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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION
13

14 DOTCONNECTAFRICA TRUST,
15 Plaintiff,
16 v.

17 INTERNET CORPORATION FOR
ASSIGNED NAMES AND
18 NUMBERS,
19 Defendant.

Case No. CV 16-00862-RGK
Assigned for all purposes to the
Honorable R. Gary Klausner
**DECLARATION OF AKRAM
ATALLAH IN SUPPORT OF
ICANN'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**
Hearing Date: April 4, 2016
Hearing Time: 9:00 a.m.
Hearing Location: Courtroom 850

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I, Akram Atallah declare the following:

1. I am the President, Global Domains Division, for the Internet Corporation for Assigned Names and Numbers (“ICANN”), a defendant in this action. I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s Opposition to DotConnectAfrica Trust’s (“DCA’s”) Motion for Preliminary Injunction.

ICANN and the New gTLD Program

2. ICANN is a California not-for-profit public benefit corporation. Pursuant to a series of agreements over the years with the United States Department of Commerce, ICANN oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community, ensuring the DNS’s continued security, stability, and integrity. As set forth in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems,” including the domain name system (“DNS”). ICANN’s Bylaws are attached as Exhibit 4 to the declaration of Sophia Bekele Eshete (“Eshete Decl.”). (Eshete Decl. Ex. 4 at 442-43 (Bylaws, Art. I, § 1).)

3. The essential function of the DNS is to convert numeric IP addresses into easily-remembered domain names that permit users to find specific websites, such as “USCOURTS.GOV” and “ICANN.ORG.” The “.GOV” and “.ORG” in these addresses, just like the more well-known “.COM,” are referred to as top-level domains (“TLDs”). ICANN is solely responsible for evaluating potential TLD operators and recommending that TLDs be added to the DNS. No government entity or regulatory scheme governs ICANN’s decisions in that respect.

4. Throughout its history, ICANN has sought to expand the number of accessible TLDs in the DNS in order to promote consumer choice and competition.

1 The New gTLD Program (“Program”), launched in 2012, constitutes by far
2 ICANN’s most ambitious expansion of the Internet’s naming system. The
3 Program’s goals include enhancing competition and consumer choice, and enabling
4 the benefits of innovation via the introduction of new gTLDs, including both new
5 ASCII gTLDs and new non-ASCII, internationalized domain name (“IDN”)
6 gTLDs. It resulted in 1,930 applications for new gTLDs, including DCA’s and ZA
7 Central Registry’s (“ZACR’s”) applications for the .AFRICA gTLD.

8 5. A number of “Advisory Committees” advise ICANN’s Board on
9 various topics described in the ICANN Bylaws. The Governmental Advisory
10 Committee of ICANN has members composed of national governments and distinct
11 economies as recognized in international fora, including the United States, and its
12 purpose is to “consider and provide advice on the activities of ICANN as they relate
13 to concerns of governments, particularly matters where there may be an interaction
14 between ICANN’s policies and various laws and international agreements or where
15 they may affect public policy issues.” (Eshete Decl. Ex. 4 at 496-97 (Bylaws, Art.
16 XI, § 2.1).)

17 **ICANN’s Accountability Mechanisms**

18 6. ICANN’s Bylaws provide for several accountability mechanisms to
19 ensure that ICANN operates in accordance with its Articles of Incorporation,
20 Bylaws, policies and procedures. (See Eshete Decl. Ex. 4 at 448-60 (Bylaws, Arts.
21 IV, V).) For example, an aggrieved applicant can file a “request for
22 reconsideration,” which is a mechanism that asks the ICANN Board to re-evaluate
23 certain Board or staff actions and inactions that the applicant believes have harmed
24 it. (*Id.* at 448-53 (Bylaws, Art. IV, § 2).) In addition, an aggrieved applicant can
25 file a “request for independent review,” a unique process set forth in ICANN’s
26 Bylaws that asks independent panelists to evaluate whether an action of ICANN’s
27 Board was consistent with ICANN’s Articles of Incorporation and Bylaws. (*Id.* at
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1 453-57 (Bylaws, Art. IV, § 3).)

2 7. The current version of ICANN’s Bylaws—like the version in effect at
3 the time new gTLD applications were submitted—provides for the IRP panel to
4 issue a written determination “declar[ing] whether an action or inaction of the
5 Board was inconsistent with the Articles of Incorporation or Bylaws” and
6 “recommend[ing] that the Board stay any action or decision, or that the Board take
7 any interim action, until such time as the Board reviews and acts upon the opinion
8 of the IRP.” (Eshete Decl. Ex. 4 at 455 (Bylaws, Art. IV, § 3.11).) The ICANN
9 Board then considers and acts on the determination. (*Id.* at 456 (Bylaws, Art. IV, §
10 3.21.)

11 8. I am informed and believe that prior to the opening of the gTLD
12 Program application period, only one IRP had resulted in a written determination,
13 *ICM Registry, LLC v. ICANN*. The *ICM* panel declared that the determinations of
14 IRP panels were not binding on ICANN’s Board. Attached hereto as Exhibit A is a
15 true and correct copy of an excerpt of the final declaration of the *ICM* Panel.

16 9. To my knowledge, ICANN has never represented that IRPs are
17 binding. Instead, ICANN has consistently argued that IRP declarations are not
18 binding, and I understand that all but one IRP panel (the panel in the *DCA v.*
19 *ICANN* IRP (“*DCA* Panel”)) have agreed.

20 10. In the case of the *DCA* IRP, the *DCA* Panel declared that its decision
21 would be binding on ICANN’s Board. But, most importantly, the question of
22 whether the Panel’s declaration was or was not legally binding became a moot issue
23 once ICANN’s Board elected to adopt all of the *DCA* Panel’s recommendations,
24 contrary to the representations in Plaintiff’s motion for preliminary injunction and
25 TRO application.

26 11. Specifically, on July 9, 2015, the *DCA* Panel issued its final
27 declaration. The *DCA* Panel determined that ICANN’s Board had violated
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ICANN’s Articles of Incorporation and Bylaws by accepting the GAC’s consensus advice that Plaintiff’s application for .AFRICA (“Application”) should not proceed. The Panel therefore recommended that “ICANN continue to refrain from delegating the .AFRICA gTLD and permit [Plaintiff]’s application to proceed through the remainder of the new gTLD application process.” (Eshete Decl. Ex. 1 at 61-62 ¶ 149.)

12. As it has done with every IRP declaration to date, ICANN’s Board promptly considered and adopted each of the *DCA* Panel’s recommendations. Specifically, on July 16, 2015, the Board resolved to “continue to refrain from delegating the .AFRICA gTLD,” “permit [Plaintiff’s] application to proceed through the remainder of the new gTLD application process,” and “reimburse DCA for the costs of the IRP.” Attached hereto as Exhibit B is a true and correct copy of ICANN Board Resolutions 2015.07.16.01-05, adopting the *DCA* Panel’s recommendations.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 10, 2016, in Marrakech, Morocco.



Akram Atallah

EXHIBIT A

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 50 117 T 00224 08

In the Matter of an Independent Review Process:

ICM REGISTRY, LLC,

Claimant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES
AND NUMBERS ("ICANN"),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

Judge Stephen M. Schwebel, *Presiding*
Mr. Jan Paulsson
Judge Dickran Tevrizian

February 19, 2010

130. As to whether ICM was treated unfairly and was the object of discrimination, ICANN relies on the following statement of Dr. Cerf at the hearing:

“...I am surprised at an assertion that ICM was treated unfairly...the board could have simply accepted the recommendations of the evaluation teams and rejected the proposal at the outset...the board went out of its way to try to work with ICM through the staff to achieve a satisfactory agreement. We spent more time on this particular proposal than any other...We repeatedly defended our continued consideration of this proposal...If...ICM believes that it was treated in a singular way, I would agree that we spent more time and effort on this than any other proposal that came to the board with regard to sponsored TLDs.” (Tr. 654:3-655:7.)

PART FOUR: THE ANALYSIS OF THE INDEPENDENT REVIEW PANEL

The Nature of the Independent Review Panel Process

131. ICM and ICANN differ on the question of whether the Declaration to be issued by the Independent Review Panel is binding upon the parties or advisory. The conflicting considerations advanced by them are summarized above at paragraphs 51 and 91-94. In the light of them, the Panel acknowledges that there is a measure of ambiguity in the pertinent provisions of the Bylaws and in their preparatory work.

132. ICANN's officers testified before committees of the U.S. Congress that ICANN had installed provision for appeal to “independent arbitration” (*supra*, paragraph 55). Article IV, Section 3 of ICANN's Bylaws specifies that, “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider”. The provider so chosen is the American Arbitration Association's International Centre for Dispute Resolution (“ICDR”), whose Rules (at C-11) in Article 27 provide for the making of arbitral awards which “shall be final and binding on the parties. The parties undertake to carry out any such award without delay.” The Rules of the ICDR “govern the arbitration” (Article 1). It is unquestioned that the term, “arbitration” imports production of a binding award (in contrast to conciliation and mediation). Federal and California courts have so held. The Supplementary Procedures adopted to supplement the independent review procedures set forth in ICANN's Bylaws provide that the ICDR's “International Arbitration Rules...will govern the process in combination with these Supplementary Procedures”. (C-12.) They specify

that the Independent Review Panel refers to the neutrals “appointed to decide the issue(s) presented” and further specify that, “DECLARATION refers to the decisions/opinions of the IRP”. “The DECLARATION shall specifically designate the prevailing party.” All of these elements are suggestive of an arbitral process that produces a binding award.

133. But there are other indicia that cut the other way, and more deeply. The authority of the IRP is “to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” – to “declare”, not to “decide” or to “determine”. Section 3(8) of the Bylaws continues that the IRP shall have the authority to “recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP”. The IRP cannot “order” interim measures but do no more than “recommend” them, and this until the Board “reviews” and “acts upon the opinion” of the IRP. A board charged with reviewing an opinion is not charged with implementing a binding decision. Moreover, Section 3(15) provides that, “Where feasible, the Board shall consider the IRP declaration at the Board’s next meeting.” This relaxed temporal proviso to do no more than “consider” the IRP declaration, and to do so at the next meeting of the Board “where feasible”, emphasizes that it is not binding. If the IRP’s Declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on “Form and Effect of an IRP Declaration”, significantly omit the provision of Article 27 of the ICDR Rules specifying that award “shall be final and binding on the parties”. (C-12.) Moreover, the preparatory work of the IRP provisions summarized above in paragraph 93 confirms that the intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.

134. In the light of the foregoing considerations, it is concluded that the Panel’s Declaration is not binding, but rather advisory in effect.

The Standard of Review Applied by the Independent Review Process

135. For the reasons summarized above in paragraph 56, ICM maintains that this is a *de novo* review in which the decisions of the ICANN Board do not enjoy a deferential standard of review. For the reasons summarized above in paragraphs 100-103, ICANN maintains that the decisions of the Board are entitled to deference by the IRP.

EXHIBIT B

[English \(/translations\)](#) [العربية \(/ar\)](#) [Español \(/es\)](#)

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Resources

▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)
(/resources/pages/welcome-2012-02-25-en)

▶ [Board](#)
(/resources/pages/board-of-directors-2014-03-19-en)

▶ [Accountability](#)
(/resources/accountability)

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(/resources/pages/groups-2012-02-06-en)

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▶ [Registrars](#)

Approved Board Resolutions | Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

This page is available in:

English | [العربية \(http://www.icann.org/resources/board-material/resolutions-2015-07-16-ar\)](#) | [Español \(http://www.icann.org/resources/board-material/resolutions-2015-07-16-es\)](#) | [Français \(http://www.icann.org/resources/board-material/resolutions-2015-07-16-fr\)](#) | [Русский \(http://www.icann.org/resources/board-material/resolutions-2015-07-16-ru\)](#) | [中文 \(http://www.icann.org/resources/board-material/resolutions-2015-07-16-zh\)](#)

16 Jul 2015

1. [Main Agenda](#)

a. [DotConnectAfrica Trust \(DCA\) v. ICANN \(Internet Corporation for Assigned Names and Numbers\) IRP Final Declaration](#)

Rationale for Resolutions 2015.07.16.01 – 2015.07.16.05

1. Main Agenda

a. [DotConnectAfrica Trust \(DCA\) v. ICANN \(Internet Corporation for Assigned Names and Numbers\) IRP Final Declaration](#)

Whereas, on 9 July 2015, an independent review panel ("Panel") issued a final Declaration ("Declaration") in the independent review proceedings (IRP) initiated by DotConnectAfrica Trust (DCA), in which DCA sought relief relating to Board action or inaction on its application for .AFRICA.

(/resources/pages/registrars-0d-2012-02-25-en)

- ▶ Registries
(/resources/pages/registries-46-2012-02-25-en)

Operational Metrics
(/resources/pages/metrics-gdd-2015-01-30-en)

- ▶ Identifier Systems Security, Stability (Security, Stability and Resiliency) and Resiliency (IS-SSR)
(/resources/pages/is-ssr-2014-11-24-en)

- ▶ ccTLDs
(/resources/pages/cctlds-21-2012-02-25-en)

- ▶ Internationalized Domain Names
(/resources/pages/idn-2012-02-25-en)

- ▶ Universal Acceptance Initiative
(/resources/pages/universal-acceptance-2012-02-25-en)

- ▶ Policy
(/resources/pages/policy-01-2012-02-25-en)

- ▶ Public Comment
(/public-comments)

- ▶ Technical Functions
(/resources/pages/technical-functions-2015-10-15-en)

- ▶ Contact
(/resources/pages/contact-2012-02-06-en)

- ▶ Help
(/resources/pages/help-2012-02-03-en)

Whereas, in the Declaration, the Panel set forth the following:

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

149. Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, the Panel recommends that ICANN (Internet Corporation for Assigned Names and Numbers) continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain) and permit DCA Trust's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application process.

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

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

151. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN (Internet Corporation for Assigned Names and Numbers) shall each bear their own expenses. The parties shall also each bear their own legal representation fees.

Whereas, the independent review process is an integral ICANN (Internet

Corporation for Assigned Names and Numbers) accountability mechanism that helps support ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder model, and the Board thanks the Panel for its efforts in this IRP, and would like to specifically honor the memory of former panelist Hon. Richard C. Neal, who passed away during the proceedings.

Whereas, in addition to the Declaration, the Board must also take into account other relevant information, including but not limited to: (i) that ICANN (Internet Corporation for Assigned Names and Numbers) received and accepted GAC (Governmental Advisory Committee) consensus advice that DCA's application for .AFRICA should not proceed; and (ii) that ICANN (Internet Corporation for Assigned Names and Numbers) has a signed Registry Agreement with ZA Central Registry ("ZACR") to operate the .AFRICA top-level domain.

Whereas, pursuant to Article IV, Section 3.21 of the Board considered the Declaration at the Board's next meeting, which the Board specifically scheduled in order to take action on this matter as quickly as possible.

Resolved (2015.07.15.01), the Board has considered the entire Declaration, and has determined to take the following actions based on that consideration:

1. ICANN (Internet Corporation for Assigned Names and Numbers) shall continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain);
2. ICANN (Internet Corporation for Assigned Names and Numbers) shall permit DCA's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application process as set out below; and
3. ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

Resolved (2015.07.16.02), since the Board is not making a final determination at this time as to whether DCA's application for .AFRICA should proceed to contracting or delegation, the Board does not consider that resuming evaluation of DCA's application is action that is inconsistent with GAC (Governmental Advisory Committee) advice.

Resolved (2015.07.16.03), the Board directs the President and CEO, or his designee(s), to take all steps necessary to resume the evaluation of DCA's application for .AFRICA and to ensure that such evaluation proceeds in accordance with the established process(es) as quickly as possible (see Applicant Guidebook at <http://newgtlds.icann.org/en/applicants/agb> (<http://newgtlds.icann.org/en/applicants/agb>) for established processes).

Resolved (2015.07.16.04), with respect to the GAC (Governmental Advisory Committee)'s consensus advice in the Beijing Communiqué that DCA's application for .AFRICA should not proceed, which was confirmed in the London Communiqué, the Board will ask the GAC (Governmental Advisory Committee) if it wishes to refine that advice and/or provide the Board with further information regarding that advice and/or otherwise address the concerns raised in the Declaration.

Resolved (2015.07.16.05), in the event that DCA's application for .AFRICA successfully passes the remainder of the evaluation process, at that time or before, the Board will consider any further advice or information received from the GAC (Governmental Advisory Committee), and proceed as necessary, balancing all of the relevant material information and circumstances. Should the Board undertake any action that may be inconsistent with the GAC (Governmental Advisory Committee)'s advice, the Board will follow the established process set out in the Bylaws (see ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, Article XI, Section 2.1).

Rationale for Resolutions 2015.07.16.01 – 2015.07.16.05

On 24 October 2013, DotConnectAfrica Trust (DCA) initiated an independent review proceeding (IRP) against ICANN (Internet Corporation for Assigned Names and Numbers), and filed a notice of independent review with the International Centre for Dispute Resolution (ICDR), ICANN (Internet Corporation for Assigned Names and Numbers)'s chosen IRP provider. In the IRP proceedings, DCA challenged the 4 June 2013 decision of the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC), which was delegated authority from the Board to make decisions regarding the New gTLD (generic Top Level Domain) Program. In that decision, the NGPC accepted advice from ICANN (Internet Corporation for Assigned Names and Numbers)'s Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) that DCA's application for .AFRICA should not proceed.

On 9 July 2015, the IRP Panel (Panel) issued its Final Declaration (Declaration or Decl.). The Panel cited two main concerns relating to the GAC (Governmental Advisory Committee)'s advice on DCA's application: (1) the Panel was concerned that the GAC (Governmental Advisory Committee) did not include, and that ICANN (Internet Corporation for Assigned Names and Numbers) did not request, a rationale on the GAC (Governmental Advisory Committee)'s advice; and (2) the Panel expressed concern that ICANN (Internet Corporation for Assigned Names and Numbers) took action on the GAC (Governmental Advisory Committee)'s advice without conducting diligence on the level of transparency and the manner in which the advice was developed by the GAC (Governmental Advisory Committee). The Panel found that ICANN (Internet Corporation for Assigned Names and Numbers)'s conduct was inconsistent with the ICANN (Internet Corporation for Assigned Names and Numbers) Articles and Bylaws because of certain actions and inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

As provided in [Article IV \(/resources/pages/governance/bylaws-en/#IV\)](#), Section 3 of the Bylaws, any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. The Panel is charged with comparing the contested Board actions to the Articles of Incorporation and Bylaws, and declaring whether the Board acted consistently with the provisions of those Articles of Incorporation and Bylaws. The Panel must apply a defined standard of review to the IRP request focusing on:

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

After the Panel issues its final Declaration, the Board is then required to consider the Declaration at its next meeting (where feasible). Pursuant to Article IV, Section 3.21 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board has considered and discussed the Declaration and is taking action to: (1) continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain); (2) permit DCA's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application process; and (3) reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

Additionally, the Board will communicate with the GAC (Governmental Advisory Committee) and attempt to ascertain whether the GAC (Governmental Advisory Committee) wishes to refine its advice concerning DCA's application for .AFRICA and/or provide the Board with further information regarding that advice and/or otherwise address the concerns raised in the Declaration. The Board will consider any response the GAC (Governmental Advisory Committee) may choose to provide, and proceed as necessary, balancing all of the relevant material information and circumstances. Should the Board undertake any action that may be inconsistent with the GAC (Governmental Advisory Committee)'s advice, the Board will follow the established processes set out in the Bylaws. As required by the Bylaws, if the Board decides to take an action that is not consistent with the GAC (Governmental Advisory Committee) advice, it must inform the GAC (Governmental Advisory Committee) and state the reasons why it decided not to follow the advice. The Board and the GAC (Governmental Advisory Committee) will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC (Governmental Advisory Committee) advice was not followed.

The Board's action represents a careful balance, weighing the opinion of the Panel, as well as other significant factors discussed in this rationale. In taking this action today, each of the Board members exercised independent judgment, was not conflicted on this matter, and believes that this decision is in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers). The Board considered several significant factors as part of its consideration of the Declaration and had to balance its consideration with other factors. Among the factors the Board considered to be significant are the following:

1. The IRP is an integral ICANN (Internet Corporation for Assigned Names and Numbers) accountability mechanism that helps support ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder model. The Board considers the principles found in ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms to be fundamental safeguards in ensuring that ICANN (Internet Corporation for Assigned Names and Numbers)'s bottom-up, multistakeholder model remains effective, and ICANN (Internet Corporation

for Assigned Names and Numbers) achieves its accountability and transparency mandate. The Board has carefully considered the Declaration, and in taking its action the Board, as did the Panel, takes specific note of the following regarding the independent review process and its obligations for accountability and transparency:

- ICANN (Internet Corporation for Assigned Names and Numbers) is bound by its own Articles of Incorporation to act fairly, neutrally, non-discriminatorily and to enable competition. (Decl. ¶ 94.)
 - ICANN (Internet Corporation for Assigned Names and Numbers) is also bound by its own Bylaws to act and make decisions "neutrally and objectively, with integrity and fairness." (Decl. ¶ 95.)
 - As set out in Article IV (Accountability and Review) of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, in carrying out its mission as set out in its Bylaws, ICANN (Internet Corporation for Assigned Names and Numbers) should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of the Bylaws. (Decl. ¶ 97.)
2. ICANN (Internet Corporation for Assigned Names and Numbers) has a signed Registry Agreement with ZA Central Registry NPC trading as Registry.Africa (ZACR) under which ZACR is authorized to operate the .AFRICA top-level domain. Parties affected by these resolutions have had, and may continue to have, the ability to challenge or otherwise question DCA's application through the evaluation and other processes.
 3. The Board considered the community-developed processes in the New gTLD (generic Top Level Domain) Program Applicant Guidebook (Guidebook). According to Section 3.1 of the Guidebook, the GAC (Governmental Advisory Committee) may provide public policy advice to the ICANN (Internet Corporation for Assigned Names and Numbers) Board on any application, which the Board must consider. When the GAC (Governmental Advisory Committee) advises ICANN (Internet Corporation for Assigned Names and Numbers) that it is the consensus of the GAC (Governmental Advisory Committee) that a particular application should not proceed, it "will create a strong presumption for the ICANN (Internet Corporation for Assigned Names and Numbers) Board that the application should not be approved." In its 11 April 2013 Beijing Communiqué, the GAC (Governmental Advisory Committee) stated (<https://gacweb.icann.org/display/GACADV/2013-04-11-Obj-Africa>) it had reached consensus on GAC (Governmental Advisory Committee) Objection Advice for .AFRICA application number 1-1165-42560, thereby creating a strong presumption for the ICANN (Internet Corporation for Assigned Names and Numbers) Board that this application should not proceed through the program. Additionally, in its 25 June 2014 London Communiqué, the GAC (Governmental Advisory Committee) stated (<https://gacweb.icann.org/display/GACADV/2014-06-25+.africa>) that "Consistent with the new gTLD (generic Top Level Domain) applicant guidebook, the GAC (Governmental Advisory Committee) provided consensus advice articulated in the April 11 2013 communiqué that the

DotConnectAfrica (DCA) application number 1-1165-42560 for dot Africa should not proceed. The GAC (Governmental Advisory Committee) welcomes the June 2013 decision by the New gTLD (generic Top Level Domain) Program Committee to accept GAC (Governmental Advisory Committee) advice on this application."

The Guidebook does not require the Board to engage the GAC (Governmental Advisory Committee) in a dialogue about its advice when consensus has been reached, or question the GAC (Governmental Advisory Committee) how such consensus was reached. The acceptance of the GAC (Governmental Advisory Committee) advice on this matter was fully consistent with the Guidebook. Notably, however, the Board has requested additional information from the GAC (Governmental Advisory Committee) when the Board thought it needed more information before taking a decision, both before and during the New gTLD (generic Top Level Domain) Program. Here, the NGPC did not think it required additional information from the GAC (Governmental Advisory Committee). Further, in addition to the GAC (Governmental Advisory Committee) advice, the Board also had DCA's response to that advice, which the NGPC considered before accepting the GAC (Governmental Advisory Committee) advice. Notwithstanding the Guidebook, the Panel has suggested that, ". . . the GAC (Governmental Advisory Committee) made its decision without providing any rationale . . ." (Decl. ¶ 104), and ". . . the Panel would have expected the ICANN (Internet Corporation for Assigned Names and Numbers) Board to, at a minimum, investigate the matter further before rejecting DCA Trust's application." (Decl. ¶ 113).

4. The Board considered Section 5.1 of the Guidebook, which provides that, "ICANN (Internet Corporation for Assigned Names and Numbers)'s Board of Directors has ultimate responsibility for the New gTLD (generic Top Level Domain) Program. The Board reserves the right to individually consider an application for a new gTLD (generic Top Level Domain) to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD (generic Top Level Domain) application. For example, the Board might individually consider an application as a result of GAC (Governmental Advisory Committee) Advice on New gTLDs or of the use of an ICANN (Internet Corporation for Assigned Names and Numbers) accountability mechanism."

On balance, the Board has determined that permitting DCA's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application evaluation process is the best course of action at this time. Doing so helps promote ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to make a decision concerning DCA's application for .AFRICA by applying documented procedures in the most transparent, neutral and objective manner possible, while also recognizing the importance of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms. Completion of the application evaluation would allow DCA's application to undergo the same review processes as other gTLD (generic Top Level Domain) applicants, and is not inconsistent with the GAC (Governmental Advisory Committee)'s advice. Further,

completing the evaluation will provide additional relevant information for ICANN (Internet Corporation for Assigned Names and Numbers) to consider as part of any final determination as to whether DCA's application for .AFRICA should proceed beyond initial evaluation.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) in taking this decision in that resuming the evaluation process for DCA's application for .AFRICA will result in additional cost, but that cost was anticipated in the application fee already received. The Board directs the President and CEO to re-engage the evaluation processes for DCA's application as quickly as possible, and to strongly encourage any third-party providers charged with performing the relevant New gTLD (generic Top Level Domain) Program evaluations and analysis also to act as quickly as possible in concluding their evaluations in accordance with the established processes and procedures in the Guidebook.

There may also be additional costs to ICANN (Internet Corporation for Assigned Names and Numbers) the extent any party challenges this decision. This action will have no impact on the security, stability or resiliency of the domain name system.

The significant materials related to the matters at issue in the Determination include, but are not limited to the following:

- Dakar Communiqué (27 October 2011)
 (<https://gacweb.icann.org/download/attachments/27132037/Communique%20Da%2027%20October%202011.pdf?version=1&modificationDate=1323819889000&api=v2>)
 (<https://gacweb.icann.org/download/attachments/27132037/Communique%20Da%2027%20October%202011.pdf?version=1&modificationDate=1323819889000&api=v2>)
- Letter from Stephen Crocker to Elham M.A. Ibrahim
 (<https://www.icann.org/en/system/files/correspondence/crocker-to-ibrahim-08mar12-en.pdf> (/en/system/files/correspondence/crocker-to-ibrahim-08mar12-en.pdf))
- African Union Communiqué (<https://www.icann.org/resources/files/african-union-communicue-2011-10-21-en> (/resources/files/african-union-communicue-2011-10-21-en))
- DotConnectAfrica Trust's application for .AFRICA
 (<https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1276?t:ac=1276> (<https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1276?t:ac=1276>))
- ZACR's application for .AFRICA (<https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1184?t:ac=1184> (<https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1184?t:ac=1184>))

- Letter from Heather Dryden to Stephen Crocker (17 June 2012) re: Processing of Applications for New Generic TopLevel Domain (<https://www.icann.org/en/news/correspondence/dryden-to-crocker-17jun12-en> (/en/news/correspondence/dryden-to-crocker-17jun12-en))
- Letter from Stephen Crocker to Heather Dryden (27 July 2012) re: Processing of applications for New Generic Top-Level Domains (<http://www.icann.org/en/system/files/correspondence/crocker-to-dryden-27jul12-en.pdf> (<http://www.icann.org/en/system/files/correspondence/crocker-to-dryden-27jul12-en.pdf>))
- GAC (Governmental Advisory Committee) Early Warnings filed against DCA's application for .AFRICA
 - African Union Commission: <https://gacweb.icann.org/download/attachments/27131927/Africa-AUC-42560.pdf?version=1&modificationDate=1353382039000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-AUC-42560.pdf?version=1&modificationDate=1353382039000&api=v2>)
 - Comoros: <https://gacweb.icann.org/download/attachments/27131927/Africa-KM-42560.pdf?version=1&modificationDate=1353384893000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-KM-42560.pdf?version=1&modificationDate=1353384893000&api=v2>)
 - Kenya: <https://gacweb.icann.org/download/attachments/27131927/Africa-KE-42560.pdf?version=1&modificationDate=1353389367000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-KE-42560.pdf?version=1&modificationDate=1353389367000&api=v2>)
 - Cameroon: <https://gacweb.icann.org/download/attachments/27131927/Africa-CM-42560.pdf?version=1&modificationDate=1353430788000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-CM-42560.pdf?version=1&modificationDate=1353430788000&api=v2>)
 - DRC: <https://gacweb.icann.org/download/attachments/27131927/Africa-CD-42560.pdf?version=2&modificationDate=1353432869000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-CD-42560.pdf?version=2&modificationDate=1353432869000&api=v2>)
 - Benin: <https://gacweb.icann.org/download/attachments/27131927/Africa-BJ-42560.pdf?version=1&modificationDate=1353433003000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-BJ-42560.pdf?version=1&modificationDate=1353433003000&api=v2>)
 - Egypt: <https://gacweb.icann.org/download/attachments/27131927/Africa-EG-1-42560.pdf?version=1&modificationDate=1353378092000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-EG-1-42560.pdf?version=1&modificationDate=1353378092000&api=v2>)
 - Gabon: [https://gacweb.icann.org/download/attachments/27131927/Africa-GA \(General Assembly Mailing List\)-42560.pdf?version=1&modificationDate=1353451525000&api=v2](https://gacweb.icann.org/download/attachments/27131927/Africa-GA (General Assembly Mailing List)-42560.pdf?version=1&modificationDate=1353451525000&api=v2)

<https://gacweb.icann.org/download/attachments/27131927/Africa-GA-42560.pdf?version=1&modificationDate=1353451525000&api=v2>

- Burkina Faso: <https://gacweb.icann.org/download/attachments/27131927/Africa-BF-42560.pdf?version=1&modificationDate=1353451829000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-BF-42560.pdf?version=1&modificationDate=1353451829000&api=v2>
- Ghana: <https://gacweb.icann.org/download/attachments/27131927/Africa-GH-42560.pdf?version=1&modificationDate=1353451997000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-GH-42560.pdf?version=1&modificationDate=1353451997000&api=v2>
- Mali: <https://gacweb.icann.org/download/attachments/27131927/Africa-ML-42560.pdf?version=1&modificationDate=1353452174000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-ML-42560.pdf?version=1&modificationDate=1353452174000&api=v2>
- Uganda: <https://gacweb.icann.org/download/attachments/27131927/Africa-UG-42560.pdf?version=1&modificationDate=1353452442000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-UG-42560.pdf?version=1&modificationDate=1353452442000&api=v2>
- Senegal: <https://gacweb.icann.org/download/attachments/27131927/Africa-SN-42560.pdf?version=1&modificationDate=1353452452000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-SN-42560.pdf?version=1&modificationDate=1353452452000&api=v2>
- South Africa: <https://gacweb.icann.org/download/attachments/27131927/Africa-ZA-89583.pdf?version=1&modificationDate=1353452595000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-ZA-89583.pdf?version=1&modificationDate=1353452595000&api=v2>
- Nigeria: <https://gacweb.icann.org/download/attachments/27131927/Africa-NG-2-42560.pdf?version=1&modificationDate=1353378092000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-NG-2-42560.pdf?version=1&modificationDate=1353378092000&api=v2>
- Tanzania: <https://gacweb.icann.org/download/attachments/27131927/Africa-TZ-42560.pdf?version=1&modificationDate=1353452982000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-TZ-42560.pdf?version=1&modificationDate=1353452982000&api=v2>
- DCA Response to GAC (Governmental Advisory Committee) Early Warning
[http://www.dotconnectafrica.org/wp-content/uploads/2012/12/Response-to-the-ICANN-\(Internet-Corporation-for-Assigned-Names-and-Numbers\)-GAC-\(Governmental-Advisory-Committee\)-Early-Warning-Advice-against-the-.Africa-Application-Submitted-by-DotConnectAfrica-Trust.pdf](http://www.dotconnectafrica.org/wp-content/uploads/2012/12/Response-to-the-ICANN-(Internet-Corporation-for-Assigned-Names-and-Numbers)-GAC-(Governmental-Advisory-Committee)-Early-Warning-Advice-against-the-.Africa-Application-Submitted-by-DotConnectAfrica-Trust.pdf)
[http://www.dotconnectafrica.org/wp-content/uploads/2012/12/Response-to-the-ICANN-\(Internet-Corporation-for-Assigned-Names-and-Numbers\)-GAC-\(Governmental-Advisory-Committee\)-Early-Warning-Advice-against-the-.Africa-Application-Submitted-by-DotConnectAfrica-Trust.pdf](http://www.dotconnectafrica.org/wp-content/uploads/2012/12/Response-to-the-ICANN-(Internet-Corporation-for-Assigned-Names-and-Numbers)-GAC-(Governmental-Advisory-Committee)-Early-Warning-Advice-against-the-.Africa-Application-Submitted-by-DotConnectAfrica-Trust.pdf)

[the-ICANN-GAC-Early-Warning-Advice-against-the-Africa-Application-Submitted-by-DotConnectAfrica-Trust.pdf](#))

- GAC (Governmental Advisory Committee) Beijing Communiqué (11 April 2013) (<https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf> ([/en/system/files/correspondence/gac-to-board-11apr13-en.pdf](#)))
- DCA Response to GAC (Governmental Advisory Committee) Advice in Beijing Communiqué (<http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1165-42560-en.pdf> (<http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1165-42560-en.pdf>))
- NGPC Resolution 2014.06.04.NG01 (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a> ([/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a](#)))
- The NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC (Governmental Advisory Committee) Beijing Communiqué (4 June 2013) (<https://www.icann.org/en/groups/board/documents/new-gtld-resolution-annex-1-04jun13-en.pdf> ([/en/groups/board/documents/resolutions-new-gtld-annex-1-04jun13-en.pdf](#)))
- DCA Trust Reconsideration Request 13-4 and attachments (<https://www.icann.org/en/groups/board/governance/reconsideration/13-4/request-dca-trust-19jun13-en.pdf> ([/en/groups/board/governance/reconsideration/13-4/request-dca-trust-19jun13-en.pdf](#)))
- BGC Recommendation on Reconsideration Request 13-14 (<https://www.icann.org/en/groups/board/governance/reconsideration/13-4/recommendation-dca-trust-01aug13-en.pdf> ([/en/groups/board/governance/reconsideration/13-4/recommendation-dca-trust-01aug13-en.pdf](#)))
- NGPC Action Adopting BGC Recommendation on Reconsideration Request 13-4 (<https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13aug13-en.htm#1.c> ([/en/groups/board/documents/resolutions-new-gtld-13aug13-en.htm#1.c](#)))
- GAC (Governmental Advisory Committee) London Communiqué (25 June 2014) (<https://www.icann.org/en/system/files/correspondence/gac-to-board-25jun14-en.pdf> ([/en/system/files/correspondence/gac-to-board-25jun14-en.pdf](#)))
- DCA Response to GAC (Governmental Advisory Committee) Advice in London Communiqué (<http://newgtlds.icann.org/sites/default/files/applicants/11aug14/gac-advice-response-1-1165-42560.pdf> (<http://newgtlds.icann.org/sites/default/files/applicants/11aug14/gac-advice-response-1-1165-42560.pdf>))

- NGPC Resolution 2014.09.08.NG02 ([https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-09-08-en - 1.b \(/resources/board-material/resolutions-new-gtld-2014-09-08-en#1.b\)\)](https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-09-08-en - 1.b (/resources/board-material/resolutions-new-gtld-2014-09-08-en#1.b))))
- The NGPC Scorecard - GAC (Governmental Advisory Committee) Advice (London, Singapore, Buenos Aires, Durban, Beijing): Actions and Updates (as of 8 September 2014) ([https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf \(/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf\)\)](https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf (/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf))))
- Letter from Steve Crocker to Heather Dryden re: NGPC Meeting of 8 September 2014 ([https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-10sep14-en.pdf \(/en/system/files/correspondence/crocker-to-dryden-10sep14-en.pdf\)\)](https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-10sep14-en.pdf (/en/system/files/correspondence/crocker-to-dryden-10sep14-en.pdf))))
- All briefs, declarations, and supporting documents filed by DCA Trust and ICANN (Internet Corporation for Assigned Names and Numbers) in the Independent Review Proceeding *DCA Trust v. ICANN (Internet Corporation for Assigned Names and Numbers)* ([https://www.icann.org/resources/pages/dca-v-icann-2013-12-11-en \(/resources/pages/dca-v-icann-2013-12-11-en\)\)](https://www.icann.org/resources/pages/dca-v-icann-2013-12-11-en (/resources/pages/dca-v-icann-2013-12-11-en))))
- Letter from Akram Atallah to Neil Dundas (13 July 2015) re: Final Declaration in the DotConnectAfrica Trust (DCA) Independent Review Proceeding (IRP) ([https://www.icann.org/en/system/files/correspondence/atallah-to-undas-13jul15-en.pdf \(/en/system/files/correspondence/atallah-to-undas-13jul15-en.pdf\)\)](https://www.icann.org/en/system/files/correspondence/atallah-to-undas-13jul15-en.pdf (/en/system/files/correspondence/atallah-to-undas-13jul15-en.pdf))))
- Letter from Dr. Elham M.A. Ibrahim to Steve Crocker (14 July 2015) re: Independent Review Panel (IRP) recommendation on the matter between DCA and ICANN (Internet Corporation for Assigned Names and Numbers) related to Dot Africa gTLD (generic Top Level Domain) ([https://www.icann.org/en/system/files/correspondence/ibrahim-to-crocker-14jul15-en.pdf \(/en/system/files/correspondence/ibrahim-to-crocker-14jul15-en.pdf\)\)](https://www.icann.org/en/system/files/correspondence/ibrahim-to-crocker-14jul15-en.pdf (/en/system/files/correspondence/ibrahim-to-crocker-14jul15-en.pdf))))
- Letter from Lucky Masilela to Steve Crocker (15 July 2015) re: ZACR Response on the Independent Review Process (IRP) Final Declaration ([https://www.icann.org/en/system/files/correspondence/masilela-to-crocker-15jul15-en.pdf \(/en/system/files/correspondence/masilela-to-crocker-15jul15-en.pdf\)\)](https://www.icann.org/en/system/files/correspondence/masilela-to-crocker-15jul15-en.pdf (/en/system/files/correspondence/masilela-to-crocker-15jul15-en.pdf))))

This is an Organizational Administrative function that does not require public comment.

Published on 16 July 2015



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[Registrar Problems \(/en/news/announcements/announcement-06mar07-en.htm\)](#)

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