

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 MEMORANDUM REGARDING PROCEDURAL ISSUES

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INTRODUCTION

1. Pursuant to the Panel’s Procedural Order No. 1 issued on 24 April 2014, the Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits this Brief Regarding Procedural Issues.

FACTUAL AND PROCEDURAL BACKGROUND

2. This Independent Review proceeding involves an application for a new generic Top Level Domain (“gTLD”) submitted by Claimant DotConnectAfrica Trust (“DCA”). The ICANN Board has accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that DCA’s application should not proceed, and DCA is challenging that decision.

3. ICANN has three “accountability mechanisms” set out in its Bylaws that allow parties affected by an ICANN decision, including a final decision on a gTLD application, to seek some form of review of that decision.¹ One of the accountability mechanisms set forth in ICANN’s Bylaws, the Independent Review Process (“IRP”), provides for “independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.”² In its fifteen-year history, ICANN has had only one IRP that went to a decision. Specifically, in June 2008, ICANN received its first IRP request, which was filed by

¹ The three mechanisms are the Ombudsman, the Reconsideration process and the Independent Review process. (ICANN’s Bylaws (“Bylaws”) Art. IV, V.) All applicants for new gTLDs, including DCA, were required to agree in their applications that, in the event they wished to challenge any “final decision made by ICANN with respect to [their] application[s],” that challenge could occur only through the “accountability mechanism[s] set forth in ICANN’s Bylaws.” Generic Top Level Domains Application Terms and Conditions ¶ 6, *available at* <http://newgtlds.icann.org/en/applicants/agb/terms>. ICANN’s Board has publicly stated that this provision was included in the gTLD application because ICANN is “a non-profit public benefit corporation and lacks the resources to defend against potentially numerous lawsuits . . . initiated by applicants.” ICANN Board-GAC Consultation: “Legal Recourse” for New gTLD Registry Applicants at p. 2, *available at* <http://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf>.

² Bylaws, Art. IV, § 3, *available at* <http://www.icann.org/en/about/governance/bylaws/bylaws-11apr13-en.htm>.

ICM Registry, LLC (“*ICM IRP*”).³ That IRP involved extensive discovery and a five-day hearing that included lengthy witness testimony. The IRP wound up costing the parties millions of dollars, and the IRP Panel took over a year and a half to render its declaration.⁴

4. In 2012, after the *ICM IRP*, and as part of its commitment to accountability and transparency, ICANN convened the Accountability Structures Expert Panel (“Experts”),⁵ comprised of three world-renowned Experts on issues of corporate governance, accountability, and international dispute resolution to evaluate ICANN’s accountability mechanisms as well as the prior evaluations and modifications of those mechanisms, including the Independent Review process. After significant and substantive research and review of ICANN’s accountability mechanisms, the Experts recommended certain enhancements and refinements to the Reconsideration process and Independent Review process, with a focus on effectiveness, efficiency, ease of access, and expeditious resolution, as well as maintaining and enhancing ICANN's accountability to the community and the global public interest. After extensive analysis, including multiple opportunities for community input of the Expert’s recommendations, ICANN amended its Bylaws with respect to the Independent Review process in order to streamline the proceedings dramatically.⁶ Those Bylaws amendments, and the Supplementary

³ ICM’s Request for Independent Review Process, *available at* <http://www.icann.org/en/news/irp/icm-v-icann/icm-irp-request-06jun08-en.pdf>.

⁴ 19 February 2010 Declaration of Independent Review Panel, *available at* <http://www.icann.org/en/news/irp/icm-v-icann/news/irp/-panel-declaration-19feb10-en.pdf>.

⁵ The experts were Mervyn King S.C., a former Judge of the Supreme Court of South Africa; Graham MacDonald, a Presidential Member of Australia's Administrative Appeals Tribunal; and Richard Moran, a widely known expert on corporate leadership and governance. For more information, *see* Accountability Structures Expert Panel (ASEP), *available at* <http://www.icann.org/en/news/in-focus/accountability/asep>. *See also*, Report by Accountability Structures Expert Panel (ASEP), *available at* <http://www.icann.org/en/news/in-focus/accountability/asep/report-26oct12-en.pdf>

⁶ 11 April 2013 Approved Board Resolutions, *available at* <http://www.icann.org/en/groups/board/documents/resolutions-11apr13-en.htm#1.d>.

Procedures (“Supplementary Procedures”) that set forth additional procedural rules for IRP proceedings, went into effect on 11 April 2013, six months before DCA filed its Notice of Independent Review.⁷ Nonetheless, DCA’s proposal for conducting this IRP proceeding disregards the community-vetted and Board-approved changes to the IRP and/or argues that those changes are “unfair” or somehow inapplicable because this is a quasi-international arbitration.

5. On 9 January 2014, prior to the filing of DCA’s Amended Notice, ICANN explicitly emphasized that the Supplementary Procedures govern this IRP, stating in an email to DCA’s counsel that, in ICANN’s view, the Supplementary Rules bar the filing of supplemental submissions.⁸ At no time prior to the initial call with the IRP Panel on 22 April had DCA ever suggested that the amendments to ICANN’s Bylaws and Supplementary Procedures did not apply to these proceedings (which they undoubtedly do).

6. On 15 April 2014, following the constitution of the Panel and in light of DCA’s 13 April 2014 Request for an Emergency Stay, ICANN submitted a procedural proposal aimed at expediting the Panel’s resolution of this IRP. ICANN’s proposal pointed out that, pursuant to the rules governing this proceeding, the parties had concluded their briefing, and the Panel needed only to conduct a hearing pursuant to Article IV, Section 3 of ICANN’s Bylaws before reaching a decision on the merits. ICANN proposed that if the Panel set a hearing date that would allow it to commit to issuing a ruling on the merits by 15 May 2014, the need for any emergency relief would be eliminated because “[a]s a practical matter, [ICANN would] not be in

⁷Bylaws as Amended 11 April 2013, *available at* <http://www.icann.org/en/about/governance/bylaws/bylaws-11apr13-en.htm>.

⁸9 January 2014 Letter from Jeffrey A. LeVee to Carolina Cardenas-Soto, Arif Ali and Marguerite Walter copied, attached as Ex. 1.

a position to . . . take the final steps that are necessary to delegate the .AFRICA TLD to ZA Central Registry” prior to 15 May.⁹

7. On 17 April 2014, DCA wrote a letter to the Panel objecting to ICANN’s proposal. DCA proposed a schedule that would delay the Panel’s ruling until at least September 2014, eleven months after it filed its Notice of IRP.¹⁰ DCA argued that it had submitted its Amended Notice “on the understanding that opportunities would be available to make further submissions,” failing to mention the 9 January 2014 email from ICANN’s counsel that put DCA on notice that it would not be entitled to further briefing.¹¹ Without giving any indication of what evidence it planned to submit to refute the arguments and evidence in ICANN’s Response, DCA contended that it “would be highly inappropriate to close the written record already, without further development of the disputed facts that require clarification through additional documentary evidence and/or testimony.”¹² DCA took this position despite the fact that DCA, the Claimant, had the burden of presenting evidence proving its claims at the outset of this case, as required by the Supplementary Procedures that apply to these proceedings.¹³

8. On 20 April 2014, ICANN responded to DCA’s proposal. It noted that DCA’s proposal would severely delay the resolution of this IRP and pointed out that DCA’s proposal

⁹ 15 April 2014 email from Jeffrey LeVee to Babak Barin, Arif Ali, Carolina Cardenas-Soto copied, attached as Ex. 2.

¹⁰ 17 April 2014 letter from DCA to President and Members of the Panel at 8, attached as Ex. 3.

¹¹ *Id.* at 2.

¹² *Id.*

¹³ *See* ICDR Rules, Art. 19.1 (“Each party shall have the burden of proving the facts relied on to support its claim or defense.”); Supplementary Procedures ¶ 5 (“All necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the [initial written] submission.”)

“ignore[d] the significant changes that have been made to the rules for IRPs.”¹⁴ That same day, DCA responded to ICANN’s letter and argued that the Supplementary Procedures “ultimately commit the conduct of the IRP to the discretion of the Panel.”¹⁵ DCA cited to no provision in the Supplementary Procedures giving the Panel such unfettered discretion, since no such provision exists.

9. On 22 April 2013, the parties participated in a telephone conference call (“22 April Call”) with the Panel, during which the parties’ procedural proposals were discussed. Noting the importance of the issues raised by the parties, the Panel requested that the parties submit briefs addressing the issues of: (1) *viva voce* testimony; (2) document requests; (3) additional filings; and (4) the method of hearing, whether telephonic, by video, or in-person.

ARGUMENT

I. THIS PROCEEDING IS AN INTERNAL ACCOUNTABILITY MECHANISM CONSTITUTED UNDER AND GOVERNED BY ICANN’S BYLAWS. IT IS NOT AN INTERNATIONAL ARBITRATION.

10. This proceeding is *not* an arbitration. Rather, an IRP is a truly unique “Independent Review” process established in ICANN’s Bylaws with the specific purpose of providing for “independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.”¹⁶ Although ICANN is using the International Center for Dispute Resolution (“ICDR”) to administer these proceedings, nothing in the Bylaws can be construed as converting these proceedings into an “arbitration,” and the Bylaws make clear that that these proceedings are not to be deemed as the equivalent of an “international arbitration.” Indeed, the word “arbitration” does not appear in the relevant portion

¹⁴ 20 April 2014 letter from ICANN to President and Members of the Panel at 2, attached as Ex. 4.

¹⁵ 20 April 2014 letter from DCA to President and Members of the Panel at 2, attached as Ex. 5.

¹⁶ Bylaws, Art. IV, § 3.1 (emphasis added).

of the Bylaws, and as discussed below, the ICANN Board retains full authority to accept or reject the declaration of all IRP Panels.

11. ICANN’s Board had the authority to, and did, adopt Bylaws establishing internal accountability mechanisms and defining the scope and form of those mechanisms. Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation’s bylaws). Indeed, ICANN would be in violation of its Bylaws were it to submit to an IRP conducted in a manner inconsistent with the Bylaws, which is what DCA is suggesting be done. ICANN’s Bylaws state that “ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws” and provide for accountability mechanisms to reinforce ICANN’s duty to act in consistence with its Bylaws.¹⁷ ICANN should not be called on to violate certain provisions of its Bylaws, while ICANN is simultaneously being called on to explain why ICANN did not violate other provisions of its Bylaws.

12. Article IV, Section 3 of the Bylaws establishes “Independent Review of Board Actions” and addresses such items as the deadline for filing an IRP request, the standard of review to be applied to IRP requests, and the authority of IRP panels. With respect to the procedures governing IRP proceedings, Section 3 both addresses certain procedural issues and provides that “*[s]ubject to the approval of the [ICANN] Board*, the IRP Provider shall establish operating rules and procedures, *which shall implement and be consistent with this Section 3.*”¹⁸

13. Pursuant to Section 3, the ICANN Board has approved the use of the ICDR’s International Arbitration Rules in IRPs in conjunction with the Supplementary Procedures.

¹⁷ Bylaws, Art. IV, § 1; *see also* Bylaws, Art. IV, §§ 2-3; Bylaws, Art. V, § 3.1.)

¹⁸ Bylaws, Art. IV, § 8.

However, just as the Bylaws require that the ICDR Rules and the Supplementary Procedures “be consistent” with the IRP procedures set forth in the Bylaws, Paragraph 2 of the Supplementary Procedures requires that “*[i]n the event there is any inconsistency between these Supplementary Procedures and [the ICDR Rules], these Supplementary Procedures will govern.*”¹⁹ In sum, while ICANN has approved the use of the ICDR Rules, it has been clear that those rules are subordinate to the Bylaws and the Supplementary Procedures.

14. As noted above, DCA agreed to abide by the rules of the Independent Review process when it chose to apply for .AFRICA. The Terms and Conditions of the gTLD Applications state:

Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the Application . . . provided that Applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for the purposes of challenging any final decision made by ICANN with respect to the application.²⁰

DCA was neither required nor entitled to apply for .AFRICA. Nor does DCA (or any entity) have any “right” to any particular gTLD. In choosing to apply for a gTLD, DCA limited its recourse to ICANN’s internal accountability mechanisms. In filing an IRP, DCA submitted itself to the rules established by ICANN (following community input) that govern IRPs.

II. LIVE WITNESS TESTIMONY IS NOT PERMITTED PURSUANT TO THE RULES GOVERNING THIS PROCEEDING.

15. Both the Supplementary Procedures and ICANN’s Bylaws unequivocally and unambiguously prohibit live witness testimony in conjunction with any IRP. Paragraph 4 of the Supplementary Procedures, which governs the “Conduct of the Independent Review,” states:

¹⁹ ICANN’s Supplementary Procedures for Independent Review Process (“Supplementary Procedures”) ¶ 2 (emphasis added), available at <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

²⁰ Top-Level Domain Application Terms and Conditions ¶ 6.

The IRP Panel should conduct its proceedings by electronic means to the extent feasible In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding . . . ***the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.***²¹

16. Indeed, two separate phrases of Paragraph 4 explicitly prohibit live testimony: (1) the phrase limiting the in-person hearing (and similarly telephonic hearings) to “argument only,” and (2) the phrase stating that “all evidence, including witness statements, must be submitted in advance.” The former explicitly limits hearings to the argument of counsel, excluding the presentation of any evidence, including any witness testimony.²² The latter reiterates the point that *all* evidence, *including witness testimony*, is to be presented in writing and prior to the hearing. Each phrase unambiguously excludes live testimony from IRP hearings. Taken together, the phrases constitute irrefutable evidence that the Supplementary Procedures establish a truncated hearing procedure.

17. Paragraph 4 of the Supplementary Procedures is based on the exact same and unambiguous language in Article IV, Section 3.12 of the Bylaws, which provides that “[i]n the unlikely event that a telephonic or in-person hearing is convened, ***the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.***”²³

²¹ Supplementary Procedures ¶ 4 (emphasis added).

²² See *Burrell v. McIlroy*, 464 F.3d 853, 860 (9th Cir. 2006) (noting the distinction between “counsel’s argument” and “record evidence”).

²³ *Id.* (emphasis added).

18. While DCA may prefer a different procedure, the Bylaws and the Supplementary Procedures could not be any clearer in this regard.²⁴ Despite the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of live witness testimony, DCA attempts to argue that the Panel should instead be guided by Article 16 of the ICDR Rules, which states that subject to the ICDR Rules, “the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”²⁵ However, as discussed above, the Supplementary Procedures provide that “[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR’s International Arbitration Rules], these Supplementary Procedures will govern,” and the Bylaws require that the ICDR Rules “be consistent” with the Bylaws.²⁶ As such, the Panel *does not have discretion* to order live witness testimony in the face of the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of such testimony.

19. During the 22 April Call, DCA vaguely alluded to “due process” and “constitutional” concerns with prohibiting cross-examination. As ICANN did after public consultation, and after the *ICM* IRP, ICANN has the right to establish the rules for these procedures, rules that DCA agreed to abide by when it filed its Request for IRP. First, “constitutional” protections do not apply with respect to a *corporate accountability mechanism*.

²⁴ During the 22 April Call, DCA appeared to contest, for the first time, whether the current version of the Supplementary Procedures apply in this case, contrary to the positions both sides had previously taken. During an initial administrative call with the ICDR on 4 December 2013, DCA requested a copy of the rules governing the IRP proceeding. At that time, ICANN provided DCA with a copy of the current and applicable version of the Supplementary Procedures. Until the 22 April Call, DCA never contested the applicability of those Procedures. In fact, in its 17 April 2014 and 20 April 2014 letters to the Panel, DCA cited to and relied on the current version of the Supplementary Procedures. (*See, e.g.*, Ex. 3 at p. 5 n.13, Ex. 5 at p. 2.)

²⁵ ICDR Rules, Art. 16.

²⁶ Supplementary Procedures ¶ 2.

Second, “due process” considerations (though inapplicable to corporate accountability mechanisms) were already considered as part of the design of the revised IRP.²⁷ And the United States Supreme Court has repeatedly affirmed the right of parties to tailor unique rules for dispute resolution processes, including even *binding arbitration proceedings* (which an IRP is not). The Supreme Court has specifically noted that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”²⁸

20. The U.S. Supreme Court has explicitly held that the right to tailor unique procedural rules includes the right to dispense with certain procedures common in civil trials, including the right to cross-examine witnesses.²⁹ The Court noted that

[T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; *and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable* Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.”³⁰

²⁷ During the 22 April Call, the question of the applicability of the Federal Arbitration Act (“FAA”) was raised. Whether or not the FAA applies here, U.S. case law is clear that parties have the right to tailor their own arbitration procedures. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-49 (2011) (“The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”) (internal quotation marks and citations omitted.) Similarly, whether or not the California Arbitration Act (“CAA”) applies in this case, the CAA explicitly states that parties are entitled to cross-examine witnesses at hearing *only if* the parties’ agreement does not provide otherwise. Cal. Civ. Proc. Code § 1282.2.

²⁸ *AT&T Mobility LLC*, 131 S. Ct. at 1748-1749; *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) (noting that parties “trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”) (quotation marks and citations omitted).

²⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 648 n.14 (1985).

³⁰ *Id.* (internal quotation marks and citations omitted) (emphasis added).

21. Similarly, international arbitration norms recognize the right of parties to tailor their own, unique arbitral procedures. “*Party autonomy is the guiding principle in determining the procedure to be followed in international arbitration.* It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law.”³¹

22. In short, even if this were a formal “arbitration,” ICANN would be entitled to limit the nature of these proceedings so as to preclude live witness testimony. The fact that this proceeding is not an arbitration further reconfirms ICANN’s right to establish the rules that govern these proceedings.

23. DCA argues that it will be prejudiced if cross-examination of witnesses is not permitted. However, the procedures give both parties equal opportunity to present their evidence—the inability of either party to examine witnesses at the hearing would affect both the Claimant and ICANN equally. In this instance, DCA did not submit witness testimony with its Amended Notice (as clearly it should have). However, were DCA to present any written witness statements in support of its position, ICANN would not be entitled to cross examine those witnesses, just as DCA is not entitled to cross examine ICANN’s witnesses. Of course, the parties are free to argue to the IRP Panel that witness testimony should be viewed in light of the fact that the rules do not permit cross-examination.

³¹ *Redfern and Hunter on International Arbitration* § 6.08, Blackaby & Partasides (5th ed. 2009) (emphasis added).

III. DCA HAS NO RIGHT TO SUPPLEMENTAL BRIEFING, AND FURTHER BRIEFING IS NEITHER APPROPRIATE NOR NECESSARY.

24. DCA has no automatic right to additional briefing under the Supplementary Procedures. Paragraph 5 of the Supplementary Procedures, which governs written statements, provides:

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. *All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.* Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. *The IRP Panel may request additional written submissions from the party seeking review,* the Board, the Supporting Organizations, or from other parties.³²

This section clearly provides that DCA's opportunity to provide briefing and evidence in this matter has concluded, subject only to a request for additional briefing from the Panel. DCA has emphasized that the rule references the "initial" written submission, but the word "initial" refers to the fact that the Panel "may request additional written submissions," not that DCA has some "right" to a second submission. There is no Supplementary Rule that even suggests the possibility of a second submission as a matter of right. The fact that DCA has twice failed to submit evidence in support of its claims is not justification for allowing DCA a third attempt.

25. Further, as ICANN noted in its 20 April 2014 letter to the Panel, DCA's argument that it submitted its papers "on the understanding that opportunities would be available to make further submissions" is false. ICANN stated in an email to DCA's counsel on 9 January 2014—

³² Supplementary Procedures ¶ 5 (emphasis added).

prior to the submission of DCA's Amended Notice—that the Supplementary Rules bar the filing of supplemental submissions absent a request from the Panel.³³

26. The decision as to whether to allow supplemental briefing is within the Panel's discretion, and ICANN urges the Panel to decline to permit supplemental briefing for two reasons. First, despite having months to consider how DCA might respond to ICANN's presentation on the merits, DCA has never even attempted to explain what it could say in additional briefing that would refute the materials in ICANN's presentation. Indeed, when DCA filed its request for emergency relief on 28 March 2014, it did not indicate that it had witnesses who could respond to ICANN's briefing; DCA did not even acknowledge that ICANN had submitted its brief. During the 22 April Call, DCA's counsel remained unable to identify a single witness who has specific knowledge regarding the GAC's consideration of DCA's application.³⁴ The fact that DCA is unable to identify supplemental witnesses six months after filing its Notice of IRP is strong indication that further briefing would not be helpful in this case. Second, as ICANN has explained on multiple occasions, DCA has delayed these proceedings substantially, and further briefing would compound that delay.

27. Finally, as ICANN noted in its letter of 20 April 2014, despite DCA's attempts to frame this case as implicating issues “reach[ing] far beyond the respective rights of the parties as concerns the delegation of .AFRICA,” the issues in this case are in fact extremely limited in scope. This Panel is authorized only to address whether ICANN violated its Bylaws or Articles of Incorporation *in its handling of DCA's Application for .AFRICA*. The parties have had the

³³ 9 January 2014 email from Jeffrey A. LeVee, Ex. 1.

³⁴ The only witness DCA counsel identified was Sophia Bekele, DCA's Executive Director, who is not a member of the GAC and therefore almost certainly does not have firsthand knowledge of the GAC's consideration of DCA's application. Nor would Ms. Bekele have firsthand knowledge of ICANN's internal processes for evaluating alleged conflicts of interests of ICANN Board members.

opportunity to submit briefs and evidence regarding that issue. DCA has given no indication that it has further dispositive arguments to make or evidence to present. The Panel should resist DCA's attempt to delay these proceedings even further via additional briefing.

IV. DCA HAS NO AUTOMATIC RIGHT TO DISCOVERY AND HAS NOT DEMONSTRATED ANY NEED FOR DISCOVERY.

28. Pursuant to the ICDR Guidelines for Arbitrators on Exchanges of Information (“Discovery Rules”), a party must request that a panel order the production of documents. Those documents must be “reasonably believed to exist and to be relevant and material to the outcomes of the case,” and requests must contain “a description of specific documents or classes of documents, along with an explanation of their materiality to the outcome of the case.”³⁵

29. As ICANN noted in its 20 April Letter, despite the fact that the Supplementary Rules explicitly state that “[a]ll *necessary evidence* to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the [initial written] submission,” DCA did not mention the notion of possible discovery until it served its initial request for emergency relief at the end of March 2014, three months after its served its amended papers and two months after ICANN served its initial papers. To date, DCA has not provided any indication as to what information it believes the documents it may request may contain and has made no showing that those documents could affect the outcome of the case.

30. While ICANN recognizes that the Panel may order the production of documents within the parameters set forth in the Discovery Rules, ICANN will object to any attempts by DCA to propound broad discovery of the sort permitted in American civil litigation. The ICDR has made clear that its Discovery Rules do not contemplate such broad discovery. The

³⁵ ICDR Guidelines for Arbitrators Concerning Exchanges of Information § 3(a).

introduction to the rules states that their purpose is to promote “the goal of providing a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.” It notes that:

One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation. The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.³⁶

31. Finally, during the 22 April Call, the Panel inquired about the possibility of a confidentiality agreement between the parties. Such a confidentiality agreement or protective order would be possible with respect to documents that are otherwise confidential, and where publicly releasing documents would violate existing confidentiality. Further, Article IV, Section 3.20 of ICANN’s Bylaws provides that the “IRP Panel may, in its discretion, grant a party’s request to keep certain information confidential”³⁷

V. THE PANEL’S DECLARATION IN THIS CASE WILL NOT BE BINDING ON ICANN.

32. The Panel’s Procedural Order No. 1 did not address the issue of whether its declaration would be binding, an issue that is not in any event a “procedural” issue. However, the issue was discussed at some length during the 22 April Call. Accordingly, ICANN briefly addresses the issue here.

33. The provisions of Article IV, Section 3 of the ICANN Bylaws, which govern the Independent Review process and these proceedings, make clear that the declaration of the Panel

³⁶ ICDR Guidelines for Arbitrators on Exchanges of Information, Introduction.

³⁷ Bylaws, Art. IV, § 3.20.

will not be binding on ICANN. Section 3.11 gives the IRP panels the authority to “*declare* whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and “*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.”³⁸ Section 3.21 provides that “[w]here feasible, the Board shall *consider* the IRP Panel *declaration* at the Board's next meeting.”³⁹ Section 3 never refers to the IRP panel’s declaration as a “decision” or “determination.” It does refer to the “Board’s subsequent action on [the IRP panel’s] declaration[.]”⁴⁰ That language makes clear that the IRP’s declarations are advisory and not binding on the Board. Pursuant to the Bylaws, the Board has the discretion to consider an IRP panel’s declaration and take whatever action it deems appropriate.

34. This issue was addressed extensively in the *ICM* IRP, a decision that has precedential value to this Panel.⁴¹ The *ICM* Panel specifically considered the argument that the IRP proceedings were “arbitral and not advisory in character,” and unanimously concluded that its declaration was “not binding, but rather advisory in effect.”⁴² At the time that the *ICM* Panel rendered its declaration, Article IV, Section 3 of ICANN’s Bylaws provided that “IRP shall be

³⁸ *Id.*, Art. IV, § 3.11 (emphasis added).

³⁹ *Id.*, Art. IV, § 3.21 (emphasis added).

⁴⁰ *Id.*

⁴¹ Pursuant to Article IV, Section 3.21 of ICANN’s Bylaws, the *ICM* Panel’s declaration has precedential value and is properly considered by this Panel, although that declaration does not bind this Panel in any legal sense. During the 22 April Call, the Panel inquired as to whether a declaration may be non-binding while also having precedential value. In the American context—the legal and semantic context in which ICANN’s Bylaws were drafted—it may. “In the United States, the doctrine of stare decisis has different implications depending on the relationship between the court rendering the judgment and the court that is asked to give the prior judgment precedential effect. When the prior court is the same as the subsequent court, the general rule is that precedent is not binding, even though a court may give great weight to its own prior decisions.” 18-134 Moore’s Federal Practice - Civil § 134.02. Thus, ICANN, claimants, and IRP Panels may refer to previous IRP declarations and view them as having precedential effect, but those precedents are not binding on subsequent IRP Panels.

⁴² February 2010 Declaration of Independent Review Panel ¶¶ 55, 134.

operated by an international arbitration provider appointed from time to time by ICANN . . . using arbitrators . . . nominated by that provider.”⁴³ ICM unsuccessfully attempted to rely on that language in arguing that the IRP constituted an arbitration, and that the IRP panel’s declaration was binding on ICANN. Following that IRP, that language was removed from the Bylaws with the April 2013 Bylaws amendments, further confirming that, under the Bylaws, an IRP panel’s declaration is not binding on the Board.

VI. **IN-PERSON HEARINGS ARE TO BE HELD ONLY IN “EXTRAORDINARY CIRCUMSTANCES.”**

35. Paragraph 4 of the Supplementary Procedures provides:

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only”⁴⁴

Similarly, Article IV, Section 3.12 of the Bylaws provides:

In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.⁴⁵

36. During the 22 April 2014 Call, ICANN agreed that this IRP is one in which a telephonic or video conference would be helpful and offered to facilitate a video conference.

⁴³ *Id.* ¶ 96.

⁴⁴ Supplementary Procedures ¶ 4 (emphasis added).

⁴⁵ Bylaws, Art. IV, § 3.12 (emphasis added)

ICANN does not believe, however, that this IRP is sufficiently “extraordinary” so as to justify an in-person hearing, which would dramatically increase the costs for the parties. As discussed above, the issues in this IRP are straight forward—limited to whether ICANN’s Board acted consistent with its Bylaws and Articles of Incorporation in relation to DCA’s application for .AFRICA—and can, and easily should, be resolved following a telephonic oral argument with counsel and the Panel.

CONCLUSION

ICANN thanks the Panel for its considerable attention to these issues and looks forward to a swift resolution of these Independent Review proceedings.

Respectfully submitted,

Dated: 5 May 2014

By:



Jeffrey A. LeVee

Jones Day

Counsel for Respondent ICANN

LAI-3214301v3

Exhibit 1



Subject: RE: ICDR Case 50 117 T 1083 13 DotConnectAfrica Trust (DCA Trust)
vs. Internet Corporation for Assigned Names and Numbers (ICANN) 

From: Jeffrey LeVee
Extension: 32572

01/09/2014 02:21 PM

To: Carolina Cardenas-Soto, LL.M.

Cc: "Ali, Arif", Cindy Reichline, "Eric P. Enson", "Franzetti, Erica", "Walter, Marguerite"

History: This message has been forwarded.

Carolina:

Thank you for your email. We will look forward to receiving DCA Trust's materials tomorrow.

We do, however, wish to make clear that ICANN disagrees with your suggestion that DCA Trust is free to amend or supplement its claims at any time before the arbitrators are appointed. Accordingly, ICANN reserves its right to argue that any amended or supplemental submission that DCA Trust attempts to submit after tomorrow is barred by the rules that apply to this proceeding.

The ICDR's Supplementary Procedures for ICANN Independent Review Process clearly provide that in the event of any inconsistency between the Supplementary Procedures and the ICDR's International Arbitration Rules, the Supplementary Procedures will govern. The Supplementary Procedures do not provide for any amendments or supplemental submissions. Paragraph 5 of the Supplementary Procedures provides for a different process than the ICDR's rules and requires the initial submission (the Request) to include all necessary evidence to demonstrate Requestor's claims. The IRP Panel may then request additional written submissions.

Further, your email does not accurately capture the language of Article 4 of the ICDR's International Arbitration Rules (even if Article 4 were to apply). At a minimum, Article 4 makes clear that any attempt to amend or supplement is subject to a ruling by the tribunal that the attempt was inappropriate.


In all events, we agree that, if DCA Trust attempts to amend or supplement its submissions, the parties can address to the panel in due course the propriety of the timing of DCA Trust's submissions.

Regards,

Jeff LeVee
JONES DAY@ - One Firm Worldwide
Telephone: 213.243.2572

Exhibit 2



Subject: Re: ICDR Case 502013001083 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation for Assigned Names and Numbers (ICANN) 

From: Jeffrey LeVee
Extension: 32572 04/15/2014 03:51 PM

To: Babak Barin

Cc: "Ali, Arif", "Carolina Cardenas-Soto, LL.M. (Cardenasc@adr.org)", C K, "Cindy Reichline (creichline@JonesDay.com)", "Eric P. Enson (epenson@JonesDay.com)", "Franzetti, Erica", "Walter, Marguerite", "Craven, Meredith", "Justice Richard C. Neal (Ret.)"

Members of the Panel, Ms. Cardenas, and Counsel:

I am responding further to Ms. Walter's email sent on Sunday, 13 April 2014.

Now that the Panel has been convened, ICANN would very much like to advance to the final resolution of this Independent Review proceeding. While we recognize that DCA has submitted a revised request for emergency relief, we wish to suggest an alternative approach that we think would preserve everyone's rights and be far more expedient for the Panel and the parties.

Inasmuch as the parties have concluded the briefing, and the Panel has been convened, there is only one meaningful step left before the Panel can reach its decision on the merits. These proceedings are governed by Article IV, Section 3 of ICANN's Bylaws. Pursuant to Paragraph 12 of this Section:

"12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance."

Accordingly, ICANN requests that the Panel decide this week whether to conduct a telephonic or in-person hearing. If the Panel elects to conduct a hearing (and in this instance ICANN believes that a hearing would be useful), ICANN proposes a telephonic hearing since Professor Kessedjian is in Paris and Mr. Barin is in Montreal. We are available to conduct that hearing on April 21 (the date currently set for the administrative call), or we could schedule the hearing later that week.

Importantly, Article IV, Section 3, Paragraph 18 of the ICANN Bylaws provides that "The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review." DCA's initial request was filed in October 2013; accordingly, we have already arrived at (and are about to exceed) this six month time period.

As a result, ICANN is hoping that the Panel will commit to issuing its ruling by 15 May 2014. As a practical matter, ICANN will not be in a position prior to that date to take the final steps that are necessary to delegate the .AFRICA TLD to ZA Central Registry. This would eliminate the need for any emergency relief, it would eliminate the need for two separate hearings and rulings, it would be the most cost-effective approach (consistent with Paragraph 12 above), and it would address DCA's concern that its claims could become moot by virtue of the final delegation of .AFRICA into the root zone.

Thank you for considering this proposal.

Jeff LeVee

JONES DAY® - One Firm Worldwide
Telephone: 213.243.2572

Exhibit 3

Weil, Gotshal & Manges LLP

BY E-MAIL

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April 17, 2014

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**Re: ICDR Case 50 2013 00 1083 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation
for Assigned Names and Numbers (ICANN) – Procedural Proposals**

Dear Mr. President and Members of the Panel,

We write to strongly object to ICANN's proposal set forth in Mr. LeVee's email of 15 April that this case be heard on the merits in the coming week, with no further written submissions by the parties. To put it mildly, this is a truly preposterous position for ICANN to take and emblematic of its treatment of DCA Trust from the outset of the new gTLD application process.

Mr. LeVee's representation that the parties have "concluded the briefing" is incorrect. The parties have each filed only their initial submissions in this proceeding and their respective submissions on emergency relief; the latter being a filing precipitated by ICANN's actions and belated acceptance that Article 37 emergency relief was available to DCA Trust. As we lay out below, the parties' initial submissions hardly provide a basis for the Panel to render a properly informed determination regarding DCA Trust's rights and ICANN's violations of its Articles of Incorporation, Bylaws and applicable law.

Other than its application for Article 37 emergency relief, DCA Trust has filed a form notice of arbitration (24 October 2013) and an Amended Notice of Arbitration (10 January 2014). No witness testimony was presented with this initial submission. It was, after all, submitted on the understanding that opportunities would be available to make further submissions in light of the dispute resolution framework that applies to this IRP proceeding.

In its Response to DCA Trust's Notice of IRP (10 February 2014), ICANN put forward certain witness testimony that purports to raise factual issues concerning how the Government Advisory Committee ("GAC") came to render advice against DCA Trust's application for .AFRICA. In particular, ICANN has provided testimony from Ms. Heather Dryden – who is simultaneously both a member of ICANN's Board and the Chair of the GAC – which implies that the GAC advisor for Kenya, Mr. Sammy Buruchara, was not authorized to speak for Kenya when he objected to the proposed advice to quash DCA Trust's application for .AFRICA. Ms. Dryden also refers to additional documentary evidence that she claims shows that Mr. Buruchara in fact supported the issuance of advice against DCA Trust's application, yet neither she nor ICANN have provided this evidence on the ground that it is "confidential."

Under the circumstances, it would be highly inappropriate to close the written record already, without further development of the disputed facts that require clarification through additional documentary evidence and/or testimony. It would be equally inappropriate to hold a summary hearing on the merits in just five days, without ICANN's witnesses being made available for cross-examination by DCA Trust or questioning by the Panel. Indeed, to proceed as ICANN has proposed would result in a gross injustice to DCA Trust, as this proceeding may well be the last opportunity that DCA Trust has to be heard.

Contrary to the assertions in Mr. LeVee's email, ICANN's proposal certainly does not protect DCA's procedural rights, which have already been compromised several times by ICANN's failure to respect the legitimacy of its own administrative proceeding, most recently through ICANN's signature of a Registry Agreement with ZACR in violation of DCA's rights to a legitimate, effective opportunity to be heard in this IRP.

ICANN shortsightedly relies on certain provisions in its Bylaws concerning time and cost efficiency in its IRPs to try to fundamentally alter the IRP framework in order to gain advantage in this IRP. In doing so, however, it ignores other provisions of the Bylaws, the ICDR Rules, and the Supplementary

Procedures, not to mention the integrity of the accountability framework ICANN has created. The three elements of this framework – ICANN’s Bylaws, the ICDR Rules of Arbitration, and ICANN’s Supplementary Procedures for IRPs – all contemplate a meaningful proceeding in which the parties are able to fully develop the factual and legal record, and are not limited to a summary process based on initial pleadings only. While we completely agree that the IRP is meant to be a swift and efficient process, it is in no way meant to be a summary process, and certainly not at the expense of the parties’ right to be heard.

We address the dispute resolution framework below.

The Bylaws Provide For A Full, Independent And Objective Review Of ICANN’s Actions

The Bylaws leave no doubt that the IRP is meant to be a genuine dispute-resolution process administered by an independent third party, and not a mere extension of ICANN’s own decision-making process in which ICANN believes it is free to remake the rules as it goes along. Section IV, Article 3(1) of the Bylaws establishes “a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.” The IRP Panel is “charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”¹ Pursuant to Section IV, Article 3(4), the Panel is to apply “a defined standard of review” in assessing the actions of ICANN’s Board.²

The Bylaws further provide that, although requests for independent review are limited to 25 pages, parties “may submit documentary evidence supporting their positions *without limitation*.”³ The IRP Panel has the authority to request additional written submissions, not only from the claimant, but also from the Board, the Supporting Organization, or other parties.⁴ The Panel may also hold an in-person hearing if it so chooses.⁵ Nor is the Panel limited to declaring whether the Board’s actions were

¹ Article IV, Section 3(4), ICANN’s Bylaws.

² A previous IRP Panel (comprised of Judge Stephen Schwebel, president; Professor Jan Paulsson; and Judge Dickran Tevrizian) confirmed that ICANN Board decisions are to be reviewed based on an objective standard. *ICM Registry LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 February 2010), para. 136 [Ex. C-12 to Amended Notice of IRP].

³ Art. IV, Sec. 3(5), ICANN’s Bylaws.

⁴ Art. IV, Sec. 3(11)(b), ICANN’s Bylaws.

⁵ Art. IV, Sec. 3(12).

consistent with its Articles of Incorporation or Bylaws; it also has the power 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.”⁶ The Panel’s declarations and any action taken by the Board in response to such declarations “are final and have precedential value.”⁷ The mere fact that the Panel’s decision is to have precedential effect should put an end to Mr LeVee’s efforts to cut short these proceedings; no determination resulting from the type of proceeding proposed by Mr LeVee could have any sort of precedential value based on a summary, untested record. ICANN’s effort to transform the IRP into a type of summary judgment process without a fully developed record is thus not only inappropriate, but contravenes its own Bylaws.

The ICDR Rules Provide Substantial Procedural Rights To The Parties, Including The Right To Document Production

Moreover, by designating the ICDR Rules of Arbitration as the rules governing the IRP, ICANN has consented to the application of every aspect of those rules except where the Supplementary Procedure expressly derogate from them. Article 16(1) provides that the Panel may conduct the proceeding as it deems appropriate, subject to the Rules, “provided that the parties are treated with equality and that each party has the right to be heard and is given *a fair opportunity to present its case*.”⁸ The Panel may decide how many pleadings there will be in addition to the initial statement of claim and statement of defense, and may set the time limits for such submissions.⁹

Moreover, the ICDR Guidelines for Arbitrators on Exchanges of Information – which apply to all proceedings commenced after 31 May 2008¹⁰ – confirm that the IRP Panel has the power to order document production in this proceeding.¹¹ If the Panel permits, DCA intends to seek documents that are in ICANN’s possession and which would clarify the factual issues in this dispute, including but not

⁶ Art. IV, Sec. 3(11)(e), ICANN’s Bylaws.

⁷ Art. IV, Sec. 3(21), ICANN’s Bylaws.

⁸ Art. 16(1), ICDR Rules (as Amended and Effective 1 June 2009).

⁹ Art. 17(1), ICDR Rules.

¹⁰ ICDR Guidelines for Arbitrators on Exchanges of Information, attached hereto as Annex A.

¹¹ Art. 3, ICDR Guidelines for Arbitrators on Exchanges of Information, Annex A.

limited to the “confidential” documents on which ICANN relies for its arguments concerning the issuance of the GAC advice against DCA’s application for .AFRICA.¹²

ICANN’s Supplementary Procedures For The IRP Also Contemplate The Development Of A Full Evidentiary Record And Opportunity For A Hearing

ICANN’s Supplementary Procedures for the IRP in no way conflict with the parties’ right to develop a full evidentiary record and hold a hearing on the merits, in person or electronically, as provided in the ICDR rules. Article 4 of the Supplementary Procedures commits the timetable of the proceeding to the discretion of the Panel.¹³ Article 4 also provides that the Panel may hold a hearing, either by telephone or in person.

Moreover, and contrary to what Mr. LeVee has argued from the outset of this proceeding, Article 5 of the Supplementary Procedures contemplates *multiple submissions* from the parties, and does not limit submissions to the Notice of IRP and response. Under Article 5, the parties’ “*initial* written submissions” are limited to 25 pages. The use of the word “initial” leaves no doubt that multiple rounds of submissions are expected in the IRP. Article 5 further confirms that the Panel may request additional written submissions from the parties, from the Board, the Supporting Organizations, or other parties.

Accordingly, ICANN’s insistence that the parties to this IRP are limited to the written submissions already in the record ignores the ICDR Rules as well as the Supplementary Procedures.

ICANN’s Invocation Of The Six-Month Aspirational Deadline For The Resolution Of This Dispute Ignores Its Own Role In Delaying This Proceeding

It should also be noted that the six-month aspirational deadline for a declaration, as referenced in the ICANN Bylaws, Art. IV, Section 3(18), assumes a number of actions on ICANN’s part that were not taken in this case.

First, the Bylaws assume that the petitioner filing an IRP will have access to instructions that tell it what documents constitute an initial filing for an IRP. When DCA filed its Notice of Independent Review Process on 24 October 2013, it did so pursuant to the instructions available on the ICANN and ICDR

¹² In this regard, we note that Art. 3(b) of the Guidelines provides that the Panel “may condition any exchange of documents subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality,” which should alleviate ICANN’s concerns about producing the “confidential documents” on which it relies.

¹³ Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process [Ex. C-3 to Amended Notice of IRP].

websites, which simply said that parties interested in filing an IRP should complete the linked pdf form (a one-page document), and the ICDR would contact the petitioner with more information on the process.

DCA was not aware until 2 December 2013 that there was a second page to the Notice form which was not posted, or that the form was expected to be accompanied by a 25-page submission summarizing its complaint.¹⁴ Moreover, even the Supplementary Procedures were unavailable and had to be forwarded by ICANN's counsel to the ICDR itself and then passed along to DCA on 4 December 2013.¹⁵

The six-month aspirational deadline also assumes that ICANN will have a standing panel in place to be appointed immediately to the IRP panel, which was not the case – and is still not the case. Although the standing panel mechanism was inserted into the Bylaws Art. IV, Section 3(6) on 11 April 2013,¹⁶ between that date and 24 October 2013, ICANN took no steps to create the standing panel. During that six-month period, ICANN also made no effort to ensure that the paperwork and instructions for filing an IRP were up to date. It bears further noting that DCA informed ICANN of its intent to file an IRP in August 2013, before engaging in a Cooperative Engagement Process¹⁷ with ICANN for a period of two months. During those two months, ICANN did not update the Notice of IRP form available online to petitioners, ICANN did not make the Supplementary Rules available to petitioners, and ICANN did not take any steps towards creating a standing panel to expedite the IRP process.

In sum, ICANN cannot justify violating DCA's procedural rights under this IRP based upon an aspirational deadline that ICANN itself has caused to be delayed.

¹⁴ See Letter from Jeffrey LeVee to Carolina Cardenas-Soto, dated 2 December 2013 (indicating that it is "clear" from the rules that DCA should have filed the two page notice form as well as a 25-page briefing) [Respondent's Ex. – 1 to Response to Request for Emergency Relief].

¹⁵ See Letter from Cindy Reichline to Carolina Cardenas-Soto, dated 4 December 2013 (forwarding the Supplementary Rules to the ICDR, because the Rules web link was inoperative) [Respondent's Ex. – 1 to Response to Request for Emergency Relief]; *see also*, Letter from Carolina Cardenas-Soto to the parties, dated 4 December 2013 (forwarding the Supplementary Rules to the parties) [Respondent's Ex. – 1 to Response to Request for Emergency Relief].

¹⁶ Indeed, while the onus has been on ICANN to establish the standing panel since April 2013, the standing panel mechanism for an IRP was first inserted into ICANN's bylaws in December 2002.

¹⁷ The Cooperative Engagement Process is a negotiation period recommended under the ICANN Bylaws Art. IV, Section 3(14). Parties that do not engage in a CEP process before filing an IRP may be subject to fee-shifting penalties pursuant to the ICANN Bylaws Art. IV, Section 3(16).

This Dispute Concerns ICANN's Accountability For Internet Governance And Thus Implicates Issues Reaching Far Beyond The Dispute Over .AFRICA

We further recall – as ICANN would apparently prefer not to do – that the issues at stake in this case reach far beyond the respective rights of the parties as concerns the delegation of .AFRICA. The IRP is the primary means by which ICANN claims to make itself accountable to Internet stakeholders around the world for abiding by its own Bylaws, Articles of Incorporation, and other rules such as, in this case, the new gTLD Guidebook. ICANN's legitimacy and integrity as an institution are currently being debated by the United States Congress, as it considers whether the U.S. government should withdraw or reduce its oversight of ICANN. Of particular relevance here, one concern that has been raised in the context of these discussions is ICANN's vulnerability to undue influence exerted by governments. If ICANN's conduct concerning the application process for .AFRICA is anything to go by, there is good reason to be concerned.

Indeed, the legitimacy of this proceeding should be of paramount concern to ICANN, just as it is to DCA. This proceeding is the first ever IRP proceeding under the New gTLD Program, the first IRP proceeding under the Bylaws as amended in April 2013 pursuant to ICANN's Accountability and Transparency Review, and only the third IRP ever filed against ICANN.

Furthermore, both parties agree that .AFRICA is a unique right, and once it is delegated no adequate remedy will remain for DCA. At the very least, DCA has a right to be properly heard by this IRP panel and not by ICANN as judge, jury and executioner.

Finally, we find it particularly galling that, after several requests that ICANN suspend processing of applications for .AFRICA in order to avoid eviscerating DCA's rights in this proceeding, it is only now, and in exchange for DCA giving up its procedural rights in this IRP, that ICANN is willing to offer any assurance that it will not complete delegation of .AFRICA to the only other (government-backed) applicant for .AFRICA, ZACR, before this IRP has come to completion.

Based on the foregoing, DCA respectfully requests that the Panel reject ICANN's request for a summary telephone hearing on the merits of DCA's claims just days from now. We further request that the Panel establish a procedural schedule as follows:

- A telephonic hearing on DCA's request for interim relief on April 22, 2014, unless ICANN confirms in writing that it will not proceed with the delegation of the .AFRICA gTLD until the ICANN Board has considered and implemented the Panel's ruling. DCA also requests that the Panel hear, as scheduled, the parties' submissions on the procedure of the remainder of the IRP during that same hearing. DCA has no objections to this being a telephonic hearing;
- Exchange of simultaneous document requests by the parties on April 25, 2014;

- Simultaneous exchange of documents and any objections to document requests on May 9, 2014;
- DCA's Memorial on the Merits submitted on June 6, 2014;
- ICANN's Counter-Memorial submitted on July 4, 2014;
- A telephonic or video hearing on August 1, 2014; and
- Barring other procedural measures deemed necessary by the Panel, that the Panel attempt to render a decision by September 1, 2014.

We appreciate the Panel's consideration of the foregoing and look forward to working with the Panelists and ICANN to put in place a dispute resolution framework that is appropriate for the rights that are at stake and that will be determined as a result of this IRP process.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Arif H. Ali', written over a horizontal line.

Arif H. Ali

cc: Carolina Cardenas Soto
Jeffrey LeVee

Enclosures

Annex A



International Centre
for Dispute Resolution

ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION

Introduction

The American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution[®] (ICDR) are committed to the principle that commercial arbitration, and particularly international commercial arbitration, should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.

While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fairness within those systems, but which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious. One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation.

The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process. Unless the parties agree otherwise in writing, these guidelines will become effective in all international cases administered by the ICDR commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases. They will be reflected in amendments incorporated into the next revision of the International Arbitration Rules. They may be adopted in arbitration clauses or by agreement at any time in any other arbitration administered by the AAA.

1. In General

- a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.

- b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority to apply the above standard. To the extent that the Parties wish to depart from this standard, they may do so only on the basis of an express agreement among all of them in writing and in consultation with the tribunal.

2. Documents on which a Party Relies.

Parties shall exchange, in advance of the hearing, all documents upon which each intends to rely.

3. Documents in the Possession of Another Party.

- a. In addition to any disclosure pursuant to paragraph 2, the tribunal may, upon application, require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.
- b. The tribunal may condition any exchange of documents subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

4. Electronic Documents.

When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Tribunal may direct testing or other means of focusing and limiting any search.

5. Inspections.

The tribunal may, on application and for good cause, require a party to permit inspection on reasonable notice of relevant premises or objects.

6. Other Procedures.

- a. Arbitrators should be receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.

- b. Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.

7. Privileges and Professional Ethics.

The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection.

8. Costs and Compliance.

- a. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.
- b. In the event any party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.

Exhibit 4

JONES DAY

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April 20, 2014

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Re: ICDR Case 50 2013 00 1083 DotConnect Africa Trust (DCA Trust) vs. Internet Corporation for Assigned Names and Numbers (ICANN) - Procedural Proposals

Dear Mr. President and Members of the Panel:

On behalf of ICANN, I am responding to DCA's letter of 17 April 2014 and DCA's proposal to extend this matter into August or September. The Panel should decline DCA's transparent attempt to delay the resolution of this matter well beyond the delays that DCA already has caused. Indeed, the schedule that DCA proposes – particularly in light of DCA's request for emergency relief – is truly shocking and demonstrates that DCA is more interested in delay than in a resolution on the merits. If the Panel is thinking of recommending emergency relief of any kind – and ICANN already has explained why it believes that emergency relief is utterly inappropriate here – ICANN remains willing and eager to resolve this proceeding swiftly pursuant to the schedule that ICANN has proposed.

IRP Panel
April 20, 2014
Page 2

In the April 17 letter, DCA selectively refers to portions of ICANN's Bylaws and the Supplementary Procedures and argues that the parties should be permitted several more months to take discovery and file further briefs. In so doing, DCA ignores the significant changes that have been made to the rules for IRPs.

DCA's counsel, Mr. Ali, participated in the very first ICANN Independent Review proceeding (referenced in footnote 2 of his letter), a proceeding that involved extensive discovery and a five-day hearing that included extensive witness testimony. That proceeding cost the parties millions of dollars. Not long after the conclusion of that proceeding, ICANN engaged world-renowned governance and dispute resolution experts to evaluate the Independent Review process and make recommendations they thought appropriate given the purpose of such a process.¹ As a result of the experts' recommendations, which followed extensive analysis as well as receipt of public comments from the ICANN community via live presentations and written submissions, ICANN significantly amended the rules that apply to Independent Review proceedings in order to streamline the proceedings dramatically so as to avoid exactly the type of "process" and expense that DCA has proposed. Indeed, DCA's proposal treats these proceedings as if these amendments had not occurred.

Paragraphs 4 and 5 of the Supplementary Procedures that now govern these proceedings are critical to how these proceedings should be managed.² Because DCA quotes only selectively from these paragraphs, ICANN provides them here in full (with bolding that refutes some of DCA's particular assertions):

4. Conduct of the Independent Review

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the **extraordinary event** that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), **the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.** Telephonic hearings are subject to the same limitation.

¹ The experts were Mervyn King S.C. former Judge of the Supreme Court of South Africa, Graham MacDonald, Presidential Member of Australia's Administrative Appeals Tribunal, and Richard Moran, a widely known expert on corporate leadership and governance. For more information, see <http://www.icann.org/en/news/in-focus/accountability/asep>.

² Section 2 of the Supplementary Procedures states that "[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR's International Arbitration Rules], these Supplementary Procedures will govern." A copy of the Supplementary Procedures are attached to this letter.

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The IRP Panel retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP Panel's timetable may result in the assessment of costs pursuant to Section 10 of these Procedures.

5. Written Statements.

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. **All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.** Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP Panel may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

With respect to DCA's various proposals:

1. **IRPs no longer involve cross-examination of witnesses.**

DCA argues on page 2 that it would be "inappropriate to hold a summary hearing on the merits in just five days, without ICANN's witnesses being made available for cross-examination by DCA Trust or questioning by the Panel." However, Paragraph 4 of the Supplementary Procedures, quoted above, makes it clear that hearings, if any, are now limited to "argument only." There is no right to cross-examine witnesses at the hearing (or at any other time).

2. **DCA has no automatic right to discovery and has not demonstrated any need for discovery in all events.**

A party does have the right, pursuant to the ICDR Guidelines for Arbitrators on Exchanges of Information, to request that a panel call for the production of documents. However, those documents must be "reasonably believed to exist and to be relevant and material to the outcome of the case," and requests must contain "a description of specific documents or classes of documents, along with an explanation of their materiality to the outcome of the case."³ DCA provides no indication as to what information it believes those documents might contain and has made no showing that those documents could affect the outcome of this case. The ICDR rules plainly do not entitle DCA to proceed with a vague "fishing expedition" request for any and all documents that DCA somehow believes would "clarify the factual issues in dispute."

³ ICDR Guidelines for Arbitrators on Exchanges of Information § 3(a).

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It should also be noted that ICANN's Supplementary Procedures explicitly state that that “[a]ll necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the [initial written] submission.”⁴ DCA’s Amended Notice made no reference to documents that DCA either unsuccessfully sought or was in the process of seeking. Indeed, DCA did not even mention the notion of possible discovery until it served its initial request for emergency relief at the end of March 2014, three months after it served its papers and two months after ICANN served its papers.

3. Further briefing is neither appropriate nor necessary.

DCA’s interpretation of the Supplementary Procedures is simply false. To repeat, the Supplementary Rules state that: “[a]ll necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.” DCA refers on page 3 of its letter to the fact that there is no page limitation for documentary evidence, but this is quite beside the point that DCA was supposed to have submitted **all** of its evidence at the time of the filing of its Amended Notice.⁵ (And, in fact, DCA’s Amended Notice was accompanied by two binders full of exhibits.) DCA then states that, when it submitted its papers “on the understanding that opportunities would be available to make further submissions,” but ICANN made clear at the outset that it viewed DCA’s “understanding” to be absolutely contrary to the rules. ICANN stated in an email to DCA’s counsel on 9 January 2014—prior to the submission of DCA’s Amended Notice—that the Supplementary Rules barred the filing of supplemental submissions.⁶

In short, the Supplementary Procedures provide clearly that the briefing for this matter has concluded, subject only to the ability of the Panel to request additional written submissions. In that respect, ICANN urges the Panel to rule based on the papers already served, following telephonic oral argument, for the following reasons:

- Despite having received ICANN’s response to DCA’s Amended Notice on 10 February 2014, DCA has never even **hinted** that it has any meaningful response to ICANN’s papers. Indeed, when DCA filed its request for emergency relief on 28 March 2014, DCA did not even reference ICANN’s response, much

⁴ Supplementary Procedures § 5.

⁵ DCA also argues that the use of the phrase “initial written submissions” in the first section of paragraph 5 assumes the notion that there will be subsequent submissions. But the rest of the paragraph makes clear that any subsequent submission would be at the request of the IRP Panel, not at the whim of one of the parties.

⁶ 9 January 2014 Letter from Jeffrey A. LeVee to Carolina Cardenas-Soto, Arif Ali and Marguerite Walter copied.

less suggest that DCA had the ability to refute the arguments and evidence contained in the response.

- DCA has delayed these proceedings multiple times, and any request for a further delay as a result of discovery and new briefing (that is proposed to stretch from May to July) is completely contrary to the spirit of the Bylaws and Supplementary Procedures that strongly urge these proceedings to be concluded within six months of when they were initiated. True, ICANN does not yet have a Standing Panel, but the entire spirit of the Bylaws and the Supplementary Rules urges that these proceedings be handled expeditiously. DCA's proposal, by contrast, would delay these proceedings until at least August 2014.
- These proceedings are for the benefit of the entire ICANN community, not merely DCA. The community – which includes the competing applicant for .AFRICA – is entitled to a swift resolution as is expressly (and repeatedly) urged in the Bylaws and Supplementary Procedures.

4. **The issues in this proceeding are limited in scope and are not complicated.**

Despite DCA's suggestion that "the issues at stake in this case reach far beyond the respective rights of the parties as concerns the delegation of .AFRICA" (letter at p. 7), in fact, the **only** issue in this proceeding is whether ICANN violated its Bylaws or Articles of Incorporation in its handling of DCA's application for .AFRICA. And on this issue, the evidence could not be more clear:

- At the time it submitted its application, DCA did not present the requisite evidence of support of at least 60% of the nations of Africa, nor has DCA ever indicated that it could present such evidence;
- the Governmental Advisory Committee ("GAC") properly issued "consensus advice" to block DCA's application;
- ICANN properly followed that GAC advice (and there was no rationale to do otherwise); and
- none of the ICANN Board members who voted on this issue had conflicts of interest.

The papers that the parties already have submitted, including the voluminous exhibits, demonstrate these facts clearly, and no discovery or further briefing would aid the Panel in

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reaching its conclusion. And while DCA objects that ICANN is trying to “transform the IRP into a type of summary judgment process” (letter at p. 4), the IRP process is **supposed** to be limited in scope and process, and this is particularly true where the evidence is unambiguous as to what occurred.

5. **ICANN will not agree to stay the delegation of .AFRICA.**

Finally, ICANN has already stated that it will not agree to refrain from delegating the .AFRICA TLD to ZA Central Registry. ICANN has urged the Panel to hear the matter on the merits in order to issue a decision by 15 May 2014 because ICANN will not, as a practical matter, conclude the delegation process by that date. But the notion urged by DCA that ICANN should voluntarily refrain from the delegation until September 2014 would result in severe prejudice to ICANN and ZA Central Registry, and that would be true even if DCA had viable claims, which it clearly does not.

For this reason, ICANN again urges the Panel to set a schedule for this proceeding that is expeditious, that recognizes that great delays that have occurred as a result of DCA’s conduct, and that conforms with the spirit of these proceedings.

Respectfully submitted,

/s/

Jeffrey A. LeVee

cc: Ms. Carolina Cardenos-Soto
Arif H. Ali, Esq.

Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process

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These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.

1. Definitions

In these Supplementary Procedures:

DECLARATION refers to the decisions/opinions of the IRP PANEL.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 3 of ICANN's Bylaws.

INDEPENDENT REVIEW or IRP refers to the procedure that takes place upon the filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation

INTERNATIONAL DISPUTE RESOLUTION PROCEDURES OR RULES refer to the ICDR's International Arbitration Rules that will govern the process in combination with these Supplementary Procedures.

IRP PANEL refers to the neutral(s) appointed to decide the issue(s) presented. The IRP will be comprised of members of a standing panel identified in coordination with the ICDR. Certain decisions of the IRP are subject to review or input of the Chair of the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP PANEL must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the ICDR; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the ICDR shall identify and appoint one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

2. Scope

The ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws. In the event there is any inconsistency between these Supplementary Procedures and the RULES, these Supplementary Procedures will govern. These Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

3. Number of Independent Review Panelists

Either party may elect that the request for INDEPENDENT REVIEW be considered by a three-member panel: the parties' election will be

taken into consideration by the Chair of the standing panel convened for the IRP, who will make a final determination whether the matter is better suited for a one- or three-member panel.

4. Conduct of the Independent Review

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.

The IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Procedures.

5. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

6. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the requestor has not demonstrated that it meets the standing requirements for initiating the INDEPENDENT REVIEW.

Summary dismissal of a request for INDEPENDENT REVIEW is also appropriate where a prior IRP on the same issue has concluded through DECLARATION.

An IRP PANEL may also dismiss a querulous, frivolous or vexatious request for INDEPENDENT REVIEW.

7. Interim Measures of Protection

An IRP PANEL may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration. Where the IRP PANEL is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision.

8. Standard of Review

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

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

9. Declarations

Where there is a three-member IRP PANEL, any DECLARATION of the IRP PANEL shall be made by a majority of the IRP PANEL members. If any IRP PANEL member fails to sign the DECLARATION, it shall be accompanied by a statement of the reason for the absence of such signature.

10. Form and Effect of an IRP Declaration

- a. DECLARATIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.
- b. The DECLARATION shall specifically designate the prevailing

party.

- c. A DECLARATION may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen circumstances, ICANN will consent to publication of a DECLARATION if the other party so request.
- d. Copies of the DECLARATION shall be communicated to the parties by the ICDR.

11. Costs

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.


In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRPPANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

12. Emergency Measures of Protection

Article 37 of the RULES will not apply.

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Subject: RE: ICDR Case 50 117 T 1083 13 DotConnectAfrica Trust (DCA Trust)
vs. Internet Corporation for Assigned Names and Numbers (ICANN) 
From: Jeffrey LeVee 01/09/2014 02:21 PM
Extension: 32572
To: Carolina Cardenas-Soto, LL.M.
Cc: "Ali, Arif", Cindy Reichline, "Eric P. Enson", "Franzetti, Erica", "Walter, Marguerite"
Bcc: amy.stathos, elizabeth.le

Carolina:

Thank you for your email. We will look forward to receiving DCA Trust's materials tomorrow.

We do, however, wish to make clear that ICANN disagrees with your suggestion that DCA Trust is free to amend or supplement its claims at any time before the arbitrators are appointed. Accordingly, ICANN reserves its right to argue that any amended or supplemental submission that DCA Trust attempts to submit after tomorrow is barred by the rules that apply to this proceeding.

The ICDR's Supplementary Procedures for ICANN Independent Review Process clearly provide that in the event of any inconsistency between the Supplementary Procedures and the ICDR's International Arbitration Rules, the Supplementary Procedures will govern. The Supplementary Procedures do not provide for any amendments or supplemental submissions. Paragraph 5 of the Supplementary Procedures provides for a different process than the ICDR's rules and requires the initial submission (the Request) to include all necessary evidence to demonstrate Requestor's claims. The IRP Panel may then request additional written submissions.

Further, your email does not accurately capture the language of Article 4 of the ICDR's International Arbitration Rules (even if Article 4 were to apply). At a minimum, Article 4 makes clear that any attempt to amend or supplement is subject to a ruling by the tribunal that the attempt was inappropriate.

In all events, we agree that, if DCA Trust attempts to amend or supplement its submissions, the parties can address to the panel in due course the propriety of the timing of DCA Trust's submissions.

Regards,

Jeff LeVee
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Exhibit 5

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**Re: ICDR Case 50 2013 00 1083 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation
for Assigned Names and Numbers (ICANN) – Procedural Proposals**

Dear Mr. President and Members of the Panel,

DCA writes in response to ICANN's letter of today's date concerning the scope of the IRP. We also briefly address ICANN's categorical refusal to stay processing of ZACR's application for .AFRICA until this proceeding has concluded.

First, it is telling that ICANN's representations as to the scope of this proceeding focus exclusively on ICANN's Supplementary Procedures. As their title indicates, the Supplementary Procedures only

supplement – and do not replace – the ICDR Rules, which, along with associated guidelines, govern this proceeding. These rules ensure DCA’s right to be fully heard in this proceeding. That right includes the ability to submit a full written submission on the merits of its claims; the right to the documents on which ICANN relies for its defenses; and the right to test ICANN’s witnesses. What ICANN may have intended and what the legal consequences are of the dispute resolution mechanism that ICANN put in place are for the Panel to decide, not for ICANN to dictate.

The Panel should be guided first and foremost by the text of the ICDR Rules and Supplementary Procedures – as opposed to ICANN’s current, self-serving gloss on those rules. The Supplementary Procedures and the ICDR Rules, moreover, ultimately commit the conduct of the IRP to the discretion of the Panel. In exercising such discretion, the Panel should be guided by the cardinal principle set out in the ICDR Arbitration Rules that each party be given a full and fair opportunity to be heard; a principle that must also be viewed in the context of the fact that these proceedings will be the first and last opportunity that DCA Trust will have to have its rights determined by an independent body. The principles of fairness and equality set out in the ICDR Arbitration Rules, which have not been derogated from by ICANN, prohibit ICANN from unilaterally altering the substance of the rules that apply to this proceeding now that DCA has invoked the IRP.

Second, the Supplementary Procedures do not materially deviate from the rights established under the ICDR Rules, except with respect to the 25-page limit on the parties’ “initial written submissions” and the requirement that hearings be limited to “argument only.”

In particular, and in contrast to what ICANN claims, the Supplementary Procedures provide that:

- There will be “initial written submissions” by each party of no more than 25 pages. The word “initial” confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many and how long the additional written submissions should be (Art. 5);
- “All necessary evidence should” be included with the claimant’s initial written submission. The use of the word “should,” and not “shall,” confirms that it is desirable but not required that all necessary evidence be included with the Notice of IRP (Art. 5). Thus, nothing precludes the claimant from adducing additional evidence to rebut ICANN’s defences, as DCA intends to do;
- The IRP Panel may request additional written submissions from either party, or from third parties, as necessary to render a decision in the matter (Art. 5); and
- As ICANN observes, in the event of an in-person or telephonic hearing, witness statements must be provided in advance and the hearings “shall be” limited to “argument only” (Art. 4). This provision does not expressly prohibit cross-examination of witnesses, however, or their questioning by the Panel. Indeed, it would be highly improper for a party to be allowed to submit witness testimony that could not then subsequently be tested, whether by opposing counsel or the

Panelists. It seems impossible and implausible that this is what ICANN intended or what any Panel could allow. Untested witness testimony is ultimately not worth the paper on which it is written.

The Supplementary Procedures are silent on the issue of document production. The ICDR Rules and Guidelines are the only rules applicable to this issue, giving DCA – and ICANN, should it so desire – the right to seek documents from the other party. The fact that the Supplementary Procedures say nothing about document production should be viewed as allowing document requests to be propounded by the parties, especially where, as here, critical information potentially dispositive of the outcome of these proceedings lies in ICANN possession, custody and control.

The fact that ICANN’s counsel in this case has consistently opposed the operation of the very rules set up by ICANN for the IRP is irrelevant. We understand that ICANN would prefer to avoid the kind of full hearing on the merits that took place in ICM Registry, no doubt because ICANN lost that case. But, even assuming it were true, as ICANN suggests, that it amended the Supplementary Procedures in order to prevent any other party from successfully challenging its actions, the Supplementary Procedures do not restrict the IRP in the manner, or to the extent, that ICANN now argues.

Third, we note that, notwithstanding ICANN’s argument that it engaged experts to amend the Supplementary Procedures in order to prevent proceedings such as that in the ICM Registry case, ICANN’s own evidence shows that these experts were engaged to conduct a review of all of ICANN’s accountability mechanisms, including requests for reconsideration and the role of the office of the ombudsman.¹ The need to hold ICANN accountable to its stakeholders has been a recurrent issue for ICANN. Contrary to what ICANN suggests in its letter, the review of ICANN’s accountability procedures appears to have been motivated as much by concerns about providing for genuine accountability as by any concerns about costs, much less concerns about an excess of due process for IRP claimants.² In fact, ICANN committed to carrying out reviews of its accountability procedures every three years.³ The fact that ICANN’s accountability procedures have undergone revisions is irrelevant to the question of the scope of this IRP. The text of the Supplementary Procedures is simply not as restrictive as ICANN would wish in this case.

Fourth, while ICANN claims that delaying the delegation of .AFRICA in order to allow for the full hearing and evaluation of the parties’ claims and defences would cause it “severe prejudice,” it does not

¹ See <http://www.icann.org/en/news/in-focus/accountability/asep> (cited by ICANN in footnote 1 to its letter of 20 April).

² See <https://community.icann.org/display/ATRT2/Mandate>.

³ *Id.*

even attempt to substantiate that claim. It is difficult to see how ICANN would be prejudiced by waiting a few months in order to allow its own IRP process to proceed according to the rules it has chosen. On the contrary, ICANN's alleged commitment to transparency and accountability would be at far greater risk of harm if ICANN were to succeed in imposing a truncated, summary proceeding on DCA and the Panel in this matter.

Nor should the Panel be persuaded to quash DCA's rights in this proceeding in favour of the alleged right of ZACR to obtain full rights to operate .AFRICA before the IRP is complete. ICANN has consistently behaved as if ZACR's rights trumped those of DCA. It is this very conduct that lies at the basis of DCA's claims: it is not for ICANN to decide, for reasons of political expediency or otherwise outside the rules laid down in its Bylaws, Articles of Incorporation, and the new gTLD Guidebook, that one applicant "deserves" a domain name more than another.

Finally, ICANN has repeatedly brought attention to the fact that DCA has not submitted a rebuttal to ICANN's Response to DCA's Notice of IRP in order to argue that DCA is incapable of providing such a rebuttal. There is no basis for making such an inference. DCA will provide its rebuttal according to the procedures set forth in the ICDR Rules, the Supplementary Procedures, and the Panel's decision on the procedural schedule in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Arif H. Ali', with a long horizontal line extending to the right.

Arif H. Ali

cc: Carolina Cardenas Soto
Jeffrey LeVee