

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DOTCONNECTAFRICA TRUST, ) ICDR CASE NO. 50 117 T 1083 13  
)  
Claimant, )  
)  
and )  
)  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
)  
Respondent. )  
\_\_\_\_\_)

**ICANN'S RESPONSE TO DCA'S MEMORIAL ON THE MERITS**

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## INTRODUCTION

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits this Response to the Memorial on the Merits (“Memorial”) submitted by claimant DotConnectAfrica Trust (“DCA”) submitted on 3 November 2014.

2. This Independent Review Process (“IRP”) arises out of DCA’s application for the “.AFRICA” generic top level domain (“gTLD”). Pursuant to ICANN’s New gTLD Applicant Guidebook (“Guidebook”),<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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

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<sup>1</sup> The Guidebook provides instructions to new gTLD applicants and forms the basis for ICANN’s evaluation of new gTLD applications. The current version of the Guidebook was published on 4 June 2012 following an extensive review process, which involved public comment on multiple drafts. *See* Guidebook, Preamble (Ex. C-11).

<sup>2</sup> *Id.*, § 2.2.1.4.2.

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

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")<sup>4</sup> 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,

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<sup>4</sup> The NPGC is a Board committee that has been delegated "all legal and decision making authority of the Board relating to the New gTLD Program (for the round of the Program, which commenced in January 2012 and for the related Applicant Guidebook that applies to this current round) as set forth in its Charter, which excludes those things the Board is prohibited from delegating by law, or pursuant to Article XII, Section 2 of the ICANN Bylaws." Board Resolution 2012.04.10.02 (Ex. C-R-7), *also available at* <https://features.icann.org/2012-04-10-establishment-new-gtld-program-committee>. Accordingly, any advice to the ICANN Board is advice to the NGPC, and if Board action is required, action by the NGPC may be considered Board action for purposes of these proceedings.

Pursuant to the Panel's Procedural Order No. 1, exhibits to this brief begin with "C-R-." Because the exhibit numbering is sequential, the first exhibit to this brief is "C-R-7." All citations to exhibits beginning with "R-" are citations to exhibits to ICANN's Response to DCA's Amended Notice of IRP ("Response"). All citations to exhibits beginning with "C-" are citations to exhibits to DCA's Amended Notice of IRP and Memorial on the Merits.

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.

7. DCA argues that the AUC's involvement in the process was inappropriate, but DCA has presented no facts to show that it was inappropriate. More importantly, the Guidebook does not prohibit such involvement. Indeed, no applicant for .AFRICA could have succeeded without significant support of the countries on the African continent, and the AUC, an intergovernmental organization, had no obligation whatsoever to remain neutral (and, as discussed below, DCA itself sought the AUC's endorsement). Nevertheless, DCA treats the AUC's decision to support ZACR as conspiratorial and somehow warranting the elimination of the Guidebook requirement that any .AFRICA application demonstrate the support of at least 60% of the governments on the continent. DCA's disappointment that it was not the successful applicant hardly indicates that ICANN's processes failed in some way.

8. DCA specifically objects to the GAC having issued consensus GAC Advice against DCA's application, and much of DCA's Memorial addresses the propriety of the GAC Advice. Although ICANN's Bylaws do not permit an IRP Panel to review the conduct

of the GAC, the facts demonstrate that the GAC’s conduct was fully consistent with its operating principles. Specifically, in order to prevent “consensus” GAC advice, only one government needs to voice its opposition to the proposed advice during the relevant GAC meeting. DCA cannot point to a single country that spoke up in support of DCA during the GAC meeting during which its .AFRICA application was discussed.

9. In light of this, DCA’s notice of independent review (“IRP Notice”)<sup>5</sup> relied solely on a snippet of a single email (that we now know was taken out of context) from DCA’s former chairman, Sammy Buruchara, who resigned his position as DCA’s chairman to become Kenya’s GAC advisor. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10. In the end, the African governments had the right to endorse whichever application for .AFRICA they chose, and to oppose any other application. The Guidebook specifically contemplates such an outcome. Frustrated with this result and unable to demonstrate that ICANN’s Board (or, in this case, the NGPC) violated any provision of the Bylaws or Articles, DCA now attempts in its Memorial to spin the facts to imply that ICANN staff acted improperly in evaluating ZACR’s application. Even if DCA’s allegations had merit (which they do not), the evaluation of ZACR’s application had no effect on DCA’s

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<sup>5</sup> The IRP Notice was an amended version of the notice DCA originally filed on 24 October 2013.

application. DCA’s application could not have prevailed because the NGPC accepted the consensus GAC Advice that DCA’s application should not proceed. Further, the actions of ICANN staff are not reviewable in any Independent Review proceeding—ICANN’s Bylaws explicitly restrict the scope of an Independent Review to actions of the ICANN Board (or NGPC acting on behalf of the Board).

### STANDARD OF REVIEW

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.<sup>6</sup> This IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN’s Bylaws or Articles.<sup>7</sup> 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?<sup>8</sup>

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

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<sup>6</sup> Bylaws, Art. IV, §§ 3.1, 3.2 (Ex. C-10).

<sup>7</sup> *See id.*, Art. IV, §§ 3.2, 3.4.

<sup>8</sup> *Id.*, Art. IV, § 3.4.

specify or imply that the [IRP] process provided for s[hould] (or s[hould] not) accord deference to the decisions of the ICANN Board.”<sup>9</sup> As DCA acknowledges, the version of ICANN’s Bylaws that apply to this proceeding are the version as amended in April 2013.<sup>10</sup> The current Bylaws provide for the deferential standard of review set forth above.

## ARGUMENT

### I. **THE BOARD PROPERLY ADVISED THE AFRICAN UNION’S MEMBER STATES OF THE GUIDEBOOK RULES REGARDING GEOGRAPHIC STRINGS.**

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”).<sup>11</sup> 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,<sup>12</sup> 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.”<sup>13</sup>

14. As DCA acknowledges, in response to the request in the Dakar Communiqué

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<sup>9</sup> *ICM v. ICANN*, Declaration of Review Panel ¶ 136 (Ex. C-12).

<sup>10</sup> See Memorial ¶ 30; IRP Notice ¶ 11 (referring to Bylaws as amended 11 April 2013 (Ex. C-10)); *see also* ICANN’s Memorandum on Procedural Issues ¶ 4; Board Resolution 2013.04.11.06 (Ex. C-R-8).

<sup>11</sup> Memorial ¶¶ 12-15.

<sup>12</sup> African ICT Ministerial Round-Table on 42<sup>nd</sup> Meeting of ICANN at 2-5 (Ex. C-22)

<sup>13</sup> *Id.* at 4.



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.”<sup>14</sup> 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.”<sup>15</sup>

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.<sup>16</sup> 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.”<sup>17</sup> Next, ICANN explained that the Guidebook provides an opportunity for the GAC, whose members

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<sup>14</sup> Memorial ¶ 13; Letter from S. Crocker to E. Ibrahim at 2 (Ex. C-24).

<sup>15</sup> Letter from S. Crocker to E. Ibrahim at 2 (Ex. C-24).

<sup>16</sup> Memorial ¶ 40.

<sup>17</sup> Letter from S. Crocker to E. Ibrahim at 2 (Ex. C-24); *see also* Guidebook § 2.2.1.4.2 (Ex. C-11).

include the AU member states, to provide “Early Warnings” to ICANN regarding specific gTLD applications.<sup>18</sup> 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.”<sup>19</sup> 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.<sup>20</sup> 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

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<sup>18</sup> Letter from S. Crocker to E. Ibrahim at 2 (Ex. C-24); *see also* Guidebook § 1.1.2.4 (Ex. C-11).

<sup>19</sup> Letter from S. Crocker to E. Ibrahim at 2 (Ex. C-24); *see also* Guidebook § 3.2.1 (Ex. C-11).

<sup>20</sup> Memorial ¶¶ 14, 29.

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."<sup>21</sup> 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.

## **II. THE NGPC DID NOT VIOLATE THE BYLAWS OR ARTICLES BY ACCEPTING THE GAC ADVICE.**

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

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<sup>21</sup> Bylaws, Art. XI, § 2.1.b (Ex. C-10). DCA argues that the only other multinational organization that is a voting member of the GAC, the European Commission ("EC"), is "fundamentally different" from the AUC. (Memorial ¶ 41.) DCA's opinion on this undoubtedly complex subject is irrelevant to this Independent Review, as the decision whether to grant the AUC the same status as the EC was within the sole discretion of the GAC (and not ICANN, much less the ICANN Board). Even so, it is odd that DCA, which presents itself as an advocate for the representation of the African continent in the Internet sphere, should object to the African community being granted the same representation as the European community in the GAC.

demonstrates that the NGPC’s decision to accept the GAC Advice—the only decision reviewable here—was appropriate in all aspects.

**A. The AUC and African GAC Members Properly Supported the .AFRICA Applicant Chosen through the RFP Process.**

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,<sup>22</sup> Mali, Morocco, Nigeria, Senegal, South Africa, Tanzania and Uganda—submitted GAC Early Warnings regarding DCA’s application.<sup>23</sup> 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.”<sup>24</sup> 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.<sup>25</sup> They further notified DCA that they did not believe that DCA had the requisite support of 60% of the countries on the African continent.<sup>26</sup>

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.”<sup>27</sup> DCA demonstrated the same dismissive

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<sup>22</sup> It is particularly telling that Kenya, which according to DCA opposed the GAC Advice, was one of the countries that submitted an Early Warning.

<sup>23</sup> See GAC Early Warnings (Ex. C-34). DCA argues that the Early Warnings looked similar or identical, suggesting coordination among the countries, but that would not have been improper. The fact is that each of the Early Warning notices was issued by those governments; their coordination would not have been surprising.

<sup>24</sup> Guidebook, § 1.1.2.4 (Ex. C-11.).

<sup>25</sup> See, e.g., GAC Early Warnings at 1 (Ex. C-34).

<sup>26</sup> See, e.g., *id.* at 2.

<sup>27</sup> Guidebook, § 1.1.2.4 (Ex. C-11) (emphasis added).

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).”<sup>28</sup>

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.”<sup>29</sup> 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.<sup>30</sup> 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.”<sup>31</sup>

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

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<sup>28</sup> DCA Response to GAC Early Warning Advice at 1 (Ex. C-35).

<sup>29</sup> *Id.* at 4-5.

<sup>30</sup> Bekele Decl. ¶¶ 31-34, 35.

<sup>31</sup> See AUC Endorsement Letter for DCA (Ex. C-16).

Abuja Declaration.<sup>32</sup> 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.”<sup>33</sup>

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.<sup>34</sup> The AUC notified DCA [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>36</sup>—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.<sup>37</sup> 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.<sup>38</sup>

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

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<sup>32</sup> 2010 Abuja Declaration (Ex. C-65).

<sup>33</sup> *Id.* at 3.

<sup>34</sup> “Expression of Interest for the Operation of DotAfrica” (Ex. C-R-9).

<sup>35</sup> [REDACTED] (Ex. C-R-10).

<sup>36</sup> *Id.*

<sup>37</sup> Ms. Bekele states that DCA did not participate in the RFP process because she personally had concerns about the process. (Bekele Decl. ¶¶ 66-81.) The Guidebook does not allow ICANN to police the process by which individual governments and public authorities decide which geographic name applicants (if any) to support. Nor would it be appropriate for ICANN to interfere with governmental authority in that matter, which is why ICANN did not act on Ms. Bekele’s repeated complaints about the AUC’s process.

<sup>38</sup> The Guidebook explicitly provides that governments and public authorities may “withdraw [their] support for an application at a later time.” Guidebook, § 2.2.1.4.3 (Ex. C-11).

instead of obtaining the necessary support of 60% of the countries on the African continent,<sup>39</sup> 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.

**B. The GAC Issued Consensus Advice Opposing DCA’s Application.**

28. At its 10 April 2013 meeting in Beijing, the GAC advised ICANN that DCA’s application for .AFRICA should not proceed.<sup>40</sup> 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.”<sup>41</sup> 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,<sup>42</sup> was present at the 10 April 2013 Beijing meeting and did not oppose the issuance of the consensus GAC Advice.<sup>43</sup>

29. DCA attempts to argue that the GAC Advice was not consensus advice and

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<sup>39</sup> The Guidebook does not prohibit governments from supporting more than one applicant for a particular geographic string. Guidebook, § 2.2.1.4.3 (Ex. C-11).

<sup>40</sup> GAC Beijing Communiqué at 3 (Ex. C-43).

<sup>41</sup> GAC Operating Principle 47 (Ex. C-44) (“The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.”).

<sup>42</sup> See GAC Operating Principle 14 (Ex. C-44) (“Members of the GAC shall be national governments, multinational governmental organisations and treaty organisations, and public authorities, each of which may appoint one representative and one alternate representative to the GAC. The accredited representative of a Member may be accompanied by advisers.”); GAC Operating Principle 16 (Ex. C-44) (“Accredited representatives of governments and other public authorities, Members of GAC, have voting rights.”)

<sup>43</sup> Dryden Decl. ¶¶ 12-13. Ms. Dryden recalls that Mr. Katundu attended the Beijing meeting but does not recall if he was in the room at the time GAC decided to issue the consensus advice. Presumably, had Mr. Katundu been concerned with objecting to the advice (which had been on the official agenda published several days earlier), he would have been present when it was discussed.

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),<sup>44</sup> the GAC’s Operating Principles require that votes on GAC advice be made in person.<sup>45</sup> 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.

30. 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.

31. [REDACTED]

[REDACTED]<sup>46</sup> [REDACTED]

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

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<sup>44</sup> Memorial at 25 n.110.

<sup>45</sup> Dryden Decl. ¶ 40.

<sup>46</sup> IRP Request ¶ 33.



32.

REDACTED

[REDACTED]

33. Notably, immediately prior to becoming Kenya’s GAC advisor,

Mr. Buruchara had served as the chairman of DCA’s Strategic Advisory Board.<sup>53</sup> 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.

<sup>47</sup> [REDACTED] (Ex. C-87).  
<sup>48</sup> [REDACTED] (Ex. C-87).  
<sup>49</sup> *Id.*  
<sup>50</sup> [REDACTED] (Ex. C-87).  
<sup>51</sup> [REDACTED] (Ex. C-87).  
<sup>52</sup> [REDACTED] (emphasis added)

(Ex. C-87).  
<sup>53</sup> See 14 March 2013 DCA Press Release, “Mr. Sammy Buruchara, Former Chairman of DCA Appointed as the Kenyan GAC Advisor to ICANN” (Ex. R-6).



Buruchara was not authorized by the Kenyan government to oppose the GAC Advice; (ii)

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(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.

36. 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).

**C. The NGPC Properly Accepted the Consensus GAC Advice.**

37. 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.”<sup>59</sup> 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.

38. 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

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<sup>59</sup> Guidebook § 3.1 (Ex. C-11).

was not consensus advice.<sup>60</sup> Second, DCA argues that the NGPC should have consulted an independent expert prior to accepting the advice.<sup>61</sup> 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).<sup>62</sup>

39. 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.<sup>63</sup> The applicant is given 21 days from the date of the publication of the advice to submit a response to the Board.<sup>64</sup> Those procedures were followed here. Upon receipt of the GAC Advice, ICANN posted the advice and provided DCA with an opportunity to respond.<sup>65</sup> DCA submitted a lengthy response explaining “[w]hy DCA Trust disagree[d]”<sup>66</sup> 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

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<sup>60</sup> Memorial ¶¶ 44-47.

<sup>61</sup> *Id.* ¶¶ 48-49.

<sup>62</sup> In its January 2014 IRP Notice, DCA argued that two NGPC members had alleged conflicts of interest, and that Independent Review was warranted because the Board “failed to follow its own procedures for handling alleged conflicts of interest.” (IRP Request ¶ 45.) In its Response, ICANN pointed out that that DCA did not identify what “procedures” ICANN supposedly failed to follow. (Response ¶ 28.) ICANN further noted that DCA had submitted its allegations to ICANN’s Ombudsman, who had investigated and concluded that there was “no disqualifying conflict of interest, or indeed any conflict of interest at all.” (*Id.* ¶ 29) ICANN also submitted the declaration of Cherine Chalaby, a member of ICANN’s Subcommittee on Ethics and Conflicts, who stated that the Subcommittee had investigated and had concluded that no conflicts existed. (*See* Chalaby Decl.) DCA does not respond to (or even cite) Mr. Chalaby’s declaration. Further, in responding to ICANN’s document requests, DCA confirmed that it had no further evidence regarding the alleged conflicts of interest. (14 September 2014 Letter from M. Weil to J. LeVeé at 2 (Ex. C-R-14); ICANN’s Document Requests, Request No. 5 (Ex. C-R-15).) Although Ms. Bekele references the alleged conflicts in her declaration, she presents no new evidence in support of her contentions that there were conflicts or the allegations of conflicts were not properly investigated. (Bekele Decl. ¶¶ 104-109.)

<sup>63</sup> Guidebook, § 3.1 (Ex. C-11).

<sup>64</sup> *Id.*

<sup>65</sup> <http://newgtlds.icann.org/en/applicants/gac-advice>.

<sup>66</sup> Response to GAC Advice at 2 (Ex. C-41).

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 . . . .”<sup>67</sup> 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.

40. 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.<sup>68</sup> 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 (v) 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.

41. The NGPC’s resolution accepting the GAC Advice states that the NGPC considered DCA’s response prior to accepting the GAC Advice,<sup>69</sup> and DCA presents no

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<sup>67</sup> *Id.* at 3, 15.

<sup>68</sup> *Id.* at 10-14.

<sup>69</sup> NGPC Resolution 2013.06.04.NG01 (Ex. R-1); *also available at* <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm>. DCA argues that, because the NGPC’s minutes of its 3 June 2013 do not provide details regarding its discussion about the GAC Advice, the Board did not consider DCA’s response to the GAC Advice. However, the NGPC’s rationale for its

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.

42. 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.<sup>70</sup>

43. 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.

## **II. THE NGPC PROPERLY DENIED DCA'S REQUEST FOR RECONSIDERATION.**

44. DCA argues that the NGPC improperly denied DCA's Reconsideration Request, which sought reconsideration of the NGPC's acceptance of the GAC Advice.<sup>71</sup> Reconsideration is an accountability mechanism available under ICANN's Bylaws and

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(continued...)

decision explicitly states that it did consider DCA's response.

<sup>70</sup> Guidebook, § 3.1 (C-11) (emphasis added).

<sup>71</sup> Reconsideration Request 13-4 (Ex. C-46).

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.”<sup>72</sup>

45. 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.

46. 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

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<sup>72</sup> Bylaws, Art. IV, § 2.2(b-c) (Ex. C-10).

recommendation to the NGPC. The NGPC then reviewed the BGC's recommendation and voted to accept it.<sup>73</sup> In short, the various Board committees conducted themselves exactly as ICANN's Bylaws require.

### **III. ICANN'S ACTIONS FOLLOWING THE ACCEPTANCE OF THE GAC ADVICE ARE NOT RELEVANT TO THIS IRP, AND IN ANY EVENT WERE NOT IMPROPER.**

47. 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.

#### **A. ICANN Staff Directed the ICC to Treat the Two .Africa Applications Consistently.**

48. DCA alleges that "ICANN staff worked with [the ICC] to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation."<sup>74</sup> DCA's argument is based on false and unsupported characterizations of the ICC's evaluation of the two .AFRICA applications.

49. First, DCA claims (without relevant citation) that ICANN determined that the

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<sup>73</sup> *Id.*, Art. IV, § 2.3.

<sup>74</sup> Memorial ¶ 35.



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50. The Guidebook provides that the Geographic Names Panel is responsible for “verifying the relevance and authenticity of supporting documentation.”<sup>77</sup> REDACTED

<sup>75</sup> *Id.*; see also *id.* ¶ 35 n.82.

<sup>76</sup> See REDACTED

(Ex. C-R-16); Exs. C-74, C-76, C-111.)

Guidebook, § 2.2.1.4.4.

<sup>78</sup> REDACTED

(Ex. C-68).

*Id.*

<sup>80</sup> *Id.* DCA disparages the ICC’s “experience [and] expertise in international affairs.” (Memorial at 8 n.38.) However, the fact that DCA disagrees with the ICC’s conclusions is not evidence that the ICC’s conclusions were incorrect, or that the ICC lacked the requisite experience.

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED<sup>81</sup>.

51. DCA also claims that ICANN determined that REDACTED

REDACTED REDACTED

REDACTED

REDACTED

REDACTED

REDACTED<sup>84</sup>

B. REDACTED

52. DCA argues that, after ICANN had stopped processing DCA's application,

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REDACTED

REDACTED the Guidebook contains

<sup>81</sup> See REDACTED

<sup>83</sup> REDACTED (Ex. C-70).

<sup>84</sup> REDACTED (Ex C-R-16).

REDACTED (Ex. C-R-18).)



54. 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.”<sup>91</sup> 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.”<sup>92</sup> 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.<sup>93</sup>

55. 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.

## CONCLUSION

56. 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

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<sup>91</sup> Memorial ¶ 56.

<sup>92</sup> *Id.* ¶ 55.

<sup>93</sup> The Guidebook anticipates that applicants will have the requisite support before the close of the Initial Evaluation Period and, if they do not, allows for 90 additional calendar days for applicants to obtain that support. (Guidebook, § 2.2.1.4.4 (C-11).)

.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.

57. 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.

58. 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.

Respectfully submitted,

Dated: December 3, 2014

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