accrue directly to the trust fund and shall be duly appropriated and transferred to the DCA Charitable Trust and utilized for charitable purposes.⁹ Some of the charitable campaigns already launched include miss.africa and generation.africa.¹⁰

B. ICANN

10. ICANN is a non-profit corporation established under the laws of the State of California on 30 September 1998 and headquartered in Marina del Rey, California. ICANN was established “for the benefit of the Internet community as a whole”¹¹ and is tasked with “carrying

⁶ *Id.*

⁷ *Id.*, pp. 7, 10.

⁸ *Id.*, p. 9.

⁹ *Id.*

¹⁰ *Id.* The miss.africa program is a gender-focused initiative targeted mainly at female youth in Africa to increase their personal involvement in early technology use with a view to improving their digital self-awareness and empowerment. Generation.africa is a youth focused program aiming to empower a new generation of Internet users in Africa by encouraging their involvement in discussions that define and increase their common stake-holdings in the development and evolution of the Internet.

¹¹ ICANN Articles of Incorporation, Art. 4 [Ex. C-9].

out its activities in conformity with relevant principles of international law and applicable international conventions and local law.”¹²

11. As set forth in its Bylaws, ICANN is responsible for administering certain aspects of the Internet’s domain name system (“DNS”), which includes coordinating the introduction of new Top-level Domains (“TLDs”).¹³ TLDs appear in the domain names as the string of letters – such as “.com”, “.gov”, “.org”, and so on – following the rightmost “dot” in domain names. ICANN delegates responsibility for the operation of each TLD to a registry operator, which contracts with consumers and businesses that wish to register Internet domain names in such TLD.¹⁴

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

¹² *Id.*

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

¹⁴ There are several types of TLDs within the DNA. The most prevalent TLDs are country-code TLDs (“ccTLDs”) and gTLD’s. The former, ccTLDs, are two-letter TLDs allocated to countries, usually based upon their two-letter ISO codes. In contrast, open gTLDs are privately managed and may include any combination of three or more letters. The original gTLDs were .com, .net, .org, .gov, .mil, and .edu. The first three are open gTLDs and the last three listed are closed gTLDs. Certain categories of potential gTLDs are protected, for example combinations of letters that are similar to any ccTLD and gTLDs on the reserve list included in the new gTLD Guidebook. Under the ICANN New gTLD Program, any “established corporations, organizations or institutions in good standing” may apply for gTLDs. In addition, a new gTLD may be a “community-based gTLD”, which is “a gTLD that is operated for the benefit of a clearly delineated community,” or fall under the category “standard gTLD”, which “can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement.” See gTLD Applicant Guidebook (Version 2012-06-04), Module 1, 1.2.1 “Eligibility” and 1.2.3.1 “Definitions” [Ex. C-11].

¹⁵ See ICANN Articles of Incorporation, Art. 4 [Ex. C-9]; see also *Declaration of the Independent Review Panel in the matter of an Independent Review Process between ICM Registry, LLC and ICANN*, p. 69 [Ex. C-12], in which the Panel concluded that “the provision of Article 4 of ICANN’s Articles of Incorporation prescribing that ICANN ‘shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law,’ requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.”

including transparency, fairness, accountability, and promotion of competition with respect to the Internet's domain name system.¹⁶

13. ICANN is managed by a Board of Directors ("Board"), which consists of sixteen voting directors and five non-voting liaisons from around the globe.¹⁷ Evaluations of applications for new gTLDs are carried out by the New gTLD Program Committee ("NGPC").¹⁸ In making its decisions, the Board receives input from a number of Supporting Organizations and Advisory Committees established by ICANN's Bylaws.¹⁹ Among the Advisory Committees that provide input to the Board is the Governmental Advisory Committee ("GAC"), which is composed of representatives of a number of national governments, distinct economies, and multinational government organizations and treaty organizations (as observers).²⁰ The role of the GAC in the New gTLD Program is to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues."²¹

IV. SUMMARY OF RELEVANT FACTS

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

¹⁷ *Id.*, Art. VI, Section 2.

¹⁸ *See* New gTLD Program Committee, available at <http://www.icann.org/en/groups/board/new-gtld>. The NGPC is composed of all ICANN Board members who are not conflicted by interests in gTLDs. According to the NGPC's page on the ICANN website, there are eleven voting members and two non-voting liaisons to the board who are considered non-conflicted and make up the NGPC.

¹⁹ *See, e.g.*, ICANN Bylaws [Ex. C-10], Art. VIII, "Address Supporting Organization"; Art. IX "Country-Code Names Supporting Organization"; Art. X, "Generic Names Supporting Organization"; Art. XI "Advisory Committees."

²⁰ *See id.*, Art. XI Section 2.1.

²¹ gTLD Applicant Guidebook (Version 2012-06-04), Module 3.1 [Ex. C-11].

A. The New gTLD Program

14. In October 2007, the Generic Names Supporting Organization (“GNSO”), a group that advises on global internet policy at ICANN, completed policy development work on new gTLDs and approved 19 recommendations aimed at, *inter alia*, fostering diversity, encouraging competition and enhancing the utility of the DNS.²² Representatives from a wide variety of stakeholder groups, including governments, business, individuals and the technology community, were engaged for several months in discussions that included the selection criteria that should be applied to new gTLDs and how gTLDs should be allocated.²³ Based on the community-developed policy for new gTLDs, ICANN worked along with the Internet community to create an application and evaluation process for new gTLDs that is aligned with the GNSO policy recommendations.²⁴ The culmination of this process was the decision by the ICANN Board of Directors in June 2011 to launch the New gTLD Program.²⁵

B. The Foundation Of The .AFRICA Domain Name

15. The .AFRICA gTLD initiative was launched under the leadership of DCA’s founder and CEO Sophia Bekele Eshete (“Ms. Bekele”), a business and corporate executive, entrepreneur, activist and international policy adviser on information communication technologies.²⁶

²² *Id.*, Preamble.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Sophia Bekele - ICANNWiki, available at http://icannwiki.com/index.php/Sophia_Bekele [Ex. C-13]. Born and raised in Ethiopia, Ms. Bekele has long been engaged in efforts related to the promotion of information communication technologies in Africa. One of Ms. Bekele’s start-ups was CBS International, a private California-based firm engaged in technology transfer to emerging economies. CBS International set up an Ethiopian IT company that was successfully awarded a bid for a government contract to build an integrated information network infrastructure for the Ethiopian Parliament. In

16. The idea of a domain name that would enable a united and coordinated branding of the African Continent arose while Ms. Bekele was serving on ICANN’s Council of the GNSO.²⁷ During her tenure at ICANN’s GNSO (from 2005 to 2007), Ms. Bekele was instrumental in initiating policy dialogue over International Domain Names (“IDN”).²⁸ Following IDN work for ICANN and the global internet community, Ms. Bekele turned her focus to the .AFRICA domain name initiative, travelling to various African countries and globally advocating the benefits of a .AFRICA gTLD for the African continent.²⁹

17. As part of DCA’s efforts to launch the .AFRICA domain, DCA obtained the endorsement of two of the most important African intergovernmental organizations, the United Nations Economic Commission for Africa (“UNECA”) and the African Union Commission (“AUC”). UNECA expressed its endorsement through a letter dated 8 August 2008 sent to Ms. Bekele expressing “support” for DCA’s “‘dotafrica’ initiative” and DCA’s intention to apply to ICANN for the delegation of the gTLD .AFRICA.³⁰ AUC endorsed DCA’s intent to apply for the .AFRICA domain name through a letter dated 27 August 2009 directed to Ms. Bekele.³¹ In

addition, Ms. Bekele has served on several United Nations-sponsored committees and initiatives where she represented the private sector in discussions about the economic development of Africa.

²⁷ See *id.*, ICANN Work (PDF p. 2).

²⁸ *Id.*

²⁹ See Sophia Bekele - ICANNWiki, available at http://icannwiki.com/index.php/Sophia_Bekele [Ex. C-13]. Among the benefits of the .AFRICA gTLD, DCA emphasized that the new gTLD would facilitate cross-border knowledge sharing and research partnerships with key knowledge end users, allow users to express membership in the larger Pan African and African community, enhance regional identity and global presence, and generate surplus profit to benefit projects of sustainability in Africa. See also, 1bn people, 54 countries, 1 domain [Ex. C-14].

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

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

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

18. DCA announced the official launch of the .AFRICA campaign at the AITEC Information Communication Technology summit held in Nairobi, Kenya, on September 7, 2010.³⁴ Since then, DCA has continued to work towards and obtain support from several stakeholders, including African governments, businesses and community organizations in the region to apply to ICANN for the delegation of the .AFRICA TLD.³⁵

C. AUC Becomes DCA’s Competitor For The Delegation Of The .AFRICA Domain

19. After DCA’s official announcement of the .AFRICA campaign, other groups began to express interest in the .AFRICA domain, including the Africa Top Level Domain Organization (“AfTLD”)³⁶ and certain members of the African Union DotAfrica Task Force, which is

³² *Id.*

³³ *Id.*

³⁴ DotConnectAfrica launched its official ".AFRICA" campaign at the AITEC ICT Summit <http://www.prlog.org/10916169-dotconnectafrica-launched-its-official-africa-campaign-at-the-aitec-ict-summit.html> [Ex. C-17].

³⁵ The Yes2dotafrica Campaign is part of DCA’s on-going effort to create awareness of the benefits of a dotAfrica name and do a public outreach. DCA’s .AFRICA initiative was also endorsed by the Internationalized Domain Resolution Union (“IDRU”) and the Ministry of Information and Communications of Kenya. *See* IDRU Endorsement Letter to Ms. Bekele dated 5 December 2010 and the Ministry of Information and Communications of Kenya’s Endorsement Letter to Ms. Bekele dated 7 August 2012 [Ex. C-18.].

³⁶ The AfTLD is an association of managers of African ccTLDs. According to its website, AfTLD’s mission is to partner with international, national and African stakeholders to market and “achieve excellence among African ccTLDs.” *See* AfTLD – Our Mission, available at <http://www.aftld.org/about/?pg=233005> [Ex. C-19].

comprised of members of the African internet community, mainly ccTLD managers and officers of AfTLD and the African Network Information Center (“AfriNIC”).³⁷

20. Accordingly, the AUC informed the Internet community that it would initiate an Expression of Interest to bidders to be endorsed for .AFRICA.³⁸ In addition, on 21 October 2011, at the African Ministerial Round-Table that met in Dakar, Senegal, during the 42nd ICANN meeting, the AUC requested that ICANN reserve the .AFRICA name and its representations in any other language in the List of Top Level Domain names, as well as allow the AUC to delegate the .AFRICA gTLD to an organization to be selected by AUC.³⁹ DCA objected to the request.⁴⁰ ICANN’s official response to the AUC was communicated through a letter from ICANN’s Board Chairman Stephen Crocker dated 8 March 2012,⁴¹ in which ICANN refused to reserve the .AFRICA gTLD to AUC. ICANN stated that to do so would be against ICANN’s rules for the New gTLD Program. However, ICANN informed the AUC that it could avail itself of the “robust protections” in the New gTLD Guidebook, including raising concerns

³⁷ For a list of the members on the African Union Task Force, see “Dot.Africa gTLD Project: Branding the African Continent on the Cyberspace and Providing African Community with a Continental Mark on the Internet”, 6 November 2010 [Ex.C-20]. According to its website (<http://www.afrinic.net/en/about-us>), AfriNIC is the Regional Internet Registry for Africa, which is “responsible for the distribution and management of Internet number resources such as IP addresses and ASN (Autonomous System Numbers) for the African region.” Its global counterparts include the regional registry for Europe, RIPE-NCC; the regional registry for Asia and the Pacific region, APNIC; ARIN the regional registry for North America; and LACNIC, serving Latin America and the Caribbean.

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

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

⁴⁰ See Yes2dotAfrica Campaign Triumphs at ICANN-42 meeting in Dakar Senegal! Available at, <http://www.prlog.org/11722365-yes2dotafrica-campaign-triumphs-at-icann-42-meeting-in-dakar-senegal.html> [Ex. C-23].

⁴¹ Letter from Stephen Crocker (ICANN CEO) to Elham M.A. Ibrahim (Commissioner, Infrastructure and Energy Commission of the African Union Commission), dated 8 March 2012, [Ex. C-24].

about the .AFRICA gTLD applications through the GAC and objecting formally to .AFRICA applications on “community” grounds.⁴²

21. Shortly after the ICANN Meeting in Dakar, the AUC issued a Request for Proposals for the operation of .AFRICA.⁴³ DCA did not participate in this process, as it believed that the AUC had not set up an open, competitive and transparent process.⁴⁴ UniForum South Africa (“Uniforum”), a South African company trading as UniForum ZA Central Registry, was appointed based on the recommendation of Mr. Vika Mpisane, Head of the South African Domain Names Authority. At the time the appointment was made, Mr. Mpisane was also Chairperson of the AfTLD.⁴⁵

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

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

23. DCA submitted its application for the .AFRICA gTLD in March 2012.⁴⁸ In its application, DCA explained that although .AFRICA would serve the African community, it was not a community-based application because it was too difficult to define the community that

⁴² *Id.*, p. 3.

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

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

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

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

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

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

would benefit from .AFRICA.⁴⁹ DCA envisioned .AFRICA as a domain name open to “all things that relate to Africa, in a way that presents vast opportunities for all those who are interested in Africa for any possible number of reasons.”⁵⁰ It intended to offer domain names in the .AFRICA gTLD at US\$10.00 apiece, which it contrasted with the US\$80.00 per month price for ccTLDs that had hitherto prevented the development of “meaningful content in Africa’s Internet space.”⁵¹ Proceeds from sales of domain names were to be placed in trust for use in charitable purposes, as already explained in paragraph 9 above.⁵²

1. ICANN Brushed Aside DCA’s Concerns Regarding Conflicts Of Interest On The Part of New gTLD Committee Members

24. When UniForum’s application became public in June 2012, DCA realized that two of the members of the ICANN Board who would be involved in taking decisions on the .AFRICA applications had potential or actual conflicts of interest with regard to these applications. Mike Silber, a member of the ICANN Board from South Africa, was the treasurer and director of the ccTLD co.za, which has long been administered by UniForum.⁵³ He was also a member of the Board of Directors of the South African Domain Names Authority, which had supported the establishment of South African (.za) Central Registry, a part of UniForum S.A.⁵⁴ Similarly, Australian Chris Disspain was CEO of a company affiliated with ARI Registry Services, which provided consulting services to the South African Domain Names Authority with respect to the

⁴⁹ *Id.*

⁵⁰ *Id.*, p. 10.

⁵¹ *Id.*, p. 11.

⁵² See *id.*, p. 9.

⁵³ Office of the Ombudsman, Case 12-00241, In a matter of a Complaint by Sophia Bekele for DotAfrica, Report dated 10 December 2012 [Ex. C-29] (identifying Silber’s affiliation); AUC/UniForum New gTLD Application [Ex. C-28] (confirming its administration of .za).

⁵⁴ Letter from Ms. Sophia Bekele (DCA) to The CEO of ICANN, dated 18 July 2012 [Ex. C-30].

establishment of the South African (.za) Central Registry.⁵⁵ DCA wrote to ICANN requesting that both men recuse themselves from any consideration of the .AFRICA applications.⁵⁶ ICANN's Ombudsman, Chris LaHatte, investigated. The Ombudsman reports directly to the ICANN Board and is charged with providing an independent, impartial review of facts relating to complaints about ICANN.⁵⁷

25. Mr. LaHatte published a report finding that there was “no disqualifying conflict of interest, or indeed any conflict of interest at all, is present in the actions of both Chris Disspain and Mike Silber.”⁵⁸ Mr. LaHatte based his conclusion on the fact that ICANN Board meeting minutes allegedly showed that neither Mr. Silber nor Mr. Disspain had been involved in any Board discussions of the .AFRICA application.⁵⁹ Before finalizing his report, Mr. LaHatte sought input from DCA, which requested that he recommend that Messrs. Silber and Disspain recuse themselves from any consideration of the .AFRICA domain name in order to avoid conflicts of interest in the future.⁶⁰ Upon concluding his investigation, Mr. LaHatte provided for comment a draft report to DCA and Messrs. Silber and Disspain, as well as with John Jeffrey, the General Counsel for ICANN.⁶¹ DCA requested that Mr. LaHatte include language recommending the two directors recuse themselves from making decisions about the .AFRICA applications. Following consultation with Messrs. Silber, Disspain and Jeffrey, Mr. LaHatte did not recommend recusal but instead observed in his report that it was “likely this complaint has

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

⁵⁶ *See id.*, *see also* Ex. C-30.

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

⁵⁸ Office of the Ombudsman, Case 12-00241, In a matter of a Complaint by Sophia Bekele for DotAfrica, Report dated 10 December 2012 [Ex. C-29]

⁵⁹ *Id.*

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

⁶¹ *Id.*

led to increased awareness of the possibilities of conflict of interest, which the Board will carefully consider in terms of the existing policy about conflict, when the issue arises.”⁶² Mr. LaHatte indicated that Ombudsman’s reports were usually either anonymous or not public, but he would publish the particular report, absent objection from any of the concerned parties.⁶³ Mr. LaHatte made the report public, over DCA’s objections and at the urging of Mr. Silber.⁶⁴

2. The AUC Used The GAC To Urge ICANN Not To Accept DCA’s Application

26. In November 2012, the AUC filed an Early Warning about DCA’s application for .AFRICA before the GAC. As already indicated, the role of the GAC is “to provide advice to ICANN on issues of public policy, and especially where there may be an interaction between ICANN’s activities or policies and national laws or international agreements.”⁶⁵ In this case, however, the Early Warning was made by the AUC as a member of the GAC – despite the fact that the AUC was also part of the UniForum bid – DCA’s only competitor for the .AFRICA TLD.

27. In the Early Warning, the AUC “express[ed] its objection” to DCA’s application, arguing that DCA did not have “the requisite minimum support from African governments”⁶⁶ and that its application “constitut[ed] an unwarranted intrusion and interference on the African Union Commission’s (AUC) mandate from African governments to establish the structures and

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* “Given that the complainant continues to give her spurious allegations significant prominence in her email ‘newsletter’ in in [sic] the DCA website, I would respectfully request that the report be made public.”

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

⁶⁶ GAC Early Warning – Submittal Africa-AUC-42560, dated 20 November 2012, p. 1 [Ex. C-33].

modalities for the implementation of the dotAfrica (.Africa) project.”⁶⁷ In other words, the AUC objected to any competition at all as an “unwarranted intrusion and interference” with its own application – but cloaked the objection in the guise of a governmental policy concern, not the concern of a competitor for .AFRICA.⁶⁸

28. DCA pointed out AUC’s conflict of interest regarding the .AFRICA gTLD in a response to ICANN, in which it objected that the AUC was effectively “both an ‘endorser’ and ‘co-applicant’ for the name string” of .AFRICA.⁶⁹ In other words, while the AUC used UniForum to apply for the .AFRICA on its behalf,⁷⁰ it simultaneously used its status as a member of the GAC to create obstacles for DCA’s competing application. DCA also pointed out in its response that at least one of the countries supposedly objecting to its application had officially endorsed that very same application.⁷¹ ICANN did not respond.

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

⁶⁸ We note that ICANN itself had previously informed AUC that acting through the GAC would be another way to achieve its goal of reserving the dotAfrica domain name for its own control. ICANN Letter of 8 March 2012 to AUC at 2 (explaining that ICANN could not place dotAfrica on the Reserved Names List, but adding that “protections exist that will allow the African Union and its member states to play a prominent role in determining the outcome of any application for these top-level domain name strings,” followed by explanation of GAC Early Warning notice system) [Ex. C-24].

⁶⁹ DCA Response to ICANN GAC Early Warning Advice, 5 December 2012, p. 4 (objecting that AUC was “both an ‘endorser’ and ‘co-applicant’ for the name string” of dotAfrica) [Ex. C-35].

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

⁷¹ DCA Response to ICANN GAC Early Warning Advice, 5 December 2012 p. 1 (noting that Kenya had endorsed DCA’s application, but had also submitted an Early Warning, without explanation) [Ex. C-35]. See Kenya Ministry of Information and Communications Letter of Endorsement dated 7 August 2012 [Ex. C-18].

3. ICANN's Independent Objector Sought To Object To The DCA Application, Even Though The AUC Had Already Done So Through The GAC

29. The new gTLD program created a new position within the ICANN framework, the Independent Objector (“IO”).⁷² Pursuant to the new gTLD Guidebook, the IO “acts solely in the best interests of the public who use the global Internet” to object to applications that have limited public interest and/or lack the support of the community to which the domain names are directed, but where no other party has lodged or is willing to lodge an objection.⁷³

30. Toward the end of December 2012, the IO sent DCA and UniForum an email indicating he would investigate a potential community objection to .AFRICA.⁷⁴ DCA replied in January 2013, explaining, *inter alia*, that any objection on its part would be superfluous in light of the GAC Early Warning, and that a community objection would be unwarranted since DCA’s application was for a geographic name, not a community-based name, and it would be difficult to define an African community in any event.⁷⁵ UniForum also responded, sending a letter echoing the IO’s concerns and outlining what it saw as the “shortcomings” of DCA’s application.⁷⁶

31. In his responding comments, posted on his website, the IO acknowledged that DCA’s application was for a geographic name string. He nevertheless expressed the view that it was “unlikely” that DCA’s application could succeed in light of the opposition to its application by the AUC given that the AU has 54 member states – ignoring the fact that DCA could obtain

⁷² gTLD Applicant Guidebook (Version 2012-06-04), Art. 3.2.5 [Ex. C-11]. Professor Alain Pellet was chosen as the IO in May 2012. See <http://www.icann.org/en/news/announcements/announcement-14may12-en.htm> [Ex. C-36].

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

⁷⁴ See Letter from Ms. Sophia Bekele (DCA) to Alain Pellet (Independent Objector for ICANN), dated 20 January 2013, p. 1 (referring to email received from IO) [Ex. C-37].

⁷⁵ *Id.*

⁷⁶ Letter from Neil Dundas (UniForum) to Messr. Alain Pellet (Independent Objector for ICANN) dated 18 January 2013 [Ex. C-38].

endorsements from governments with or without the AU, as indeed it already had.⁷⁷ He acknowledged, however, that if DCA’s application passed initial review, it would be “assigned to a contention set” – that is, it would have to negotiate with UniForum, assuming its application also passed initial review, to resolve who would receive the right to administer .AFRICA.⁷⁸ The IO did not file an objection against DCA’s application, recognizing that it would be inappropriate to do so where another interested party could do so.⁷⁹

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

4. The GAC Issued Advice Recommending That ICANN Reject DCA’s Application

33. In April 2013, the GAC held a meeting in Beijing during which it considered, *inter alia*, offering objection advice on new gLTD applications, including that of DCA. While the meeting was ongoing, DCA became aware that discussions of its application were being led, in part, by Ms. Alice Munyua, a former GAC representative of Kenya who was no longer authorized to speak on behalf of the Kenyan government, while the actual Kenyan representative, Sammy Buruchara, had been unable to attend the meeting.⁸¹ On 9 April 2013, Mr. Buruchara informed

⁷⁷ Moreover, the Guidebook anticipates that governments and other public authorities may endorse more than one candidate. *See* gTLD Applicant Guidebook, pp. 2-22 (referring to situations in which multiple applications have “documentation of support from the same government or public authority”) [Ex. C-11].

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

⁷⁹ *Id.*, (“[I]t is the public policy of the IO not to make an objection when a single established institution representing and associated with the community having an interest in an objection can lodge such an objection directly.”).

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

⁸¹ GAC Advice Response form for Applicants, dated 8 May 2013, pp. 10-13 [Ex. C-41]. Mr. Buruchara was formerly the Chair of DCA and was appointed to represent Kenya on the GAC in March 2013. *See* “Mr. Sammy Buruchara, Former Chair of DCA Appointed as the Kenyan GAC Advisor to ICANN,” 15 March 2013, DomainNewsAfrica, at <http://domainnewsafrica.com/mr-sammy-buruchara-former-chair-of-dca-appointed-as-the-kenyan-gac-advisor-to-icann> [Ex. C-42].

the GAC Secretariat by email, with a copy to Fadi Chehadé, the President and CEO of ICANN, that Ms. Munyua no longer represented the Kenyan government and that “Kenya does not wish to have a GAC advise [sic] on DotConnect Africa Application for .africa delegation.”⁸²

34. Nevertheless, on 11 April 2013, the GAC issued a communiqué in which it informed the ICANN Board that it had reached “consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook” on DCA’s application.⁸³ The GAC thus “advise[d] ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.”⁸⁴

5. ICANN Accepted The Beijing GAC Advice Without Further Examination, Despite The Irregularities That Gave Rise To It

35. DCA submitted a GAC Advice Response Form in which, *inter alia*, it informed the ICANN Board of the dispute over Kenya’s representative and position with respect to DCA’s application during the Beijing GAC meeting.⁸⁵

36. Under the rules set forth in the new gTLD Guidebook, there are three forms of GAC advice that may be given regarding new gTLD applications, including consensus GAC Advice.⁸⁶ The Guidebook provides that consensus GAC advice creates a “strong presumption” that an application should not proceed.⁸⁷ However, consensus GAC advice exists only where “any

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

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

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

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

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

⁸⁷ *Id.*

formal objection” has been made.⁸⁸ In this instance, the Kenyan representative had objected to the proposed advice against the DCA application in an email sent, not only to the GAC, but to the President and CEO of ICANN, before the advice was adopted by the GAC in its 11 April 2013 communiqué. Moreover, ICANN was aware that the AUC had offered GAC Early Warning advice objecting to DCA’s application, and that the AUC was in fact DCA’s competitor for .AFRICA, as indicated in UniForum’s application.⁸⁹

37. Nevertheless, on 4 June 2013, the ICANN Board NGPC posted a notice that it had accepted the advice from the Beijing Communiqué, including the decision not to accept DCA’s application.⁹⁰

6. ICANN Denied DCA’s Request For Reconsideration Without Acknowledging The Conflict Of Interest At The Heart Of DCA’s Complaint

38. On 19 June 2013, DCA filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), arguing that ICANN had improperly accepted the Beijing GAC advice without further inquiry or investigation.⁹¹ DCA argued that ICANN should have carried out further due diligence, such as consulting an expert as provided for in the Guidebook, in order to properly evaluate the GAC advice from Beijing.⁹²

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

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

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

⁹⁰ NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué, ANNEX 1 to NGPC Resolution No. 2013.06.04.NG01, 4 June 2013 [Ex. C-45].

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

⁹² *Id.*

⁹³ Recommendation of the Board Governance Committee (BGC) Reconsideration Request 13-4, 1 August 2013 [Ex. C-47].

NGPC consult with an expert. It also explained its view that the Guidebook’s reference to the fact that the Board “may” consult with an expert indicated a discretionary power that could not be the basis for an argument that ICANN had not followed its own procedures. In reaching this conclusion, it reasoned that “[t]here is no requirement to seek input from independent experts in this situation, therefore no material information was missing.”⁹⁴ The BGC made no reference to the fact that the GAC advice was not rendered by consensus, or that it was effectively made by a competitor to DCA.

40. DCA’s application has never been rejected; instead, it is listed on ICANN’s website as “incomplete.”⁹⁵

7. DCA Trust Engaged In The Cooperative Engagement Process, To No Avail

41. On 19 August 2013, DCA informed ICANN of its intent to seek relief before an Independent Review Panel under ICANN’s Bylaws.⁹⁶ At ICANN’s suggestion, between August and October 2013, DCA participated in a Cooperative Engagement Process (“CEP”) with ICANN to try to resolve the issues surrounding DCA’s application.⁹⁷ Despite several meetings, no resolution was reached. On 24 October 2013, DCA filed a Notice of Independent Review with the ICDR.⁹⁸

⁹⁴ *Id.*, p. 8.

⁹⁵ The gTLD Applicant Guidebook provides that an application be considered incomplete when an applicant does not produce the required documentation of support, but only *after* being notified and given a timeframe of no less than 90 days from the date of notice to provide the documentation. gTLD Applicant Guidebook, Sections 2.2.1.4.4 (at 2-21) and 2.3.1. ICANN never followed this procedure with respect to DCA’s application. Instead, it simply stopped the application from proceeding any further [Ex. C-48].

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

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

⁹⁸ DCA Notice of Independent Review, dated 24 October 2013 [Ex. C-51].

V. APPLICABLE RULES AND GOVERNING LAW

42. This IRP is constituted under Article IV, Section 3 of ICANN's Bylaws.⁹⁹ Other applicable rules include ICANN's Articles of Incorporation, the gTLD Applicant Guidebook,¹⁰⁰ and ICANN's stated policies regarding conflicts of interest and the code of conduct for ICANN Board members.¹⁰¹ The applicable law is international law and local law, as provided in Article 4 of ICANN's Articles of Incorporation.¹⁰²

VI. SUMMARY OF ICANN'S BREACHES

43. The ICANN Board committed numerous breaches of its Articles, Bylaws, and other applicable rules of conduct in its treatment of DCA's application for .AFRICA, which DCA outlines briefly below, subject to its right to amend or supplement its claims at a later date.¹⁰³ These breaches also constituted breaches of applicable principles of international law and local law.

A. ICANN Breached Its Articles Of Incorporation And Its Bylaws By Failing To Provide Procedural Fairness And Failing To Permit Competition For The .AFRICA gTLD

⁹⁹ See ICANN's Bylaws [Ex. C-10].

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

¹⁰¹ ICANN Conflicts of Interest Policy, available at, <http://www.icann.org/en/groups/board/governance/coi> [Ex. C-52]; ICANN Code of Conduct for Board members, available at, <http://www.icann.org/en/groups/board/governance/code-of-conduct> [Ex. C-53].

¹⁰² Art. 4, ICANN Articles of Incorporation [Ex. C-9]. Article 4 provides:

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and Bylaws, through open and transparent process that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

¹⁰³ ICDR Arbitration Rules, Article 4: "During the arbitral proceedings, any party may amend or supplement its claim, counterclaim or defense, unless the tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties or any other circumstances."

44. Under Article 4 of its Articles of Incorporation, ICANN is required to operate for the benefit of the Internet community as a whole, “through open and transparent processes that enable competition and open entry in Internet-related markets.”¹⁰⁴ ICANN’s Bylaws likewise provide that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”¹⁰⁵ The Core Values set forth in ICANN’s Bylaws include the requirement that ICANN “introduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial in the public interest,”¹⁰⁶ and that it make decisions “by applying documented policies neutrally and objectively, with integrity and fairness.”¹⁰⁷

45. ICANN breached these obligations by, *inter alia*:

- Failing to follow its own procedures for handling alleged conflicts of interest on the part of Board members;
- Failing to protect DCA from conflicts of interest on the NGPC;
- Ignoring conflicts of interest giving rise to the AUC GAC Early Warning and the Beijing Communiqué; and
- Permitting, if not supporting, the AUC’s efforts to eliminate competition for the .AFRICA gTLD by quashing DCA’s application through various mechanisms put in place by ICANN (including the IO and the GAC).

B. ICANN Breached Its Articles Of Incorporation And Its Bylaws By Giving Excessive Deference To The GAC, Thus Failing To Exercise Due Diligence And Care In Having A Reasonable Amount Of Facts Before It

46. Under Article IV of ICANN’s Bylaws, the IRP Panel is to evaluate, among other things, whether the Board exercised appropriate “due diligence and care in having a reasonable amount

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

¹⁰⁵ ICANN Bylaws [Ex. C-10].

¹⁰⁶ *Id.*, Art. I, § 2.6.

¹⁰⁷ *Id.*, Art. I, § 2.8.

of facts” before it.¹⁰⁸ The Board and the NGPC failed to exercise such due diligence in care by giving excessive deference to the GAC advice produced thanks to the efforts of DCA’s competitor, the AUC. In doing so, ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook, all of which provide that GAC advice is to have an advisory role relating to public policy matters, and not a decision-making role.¹⁰⁹

47. The gTLD Applicant Guidebook similarly includes the possibility that ICANN will reject the GAC advice following an investigation and consultation process.¹¹⁰ ICANN failed to give “duly taken into account”¹¹¹ to the Beijing GAC advice; instead, it simply adopted that advice wholesale. As such, ICANN also failed to “exercise independent judgment in taking the decision”¹¹² to accept the GAC advice and to put DCA’s application on hold. ICANN’s breaches in this regard include:

- Failing to take account of or respond to DCA’s concerns regarding the AUC GAC Early Warning;
- Ignoring protests of the Kenya representative that indicated that the Beijing GAC Advice was not consensus advice;
- Adopting the Beijing GAC Advice as if it were consensus advice, although it was not;
- Failing to investigate the questions raised about the Beijing GAC Advice;
- Failing to enter into discussions with the GAC when it provided its non-consensus advice, as required by the Guidebook;
- Failing to take account of the fact that both the AUC GAC Early Warning and the Beijing GAC Advice concerning .AFRICA were the product of DCA’s only competitor for the .AFRICA gTLD;

¹⁰⁸ *Id.*, Art. IV, § 3.4.b.

¹⁰⁹ *Id.*, Art. XI, § 2.1.a, j and k.

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

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

¹¹² *Id.*, Art. IV, § 3.4.c.

- Permitting an applicant for a new gTLD to use the GAC framework as a means of sabotaging the application of its only competitor; and
- Failing to give DCA an opportunity to provide further documentation of support for its application, as required by the Guidebook.

VII. RELIEF REQUESTED

48. Based on the foregoing, DCA respectfully requests that the Panel issue a declaration:

- Finding that ICANN breached its Articles of Incorporation, its Bylaws, the gTLD Applicant Guidebook, and its own stated policies on conflicts of interest, ethics, and the Board code of conduct;
- Requiring that ICANN permit DCA's application to proceed;
- Awarding DCA its costs in this proceeding; and
- Awarding such other relief as the Panel may find appropriate or DCA may request.

Respectfully submitted,

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

Arif H. Ali
Counsel for Claimant