

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

_____)
 DOTCONNECTAFRICA TRUST,)
 Claimant.)
 v.) ICDR Case No.
 INTERNET CORPORATION FOR) 50 2013 00 1083
 ASSIGNED NAMES AND NUMBERS,)
 Respondent.)
 _____)

HEARING ON THE MERITS
 BEFORE THE PANEL: PRESIDENT BABAK BARIN,
 HONORABLE JUDGE WILLIAM CAHILL, AND
 PROFESSOR CATHERINE KESSEDJIAN
 Friday, May 22, 2015; 9:09 a.m.

Reported by: Cindy L. Sebo, RMR, CRR, RPR, CSR,
 CCR, CLR, RSA, LiveDeposition Authorized Reporter
 Job No. 13828

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Hearing on the Merits in the above-styled
manner, held at the offices of:

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The proceedings having been reported by
the Registered Merit Real-Time Court Reporter,
CINDY L. SEBO, RMR, CRR, RPR, CSR, CLR, RSA, and
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21 HEATHER DRYDEN, International
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25 CHERINE CHALABY, ICANN Board of Directors

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16

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19 Exhibit Number 2 12 ---

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1 P R O C E E D I N G S

2
3 Washington, D.C.

4 Friday, May 22, 2015; 9:09 a.m.

5
6 PRESIDENT BARIN: Good morning,
7 everyone.

8 Welcome to Washington, D.C. Thank
9 you for joining us this morning.

10 After yesterday's weather, we were
11 this -- especially for you (indicating),
12 there's sunshine outside.

13 What we'll do this morning is we'll
14 start with, I guess, the welcome and the
15 initial presentations of the Members of
16 the Panel.

17 I will start to my left,
18 Professor Kessedjian,
19 Catherine Kessedjian; to my right,
20 Retired Judge William Cahill; and myself,
21 who is President of the Panel,
22 Babak Barin.

23 I will then ask, if you would,
24 counsel for each side, to present your
25 team members and guests that you have in

1 the room for the record.

2 And once we do that, as a roll call,
3 then we will proceed with looking at the
4 agenda just to make sure that there's no
5 issues that we need to deal with on a
6 preliminary basis and then move forward
7 with your presentations.

8 Is that okay?

9 So, Mr. Ali.

10 MR. ALI: Thank you, Mr. President.
11 And good morning.

12 My name is Arif Ali from Weil,
13 Gotshal & Manges on behalf -- appearing
14 on behalf of DCA Trust, the Claimant.

15 I'll start at the other end. We
16 have our client, Ms. Sophia Bekele; then
17 next to her is my colleague
18 Meredith Craven; next to her, colleague
19 Ricardo Ampudia; and to my immediate left
20 is Erin Yates, all from Weil, Gotshal &
21 Manges.

22 PRESIDENT BARIN: Thank you.

23 MR. ALI: Thank you.

24 MR. LEVEE: Good morning, Members of
25 the Panel.

1 My name is Jeff LeVee from
2 Jones Day. Next to me is my colleague
3 Rachel Zernik, also from Jones Day.

4 To her right is Amy Stathos. Amy is
5 the deputy general counsel of ICANN, our
6 client.

7 Behind me are witnesses you met this
8 morning: Ms. Heather Dryden, who you met,
9 and Mr. Cherine Chalaby.

10 Mr. Chalaby is a current member of
11 ICANN's Board. Ms. Dryden is the former
12 Chair of the Government Advisory
13 Committee of ICANN and is employed by the
14 Respondent, ICANN.

15 I'm sure they will introduce
16 themselves further given the opportunity
17 this afternoon.

18 PRESIDENT BARIN: Okay. Thank you.

19 So this is the -- for the record,
20 this is the merits hearing of the IRP
21 Panel between DotConnectAfrica Trust and
22 Internet Corporation for Assigned Names
23 and Numbers, ICANN. It's the American
24 Arbitration Association Case Number
25 50 2013 00 1083.

1 So the Panel sent you a Procedural
2 Order Number 8, which essentially laid
3 out, if you will, a proposed timetable
4 for the conduct of this proceeding. We
5 suggest that we stick to that. We've
6 started a few minutes later, but I think
7 we'll catch up in terms of time.

8 Are there any preliminary issues or
9 anything that you want to deal with
10 before we actually go formally into the
11 agenda this morning, either side?

12 MR. ALI: Just one item from us,
13 Mr. President.

14 Yesterday evening, based on
15 communications with -- with ICANN's
16 counsel, we indicated that we would like
17 two new documents added to the record.
18 And we have designated those Hearing
19 Exhibits 1 and 2.

20 There was no objection from ICANN's
21 side, and so we have these documents
22 printed out with sufficient copies.

23 And to the extent that it's
24 acceptable to the Panel, I'll hand them
25 out now, as we'll be referring to these

1 in our opening presentation.

2 PRESIDENT BARIN: Sure.

3 Do you have any problem?

4 HONORABLE JUDGE CAHILL: No. Go on.

5 MR. ALI: Thank you.

6 PRESIDENT BARIN: It will just be
7 important to make sure that we have a
8 sequential numbering.

9 MR. ALI: Yes.

10 We call them Hearing Exhibit 1 and 2
11 just so they can be slotted at the back.
12 And when we come to the appropriate --

13 HONORABLE JUDGE CAHILL: Thank you.

14 MR. ALI: -- slide, we'll refer to
15 those particular documents as
16 Hearing Exhibit 1 and 2.

17 PRESIDENT BARIN: Okay. Perfect.
18 Thank you.

19 MR. ALI: Of course, they could also
20 get sequential numbers in the overall set
21 of Claimant exhibits, as you prefer.

22 PRESIDENT BARIN: I think Hearing
23 Exhibit 1 and 2 is fine.

24

25

1 - - -

2 (Whereupon, Hearing Exhibit Number 1
3 was marked for identification
4 purposes.)

5 - - -

6 - - -

7 (Whereupon, Hearing Exhibit Number 2
8 was marked for identification
9 purposes.)

10 - - -

11 PRESIDENT BARIN: Okay. Anything
12 else?

13 PROFESSOR KESSEDJIAN: Do you have
14 copies?

15 MR. LEVEE: I'm sure they're going
16 to provide them.

17 (Pause.)

18 MR. LEVEE: Thank you.

19 PRESIDENT BARIN: Anything else,
20 Mr. LeVee?

21 MR. LEVEE: Nothing from our side.
22 We're ready to go.

23 MR. ALI: Same.

24 PRESIDENT BARIN: Okay. Good.

25 So I guess the first item on this

1 morning's agenda is the opening
2 presentations.

3 And, Mr. Ali, for the Claimant, the
4 floor is yours.

5 We've allocated about an hour, but
6 I'm sure the Panel's flexible to make
7 sure that we give you a bit of leeway.

8 MR. ALI: Well, thank you, because
9 we do have a fair amount to present,
10 which we'll be splitting up between today
11 and tomorrow, and between myself and my
12 colleagues.

13 - - -

14 OPENING STATEMENT ON BEHALF OF CLAIMANT

15 DOTCONNECTAFRICA TRUST

16 - - -

17 MR. ALI: So, once again, good
18 morning.

19 First of all, I'd like to thank
20 Jones Day and Mr. LeVee and Ms. Zernik
21 for all of their hospitality and
22 graciousness in providing this facility.
23 It can be quite -- quite a headache in
24 arbitrations or in any type of noncourt
25 process where you have to focus on -- on

1 finding the facilities. And these really
2 are very gracious facilities.

3 It's been a fairly long journey for
4 to us to get here, certainly about a year
5 and a half for all of us to convene here
6 in Washington, but all of -- much longer
7 for Ms. Sophia Bekele.

8 Now, as you've come to see, and
9 hopefully learn, from her witness
10 testimony and will come to appreciate in
11 the course of the next two days,
12 Ms. Bekele is a highly intelligent, very
13 motivated woman with considerable
14 business experience, someone who has
15 great ideas, a great vision and the
16 energy to be able to implement those
17 ideas.

18 Those ideas and her energy were
19 reflected in the efforts that went into
20 the development of the
21 Applicant Guidebook. That is one of the
22 documents at the -- that we will be
23 referring to as a source for the
24 standards that are applicable.

25 Now, of course, there are others,

1 but please do keep in mind that as this
2 idea of .africa was germinating, it was
3 germinating hand-in-hand with the
4 participation of Ms. Bekele in the
5 creation of the very standards that would
6 be applied, someone who believed that as
7 the standards were being developed, that
8 those standards would be applied fairly
9 and equitably and transparently.

10 Now, at bottom, what we have here is
11 the fact that ICANN simply didn't provide
12 DCA Trust a fair shake.

13 DCA Trust followed the rules of the
14 game, rules of the game that were
15 developed with significant involvement
16 from the Internet community, rules of the
17 game that were ultimately developed and
18 approved by the ICANN Board.

19 And with the approval of those rules
20 of the game, ICANN, as a
21 quasiinternational organization -- now,
22 let's not forget that ICANN, while being
23 a California corporation, has a very,
24 very unique role. It is the regulator of
25 the Internet, a global commons, a global

1 resource.

2 And in that respect, ICANN's Bylaws
3 and Articles of Incorporation lay out, in
4 the Articles of Incorporation, a very
5 significant set of principles relating to
6 ICANN being required to conduct itself
7 and its activities in accordance with
8 local law and principles of international
9 law.

10 Now, I'm not here to educate the
11 Panel on what those principles of
12 international law are, but they -- they
13 include good faith; they include
14 transparency; they include fair and
15 equitable treatment, in essence, imposing
16 upon the regulator of the Internet, the
17 party that is going to be administering
18 the rules, to afford a level playing
19 field. And that is all that DCA Trust
20 asked for from the very get-go.

21 Like the other applicants, when it
22 presented its application together with
23 \$180,000 fee, all it asked for was Treat my
24 application fairly; be transparent with me;
25 give me a fair shake.

1 And ICANN, as the curator of the
2 process, said, I accept your application,
3 and I am the caretaker of the level playing
4 field.

5 But instead, what did ICANN do? ICANN
6 tilted that playing field in favor of one
7 of the applicants.

8 And just so we understand who that
9 other applicant is, it is the African Union
10 Commission and its agent, UniForum, doing
11 business as ZACR.

12 HONORABLE JUDGE CAHILL: Doing
13 business as what?

14 MR. ALI: As ZACR, Z-A-C-R.

15 So what we'd like to do in this
16 opening presentation is to help you look
17 at the record. And, ultimately, the
18 eloquence of advocates provides no
19 substitute for hard evidence. And that's
20 all we ask the Panel to do, is to look at
21 the evidence. And we believe the
22 evidence makes very clear how that
23 playing field was tilted in favor of the
24 AUC and ZACR to DCA Trust's disadvantage.

25 So in that spirit of wanting to be

1 of assistance to you as you make your
2 decision, what we're going to do in our
3 presentation this morning is to split it
4 up.

5 So I'm just going to address the
6 standard of review, shortly, and then I'm
7 going to hand over to two members of my
8 team, Ms. Yates and Ms. Craven, who have
9 looked at every single piece of paper
10 that's in the record.

11 So who better than my two colleagues
12 to assist you in looking at the record,
13 in understanding the documents and
14 walking you through the language in
15 ICANN's production, as well as our own
16 exhibit.

17 Now, I will say, without wishing to
18 embarrass them, that this is their first
19 opportunity to appear before a panel.
20 And, indeed, they have the great fortune
21 to appear before such a distinguished one
22 in such an important proceeding. And I
23 have absolutely no doubt they will do
24 incredibly well and be of great
25 assistance to you.

1 So with that, let me just turn very
2 briefly to what it is that we claim has
3 taken place.

4 We can go to the slide with the
5 breaches.

6 So, for us, ICANN has violated its
7 articles, i.e., has violated the
8 principles of international law,
9 principles that were articulated all too
10 well in the context of the .xxx case,
11 which Mr. LeVee and I did -- locked horns
12 over. I guess that was a couple of years
13 ago --

14 MR. LEVEE: I think we both had more
15 hair back then.

16 MR. ALI: I was certainly, I hope,
17 slimmer.

18 (Laughter.)

19 MR. ALI: -- but the -- but it is
20 the Articles of Incorporation which set
21 out the principles of international law.

22 And, please, I ask the Panel not to
23 give that language short shrift. That
24 language is there for a purpose. It is a
25 reflection of who ICANN is, and it is a

1 reflection of what ICANN does.

2 And that language is included in the
3 Articles of Incorporation for a reason,
4 and it is language that imposes upon
5 ICANN certain obligations that arise out
6 of international law and which echoes in
7 the Bylaws.

8 When you look at the Bylaws of
9 ICANN, those Bylaws reflect certain
10 principles and requirements, such as the
11 fact that ICANN shall not act
12 discriminatorily towards a party; that
13 ICANN will not abuse its regulatory
14 authority; and that ICANN will act
15 transparently, objectively, fairly and
16 equitably.

17 So not only are obligations imposed
18 as a general proposition in the Articles
19 of Incorporation, including the
20 obligation of good faith, but more
21 specifically in ICANN's Bylaws. And
22 we've indicated which Bylaws are
23 associated with which particular breaches
24 in our Slide Number 8, and they're
25 reflected also in the

1 Applicant Guidebook.

2 So the construct here, insofar as
3 the substantive principles that are
4 applicable, are the Articles of
5 Incorporation; they're the Bylaws and the
6 Applicant Guidebook; and, certainly,
7 obviously, the ICDR rules and the
8 supplemental procedures.

9 Now, let me turn just very shortly
10 to the -- the standard of -- of review.
11 I know that this is a matter of some
12 interest to the Panel, and I know there's
13 some controversy associated with what the
14 standard of review should be.

15 According to ICANN, it's a
16 deferential standard review, and
17 according to the Claimant, it is a
18 standard review that's de novo or,
19 rather, perhaps, using the words of
20 Judge Schwebel in the ICM versus ICANN
21 case, it is an objective standard review.

22 Now, why should it be that? First
23 of all, ICANN says that in light of the
24 ICM case, that there were many changes
25 that were made to the IRP system.

1 I must say I'm glad that we had such
2 an impact in hopefully improving the
3 system, but it doesn't seem that there's
4 greater clarity that has arisen out of
5 those further amendments.

6 I see nowhere in the standard
7 review -- in the language, I see nowhere
8 the word "deferential."

9 Now, if ICANN had intended for
10 there -- for you to be applying a
11 deferential standard review, there's no
12 reason why that word could not have been
13 put in, is there? But they didn't put
14 those words in. They didn't say
15 "deferential standard review."

16 Now, what I think should inform your
17 decision about an objective standard
18 review, or what we might call "a de novo
19 standard review," is the following: This
20 is the only opportunity that a claimant
21 has for independent and impartial review
22 of ICANN's conduct, the only opportunity.
23 And within the context of that only
24 opportunity, that sole opportunity,
25 really, there should be a deferential

1 standard review, deference to the
2 regulator, whose very conduct is being
3 questioned. I think that that's wrong.

4 So not only do we not have any
5 specific language in the revised rules
6 whereby ICANN had previously argued for a
7 deferential standard review, the
8 ICM panel said No. ICANN revised the
9 rules, but they didn't put in the wording
10 "deferential."

11 But within the context of this
12 process -- keeping in mind the litigation
13 waiver, that all applicants are required
14 to sign a very broad, very strict
15 litigation waiver that ICANN constantly
16 invokes and provides it with a protection
17 from the public courts, and within the
18 context of a proceeding that ICANN says
19 has very limited purpose -- we, of
20 course, contest that -- they ask you to
21 apply a deferential standard review.

22 Not only do we, ICANN, develop the
23 rules, we will interpret those rules, and
24 we will tell you whether or not we are
25 going to abide by those rules. We change

1 them when we like, we'll agree to them if
2 we like, and we will apply them as we
3 wish -- the regulator of the Internet, a
4 global commons, a resource that has been
5 put in the hands of ICANN.

6 So we would submit to you that the
7 standard review is not one that is in any
8 way deferential, but one that is de novo
9 and whereby, we, as the Claimants, have
10 to establish our case by preponderance of
11 the evidence.

12 Now, ICANN will turn your attention
13 to the specific elements of Article IV of
14 the -- of the -- of the Bylaws -- I'm
15 sorry -- of the supplemental rules, where
16 it says, The Panel must focus on whether
17 the Board acted without conflict of
18 interest in making its decision, whether
19 the Board exercised due diligence and
20 care in having a reasonable amount of
21 facts in front of them, and whether the
22 Board members exercised independent
23 judgment in taking the decision believed
24 to be in the best interests of the
25 company.

1 And we're not saying you shouldn't
2 focus on those items, but that doesn't
3 mean that those items that are listed in
4 any way detract from, limit, curtail or
5 circumscribe the obligations that are
6 laid out as a result of the Articles of
7 Incorporation, the Bylaws, the Applicant
8 Guidebook.

9 And, again, we ask you to look at
10 the standard of review within the context
11 of what this proceeding is and what ICANN
12 has said about this proceeding. And we
13 ask that you reject their proposition,
14 their submission that the standard review
15 should be one that is deferential.

16 And with that, I will turn matters
17 over to Ms. Craven, and we will start
18 with, again, this perhaps somewhat
19 laborious but, we do think, very helpful
20 exercise of reviewing the evidence.

21 Thank you, Members of the Panel.

22 We should say, please do interrupt
23 any of us if you have any questions about
24 any aspect of what we've said. And if
25 there's a question at this particular

1 point, I'm happy to address it before
2 turning it over to Ms. Craven.

3 PRESIDENT BARIN: We had said that
4 we would keep questions, if you will, at
5 the end, but I'm happy to have my
6 Panel Members ask any questions.

7 Do you have any --

8 HONORABLE JUDGE CAHILL: So your
9 authority for the standard review is this
10 other case, right?

11 MR. ALI: Indeed. In -- in -- in
12 part, yes, but given ICANN's position,
13 Judge Cahill, that they modified the
14 standard review in light of that case,
15 our submissions are also that the
16 modification should -- should be looked
17 at. And the fact that there's nothing
18 set regarding the deferential standard
19 review, thereby it's important for the
20 Panel to take guidance from another IRP
21 which did look at the standard review.

22 HONORABLE JUDGE CAHILL: Got it.

23 PRESIDENT BARIN: Mr. Ali, before
24 you go, are we to understand, Mr. Ali,
25 that what you're submitting to us is that

1 we can actually go beyond, if you will,
2 what is set out in the supplementary
3 rules as well as, I guess, the provisions
4 of Article IV, Section 3 of the Bylaws?

5 Is that what you're saying?

6 MR. ALI: Our position is that the
7 supplemental rules and the ICDR rules
8 provide a procedural framework.

9 In terms of the substantive
10 framework, it's the Articles of
11 Incorporation, the Bylaws and the
12 Applicant Guidebook. And those are the
13 particular standards that we believe
14 apply for purposes of judging ICANN's
15 conduct.

16 Now, the supplemental rules and the
17 ICDR rules that they're intended to
18 modify seem to get, you know, somewhat
19 jumbled, but that doesn't mean that that
20 is not the procedural framework as
21 opposed to the substantive framework.

22 ICDR rules and the supplemental
23 rules provide the procedural framework,
24 and, ultimately, those are the documents
25 that provide the substantive principles

1 and rules that are applicable.

2 PRESIDENT BARIN: This is an
3 important point, so allow me to press a
4 little bit further.

5 MR. ALI: Please.

6 PRESIDENT BARIN: If the Panel was
7 to look at, by example, one of the items
8 that it would have to -- has to make a
9 decision on, and that's, for example,
10 Section 3, Sub 4a, Did the Board act
11 without conflict of interest in taking
12 its decision --

13 MR. ALI: Yes.

14 PRESIDENT BARIN: -- would you
15 explain to us how the Panel would
16 consider that in light of the standard
17 that you're setting, which is that
18 de novo, if you will, or objective
19 meaning of what transpired? In other
20 words, what should this Panel be looking
21 at in order to do that?

22 MR. ALI: Just so I understand the
23 question, with respect to the substantive
24 standards of conflict?

25 PRESIDENT BARIN: Right.

1 In other words, at the end of the
2 day, we have to come up -- you're looking
3 for a decision from us.

4 MR. ALI: Indeed. With respect to
5 the issue of a conflict of interest --
6 now, there has been the ICANN ombudsman's
7 review of whether or not there's a
8 conflict of interest or not, applying
9 standards that, frankly, are not entirely
10 clear.

11 I think, as in all international
12 proceedings -- and we can consider this
13 to be an international proceeding --
14 question marks, as you know, arise and
15 have been much -- a source of much
16 academic debate as to what are the
17 standards of conflict that should be
18 applicable.

19 I think that there's a rule of
20 reason that you would need to apply here,
21 and that rule of reason needs to be
22 applied within the context of the process
23 of the specific -- the specific action
24 that those who are -- who were supposedly
25 conflicted were involved in.

1 I don't think that we can look to
2 any particular rules of ethics. I don't
3 think that -- rules of ethics that would
4 apply to counsel or to arbitrators.
5 Those may be informative in a way, but I
6 don't think the specifications apply.

7 I do believe, at the end of the day,
8 you will have to apply rule of reason
9 that is reflective of the particular
10 context of the decisions that were being
11 taken --

12 HONORABLE JUDGE CAHILL: That sounds
13 like the standard that the ombudsman made
14 in his decision. He said Not arbitrator,
15 not judge, that it's a different
16 standard. It sounds like you don't agree
17 with that standard.

18 MR. ALI: I think that's right. I
19 can't disagree, Judge Cahill. I mean, at
20 the end of the day, since there aren't
21 any defined standards -- you know,
22 there's one that the ombudsman applied
23 within the context of his factual
24 investigation. There's one that you will
25 apply within the context of looking at

1 our overall submissions regarding whether
2 or not ICANN has violated the Articles of
3 Incorporation and the Applicant
4 Guidebook --

5 HONORABLE JUDGE CAHILL: You want us
6 to make a de novo decision on that? Just
7 look at it fresh?

8 MR. ALI: Yes, I think there are two
9 things you can do: one is to look at that
10 particular issue of conflict of interest;
11 and then to look at the -- the
12 allegations of the conflict of interest
13 within the overall context of our case,
14 which is that the playing field was
15 tilted very heavily in favor of the
16 African Union Commission.

17 HONORABLE JUDGE CAHILL: Okay.

18 PRESIDENT BARIN: Thank you.

19 MR. ALI: May I turn the podium over
20 to my colleague?

21 PRESIDENT BARIN: Sure. We'll
22 probably come back to this again
23 afterwards.

24 MR. ALI: Of course.

25 MS. CRAVEN: Good morning,

1 Mr. Chairman and Members of the Panel.
2 My name is Meredith Craven, and I appear
3 before you on behalf of DotConnectAfrica
4 Trust.

5 I plan to take you through, in a
6 little more detail, the chronology which
7 appears here on the tripod and also as
8 reproduced on Slide 7 of your packet --

9 HONORABLE JUDGE CAHILL: Don't pay
10 attention to that man.

11 MS. CRAVEN: I'll do my best. I
12 hope he enjoys the timeline.

13 As you can see from looking at this
14 timeline, which, of course, is a little
15 bit easier to read in your packet, from
16 the very beginning of the New gTLD
17 Program, ICANN has shepherded the African
18 Union Commission towards its desired
19 goal; namely, ownership and operation of
20 the New gTLD .africa.

21 In October 2011, the AUC formally
22 requested in a document titled The Dakar
23 Communiqué that ICANN reserve .africa and
24 its French and Arabic equivalents for the
25 exclusive use of the AUC.

1 Despite the fact that the
2 application window opened in January 2012
3 and despite the fact that DCA Trust
4 submitted a letter in December 2011
5 requesting that ICANN respond to the
6 AUC's petition and inform applicants of
7 the status of .africa, ICANN failed to
8 respond to the AUC's petition and inform
9 applicants of that status until
10 March 8th, 2012, three months into the
11 application window for new gTLDs, during
12 which DCA submitted its application for
13 .africa.

14 In its March 2013 response, ICANN
15 informed the AUC they could not reserve
16 .africa as this would violate the
17 Applicant Guidebook. However, ICANN
18 advised the AUC that it could use
19 mechanisms, like ICANN's Governmental
20 Advisory Committee, or GAC, to play a
21 prominent role in determining the outcome
22 of any application to these top-level
23 domain name strings, .africa and its
24 French and Arabic equivalents.

25 ICANN advised the AUC that by

1 joining the GAC, the AUC could inform
2 ICANN that there are concerns with an
3 application via the GAC Early Warning
4 notice and provide direct advice to the
5 ICANN Board on any particular
6 application.

7 ICANN's advice to the AUC that it
8 could join the GAC is troubling in that
9 it was not a foregone conclusion that the
10 AUC could become a GAC member and have
11 this status required to issue Early
12 Warnings or participate in GAC advice.

13 According to the ICANN Bylaws,
14 membership on the GAC is open to national
15 governments, and the AUC is not a
16 national government.

17 The Bylaws go on, as you can see
18 from the highlighting, to indicate that
19 distinct economies, as recognized in
20 international fora, multinational
21 government organizations and treaty
22 organizations may also join the GAC but
23 only upon the invitation of the GAC
24 through its Chair.

25 Moreover, the GAC operating

1 principles clarify that multinational
2 governmental organizations and treaty
3 organizations who are invited to
4 participate in the GAC by its Chair do so
5 as observers only.

6 Now, what this means is that they do
7 not have voting rights; they do not issue
8 Early Warnings; and they do not
9 participate in GAC advice.

10 HONORABLE JUDGE CAHILL: That's
11 observers, right?

12 MS. CRAVEN: As observers, they do
13 not participate in GAC advice.

14 Indeed, looking at the list of GAC
15 voting members that are not national
16 governments, as compared to the
17 organizations that are observers on the
18 GAC, it really does appear that the AUC
19 received special treatment in this case.

20 Organizations that are analogous to
21 the AUC, like the Council of Europe, the
22 Organization of American States or the
23 Pacific Islands Forum, are observers.

24 They do not have voting rights, and they
25 do not participate in GAC advice.

1 In fact, the sum total of
2 nongovernment voting members of the GAC
3 is the European Commission and the
4 African Union Commission. However, the
5 European Commission and the African Union
6 Commission are treated very differently
7 outside of the ICANN world.

8 While the AU and the EU are both
9 very important in the relevant regions,
10 their powers are different. Their
11 enforcement capabilities with regard to
12 their members are different. Their
13 status on the global stage is very
14 different.

15 For example, the EU actually has the
16 authority to regulate and legislate over
17 the sovereign governments which form part
18 of the European Union. In addition, the
19 EU creates EU law and has the ability to
20 enforce this law upon its members.

21 The EU has the authority to sign
22 international agreements as the EU, and,
23 perhaps most importantly for our
24 purposes, the EU has expanded observer
25 status in the United Nations. This means

1 that the EU, exclusively of all other
2 international organizations, has the
3 authority to speak at the UN General
4 Assembly meetings. It has the sole --
5 and it is the sole nonstate party to
6 numerous United Nations agreements.

7 The African Union does not have this
8 status. The African Union is an
9 important political organization with a
10 mission to promote peace, stability and
11 security in the African continent, but it
12 has no regulatory authority over African
13 states. There is no such thing as AU
14 law, and there is no mechanism to enforce
15 AU law.

16 Finally, the African Union is a UN
17 observer, not an expanded observer, an
18 observer alongside organizations like the
19 Council of Europe, the Organization of
20 American States, and the Pacific Islands
21 Forum, all of which have observer and
22 nonmember status on the GAC.

23 Now, ICANN has argued that the AUC's
24 membership as a voting member on the GAC
25 was a decision purely within the ambit of

1 the GAC. They have said that it was at
2 the sole discretion of the GAC for the
3 AUC to join as a voting member.

4 ICANN has argued that its Board had
5 absolutely nothing to do with the
6 decision to give the AUC voting rights;
7 however, two weeks prior to sending its
8 March 2013 response to the AUC, advising
9 the AUC that it could use the GAC to
10 achieve its ends, ICANN shared the draft
11 of that letter with the GAC Chair,
12 Ms. Heather Dryden, requesting that she
13 review and comment upon the draft, which
14 indicated the AUC could have voting power
15 as a GAC member, and used that to have a
16 prominent impact on the outcome of
17 .africa.

18 And, in fact, after receiving this
19 advice in the March 8th, 2013 letter, the
20 AUC did take steps and became a GAC
21 member by the Toronto GAC meeting in
22 June 2013. And in November 2013, the GAC
23 orchestrated the GAC Early Warnings
24 against DCA's application containing
25 exactly the anticompetitive purpose --

1 anticompetitive purpose expressed in The
2 Dakar Communiqué.

3 As you can see from Slide 16, a GAC
4 Early Warning is intended to allow a
5 government to indicate to an applicant
6 that their gTLD application is seen as
7 potentially sensitive or problematic. It
8 is merely a notice; it does not result in
9 any adverse effect upon the application.

10 A GAC Early Warning is essentially
11 an invitation to the applicant to work
12 with the affected government so that
13 problems with the application don't arise
14 later on in the process.

15 According to the Application
16 Guidebook, an Early Warning typically
17 results from a notice to the GAC by one
18 or more governments that an application
19 might be problematic because it violates
20 national law or raises sensitivities.

21 However, the AU's Early Warning did
22 not relate to policy issues or
23 sensitivities; instead, the AU's Early
24 Warning contained three rationales.

25 First, the AU claimed that DCA's

1 application had a lack of geographic
2 support. This is not a ground for an
3 Early Warning. This is not a policy
4 issue. This is actually a matter for the
5 Geographic Names Panel, which is the
6 independent body that ICANN specifically
7 hired and delegated to determine whether
8 or not geographic applications have the
9 requisite support to satisfy the
10 Applicant Guidebook.

11 Second, the AUC complained that
12 DCA's application was an unwarranted
13 intrusion on the AUC's self-awarded
14 mandate to establish .africa.
15 Essentially, the AU said it wanted the
16 string, and it did not want DCA to have
17 it.

18 Finally, the AUC alleged a string
19 similarity problem. A "string similarity
20 problem" essentially means that two
21 applied-for strings are so similar that
22 it would confuse the DNS system to have
23 them both in existence.

24 DCA's application, therefore, was
25 too similar, because it applied for

1 .africa, to the AUC's application for
2 .africa; and, therefore, DCA's
3 application should not go forward.

4 This is not a real string similarity
5 issue; this is, again, an anticompetitive
6 aim.

7 Again, however, ICANN employs an
8 independent panel to evaluate string
9 similarity. So regardless of the purpose
10 of this string similarity claim, the GAC
11 Early Warning need not address it.

12 Furthermore, the Early Warning did
13 not contain any concerns whatsoever about
14 the policy behind DCA's application. It
15 didn't touch upon the viability of the
16 application, the manner in which DCA
17 proposed to operate .africa in its
18 application or the impact upon the
19 African continent if DCA were to be the
20 custodian of the string .africa.

21 This GAC Early Warning is not a
22 matter of public policy, which is the
23 proper ambit of the GAC; instead, it is
24 merely an anticompetitive document.

25 The anticompetitive Early Warning,

1 however, then translated into the
2 anticompetitive GAC advice on April 2013.
3 Again, the purpose of GAC advice, like a
4 GAC Early Warning, is to address
5 applications that potentially violate
6 national law or raise sensitivities. The
7 purpose is not to simply object to a
8 competitor.

9 And it's important to understand
10 that we're looking at a unique situation
11 here. In no other instance, that we are
12 aware of, was there an applicant for a
13 gTLD that was also a member of the GAC.
14 In no other instance do we have an
15 applicant who is also a judge.

16 Now, ICANN has maintained that the
17 GAC advice in DCA's application was
18 consensus advice; and, therefore, it was
19 proper for the Board to accept that
20 advice.

21 As you can see from the slide, the
22 Applicant Guidebook provides three types
23 of GAC advice: first, consensus advice;
24 second, advice that some members on the
25 GAC may have concerns about an

1 application; and third, advice that
2 certain amendments should be made to the
3 application before it should proceed.

4 Consensus advice creates a strong
5 presumption that the ICANN Board should
6 not approve the application; however,
7 this is a strong presumption. It is not
8 a mandatory requirement that the Board
9 accept the GAC's decision. And the
10 factors here that the Claimant maintains
11 render this advice not consensus advice
12 should have, at a minimum, prompted the
13 ICANN Board to conduct due diligence into
14 the validity of the anticompetitive GAC
15 advice.

16 First among these factors, the
17 advisor from Kenya, Mr. Sammy Buruchara,
18 specifically informed the GAC Chair and
19 the ICANN CEO, in advance of the GAC
20 meeting in Beijing in April 2013, the
21 meeting which produced the GAC advice at
22 issue here, that Kenya did not wish to
23 issue the advice on DCA's application.

24 Two days prior to the GAC meeting
25 from where the advice issued,

1 Mr. Buruchara wrote directly to the
2 GAC Chair, Ms. Dryden, and to ICANN's
3 CEO, Fadi Chehadé, informing them that he
4 could not attend the GAC meeting in
5 Beijing but that he had concerns about
6 certain irregularities that had arisen in
7 the meetings leading up to the GAC
8 meeting.

9 He informed Ms. Dryden and
10 Mr. Chehadé that should anyone raise an
11 objection against DCA's application
12 through the GAC advice, Kenya objected to
13 the GAC advice.

14 Redacted - GAC Designated Confidential Information

1

Redacted - GAC Designated Confidential Information

1 Redacted - GAC Designated Confidential Information

8 Now, how that turned into advice on
9 DCA's application, we don't know.

10 Somehow, the GAC issued advice based
11 upon the -- the version of text -- or a
12 version of text that included an
13 objection to DCA's application. We have
14 no indication of how this occurred
15 because the GAC meeting was confidential.

16 Apparently, no minutes were taken.
17 No one seems to have a recollection of
18 what happened. Ms. Dryden didn't provide
19 any enlightening information in her
20 statement on what actually happened
21 during that critical meeting from which
22 the GAC advice issued.

23 Nonetheless, all the GAC members
24 through the GAC LISTSERV, the GAC's
25 chairperson and ICANN's CEO were all

1 aware that the Government of Kenya
2 objected to anticompetitive advice issued
3 through the GAC.

4 In light of the fact that the advice
5 was anticompetitive and inconsistent with
6 the role of the GAC and the purpose of
7 the GAC advice, in light of the fact that
8 the Board had notice that Kenya disagreed
9 with anticompetitive use of the GAC
10 advice, and in light of the fact that the
11 GAC Chair, a liaison to the ICANN Board,
12 had notice that Kenya objected to the
13 anticompetitive use of the GAC advice,
14 the NGPC should have at a minimum --
15 should have considered that this was not
16 proper consensus advice but, at a
17 minimum, should have investigated into
18 the procedural irregularities raised,
19 particularly because DCA pointed out in
20 its response, which it was entitled to
21 send to the NGPC -- in its response to
22 the GAC advice, submitted on May 8th,
23 2013, that there were all of these
24 procedural irregularities and that the
25 AUC was motivated by political

1 machinations, by an anticompetitive
2 purpose to acquire this TLD for its own
3 use, operation and profit.

4 HONORABLE JUDGE CAHILL: I saw in
5 one of their briefs -- one of ICANN's
6 briefs that this person from Kenya was --
7 who was sending e-mails was not the
8 proper to person to vote on or was not in
9 the right position, and the person who
10 was in the right position was in Beijing.
11 And we don't know what happened. We
12 don't even know if he was in the room.

13 When you say about, you know, Kenya
14 objecting to -- through someone who has
15 not the power to do it, I think that's
16 their point.

17 MS. CRAVEN: You're absolutely right
18 that Mr. Buruchara was the GAC advisor,
19 and ICANN maintains that the GAC
20 representative is the proper person to --
21 to represent a government.

22 Now, whether or not -- some
23 countries seem to have advisors only.
24 Some countries seem to have
25 representatives only.

1 I would certainly appreciate some
2 enlightening on how the system is
3 supposed to work, because the reality of
4 who represents governments and the GAC
5 operating principles doesn't line up
6 precisely.

7 Redacted - GAC Designated Confidential Information

1 The other thing that I would point
2 out is -- and we're not here to debate
3 ICANN's procedures; we're here to --
4 we're here to address the fact that ICANN
5 has not followed its procedures.

6 But it does seem somewhat strange
7 that in a meeting where governments are
8 supposed to be authorizing their
9 sovereign authority through their
10 representatives, no one has a record of
11 what happened, no one seems to know where
12 Mr. Katundu was, no one seems to know
13 when this vote was occurring.

14 I mean, hypothetically, a
15 representative could be in the room,
16 leave to take a phone call, and a vote
17 could occur without them knowing. We
18 don't even know if there is a distinct
19 agenda for these meetings.

20 So the prominent point is that
21 Mr. Katundu was, in fact, onboard with
22 this -- with this objection to the GAC --
23 the GAC advice and to the use of the GAC
24 in this manner; but, in addition, his
25 whereabouts are somewhat -- it's somewhat

1 questionable as to where he was, why he
2 wasn't in the room. And the only people
3 who can enlighten us on that have not.

4 HONORABLE JUDGE CAHILL: The only
5 evidence I saw was a declaration that
6 said they couldn't remember whether he
7 was in the room or not when that
8 happened.

9 Okay.

10 MS. CRAVEN: That's what we've seen
11 as well, and we don't have additional
12 information on that.

13 HONORABLE JUDGE CAHILL: Okay.
14 Thank you.

15 MS. CRAVEN: Absolutely.

16 Indeed, the NGPC consideration of
17 .africa, as we discussed, didn't consider
18 any of those procedural errors or
19 the -- the questionable use of the AUC
20 for what was not -- excuse me -- of the
21 GAC for what was not a public policy
22 purpose.

23 In fact, the NGPC's consideration,
24 as reflected in the Board
25 meeting minutes, is actually just a

1 one-liner. The Board says, The committee
2 discussed accepting the GAC Advisory
3 Committee advice regarding the
4 application for .africa.

5 And that's really it. The rest of
6 the paragraph discusses the process by
7 which the NGPC will accept the GAC advice
8 and remove DCA's application from
9 contention.

10 There's no actionable diligence
11 performed in that meeting, as far as we
12 can tell from the minutes and as far as
13 we can tell from the public records
14 surrounding those meeting minutes.

15 In addition, the NGPC scorecard
16 reveals no additional diligence either.
17 It simply repeats the fact that the NGPC
18 directed its staff to accept the GAC
19 advice and that .africa would not be
20 approved and would, therefore, be
21 withdrawn from the process.

22 Meanwhile, the NGPC actually did
23 have the authority to undertake a
24 detailed investigation, including, if
25 necessary, the NGPC had the authority to

1 consult an independent expert on these
2 complex political machinations that were
3 in play.

4 In cases where the issues resulting
5 from GAC advice are pertinent to a formal
6 objection process, the NGPC may consult
7 an independent expert.

8 The GAC warning and GAC advice
9 essentially argue that a substantial
10 portion of the African continent is
11 opposed to DCA's application, as
12 represented by the African Union
13 Commission.

14 The African Union Commission argues
15 that this Africa community is targeted by
16 DCA's application for .africa and that
17 the support is lacking.

18 These claims are pertinent to a
19 community objection under the ICANN
20 Applicant Guidebook. Moreover, in light
21 of the concerns that we have highlighted
22 surrounding the advice, the NGPC should
23 have consulted the independent expert
24 that it had, under the AGB, the authority
25 to consult.

1 If the -- if the NGPC was uncertain
2 as to what independent expert to consult,
3 it could have, at a minimum, referred to
4 the Geographic Names Panel, which had
5 been working on the issue for months.

6 The Geographic Names Panel is the
7 independent expert that ICANN itself
8 hired specifically to examine, evaluate
9 and rule upon exactly the governmental
10 support concerns that are raised by the
11 AUC in the Early Warning which led to the
12 GAC advice.

13 And I would like to turn over to my
14 colleague Erin Yates to explain a little
15 bit more about the -- the Geographic
16 Names Panel itself and ICANN's
17 relationship with the Geographic Names
18 Panel throughout this process.

19 However, if the Panel has any
20 questions, I'm happy to address them
21 before I do so.

22 PROFESSOR KESSEDJIAN: None for me.
23 Thank you.

24 PRESIDENT BARIN: Thank you.

25 HONORABLE JUDGE CAHILL: No. Talked

1 all we can.

2 MS. CRAVEN: Thank you very much.

3 MS. YATES: Good morning,
4 Mr. President and Members of the Panel.

5 My name is Erin Yates, and I'm also
6 here on behalf of the Claimant,
7 DotConnectAfrica Trust.

8 This morning, I'll take you through
9 the Geographic Names Panel review that
10 InterConnect Communications performed in
11 coordination with ICANN and demonstrate
12 how ICANN's interference in that process
13 influenced the outcome of the application
14 process for .africa to the benefit of
15 DotConnectAfrica Trust's direct
16 competitor.

17 As you know, the Geographic Names
18 Panel review is part of ICANN's initial
19 evaluation process for applications for
20 geographic strengths. ICANN's gTLD
21 Applicant Guidebook requires applicants
22 for geographic strengths to demonstrate
23 support from at least 60 percent of
24 national governments in their respective
25 region.

1 As shown on the slide in front of
2 you, ICANN's Applicant Guidebook provides
3 that the Geographic Names Panel will
4 determine which governments are relevant
5 based on the inputs of the applicants,
6 the governments and its own research and
7 analysis. Nowhere is there mention of
8 reference to ICANN Staff, the Board or
9 other resources.

10 The Geographic Names Panel reviews
11 the documentation of support or
12 nonobjection provided by applicants and
13 accesses its relevance and verifies its
14 authenticity.

15 The Applicant Guidebook contemplates
16 that the Geographic Names Panel may
17 communicate with the entities that sign
18 letters of support in order to understand
19 the terms on which the support was
20 provided.

21 With this in mind and consistent
22 with ICANN's gTLD Applicant Guidebook,
23 DotConnectAfrica Trust consulted with the
24 relevant governments and public
25 authorities in Africa to enlist their

1 support prior to submitting its
2 application.

3 As Mr. Ali explained earlier, the
4 fact that ZACR, DCA's direct competitor,
5 claimed to have the support of the AU
6 Commissioner for Infrastructure and
7 Energy did not mean the DotConnectAfrica
8 Trust could not pass the Geographic Names
9 review.

10 The Applicant Guidebook expressly
11 provides that where there was more than
12 one application for a geographic string
13 with requisite government approvals, that
14 applicants, themselves, must resolve the
15 contention.

16 Where an applicant has not produced
17 all of the documentation of support, the
18 Guidebook provides that the Geographic
19 Names Panel will contact the applicant
20 and give the applicant no fewer than
21 90 days to provide such documentation.

22 That is how the process should have
23 worked. Instead, ICANN controls every
24 step of the process. And while this
25 chronology is a bit busy, we'll walk

1 through these documents together and show
2 the communications that took place
3 between ICANN and InterConnect
4 Communications, because even at the very
5 early stages of the process, ICANN
6 directed the Geographic Names Panel on
7 how to treat support for the .africa
8 applications.

9 As you can see on Slide 34, an
10 excerpt of Claimant's Exhibit 110, on
11 July 10th, 2012, ICANN circulated to the
12 Geographic Names Panel its preliminary
13 responses to what appear to be questions
14 about how to resolve certain issues with
15 respect to geographic strings.

16 As you can see on Slide 35, one of
17 those questions was whether letters of
18 support from the African Union or the
19 United Nations Economic Commission for
20 Africa count towards the 60 percent rule.

21 ICANN determined in its preliminary
22 guidance that such letters would not, and
23 the letters of support must be obtained
24 from individual countries.

25 Somewhat strangely, ICANN directed

1 InterConnect to send a clarification
2 question to the African Union only to
3 state that its letter was meaningful but
4 did not count.

5 In the following months, ICANN and
6 InterConnect engaged in much discussion
7 and debate over this point.

8 As you can see in the excerpt of
9 Claimant's Exhibit 69 on Slide 36,
10 InterConnect recognized that -- the
11 politically sensitive nature of these
12 applications within ICANN but also didn't
13 believe that ICANN should second-guess
14 its independent panels.

15 InterConnect also expressed concern
16 to ICANN about the acres of time it was
17 spending on the .africa applications, in
18 their words, "way out of proportion to
19 any other geographic name," and repeated
20 its recommendation that ICANN meet with
21 InterConnect to discuss how to handle
22 these applications.

23 At the time InterConnect completed
24 its geographic review of the .africa
25 applications in October 2012, discussions

1 about how to handle the .africa
2 applications were even taking place at
3 the executive level within ICANN.

4 At the same time, ICANN was aware
5 that there were significant problems with
6 the letters of support submitted by ZACR,
7 and the many ZACR purported letters of
8 support would result in what ICANN calls
9 "clarifying questions."

10 Many of the letters of support ZACR
11 submitted were based on a template that
12 InterConnect determined did not satisfy
13 the criteria in the Guidebook.

14 InterConnect also put ICANN on
15 notice that if ICANN did not count the
16 support of the AU, DotConnectAfrica would
17 not have a chance of passing the
18 Geographic Names review with no mention
19 of DotConnectAfrica support from the
20 United Nations Economic Commission for
21 Africa.

22 After this e-mail, ICANN and
23 InterConnect communicated from time to
24 time about whether ICANN had made a
25 decision on how to treat support for the

1 .africa applications.

2 InterConnect apparently issued
3 clarifying questions for every other
4 geographic name but not for .africa.

5 Several months passed, and while
6 InterConnect's position did not change,
7 no clarifying questions were issued for
8 the .africa applications.

9 And moving ahead to early
10 March 2013, an ICANN consultant reached
11 out to InterConnect Communications to ask
12 for information for an ICANN steering
13 committee. What committee that is, we're
14 not sure, but it does not seem proper
15 that at the ICANN executive level,
16 conversations were happening about the
17 work of an independent panel.

18 On March 15th, 2013, as you can see
19 from the document before you,
20 InterConnect e-mails ICANN to reiterate
21 its recommendation that the Geographic
22 Names Panel issue the clarifying
23 questions to each of the applicants, just
24 as InterConnect did for every other
25 geographic string, to clarify the

1 position on the African Union.

2 As Ms. Craven explained, the
3 following month, on April 11, 2013, the
4 GAC issued its purported consensus
5 objection advice against
6 DotConnectAfrica's application.
7 Only days later, ICANN contacted
8 InterConnect to see whether InterConnect
9 had begun preparing clarifying questions
10 for .africa.

11 Although these e-mails before you
12 show that InterConnect had some informal
13 discussions before the Beijing meeting,
14 the meeting at which the GAC advice was
15 issued against DCA's application, about
16 how to proceed on these applications,
17 InterConnect requested, again, formal
18 instructions from ICANN on how it should
19 conduct its work.

20 Only at this point, after the
21 purported consensus objection advice had
22 been issued against DotConnectAfrica's
23 application, did ICANN instruct
24 InterConnect to proceed with preparing
25 clarifying questions on the .africa

1 applications.

2 As InterConnect began its work, it,
3 once again, asked ICANN whether to
4 contact the African Union directly to
5 resolve the questions about
6 the African Union support. ICANN again
7 denied InterConnect's request.

8 ICANN also questioned why
9 InterConnect would recommend issuing a
10 clarifying question for the United
11 Nations Economic Commission for Africa.

12 After months and months of delay, on
13 May 7th, ICANN begins pushing
14 InterConnect to issue clarifying
15 questions for ZACR's application.

16 At this point, InterConnect explains
17 to ICANN that ICANN has rejected its
18 proposed approach, the proposed approach
19 of the independent panel tasked with
20 verifying and authenticating the letters
21 of support, and, instead, recommended
22 issue clarifying questions to every
23 country and relevant authority.

24 On the same day, in the face of
25 deadlines to complete the clarifying

1 questions on ZACR's application,
2 InterConnect reminded ICANN that it had
3 advised ICANN all the way back in October
4 of 2012 of the problems that would be
5 associated with the .africa applications,
6 and ICANN waited over seven months to
7 respond.

8 And as you can see in the following
9 slides, a similar vein of communications
10 was exchanged between ICANN and
11 InterConnect on these issues, with
12 InterConnect remaining steadfast in its
13 opinion that the African Union is a
14 relevant authority and that InterConnect
15 should be able to contact its
16 representatives.

17 Interconnect stressed to ICANN that
18 its approach was in conformance with the
19 Guidebook, deals fairly and reasonably
20 between the applicants without the risk
21 of prejudice to one of the -- one or the
22 other, and is likely to avoid many months
23 of delay or potential confusion.

24 On May 15th, ICANN again rejected
25 the approach recommended by its

1 independent panel --

2 PROFESSOR KESSEDJIAN: Could I
3 interrupt you here? Because you went
4 very fast on this new exhibit. That is
5 the first time the Panel is seeing it.

6 MS. YATES: Yes.

7 PROFESSOR KESSEDJIAN: Perhaps you
8 want to tell us more --

9 MS. YATES: If you could take it
10 back to the --

11 PROFESSOR KESSEDJIAN: -- so it's
12 your Slide 46. It's here in Exhibit 2.

13 And so why are we seeing this for
14 the first time? And what is important in
15 this exhibit?

16 MS. YATES: Yes. We thought this
17 helped complete the picture of the
18 communications that were taking place
19 between InterConnect and ICANN during
20 this time. And it is also helpful to
21 show that ICANN -- or that InterConnect
22 remained steadfast into its view that
23 the African Union was a relevant
24 authority and would, in fact, qualify
25 under the 60 percent rule.

1 And we also thought it was helpful
2 in that it showed that ICANN had a strong
3 preference that its independent panel not
4 engage directly with the African Union
5 and, instead, preferred -- prepared these
6 clarifying questions for other countries
7 that gave letters of support, despite the
8 fact that the Guidebook provided that the
9 independent panel could reach out and
10 verify and authenticate these letters of
11 support directly.

12 HONORABLE JUDGE CAHILL: Who's Emily
13 Taylor?

14 MS. YATES: Pardon me?

15 HONORABLE JUDGE CAHILL: Who is
16 Emily Taylor?

17 MS. YATES: She is an InterConnect
18 employee. And I believe, if you're
19 looking at that slide, that she seems to
20 send an e-mail from a personal e-mail
21 address where you see the .eu. But she's
22 an InterConnect employee.

23 HONORABLE JUDGE CAHILL: Okay. I
24 was just wondering who she was.

25 Okay.

1 MS. YATES: And as you can see on
2 Slide 49, conversations continue to take
3 place between ICANN and InterConnect on
4 these issues.

5 In InterConnect's May 30th, 2013
6 letter to ICANN, InterConnect explains
7 that the AU declarations submitted by
8 ZACR, the ones that Ms. Craven spoke
9 about, are not, in fact, letters of
10 support and, therefore, would not get
11 qualifying -- or clarifying questions.

12 However, InterConnect restated its
13 believe that the UN Economic Commission
14 for Africa should get a clarifying
15 question, as it is an intergovernmental
16 organization for the region and,
17 therefore, qualifies as a relevant public
18 authority.

19 And before any such clarifying
20 questions were issued, however, the NGPC
21 accepted the GAC objection advice against
22 DotConnectAfrica's application.

23 The very same day the NGPC's
24 decision was announced, Friday, June 7th,
25 ICANN directed InterConnect to cease work

1 on DotConnectAfrica Trust's application
2 and directed InterConnect to issue
3 clarifying questions for ZACR by the
4 following Tuesday in only four days' time
5 after months and months and months of
6 delay.

7 Without DotConnectAfrica Trust in
8 contention for .africa, ICANN Staff took
9 the remarkable step of actually drafting
10 an endorsement letter for the
11 African Union so they would have the
12 required documentation to pass the
13 Geographic Names review.

14 And as you can see in the following
15 slide, the AUC made only minor
16 modifications to the letter, copied it
17 onto its letterhead and submitted it to
18 ICANN's CEO, Fadi Chehadé, days later.

19 Now, ICANN's contention is that the
20 AUC did not follow the template
21 precisely, and it only used it as a guide
22 and would have done the same thing for
23 DotConnectAfrica Trust had it asked.
24 However, as you can see in Slide 54, the
25 critical portions of the letter were

1 drafted by ICANN.

2 With DotConnectAfrica Trust's
3 application out of the way, ICANN now
4 rushed to pass ZACR's application. And,
5 unsurprisingly, InterConnect found that
6 the letter satisfied the Guidebook
7 criteria.

8 Finally, ZACR passed the Geographic
9 Names review on July 9th and an initial
10 evaluation on July 12th in time to
11 announce their ICANN 44, Durban,
12 South Africa.

13 And unless you have questions for
14 me, I will pass it back over to Mr. Ali,
15 who will address the Board's failure to
16 make an inquiry into all of these serious
17 issues.

18 Thank you.

19 HONORABLE JUDGE CAHILL: Sorry. No
20 questions.

21 MR. ALI: As I was listening to my
22 two colleagues, I was reminded of the
23 definition of "success." Success is when
24 you work with the best and replace
25 yourself. And I certainly feel that my

1 time for being replaced at the head of
2 the -- of the legal teams that I run is
3 soon coming.

4 So thank you both very much. And
5 congratulations on excellent
6 presentations.

7 What I would just like you to do for
8 a brief moment is to focus on the
9 language that we looked at in the
10 presentation that was made regarding
11 ICANN's advice with the input of the GAC
12 to the African Union Commission about the
13 prominent role that the African Union
14 could play through the GAC in impacting
15 the outcome of what is supposed to be a
16 fair and transparent process, where the
17 rules of the game should apply equally to
18 both -- to all applicants, but, here,
19 we're talking about two applicants.

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2 So just to quickly recap everything
3 that we've looked at, October 2011, the
4 AUC writes to ICANN saying we would like
5 to have this gTLD for Africa, Afrique,
6 Afrikia, whatever may be the different
7 sort of languages, reserved for us.
8 ICANN says, No, we can't do that; but
9 ICANN says, You can use your position in
10 the GAC.

11 Why did it take five months from the
12 time of the letter that was sent in
13 October 2011 by the AUC for ICANN to
14 respond? What happened in those
15 five months?

16 We don't know for sure because we
17 have not -- everything was produced to
18 us, but we do know that at least one
19 thing happened, based on the evidence
20 that's before you, that there was at
21 least one, possibly more, consultations
22 between the ICANN Board and ICANN Staff
23 and the GAC.

24 What else could they have been
25 discussing other than the AUC's request?

1 Why should the ICANN Board consult
2 with the GAC when the GAC is supposed to
3 make an independent determination about
4 the position that the AUC will occupy
5 within the GAC?

6 But as we've seen, based on
7 unconverted evidence, that the GAC,
8 Ms. Dryden, gives the AUC special status,
9 which it otherwise is not entitled to
10 under the rules of the GAC.

11 Why was the AUC granted this special
12 consideration and given this special
13 status?

14 There are only two organizations
15 that have the special status in the GAC:
16 the European Commission and the AUC.

17 But you would expect that the
18 Governmental Advisory Committee would at
19 least do the due diligence that we have
20 in order to ascertain the difference
21 between the European Commission and the
22 AUC, and understand what the role is of
23 the AUC in respect of the nonvoting
24 members and have put them in that
25 category. But they were not.

1 All I can do is rely on the
2 evidence. I can't rely on supposition.

3 Now, 28th June 2012, the AUC joins
4 the GAC. And around this time,
5 June 2012, ZACR puts its application in.

6 July 2012, ICANN distributes the
7 Geographic Names Panel guidelines to
8 InterConnect Communications, which, as
9 you've heard, is the organization that
10 was the independent organization that is
11 to evaluate whether or not the criteria
12 are satisfied, the criteria that are in
13 the Applicant Guidebook.

14 These guidelines instruct
15 InterConnect not to apply the
16 endorsements of regional organizations
17 towards the 60 percent geographic
18 requirement that is in the Applicant
19 Guidebook.

20 So we're in -- right at the
21 beginning of the process. We're in
22 July 2012, and ICANN Staff tell
23 InterConnect that, No, you shouldn't
24 apply the -- the -- the endorsement of an
25 international organization as a proxy or

1 substitute for the 60 percent
2 requirement.

3 Please keep that in mind when you
4 think about the complete about-face that
5 is done following the so-called consensus
6 GAC advice and the approval by the NGPC
7 of the -- of the -- of the ZACR
8 application that led to the ICANN Staff
9 then writing the letter for the AUC.

10 Suddenly, this criterion doesn't
11 apply anymore. These rules of the game
12 don't apply anymore, the rules of the
13 game that the independent Geographic
14 Names Panel is saying should be applied
15 equally.

16 Let's just take a quick look back
17 again at what it is that on May 10th,
18 2013, the Geographic Names Panel writes
19 to ICANN and tells them. And, here, I'm
20 looking at Slide Number 47.

21 HONORABLE JUDGE CAHILL:
22 Forty-seven?

23 MR. ALI: Yes, sir.

24 Given that both applicants rely on
25 AU support, and the Guidebook foresees

1 that it is possible for a single country
2 or public authority -- that a single -- a
3 single country or authority may support
4 more than one application for the same
5 string, we strongly recommend, in the
6 interests of both applicants and of the
7 gTLD process, that the next step should
8 be to approach the AU and signal to the
9 applicants that depending on the outcome,
10 we may also seek CQs from the remaining
11 countries and authorities and attached
12 their respective applications.

13 I hope that you will give advice
14 your careful consideration. It is in
15 conformance with the Guidebook, deals
16 fairly and reasonably between the
17 applicants without the risk of prejudice
18 to one or the other, and is likely to
19 avoid many months of delay and potential
20 confusion.

21 And what happens? Time and time
22 again, ICANN says, No, do not do that.

23 ICANN even questions the support
24 that is granted or given by UNECA to
25 DCA Trust. There is -- there is a

1 communication from ICANN to the
2 independent panel, Geographic Names
3 Panel, saying, Oh, why do you think that
4 UNECA is relevant?

5 Well, the Geographic Names Panel
6 thinks that UNECA is relevant, and they
7 say so time and time again. But time and
8 time again, they are told by ICANN, No.

9 So we have the situation now which
10 continues from June 2012 till June 2013
11 where ZACR's application does not have
12 the support -- and if you'd like us to
13 get more into what supports ZACR's
14 application, the application that -- that
15 the AUC has supported and that ICANN has
16 facilitated has -- we would be happy to
17 get into it, because ZACR's application
18 to date does not have the support that
19 was set forth in the Guidebook and the
20 criteria that ICANN was applying back in
21 July of 2012.

22 Had that criteria, the same criteria
23 that has been applied to ZACR's
24 application, been applied to DCA's
25 application, they would be on parity. They

1 would be in direct discussions.

2 But the way the game was played, the
3 way the referee allowed the game to be
4 played, the referee facilitated a tilting
5 of the playing field.

6 So other questions that we'd like you
7 to keep in mind as you listen to
8 Mr. LeVee's presentation, What happens at
9 this executive level meeting? They had an
10 executive level meeting -- by now, when you
11 look at all the correspondence -- and by
12 the way, we apologize for how small this is
13 in terms of its print.

14 But all of these documents are in the
15 binder that we've given you. So you can
16 follow those along, I think, much more
17 easily in terms of the printout.

18 So we have a -- we have a -- we have
19 documentation which clearly states that
20 there's a hot political debate going on
21 within ICANN, within the Geographic Names
22 Panel. It says -- it says very clearly
23 that there is a political struggle that's
24 going on, that these are politically
25 complicated applications. The

1 documentation says that.

2 So what happens?

3 On the 25th of October, there's an
4 executive level meeting at ICANN to discuss
5 .africa.

6 Do we know anything about what
7 happened at that executive level meeting?

8 No, because they haven't produced any
9 documentation to us, and they have no
10 witnesses to talk about what happened at
11 that executive level meeting.

12 But there is a meeting --

13 PROFESSOR KESSEDJIAN: What's the
14 date again?

15 MR. ALI: It's 25th October 2012.

16 -- what they have at that executive
17 level meeting, what we know is that they
18 have input from the Geographic Names
19 Panel. And we have a subsequent set of
20 communications whereby all sorts of
21 questions are being raised as a result of
22 this executive level meeting with
23 reference to DCA's application, but the
24 same questions aren't being raised with
25 respect to -- to -- to -- to the AUC's

1 application.

2 Well, what happens a month later?

3 Well, you've seen that on 20th of
4 November 2012, the AUC, using its
5 position on the GAC, the special position
6 that's been given to it on the GAC with
7 the facilitation of ICANN, it use its
8 Early Warning notices.

9 Now --

10 HONORABLE JUDGE CAHILL: AUC does?

11 MR. ALI: The AUC --

12 HONORABLE JUDGE CAHILL: Okay.

13 MR. ALI: -- issues its Early
14 Warning notice --

15 HONORABLE JUDGE CAHILL: Okay.

16 MR. ALI: -- and some other
17 governments or part of it issue these
18 Early Warning notices all pretty much in
19 the same language.

20 -- now, would it be that difficult
21 to conclude, again, in the absence of
22 documentation from the other side, that
23 if ICANN had guided the AUC as to how it
24 could participate in the process through
25 the GAC -- and appreciating that the AUC,

1 so far, has not been a participant in the
2 fairly complicated world of ICANN
3 governments -- that the AUC might, in
4 fact, have sought ICANN's help in
5 crafting the Early Warning advice.

6 Is that so difficult? They
7 ultimately helped them draft the letter
8 that they needed to get the approval,
9 which they shoehorned, bulldozed.

10 HONORABLE JUDGE CAHILL: I think it
11 was a form that was created by ICANN, but
12 people just started using it.

13 MR. ALI: The form is there. The
14 contents -- the contents of the Early
15 Warning are something that was created.
16 The contents are -- the form, maybe. The
17 contents are very much specific to the
18 DCA application, applicant and judge.
19 That's one in the same time --

20 HONORABLE JUDGE CAHILL: Okay.

21 MR. ALI: -- that is just wrong.

22 Anyway. So now we have the
23 executive meeting. A month later, we
24 have the -- we have these Early Warning
25 notices, which, as we've seen, do not fit

1 the criteria of Early Warning notice,
2 but, nonetheless, they are provided.

3 What we'd also like you to
4 appreciate is that starting in March
5 of -- starting in July of 2012 and going
6 through to March or April of 2013, there
7 is this dialogue that was very
8 interesting and which Ms. Craven --
9 Ms. Yates took you through, but we would
10 invite you to look at the documentation
11 in some detail, where the GNP is saying,
12 Let us do our job. Please let us apply
13 the Applicant Guidebook. Let us do what
14 we need to do. And ICANN is saying, No.

15 The GNP says, We need to go to the
16 AU and ask. ICANN says, No. Why? What
17 is it that is worrying ICANN so much if
18 the GNP is to contact the AU or UNECA?

19 They even questioned UNECA. No, no,
20 you don't need to go back to them.

21 One wonders.

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25

But, obviously, we don't know --

1 they haven't provided us with the
2 information that we requested. And,
3 obviously, here, again, as we will make
4 our submissions tomorrow, there is a very
5 well-established principle in
6 international procedure of the drawing of
7 adverse inferences. And we believe that
8 the absence of testimonial evidence or
9 documentary evidence on the part of ICANN
10 with respect to these points, adverse
11 inferences are entirely appropriate.

12 So I'm also troubled by the fact
13 that within the context of what were
14 clearly two red flag applications, two
15 applications that were -- that were
16 consuming a lot of resources of the GNP,
17 as the documentation says, and two
18 applications that clearly were the
19 subject of significant internal
20 discussion, the NGPC simply accepts the
21 GAC advice.

22 Perhaps the right course for the
23 NGPC would have been to let an
24 independent third-party decision-maker
25 decide whether or not the criteria

1 satisfied -- they clearly didn't want to
2 let the GNP, the Geographic Names Panel,
3 do that.

4 They could have asked -- they could
5 have retained an independent expert if
6 they didn't think the GNP was qualified,
7 for some reason, to do this. But they
8 didn't do that.

9 They might even have dug in further
10 themselves, but there's no evidence that
11 they did that.

12 They summarily accepted the GAC
13 advice, and they summarily rejected all
14 the points that were made by DCA Trust as
15 to why the GAC advice should not have
16 been accepted.

17 At the end of the day, what ends up
18 happening following the -- the GAC advice
19 and the reconsideration requests and what
20 have you -- by the way, just going back
21 to this point of deference, we'd like you
22 to take a look at one of our slides
23 whereby -- which shows you what happens
24 within the ICANN process.

25 GAC advice, it's accepted by the

1 NGPC. The NGPC, you then have a request
2 for reconsideration to the Board
3 Governance Committee. The Board
4 Governance Committee accepts what the
5 NGPC has -- has decided, and it goes back
6 to the NGPC from the Board so that the
7 NGPC can accept the recommendation of the
8 BGC with respect to its original
9 decision.

10 It seems somewhat incestuous,
11 particularly when you compare who the
12 individuals are that are on the NGPC and
13 the BGC.

14 I implore you, within a system of
15 control in governance that is reflected
16 up on the screen, the review cannot be
17 deferential, particularly in a forum
18 which is the only forum that is
19 independent and impartial that an
20 applicant has to protect its rights. It
21 cannot be deferential.

22 Anyway. So the last question I'd
23 leave you with is the following: What is
24 it that justifies the complete about-face
25 that takes place in June of 2013

1 following the so-called consensus GAC
2 advice that warrants the application of
3 criteria that, only 12 months earlier,
4 ICANN has said, This does not satisfy the
5 requirement of the Applicant Guidebook?

6 If you look at what they say in June
7 of 2012 and you track through the
8 correspondence that took place with the
9 Geographic Names Panel and you arrive at
10 June 7th, 2013, when ICANN Staff, at the
11 direction of the Board, tells the GNP,
12 You can stop work, and the GNP, of
13 course, finally folds its arms and says,
14 Well, what are we to do? We tried
15 everything. We tried to be independent.
16 We tried to apply the Applicant
17 Guidebook. We tried to give you our
18 objections. We told you what would be
19 fair and equitable. We told you what
20 would be transparent. We told you a lot
21 of things.

22 And at the end of the day, they fold
23 their arms and say, Okay, we're doing
24 what you want us to do. We're going to
25 approve this letter that you, ICANN,

1 drafted for the AUC.

2 And there is language in these
3 e-mails where Mark McFadden throws up his
4 arms and says, Well, if Sophia wants to
5 go to an IRP, good luck to her.

6 And that's why we're here.

7 We think that the documentation is
8 clear. We think the evidence supports
9 every one of the points that we have
10 made. We think that it speaks for
11 itself.

12 It is clear to us that from the very
13 get-go, ICANN wanted to help the AUC to
14 achieve an outcome that they couldn't
15 otherwise, using a process that was not
16 designed to give the AUC what it was --
17 what it wanted.

18 So AUC wanted to use one process.
19 ICANN says, You can't use that process.
20 The AUC is put into another process.
21 ICANN, hand in glove with the AUC, ensure
22 that DCA doesn't have a fair shot.

23 This, we submit, based on the
24 evidence, is an absolute violation of
25 ICANN's Articles, Bylaws and the

1 Applicant Guidebook.

2 I'm happy to answer any questions.

3 We've presented a lot to you. We do
4 hope you look at the documentation as you
5 think about tomorrow. But I can answer
6 questions now or answer them tomorrow in
7 the course of our closing.

8 HONORABLE JUDGE CAHILL: You didn't
9 mention anything about the conflict --
10 the alleged conflict of the Board members
11 of ICANN.

12 Is that something that's not
13 important now?

14 MR. ALI: Well, we believe it is
15 important, Judge Cahill. Within the
16 context of the time we had, which I know
17 we've exceeded already, we had to make
18 certain choices of what we thought was
19 going to be the most significant.

20 But that's not to say that we don't
21 think -- again, if one looks at -- passes
22 through all the individuals who are
23 involved, when you look at the AUC
24 players who were involved and the players
25 who were involved with ZACR, clearly,

1 conflicts of interest.

2 When you look at who is on the NGPC
3 and the Board Governance Committee,
4 clearly a conflict.

5 If you look at the fact that one of
6 the individuals who had conflict of
7 interest -- who's charged with having a
8 conflict of interest is actually the
9 person who, at the NGPC meeting, is the
10 individual who directs the discussion
11 associated with .africa or DCA's
12 application, and that individual has
13 financial or business or advisory
14 interests in support of another
15 applicant, more reason that just doesn't
16 seem right to me.

17 A prudent person within the context
18 of such highly politicized -- or such a
19 highly politicized debate with two
20 applicants, who are so legitimate in
21 their rights within the forum in which
22 they're playing, prudence would counsel
23 that you recuse yourself. That didn't
24 happen.

25 So we hate that -- again, there's so

1 many different ways you can find in our
2 favor --

3 HONORABLE JUDGE CAHILL: One other
4 thing -- I hate to take all this time,
5 but are there 16 voting members on the
6 ICANN Board, and two of these are the
7 ones that you're -- that you're concerned
8 about?

9 MR. ALI: I believe so.

10 Is that correct?

11 (Off-the-record conference with
12 colleagues.)

13 MR. ALI: Yes.

14 HONORABLE JUDGE CAHILL: Okay.

15 Thanks.

16 PRESIDENT BARIN: Any questions?

17 PROFESSOR KESSEDJIAN: No.

18 HONORABLE JUDGE CAHILL: Sorry.

19 PRESIDENT BARIN: That's all right.

20 HONORABLE JUDGE CAHILL: I'm very
21 curious.

22 PRESIDENT BARIN: Thank you.

23 MR. ALI: Thank you.

24 PRESIDENT BARIN: You have,
25 according to my -- we'll give you the

1 same amount of time, Mr. LeVee.

2 MR. LEVEE: I won't need as much.

3 So what I would suggest is we take a
4 five-minute break. That way we can swap
5 out the laptop, whichever is operating
6 the monitors. And when we come back,
7 I'll get going.

8 PRESIDENT BARIN: I just have a
9 question for you in terms of the
10 witnesses that you have.

11 MR. LEVEE: Yes.

12 PRESIDENT BARIN: We had understood
13 that there was some time constraint in
14 terms of their availability. If that's
15 no longer an issue, then --

16 MR. LEVEE: We had asked for
17 Mr. Chalaby to testify first, because he
18 does need to leave earlier. But he'll
19 have ample time after lunch to do his
20 testimony.

21 PRESIDENT BARIN: Okay. Could we
22 have an idea of when he needs to leave?

23 MR. LEVEE: Let me consult with him,
24 and I will let you know.

25 You had estimated 90 minutes. And

1 even if it goes two hours -- which,
2 candidly, particularly since the Claimant
3 didn't even raise the issue in the
4 opening, Mr. Chalaby will answer your
5 questions -- I'd be stunned if we even
6 took the 90 minutes --

7 PROFESSOR KESSEDJIAN: Don't bet on
8 anything.

9 MR. LEVEE: Yes, a good point.

10 But in any case, he will not have a
11 difficulty. His schedule was a little
12 bit more complicated than Ms. Dryden's.
13 That's why we asked Ms. Dryden to go
14 second.

15 Please don't be concerned. He'll be
16 here as long as you need him.

17 PRESIDENT BARIN: That's fine.
18 Thank you.

19 MR. LEVEE: Why don't we adjourn for
20 a -- why don't we take 10 minutes?

21 HONORABLE JUDGE CAHILL: Fifteen.

22 MR. LEVEE: Going once.

23 MR. ALI: Thank you.

24 - - -

25 (Whereupon, a brief recess was taken

1 from 10:46 a.m. to 11:02 a.m.)

2 - - -

3 - - -

4 OPENING STATEMENT ON BEHALF OF RESPONDENT
5 INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

6 - - -

7 MR. LEVEE: Members of the Panel,
8 thank you this morning. And on behalf of
9 ICANN, let me share in the welcome
10 officially this morning to these
11 Independent Review Proceedings.

12 We're very much looking forward to
13 today and tomorrow and pleased that we
14 have reached the merits of this claim
15 after what has definitely been a longer
16 road than I think most of us would have
17 anticipated.

18 Before I begin, let me pause very
19 briefly to discuss ICANN's participation
20 in today's hearing.

21 As you know, ICANN argued to the
22 three of you that the Bylaws prohibit
23 live testimony during the final argument
24 in an IRP hearing. This Panel ruled
25 otherwise. And so ICANN has brought its

1 two Declarants here today so that they
2 may answer questions from the Panel and
3 from the parties.

4 Most importantly, ICANN never wanted
5 to leave the impression that we were
6 concerned that our witnesses would not
7 back up their statements in spades, as
8 they will do this afternoon.

9 So we are confident that at the
10 close of this proceeding, the Panel will
11 determine that ICANN's Board acted fully
12 consistent with its Bylaws, its Articles
13 and the Applicant Guidebook in
14 conjunction with DCA's application for
15 .africa.

16 Let me turn now to the merits.

17 ICANN was incorporated in 1998 as a
18 not-for-profit benefit -- public benefit
19 corporation in California. Its focus on
20 the -- in the early years was on
21 literally achieving legitimacy and in
22 taking some small steps to creating
23 competition within the domain name
24 system.

25 In terms of competition, the first

1 thing that ICANN did was to increase the
2 number of Internet registrars. These are
3 the companies that actually sell domain
4 names subscriptions to you and me. And
5 ICANN was incredibly successful in this
6 regard, accrediting over -- literally
7 over hundreds of new registrars in the
8 course of just a few years.

9 The introduction of that competition
10 caused the price of domain name
11 registrations to plummet from \$35 for a
12 name for a year back in 1998 to \$10 or
13 even less -- sometimes you can get a name
14 now for free -- saving consumers
15 literally hundreds of millions of
16 dollars.

17 ICANN decided to proceed much more
18 slowly with respect to top-level
19 domains -- new top-level domains, such as
20 the program that brings us here today,
21 because of concerns that new TLDs could
22 affect the security or the stability of
23 the Internet.

24 And so ICANN approved seven new TLDs
25 in the year 2000, including .info and

1 .name, TLDs that are not all that widely
2 used, candidly, and then a few more in
3 the year 2004. But these were basically
4 test cases to make sure that a broader
5 expansion would not cause any problems.

6 Now, ICANN has a number of
7 supporting organizations that develop
8 policy for ICANN. One of them is known
9 as the Generic Names Supporting
10 Organization, or GNSO. And the GNSO is
11 responsible for formulating policy for
12 the expansion of the name space, the
13 registry space.

14 In 2007, after years of study and
15 public comment, the GNSO recommended that
16 ICANN permit a substantial expansion in
17 the number of TLDs, so long as there were
18 carefully crafted rules that accompanied
19 that expansion.

20 And in 2011, ICANN's Board approved
21 what we refer to as the "New gTLD
22 Program" and that, pursuant to which,
23 ICANN agreed to accept an unlimited
24 number of applications.

25 Now, concurrently, beginning in

1 2008, ICANN was developing what you've
2 heard referred to frequently as the
3 "Guidebook," or the "New gTLD Application
4 Guidebook." And several drafts of the
5 Guidebook were published for public
6 comment, and ICANN received thousands and
7 thousands of comments.

8 The Guidebook was crafted consistent
9 with ICANN's Bylaws, and I want to point
10 out that DotConnectAfrica has never
11 alleged otherwise.

12 Ultimately, ICANN announced that it
13 would accept applications for new gTLDs
14 beginning in January of 2012.

15 Now, I know that you have seen the
16 Guidebook in an electronic form, but I
17 don't know if you've actually seen it
18 printed out. Maybe you have. Maybe
19 you've printed it yourself --

20 HONORABLE JUDGE CAHILL: No.

21 PROFESSOR KESSEDJIAN: Yes.

22 MR. LEVEE: It's a big thing. I
23 brought it today just to give you a
24 sense --

25 PROFESSOR KESSEDJIAN: And the

1 language is terrible, Mr. LeVee.

2 MR. LEVEE: Yes, it is.

3 I carry it with me. I have it on
4 every laptop I've ever used, and download
5 it on every computer. And it is thick.

6 But it is the result of literally
7 tens of thousands of hours not only of
8 ICANN, but of members of the community.
9 And we heard this morning Ms. Bekele was
10 involved in some fashion in the drafting.
11 I don't know that, but I don't question
12 it.

13 Many, many hundreds of people were
14 involved, and it became, literally, the
15 Bible of the New gTLD Program. And in
16 it, ICANN tried to anticipate as many
17 scenarios as possible.

18 The Guidebook is divided into six
19 modules, as you probably notice,
20 addressing the application process, how
21 the applications would be evaluated from
22 various perspectives, technical,
23 financial and otherwise, methods of
24 objecting to applications and a number of
25 other features.

1 Now, various industry insiders
2 predicted that ICANN would receive maybe
3 a few hundred, maybe even several hundred
4 applications for new gTLDs. I can tell
5 you confidently that no one I know
6 predicted that ICANN would receive 1,930
7 applications, which was, in fact, the
8 final tally.

9 Those applications involved
10 approximately 1,400 separate gTLD
11 strings. And as of May 1, the most
12 recent date I could capture, over 900 new
13 gTLD registry agreements had been signed,
14 and most of those gTLDs are now live on
15 the Internet.

16 So you can go get an .xyz domain or
17 a dot -- you know,
18 you-can-pick-your-name-practically
19 domain, to the extent they are not closed
20 or that you're not a member of the
21 community that they represent.

22 So I wanted to be clear, ICANN has
23 already achieved the goal of increasing
24 competition.

25 We heard a little bit in the opening

1 statement about anticompetitive conduct.
2 I don't know that the core values refer
3 to anticompetitive conduct within a
4 particular gTLD string.

5 The mission of ICANN was to increase
6 competition in the registry space. And
7 it has undoubtedly accomplished that.

8 Now, ICANN anticipated that certain
9 types of gTLD applications would require
10 special treatment for various sorts of
11 reasons. I'll give you two examples.

12 ICANN anticipated that it would
13 receive applications for strings that, in
14 some fashion, related to trademarked
15 names. The trademark community was very
16 concerned about that, so ICANN
17 established a number of features in the
18 Guidebook to allow persons and entities
19 all over the world to attempt to protect
20 their intellectual property, including a
21 trademark clearinghouse.

22 Similarly, ICANN anticipated that
23 certain types of communities that are not
24 geographic communities but, instead,
25 communities of persons who might want to

1 operate gTLD strings would come together.
2 So ICANN has already approved two
3 communities off the top of my head. One
4 is .radio and one is .osaka for citizens
5 in Japan.

6 And ICANN created a process whereby
7 an applicant could seek community
8 treatment for its application, and a
9 third-party vendor would evaluate whether
10 that applicant should, in fact, be
11 permitted to operate a string on
12 behalf -- for the benefit of that
13 community.

14 Obviously, we have a specific
15 feature that's relevant here, which is
16 that the Guidebook contemplated that
17 applicants might apply for strings that
18 represented the specific geographic -- a
19 specific geographic community, such as
20 the name of a continent. And the
21 Guidebook contains a number of provisions
22 addressing those strings, all located in
23 Module 2.

24 The most important of those
25 provisions for this proceeding is

1 Section 2.2.1.4.2 -- sorry that it's so
2 long -- and that section, in and of
3 itself, covers several pages.

4 So what I've put in the slide is the
5 portion that I wanted to focus your
6 attention to.

7 It says, In the case of an
8 application for a string appearing on
9 either of the lists above -- and that
10 includes .africa -- documentation of
11 support will be required from at least
12 60 percent of the respective national
13 governments in the region -- and then
14 this is also important, and no one's
15 really focused on this in the briefs --
16 there may be no more than one written
17 statement of objection to the application
18 from relevant governments in the region
19 and/or public authorities associated with
20 the continent or the region.

21 Importantly, the applicant was
22 supposed to demonstrate that requisite
23 support in the application itself. And
24 we'll talk about that in a minute.

25 Now, there was great logic in

1 adopting this provision. If an entity
2 was going to operate a gTLD string not
3 only for the benefit of a particular
4 community, but it actually took the name
5 of that community, it obviously was
6 critically important that the applicant
7 have support from the community.

8 So ICANN decided that the support
9 would have to be measured as 60 percent
10 of the countries in that region in order
11 to use the name of that region as the
12 string.

13 Now, let me pause to note what the
14 Guidebook does not address. The
15 Guidebook does not say that governments
16 or other governmental authorities in a
17 particular region cannot organize to
18 apply for a TLD using that region's name.

19 Quite to the contrary, the Guidebook
20 permits any entity or any government to
21 apply to operate a gTLD string that uses
22 the name of a specific region of the
23 world or to select a company to operate
24 that string on its behalf.

25 So it is very important to

1 understand that the Guidebook did not
2 prevent the countries of Africa, much
3 less the AUC, from determining that they
4 wanted to operate a TLD and that they
5 wanted to select a particular registry to
6 do so.

7 The Guidebook encourages this
8 result, because such an application would
9 demonstrate that the countries of the
10 region truly support the applicant. And
11 that would be in the public interest.

12 This is critically important
13 throughout this whole proceeding, because
14 one of the primary objections that DCA
15 has asserted to the entire process dating
16 back to 2012 is that the very decision by
17 the African Union Commission to select
18 ZACR and to sponsor ZACR's application
19 for .africa not only was inappropriate,
20 but should have disqualified the AUC from
21 being part of the process at all.

22 Indeed -- and we'll look at a
23 document in a moment -- DCA asked
24 ICANN -- or argued that the AUC's role in
25 conjunction with ZACR's application

1 should have caused ICANN to eliminate the
2 requirement in the Guidebook that an
3 applicant have the support of 60 percent
4 of the governments in the region. But
5 DCA's contentions were exactly the
6 opposite of what ICANN had developed in
7 the Guidebook.

8 ICANN welcomed the support of
9 governments and governmental
10 organizations because the Guidebook
11 required that support.

12 HONORABLE JUDGE CAHILL: One of the
13 issues is there's no definition of
14 African community.

15 MR. LEVEE: And we'll come to that,
16 definitely.

17 HONORABLE JUDGE CAHILL: All right.

18 MR. LEVEE: Now, it's also important
19 to note that the Guidebook did not
20 restrict the ability of a country to
21 support more than one application. It
22 certainly could have happened that two
23 competing applications each had the
24 support of the nations in that region.
25 It's not what happened here, but it could

1 have happened.

2 And, finally, the Guidebook
3 specifically permitted -- I've quoted in
4 the slide -- specifically permitted a
5 government to endorse an applicant and
6 then change its mind and either support
7 no applicant or support a different
8 applicant. And that is what happened
9 here.

10 DCA --

11 HONORABLE JUDGE CAHILL: What does
12 "nonobjection" mean in this?

13 MR. LEVEE: What does?

14 HONORABLE JUDGE CAHILL: You can
15 change your mind if the operator's
16 deviated from conditions or nonobjection.

17 What does that mean? The last word.

18 Never mind. It's not that
19 important.

20 MR. LEVEE: Nonobjection might
21 simply be a statement that they don't
22 object, as opposed to a statement that
23 they specifically endorse. That's how I
24 interpret it.

25 HONORABLE JUDGE CAHILL: Okay. Your

1 point is you can change your mind?

2 MR. LEVEE: Correct.

3 HONORABLE JUDGE CAHILL: Okay.

4 MR. LEVEE: Now, the Panel has also,
5 obviously, heard a lot about the GAC.
6 And I won't give all of the background,
7 but the Governmental Advisory Committee
8 is the committee where governments across
9 the world are permitted and able to
10 participate in the ICANN process. And
11 both the Guidebook and the Bylaws address
12 the GAC's participation in some detail.

13 So starting with the Guidebook,
14 Section 3.1 of the Guidebook permits GAC
15 members to raise concerns about any
16 application to the GAC. And the GAC, as
17 a whole, would consider concerns raised
18 by GAC members and agree on GAC advice to
19 forward to the ICANN Board of Directors.

20 Mr. Ali put up a slide showing the
21 various types of advice, but there's only
22 one type that is at issue here, which is
23 the first, that the GAC advises ICANN
24 that it is the consensus of the GAC that
25 a particular application should not

1 proceed.

2 And this next sentence is very
3 important, not mentioned in the opening
4 of the DCA: This will create a strong
5 presumption for the ICANN Board that the
6 application should not be approved.

7 In addition, Guidebook Section 3.1
8 says, ICANN will consider the GAC advice
9 on new gTLDs as soon as practicable. The
10 Board may -- and I've highlighted "may,"
11 and we'll come back to that in a
12 minute -- consult with independent
13 experts, such as those designated to hear
14 objections, in cases where the issues
15 raised in the GAC advice are pertinent to
16 one of the subject matter areas of the
17 objection procedures.

18 Now, all of this work in the
19 Guidebook relating to the GAC is actually
20 derived from -- directly out of the
21 Bylaws. What I've quoted here on Slide 8
22 is Article XI, Section 2, Paragraph 1(j),
23 which says, The advice of the
24 Governmental Advisory Committee on public
25 policy matters shall be duly taken into

1 account, both in the formulation and
2 adoption of policies.

3 And the rest of the quote goes on to
4 say what happens if the Board decides not
5 to act consistent with the GAC advice,
6 although that's not what happened here.

7 So I wanted to provide my own view
8 of the background in mind, so let me turn
9 now to DCA's claims.

10 Let me emphasize that the entire
11 focus of my presentation today and the
12 entire focus of my closing tomorrow will
13 be to explain to you that ICANN's conduct
14 and the conduct in particular of the
15 ICANN Board was entirely consistent with
16 the Articles and the Bylaws.

17 We'll discuss during closing
18 tomorrow exactly what the Panel's mandate
19 is. And I will respond tomorrow to this
20 issue of the standard of review. But I
21 think it's important to remember,
22 irrespective of the standard of review,
23 is that the purpose, and only purpose, of
24 an independent review proceeding is to
25 test whether the conduct of the Board was

1 consistent with the Articles and the
2 Bylaws. We believe it was.

3 And I'll put all sorts of slides up
4 tomorrow talking about the mandate of the
5 Panel. And I will also, tomorrow, put
6 before you each and every one of DCA's
7 allegations from both of its briefs as to
8 how DCA alleges that the Board violated
9 its Articles and Bylaws. And we'll go
10 through those one by one, and I'll
11 explain how the evidence is to the
12 contrary.

13 I thought I would focus my opening
14 actually on the facts --

15 PROFESSOR KESSEDJIAN: Can I
16 interrupt you?

17 MR. LEVEE: Of course.

18 PROFESSOR KESSEDJIAN: Could you
19 explain to the Panel what is exactly the
20 role of ICANN? And if we -- if we
21 take -- I think it was alluded to in the
22 opening of -- of DCA, if we take the
23 example of the UN, let's imagine that
24 ICANN is for the Internet what the UN is
25 for peace and security, just for the sake

1 of discussion.

2 MR. LEVEE: Fine.

3 PROFESSOR KESSEDJIAN: Is ICANN the
4 general assembly, the security council or
5 the Secretary General of the UN?

6 MR. LEVEE: ICANN is none of those.
7 And, actually, the parallel to the
8 United Nations is not apt in ICANN's
9 mind. And let me flesh that out.

10 Mr. Ali referred to ICANN as a
11 "regulator." Regulators actually have
12 specific authority granted to them. A
13 government or people can get together and
14 designate people as a regulator.

15 ICANN is not a regulator. It
16 doesn't have laws. It doesn't even have
17 rules. It has Bylaws --

18 PROFESSOR KESSEDJIAN: It does have
19 a Bible.

20 MR. LEVEE: It does have a Bible,
21 but ICANN is based -- I view ICANN as an
22 administrator. Its relationships are
23 governed by contract.

24 This, interestingly enough, is
25 simply a contract. The applicant

1 promises to pay money and to conduct
2 itself in a certain way and to submit
3 certain materials. And in response,
4 ICANN promises to evaluate the
5 application pursuant to the Bible and
6 then to give an answer. ICANN has
7 reserved rights; the applicant has
8 reserved rights.

9 The way that ICANN is structured is
10 very much different from the United
11 Nations. ICANN is what they like to
12 refer to as a "bottoms-up organization."
13 The genesis of policy that ICANN
14 ultimately adopts is supposed to bubble
15 up from all of its supporting
16 organizations.

17 We have the GNSO, which we already
18 referred to; there's the address
19 supporting organization; there are
20 various other supporting organizations
21 that deal with the names and the numbers,
22 and they formulate policy.

23 The policy then gurgles up, and
24 ICANN has a staff. It has a general
25 counsel's office, it has people who are

1 involved in processing the applications.
2 Even before the GNSO program -- or the
3 gTLD program, ICANN had people who
4 contracted with the registrars that I
5 referred to before, people who
6 investigated when the registrars might
7 not be compliant with their contracts.
8 ICANN has -- and then, of course, ICANN
9 has the Governmental Advisory Committee,
10 which are representatives of government
11 that meet separately with the GAC.

12 ICANN does not control the GAC.

13 Ms. Dryden, who you will hear from
14 later this afternoon, was eager to
15 clarify a lot of the statements that you
16 heard in the opening about what the GAC
17 actually does and the nature of their
18 meetings and so forth. You'll hear from
19 her and have a chance to evaluate her
20 testimony.

21 But ICANN is different than any
22 other organization I'm aware of, and
23 it -- it specifically did not want to
24 organize akin to the United Nations. It
25 certainly did not want to be controlled

1 by governments.

2 So that's why ICANN's relationship
3 with the Governmental Advisory
4 Committee --

5 PROFESSOR KESSEDJIAN: That is
6 clear.

7 MR. LEVEE: -- is a little bit of a
8 give-and-take relationship.

9 Have I helped?

10 PROFESSOR KESSEDJIAN: Not
11 entirely, but if -- we'll come back
12 tomorrow. But I think it's important
13 that we do understand, because there is a
14 claim, if I understand correctly, from
15 the DCA that ICANN should have remained
16 neutral.

17 So in order to assess that argument,
18 I, for one -- we have not discussed that
19 in the Panel, but I, for one, need to
20 understand what is -- where does that
21 claim of neutrality come and, you know,
22 how it plays out in the ICANN's
23 responsibilities, if you will.

24 MR. LEVEE: I think Mr. Ali would
25 tell you that the Bylaws require ICANN to

1 be procedurally open, to be transparent.
2 And perhaps he is reading into the Bylaws
3 the claim of neutrality.

4 As I develop the facts, I'm going to
5 try to make it pretty clear that ICANN
6 was neutral in this matter consistent
7 with the Guidebook. ICANN had no
8 obligation to ignore the provisions of
9 the Guidebook as applied to what happened
10 here.

11 PROFESSOR KESSEDJIAN: So you don't
12 contest that ICANN must be neutral
13 according to the Guidebook?

14 MR. LEVEE: I think that -- to
15 answer the question, I think that ICANN
16 tries to be neutral. I don't know that
17 ICANN has some legal obligation to be
18 neutral.

19 HONORABLE JUDGE CAHILL: Her analogy
20 with the United Nations -- my colleague's
21 analogy, Secretary Generals, I'm not as
22 familiar as she is with it, but everybody
23 is supposed to treat everybody the same
24 way --

25 MR. LEVEE: Yes.

1 HONORABLE JUDGE CAHILL: -- now,
2 you're telling me ICANN -- and maybe you
3 are -- that the Bylaws do not require
4 ICANN to treat all applicants the same
5 way?

6 MR. LEVEE: I'm telling you that
7 ICANN did do everything it could to treat
8 applicants fairly and neutrally in the
9 same way, however --

10 HONORABLE JUDGE CAHILL: That wasn't
11 my question.

12 MR. LEVEE: Okay. You're using the
13 word "neutral." The only problem I have
14 with the word is that the Guidebook
15 creates procedures that might alter the
16 neutrality.

17 So, for example, if an applicant has
18 support of the representatives of a
19 continent for a particular name and
20 another applicant does not have support,
21 ICANN isn't going to treat those the
22 same. ICANN is going to --

23 HONORABLE JUDGE CAHILL: That's
24 fine. Yeah.

25 MR. LEVEE: Okay. But in terms of

1 proceeding on a day-to-day basis,
2 absolutely, ICANN does everything it can
3 to be neutral.

4 PRESIDENT BARIN: Just one follow-up
5 from me.

6 MR. LEVEE: Sure.

7 PRESIDENT BARIN: I would admit that
8 it is perhaps a loaded question.

9 If ICANN is an administrator, as
10 you're saying it is, who does ICANN
11 answer to?

12 MR. LEVEE: Well, it's a complicated
13 question.

14 As of this moment, on certain
15 matters relating to what is referred to
16 as the IANA function, which involves
17 certain types of registrations, the
18 United States Government has a
19 supervisory role vis-a-vis ICANN.

20 There is, literally as we speak, a
21 proposal from the Obama administration to
22 have the U.S. Government relinquish that
23 role, and it has become politicized
24 within the United States and elsewhere.

25 I don't know what the outcome will

1 be. It's not relevant here, but -- so,
2 in some senses, ICANN has a relationship
3 with the United States Government.

4 Otherwise, ICANN's obligation is to the
5 members of the Internet community, and
6 its Board is selected from among those
7 members.

8 PRESIDENT BARIN: If you were to
9 assume for a moment that -- on a
10 contractual basis, from a political
11 perspective, that's fine, but from a
12 contractual perspective, if, in fact, the
13 relationship of ICANN is with its
14 constituents, as you've said, on a
15 contractual basis --

16 MR. LEVEE: Yes.

17 PRESIDENT BARIN: -- if there is an
18 issue with ICANN, then who addresses that
19 issue? In other words, who is ICANN
20 answering to when an issue comes up?

21 MR. LEVEE: It really depends on the
22 nature of the issue.

23 PRESIDENT BARIN: Well, the courts
24 are, I guess, from what I understood, no
25 longer there, because the applicants are

1 asked to waive that right.

2 If that's the case, then where do
3 constituents go to?

4 MR. LEVEE: So if you are an
5 applicant, you have signed the
6 Applicant Guidebook and, yes, you have
7 waived your right to sue ICANN. And you
8 have agreed that your redress is through
9 the ICANN accountability measures, which
10 include reconsideration and independent
11 review.

12 So, thus, we are here --

13 PRESIDENT BARIN: So here.

14 MR. LEVEE: -- if you are not an
15 applicant, you have not signed away your
16 right to sue ICANN. And I -- I can tell
17 you that I represented ICANN in many U.S.
18 Court proceedings.

19 So ICANN is subject to suit on
20 many -- in many areas, and it just
21 depends who you are.

22 If you are a member of the ICANN
23 community and you have an issue, you can
24 submit a public comment; you can send
25 letters; you can attend meetings. There

1 are multiple ways of being involved in
2 the ICANN process.

3 For those who are actively involved,
4 it is extraordinarily time-consuming.
5 The Board's meetings, which are three
6 times a year, take place over a two-week
7 period. It's not just a day. They
8 literally -- the meetings, themselves,
9 last two weeks.

10 So there's a number of different
11 opportunities for people to be heard.

12 If you're asking about the actual
13 ability to initiate a legal process, if
14 you're an applicant, you can't sue; but
15 if you're not an applicant, you can.

16 If you are a registry or a
17 registrar, you have signed a contract
18 that provides for an arbitration clause.

19 So it really depends on the nature
20 of your participation.

21 Is that helpful?

22 PRESIDENT BARIN: Yeah.

23 MR. LEVEE: Okay.

24 HONORABLE JUDGE CAHILL: I mean -- I
25 forgot what I really wanted to ask here.

1 Other than on the merits, right,
2 because the example you gave me is maybe
3 one application doesn't meet the
4 60 percent or something like that --

5 MR. LEVEE: Yeah.

6 HONORABLE JUDGE CAHILL: -- other
7 than on the merits, is ICANN's
8 responsibility to start off treating
9 everyone the same in a neutral way?

10 MR. LEVEE: Yes, yes.

11 HONORABLE JUDGE CAHILL: Then it
12 looks at each application on its merits?

13 MR. LEVEE: Correct.

14 HONORABLE JUDGE CAHILL: So what --
15 okay. All right.

16 MR. LEVEE: Yeah. If I didn't
17 clarify that previously, I apologize.

18 HONORABLE JUDGE CAHILL: No. No.
19 Maybe I just didn't hear you right --

20 MR. LEVEE: Yeah.

21 HONORABLE JUDGE CAHILL: -- but it
22 starts off equal, and then, in the whole
23 process, it treats everybody equally
24 until sometime on the merits, one of the
25 applications becomes better or worse than

1 the other?

2 MR. LEVEE: Pursuant to the terms of
3 the Guidebook --

4 HONORABLE JUDGE CAHILL: Thank you.

5 MR. LEVEE: -- yes.

6 Okay. Now, what I have done to
7 address DCA's claims is to lay out what I
8 believe are the five fundamental
9 assumptions that DCA has made. And when
10 you look at each of those assumptions and
11 conclude that they are wrong factually,
12 which I will demonstrate, then you can
13 conclude that all of DCA's claims fail.

14 So the first assumption we've
15 already addressed a bit. That is that
16 the AUC's involvement in an application
17 for .africa should have either
18 disqualified that application or at least
19 caused ICANN to eliminate the Guidebook
20 requirement that each application for a
21 geographic name have the support of
22 60 percent of the countries in that
23 region.

24 And one of the things I wanted to
25 point out -- these are based on the

1 exact -- on the specific exhibits. So in
2 your binders, I gave you the slides that
3 I'm using. And behind those slides are
4 the actual exhibits that are referenced
5 in the slides.

6 And so, for example, if you look at
7 Exhibit C-35, this is the response by DCA
8 to the Early Warning advice -- by the
9 way, that advice was issued by 17
10 different organizations or countries.
11 The AUC issued one, but 16 other
12 countries issued that advice.

13 And if you look at -- I highlighted
14 on Page 5 -- DCA's position is that the
15 endorsement issue should no longer be
16 considered as relevant in the evaluation
17 of the .africa gTLD as a geographic
18 string. We urge the ICANN Board to waive
19 this requirement because of the confusing
20 role that was played by the
21 African Union.

22 She goes on, It's created huge
23 problems of legitimacy. And it
24 concludes, It is our view that the final
25 decision by ICANN regarding the

1 delegation of the .africa string should
2 now only be based on the evaluated
3 technical, operational and financial
4 criteria, and not on the issue of
5 endorsement, which has been entirely
6 politicized.

7 The point here is that DCA has been
8 arguing throughout that the Guidebook
9 should be changed for its benefit, not
10 enforced for the benefit of all. They
11 were the ones that wanted to be treated
12 differently.

13 In addition, we heard this
14 morning -- well, actually, why don't we
15 do it this way: Again, nothing in the
16 Guidebook prohibited the AUC, or country
17 or any group of countries) from applying
18 for, or sponsoring, a gTLD application
19 for .africa.

20 The AUC's role was not improper and
21 certainly was not a basis for ICANN to
22 eliminate the Guidebook requirement.

23 Inasmuch as no applicant could
24 prevail without the 60 percent approval,
25 the AUC's support for an application was

1 extremely valuable (as DCA knew) because
2 AUC was representative of the entire
3 continent of the Africa.

4 Also, I mentioned this before --

5 PROFESSOR KESSEDJIAN: Could you
6 tell us and point out for us to any other
7 example where an applicant or somebody
8 interest -- directly interested in
9 becoming an applicant, directly or
10 indirectly, is, at the same time, part of
11 the body, part of the -- of the
12 institution that is going to advise the
13 Board? Because that's the position of
14 the AUC.

15 MR. LEVEE: Yes.

16 So I can give you an example --

17 ARBITRATOR KESSEDJIAN: Another one?

18 MR. LEVEE: -- the facts are very
19 different because it relates to the only
20 other intergovernmental authority that
21 Mr. Ali references, which is the .ec.
22 And there is a .eu. It's -- it was done
23 outside of the Applicant Guidebook --

24 PROFESSOR KESSEDJIAN: Yeah, that
25 has nothing to do --

1 MR. LEVEE: -- it was done earlier.

2 But they -- they were the sponsoring
3 authority --

4 PROFESSOR KESSEDJIAN: No, no. In
5 the current --

6 MR. LEVEE: -- under this Guidebook,
7 there is no other situation -- is there?

8 (Off-the-record conference with
9 colleagues.)

10 MR. LEVEE: During the break, I'll
11 get it.

12 There are -- I'm not aware of any
13 other continents, and that's what I'm
14 thinking of. There are examples, I
15 believe, with cities in particular, but
16 also regions.

17 And my point was there was nothing
18 in the Guidebook that said that anyone
19 couldn't apply for that.

20 PROFESSOR KESSEDJIAN: It's a
21 different problem that I have.

22 MR. LEVEE: Okay.

23 PRESIDENT BARIN: I have one more
24 question.

25 MR. LEVEE: Sure.

1 PRESIDENT BARIN: I'd rather ask now
2 because it follows up on
3 Professor Kessedjian's question.

4 If you go to your Slides 4 and 5,
5 which you referred to earlier.

6 In Slide 4, you refer to
7 Section 2.2.1.4.2, where you set out
8 explicitly the requirements of the
9 Guidebook for the applications.

10 MR. LEVEE: Yes.

11 PRESIDENT BARIN: On Page 5, your
12 first point is that there are no
13 restrictions on the ability of
14 governments or other entities to apply
15 for a geographic name.

16 MR. LEVEE: Correct.

17 PRESIDENT BARIN: How was that
18 communicated to the parties?

19 MR. LEVEE: It's just not in the
20 Guidebook. That was my point.

21 PRESIDENT BARIN: Was there any
22 communication? Was there anything sent
23 to people just so that they would know
24 that that, in fact, is a possibility?

25 MR. LEVEE: Not that I'm aware of,

1 no.

2 And there are -- so many different
3 types of organizations have applied for
4 TLDs over the years. And, of course,
5 governments across the world do operate
6 what are referred to as "ccTLDs." I
7 think maybe some of them operate one.
8 And those are typically operated by
9 governments, or the government is the
10 sponsor and there's a specific entity
11 that operates it on behalf of the
12 government.

13 So it's not uncommon. It's very --
14 it's actually common.

15 PRESIDENT BARIN: But is it fair to
16 say that this was, I guess, ICANN's
17 interpretation of --

18 MR. LEVEE: Well, you could say
19 that, but unless there's a prohibition, I
20 don't know why it would be -- I'm not
21 trying to spin it. There's nothing in
22 the Guidebook that says that you can't do
23 it --

24 PRESIDENT BARIN: That you can't do
25 it.

1 MR. LEVEE: -- and there are so
2 many -- it's the practice within ICANN
3 that there are lots of governments, 250
4 or so, that do operate their own
5 top-level domains, including the
6 United States. Nobody uses .us. It's
7 operated by the Postal Service, but
8 it's -- it's -- it would be common.

9 So there wouldn't really have been a
10 need to spell out who could apply.
11 Anyone could apply as long as you were an
12 entity.

13 The only restriction in the
14 Guidebook on who could apply is an
15 individual was not eligible to apply.
16 Any other entity, corporation structure
17 of any kind, LLP, they're all permitted
18 to apply.

19 PRESIDENT BARIN: But to follow on
20 Professor Kessedjian's questions, there
21 were no other examples that one could
22 inspire, at least up-front? In other
23 words, there were no other examples
24 previously that you could say there was a
25 support from another?

1 MR. LEVEE: Well, again, just the
2 .eu example, it's a different -- it was
3 not done in conjunction with the
4 Guidebook. It was a heavily politicized
5 event, but it was the EU that selected a
6 registry operator and then ultimately got
7 approval from ICANN to operate the
8 string.

9 Now, it -- and so that -- that was a
10 precedent, but it's not -- it's not
11 really -- it's not under the Guidebook.

12 PROFESSOR KESSEDJIAN: It's a
13 previous process?

14 MR. LEVEE: Correct.

15 Okay.

16 PRESIDENT BARIN: Thank you.

17 MR. LEVEE: So at the bottom of
18 Slide 10, the point that I was making is
19 had any two governments in Africa
20 objected in writing to ZACR's
21 application, that application could not
22 have proceeded either.

23 So we have the situation where
24 there's some dispute as to which
25 governments are supporting which

1 applications, but if DCA had had strong
2 support from two governments, those two
3 governments could actually have sent a
4 writing to ICANN objecting to ZACR's
5 application, and that application would
6 have failed on that basis.

7 HONORABLE JUDGE CAHILL: And this is
8 different from the consensus vote in --
9 in Beijing?

10 MR. LEVEE: Correct. It's outside
11 of any GAC advice.

12 HONORABLE JUDGE CAHILL: Okay.

13 MR. LEVEE: Now, if you look at
14 Exhibit C-24, there was a lot of
15 discussion of it during Mr. Ali's opening
16 statement and his colleagues'.

17 This is Dr. Crocker's letter. It's
18 dated March of 2012. It is nine pages
19 long, and it was written in response to a
20 communiqué that the AUC issued in October
21 of 2012.

22 The AUC had made 12 requests of --
23 of ICANN, and Dr. Crocker, pretty
24 methodically in this nine-page letter,
25 responds to each of them.

1 I'm not going to take you through
2 the whole letter, but in the first
3 request, the AUC stated it wanted ICANN
4 to add to ICANN's list of reserve names
5 the string .africa.

6 Now, ICANN did have a list of
7 reserve names. In particular, the
8 Olympics and the Red Cross had asked
9 ICANN, Don't let anybody take these
10 names, and ICANN had agreed. So the
11 Applicant Guidebook reserved those names.

12 The AUC requested similar treatment
13 for .africa, and Dr. Crocker said, No,
14 you can't do that.

15 He then went on to explain -- and
16 we've highlighted on Pages 2 and a little
17 bit of 3 -- what the Guidebook actually
18 says about the participation of
19 governments. He explained that the
20 Guidebook had protections that would
21 allow the African Union and its member
22 states to play a prominent role in
23 determining the outcome of those strings.

24 By the way, that statement is
25 100 percent accurate, as were the several

1 next paragraphs that refer to the
2 protections available for geographic
3 names, the fact that Africa is a
4 geographic name, the fact that it would
5 require support from at least 60 percent
6 of the national governments.

7 The letter then very briefly goes on
8 to discuss the GAC, discuss the concept
9 of Early Warnings and other objection
10 processes.

11 The letter does not tell the AUC to
12 go join the GAC. And that's something
13 that's very separate --

14 PROFESSOR KESSEDJIAN: That is my
15 question.

16 At that time when the letter is
17 written, 8 March 2012, is AUC a member of
18 the GAC?

19 MR. LEVEE: No.

20 PROFESSOR KESSEDJIAN: Okay.

21 MR. LEVEE: And Ms. Dryden is here.
22 She will tell you -- this was not in her
23 declaration because it didn't really come
24 up in the very first briefing that was
25 submitted -- she will be more than happy

1 to answer questions to you about that
2 process.

3 But if you ask her the question, Was
4 ICANN involved or somehow directed the
5 GAC to accept the AUC as a voting
6 member --

7 PROFESSOR KESSEDJIAN: You are
8 making the question and the answer?

9 MR. LEVEE: -- I'm telling you now,
10 she's going to say, No, ICANN was not
11 involved.

12 HONORABLE JUDGE CAHILL: We'll see
13 what happens.

14 MR. LEVEE: We'll see what happens.

15 HONORABLE JUDGE CAHILL: Leading.

16 MR. LEVEE: The most important thing
17 is that DCA tells you that this letter is
18 some -- is the genesis of a conspiracy
19 that is -- it tells the AUC, No worries,
20 we've got this wired on your behalf.

21 I've read the letter too many times.
22 You can read the letter. The letter is
23 fact-based. It tells the AUC nothing
24 more than, in particularly on the first
25 page, of what you could read in the

1 Guidebook.

2 There was absolutely nothing
3 untoward about the letter. It was in
4 every way appropriate for the Chairman of
5 the Board of ICANN to send this letter.

6 Now, DCA's second assumption relates
7 to the GAC. First, we heard extensively
8 this morning that the Early Warning
9 notices were improperly issued. And then
10 we also heard extensively this morning
11 that the GAC advice that was issued was
12 not consensus advice, and that the ICANN
13 Board should have known this and rejected
14 it.

15 First, this is Section 1.1.2.4 of
16 the Guidebook. I'll confess, I didn't
17 have an opportunity to compare the slides
18 that you were given this morning to the
19 slides that I have done. But at the
20 bottom of this paragraph in a sentence
21 that I think was omitted from DCA's
22 presentation is the sentence, A GAC Early
23 Warning may be issued for any reason.

24 It's not a formal objection. It
25 doesn't lead to a process that can cause

1 disqualification of the application.
2 What it does is it says to the applicant,
3 You have an issue, and we need to deal
4 with it. And if we can deal with it, so
5 be it. And if we can't deal with it, you
6 are at risk of the GAC issuing advice.

7 But it can be issued for any reason.

8 So there was absolutely nothing
9 improper about the 17 Early Warning
10 notices. Further, each of the issuing
11 countries was entitled to issue a warning
12 notice, and there were 17 of them.

13 I also want to emphasize -- and
14 we'll discuss it in a minute -- the
15 Government of Kenya issued an Early
16 Warning notice. So even though there's a
17 lot of discussion that DCA had the
18 support of the Government of Kenya, it
19 signed and issued an Early Warning
20 notice. And we'll talk about the effect
21 of that later.

22 Now, DCA was permitted to respond to
23 those notices, and it did. I've already
24 mentioned to you that part of its
25 response was to say, Ah, I don't think

1 the support of the continent should even
2 be relevant to the outcome.

3 But the point is that the process of
4 Early Warning notices worked exactly as
5 it was supposed to work under the
6 Guidebook. There was nothing untoward
7 about it. Those notices told the DCA
8 that it had an issue, and that -- and
9 that was the full legal effect of them.
10 There's nothing more.

11 Now, let's talk about the GAC. As
12 we've heard, the GAC issues consensus
13 advice where no duly authorized
14 representative of a country dissents from
15 the proposed advice at the meeting where
16 the advice is considered.

17 At the meeting, GAC advice was
18 proposed against DCA's application.

19 Ms. Dryden will talk to you this
20 afternoon about that.

21 No country dissented.

22 HONORABLE JUDGE CAHILL: Is there
23 any record of that?

24 MR. LEVEE: Pardon?

25 HONORABLE JUDGE CAHILL: Is there

1 any record --

2 MR. LEVEE: Ms. Dryden can explain
3 exactly the details. And she'll also
4 explain the effect of the e-mail
5 exchanges that come forward.

6 Now, remember, at the time
7 Ms. Dryden did her declaration, there
8 were two things that were true: one was
9 that she didn't even want to release the
10 GAC e-mail --

11 HONORABLE JUDGE CAHILL: Right.

12 MR. LEVEE: -- because they were
13 confidential. And so neither side had
14 them.

15 And I have no way of knowing what
16 was in them. She can explain -- and I
17 don't want to testify for her. I'm
18 giving comments that I'm doing bad on
19 that -- she can explain what was
20 happening in the e-mail and then what
21 happens at the GAC meeting where a
22 country says, I propose advice against a
23 particular application --

24 HONORABLE JUDGE CAHILL: Sure --

25 MR. LEVEE: -- she'll connect those

1 dots for you --

2 HONORABLE JUDGE CAHILL: -- but
3 there's no sign-in sheet saying who was
4 there, and there's no minutes that say
5 that this is what happened?

6 MR. LEVEE: There are sometimes, but
7 not always. And, again, she can explain
8 that.

9 HONORABLE JUDGE CAHILL: Okay.

10 MR. LEVEE: Yeah.

11 So we know for sure, because
12 Ms. Dryden has already said so in her
13 declaration, no country dissented. What
14 she couldn't remember was whether
15 Mr. Katundu was actually in the room.

16 There were a lot of people in the
17 room, Members of the Panel. It's a big
18 room. There's a lot of members. There
19 are advisors, there's representatives,
20 there's observers. And it's not
21 surprising that Ms. Dryden cannot
22 100 percent be certain whether one
23 particular individual was in the room or
24 not.

25 She does know for sure that

1 Mr. Buruchara was not, but we already
2 know that he said he wasn't there.

3 HONORABLE JUDGE CAHILL: Yeah, he
4 was out of town.

5 MR. LEVEE: The last point I want to
6 emphasize -- and, again, this is very
7 important -- if any country from inside
8 or outside of Africa had opposed the
9 advice at the meeting, it would not have
10 been consensus advice.

11 So at the meeting, if Switzerland
12 had said, You know what, I don't know if
13 this is right; or if the Government of
14 China or the Government of Mexico or any
15 government in Africa had opposed the
16 advice, it would not have been issued.
17 That's not what happened.

18 So as we know, the official
19 representative for Mr. Katundu did not
20 oppose it.

21 One thing that's important,
22 Mr. Buruchara, who, I want to remind you,
23 when we talk about conflicts, he was the
24 former Chairman of DCA's Strategic
25 Advisory Board, so not exactly a neutral

1 party here. But more importantly, he was
2 not the official GAC representative.

3 That's the phrase that is included
4 in Paragraph 33 of DCA's amended notice
5 to this Panel. But he was never the
6 official GAC representative; he was
7 always only an advisor.

8 But irrespective of his title, the
9 bottom line is he did not attend the
10 meeting, and, thus, he could not prevent
11 the issuance of GAC advice even if he had
12 wanted to do so, even if he had been
13 authorized to do so.

14 The other thing is that
15 Mr. Buruchara knew that the Government of
16 Kenya had issued an Early Warning -- I
17 gave that to you in your binder as
18 Exhibit C-34 -- so he's on thin ground in
19 all events, even having the e-mail debate
20 that he had.

21 The complete e-mail thread, which
22 Mr. Ali took you through -- and I've also
23 got copies of some of those exhibits in
24 our binder -- confirms to me that he did
25 not oppose the issuance of GAC advice, in

1 any event.

2 Now, importantly, DCA initially
3 presented the Panel with only a very
4 small snippet of the e-mail thread. I
5 don't know how much DCA had at the
6 time -- we'll ask Ms. Bekele when she is
7 testifying -- but once we got the
8 complete thread, it demonstrates that
9 Mr. Buruchara withdrew his opposition to
10 the issuance of GAC advice because he
11 specifically says that he supports the
12 AUC and that they are acting as one.

13 Exhibit C-87 shows that what he
14 wanted to do was to keep the GAC as
15 issuing advice and keep ICANN as the
16 ultimate decision-maker. And that is
17 what happens: The GAC issues advice;
18 ICANN is the decision-maker.

19 There would have been no advice for
20 the GAC to issue that it supports one
21 application. That apparently is the spin
22 of what DCA is arguing to the Panel now,
23 that the advice was just simply, We
24 support the -- the ZACR application.
25 That would've said nothing to ICANN.

1 HONORABLE JUDGE CAHILL: Right. But
2 the only competing one they said couldn't
3 go forward.

4 MR. LEVEE: Well, that is the GAC
5 advice that was issued, but I'm saying
6 that the -- what -- what DCA's arguing to
7 the Panel this morning is that somehow,
8 the GAC was supposed to issue advice, We
9 like ZACR's application, period.

10 HONORABLE JUDGE CAHILL: That's not
11 what happened, but --

12 MR. LEVEE: It wouldn't have been
13 GAC advice. The GAC is giving advice
14 against an application. It doesn't say,
15 We like this one, but we're not going to
16 comment on the other. It wouldn't have
17 had an effect.

18 The purpose of the GAC in this role
19 is to say when they have a problem with
20 an application, and that's the advice
21 that was given.

22 So the summary that I want to leave
23 you with is two-fold: We have testimony
24 from Ms. Dryden already in the record.
25 In Paragraph 11, she's says, By the end

1 of this e-mail exchange, I could not
2 reasonably conclude that Mr. Buruchara,
3 on behalf of Kenya, continued to hold a
4 divergent view from the AUC or its member
5 states which supported the issuance of
6 GAC advice in conjunction with DCA's
7 application for .africa.

8 That paragraph is and was
9 100 percent accurate. And you'll have
10 the opportunity to test that this evening
11 when Ms. Dryden testifies.

12 She's the one that received these
13 e-mails. She's the one to interpret
14 them. And then she will tell you what
15 happens when she gets all these e-mails
16 and their relevance to what actually
17 happens in the room when the GAC meets.

18 Finally, we don't have a sworn
19 statement from Mr. Buruchara. We know
20 that DCA could have gotten one, but we
21 don't have his statement. So that is the
22 missing evidence that perhaps might have
23 given you an additional piece of evidence
24 to support DCA's claim.

25 If he actually thought that via

1 e-mail, he could have blocked or did, in
2 fact, block, he could have put that in a
3 declaration and told you that, and then
4 he could have been here today. He
5 didn't, and he's not here.

6 So the bottom line -- I'm going to
7 run through this quickly. I know I'm
8 running out of time -- DCA did not have
9 the support of a single country on the
10 Africa continent, and numerous countries
11 opposed.

12 DCA knew that the AUC support was
13 critical -- and by the way, DCA went and
14 got that support. The problem was it got
15 it in 2009. It then submitted to ICANN a
16 copy of the support letter that it had
17 received in 2009.

18 We heard a lot today at the end,
19 very end of DCA's opening statement about
20 the struggle that ICANN had with whether
21 the AUC support was valid, and the
22 Geo Names and all that.

23 That entire discussion, by the way,
24 takes a page and a half of DCA's brief.
25 It took a half an hour this morning.

1 But the reason there was so much
2 confusion was that DCA had submitted with
3 its application the letter from
4 the African Union. And then DCA said,
5 Well, we're not really sure of the status
6 of -- of whether this letter actually has
7 support.

8 I'll tell you what DCA knew. DCA
9 knew that it had voluntarily refused to
10 participate in the request for proposal
11 process and that, as a result, the AUC
12 had withdrawn its endorsement. And
13 that's in Exhibit C-R-10 in your book --

14 HONORABLE JUDGE CAHILL: C-R-10?

15 MR. LEVEE: -- in fact, in
16 Exhibit C-26, DCA begs the AUC, Please
17 reinstate our endorsement to enable us to
18 go ahead with our application to ICANN.
19 But the AUC did not do so.

20 So DCA knew how critical the
21 endorsement of the African Union
22 Commission was, and it had gotten that
23 endorsement. And then the AUC, which was
24 entitled to withdraw it and change its
25 mind, did so.

1 In any event, there is no basis for
2 any request to change the rules in DCA's
3 favor by modifying the Guidebook to
4 eliminate the support requirement, much
5 less, by the way, in the final brief that
6 DCA submitted, asking the Panel to then
7 give it 18 more months.

8 That's not how the Guidebook was set
9 up. That change would be inconsistent
10 with the Guidebook and the Bylaws, and it
11 would give DCA an unfair advantage.

12 HONORABLE JUDGE CAHILL: You said
13 that the AUC withdrew its support because
14 .africa refused to participate in the
15 RFP.

16 Is that just because of the -- of
17 the dates, or is there something that
18 says --

19 MR. LEVEE: No. I think what
20 happened was -- and it's in the letter in
21 the exhibit -- the AUC decided to hold a
22 request for proposal --

23 HONORABLE JUDGE CAHILL: Right.

24 MR. LEVEE: -- now, we know that DCA
25 didn't like the terms; they didn't think

1 it was fair; they thought it was wired.
2 The bottom line is they didn't
3 participate.

4 HONORABLE JUDGE CAHILL: Right.

5 MR. LEVEE: But the AUC decided it
6 would sponsor a registry to apply for
7 .africa. It had a right to do that, and
8 it decided it wanted to.

9 Previously, it had supported
10 Ms. Bekele's approach that -- it was
11 three years before the applications were
12 due, but they had -- she had gotten the
13 support, which she knew was very
14 important.

15 And then the AUC changes its mind
16 and says, You know what, we want to be
17 more influential. We want to have an
18 RFP. The winner of the RFP is going to
19 have our endorsement, so we withdraw the
20 previous endorsement given to you.

21 HONORABLE JUDGE CAHILL: That's
22 fair. Okay.

23 MR. LEVEE: Okay.

24 The bottom line is no applicant for
25 .africa can (or should) succeed without

1 the support of the countries of Africa.

2 DCA didn't have that support in
3 2012. It does not have that support
4 today.

5 So, really, what this is all about
6 is trying to change the Guidebook so that
7 DCA can proceed in the face of the lack
8 of support that it did not have.

9 But does that amount to -- ICANN's
10 refusal to change the Guidebook, that
11 obviously doesn't amount to a violation
12 of its Articles, Bylaws or Guidebook.
13 We're following the Guidebook, not
14 modifying it.

15 The next assumption relates to the
16 conflicts of interests, and Judge Cahill
17 noted that it was not discussed in the
18 opening statement of DCA. I'm going to
19 cover it very briefly.

20 DCA sent letters to the ombudsman,
21 sent letters to ICANN's CEO saying these
22 two Board members shouldn't vote. The
23 ombudsman rejected it. Messrs. Disspain
24 and Silber twice confirmed that -- that
25 they did not believe they had a conflict.

1 And then we have ICANN has a
2 conflicts of interest policy, and it has
3 a Subcommittee on Ethics and Conflicts.
4 And the Chairman of that Subcommittee is
5 here to testify today, and he will tell
6 you that they followed their process,
7 what they did. And the Subcommittee
8 concluded that no conflicts existed.

9 So the mere assertion of a conflict
10 doesn't mean that a conflict actually
11 exists. You actually have to go look at
12 it.

13 The Board conducted itself
14 consistent with the Bylaws to proceed
15 when someone has asserted a conflict.

16 And DCA not once, in any of its
17 papers, ever told the Panel, using a rule
18 of reason or any other criteria, why the
19 Board's decision was objectively or even
20 subjectively wrong.

21 All they've ever told the Panel was
22 that they made a complaint. They don't
23 think these two Board members should have
24 voted.

25 DCA has never explained to you why

1 the Board's internal investigation, which
2 ultimately concluded that there was no
3 conflict, was -- how that somehow
4 violated its Articles or Bylaws.

5 But my last point is, really, the
6 most important point, I suppose. This
7 could come in the category of no harm, no
8 foul. The vote of the committee of the
9 Board, the NGPC, the New gTLD Program
10 Committee -- you asked, Judge Cahill, how
11 many members are on the Board. There's
12 16.

13 But the Board created a subset of
14 itself. All Board members who did not
15 have a conflict relating to the
16 program -- in other words, there were a
17 couple of Board members whose companies
18 were applying for new gTLDs. Those Board
19 members stepped back when it related to
20 the gTLD program.

21 And so the Board created the
22 New gTLD Program Committee, the NGPC, to
23 rule on all matters relating to the New
24 gTLD Program. Those Board members were
25 not conflicted.

1 HONORABLE JUDGE CAHILL: Were those
2 two people that were objected to on that
3 Board?

4 MR. LEVEE: They were, they were.

5 HONORABLE JUDGE CAHILL: Okay.

6 MR. LEVEE: But if you take those
7 two people off --

8 HONORABLE JUDGE CAHILL: How many
9 people are on the committee? Sorry.

10 MR. LEVEE: Well, it changed.
11 Roughly 14-ish; there were 11 at that
12 time. It changed -- as Board members'
13 conflicts were resolved, like, they
14 withdrew their application, then the
15 Board -- that Board member would re-join
16 the committee --

17 HONORABLE JUDGE CAHILL: That's
18 fair, yeah.

19 MR. LEVEE: -- at the time of the
20 vote, there were 11.

21 If you take the two people away --
22 nine people attended the meeting. If you
23 take those two people away, you've got
24 seven people voting. To vote, all you
25 need is a quorum. They had a quorum.

1 They had nine out of 14 -- nine out of
2 11. I'm sorry. They had a quorum.

3 And once you have a quorum, it's
4 majority rules.

5 In this instance, if you take the
6 two disputed Board members out of the
7 equation, you have a 7-0 vote.

8 So it -- it truly just did not
9 matter whether those Board members voted
10 or not.

11 HONORABLE JUDGE CAHILL: I was going
12 to ask that question before, but I
13 thought the answer was they're not -- so
14 the vote -- if they didn't vote, it still
15 would have passed. But I was
16 anticipating them saying, but these two
17 people were there, so they were going to
18 influence the other seven people. I
19 think that's what --

20 MR. LEVEE: I didn't hear that --

21 HONORABLE JUDGE CAHILL: I didn't
22 hear that either, but I may well ask the
23 question --

24 MR. LEVEE: It may be on --

25 HONORABLE JUDGE CAHILL: -- yeah,

1 that's usually what the --

2 MR. LEVEE: -- yeah.

3 HONORABLE JUDGE CAHILL: There's
4 no minutes of this or anything?

5 MR. LEVEE: There are minutes.
6 We're going to come to that.

7 HONORABLE JUDGE CAHILL: Oh, sorry.

8 MR. LEVEE: The next -- the minutes
9 are actually in your binder, and I'm
10 about to get to them.

11 The fourth of five assumptions is
12 very brief, that ICANN inappropriately
13 rejected DCA's reconsideration request
14 for various reasons, including by not
15 retaining an independent expert.

16 I'm not going to read the whole
17 Bylaws provision here -- whoops, there I
18 just took away -- this is the section --
19 Article IV, Section 2.2 of the Bylaws
20 tells you what the grounds for
21 reconsideration could be.

22 And then I gave you Exhibit 47,
23 which is the Board Governance Committee
24 recommendation to deny the request. What
25 it says is that DCA has not demonstrated

1 that the acceptance of the GAC advice
2 was, quote, without consideration of
3 material information, except where the
4 party submitting the request could have
5 submitted, but did not submit, the
6 information for the Board's consideration
7 at the time of the action.

8 The second bullet says that DCA has
9 not demonstrated that one or more actions
10 or -- of the Board were taken as a result
11 of the Board's reliance on false or
12 inaccurate information.

13 What we know, instead, DCA, in its
14 paper, say, We have no idea if the NGPC
15 even saw our response to the GAC advice.
16 We had a lengthy response to the GAC
17 advice to tell the Board why they should
18 ignore it.

19 But if you look at Exhibits R-1 and
20 Exhibit C-17 [verbatim], those are
21 the minutes. I think Exhibit R-1 is the
22 best. And we've highlighted on Page 5
23 the question at the top. What materials
24 did the Board review. As part of its
25 deliberations, the new GPC reviewed the

1 following materials and documents.

2 It reviewed, obviously, the GAC
3 communiqué, and then it reviewed the
4 applicant responses, and then it reviewed
5 the Guidebook.

6 That's all that needed to be
7 reviewed. And it confirms that the Board
8 did, in fact, review DCA's objections and
9 voted to accept the GAC advice,
10 nevertheless.

11 DCA also says, Well, you know, you
12 should have hired an expert.

13 The first thing of course, as we've
14 already seen, there's no requirement to
15 hire an expert. The Guidebook in
16 Section 3.1 says that the Board may
17 consult with experts.

18 At the time that DCA said, You
19 should hire an expert, there was no
20 indication of what that expert might have
21 said. The Board didn't need an expert to
22 evaluate whether the GAC advice said what
23 it said. They didn't need an expert to
24 evaluate whether the GAC's advice was
25 consensus advice.

1 Ms. Dryden had issued, on behalf of
2 the GAC, a communiqué which said what it
3 said. Nothing that an expert would have
4 said would have changed anything.

5 So we pointed out in the briefs,
6 Hey, you know, you never said anything
7 about what the expert might have said.
8 And in DCA's second brief to the Panel,
9 again, DCA says nothing. They don't tell
10 you anything about what an expert might
11 have said.

12 This morning, we hear that you could
13 have gotten an expert to deal with Geo
14 Names and whether the African Union
15 Commission was or was not authorized to
16 sponsor a different application.

17 That actually had nothing to do with
18 the GAC advice. The GAC advice was
19 specific to DCA's application. And so
20 there truly was nothing that any,
21 quote/unquote, expert could have done to
22 tell the Board what it -- how it should
23 be voting. The Board was perfectly
24 capable of understanding the GAC advice.

25 More importantly, the decision

1 whether to retain an expert is
2 100 percent discretionary. DCA argued in
3 its reconsideration request that it was
4 not discretionary, that it was mandatory;
5 but, in fact, it's very clear that it was
6 discretionary.

7 Assumption Number 5 -- and I'm
8 almost done -- is that ICANN's other
9 conduct in relation to the AUC and ZACR
10 was inappropriate.

11 And we heard almost half of the
12 opening statement this morning where it
13 talked about the dialogue that occurred
14 between the -- the supporting
15 organizations and ICANN and within ICANN
16 as to whether the AUC was or was not --
17 whether the letter was or was not
18 supportive and sufficient under the
19 Guidebook.

20 And I'm going to address that to
21 some degree. I'll be candid. It was two
22 pages of the brief, so I had allocated a
23 similar amount of time in my overall
24 presentation.

25 I'll spend more time on it tomorrow

1 in my closing.

2 But the main point I want to
3 emphasize is the oddity. DCA is saying
4 that although the African Union
5 Commission signed a letter of support for
6 ZACR's application, ICANN was struggling
7 with whether that letter was sufficient
8 under the terms of the Guidebook.

9 If the process was wired in favor of
10 the AUC's application with ZACR, ICANN
11 should have immediately said, Yeah, the
12 letter looks good to us, you can use it.

13 Instead, the Staff at ICANN kept
14 questioning, We want to make sure that
15 the AUC's letter is sufficient.

16 Ultimately, the Staff agreed that a
17 letter from the AUC would be sufficient,
18 and at that point, someone says, Well,
19 maybe you could write a letter. ICANN --
20 the Guidebook actually has a draft letter
21 of support. It's not unusual for the
22 Staff to recommend a draft.

23 So I don't see anything untoward
24 about the drafting of a letter for the
25 AUC to meet the terms of the Guidebook.

1 ICANN would have done the same thing for
2 DCA if DCA had been the winning
3 applicant. It wasn't.

4 So the fact that ICANN worked with
5 the AUC to get the letter right, really,
6 is that the violation of the Guidebook?
7 Is that the violation of the Bylaws?

8 DCA's application had already been
9 the subject of GAC advice, and so at that
10 point, the question was, Was any
11 application for .africa going to proceed?

12 There is a string of correspondence
13 that you saw this morning. None of it is
14 untoward. None of it is conspiratorial.

15 If the Staff of ICANN or the Board
16 of ICANN was trying to favor ZACR's
17 application, it did a really bad job
18 because it kept being very unsure as to
19 whether the AUC's original letter of
20 support was sufficient, there was no
21 preference here.

22 ICANN's Staff did what it was
23 supposed to do under the Guidebook. It
24 made sure that the AUC was, in fact,
25 representative and said so in a properly

1 drafted letter.

2 Finally, as you will also hear from
3 Ms. Dryden, the AUC did not permit --
4 ICANN did not permit the AUC to join the
5 GAC. The GAC regulates its own
6 membership, and ICANN had no role
7 whatsoever.

8 ICANN's ultimate decision, based on
9 the recommendation of InterConnect
10 Communications, which was its vendor, to
11 acknowledge the AUC's enforcement of
12 ZACR, was appropriate and, candidly,
13 irrelevant to this proceeding. It occurs
14 after DCA's application has already been
15 blocked.

16 As I already said, the drafting of
17 an endorsement letter was both
18 appropriate -- appropriate and, likewise,
19 irrelevant. And the Guidebook even has a
20 sample letter of support.

21 There's no ill-will or
22 inappropriateness about helping somebody
23 draft a letter. We didn't hear anything
24 about it this morning, so I -- sorry,
25 now, I include -- I included what --

1 one bullet -- a lot of the papers refer
2 to problems that DCA had with ICANN's
3 independent objector, but at the end of
4 the day, the independent objector, who
5 was -- whose purpose was to file
6 objections in certain situations when no
7 one else did -- well, he didn't file an
8 objection. So I wasn't sure why that was
9 in DCA's papers, and I didn't know if it
10 would come up this morning.

11 But all of these things, which are
12 sort of miscellaneous, none of the
13 conduct involves a possible violation of
14 the Articles, the Bylaws or the
15 Guidebook. I don't think there's even
16 Board conduct of talking about Staff of
17 ICANN assisting in a letter communicating
18 with various authorities. These aren't
19 decisions that are made by the
20 ICANN Board.

21 HONORABLE JUDGE CAHILL: Are you
22 saying we should only look at what the
23 Board does?

24 The reason I'm asking is that your
25 the Bylaws say that ICANN and its

1 constituent bodies shall operate, to the
2 maximum extent feasible, in an open and
3 transparent manner.

4 Does the constituent bodies include,
5 I don't know, GAC or anything? What is
6 "constituent bodies"?

7 MR. LEVEE: Yeah. What I'll talk to
8 you about tomorrow in closing when I lay
9 out what an IRP Panel is supposed to
10 address, the Bylaws are very clear.
11 Independent Review Proceedings are for
12 the purpose of testing conduct or
13 inaction of the ICANN Board. They don't
14 apply to the GAC. They don't apply to
15 supporting organizations. They don't
16 apply to Staff.

17 HONORABLE JUDGE CAHILL: So you
18 think that the situation is a -- we
19 shouldn't be looking at what the
20 constituent -- whatever the constituent
21 bodies are, even though that's part of
22 your Bylaws?

23 MR. LEVEE: Well, when I say not --
24 when you say not looking, part of DCA's
25 claims that the GAC did something wrong

1 and that ICANN knew that.

2 HONORABLE JUDGE CAHILL: So is GAC a
3 constituent body?

4 MR. LEVEE: It is a constituent
5 body, to be clear --

6 HONORABLE JUDGE CAHILL: Yeah.

7 MR. LEVEE: -- whether -- I don't
8 think an IRP Panel -- if the only thing
9 that happened here was that the GAC did
10 something wrong --

11 HONORABLE JUDGE CAHILL: Right.

12 MR. LEVEE: -- an IRP Panel would
13 not be -- an Independent Review
14 Proceeding is not supposed to address
15 that, whether the GAC did something
16 wrong.

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

24 The Board knew that the GAC did not,
25 in fact, issue consensus advice. That's

1 the allegation. So it's fair to look at
2 the GAC's conduct.

3 HONORABLE JUDGE CAHILL: Okay.

4 You think that GACs have actual
5 notice, but if they should have known,
6 then they would have constructive notice?

7 Is that -- what do you do with that?

8 MR. LEVEE: I think that possibly
9 would fall into a Board inaction --

10 HONORABLE JUDGE CAHILL: Okay.

11 MR. LEVEE: -- yeah.

12 I don't want to suggest that -- that
13 it's so narrow you're only supposed to --

14 HONORABLE JUDGE CAHILL: All you're
15 doing is just answering the question.

16 MR. LEVEE: Okay.

17 But, certainly, Independent Review
18 Proceedings, which -- I mean, these are
19 ICANN's rules. We're here today to --
20 pursuant to those rules. And we're
21 really testing the conduct of the Board.
22 Okay?

23 So let me close.

24 I gave you five assumptions that DCA
25 made. We believe each of those is false.

1 We believe that the Board conducted
2 itself consistent with the Articles, the
3 Bylaws and the Guidebook.

4 Nothing in the Guidebook even hints
5 at the notion that the AUC's support
6 created a conflict of interest or
7 required the Guidebook to be ignored.

8 The Board didn't violate the
9 Articles or Bylaws by accepting the
10 consensus advice or by allowing the two
11 challenged members to vote. Indeed, the
12 process for evaluating contested
13 applications for gTLD using the name of a
14 geographic region worked exactly as it
15 was supposed to work.

16 And I know that, ultimately, the
17 argument of counsel to my left is that
18 the process was unfair. I get that. But
19 the process also required DCA to have
20 support of 60 percent of the countries of
21 the Africa continent. And at the time it
22 submitted its application, it did not
23 have the support of any single country,
24 certainly not 60 percent.

25 And so, fair is following the

1 Guidebook. There are winners and losers
2 in the gTLD process. It's designed to
3 work that way. It doesn't mean that the
4 process was unfair or that the Board
5 violated its Bylaws.

6 Thank you.

7 HONORABLE JUDGE CAHILL: Thank you.

8 PRESIDENT BARIN: Any questions?

9 HONORABLE JUDGE CAHILL: No. I
10 talked myself out of questions.

11 MR. LEVEE: I think we're right on
12 your timeline.

13 So should we take one hour?

14 PRESIDENT BARIN: It's 12:15, so,
15 yeah, we could take an hour.

16 MR. LEVEE: Come back at 1:20?

17 PRESIDENT BARIN: Yeah.

18 MR. LEVEE: We'll get started with
19 Mr. Chalaby at 1:20.

20 PRESIDENT BARIN: That's fine.

21 HONORABLE JUDGE CAHILL: How is this
22 going to go? Are we going to ask him
23 questions, or is he going to tell us
24 something?

25 MR. LEVEE: I will play almost no

1 role.

2 I think we already determined the
3 Panel will ask its questions first,
4 followed by counsel, if they have
5 questions.

6 PRESIDENT BARIN: I -- I -- we're
7 advised that the first witness is going
8 to be Mr. Chalaby --

9 MR. LEVEE: Correct.

10 PRESIDENT BARIN: -- right after
11 lunch?

12 MR. LEVEE: Yes. Then Ms. Dryden to
13 follow, and then Ms. Bekele to follow.

14 PRESIDENT BARIN: Good. So if we
15 break now and come back by 1:20 --

16 MR. LEVEE: Fine.

17 PRESIDENT BARIN: -- that gives us
18 enough time. And then we'll start.

19 MR. LEVEE: We should be fine.
20 Thank you.

21 PRESIDENT BARIN: Thank you very
22 much.

23 (Whereupon, at 12:21 p.m., a
24 luncheon recess was taken.)

25

1 A F T E R N O O N S E S S I O N

2 (1:26 p.m.)

3 MS. CRAVEN: These are just exhibits
4 that were already in the PowerPoint,
5 because we understand that the record is
6 really gigantic --

7 PRESIDENT BARIN: Gigantic?

8 MS. CRAVEN: -- and difficult to
9 manage.

10 MR. LEVEE: Do you have one for us?

11 MS. CRAVEN: We do not. It's
12 coming.

13 MR. LEVEE: Okay.

14 HONORABLE JUDGE CAHILL: What are
15 these?

16 MS. CRAVEN: These are the documents
17 that were already referenced in the
18 PowerPoint, and they're already in the
19 record, but they're just organized
20 differently.

21 MR. ALI: It would be easier to read
22 those, if you wanted --

23 HONORABLE JUDGE CAHILL: That's
24 fine.

25 PRESIDENT BARIN: So we're back.

1 It's 1:25. Perfectly on time after
2 the lunch break.

3 The next part of the Hearing, we'll
4 deal with the presentation of witnesses
5 and questions by the Panel.

6 The first witness who is up for
7 questions by the Panel, and then,
8 subsequently, questions by counsel for
9 the parties, is Mr. Cherine Chalaby, if I
10 pronounced that correctly.

11 THE WITNESS: Perfect.

12 MR. LEVEE: Good afternoon,
13 Mr. Chalaby.

14 THE WITNESS: Good afternoon.

15 MR. LEVEE: First thing we should do
16 is make sure that you're sworn in.

17 - - -

18 C H E R I N E C H A L A B Y,
19 after having been first duly sworn by
20 President Barin, was examined and
21 testified as follows:

22 - - -

23 PRESIDENT BARIN: The witness is
24 sworn.

25 Thank you for making yourself

1 available, Mr. Chalaby.

2 What we will do is we'll start with
3 some questions from me, as Chair, but my
4 colleagues will also come in and ask you
5 questions.

6 I ask you to be as -- as forthright
7 as you can be. And if you obviously
8 don't know the answer to my question,
9 simply say you don't know.

10 - - -

11 EXAMINATION ON BEHALF OF THE PANEL

12 BY PRESIDENT BARIN

13 - - -

14 PRESIDENT BARIN: I read in your
15 statement that you've been a member of
16 the Board of Directors of ICANN since
17 2010?

18 THE WITNESS: Correct.

19 PRESIDENT BARIN: And you're
20 currently still a member of that Board?

21 THE WITNESS: Correct.

22 PRESIDENT BARIN: Can I ask you what
23 your professional qualifications are?

24 It's -- it wasn't clear from the
25 statement to what -- what you do.

1 THE WITNESS: Sure.

2 Well, first of all, I -- I have a --
3 I graduate -- I went to school -- Jesuit
4 schools in Egypt where I was born. And
5 then I have a -- a undergraduate degree
6 in electronic engineering from Cairo
7 University --

8 ARBITRATOR KESSEDJIAN: Can you
9 speak a little bit louder? This room --

10 THE WITNESS: Sure. Okay.

11 HONORABLE JUDGE CAHILL: Where was
12 the graduate degree again?

13 THE WITNESS: So I was born in
14 Egypt --

15 HONORABLE JUDGE CAHILL: Got that.

16 THE WITNESS: -- I went to the
17 Jesuit school, the French Jesuits; and
18 then I went to Cairo University, where I
19 took a degree in electrical engineering.

20 Then I took a Master's degree in
21 computing sciences from Imperial College
22 in London. Then I joined what is known
23 today as Accenture. In those days, it
24 was known as Arthur Andersen Consulting
25 Division and, thereafter,

1 Andersen Consulting. I stayed with them
2 28 years, 18 of which I was a partner.

3 I had various positions within
4 Accenture. One of them was global
5 managing partner for the capital markets
6 business. I was also the managing
7 partner for the venture capital business
8 that Accenture set up for Middle East,
9 Africa and Europe. And I was on the
10 executive global committee.

11 In around 2005, I left Accenture
12 after a career of about 28 years, I'd
13 say, and I joined an investment bank in
14 the Middle East as a chairman of that
15 investment bank.

16 Subsequently, I became chairman of
17 the supervisory board of the bank, which
18 was formed after I arrived. And the bank
19 also acquired a -- a brokerage house in
20 Egypt, and I became chairman of that
21 brokerage house.

22 ARBITRATOR KESSEDJIAN: Which bank?

23 THE WITNESS: It's called -- it's an
24 investment bank called Rasmala,
25 R-A-S-M-A-L-A.

1 Before joining Rasmala, I was on the
2 Board of four companies that Accenture
3 had invested money in.

4 And then I joined ICANN in 2010 on
5 the Board.

6 And since joining, I became head of
7 the New gTLD Committee that was referred
8 to this morning. I'm also head of the
9 Finance Committee, and I'm a member of
10 the Board Governance Committee, and also
11 member of the Subcommittee of that
12 Governance Committee for Ethics and
13 Conflicts.

14 ARBITRATOR KESSEDJIAN: Of which
15 you're the Chair now?

16 THE WITNESS: There is no official
17 elected Chair; but, by default, it came
18 to me. It's only a group of three
19 people, and I've been elected Chair among
20 that group.

21 PRESIDENT BARIN: As an ad hoc, if
22 you will, Chair to the Subcommittee, if I
23 can put it that way --

24 THE WITNESS: I beg your pardon?

25 PRESIDENT BARIN: -- is that

1 correct?

2 As an ad hoc Chair to the
3 Subcommittee --

4 THE WITNESS: Yes.

5 PRESIDENT BARIN: -- is this what it
6 is?

7 THE WITNESS: Yeah.

8 PRESIDENT BARIN: Okay. How many
9 members are there for the -- Board
10 members are there on the Governance
11 Committee?

12 THE WITNESS: The Board Governance
13 Committee?

14 Six -- six members -- five or
15 four -- I'm not 100 percent sure.

16 Are you talking about the
17 Subcommittee or --

18 PRESIDENT BARIN: No; the Governance
19 Committee, not the Subcommittee. Because
20 the Subcommittee, if I -- if I have it
21 right, there's a Governance Committee
22 and, under the Governance Committee,
23 there's -- there is a Subcommittee on
24 Ethics and Conflicts?

25 THE WITNESS: Correct.

1 PRESIDENT BARIN: Okay.

2 There's three members on the Ethics
3 and Conflicts Subcommittee --

4 THE WITNESS: (No audible response.)

5 PRESIDENT BARIN: -- but there are
6 six members, according to you?

7 THE WITNESS: Correct.

8 PRESIDENT BARIN: Okay. And are you
9 able to give us just a quick description
10 of what the backgrounds of those other
11 six members of the Governance Committee
12 are?

13 THE WITNESS: Well, they are
14 directors of the Board. The head of the
15 Board Governance Committee is the
16 Vice Chair, and the other members are
17 the -- they're diverse from different
18 parts.

19 Mr. -- two of the members that are
20 discussed this morning are a member of
21 the Board Governance Committee.

22 PRESIDENT BARIN: Two of the members
23 that were discussed this morning? By the
24 two members, you're talking about
25 Chris Disspain and Mike Silber?

1 THE WITNESS: Yes.

2 PRESIDENT BARIN: So Chris Disspain
3 and Mike Silber are two other members of
4 the six-member Board Governance
5 Committee?

6 THE WITNESS: Yes, indeed.

7 PRESIDENT BARIN: Okay. And are you
8 able to tell me -- or tell us a little
9 bit more about their backgrounds? I
10 mean, are they businesspeople like you
11 or -- in terms of experience and
12 background.

13 And -- and if you don't know, that's
14 fine.

15 THE WITNESS: No. I can -- I can
16 only say what I know, that most of them
17 are a member of a community called the
18 ccTLD community.

19 Mr. Disspain is the CEO of an
20 organization in Australia, which is
21 called auDA, AU Domain Registry [sic].
22 And Mr. Silber is a director of an
23 organization in -- in South Africa called
24 ZADNA, which is .za Domain Name
25 Authority.

1 That's all I can say.

2 PRESIDENT BARIN: And are you able
3 to give us an idea of how many times the
4 Committee meets?

5 THE WITNESS: Which committee?

6 PRESIDENT BARIN: The Governance
7 Committee.

8 And so, for your purposes, if I say
9 "Subcommittee," I'm talking about the
10 Ethics Subcommittee. If I talk about the
11 "Committee," it's with respect to the
12 Governance Committee.

13 THE WITNESS: Well, we have -- we
14 have -- ICANN has three public Board
15 meetings a year. During those public
16 Board meetings, all committees meet. So,
17 at minimum, the Board Governance
18 Committee meet three times.

19 But in addition to that, outside the
20 Committee, we have a Board workshop. And
21 we have, I think, about four of those a
22 year. And also, at each one of those,
23 every committee meets again. So the BGC
24 meets again.

25 Outside of that, Board Governance

1 Committee meets whenever there's a
2 requirement to look at reconsideration
3 requests or any other matters that it's
4 required to look into.

5 So it's active and it does what it
6 has to do when it needs to do it.

7 PRESIDENT BARIN: And does
8 the -- the Board Committee also
9 keep minutes or records of its meetings
10 and take minutes?

11 THE WITNESS: Indeed, it does.

12 PRESIDENT BARIN: Yes.

13 Okay. And are they taken by someone
14 that sort of consistently takes those
15 notes and keeps them?

16 THE WITNESS: Yes. I believe
17 there's a scribe, and there are notes
18 being taken and minutes published.

19 PRESIDENT BARIN: Let me just, if
20 you will, take you to a document that I
21 would like you to take a look at, and
22 that would be the conflicts of interest
23 policy --

24 MR. LEVEE: If you can give us the
25 exhibit number, I can put it on

1 everybody's monitor.

2 PRESIDENT BARIN: It's Exhibit C-52,
3 if I'm correct.

4 HONORABLE JUDGE CAHILL: It's
5 coming.

6 MR. LEVEE: You have to let us know
7 which page you want.

8 PRESIDENT BARIN: I see. That's
9 fine.

10 MR. LEVEE: Can you see it,
11 Mr. Chalaby?

12 HONORABLE JUDGE CAHILL: It's too
13 small to read?

14 THE WITNESS: I can see it, but I
15 can barely read it.

16 PRESIDENT BARIN: Do you want us to
17 give you a printed copy?

18 HONORABLE JUDGE CAHILL: They can
19 blow up the copy.

20 THE WITNESS: It's okay. I can see
21 it.

22 PRESIDENT BARIN: Well, I may have
23 to go back and forth, so --

24 THE WITNESS: I can see what's
25 there, and then we'll see if --

1 ARBITRATOR KESSEDJIAN: That's the
2 policy -- if I'm not mistaken, that's the
3 policy of 6 May 2012 that is quoted in
4 your declaration?

5 THE WITNESS: It is.

6 MR. LEVEE: It is.

7 PRESIDENT BARIN: It's, in fact,
8 quoted in Paragraph 3.

9 THE WITNESS: Correct.

10 PRESIDENT BARIN: And then just by
11 way of background, were you -- were you
12 involved in any way in the drafting or
13 the preparation of this policy?

14 THE WITNESS: No. No, I was not.

15 PRESIDENT BARIN: It was prepared
16 before you --

17 THE WITNESS: It was prepared and --
18 yes, I was not involved in the drafting
19 of this.

20 PRESIDENT BARIN: Okay. Is this a
21 policy that you would say that you're
22 very familiar with in terms of how it's
23 applied and used in the, I would say,
24 Governance and particularly the
25 Subcommittee on Ethics and Conflicts

1 meetings?

2 THE WITNESS: I would say so.

3 PRESIDENT BARIN: Okay. And do you
4 regularly use this policy in terms of the
5 work that either the Committee or the
6 Subcommittee does?

7 THE WITNESS: Yeah, definitely was
8 the Subcommittee, and all -- all
9 directors have to, every year, confirm
10 that they've read it and understood it
11 and apply it.

12 PRESIDENT BARIN: And I assume, like
13 most boards, they -- all directors read
14 it and sign a document that's then filed
15 with the Board that says they --

16 THE WITNESS: Yes, it's part of the
17 annual statement they read.

18 PRESIDENT BARIN: Okay. Was this
19 policy looked at, Mr. Chalaby, when I
20 would say the issues in relation to
21 Chris Disspain and Mike Silber were being
22 considered by, I would say, first, the
23 Committee and then the Subcommittee?

24 THE WITNESS: We applied this
25 policy. I don't know if we had the

1 document open in front of us and read
2 page by page. I don't remember that.
3 But we certainly applied the policy.

4 PRESIDENT BARIN: And I guess -- by
5 my question, I don't mean to say that you
6 sort of applied it on -- on a -- on a
7 verbatim basis, but was it -- was it
8 something that the -- I would say, first,
9 the Board, as well as the Subcommittee
10 members looked at in order to arrive at
11 the decisions that they did?

12 THE WITNESS: Absolutely.

13 PRESIDENT BARIN: During that
14 meeting, I guess, there was -- can you --
15 can you explain how the -- the process
16 worked in that -- I assume the question
17 must have gone to the Board first and
18 then -- in terms of --

19 THE WITNESS: Which particular
20 meeting are you referring to, please?

21 PRESIDENT BARIN: To the meeting
22 where you are looking as a Subcommittee,
23 if you will --

24 THE WITNESS: Yes.

25 PRESIDENT BARIN: -- as to what is

1 to happen to Chris Disspain and
2 Mike Silber with respect to their
3 conflict of interest question.

4 THE WITNESS: Yes.

5 So what typically happens is the
6 Board Governance Committee requests the
7 Subcommittee to investigate the matter --

8 PRESIDENT BARIN: Right.

9 THE WITNESS: -- right?

10 So the Board Governance Committee
11 requests us. So we met, the three
12 members, of which Disspain or Silber are
13 not members of the Subcommittee --

14 PRESIDENT BARIN: All right.

15 THE WITNESS: -- okay?

16 At that time when we met, the first
17 thing we do, we -- we look at all the
18 information available to us, and we call
19 people who are -- have an issue. We
20 explain to them the process.

21 The first thing we explain is the
22 definition of "conflict," all right? And
23 we say that conflict is not just actual;
24 it's also potential and perceived, and
25 it's very important.

1 And we -- we apply this very much in
2 everything we do in the discussion. Then
3 we -- we discuss among ourself, we
4 interview people, and then we make a
5 decision at the end, a finding.

6 We then pass the findings to the
7 BGC, and the BGC sends it to the Board
8 for edification and . . .

9 PRESIDENT BARIN: In this particular
10 case, though, I believe it -- it must
11 have started with, I would say, the
12 Committee first, because that's where the
13 issue is laid before --

14 THE WITNESS: Um-hum.

15 PRESIDENT BARIN: -- of which
16 Mr. Disspain and Mr. Silber are members,
17 correct?

18 THE WITNESS: Correct.

19 PRESIDENT BARIN: The issue of the
20 conflict of interest would first be put
21 to the Board --

22 THE WITNESS: Right.

23 PRESIDENT BARIN: -- to the
24 Committee -- to the Governance Committee?

25 THE WITNESS: Correct.

1 PRESIDENT BARIN: Then from the
2 Governance Committee, it would then go to
3 the Subcommittee?

4 THE WITNESS: Correct.

5 PRESIDENT BARIN: Okay.

6 And in -- in terms of the -- the
7 process that was followed with the
8 Governance Committee, of which
9 Mr. Disspain and Mr. Silber are members,
10 they were not part of the -- the
11 decision-making or discussions --

12 THE WITNESS: No, they were not.

13 PRESIDENT BARIN: -- that were
14 following, I guess, their questions of
15 the conflict, correct?

16 THE WITNESS: Correct, no, they were
17 not.

18 PRESIDENT BARIN: And, subsequently,
19 when the issue was decided or considered
20 by the Subcommittee, what information was
21 before you when you made your decision as
22 a Subcommittee?

23 THE WITNESS: I don't recall
24 everything that was put forward to us,
25 but we start with the -- in that

1 particular instance, we started with, of
2 course, the declaration of the two
3 directors.

4 But what triggered that meeting is
5 an event took place in Durban, when ICANN
6 met, where, at the opening speech, a
7 member on the outside had thanked a
8 couple of Board members, and then another
9 Board member came after that, concerned
10 about hearing that a couple of members
11 were thanked, and informed me and
12 informed counsel.

13 As a result of that, we -- we said
14 we will look into this again. So the
15 Committee met again to look into this.
16 The Committee advised the Board
17 Governance Committee, and the Board
18 Governance Committee advised the
19 Subcommittee to do the investigation.

20 PRESIDENT BARIN: Let me get this
21 right, because there are two references
22 in your statement --

23 THE WITNESS: Yeah.

24 PRESIDENT BARIN: -- to an issue of
25 conflict being raised against Mr. --

1 Mr. Disspain and Silber. One is in
2 Paragraphs -- one is in Paragraphs 4 and
3 5, if you will, particularly 5, where, in
4 October 2012, DCA notifies ICANN's
5 ombudsman that DCA believes that two of
6 the members had a conflict of interest.

7 Then there's a second incident, if
8 I'm correct, or a second time this was
9 raised in Paragraph 7, Some weeks after
10 June 4th, 2013, the issue comes up.

11 THE WITNESS: Yes.

12 PRESIDENT BARIN: Okay. And when
13 you were talking earlier --

14 THE WITNESS: I was talking about
15 the second one.

16 PRESIDENT BARIN: -- you were
17 talking about the second one?

18 THE WITNESS: Indeed.

19 PRESIDENT BARIN: I'd like to take
20 you back to the first one, if you would.

21 THE WITNESS: Yeah.

22 PRESIDENT BARIN: So when the issue
23 was raised in -- in December, in October
24 of 2012, do you recall how it came to
25 you?

1 THE WITNESS: In relation to the
2 ombudsman statement in Paragraph 5, is
3 that what you mean?

4 PRESIDENT BARIN: Yes.

5 THE WITNESS: Okay.

6 It didn't come to us at all. So
7 what typically happened before the
8 composition of the New gTLD, the
9 Subcommittee was formed. And we looked
10 at all of the statements made by
11 individual Board members to see who was
12 going to be in the Committee, who's not
13 going to be in the Committee. And we
14 applied those three objective criteria,
15 actual, potential, and perceived, to all
16 the Board members -- the voting Board
17 members.

18 And out of the 16, we decided that
19 five were conflicted in relation to the
20 New gTLD, all right, and those that were
21 not conflicted became part of the New
22 gTLD.

23 Out of the five that were excluded
24 from the New gTLD was the Chairman of the
25 Board and the Vice Chairman of the Board,

1 because we took that definition very
2 strictly and wanted to make sure that the
3 New gTLD had members that were not
4 conflicted at all.

5 After that, usually, we -- we --
6 only when issues come up to the New gTLD
7 Committee that we discuss it. The issue
8 about .africa and the issue had not come
9 to the New gTLD Committee at all or not
10 even discussed when the letters and the
11 ombudsman produced his report.

12 And, in fact, in his report, he
13 said, as quoted here, I consider no
14 disqualifying conflict.

15 And, in fact, it was sort of
16 premature, because no issue came to the
17 New gTLD Committee to discuss in relation
18 to these two gentlemen.

19 PRESIDENT BARIN: All right.

20 So if -- if I understand the
21 summary, what you're saying is that in
22 the first instance, the -- the Committee
23 didn't really have to deal with that
24 issue?

25 THE WITNESS: The New gTLD

1 Committee.

2 PRESIDENT BARIN: The New gTLD
3 Committee?

4 THE WITNESS: Yes.

5 PRESIDENT BARIN: Okay. But once
6 the -- once the report of the ombudsman
7 was issued -- and that's the report that
8 you'll find in C-29?

9 THE WITNESS: Right.

10 PRESIDENT BARIN: I don't know if
11 you want to put up a copy.

12 MR. LEVEE: Do you want that up?

13 PRESIDENT BARIN: Yes.

14 MR. LEVEE: Of course.

15 PRESIDENT BARIN: I think he's going
16 to have a tough time reading that.

17 HONORABLE JUDGE CAHILL: Can you
18 highlight or expand?

19 MR. LEVEE: Can you just tell us
20 what to highlight?

21 HONORABLE JUDGE CAHILL: Just the
22 first half there -- I don't know. I'm
23 not asking the questions. Excuse me.

24 PRESIDENT BARIN: Well, I guess I'll
25 start with some general questions.

1 THE WITNESS: Okay.

2 PRESIDENT BARIN: You've obviously
3 seen this report?

4 THE WITNESS: I had to refamiliarize
5 myself with it as part of this
6 proceedings, but I don't remember at the
7 time when and where I have seen it.

8 PRESIDENT BARIN: So was this never
9 really looked at, if you will, by the
10 Committee or the Subcommittee subsequent
11 to it being issued?

12 THE WITNESS: No --

13 PRESIDENT BARIN: Okay.

14 THE WITNESS: -- not that I
15 remember, to be honest.

16 PRESIDENT BARIN: Okay. And is
17 there a reason why that, perhaps, either
18 the Committee or the Subcommittee may not
19 be, as being ethics or, if you will,
20 conflicts committees, interested in the
21 report of the ombudsman?

22 THE WITNESS: There is no action to
23 be taken as a result of this.

24 PRESIDENT BARIN: Right.

25 If you look at the report -- and I

1 appreciate that you've looked at it
2 subsequently -- you will see that it
3 talks about, as you've said yourself, a
4 situation of actual -- an actual conflict
5 of interest existing, which the ombudsman
6 comes to the conclusion that there
7 wasn't, according to him at the time.

8 What is not clear from the report,
9 if you will, is whether or not the
10 ombudsman looked at that second part of
11 what you were saying that the Board
12 Subcommittee deals with, which is not
13 only just the conflict of interest or the
14 appearance of a conflict of interest.

15 Was that an issue for you, perhaps,
16 that required --

17 THE WITNESS: Well, we had
18 previously, if I -- as I mentioned,
19 earlier in the year, we had looked at all
20 of the statements made by the Board
21 members, including Mr. Silber and
22 Mr. Disspain, and concluded there wasn't
23 actual, potential, or perceived conflicts
24 of interest.

25 And until that time, from earlier in

1 the year, I think it was in 2000, until
2 that time, that matter had not come to
3 the New gTLD for any discussion. There
4 was no reason to look into it.

5 PRESIDENT BARIN: Okay.

6 What about subsequently, then, in --
7 in what you refer to in your statement as
8 June 4, 2013, because this is the second
9 time now that the issue is coming up?
10 Did you do anything different when the
11 issue came up the second time?

12 THE WITNESS: Before the second
13 time, remember that the -- both -- all
14 members have resubmitted again an annual
15 statement. And both Mr. Disspain and
16 Mr. Silber had disclosed all of their
17 professional relationships, and there was
18 no -- no change in their status --

19 PRESIDENT BARIN: Right.

20 THE WITNESS: -- and, therefore, not
21 conflicted.

22 PRESIDENT BARIN: I appreciate that
23 Board members would always file, if you
24 will, with all Board members on an annual
25 basis the statement that says, At the

1 time we're signing it, there's no issue.

2 But if and when something does come
3 up and -- a new issue does come up, would
4 the Board then not take it upon itself to
5 examine and perhaps go further into the
6 issue?

7 THE WITNESS: But it did. So when
8 it came up, and this is why when -- when
9 the NGBC [sic] then afterwards had
10 requested from the BGC to look into the
11 matter again, just to be extra cautious.

12 PRESIDENT BARIN: Okay. And what --
13 what exactly -- and this will take me to
14 Paragraph 7 of your statement -- what
15 exactly did the Subcommittee do?

16 At the end of your statement on
17 Paragraph 7, you say, After investigating
18 the matters, the Subcommittee concluded
19 that Chris Disspain and Mike Silber did
20 not have conflict of interest with
21 respect to DCA's application for .africa.

22 THE WITNESS: Um-hum.

23 PRESIDENT BARIN: I take it from
24 your statement that you're referring to
25 both actual as well as an appearance of

1 conflict of interest?

2 THE WITNESS: Actual, potential and
3 perception.

4 PRESIDENT BARIN: Okay. And so what
5 did the Committee -- what did the
6 Subcommittee exactly do to arrive at its
7 conclusion?

8 THE WITNESS: Well, the Subcommittee
9 went back and reviewed facts, what's
10 available in front of them in terms of
11 information.

12 PRESIDENT BARIN: Can you give us an
13 idea what those would be, what was
14 available in front of you?

15 THE WITNESS: Well, for example, the
16 relationship disclosed, the -- I suppose,
17 if I remember, the allegations made
18 against them. And we looked at the
19 relationship between both of them and
20 the .africa application, and we found no
21 reason to -- to conclude that there is,
22 you know, any real or potential or
23 perceived conflict.

24 In the case of Mr. Disspain, as
25 mentioned in my statement, any -- any

1 relationship that happened between one of
2 the affiliates of auDA -- and which I
3 think is called AusRegistry -- and
4 UniForum SA happened so far in the past,
5 even before the applications were made,
6 that the situation was so attenuated, in
7 terms of the nature, in terms of
8 contents, in terms of financial interests
9 or anything, that there was no way we --
10 we -- we could find that Mr. Disspain,
11 for example, had any potential or -- or
12 actual or perceived conflict.

13 In the case of Mr. Silber, we looked
14 at the relationship he had on -- as
15 member -- nonexecutive member of the
16 Board of ZADNA, who has an arm's-length
17 relationship with this organization
18 called UniForum SA. They -- they provide
19 services -- that kind of services for
20 other -- other organization; ZADNA
21 happened to be one of them. And the fact
22 that they apply for .africa doesn't
23 benefit in any way or form or shape,
24 financially or any way, Mr. Silber.

25 And, therefore, we concluded that

1 during those times when you were with
2 bank, when you were with the former
3 entity not called Accenture at the time?

4 Did you have any experience during
5 those past jobs with conflict of
6 interests?

7 THE WITNESS: On the Board that I
8 served on, there was always, you know,
9 conflicts issue and conflicts interest.
10 And we all had to conform to make sure
11 that we were -- that we applied conflict
12 of interest policies, sure.

13 ARBITRATOR KESSEDJIAN: So you have
14 been participating in analysis of
15 conflict of interest and investigations,
16 perhaps, and decisions over potential
17 conflict of interest, or was, in other
18 words, your work at ICANN kind of new to
19 you?

20 THE WITNESS: I would not say it's
21 new, but I cannot recall individual
22 instances to answer your question very
23 specifically. I'm sorry. It's so far
24 back.

25 ARBITRATOR KESSEDJIAN: Okay.

1 In your statement -- and I come back
2 to one of the questions that the Chair
3 asked you. When I read Paragraph 7 and
4 when I read the word "investigating," to
5 me -- of course, I'm not an English
6 speaker -- but, to me, "investigation" is
7 quite a strong word.

8 So it means, to me, a proactive
9 activity. So you go out and you find for
10 yourself.

11 So if I am correct, you answered the
12 Chair that you didn't ask either
13 Mr. Disspain nor Mr. Silber to appear
14 before the Committee?

15 THE WITNESS: I don't recall.

16 ARBITRATOR KESSEDJIAN: You don't
17 recall?

18 THE WITNESS: I don't recall.

19 ARBITRATOR KESSEDJIAN: Well, if you
20 had called them in, you would recall, no?

21 THE WITNESS: I don't recall.

22 ARBITRATOR KESSEDJIAN: When was
23 that? When was the investigation taking
24 place?

25 THE WITNESS: In 2012.

1 ARBITRATOR KESSEDJIAN: Okay. Three
2 years ago. That far away.

3 Do you do a lot of conflicts in the
4 Subcommittee?

5 THE WITNESS: Whenever -- I mean,
6 what typically happens if -- if a
7 director of the Board feels that they
8 have a conflict of interest or disclosed
9 something, they -- the process is they
10 disclose it to general counsel, general
11 counsel then informs the Board Governance
12 Committee, and the Board Governance
13 Committee asks us to investigate.

14 So that's -- that's the process.

15 ARBITRATOR KESSEDJIAN: Okay. So,
16 in other words, the only way in which the
17 Subcommittee would start an investigation
18 would be if the person who is supposed to
19 have a conflict says it is a potential
20 conflict? So if somebody does not
21 disclose anything, then nobody does
22 anything?

23 THE WITNESS: Well, in that case, we
24 did, because somebody other than the two
25 has raised the issue, another Board

1 member. So we took it very seriously and
2 reinvestigated the issue.

3 ARBITRATOR KESSEDJIAN: Um-hum.

4 THE WITNESS: So if any of the Board
5 members do not declare, then there's no
6 reason to go and investigate. But if
7 there's somebody from -- from the Board,
8 in that case, or there's any issue that
9 was brought to us, we would investigate.
10 And in that case, we have.

11 ARBITRATOR KESSEDJIAN: But what did
12 you do exactly?

13 I'm not entirely satisfied with the
14 way you described your, quote/unquote,
15 investigation. Again, investigating
16 something means really having proactive
17 activity, which I didn't hear from you
18 very clearly.

19 THE WITNESS: What we -- what we
20 normally do is we -- I explained the
21 process, and I said --

22 ARBITRATOR KESSEDJIAN: But I would
23 prefer -- I would really prefer you to be
24 specific on this particular case, because
25 the general rules we understand. There's

1 the policy, there's the Subcommittee
2 saying something. Let's be precise on
3 this particular case.

4 THE WITNESS: Normally, we would
5 have interviewed them. I can't remember.
6 That's all. I mean, I'm just really --
7 really not trying to not answer the
8 question.

9 ARBITRATOR KESSEDJIAN: Okay. And
10 you didn't ask Ms. Bekele to come in and
11 discuss with you?

12 THE WITNESS: No; but we did ask the
13 Board member who was concerned, who
14 expressed concern to come, and we
15 interviewed him. That I remember very
16 well.

17 ARBITRATOR KESSEDJIAN: Who was
18 that?

19 THE WITNESS: One of our Board
20 members. I mentioned earlier that when
21 we were in Durban, in the opening speech,
22 a member of .za thanked a couple of
23 members of the Board for their help.

24 ARBITRATOR KESSEDJIAN: Was it
25 Disspain and Silber in those thanks?

1 THE WITNESS: No; it was Disspain
2 and another Board member who has nothing
3 to do with the issue with .africa.

4 ARBITRATOR KESSEDJIAN: So Disspain
5 was thanked by --

6 THE WITNESS: Indeed, yes --

7 ARBITRATOR KESSEDJIAN: Okay.

8 THE WITNESS: -- he was thanked.

9 All right?

10 So that Board member said he
11 remembered the ombudsman report and not
12 finding conflicted.

13 ARBITRATOR KESSEDJIAN: And Durban
14 was when?

15 THE WITNESS: Durban was July 15th,
16 2013.

17 ARBITRATOR KESSEDJIAN: Okay.

18 So that's after what you did -- now,
19 I'm lost in the dates. Because here, in
20 your declaration, we only have two dates.
21 It's October 2012 and 4 June 2013.

22 So Durban is after all of that, but
23 you don't have any declaration about
24 that.

25 MR. LEVEE: I'm sorry. It's the

1 next --

2 THE WITNESS: Sorry.

3 Yes, Durban happened after June the
4 4th.

5 ARBITRATOR KESSEDJIAN: Okay.

6 PRESIDENT BARIN: I guess, in your
7 statement, Mr. Chalaby, it's Paragraph 7,
8 was that when you say, Some weeks after
9 June 4th? Is that -- is that the
10 reference?

11 THE WITNESS: Yes. Some weeks after
12 June 4th, NGPC vote accepting GAC
13 advice the claim of Mike Silber and
14 Chris Disspain potential conflict of
15 interest was raised. So this is --

16 PRESIDENT BARIN: That's the second
17 incident that you were talking about?

18 THE WITNESS: Yes.

19 -- so that was raised in -- in
20 Durban by a member of the Board who was
21 concerned that he heard in the opening
22 speech -- that he originally thought that
23 in the opening speech -- that person had
24 thanked both Mike Silber and
25 Chris Disspain and --

1 ARBITRATOR KESSEDJIAN: Now, the two
2 of them were mentioned?

3 THE WITNESS: But he was wrong,
4 because we went to the script, and he
5 accepted afterwards that Mike Silber was
6 not mentioned. So he wasn't -- indeed,
7 it was -- the transcript of the speech
8 showed that he didn't mention
9 Mike Silber, okay?

10 ARBITRATOR KESSEDJIAN: Okay.

11 THE WITNESS: So -- so what happened
12 then is, because of that, we decided,
13 okay, to do two things: one is to ask
14 members of the NGPC to reconfirm and
15 reaffirm that when they voted on the 4th
16 of June, they had -- they were not
17 conflicted. Everybody said -- said this,
18 including Mr. Silber and including
19 Mr. Disspain.

20 And in addition to that, we were not
21 satisfied with the NGPC. We asked our
22 Governance Committee to go back and
23 investigate again and look into the facts
24 again.

25 The Board Governance Committee

1 investigated and asked the question, Were
2 they there in the meeting? I do not
3 remember, but I do remember that we did
4 ask the Board member who was concerned to
5 come in, and we discussed with him and
6 interviewed him and asked him about, you
7 know, what is his concern.

8 And then we continued our
9 investigation based on facts available to
10 us, and we concluded that there was no
11 new evidence and no new facts for both
12 Mr. Silber and Mr. Disspain to be either
13 conflicted or potential or perceived.

14 ARBITRATOR KESSEDJIAN: Okay. So
15 you can't be more precise than what you
16 are now, I guess.

17 Okay. So Mr. Silber, what was his
18 exact position at the time?

19 And you answered one question by the
20 Chair by saying that they did exactly the
21 same declarations again, so nothing was
22 changed.

23 But in between the declarations, the
24 .africa controversy, if I may take that
25 word, was blowing up. So, in fact, there

1 were some factual changes between the
2 different iterations of the Board
3 members.

4 So perhaps they didn't declare any
5 different facts on their personal life,
6 but the .africa -- I'll repeat --
7 controversy was actually very different
8 from one declaration to the other.

9 Could that have triggered a
10 different analysis for their own
11 position?

12 THE WITNESS: Well, let's look back
13 on the timing, so make sure we're talking
14 about exactly the same time.

15 ARBITRATOR KESSEDJIAN: Yeah.

16 THE WITNESS: So the March 12th,
17 2012, this is when the first summary of
18 the statement of interest of the Board
19 was put on the ICANN Web site. And this
20 is where we've seen the -- anything that
21 was disclosed by Mr. Disspain and
22 Mr. Silber, right?

23 After that -- when was it? I'm
24 looking at some time frames here.

25 In July of that year, right, the

1 letters from Sophia Bekele came, as well
2 as in October. At that time, the NGPC
3 had not looked at or had not been
4 contemplating any discussion on .africa.

5 The ombudsman took the matter, and
6 the ombudsman concluded there was no
7 conflict.

8 After the ombudsman concluded that,
9 there was a second summary of statement,
10 which had more details in it than the
11 previous one. And that summary was there
12 and, frankly, all the details were there,
13 but none of them showed any difference.
14 It's just a bit more detail on the
15 existing one just to -- there was nothing
16 more than just more detailed explanation
17 of their position and relationship.

18 ARBITRATOR KESSEDJIAN: Okay. That
19 I think I understood, and you said it
20 already --

21 THE WITNESS: Okay.

22 ARBITRATOR KESSEDJIAN: -- and I'm
23 fine with that --

24 THE WITNESS: Yeah.

25 ARBITRATOR KESSEDJIAN: -- what I'm

1 saying is that when you analyze a
2 conflict of interest, you don't analyze
3 the conflict of interest only with what
4 is declared by the person who is supposed
5 to be in conflict or who is -- for whom
6 we are asking whether there is conflict;
7 you analyze this on the background of
8 facts.

9 And the facts of the situation with
10 .africa -- because -- am I correct to
11 think that the only reason why there was
12 a question whether some conflict of
13 interest existed is because there was --
14 there may have been a link with the
15 .africa discussion?

16 That's the only reason; is that
17 correct?

18 THE WITNESS: Possibly, yeah --

19 ARBITRATOR KESSEDJIAN: Yeah.

20 THE WITNESS: -- you talk about
21 facts. What I'm not -- what has not been
22 performed --

23 ARBITRATOR KESSEDJIAN: The
24 circumstances --

25 THE WITNESS: -- but there are no

1 facts. There are no new facts or
2 additional facts.

3 So I'd like to know what facts has
4 been brought to the table that both
5 Silber and Disspain had not disclosed.

6 What are these facts?

7 ARBITRATOR KESSEDJIAN: What I'm
8 saying to you is that the conflict of
9 interest must be analyzed on the
10 background -- I don't know how to say
11 that. Should I speak French? -- it's on
12 the background of the situation at the
13 certain moment.

14 So you -- you have exactly the
15 same -- you know, I'm
16 Catherine Kessedjian. I'm a professor at
17 the University, plus an arbitrator, plus,
18 plus, plus. This never changes. This is
19 always the facts concerning me.

20 But my conflict of interest on Day 1
21 may be completely different with
22 Day 10, because between Day 1 and Day 10,
23 there is a string of events that have
24 occurred. And, therefore, exactly the
25 same circumstances which are mine, and in

1 that particular case, it's Disspain and
2 Silber, looked at through the lens of the
3 change of circumstances may indeed
4 trigger a different analysis.

5 Am I more clear?

6 THE WITNESS: You are clear.

7 But in that instance, it did not --
8 it did not trigger a -- different facts.
9 But I understand your point.

10 And as a result, because of the
11 circumstances, when we had an NGPC
12 meeting after the 4th of June, we brought
13 the issue to the NGPC and went through
14 and explained the circumstances, and
15 asked each Board member to talk again
16 about their position and whether they are
17 conflicted and whether they feel, given
18 the circumstances that you have
19 mentioned, they are conflicted. But they
20 were not.

21 HONORABLE JUDGE CAHILL: Can I
22 interrupt a little bit here?

23 ARBITRATOR KESSEDJIAN: Yes, please.

24 HONORABLE JUDGE CAHILL: Excuse me,
25 please.

1 There is a new fact. The ombudsman
2 says it is clearly apparent from the
3 records examined that the two Board
4 members have not participated in any
5 decision-making about .africa. Indeed,
6 there's been little discussion; in my
7 view, it's premature, et cetera.

8 Well, the new fact is, now, these
9 two Board members are participating in
10 .africa discussions, decisions, right?

11 THE WITNESS: Correct.

12 HONORABLE JUDGE CAHILL: So I'm
13 wondering why we didn't go back to the
14 ombudsman.

15 But there is something -- there is
16 something new that may change the
17 analysis, isn't there?

18 THE WITNESS: If they had --

19 HONORABLE JUDGE CAHILL: If the
20 ombudsman -- now, they're participating
21 in the decision.

22 THE WITNESS: They are
23 participating. But as far as the -- the
24 Subcommittee had determined before -- and
25 I'll go back to the point that they

1 didn't have any potential or perceived
2 conflict. The fact that --

3 HONORABLE JUDGE CAHILL: The
4 Subcommittee or the ombudsman?

5 THE WITNESS: The Board Governance
6 Committee --

7 HONORABLE JUDGE CAHILL: Okay.

8 THE WITNESS: -- had determined
9 before that they had no conflict.

10 So -- and especially in their second
11 set of statement after all the letters
12 that came from Sophia, and the ombudsman
13 looked at that.

14 So what happened is when the time of
15 the discussion came for the NGPC, we
16 looked at the GAC advice; we looked at
17 the response that DCA has made; we looked
18 at the module. And I agree with you, we
19 did not -- in the 4th of June meeting, we
20 did not discuss or ask anybody to confirm
21 whether they're conflicted or not.

22 But subsequent to that, in another
23 meeting just a few weeks later, we had a
24 meeting, the NGPC, and the issue was
25 raised. And we said, The circumstances

1 are that there is the following
2 happening. Could you please go back and
3 reexamine the situation and please
4 confirm whether you are conflicted or
5 not?

6 So everybody confirmed they were not
7 conflicted, particularly the two
8 gentlemen. This was not sufficient.

9 We then -- the NGPC asked the Board
10 Governance Committee and, through it, the
11 Subcommittee on Ethics to look into the
12 situation one more time. They looked at
13 the situation one more time, and there
14 was nothing -- there were no new facts
15 other than they were --

16 HONORABLE JUDGE CAHILL: Now,
17 they're doing something.

18 THE WITNESS: -- no new facts in
19 terms of their conflict. There was a
20 fact that they were there when there was
21 a vote, but given that they're not
22 conflicted --

23 HONORABLE JUDGE CAHILL: Okay. I
24 understand.

25 Excuse me.

1 ARBITRATOR KESSEDJIAN: No, no.

2 Thank you, Bill. That's very useful.

3 Am I correct that the Governance
4 Committee has records and minutes and
5 everything is published, I guess, on the
6 Internet, on ICANN Internet? Is that
7 your answer to the Chair's question
8 earlier?

9 THE WITNESS: I believe the minutes
10 of the --

11 ARBITRATOR KESSEDJIAN: The
12 Governance Committee?

13 THE WITNESS: Yeah, yeah.

14 ARBITRATOR KESSEDJIAN: Now, I'm
15 asking you for the Subcommittee on
16 Ethics.

17 Are there records, minutes? Are
18 they public?

19 THE WITNESS: There are records, but
20 I don't believe they are public.

21 ARBITRATOR KESSEDJIAN: So ICANN
22 says in its policy of 2012 -- and I'm
23 just quoting from memory, because I've
24 read that several times -- that it is its
25 objective to actually obey by the highest

1 standards of ethics.

2 But the work of the Subcommittee on
3 Ethics, which is basically the only
4 committee dealing with those issues, are
5 not public; is that correct?

6 THE WITNESS: Well, I need to -- I
7 mean, all the discussion --

8 ARBITRATOR KESSEDJIAN: In your --

9 THE WITNESS: -- no, no -- the
10 reason is all the discussion happens
11 under client-attorney privilege with
12 lawyers. So I don't know if I can answer
13 that question in a satisfactory way for
14 you.

15 I need to ask --

16 ARBITRATOR KESSEDJIAN: Who's client
17 attorney --

18 THE WITNESS: We had general counsel
19 in the meeting as the discussions are
20 held --

21 ARBITRATOR KESSEDJIAN: You mean of
22 the Subcommittee?

23 THE WITNESS: Of the Subcommittee,
24 yeah.

25 PRESIDENT BARIN: I guess --

1 MR. LEVEE: If I could just
2 explain -- I'm not going to answer
3 anything for the witness -- I had told
4 the witness when an issue came up
5 relating to privilege that he should
6 identify it.

7 As he just testified, the general
8 counsel is in these meetings, and that's
9 the reason that the meeting minutes are
10 privileged. So I can't just publish them
11 because they would otherwise be waiving
12 --

13 ARBITRATOR KESSEDJIAN: Let's go
14 back to you, Mr. Chalaby, please.

15 You said there are three members in
16 the Subcommittee on Ethics. So it's
17 you -- who are the two others?

18 THE WITNESS: They're not
19 Chris Disspain or Mike Silber.

20 ARBITRATOR KESSEDJIAN: I love
21 you're aware of certain questions.

22 THE WITNESS: Would you like me --

23 ARBITRATOR KESSEDJIAN: Could you be
24 positive? Tell us the names.

25 Who are the other members, or at

1 that time?

2 THE WITNESS: Ray Plzak and
3 Bill Graham.

4 ARBITRATOR KESSEDJIAN: And they
5 were the same two at the time that we are
6 discussing here, 2012 to 2013?

7 THE WITNESS: I believe so.

8 ARBITRATOR KESSEDJIAN: Okay. Now,
9 we just learned from the counsel of ICANN
10 that the general counsel of ICANN attend
11 your meetings.

12 What's his function there?

13 PRESIDENT BARIN: I guess the
14 question is he attends -- the general
15 counsel attends both the Governance
16 Committee meetings, correct --

17 THE WITNESS: I'm talking about the
18 Ethics Committee meeting.

19 PRESIDENT BARIN: -- as well as the
20 Subcommittee --

21 ARBITRATOR KESSEDJIAN: That was my
22 question, the Subcommittee.

23 THE WITNESS: Yes.

24 ARBITRATOR KESSEDJIAN: But what was
25 his function? Why does he attend?

1 THE WITNESS: Well, he brings the
2 facts to us. So . . .

3 ARBITRATOR KESSEDJIAN: I don't
4 understand.

5 THE WITNESS: So when there is an
6 issue of conflict, right --

7 ARBITRATOR KESSEDJIAN: So you're
8 not doing anything yourself. All the
9 members of the Subcommittee are just
10 expecting other people to bring things to
11 you. You're not proactive?

12 THE WITNESS: No. They put the data
13 in front of us, and then we are proactive
14 in terms of discussing, analyzing,
15 investigating -- in many cases, we
16 question people.

17 In that instance, we questioned one
18 of the Board members. We looked at the
19 cross records. We do.

20 PRESIDENT BARIN: I guess the
21 question is in terms of the -- the work
22 that the Subcommittee does, it does this
23 work in the presence of the general
24 counsel, correct?

25 THE WITNESS: Yes.

1 PRESIDENT BARIN: Is it always the
2 general counsel?

3 THE WITNESS: Yes.

4 PRESIDENT BARIN: Okay.

5 ARBITRATOR KESSEDJIAN: A person?

6 THE WITNESS: Yes.

7 PRESIDENT BARIN: So I believe what
8 you also said is that the general counsel
9 comes to you, which is the Subcommittee
10 members, with the facts, correct?

11 THE WITNESS: Right.

12 PRESIDENT BARIN: You look at those
13 facts and you reach your decisions?

14 THE WITNESS: But in addition -- and
15 I was not able to answer that question in
16 that particular instance -- we interview
17 the Board members when there's a conflict
18 issue.

19 PRESIDENT BARIN: But if I
20 understand correctly, you didn't
21 interview either Mr. Disspain or
22 Mr. Silber in this case.

23 That's what you told me?

24 THE WITNESS: I said I cannot
25 recall.

1 ARBITRATOR KESSEDJIAN: Go ahead.

2 PRESIDENT BARIN: Does the general
3 counsel also get involved in the
4 discussions that you have in respect to
5 whether or not there is a conflict?

6 THE WITNESS: No.

7 PRESIDENT BARIN: Does he express
8 any opinions with respect to --

9 THE WITNESS: No. No.

10 PRESIDENT BARIN: And the facts that
11 are put before you, do you verify those
12 facts in any way, other than what is put
13 before you by the general counsel?

14 THE WITNESS: Well, the only way we
15 verify them is by asking further
16 questions of -- of the -- of the
17 directors who are subject to a conflict.

18 PRESIDENT BARIN: Right.

19 I have one other question for you in
20 terms of the policy that you use.
21 Section -- would you show this section to
22 Mr. Chalaby --

23 MR. LEVEE: Back on conflict policy?

24 PRESIDENT BARIN: Yeah, conflict
25 policy, Section 1.3.

1 MR. LEVEE: Okay.

2 MS. ZERNIK: Can you give me the
3 exhibit number --

4 PRESIDENT BARIN: Pardon me?

5 MS. ZERNIK: -- I don't have it.

6 PRESIDENT BARIN: It's C-52 --

7 MS. ZERNIK: Yeah.

8 PRESIDENT BARIN: -- and it's
9 Section 1.3.

10 ARBITRATOR KESSEDJIAN: Could you
11 enlarge it a little bit?

12 MR. LEVEE: Yeah, we'll make it
13 larger.

14 Here you go.

15 PRESIDENT BARIN: Have you seen this
16 provision before, Mr. Chalaby?

17 THE WITNESS: Yes.

18 PRESIDENT BARIN: Has it ever been
19 part of any discussions you've had as
20 part of the -- either the Committee or
21 the Subcommittee?

22 THE WITNESS: I don't remember. I
23 can't answer that question.

24 PRESIDENT BARIN: Do you understand
25 what it says?

1 THE WITNESS: More or less, yes.

2 HONORABLE JUDGE CAHILL: "More or
3 less." Good question -- good answer.

4 PRESIDENT BARIN: I guess what I
5 wanted to just sort of get a sense from
6 you is the section seems to say that the
7 conflict of interest policy is intended
8 to supplement but not to replace -- and
9 now emphasis on "any applicable laws
10 governing conflict of interest applicable
11 to ICANN."

12 Do you know what that would be?

13 THE WITNESS: It means what it says,
14 no?

15 PRESIDENT BARIN: Yes, but --

16 HONORABLE JUDGE CAHILL: That's also
17 true.

18 PRESIDENT BARIN: -- admittedly, we
19 have a problem with it, so . . .

20 THE WITNESS: Go ahead.

21 PRESIDENT BARIN: It's a simple
22 question. If you don't, you don't. I
23 just wanted to know whether you had been
24 told or explained what that means; in
25 other words, the standard against which

1 you are making your decisions?

2 THE WITNESS: Well, the standard
3 which we're making decisions, as I
4 mentioned, is possibly the highest
5 standard, which is actual, potential and
6 perceived conflict.

7 PRESIDENT BARIN: Right.

8 THE WITNESS: I mean, is there a
9 higher standard than that?

10 HONORABLE JUDGE CAHILL: I don't
11 know.

12 PRESIDENT BARIN: I'm not sure I'm
13 going to get into a debate with you as to
14 whether or not that is a standard.

15 But I guess the question is, Is that
16 something that had come up in discussions
17 with the general counsel? And I
18 assume --

19 HONORABLE JUDGE CAHILL: Don't waive
20 the privilege.

21 THE WITNESS: What I do understand
22 is those three definitions of conflict
23 are consistent with local laws. I'm not
24 an expert in local laws, but I understand
25 that that is the case.

1 PRESIDENT BARIN: Okay.

2 ARBITRATOR KESSEDJIAN: Did you say
3 "global law" or "local law"?

4 THE WITNESS: Local law.

5 ARBITRATOR KESSEDJIAN: Local law?

6 THE WITNESS: Yeah.

7 PRESIDENT BARIN: As part of the
8 discussions you had as Subcommittee
9 members, was there ever an issue or an
10 item that came up that you required, I
11 guess, advice from the general counsel?

12 THE WITNESS: As part of the
13 discussion in the meeting, general
14 counsel is silent, does not interfere
15 with the discussion.

16 PRESIDENT BARIN: No. I guess my
17 question was: Assume for a moment you're
18 having a meeting and some facts are
19 presented to you. You look at those
20 facts, and then a question comes up that
21 you, as Subcommittee members, do not know
22 the answer or do not know how to
23 approach. Perhaps it's a legal question.
24 Perhaps it has legal issues involved in
25 it.

1 Would you then ask the general
2 counsel to -- to advise you on those
3 questions?

4 THE WITNESS: I don't know if I can
5 answer that question.

6 MR. LEVEE: Yes, you can.

7 THE WITNESS: The answer is that I'm
8 trying to remember if there's -- because
9 the material presented to us is detailed
10 enough. And then we ask -- we interview
11 the -- the Board of Directors and we find
12 out more and more, and we dig and dig and
13 find out more facts.

14 If there's a question for
15 clarification rather than opinion,
16 whether this person's conflicted or not,
17 we probably would ask. But we will not
18 ask general counsel his opinion whether
19 that person's conflicted or not, just
20 clarification on that particular
21 relationship or this information, is this
22 correct, is this not correct.

23 PRESIDENT BARIN: Okay.

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- - -
EXAMINATION ON BEHALF OF THE PANEL
BY HONORABLE JUDGE CAHILL
- - -

HONORABLE JUDGE CAHILL: They've asked all my questions except for a couple.

I'm looking at the ombudsman's reasoning, and he says, There's, of course, an important distinction between actual bias and apparent bias; but underlying this is a need for some action by the members.

Okay. This goes to my other question that there is now action by the members.

What was done to -- from what I read from your declaration, what you've said is that you determined there were no actual conflicts of interest.

What did you do to see if there was any apparent conflicts of interest?

That's always the harder part where I come from.

And so what analysis was done?

1 THE WITNESS: When the Committee
2 went back, analyzed the relationship that
3 Mr. Silber and Mr. Disspain had, in terms
4 of the work and the professional
5 relationship, and evaluated whether there
6 is a potential to it .

7 So as I explained, for example, with
8 Mr. Silber, he's the CEO of auDA. AuDA
9 has a relationship with AusRegistry in
10 terms of they license them to run their
11 operation.

12 They did the consulting work for
13 UniForum SA in the past, way before the
14 applications were -- were announced or
15 applied for. And we investigated the
16 story and identified that it was so
17 attenuated that they couldn't possibly
18 constitute an apparent or a potential --

19 HONORABLE JUDGE CAHILL: It was a
20 long -- I -- I -- me reading the
21 briefs --

22 THE WITNESS: I believe so -- sorry?

23 HONORABLE JUDGE CAHILL: -- me
24 reading the briefs, I understand that the
25 company that Mr. Silber is treasurer of,

1 their conduct [verbatim] was administered
2 by UniForum.

3 Does that make sense to you?

4 THE WITNESS: Yes.

5 HONORABLE JUDGE CAHILL: Yeah. If
6 it's still happening at the time of the
7 conflict, then if UniForum is
8 administering the contract, is it
9 possible that Mr. -- Mike Silber could
10 have some impact if he votes against
11 UniForum?

12 THE WITNESS: Not in that instance.
13 And I'll explain why.

14 HONORABLE JUDGE CAHILL: Okay.

15 THE WITNESS: He's a nonexecutive
16 member of the Board of ZADNA. Like many
17 what is called "country code
18 administrators," they don't have the
19 facility themselves to run the computers
20 and the administer thing, so they
21 outsource this to other organizations.

22 There are other organizations that
23 specialize in that and provide that
24 service to many others.

25 So ZADNA has licensed, or given

1 arm's-length contract, to UniForum SA to
2 do this administration. It just happened
3 that -- and first of all, it just
4 happened that the UniForum SA applied for
5 .africa.

6 That application in no way would
7 benefit Mr. Disspain at all. And we felt
8 that because of the arm's-length
9 relationship, right, that -- that there
10 was no perception of conflict or a
11 potential one.

12 So that's our analysis. We went
13 into this -- a lot of depth and -- and
14 understood that because of this
15 arm's-length relationship and because
16 there's no financial interest at all,
17 there was no real link between Mr. Silber
18 and the .africa application.

19 So we reached that conclusion
20 ourselves.

21 HONORABLE JUDGE CAHILL: Okay. And
22 on the -- on -- in your declaration, you
23 say, Some weeks after June 4, 2013, you
24 learned about another potential
25 conflict -- or complaint of potential

1 conflict of interest.

2 What did you understand that
3 complaint to be? Was it or specific or
4 was it general?

5 THE WITNESS: Excuse me. Which
6 paragraph?

7 HONORABLE JUDGE CAHILL: I'm looking
8 at Paragraph 7 --

9 THE WITNESS: Yes, Paragraph 7.

10 HONORABLE JUDGE CAHILL: -- and the
11 first sentence, Potential conflict of
12 interest was again raised.

13 Maybe you answered it before, but I
14 wasn't sure.

15 What -- what was the exact conflict
16 of interest that was raised?

17 THE WITNESS: I did mention that
18 while -- when we were -- and ICANN had a
19 meeting in Durban, South Africa. In the
20 opening speech, a member -- because we
21 were hosted by the African community, a
22 man thanked two members of the Board.
23 And those two members, one of them was
24 Mr. Disspain, and the other one was
25 another Board member, George Sadowsky.

1 HONORABLE JUDGE CAHILL: Okay.

2 THE WITNESS: That Board member
3 thought that he also mentioned
4 Mike Silber, but he did not mention
5 Mike Silber.

6 All right?

7 HONORABLE JUDGE CAHILL: Got that.

8 THE WITNESS: So that Board member
9 came to me and went to general counsel
10 and said, Look, I heard -- everybody
11 heard it in the opening speech. I am
12 concerned that maybe we ought to look
13 into this again. And the thing we did is
14 we looked into this again.

15 HONORABLE JUDGE CAHILL: Okay. The
16 first time you got the ombudsman
17 involved.

18 What was the reason you didn't get
19 the ombudsman involved in the second
20 conflict?

21 THE WITNESS: Because there were no
22 suspected -- no new -- other than the
23 voting, no new data relating to those two
24 individuals. But we wanted to make sure
25 to go back and check this.

1 HONORABLE JUDGE CAHILL: Now, we
2 have two different individuals, though,
3 you're checking on. You're not checking
4 on Mr. Silber anymore, because he wasn't
5 mentioned in the speech --

6 THE WITNESS: No, but we -- we took
7 extra caution, and we checked him as
8 well. We checked the two that were
9 mentioned in the opening speech as well
10 as Mr. Silber again.

11 HONORABLE JUDGE CAHILL: Okay.

12 That's all I have right now.

13 (Pause.)

14 - - -

15 EXAMINATION (CONTINUED) ON BEHALF OF THE BOARD

16 BY ARBITRATOR KESSEDJIAN

17 - - -

18 ARBITRATOR KESSEDJIAN: I don't
19 understand why you have a written
20 statement -- and perhaps Mr. LeVee is
21 going to tell me that I'm wrong -- but
22 why in your recent -- in your written
23 statement you don't mention the date when
24 you reopened the issue after Durban?

25 I don't see anything in your written

1 statement about that.

2 So you are telling us now orally
3 that you reopened the issue, but -- I
4 don't know. To me, it's very unclear.
5 So if you want to clarify anything, I
6 would be grateful.

7 THE WITNESS: Yes, I'm happy to
8 clarify.

9 I don't know why the date is not
10 there. I'm sorry. The date perhaps
11 should have been there.

12 But the dates are as follows: It's
13 4th of June, the NGPC met for the advice,
14 right; then July the 17th -- sorry --
15 July the 15th in Durban, the Board met --

16 MR. ALI: Excuse me. If I may
17 interrupt. I'm sorry, Mr. Chalaby.

18 Mr. President, just for our
19 information, Mr. Chalaby is looking at
20 some notes, and he seems to have a
21 document there. If we can --

22 PRESIDENT BARIN: I was going to ask
23 --

24 THE WITNESS: No problem. It's just
25 a timeline, the same as you showed this

1 morning, but in my own work. If you want
2 it, you can put it as an exhibit --

3 HONORABLE JUDGE CAHILL: We don't
4 need it right now. You can see it at a
5 break.

6 MR. ALI: I will take a copy later.

7 HONORABLE JUDGE CAHILL: Just make
8 it available to him at a break.

9 THE WITNESS: Definitely. I was
10 just going -- I've reconstructed this
11 from all the documentation here
12 (indicating), basically, that --

13 HONORABLE JUDGE CAHILL: Okay.

14 THE WITNESS: -- that's all.

15 So if -- let me read from it, and
16 then you can -- so June the 4th, the NGPC
17 meeting met and accepted the GAC advice;
18 June the 14th, the letter from
19 Sophia Bekele came regarding the NGPC
20 decision; June the 19th, DCA submits a
21 reconsideration request; July 15th, in
22 Durban, the Board member in Durban raised
23 questions re: the opening remark, which I
24 mentioned to you; July 15th to July the
25 17th, the NGPC meeting met, we discussed

1 what happened then, and we asked every
2 Board member to confirm again, which they
3 did, the conflict of interest; then in
4 September 25, the Ethics and Conflicts
5 Subcommittee met regarding
6 reinvestigating what was said in -- in --
7 in Durban.

8 And not only we investigated that
9 Mr. Disspain was thanked, but we also
10 investigated Mike Silber, who was not
11 thanked in the opening speech.

12 And then the Subcommittee made a
13 recommendation to the Board Governance
14 Committee, and the Board Governance
15 Committee so asked the NGPC on behalf of
16 the Board to ratify it.

17 My apology that it was not in
18 the -- I -- I did it in the last couple
19 days, frankly.

20 PRESIDENT BARIN: Is that the only
21 document that you have that you've been
22 referring to?

23 THE WITNESS: Yeah. I've been
24 referring to my declaration. And I've
25 not referred to, although I have it here,

1 is the ICANN Response to DCA Memorial on
2 the Merits. I have no other documents.

3 PRESIDENT BARIN: That's the only
4 other document?

5 HONORABLE JUDGE CAHILL: That's the
6 only new document. We'll get it at a
7 break. That's fine.

8 PRESIDENT BARIN: So no more
9 questions at this stage from the Panel.

10 Thank you, Mr. Chalaby.

11 I would suggest, but I'm open to
12 whichever way you wish to proceed, that
13 Mr. Ali start, and then you can finish
14 up. It perhaps makes more sense.

15 So, Mr. Ali, I would ask you to --
16 if you would, to ensure that we remain
17 within the confines of what you had
18 agreed to as counsel and also the
19 procedural orders that you ask questions
20 that came out as a result of the
21 questions that the Panel asks.

22 MR. ALI: Without the benefit of a
23 LiveNote, I will strain my memory as best
24 I can to ensure that I stay --

25 PRESIDENT BARIN: If I see that

1 maybe it's going to a place where it
2 shouldn't, then I will -- I will let you
3 know.

4 MR. ALI: Okay.

5 HONORABLE JUDGE CAHILL: I'm sure
6 counsel --

7 MR. ALI: Give me some elasticity.
8 Your memory is -- there's a number of
9 interesting issues that have been raised
10 by Mr. Chalaby. And I just think that we
11 ought to get a little bit more in depth
12 with them.

13 - - -

14 EXAMINATION ON BEHALF OF CLAIMANT

15 DOTCONNECTAFRICA TRUST

16 - - -

17 BY MR. ALI:

18 Q. If you would just excuse me just a
19 second, Mr. Chalaby. I know this is -- it's rude
20 for us to look over a computer screen. So if you
21 don't mind, let me put this over here.

22 ARBITRATOR KESSEDJIAN: Could you
23 put it on the floor? Because then, I
24 cannot see him --

25 MR. ALI: There may be some

1 documents --

2 ARBITRATOR KESSEDJIAN: That's fine,
3 then. That's fine. It's more important
4 that you see him than I see him.

5 MR. ALI: I thought it would be a
6 little bit rude if --

7 PRESIDENT BARIN: I suggest that you
8 put it down. Just put it down. And
9 then, if there's any documents that
10 Mr. Chalaby needs to see, we can show it
11 to him.

12 BY MR. ALI:

13 Q. Mr. Chalaby, as I understand it from
14 one of your responses to a question that was just
15 put to you, you have looked at various documents
16 in preparing for your testimony which led you to
17 create that timeline, correct?

18 A. Yes.

19 Q. Okay. And just within the context of
20 looking at all of those documents, nothing came up
21 that would have jogged your memory as to whether
22 or not you did interview Mr. Disspain and Silber?

23 A. As I mentioned, I don't recall that.

24 Q. Okay. Could you just take a look at
25 Paragraph 7 of your statement?

1 A. Yeah.

2 Q. So here in your statement, it says, In
3 addition, the NGPC asked the BGC to look into the
4 issue further.

5 Do you see that?

6 A. Yes.

7 Q. Now, you've been with ICANN since
8 2010; is that correct?

9 A. Correct.

10 Q. And you've been the head of the
11 New gTLD Program Committee, NGPC, since then; is
12 that right?

13 A. Yes.

14 Q. That's correct?

15 A. Yes.

16 Q. Okay. And you've been head of the
17 Board Governance Committee since 2010 as well; is
18 that correct?

19 A. No, I'm not head of the Board
20 Governance Committee.

21 Q. I see.

22 So you're just on the Board Governance
23 Committee?

24 A. Uh-huh.

25 Q. But you are also on the Ethics

1 Subcommittee?

2 A. Indeed.

3 Q. Okay.

4 Now, when you say, here, The NGPC
5 asked the BGC, so that means the NGPC,
6 effectively meaning you, that is -- or it's some
7 sort of written communication from the NGPC to
8 the BGC to look into what you describe as the
9 issue further; namely, this question of conflict
10 that had been raised?

11 So the NGPC -- how does that happen?

12 A. Well, it happens -- I, on behalf of
13 the NGPC, would -- would call the Chair of the BGC
14 and tell him about it --

15 Q. Okay.

16 A. -- and -- yeah, go ahead.

17 Q. And who is that?

18 A. The Vice Chairman of ICANN,
19 Bruce Tonkin.

20 Q. So on this particular occasion, you
21 would have -- in your capacity as Chair of the --
22 head of the NGPC, have contacted Mr. Tonkin by
23 phone and have told him that there was an issue
24 regarding a conflict of interest; is that correct?

25 A. We were all, I think, in -- in Durban

1 at the time when the discussion happened then
2 while -- or it was by phone.

3 Q. So you went to him and said, I think
4 there is an issue of conflict of interest?

5 A. I think, also, general counsel
6 probably brought it up to him as well.

7 Q. Okay. And there was nothing put in
8 writing by you or the general counsel, to the best
9 of your knowledge?

10 A. In this instance, I believe there was
11 nothing put in writing.

12 Q. And so you indicated that once the
13 matter goes from the BGC, it goes to a
14 subcommittee?

15 A. Yes.

16 Q. And that subcommittee met in Durban?

17 A. No.

18 Q. When did that subcommittee meet?

19 A. It met in September.

20 Q. So the Subcommittee -- so the issue of
21 the conflict of interest is raised, as you put it,
22 some weeks after the NGPC's vote accepting the GAC
23 advice?

24 A. Correct.

25 Q. And then, some weeks after that, the

1 Subcommittee on Conflicts meets? Just so we have
2 the timeline straight here.

3 A. Would you like a copy of this?

4 Q. Why don't you just tell me?

5 A. Well, I did say it, and I'll repeat it
6 again.

7 So the -- June the 4th, there was the
8 NGPC meeting, which is the first line, Some weeks
9 after. So some weeks after that, the NGPC -- two
10 things happened: one is the NGPC met in Durban,
11 right, and in Durban, we asked all the Board
12 members to reaffirm and reconfirm that they have
13 no conflict of interest --

14 Q. And this was because of that -- sorry
15 to interrupt, but just to be clear, this was
16 because of that event where somebody thanked
17 somebody?

18 A. Yes, and because a Board member
19 brought it up and because it's a serious -- when a
20 Board member brings it up, it's serious. We have
21 to take -- so we asked the NGPC members to
22 reconfirm their vote.

23 And then the NGPC --

24 Q. Sorry. To reconfirm their vote? I
25 thought you had said earlier to reconfirm that

1 they have no conflict.

2 A. Sorry. You're right, to reconfirm
3 they had no conflict at the time they voted.

4 Okay?

5 Q. Okay.

6 A. And then the NGPC, which is
7 well-documented, asked the BGC to look into it,
8 the Board Governance Committee. And the Board
9 Governance Committee asked the Subcommittee to
10 please take a look into it. The Subcommittee
11 looked into it on September the 25th.

12 Q. Okay. Thank you. That's very
13 helpful.

14 So September 25th, as I understand it,
15 the Subcommittee, which includes you --

16 A. Um-hum.

17 Q. -- receives information from the
18 general counsel, John Jeffrey?

19 A. Right.

20 Q. And as you put it, upon reviewing that
21 information, you dig and dig and dig.

22 So that's what you did on this
23 occasion as well?

24 A. Yes.

25 Q. Okay. But notwithstanding the fact

1 that you dag and dag and dag, you don't recall
2 whether or not you interviewed Mr. Silber and
3 Mr. Disspain?

4 A. No, I don't recall that. I mentioned
5 this several times.

6 Q. I just want to be clear. Perhaps
7 something somebody said might have jogged your
8 memory.

9 A. No.

10 Q. Okay.

11 So you've also testified to the effect
12 that you believe that the highest standard is
13 being applied by ICANN, and, to your mind, that
14 standard is actual, potential, or perceived
15 conflict.

16 Correct?

17 A. Yes.

18 Q. So could you give me an example of
19 what would constitute a conflict?

20 A. In those three terms?

21 Q. For each one.

22 Actual?

23 A. If I have a financial interest -- a
24 personal financial interest or gain in a -- in a
25 company that is applying for a new gTLD.

1 Q. So if you have an actual financial
2 interest.

3 What is a potential conflict of
4 interest?

5 A. If I know that I will become possibly
6 involved with one of these companies in the future
7 and I will have a financial interest.

8 Q. Okay. What is a perceived conflict?

9 A. If a perceived conflict of interest
10 is -- is not actual or potential, but other people
11 may perceive me as conflicted.

12 Q. Okay. And so these are the standards
13 that you are telling us were applied in the
14 context of the discussion that is taking place in
15 September 17th in the BGC Ethics Subcommittee,
16 right?

17 A. Yes.

18 Q. Applying those standards, if you had
19 concluded that there was a conflict of interest,
20 what effect would that have had on the NGPC vote
21 to approve the GAC advice?

22 A. It would have no effect.

23 Q. Sorry. Did you say "no effect"?

24 A. Let me explain.

25 Q. Uh-huh.

1 A. In the NGPC meeting on the 4th of
2 June, there were nine voting members present. We
3 only needed seven to form a quorum and only five
4 to have a major -- a majority decision.

5 So if even Mr. Disspain and Mr. Silber
6 were not voting, we will still have a majority
7 decision, and we still have a quorum.

8 Q. I see.

9 So, in effect -- I don't think you
10 answered my question, but we'll come back to that
11 in a second.

12 But as I understand it -- let me ask
13 the question that is troubling me.

14 Can you please answer my question,
15 What would have been the effect, if you had
16 determined there was a conflict of interest, on
17 the decision that had been taken on -- on
18 June 4th with respect to the GAC advice?

19 A. Can you be more specific?

20 Q. Well, I think I have been.

21 HONORABLE JUDGE CAHILL: I think he
22 answered it.

23 MR. ALI: I think he did, too. I
24 just wanted to be sure we got -- that his
25 answer was the same.

1 HONORABLE JUDGE CAHILL: I think you
2 said there were seven people there, you
3 disqualified two, there was still --
4 there was 11 there -- nine --

5 THE WITNESS: No, the nine --

6 HONORABLE JUDGE CAHILL: -- and then
7 seven --

8 THE WITNESS: -- and then seven.
9 And we only needed five for a majority.

10 HONORABLE JUDGE CAHILL: So 7-0. I
11 think that's what you said.

12 BY MR. ALI:

13 Q. Effectively, what you're telling us is
14 that this whole digging and digging, and this
15 discussion that took place with Mr. Tonkin and the
16 subsequent Subcommittee meeting that took place
17 several weeks later was essentially irrelevant;
18 isn't that correct?

19 A. You are saying that -- in my view,
20 it's not irrelevant to apply the Bylaws, and it's
21 not irrelevant if a member is conflicted to be
22 removed from the New gTLD Committee.

23 Q. So that was the purpose? You were
24 conducting these additional inquiries to make the
25 determination as to whether or not Mr. Disspain,

1 Mr. Silber or whomever else should be removed from
2 the Committee?

3 A. Indeed, if they are conflicted, they
4 should not be on the Committee.

5 Q. Okay. But that was the purpose of the
6 further inquiry because, otherwise, it didn't
7 really matter, which is what you just told us,
8 because of the nine and seven and five members who
9 would have been available in the quorum, correct?

10 A. At the time we had the discussion, it
11 was all about applying the conflict of interest
12 policy and whether they were conflicted or not.

13 Q. But it wouldn't have made any
14 difference with respect to the vote, correct?

15 A. Now that we look at the arithmetics,
16 yes; but at the time, it didn't matter. We had to
17 do the right thing. And if they were conflicted,
18 they would be removed. And if that had
19 consequences on the vote, then it had consequences
20 on the vote.

21 Q. And what would be those consequences?

22 A. As we look at it now, there would not
23 be. But we did not think -- that did not come in
24 our thinking at the time.

25 The most important thing was to apply

1 the conflict of interest policy and to make sure
2 they were not conflicted. And if they were, then
3 we would ask them not to be in the New gTLD
4 Committee, as we asked the Chairman and
5 Vice Chairman before. And we would not shy away
6 from doing that.

7 Q. But it would not have mattered with
8 respect to the vote that had already been taken,
9 correct?

10 A. I think we've gone through this
11 several times.

12 Q. Would you please answer my question?

13 A. Now that we're doing the math, the
14 answer is no.

15 Q. I see.

16 At the time, you didn't -- the math
17 didn't really matter to you?

18 A. The primary objective of that
19 discussion was to be sure that the conflict of
20 interest policy is applied, right, which would
21 lead to those people, full stop.

22 Q. I understand.

23 Let's move on to a different set of
24 questions.

25 Let's talk a little bit about

1 Mr. Silber, who -- Silber, who you discuss in
2 Paragraph 8 of your testimony.

3 So you say that Mr. Silber is a
4 nonexecutive director of the .za domain name
5 authority.

6 .za or .zed-a is the country code for
7 South Africa; is that correct?

8 A. Yes.

9 Q. And what does the .za domain name
10 authority do?

11 A. They administer the .za.

12 Q. They administer the .za.

13 And what does UniForum SA do with
14 respect to .za?

15 A. They have a contractual relationship
16 to actually run it, you know, with computers and
17 with processes, everything that they do.

18 Q. Okay. And do you know if what --
19 where is UniForum SA based?

20 A. I don't know. I'm not sure I can
21 answer this question.

22 Q. Because you don't know the nationality
23 of the company or the nationality of any of the
24 principals of UniForum SA?

25 A. No.

1 Q. Okay. That's fair enough.

2 So .za Domain Name Authority you
3 referred to as ZADNA; is that correct?

4 A. Yes.

5 Q. And in the context of your digging
6 with respect to the conflict of interest that
7 Mr. Silber and Mr. Disspain might have had, which
8 you ultimately determined they didn't have, did
9 you -- did you ascertain whether or not ZADNA had
10 endorsed the UniForum application for .africa?

11 A. No.

12 Q. Okay. Now, I'm going to -- it's
13 difficult now that we don't have the screen up
14 there --

15 ARBITRATOR KESSEDJIAN: We can put
16 it back if you want.

17 MR. ALI: I just want to look at
18 C-71. If we could pull that up, please.

19 There may be a couple of others.

20 (Pause.)

21 BY MR. ALI:

22 Q. So can you see C-71, sir?

23 A. Yeah.

24 Q. Okay. The top -- the top line, this
25 is a document -- this is an e-mail from -- I

1 believe that's Larika Gurnick to Mark McFadden --
2 sorry -- Larisa Gurnick. And it says, at the top
3 of the e-mail, Mark, I just learned from Ann that
4 there is a meeting taking place today at the
5 executive level to discuss .africa.

6 MS. ZERNIK: Is this C-71?

7 MR. ALI: This is C-71.

8 MR. LEVEE: On the first page?

9 MR. ALI: On the first page of C-71.

10 MR. LEVEE: Not the one we have.

11 MR. ALI: Maybe it's the second
12 page. I apologize.

13 I'll give you the Bates number.

14 It's 447.

15 MR. LEVEE: It's the second page.

16 MR. ALI: It's the second page.

17 PRESIDENT BARIN: It's the second
18 page of C-71.

19 BY MR. ALI:

20 Q. It's the second page.

21 But the question really goes to -- to
22 what I've just read.

23 Do you know what she's referring to
24 when they say, "at the executive level to discuss
25 .africa"?

1 A. No.

2 MR. LEVEE: Mr. Chair, this would be
3 a good opportunity to say that this is
4 well beyond the scope of the questions.
5 And, of course, the witness is not copied
6 or addressed on the e-mail.

7 PRESIDENT BARIN: I think that's a
8 fair comment.

9 MR. ALI: Okay. If I can just lay a
10 foundation.

11 PRESIDENT BARIN: Sure.

12 HONORABLE JUDGE CAHILL: Foundation
13 doesn't go beyond the scope.

14 MR. ALI: Well, he testified to the
15 fact that he's been with ICANN for
16 five years. He's been in the ICANN
17 leadership for five years.

18 I'm just asking him, as a point of
19 information within the context of his
20 role within ICANN, if he knows what they
21 mean by "an executive level" -- what is
22 the executive level meeting that takes
23 place. Would that have involved
24 Mr. Chalaby?

25 And I believe I should be entitled

1 to ask whether or not he was involved
2 in -- you know, what meetings he was
3 involved in.

4 MR. LEVEE: Still beyond the scope.

5 MR. ALI: He said he doesn't know,
6 so I'll leave it at that. But perhaps
7 the Panel may wish to explore that
8 further.

9 PRESIDENT BARIN: It's a question,
10 Mr. LeVee, that, again, the Panel can
11 come back and ask also. I mean --

12 MR. LEVEE: I have no objection if
13 the Panel asks.

14 PRESIDENT BARIN: Yeah.

15 So, Mr. Ali, you can ask your
16 question, but let's try and keep it --

17 MR. ALI: I'll move on.

18 If I may get some clarification from
19 the President, together with any guidance
20 that my friend Mr. LeVee would care to
21 provide.

22 Would it be permissible for me to
23 ask questions regarding the June 4th
24 meeting of the NGPC, which is referred to
25 in his statement?

1 PRESIDENT BARIN: You know, I'm
2 inclined to say yes, because I don't know
3 what question you're going to ask --

4 MR. ALI: Fair point.

5 PRESIDENT BARIN: -- so I will say
6 yes. And if something comes up, then
7 we'll deal with it.

8 MR. LEVEE: That's where I was
9 headed.

10 MR. ALI: Sure. Fair enough.

11 BY MR. ALI:

12 Q. Mr. Chalaby, there was -- there's a
13 meeting on June 4th of the NGPC at which the GAC
14 advice was unanimously accepted by the NGPC,
15 right?

16 A. There was a consensus advice by the
17 GAC, and the NGPC unanimously voted to accept the
18 GAC advice, yes.

19 Q. Okay. I believe it's disputed whether
20 it was consensus or not, but --

21 A. It was consensus advice, sir.

22 Q. Okay. That's your view.

23 HONORABLE JUDGE CAHILL: Well,
24 that's his testimony. So go on.

25 MR. ALI: Right.

1 BY MR. ALI:

2 Q. So did that meeting take place in
3 person or was it a telephonic meeting?

4 A. The 4th of June? I don't recall.

5 Q. And if there's a telephonic meeting,
6 is there a recording kept of that?

7 A. There is a scribe, definitely. There
8 is minutes -- minutes of the meeting.

9 Q. But there's a real-time transcript,
10 such as the one that's being taken now; is that
11 correct?

12 A. I suppose so. I'm not sure. But I
13 know there are minutes, and minutes are published.

14 Q. All right. And would those minutes
15 reflect who was present at that meeting?

16 A. It would, yeah.

17 Q. Do you recall if Heather Dryden
18 participated in that meeting?

19 A. Can we put the minutes and see who was
20 there?

21 You have to remember that we've had,
22 since the inception of the NGPC, over 70
23 meetings. I can't recall which individual.

24 But if we bring the minutes up as an
25 exhibit, then we will know immediately.

1 Q. I'm happy to oblige.

2 MR. ALI: I believe the one that you
3 need to pull up is C-114.

4 (Pause.)

5 BY MR. ALI:

6 Q. Could you just scroll through that and
7 see --

8 A. Can you go back?

9 (Whereupon, the witness mumbles under
10 breath reviewing the material
11 provided.)

12 BY MR. ALI:

13 Q. Let me just help you out so we can
14 save some time.

15 What we'll do is --

16 A. Heather Dryden was in attendance as an
17 observer of the Committee.

18 Q. And that's the role that the Chair of
19 the GAC plays, correct?

20 A. Yes.

21 Q. Okay. And at this meeting, there was
22 a discussion, obviously, regarding -- of some sort
23 regarding the consensus advice, as you put it,
24 from -- from the GAC, correct?

25 A. Go on.

1 Q. I asked you a question.

2 A. Can you repeat again?

3 Q. My question was, Do you recall whether
4 there was a discussion in advance of the vote on
5 whether or not to accept the GAC's consensus
6 advice?

7 A. Yes.

8 Q. And was this the only meeting at which
9 the .africa TLD application by DCA Trust was
10 discussed?

11 A. I don't remember. I know it was
12 discussed at that meeting, because there was the
13 GAC advice.

14 As I mentioned, we had over 70
15 meetings. I can't remember.

16 Q. Okay. Well, I'll just submit to you
17 that there was another meeting that took place on
18 the 8th of May -- and I'm happy to show you a
19 document confirming that -- at which you -- over
20 which you presided. And Ms. Dryden was also in
21 attendance as the GAC liaison at that meeting.

22 So there are two separate meetings
23 during which the DCA application was discussed:
24 one on 8th of May and the other one on 4th June.

25 Now, do you recall whether, at any

1 time, Ms. Dryden said anything about the DCA
2 application?

3 A. No, I don't recall.

4 Q. Do you recall whether anyone on
5 either -- at either meeting raised any questions
6 or issues about the fact that the AUC was using
7 the GAC or participating in the GAC in a manner
8 that would be detrimental to the interests of --
9 of DCA?

10 A. I don't recall.

11 Q. So you don't recall, but you don't
12 know whether anybody said anything or not?

13 A. I don't recall.

14 Q. That's good enough for me.

15 But it's certainly not in the minutes,
16 to the best of your recollection? You can look
17 at them both, if you like.

18 To the best of your recollection,
19 they're not -- nothing's said in the minutes?

20 A. Right. If they are in the minutes,
21 point them out to me.

22 Q. I'm putting to you there's nothing in
23 the minutes --

24 A. Okay.

25 Q. -- to that effect, so probably nobody

1 raised anything.

2 A. I don't remember.

3 Q. Just going back, one thing that is
4 sort of puzzling me a little bit -- you talked
5 about the different standards: actual, potential,
6 perceived.

7 So if -- if -- and you also told us
8 that you've held a number of different senior
9 positions: global executive committee member,
10 chairman of supervisory board, the board of
11 various companies.

12 If one of your companies or one of the
13 companies you were involved in, in an executive
14 position or even a managerial position, was
15 applying for a contract, responding to an RFP,
16 and you learned that the chairman of one of your
17 competitors or a senior executive of one of your
18 competitors was part of the review committee, how
19 would you react?

20 A. Actually, you lost my concentration
21 while you were speaking.

22 Can you repeat?

23 Q. I accept that. I think my question
24 wasn't very precise.

25 Let's assume for a second that --

1 A. Can we talk about the case rather than
2 hypotheticals, please?

3 Q. I think we can talk about a
4 hypothetical.

5 I'm simply asking you on the basis of
6 your experience as a senior executive with -- as
7 a former partner of Accenture and someone who is
8 clearly a very sophisticated businessman if a
9 company in which you were involved was applying
10 for an RFP --

11 A. A company I was involved? How is my
12 involvement --

13 Q. Any involvement.

14 A. -- what's the involvement? Explain.

15 Q. You're the executive chairman of that
16 company. You are a partner of Accenture, and you
17 are applying for -- you're responding to an RFP.

18 You've done that many times, correct?

19 A. I'm responding to an RFP, okay.

20 Correct.

21 Q. You've done that many times?

22 A. Keep going. Yes.

23 Q. Okay. And in responding to that RFP,
24 you learn that a competitor has been awarded the
25 RFP --

1 A. Um-hum.

2 Q. -- but that a senior executive of that
3 competitor was on the Board -- the Review Board
4 for the RFP.

5 What action would you take?

6 A. So that senior executive of that
7 company was part of the decision to award the
8 RFP --

9 Q. I don't think it's a very complicated
10 question, sir. You can just simply answer it.

11 A. So I would think there's a conflict of
12 interest.

13 Q. Okay. I think we agree.

14 MR. ALI: I have no further
15 questions.

16 PRESIDENT BARIN: Thank you,
17 Mr. Ali.

18 MR. LEVEE: I'm going to stand
19 because I can barely see.

20 PRESIDENT BARIN: Before you do --
21 would you like to take a little break
22 before you do that?

23 THE WITNESS: I'm okay. Thanks.

24 MR. LEVEE: I have four questions.

25 THE WITNESS: Okay.

1 HONORABLE JUDGE CAHILL: Okay.

2 - - -

3 EXAMINATION ON BEHALF OF RESPONDENT

4 INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

5 - - -

6 BY MR. LEVEE:

7 Q. I know you cannot remember whether you
8 interviewed Mr. Disspain or Mr. Silber in
9 conjunction with the Ethics Subcommittee.

10 Was it and has it been the practice of
11 the Ethics Subcommittee to interview the Board
12 members who were under discussion?

13 A. Yes.

14 Q. Okay. You have seen, in the course of
15 preparing for your testimony, that
16 DotConnectAfrica sent letters to Mr. Chehadé in
17 the summer of 2012 expressing concern about a
18 conflict of interest relating to those two
19 members, correct?

20 A. Yes.

21 Q. Okay. After the NGPC voted or at any
22 time in the course of 2011, did DCA bring to the
23 Board's attention any new facts relating to either
24 Mr. Disspain or Mr. Silber that had not been
25 included in the previous letters that had been

1 sent to ICANN?

2 A. No.

3 MR. LEVEE: Okay. That's all I
4 have. Thank you.

5 HONORABLE JUDGE CAHILL: On
6 the -- where am I?

7 MR. ALI: Just as a point of record,
8 Judge Cahill -- sorry -- I don't believe
9 I asked any questions during my
10 cross-examination with respect to any
11 letters sent by DCA.

12 So just as a point of information,
13 if there are rules that apply to me, they
14 also apply to Mr. LeVee. Thank you.

15 PRESIDENT BARIN: Understood.

16 HONORABLE JUDGE CAHILL: I'm sorry.
17 You're fine.

18 - - -

19 EXAMINATION ON BEHALF OF THE PANEL

20 BY HONORABLE JUDGE CAHILL

21 - - -

22 HONORABLE JUDGE CAHILL: Well, I'm
23 looking at your declaration, Paragraph 5
24 again, and you have the -- I think I know
25 the answer to this, but I just want to

1 make sure -- you have the -- the Internet
2 address for the -- for the ombudsman
3 report.

4 Do you see that there?

5 THE WITNESS: Yes.

6 HONORABLE JUDGE CAHILL: Is that
7 public that everybody can see? For
8 instance, would DCA be -- be available
9 to -- to look at that?

10 THE WITNESS: I believe it was
11 posted on the Web site.

12 HONORABLE JUDGE CAHILL: But you
13 don't know for sure?

14 THE WITNESS: I don't know for sure,
15 but it would be normal practice to post
16 it.

17 HONORABLE JUDGE CAHILL: Okay.

18 ARBITRATOR KESSEDJIAN: I got it
19 from the URL that is mentioned here. I
20 didn't get it from the file, but I
21 actually typed the URL and I got
22 the -- but I don't know when it was
23 posted.

24 HONORABLE JUDGE CAHILL: Well, I
25 think they responded, but we'll get to

1 that later.

2 Thank you.

3 Okay.

4 PRESIDENT BARIN: Any questions?

5 - - -

6 EXAMINATION ON BEHALF OF THE PANEL

7 BY ARBITRATOR KESSEDJIAN

8 - - -

9 ARBITRATOR KESSEDJIAN: No, but --

10 perhaps just as a general context, is

11 your position with ICANN 100 percent job?

12 Is that -- or are you having other

13 activities?

14 THE WITNESS: Currently, I don't

15 have other activities.

16 ARBITRATOR KESSEDJIAN: And you are

17 based in Los Angeles, no?

18 THE WITNESS: No; I'm based in

19 London.

20 ARBITRATOR KESSEDJIAN: In London?

21 THE WITNESS: Yeah.

22 ARBITRATOR KESSEDJIAN: So you

23 travel to all meetings?

24 THE WITNESS: Indeed, I do.

25 ARBITRATOR KESSEDJIAN: And what's

1 the percentage of meetings that are held
2 via telephone conference or
3 videoconferencing and in person? Would
4 you --

5 THE WITNESS: Well, I don't know
6 about the percentage, but I can tell you
7 that we have three big ICANN meetings a
8 year --

9 ARBITRATOR KESSEDJIAN: That's the
10 public ones, yeah?

11 THE WITNESS: Yeah.

12 -- and we have, I think, four what I
13 call "Board workshop," and the rest of it
14 is by telephone.

15 ARBITRATOR KESSEDJIAN: Okay. Thank
16 you.

17 - - -

18 EXAMINATION ON BEHALF OF THE PANEL

19 BY HONORABLE JUDGE CAHILL

20 - - -

21 HONORABLE JUDGE CAHILL: You say
22 "currently."

23 You don't have any other --

24 THE WITNESS: Yes.

25 HONORABLE JUDGE CAHILL: -- at the

1 time this was going on, did you have
2 other responsibilities?

3 THE WITNESS: Yes. I was chairman
4 of a bank, but we sold that bank, and I'm
5 no longer a chairman.

6 HONORABLE JUDGE CAHILL: So in
7 October 2012, you were chairman of the
8 bank?

9 THE WITNESS: We sold it probably
10 just before that.

11 HONORABLE JUDGE CAHILL: Okay.
12 I'm done.

13 PRESIDENT BARIN: Okay.
14 Thank you, Mr. Chalaby --

15 HONORABLE JUDGE CAHILL: Good. Was
16 that fun?

17 PRESIDENT BARIN: -- we appreciate
18 you coming and wish you safe travel
19 wherever you're going.

20 THE WITNESS: Thank you. I answered
21 to the best of my ability. That's all I
22 can say.

23 (The witness was excused.)

24 HONORABLE JUDGE CAHILL: Take a
25 break?

1 PRESIDENT BARIN: Yes. Let's take a
2 short break. We'll come back, and we'll
3 start with Ms. Dryden.

4 Let's say a 10-minute break --

5 HONORABLE JUDGE CAHILL: Yeah.

6 PRESIDENT BARIN: -- 10 minutes
7 back?

8 - - -

9 (Whereupon, a brief recess was taken
10 from 3:07 p.m. to 3:26 p.m.)

11 - - -

12 PRESIDENT BARIN: Just a couple of,
13 perhaps, housekeeping matters before we
14 start.

15 I'm looking at my watch. It's 3:30.

16 MR. LEVEE: Yeah.

17 PRESIDENT BARIN: We'll obviously
18 get through Ms. Dryden this afternoon.

19 HONORABLE JUDGE CAHILL: Obviously?

20 PRESIDENT BARIN: The Panel is in
21 your hands with respect to Ms. Bekele.

22 MR. LEVEE: We spoke, and it's our
23 preference -- obviously, if it gets out
24 of hand, we'll speak again, but it would
25 be our preference to complete the witness

1 testimony today --

2 PRESIDENT BARIN: Okay.

3 MR. LEVEE: -- so that we could
4 actually have the testimonies in order to
5 prepare for tomorrow.

6 HONORABLE JUDGE CAHILL: Okay.

7 PRESIDENT BARIN: So that would
8 require us to sit for however long we
9 need.

10 MR. LEVEE: It make take us a little
11 later into the evening than your schedule
12 had predicted.

13 HONORABLE JUDGE CAHILL: 9:00, I
14 have to go.

15 MR. LEVEE: Whatever it is, it is.

16 PRESIDENT BARIN: He's still on
17 California time.

18 HONORABLE JUDGE CAHILL: We're wide
19 awake. We're ready to go.

20 MR. LEVEE: It's almost time for
21 lunch.

22 MR. ALI: At 10:00, I nod off in
23 front of the TV.

24 PRESIDENT BARIN: Okay.

25 So that's -- so let's move on to --

1 HONORABLE JUDGE CAHILL: If you're
2 from France, you're in real trouble.

3 (Laughter.)

4 ARBITRATOR KESSEDJIAN: They took my
5 glass.

6 HONORABLE JUDGE CAHILL: They took
7 the glasses again.

8 You have an efficient firm.

9 PRESIDENT BARIN: Ms. Dryden, good
10 afternoon.

11 THE WITNESS: Good afternoon.

12 PRESIDENT BARIN: Thank you for
13 coming to be with us.

14 First things first. I will do what
15 I did for equality purposes to you as
16 well as Mr. Chalaby.

17 - - -

18 H E A T H E R D R Y D E N,
19 after having been first duly sworn by
20 President Barin, was examined and
21 testified as follows:

22 - - -

23 PRESIDENT BARIN: So you've been
24 sworn.

25 Are you satisfied with that as well?

1 THE COURT REPORTER: Thank you.

2 - - -

3 EXAMINATION ON BEHALF OF THE PANEL

4 BY PRESIDENT BARIN

5 - - -

6 PRESIDENT BARIN: Ms. Dryden, I see
7 from your declaration that you're
8 currently a senior policy advisor at the
9 International Telecommunications Policy
10 and Coordination Directorate at the
11 Canadian Department of Industry.

12 THE WITNESS: That's correct, yes.

13 PRESIDENT BARIN: And you still hold
14 that position?

15 THE WITNESS: Yes. I am on
16 full-time French training currently and
17 have been since leaving the position of
18 chairing the GAC. So that's actually
19 what I am doing presently.

20 PRESIDENT BARIN: Sorry. Full time?

21 THE WITNESS: French training.

22 PRESIDENT BARIN: French training?

23 THE WITNESS: Yes.

24 PRESIDENT BARIN: Great.

25 ARBITRATOR KESSEDJIAN: French

1 training? In the French language?

2 THE WITNESS: Yes.

3 ARBITRATOR KESSEDJIAN: Wow. That's
4 great.

5 HONORABLE JUDGE CAHILL: Am I the
6 only one who speaks one language? I bet
7 everybody speaks more than one language.

8 ARBITRATOR KESSEDJIAN: And for how
9 long?

10 THE WITNESS: It has been for a
11 few months, and I have a test next
12 week -- an exam.

13 PRESIDENT BARIN: I assume the
14 Government of Canada has other plans for
15 her.

16 THE WITNESS: We will see. It's --
17 it's yet to be seen what I will do next.

18 PRESIDENT BARIN: Okay. Would you
19 be kind enough to let us know what your
20 professional background is in terms of
21 what you studied and what you've done?

22 THE WITNESS: Certainly.

23 I've been a Canadian public servant
24 since 2002, always with the Canadian
25 Department of Industry.

1 And my educational background is
2 focused on international politics and
3 Russian-Area studies.

4 Before joining the department, I had
5 various roles. I spent some time working
6 for the NATO Information Office in
7 Moscow. I taught English in Korea for a
8 couple of years.

9 So, as I say, I have no idea of
10 different kinds of experience before
11 becoming a public servant.

12 For most of the time working at
13 industry Canada, I've had responsibility
14 for telecommunications or Internet policy
15 matters and, in particular, Internet
16 governance. And my responsibilities have
17 not been limited only to the roles I have
18 played within the -- the GAC, as we say,
19 at ICANN, but -- but includes things like
20 representing the department on the Board
21 of the Canadian operator of the country
22 code for the Internet, which is .ca.

23 I also spent some time as a member
24 of the UN Internet Governance Forum
25 Advisory Group. And, again, that was in

1 my capacity as -- as a Canadian public
2 servant.

3 PRESIDENT BARIN: And how was it
4 that you found yourself being involved in
5 ICANN, I believe, as of 2010, correct?

6 THE WITNESS: My experience with the
7 GAC predates that. I -- my first meeting
8 was March 2007, and that was as part of
9 the Canadian representation to the
10 committee. And then over time, I became
11 the Canadian representative.

12 And then, as you pointed out, in
13 June 2010, that's when I was first
14 elected to serve as interim Chair, and
15 then I was elected after that for a total
16 of about four-and-a-half years in the
17 role of Chair.

18 PRESIDENT BARIN: And I assume that
19 kind of invitation comes, presumably,
20 from ICANN as opposed to anything any
21 particular government puts forward?

22 THE WITNESS: It's entirely down to
23 the GAC. And so the GAC has its own
24 procedures for electing its leadership.
25 There are three Vice Chairs, for example,

1 in addition to the Chair. And -- and
2 that's certainly the case with the
3 working methods of the Committee as well.

4 That's very much a decision of the
5 Committee.

6 PRESIDENT BARIN: And do I
7 understand correctly that you are still a
8 nonvoting liaison member to the Board of
9 Directors of ICANN?

10 THE WITNESS: No. So the October
11 meeting of 2014 was my last meeting
12 serving either as the Chair of the GAC or
13 the other half of that role that comes
14 along with it, which is the nonvoting
15 liaison to the Board.

16 So for any Chair of the GAC, as
17 things stand, it's a dual purpose role.
18 You're chairing the GAC, but then you're
19 also serving as the nonvoting liaison
20 from the GAC to the Board.

21 PRESIDENT BARIN: Okay. And in that
22 capacity, is it fair to say that you
23 play, I guess, a hands-on role when it
24 comes to reporting to the Board? That's
25 the ICANN Board. If it's not, you can

1 correct me. It was just an expression
2 that came to my mind.

3 THE WITNESS: The nature of the
4 role -- clearly, it's nonvoting -- is --
5 is really -- it allows for the nonvoting
6 liaisons to attend meetings. You can ask
7 to speak and contribute and, where
8 possible, you can clarify matters.

9 But the expectation from the GAC is
10 that you are there to represent the
11 collective views of the GAC as a whole.

12 PRESIDENT BARIN: If I can just sort
13 of probe into that a little bit more.

14 With respect to the incidents
15 relating to .africa and the claim of
16 DCA Trust, is that something that you
17 would have been, I guess, mostly
18 professionally, intricately involved from
19 the outset?

20 THE WITNESS: My involvement really
21 relates to handling the issue within the
22 GAC --

23 PRESIDENT BARIN: Okay.

24 THE WITNESS: -- so, as you are
25 aware, the GAC was given a particular

1 role as part of the gtLD program allowing
2 for particular kinds of advice, including
3 GAC consensus objections.

4 And so it was my job to oversee that
5 in the GAC.

6 PRESIDENT BARIN: Let me take you
7 directly to your statement, a copy of
8 which you have in front of you, I
9 believe, correct?

10 THE WITNESS: I do.

11 PRESIDENT BARIN: You don't have
12 any -- just so we don't go through -- you
13 don't have any other notes or anything
14 that you want to refer to that you can
15 give us copies?

16 THE WITNESS: No.

17 PRESIDENT BARIN: No.

18 So let's go to Paragraph 12.

19 And there are other questions I'm
20 sure my colleagues will want to ask you,
21 but I will go directly to the heart of
22 the issue.

23 In Paragraph 12, you say, In any
24 event, the dialogue that occurs among GAC
25 members prior to the particular GAC

1 meeting at which a proposal is supposed
2 to be decided, one does not bind the GAC
3 or any of its participating countries.
4 What matters is what occurs during the
5 actual decisional GAC meeting. On
6 10 April 2013, the GAC met in Beijing
7 specifically to address whether to issue
8 GAC consensus advice in conjunction with
9 DCA's application for .africa.

10 During the meeting, an African
11 country confirmed the DCA's application
12 should remain on the consensus objection
13 agenda for consideration and decision by
14 the GAC.

15 Can you tell me what really happened
16 in Beijing?

17 THE WITNESS: Yes, I can tell you in
18 very precise terms as far as the issue of
19 the decision that was taken regarding
20 .africa.

21 There was a specific agenda that was
22 developed to handle consensus objections.
23 So that particular kind of advice is
24 identified in the Guidebook.

25 And governments had the opportunity

1 before the meeting to signal that they
2 wanted to put a particular string or
3 application for consideration by the GAC
4 to issue very specific language about
5 objecting to a particular string or GAC
6 application.

7 So in that meeting, I was going
8 through that agenda, and one of the items
9 on that agenda, of course, was the
10 application from DCA --

11 PRESIDENT BARIN: Let me -- I don't
12 mean to interrupt you, but let me just
13 back up for a minute because you started
14 with an agenda.

15 THE WITNESS: Yes.

16 PRESIDENT BARIN: So who prepares
17 the agenda?

18 THE WITNESS: The GAC.

19 PRESIDENT BARIN: The GAC?

20 THE WITNESS: Yes.

21 PRESIDENT BARIN: And are you
22 involved in the preparation of that
23 agenda?

24 THE WITNESS: Yes, it's part of my
25 responsibilities to oversee and help the

1 meetings.

2 PRESIDENT BARIN: Is it fair to say
3 that it was your agenda?

4 THE WITNESS: It's the GAC's agenda.
5 It's agreed by the GAC.

6 PRESIDENT BARIN: Right. But as
7 being the person who was essentially in
8 charge, you would put the agenda forward?

9 THE WITNESS: The agenda was created
10 based on requests coming from individual
11 countries to -- to form that agenda. So
12 it's the sum of those inputs from
13 individual members and the GAC.

14 PRESIDENT BARIN: Okay. So then
15 there's this agenda that's -- that's
16 prepared and put forward, and then you go
17 from there.

18 And one of the items on that agenda
19 was .africa?

20 THE WITNESS: Correct.

21 PRESIDENT BARIN: Okay.

22 HONORABLE JUDGE CAHILL: Does the EU
23 have input on this agenda?

24 THE WITNESS: The EU -- the European
25 commission, which I think you're asking

1 about --

2 HONORABLE JUDGE CAHILL: Yeah.

3 THE WITNESS: -- did not.

4 HONORABLE JUDGE CAHILL: How about
5 the AUC?

6 THE WITNESS: They did not either.

7 HONORABLE JUDGE CAHILL: Excuse me.

8 PRESIDENT BARIN: Okay. So
9 continue on. You were saying -- you -- I
10 sort of stopped you from your flow.

11 You were explaining?

12 THE WITNESS: That's fine.

13 So in the decisional meeting, I came
14 to this item and explained to the room
15 that we are now considering a consensus
16 objection to DCA's application. And one
17 African country confirmed that they did
18 want to put it to a question.

19 There were instances where a country
20 might actually decide to remove something
21 from an agenda and -- and make that kind
22 of request.

23 Earlier in the week, on the basis of
24 discussions and so on and so forth --

25 PRESIDENT BARIN: So give us a bit

1 more context. So -- I mean, imagine --
2 because we know nothing about -- for you,
3 I'm sure it's sort of routine, but put us
4 in context as to how these -- how these
5 meetings operate.

6 Where are you and -- you're in
7 Beijing?

8 THE WITNESS: Yes.

9 So would you like me to -- to finish
10 with the -- the decisional point on DCA's
11 application or speak more generally about
12 GAC meetings?

13 PRESIDENT BARIN: Well, speak more
14 generally to put us in the context, but I
15 do want to get finally to the decision.

16 THE WITNESS: Okay.

17 So --

18 PRESIDENT BARIN: So you have an
19 agenda -- let me help you -- you have an
20 agenda; it's prepared in advance; it's
21 looked at. And then you --

22 THE WITNESS: I think it's going to
23 be helpful to be specific about the
24 agenda.

25 So in the past, the GAC has not had

1 a specific role as outlined in the
2 Guidebook regarding gTLDs. The GAC can
3 offer advice anytime it wants on any
4 topic that it chooses to issue advice on;
5 but in order to address controversial and
6 sensitive top-level domains, and, in
7 particular, the point about the ability
8 to put forward a consensus objection,
9 there was a specific agenda for that for
10 the Beijing meeting in order to manage
11 that -- handle those particular strings
12 or applications.

13 If you're talking about how GAC
14 agendas are prepared, generally, or how
15 we generate advice, generally --

16 PRESIDENT BARIN: No; I'm more
17 interested in the specific agenda.

18 THE WITNESS: Okay. So as pertains
19 to this particular application.

20 So as I was saying, one African
21 country confirmed that they wanted it put
22 to a question. I asked the question, and
23 there were no objections in the room.
24 And the room was so satisfied with this
25 result that there was unanimous applause.

1 HONORABLE JUDGE CAHILL: How many
2 countries are in the room?

3 THE WITNESS: I can't tell you
4 precisely. If you look at the record of
5 the meeting, which is the communiqué,
6 those are our official records of
7 outcomes from any meeting. You can see a
8 list of countries there. That will give
9 you an idea of the number.

10 Generally speaking, between 50 and
11 70 GAC members would -- would attend.

12 Because of the issues we were
13 dealing with, I think you had a higher
14 number than usual for this particular
15 meeting.

16 ARBITRATOR KESSEDJIAN: May I?

17 PRESIDENT BARIN: Yeah, sure.

18 - - -

19 EXAMINATION ON BEHALF OF THE PANEL

20 BY ARBITRATOR KESSEDJIAN

21 - - -

22 ARBITRATOR KESSEDJIAN: Am I correct
23 to think that the countries are the only
24 people who can -- people -- sorry -- are
25 the only entity who can see who is their

1 representative -- by whom they are --

2 yeah -- represented and so on?

3 THE WITNESS: Absolutely, yeah.

4 ARBITRATOR KESSEDJIAN: So they do

5 whatever they want in terms of --

6 THE WITNESS: Yes.

7 ARBITRATOR KESSEDJIAN: Okay.

8 And so if we speak about Kenya in

9 this particular case, because Kenya had a

10 special role, what do you remember about

11 that for the Beijing meeting?

12 I know, in your declaration, you say

13 you don't remember anything -- you don't

14 remember who was the representative or

15 who was there or not there for Kenya; is

16 that correct?

17 THE WITNESS: In terms of who was at

18 the Beijing GAC meetings, I recall that

19 Michael Katundu was there.

20 If you're talking about the session

21 that I referred to here, which was the

22 decision to take a consensus objection to

23 the application from DCA, then I don't

24 recall him being there.

25 ARBITRATOR KESSEDJIAN: Okay. So

1 you make a difference between the meeting
2 in general and the special session in
3 which DCA applications was voted on; is
4 that correct?

5 THE WITNESS: That's correct.

6 And, of course, people can come in
7 and out, and can be as strategic about
8 attending a particular discussion or
9 decision or not attending a particular
10 discussion or decision. That's entirely
11 up to a country to determine.

12 - - -

13 EXAMINATION (CONTINUED) ON BEHALF OF THE BOARD

14 BY PRESIDENT BARIN

15 - - -

16 PRESIDENT BARIN: So the context --
17 I'm just -- I was just trying to get from
18 you -- is this was on April 10th, 2013,
19 in Beijing --

20 THE WITNESS: Yes.

21 PRESIDENT BARIN: -- there's a room
22 then.

23 I assume you're chairing the
24 meeting, right?

25 THE WITNESS: Yes.

1 PRESIDENT BARIN: And so people are
2 in front of you, you tabled the issues
3 one by one, that's the general meeting --

4 THE WITNESS: Yes.

5 PRESIDENT BARIN: -- but then, as
6 part of that general meeting, there's
7 this very specific point, which is the
8 DCA .africa --

9 THE WITNESS: Yes.

10 PRESIDENT BARIN: -- point, which
11 you then table, correct?

12 THE WITNESS: Yes.

13 PRESIDENT BARIN: And you get
14 participation from the audience?

15 THE WITNESS: Yes.

16 So GAC members request to speak, and
17 so I acknowledge them. And then they can
18 make an intervention, and then I can make
19 a decision when appropriate.

20

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16 PRESIDENT BARIN: -- and following
17 that point, there was nothing else?

18 THE WITNESS: By my recollection,
19 no.

20 PRESIDENT BARIN: So what happens
21 just in terms of process, then? You say
22 Anybody else have any comments, you get
23 no comments, and --

24 THE WITNESS: Right --

25 PRESIDENT BARIN: -- and then what?

1 THE WITNESS: -- and then I say, I'm
2 now going to ask the question. I ask the
3 question. I see no objections. Then I
4 confirm that I see none, and then I
5 confirm that we now have a GAC consensus
6 objection.

7 That was the exchange.

8 PRESIDENT BARIN: And then it's
9 noted into -- into the record?

10 THE WITNESS: Yes. It went into the
11 communiqué.

12 ARBITRATOR KESSEDJIAN: So there is
13 no vote?

14 THE WITNESS: No.

15 PRESIDENT BARIN: As part of the
16 function that you occupied for GAC, had
17 you had a similar situation to that ever
18 occur with respect to any other item?

19 THE WITNESS: Could you clarify what
20 the similarity is?

21 PRESIDENT BARIN: Well, the
22 similarity is -- in this case, you have a
23 specific agenda relating to .africa --

24 THE WITNESS: Yes.

25 PRESIDENT BARIN: -- you had a

1 general meeting, as you said --

2 THE WITNESS: Yes.

3 PRESIDENT BARIN: -- and you had a
4 specific item on the agenda? The issue
5 was raised. You had one comment, and
6 then, essentially, a decision was
7 reached.

8 THE WITNESS: Yes.

9 PRESIDENT BARIN: Okay. Are
10 there -- were there -- have you been
11 involved in any other situations where a
12 similar decision was -- was reached as
13 part of your tenure at the GAC?

14 THE WITNESS: Other consensus
15 objections were issued at that meeting
16 and at the fall meeting.

17 PRESIDENT BARIN: In exactly the
18 same way?

19 THE WITNESS: Yes, the exact same
20 question was asked each time.

21 HONORABLE JUDGE CAHILL: And there
22 were objections?

23 THE WITNESS: In some cases, there
24 were objections, in which case, you do
25 not have a consensus objection. And for

1 one string, I can recall certainly there
2 was an objection carried.

3 ARBITRATOR KESSEDJIAN: On this very
4 question, when you said, yes, there were
5 the same question asked.

6 Do I have to understand that the
7 "same question" means applications --
8 objections to applicants, specific
9 applicants?

10 THE WITNESS: I would ask the room,
11 Are there any objections to a GAC
12 consensus objection to the string
13 ba-ba-ba-ba?

14 And then I would --

15 ARBITRATOR KESSEDJIAN: Which
16 example did you have before this year's
17 application --

18 THE WITNESS: So --

19 ARBITRATOR KESSEDJIAN: -- for
20 example, I mean --

21 THE WITNESS: -- this session was
22 the first time that we had done that, and
23 in that session, we agreed to object to
24 .gcc, as I recall.

25 ARBITRATOR KESSEDJIAN: Dot?

1 THE WITNESS: .gcc.

2 ARBITRATOR KESSEDJIAN: .gcc?

3 THE WITNESS: Yes.

4 HONORABLE JUDGE CAHILL: You agreed
5 to object or there were objectors to your
6 consensus objection?

7 THE WITNESS: We agreed to object.

8 There were other strings that were
9 put forward for consensus objection, and
10 they were not carried.

11 HONORABLE JUDGE CAHILL: They were
12 not carried?

13 THE WITNESS: Right. In other
14 words, countries put up their hands to
15 object and block it, in effect.

16 ARBITRATOR KESSEDJIAN: Okay. So
17 Beijing was the first time you ever did
18 that kind of process?

19 THE WITNESS: To object to a
20 particular application, yes.

21 ARBITRATOR KESSEDJIAN: Okay. Okay.

22 So how did you prepare, as the Chair
23 for this meeting, since you had no
24 precedent to work out of?

25 THE WITNESS: It was really in the

1 preparation of -- of the agenda. We have
2 preparatory calls in between meetings,
3 and we discussed within the Committee,
4 within the GAC how to proceed.

5 I made it very clear what the
6 question would be, and then it's the
7 responsibility of the countries, of
8 course, to consult at home and come with
9 positions prepared and ready to engage
10 with their colleagues if, for example,
11 they wanted an objection, to -- to gauge
12 what the other views are of the
13 colleagues.

14 And -- and in this way, it was clear
15 for colleagues what to prepare and what
16 the question would be and how it would be
17 handled, and when, for that matter.

18 ARBITRATOR KESSEDJIAN: I sense a
19 kind of contradiction between -- what you
20 say in your declaration is that all the
21 exchange of e-mails before the meeting --
22 and there seem to be substantial amount
23 of e-mail exchange before the meetings --
24 before the meetings -- and you say this
25 does not matter. What matters is what's

1 going on at the meeting.

2 But now you just explained to us
3 that, basically, at the meeting, happens
4 nothing. You ask the question and no
5 discussion almost, one country just write
6 something -- I'm not entirely sure what
7 they said -- and then you declare that
8 there is a consensus.

9 So how do you reconcile that?

10 Because then, you know, in order to get
11 to that consensus -- I mean, I've been
12 chairing meetings where consensus was the
13 rule. You need to do a lot of
14 preparation in advance and make sure that
15 the consensus is going to be accepted.

16 So how do you reconcile those two
17 things?

18 THE WITNESS: A lot happens in the
19 meetings, and the decisional part is at
20 the end. So that's when the communiqués
21 from our meetings are finalized. So
22 that's at the end.

23 And up until that point, there's a
24 lot of engagement, most of it taking
25 place outside the room. Of course, we're

1 having discussions in the room about the
2 topics that we need to. But that's all
3 ready to prepare, that moment when you
4 are going to decide.

5 And, hopefully, you know in advance
6 what is probably going to happen, simply
7 because Chairs don't like to be
8 surprised. But surprises do happen.
9 And -- and it's really -- really a matter
10 of -- of the decisional meeting at the
11 end reflecting the result of the meeting.

12 PRESIDENT BARIN: So are you
13 saying -- because I asked you this
14 question earlier. I'm a little puzzled
15 now.

16 Are you saying that a lot of the
17 decision-making process takes place prior
18 to the meeting and even during to and
19 leading to the actual decision where
20 people are outside?

21 THE WITNESS: None of the GAC
22 decision-making takes place in any other
23 form than -- than when the GAC is making
24 a decision.

25 If -- if colleagues are trying to

1 resolve issues, come up with a way
2 forward, that's all very much encouraged;
3 that's -- that's productive. That's more
4 informal but very much encouraged.

5 PRESIDENT BARIN: But I also
6 understood you to say that the -- when
7 the issue was tabled, which is the
8 .africa to be specific, it didn't take
9 very long for the decision to be -- to be
10 made, which is --

11 THE WITNESS: No, not at all, yeah.

12 PRESIDENT BARIN: -- which means
13 that a lot of this, I guess,
14 consultation, if I could put it that way,
15 was happening before?

16 THE WITNESS: That is what -- what I
17 certainly hoped, as Chair, would happen.
18 And -- and, as I say, it doesn't always,
19 but -- but --

20 PRESIDENT BARIN: But be specific in
21 this case.

22 Is that what happened in the .africa
23 case?

24 THE WITNESS: The decision was very
25 quick, and --

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7 HONORABLE JUDGE CAHILL: Okay.

8 THE WITNESS: -- that question was
9 addressed via having that meeting.

10 PRESIDENT BARIN: And what's your
11 understanding of what -- what the
12 consequence of that decision is or was
13 when you took it? So what happens from
14 that moment on?

15 THE WITNESS: It's conveyed to the
16 Board, so all the results, the agreed
17 language coming out of GAC is conveyed to
18 the Board, as was the case with the
19 communiqué from the Beijing meeting.

20 PRESIDENT BARIN: And how is that
21 conveyed to the Board?

22 THE WITNESS: Well, it's a written
23 document, and usually Support Staff are
24 forwarding it to Board Staff.

25 ARBITRATOR KESSEDJIAN: Could you

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

3 THE WITNESS: Okay.

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

7 PRESIDENT BARIN: When you say "the
8 document," are you referring to the
9 communiqué?

10 THE WITNESS: Yes.

11 PRESIDENT BARIN: Okay. And there
12 are no other documents?

13 THE WITNESS: The communiqué --

14 PRESIDENT BARIN: In relation to
15 .africa. I'm not interested in any
16 other.

17 THE WITNESS: Yes, it's the
18 communiqué.

19 PRESIDENT BARIN: And it's prepared
20 by your staff? You look at it?

21 THE WITNESS: Right --

22 PRESIDENT BARIN: And then it's sent
23 over to --

24 THE WITNESS: -- right, it's agreed
25 by the GAC in full, the contents.

1 PRESIDENT BARIN: And then sent over
2 to the Board?

3 THE WITNESS: And then sent, yes.

4 PRESIDENT BARIN: And what happens
5 to that communiqué? Does the Board
6 receive that and say, Ms. Dryden, we have
7 some questions for you on this, or --

8 THE WITNESS: Not really. If they
9 have questions for clarification, they
10 can certainly ask that in a meeting. But
11 it is for them to receive that and then
12 interpret it and -- and prepare the Board
13 for discussion or decision.

14 PRESIDENT BARIN: Okay. And in this
15 case, you weren't asked any questions or
16 anything?

17 THE WITNESS: I don't believe so. I
18 don't recall.

19 PRESIDENT BARIN: Any follow-ups,
20 right?

21 THE WITNESS: Right.

22 PRESIDENT BARIN: And in the
23 subsequent meeting, I guess the issue was
24 tabled. The Board meeting that it was
25 tabled, were you there?

1 THE WITNESS: Yes. I don't
2 particularly recall the meeting, but yes.

3 PRESIDENT BARIN: As, again, the
4 nonliaison?

5 THE WITNESS: As the nonvoting
6 liaison, correct.

7 PRESIDENT BARIN: The nonvoting
8 liaison?

9 THE WITNESS: Correct.

10 PRESIDENT BARIN: If there were any
11 questions by the Board on the particular
12 issue, you were a nonvoting member?

13 THE WITNESS: Probably, yeah.

14 PRESIDENT BARIN: Okay.

15 - - -

16 EXAMINATION (CONTINUED) ON BEHALF OF THE BOARD

17 BY ARBITRATOR KESSEDJIAN

18 - - -

19 ARBITRATOR KESSEDJIAN: Can I turn
20 your attention to Paragraph 5 of your
21 declaration?

22 Here, you basically repeat what is
23 in the ICANN Guidebook literature,
24 whatever. These are the exact words,
25 actually, that you use in your

1 declaration in terms of why there could
2 be an objection to an applicant -- to a
3 specific applicant.

4 And you use three criteria:
5 problematic, potentially violating
6 national law, and raise sensitivities.

7 Now, I'd like you to, for us -- for
8 our benefit, to explain precisely, as
9 concrete as you can be, what those three
10 concepts -- how those three concepts
11 translate in the DCA case. Because this
12 must have been discussed in order to get
13 this very quick decision that you are
14 mentioning.

15 So I'd like to understand, you know,
16 because these are the criteria -- these
17 are the three criteria; is that correct?

18 THE WITNESS: That is what the
19 witness statement says, but the link to
20 the GAC and the role that I played in
21 terms of the GAC discussion did not
22 involve me interpreting those three
23 things. In fact, the GAC did not provide
24 rationale for the consensus objection.

25 ARBITRATOR KESSEDJIAN: No.

1 But, I mean, look, the GAC is taking
2 a decision which -- very quickly -- I'm
3 using your words, "very quickly" --
4 erases years and years and years of work,
5 a lot of effort that have been put by a
6 single applicant.

7 And the way I understand the rules
8 is that the -- the GAC advice --
9 consensus advice against that applicant
10 are -- is based on those three criteria.

11 Am I wrong in that analysis?

12 THE WITNESS: I'm saying that the
13 GAC did not identify a rationale for
14 those governments that put forward a
15 string or an application for consensus
16 objection. They might have identified
17 their reasons, but there was not GAC
18 agreement about those reasons or -- or --
19 or -- or rationale for that.

20 We had some discussion earlier about
21 Early Warnings. So Early Warnings were
22 issued by individual countries, and they
23 indicated their rationale. But, again,
24 that's not a GAC view.

25 ARBITRATOR KESSEDJIAN: So,

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

6 THE WITNESS: I'm telling you the
7 GAC did not provide a rationale. And
8 that was not a requirement for issuing a
9 GAC --

10 HONORABLE JUDGE CAHILL: But you
11 also want to check to see if the
12 countries are following the right --
13 following the rules, if there are reasons
14 for rejecting this or it falls within the
15 three things that my colleague's talking
16 about.

17 THE WITNESS: The practice among
18 governments is that governments can
19 express their view, whatever it may be.
20 And so there's a deference to that.
21 That's certainly the case here as well.

22 The -- if a country tells -- tells
23 the GAC or says it has a concern, that's
24 not really something that -- that's
25 evaluated, in the sense you mean, by the

1 other governments. That's not the way
2 governments work with each other.

3 HONORABLE JUDGE CAHILL: So you
4 don't go into the reasons at all with
5 them?

6 THE WITNESS: To issue a consensus
7 objection, no.

8 HONORABLE JUDGE CAHILL: Okay.

9 - - -

10 EXAMINATION (CONTINUED) ON BEHALF OF THE BOARD

11 BY PRESIDENT BARIN

12 - - -

13 PRESIDENT BARIN: Just a quick
14 follow-up, and this may be an obvious
15 answer to the question.

16 Is there a way that you check as to
17 who is involved in sort of the
18 participation on the part of the
19 governments? In other words, do you --
20 is there a control mechanism that
21 indicates to you that certain people are
22 there that should be there?

23 It -- it's a totally innocent
24 question, if you will.

25 HONORABLE JUDGE CAHILL: It's an

1 arbitrator question.

2 (Laughter.)

3 THE WITNESS: The GAC maintains
4 records in the sense of needing to -- to
5 have -- it's useful to have a point of
6 contact within a particular government,
7 knowing which part of government is
8 responsible for GAC, and then having a
9 specific individual that really all other
10 questions about who speaks for that
11 country, who attends a meeting, them
12 being appointed, just generally, that's
13 entirely within the purview of that
14 country.

15 PRESIDENT BARIN: Okay. And I guess
16 that reinforces the point that you were
17 making perhaps earlier that by the time
18 you get to the actual meeting, you pretty
19 much have an idea. Because if there was
20 anything that was to be raised by a
21 particular government, then you would
22 know because they would have their
23 official channels and letters and
24 correspondence and -- to communicate with
25 you?

1 THE WITNESS: Correct.

2 And if I could add, in the instance
3 of being in a meeting, when I called upon
4 someone to speak, if I had incorrectly
5 named them or -- or if they say
6 something, to repeat my point earlier,
7 that -- that doesn't accord with what
8 that government expects, then it is up to
9 them to correct that or address that
10 point. It's . . .

11 PRESIDENT BARIN: I guess it goes
12 back to the point that my colleague
13 Professor Kessedjian was making, with
14 respect to the e-mails and the
15 correspondence and the communications
16 beforehand are -- they do play an
17 important role because you would suspect
18 that if something big was going to
19 happen, you would want to hear or you
20 would hear it or you would have heard
21 about it prior to getting to the meeting?

22 THE WITNESS: Not necessarily.

23 What I'm describing is a scenario
24 that's optimal for a Chair to run a
25 meeting.

1 Please understand, we had
2 controversial strings, like

3 Redacted - GAC Designated Confidential Information

5 Understand, there's a lot of activity.

6 And we are encouraging colleagues to
7 please be speaking to each other,
8 understand what views are in the room and
9 to please reach out. There's really not
10 a lot I can do beyond hoping that
11 communication is good.

12 But all of that does not have
13 bearing on -- on the validity of the
14 final decision. It doesn't diminish the
15 validity of a final decision.

16 PRESIDENT BARIN: Were you,
17 yourself, involved in e-mail
18 communications with any --

19 THE WITNESS: No --

20 PRESIDENT BARIN: -- countries'
21 representatives?

22 No?

23 THE WITNESS: Regarding the e-mails,
24 no.

25 PRESIDENT BARIN: Okay.

1 - - -

2 EXAMINATION ON BEHALF OF THE PANEL

3 BY HONORABLE JUDGE CAHILL

4 - - -

5 HONORABLE JUDGE CAHILL: You may not
6 know this, but how did the AUC become a
7 member of the GAC?

8 THE WITNESS: As I recall, they
9 would have followed the usual process,
10 which is to send a letter requesting to
11 join. That letter is addressed to the
12 Chair.

13 HONORABLE JUDGE CAHILL: That is not
14 something that you would be involved in?

15 THE WITNESS: The letter comes to
16 me, as Chair --

17 HONORABLE JUDGE CAHILL: So you
18 would be involved?

19 THE WITNESS: -- in which case, an
20 acknowledgment is sent. If it's a really
21 straightforward request to join, then
22 it's -- it's immediately a letter to
23 confirm.

24 HONORABLE JUDGE CAHILL: Did it at
25 all concern you that they were one of the

1 two bidders on the .africa?

2 THE WITNESS: That wasn't relevant
3 at the time --

4 HONORABLE JUDGE CAHILL: It wasn't
5 what?

6 THE WITNESS: That issue wasn't in
7 the GAC at the time. I had no insight
8 into --

9 HONORABLE JUDGE CAHILL: But at the
10 time of the consensus vote, did it come
11 up that maybe -- you say in your brief
12 that Africa -- I'm talking about Early
13 Warnings. Never mind --

14 THE WITNESS: Early Warnings.

15 HONORABLE JUDGE CAHILL: -- but they
16 were going to benefit by this vote.

17 THE WITNESS: It's -- it's a
18 political bucket, the GAC, so it is a
19 political decision that was taken.
20 Procedurally, it was very
21 straightforward.

22 HONORABLE JUDGE CAHILL: Politics
23 are involved in this? Geez.

24 THE WITNESS: It's all about
25 politics.

1 HONORABLE JUDGE CAHILL: Did the GAC
2 ever send out an Early Warning notice in
3 its own name --

4 THE WITNESS: No.

5 HONORABLE JUDGE CAHILL: -- because
6 I know there was one that went out for
7 AUC.

8 Was there another one that went out?
9 You say in your declaration African Union
10 and other countries requested GAC
11 transmit Early Warning notices.

12 Was that -- what were those notices?

13 THE WITNESS: There were a variety
14 of -- of different notices that were
15 conveyed.

16 Again, just to be precise, that is
17 the GAC transmitting those
18 Early Warnings; it's not the GAC
19 expressing the view.

20 HONORABLE JUDGE CAHILL: So the GAC
21 goes ahead and --

22 THE WITNESS: It's to facilitate
23 those Early Warnings being issued so that
24 those countries could explain what they
25 were concerned about and -- and alert the

1 applicants that there could be an issue.

2 HONORABLE JUDGE CAHILL: Did it
3 raise any concerns that African Union
4 Commission was going to send out an Early
5 Warning to its competitor?

6 THE WITNESS: No one raised it in
7 the GAC.

8 HONORABLE JUDGE CAHILL: No one
9 raised it. Nobody thought of it either,
10 I guess --

11 THE WITNESS: No one raised it.

12 HONORABLE JUDGE CAHILL: -- till
13 now, that's why we're here.

14 ARBITRATOR KESSEDJIAN: I'm not sure
15 I followed that conversation.

16 Nobody raised what?

17 THE WITNESS: The fact that the AUC
18 issued the Early Warning notice.

19 HONORABLE JUDGE CAHILL: Where is it
20 in the rules that you have to be present
21 in order to vote?

22 You make the point that the Kenyan
23 official, who you say doesn't have any
24 authority anyway, but that's my -- but is
25 there a rule that says you have to be in

1 that room at that time? You can't do it
2 from outside or . . .

3 THE WITNESS: That is the -- the
4 practice.

5 So at a decisional meeting, a
6 government's -- certainly in the case
7 with the GAC, you need to be present in
8 order to contribute to that.

9 HONORABLE JUDGE CAHILL: That's the
10 practice. This was the first time you've
11 done it this way, so there probably
12 wasn't a practice before this.

13 THE WITNESS: All of our communiqués
14 are handled this way. All of our -- our
15 advice in those communiqués from our
16 meetings, it's always an in-person
17 finalization at the end of our -- of our
18 week or so of meetings.

19 HONORABLE JUDGE CAHILL: It's been
20 like that forever?

21 THE WITNESS: Yes. For the seven or
22 so years I've been in the GAC, yes.

23 HONORABLE JUDGE CAHILL: Did
24 everyone understand that -- well, let
25 me -- you don't know what other people

1 understood.

2 Do you think you communicated to
3 other -- everyone that if there was not
4 an objection to -- if nobody stood up and
5 said, I object to taking this off
6 calendar, that then -- then the GAC was
7 going to send a -- a communiqué to the
8 ICANN saying that it's our consensus this
9 be not considered anymore?

10 Does everybody know that was going
11 to happen?

12 THE WITNESS: All efforts were made
13 to be clear about the agenda, the
14 question, how this matter would be
15 handled.

16 It is the responsibility of
17 individual GAC members to -- to be
18 briefed, to be prepared and to know where
19 they need to be if, in fact, they need to
20 be there.

21 HONORABLE JUDGE CAHILL: I guess
22 it's your feeling that all the
23 communications from the Kenyan member --
24 the Kenyan person who wasn't there, that
25 was -- that was communications, but the

1 only thing that counted was what happened
2 when you asked for the -- for the
3 consensus vote, right?

4 THE WITNESS: That is the only thing
5 that counted, yes.

6 HONORABLE JUDGE CAHILL: Okay.

7 I think that's it.

8 - - -

9 EXAMINATION (CONTINUED) ON BEHALF OF THE BOARD

10 BY PRESIDENT BARIN

11 - - -

12 PRESIDENT BARIN: I have one
13 question for you.

14 We spent, now, a bit of time or a
15 considerable amount of time talking to
16 you about the process, or the procedure
17 leading to the consensus decision.

18 Can you tell me what your
19 understanding is of why the GAC consensus
20 objection was made finally? In terms of
21 the substance, what is --

22 THE WITNESS: With .gcc?

23 PRESIDENT BARIN: Yes.

24 THE WITNESS: Again, no rationale
25 was provided.

1 HONORABLE JUDGE CAHILL: I'm sorry.

2 Say again.

3 THE WITNESS: There was no rationale
4 echoed by the GAC regarding .gcc.

5 PRESIDENT BARIN: But in terms of
6 the .africa, the decision -- the issue
7 came up, the agenda -- the issue came up,
8 and you made a decision, correct?

9 THE WITNESS: The GAC made a
10 decision.

11 PRESIDENT BARIN: Right. When I
12 say "you," I mean the GAC.

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

18 Can you tell us why the decision
19 happened?

20 THE WITNESS: The sum of the GAC's
21 advice is reflected in its written advice
22 in the communiqué. That is the view to
23 GAC. That's -- that's --

24 PRESIDENT BARIN: I appreciate that.
25 I just wanted to get your view, if you

1 can give it to me.

2 THE WITNESS: That is my view in my
3 capacity as Chair from that time.

4 PRESIDENT BARIN: Yeah, that's fine.
5 Okay.

6 - - -

7 EXAMINATION (CONTINUED) ON BEHALF OF THE BOARD
8 BY HONORABLE JUDGE CAHILL

9 - - -

10 HONORABLE JUDGE CAHILL: So who puts
11 the DCA on the agenda?

12 And I understand that the DCA was on
13 the agenda, but the -- AUC was not on the
14 agenda. So there's only one of the two
15 competing proposals that were on the
16 agenda.

17 Why would that be?

18 THE WITNESS: So GAC members had the
19 option, the possibility of requesting to
20 add a particular string or application to
21 that agenda for the consensus objections.
22 Three African countries asked to put that
23 particular string or application for DCA
24 on the agenda.

25 If -- if there aren't -- if there

1 isn't the -- the AUC application there,
2 it's because no one asked to put it
3 there.

4 HONORABLE JUDGE CAHILL: So how many
5 countries need to be asking to be put on
6 the agenda before --

7 THE WITNESS: One?

8 HONORABLE JUDGE CAHILL: One?

9 THE WITNESS: Yes.

10 HONORABLE JUDGE CAHILL: So one
11 country, like Kenyan, can say, I want to
12 put those on?

13 THE WITNESS: Right.

14 - - -

15 EXAMINATION (CONTINUED) ON BEHALF OF THE BOARD

16 BY PRESIDENT BARIN

17 - - -

18 PRESIDENT BARIN: I'll come back
19 again. I want to try this one more time.

20 Are you able to tell us what the
21 reason behind those three countries
22 objecting were? In other words, would
23 you know what that reason would be, or it
24 didn't matter for you?

25 THE WITNESS: It's not germane to my

1 responsibilities in handling that
2 question.

3 And if you want to understand the
4 views, there's no alternative other than
5 asking them directly.

6 PRESIDENT BARIN: Okay. But I was
7 just curious to know whether you had an
8 understanding as to . . .

9 HONORABLE JUDGE CAHILL: She
10 doesn't.

11 PRESIDENT BARIN: No.

12 ARBITRATOR KESSEDJIAN: I still --
13 Babak, can I continue on this?

14 HONORABLE JUDGE CAHILL: Did we
15 interrupt you?

16 ARBITRATOR KESSEDJIAN: I'm sorry.

17 HONORABLE JUDGE CAHILL: We
18 interrupted you. I'm sorry.

19 ARBITRATOR KESSEDJIAN: No, no.

20 - - -

21 EXAMINATION (CONTINUED) ON BEHALF OF THE BOARD

22 BY ARBITRATOR KESSEDJIAN

23 - - -

24 ARBITRATOR KESSEDJIAN: I just want
25 to come back to the point that I was

1 making earlier.

2 To your Paragraph 5, you said -- you
3 answered to me saying that is my
4 declaration, but it was not exactly
5 what's going on.

6 Now, we are here to -- at least the
7 way I understand the Panel's mandate, to
8 make sure that the rules have been obeyed
9 by, basically. I'm synthesizing.

10 So I don't understand how, as the
11 Chair of the GAC, you can tell us that,
12 basically, the rules do not matter --
13 again, I'm rephrasing what you said, but
14 I'd like to give you another opportunity
15 to explain to us why you are mentioning
16 those criteria in your written
17 declaration, but, now, you're telling us
18 this doesn't matter.

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

22 THE WITNESS: I don't need to read
23 again my declaration. Thank you.

24 The header for the GAC's discussions
25 throughout was to refer to strings or

1 applications that were controversial or
2 sensitive. That's very broad.

3 And --

4 ARBITRATOR KESSEDJIAN: I'm sorry.
5 You say the rules say problematic,
6 potentially violate national law, raise
7 sensitivities.

8 These are precise concepts.

9 THE WITNESS: Problematic, violate
10 national law -- there are a lot of
11 laws -- and sensitivities does strike me
12 as being quite broad.

13 HONORABLE JUDGE CAHILL:
14 Sensitivities especially?

15 THE WITNESS: Yes, I would have to
16 agree, yeah.

17 ARBITRATOR KESSEDJIAN: Okay. So we
18 are left with what? No rules?

19 THE WITNESS: No rationale with the
20 consensus objections. That's the -- the
21 effect.

22 ARBITRATOR KESSEDJIAN: I'm done.

23 HONORABLE JUDGE CAHILL: I'm done.

24 PRESIDENT BARIN: So am I.

25 Would you like to take a little -- a

1 few minutes before we continue on? Are
2 you okay?

3 THE WITNESS: I'm okay.

4 PRESIDENT BARIN: Okay.

5 THE WITNESS: Thank you.

6 HONORABLE JUDGE CAHILL: Don't be
7 shy.

8 PRESIDENT BARIN: Mr. LeVee, we'll
9 follow the same --

10 MR. LEVEE: Absolutely. It's --
11 Mr. Ali should go first.

12 PRESIDENT BARIN: So the same?

13 MR. ALI: Yes.

14 - - -

15 EXAMINATION ON BEHALF OF CLAIMANT

16 DOTCONNECTAFRICA TRUST

17 - - -

18 BY MR. ALI:

19 Q. As you know, I'm Arif Ali. I have
20 some questions and follow up on what it is that
21 the Panel has been asking about on various topics.
22 And if I stray, I will go back to the right path.

23 So just so I understand one part of
24 your testimony regarding what you knew at the
25 time that the AUC applied to join the GAC.

1 Do you recall when you got the request
2 from the AUC to join the GAC?

3 A. No, I don't.

4 Q. Okay. So do you recall when the AUC
5 was approved to join the GAC?

6 A. It would be via letter when they
7 joined.

8 Q. As I understand, it would have been by
9 the end of June 2012, but I stand to be corrected
10 if there's other correspondence that makes it more
11 specific as to when they were formally approved.

12 So if -- with that date in mind, does
13 that trigger anything, any recollection as to
14 when they put their application in?

15 A. I believe the June 2012 date followed
16 a further discussion about the status of -- of the
17 AUC within the GAC. They were accepted earlier
18 than that and accepted as an observer.

19 So by my recollection, the letter you
20 saw, if it was addressing the point about them
21 becoming a member listed along with other members
22 that were governments in GAC records, then, I --
23 I think that might be the reason you see a letter
24 from that time.

25 Q. Okay. So they -- so the AUC initially

1 joined the GAC as an observer?

2 A. Correct.

3 Q. Nonvoting?

4 A. Correct.

5 Q. Do you recall when that happened?

6 A. I don't. I don't.

7 Q. How would I find out when that
8 happened?

9 A. Through -- there is usually an
10 exchange of letters. The letters might be
11 published on the GAC Web site. They might be
12 available to you directly.

13 Also, the GAC would list in its
14 communiqués when they were new members during
15 that time. So that would be a possible source.

16 Q. So you were here during our opening
17 presentations, right?

18 A. (No audible response.)

19 Q. And you heard me and my colleagues
20 make mention to the draft of the communiqué that
21 was initially sent by Mr. Crocker sometime in
22 March of 2012. And that particular letter that
23 was sent by Mr. Crocker was sent to you to review.

24 Do you recall that part of my
25 presentation?

1 A. I do, yes.

2 Q. Okay. And do you recall having seen
3 the draft letter that was sent by ICANN Staff of
4 BGC to you for comment?

5 A. I don't recall it.

6 Q. Have you subsequently seen the draft
7 that was sent to you?

8 A. Not since -- since it would have been
9 issued, no, I have not.

10 Q. Okay. So you have not seen a copy of
11 this letter?

12 A. Not since it would have been sent, no.

13 Q. Okay. And insofar as applications
14 for -- do you recall -- sorry. Strike that.

15 Do you recall whether the AUC was
16 already a -- an observer on the GAC prior to
17 February 2012?

18 A. I don't.

19 Q. Insofar as other requests are
20 concerned for a country or an international
21 organization to join the GAC, is it common that
22 you would receive a communication from ICANN Staff
23 beforehand?

24 A. No. It's entirely a GAC decision.

25 Q. So in this instance, on 24th of

1 February 2012, you were sent a communication by
2 ICANN Staff which had been drafted with the
3 involvement of the BGC to provide comments on the
4 letter that was going to be going to the AUC.

5 So that was unusual?

6 MR. LEVEE: Could I just interject?

7 Counsel is not showing the witness
8 the letter. The letter doesn't say
9 anything about joining the GAC.

10 If counsel wants to say that the
11 letter does reference it, then he should
12 show it to the witness.

13 MR. ALI: Fair point. Let me
14 rephrase.

15 BY MR. ALI:

16 Q. And I'm happy to -- to -- to show you
17 the letter. It's fairly long.

18 MS. ZERNIK: If you give me an
19 exhibit number, I can get it.

20 BY MR. ALI:

21 Q. And there's a binder right there if
22 you want to find the document if you want to see.

23 HONORABLE JUDGE CAHILL: What's the
24 document?

25 MR. ALI: It is --

1 HONORABLE JUDGE CAHILL: She doesn't
2 have a screen, so that doesn't help.

3 MS. ZERNIK: Right.

4 MR. ALI: If you look under the tab
5 that says --

6 MS. CRAVEN: It's in the middle
7 section, which is the section entitled
8 GAC e-mails. And it is Tab --

9 MS. ZERNIK: I believe it's
10 Exhibit C. I have 24 --

11 ARBITRATOR KESSEDJIAN: C-24 is
12 ICANN letter of March 8th.

13 MR. ALI: That's what I'm referring
14 to, because we don't --

15 ARBITRATOR KESSEDJIAN: Okay. So
16 it's C-24.

17 MR. ALI: Yes.

18 -- they didn't produce the other
19 communications, so we don't know when
20 the -- when the AUC applied to become a
21 member in observer status. We don't know
22 when they -- when they were removed from
23 observer status to voting status.

24 And that's what we're trying to
25 establish, if we can create some sort of

1 time markers here as to what happened
2 when.

3 THE WITNESS: I don't have the
4 document.

5 ARBITRATOR KESSEDJIAN: C-24. It's
6 a long letter. It's a cover letter.

7 BY MR. ALI:

8 Q. Just to -- this document references
9 what the AUC could achieve through the GAC. And I
10 think that's a fair characterization of what the
11 letter states in March --

12 PRESIDENT BARIN: Let's start, to be
13 fair, have you seen this letter before,
14 Ms. Dryden?

15 THE WITNESS: It's something that I
16 would have been copied on or been aware
17 of at the time. The content of it I
18 don't -- I don't recall.

19 HONORABLE JUDGE CAHILL: Do you
20 remember seeing it, though, before?

21 THE WITNESS: Before it was sent?

22 HONORABLE JUDGE CAHILL: No --
23 well --

24 THE WITNESS: As a matter of -- of
25 practice, this is the kind of letter that

1 would have been --

2 HONORABLE JUDGE CAHILL: Okay.

3 PRESIDENT BARIN: Can you tell us
4 what the practice is?

5 THE WITNESS: These letters are
6 sometimes shared on the Board list. And
7 I'm on the Board list as a nonvoting
8 liaison, so --

9 PRESIDENT BARIN: So you would see
10 it before it goes in?

11 THE WITNESS: Yes, or sometimes,
12 because I'm the Chair of the GAC and we
13 represent governments and organizations,
14 plus this relates to ICANN documents,
15 it's a courtesy, if nothing else.

16 MR. ALI: Could we pull up C-113,
17 please?

18 HONORABLE JUDGE CAHILL: C what?

19 MR. ALI: 113.

20 MR. LEVEE: Do you have a copy of
21 that binder for us?

22 MR. ALI: I believe one was provided
23 to you.

24 I apologize for the confusion of the
25 binders.

1 MR. LEVEE: I don't have one.

2 MS. CRAVEN: I think it's actually
3 underneath the one that's next to yours.

4 MR. ALI: Why don't you just put the
5 screen up so she can see?

6 MR. LEVEE: Is it this (indicating)?

7 MS. CRAVEN: It's that. This
8 document is not in that.

9 PRESIDENT BARIN: C-113 is the
10 e-mail from Jamie Hedlund, right?

11 MR. ALI: Sorry?

12 PRESIDENT BARIN: Is that the e-mail
13 from Jamie Hedlund?

14 MR. ALI: That is an e-mail from
15 Chris Mondini dated 24 February 2012 --

16 PRESIDENT BARIN: Okay.

17 MR. ALI: -- to Heather Dryden at
18 Heather.Dryden@ic.gc.ca, copying
19 Jamie Hedlund and Anne-Rachel Inné and
20 Diane Schroeder. And it says, Draft
21 response to AU Communiqué.

22 BY MR. ALI:

23 Q. Do you have that document in front of
24 you, Ms. Dryden?

25 A. No, I don't.

1 Q. Okay.

2 MR. ALI: You don't have that up on
3 the screen?

4 MR. LEVEE: We can't find it, so
5 we're still looking.

6 MR. ALI: You can't find it on --

7 MS. ZERNIK: C-113.

8 MR. ALI: Exhibit C-113-001.

9 (Pause.)

10 MR. ALI: Got it?

11 MR. LEVEE: I do have it. And for
12 what it's worth, it's well beyond the
13 scope of the Panel's questions.

14 MR. ALI: I don't believe so --

15 PRESIDENT BARIN: Let's hear the
16 question --

17 MR. ALI: -- I don't believe so.

18 And I think that it's entirely

19 appropriate in light of --

20 HONORABLE JUDGE CAHILL: You already
21 won.

22 MR. ALI: -- the Panel's
23 questioning -- excuse me?

24 HONORABLE JUDGE CAHILL: You already
25 won.

1 MR. ALI: Thank you.

2 Sometimes the pugilist comes out,
3 and one never figures out if one is
4 actually winning or not. Many a knockout
5 has happened as a result.

6 HONORABLE JUDGE CAHILL: No, no.

7 BY MR. ALI:

8 Q. So, Ms. Dryden, let's try this again.
9 C-113, is that up on the screen or do
10 you have that in front of you?

11 A. I have it in front of me.

12 Q. Thank you.

13 And just to be clear, do we have --
14 it's an e-mail from Chris Mondini to
15 Heather Dryden, Jamie Hedlund and
16 Anne-Rachel Inné, Diane Schroeder, and the
17 subject is Draft response to AU Communiqué.

18 Are we looking at the same document?

19 A. Yes.

20 Q. Okay. Who is Jamie Hedlund?

21 A. He's an employee of ICANN.

22 Q. Who's Anne-Rachel Inné?

23 A. She's also an employee of ICANN?

24 Q. And Diane Schroeder?

25 A. Also an employee of ICANN.

1 Q. Okay. And Chris Mondini?

2 A. An employee of ICANN.

3 Q. Okay. This letter -- or this e-mail
4 says, Dear Heather, The attached draft response is
5 the combined effort of a number of staff members
6 as well as members of the BGRC. It will be sent
7 in the form of a letter from Steve Crocker on
8 behalf of the Board.

9 I'm sending it for your review, and
10 welcome any comments or advice before we send it
11 out next week.

12 And the subject is Draft response to
13 AU Communiqué.

14 Do you recall having received this
15 e-mail and having reviewed the draft response to
16 the AU communiqué?

17 A. I don't recall this specific e-mail or
18 providing comments.

19 But I would like to explain that
20 there's nothing unusual about this kind of desire
21 to be diplomatic with -- with government
22 colleagues and -- and to communicate with them.

23 So it's -- it's not unusual.

24 Q. Sorry. I didn't understand that
25 response.

1 Diplomatic on the part of whom with
2 respect to which government colleagues?

3 A. Governments generally. So in the GAC,
4 of course, it's comprised of governments, and they
5 would be receiving this communication. So . . .

6 Q. Thank you for that clarification.

7 But what I'm just trying to understand
8 is why ICANN Staff, on this particular occasion,
9 are sending you a draft of a communication that
10 they're sending to the AUC.

11 A. Because they're wanting to provide
12 that opportunity to provide comments if they
13 deemed it beneficial to their draft. But that's
14 really an aid of having positive communications
15 with governments, generally.

16 Obviously, the GAC is a major
17 component of -- of that activity within the ICANN
18 structure.

19 Q. So is it your testimony that the ICANN
20 Staff here are communicating with you in your
21 capacity as a Canadian Government representative
22 or Chair of GAC?

23 A. They're communicating with me because
24 I'm the Chair of the GAC.

25 Q. I see.

1 So -- and the idea here is that
2 they're looking for your implemental or input
3 with respect to the communication that will be
4 sent to the AUC having obtained your views
5 with -- from the perspective of -- as GAC Chair;
6 is that correct?

7 A. It's quite clear, I think, from what's
8 written here, it's simply providing an
9 opportunity, if I wish to take it, if it was
10 appropriate to do so, to communicate.

11 Q. Okay. And do you recall if you took
12 it?

13 A. I don't.

14 MR. LEVEE: Heather, speak up a
15 little bit.

16 THE WITNESS: Sorry.

17 I don't recall.

18 BY MR. ALI:

19 Q. So you don't recall whether you
20 commented on the draft that had been sent to you
21 by ICANN Staff?

22 A. Correct.

23 PRESIDENT BARIN: May I?

24 Is this the kind of, sort of, draft
25 letter that you would get from your

1 colleagues on other issues as well? In
2 other words, is it -- was it frequent for
3 you to get letters in draft for you to
4 comment on and . . .

5 THE WITNESS: When the Board was
6 communicating with governments, I think
7 there were circumstances where those
8 letters would be circulated via
9 the -- the Board list, which I mentioned
10 I was a part of as a nonvoting liaison to
11 the Board --

12 PRESIDENT BARIN: But this is not
13 one of them. This is -- as I understood
14 you said, these are letters that are --
15 these are employees of -- of ICANN.
16 These are not Board members.

17 THE WITNESS: But the signatory on
18 the letter is -- is ICANN's leadership,
19 the Chair of the Board.

20 So staff are facilitating that
21 activity.

22 PRESIDENT BARIN: Okay.

23 I guess my question is, There must
24 have been other letters like this that
25 these staff members perhaps prepared

1 for -- I don't know -- I guess, other
2 communiqués, or is this the only one?

3 THE WITNESS: In terms of the
4 letters that come from the Board, then
5 the Board would be better able to respond
6 to the kinds of letters that they would
7 send to -- to -- to governments, which
8 is, I think, what you're -- how you're
9 categorizing this type of letter.

10 PRESIDENT BARIN: Okay.

11 ARBITRATOR KESSEDJIAN: May I
12 continue on this question?

13 How many times do you recall having
14 been asked to review these types of
15 letters and -- was that often?

16 THE WITNESS: No, no, but not
17 unusual either.

18 ARBITRATOR KESSEDJIAN: And for what
19 kind of matters would you be asked to
20 review documents and letters?

21 THE WITNESS: It was really from the
22 view of maintaining positive relations
23 with -- with government stakeholders.

24 There are programs in place at ICANN
25 to deal with other stakeholder groups as

1 well and look at those relational
2 aspects. So this is a component of that
3 --

4 ARBITRATOR KESSEDJIAN: Thank you.

5 THE WITNESS: -- that's my
6 understanding.

7 MR. ALI: Thank you.

8 BY MR. ALI:

9 Q. Just staying with -- just staying with
10 the -- with this letter, could you turn, please,
11 to -- if you could pull up C-24, which is the
12 actual letter that Mr. Crocker said and which,
13 presumably, you reviewed a draft of at the time.

14 Can you see that -- do you have it?

15 A. Yes. Yes.

16 Q. You have it, C-24?

17 A. Yes.

18 Q. This is a letter that is from
19 Stephen D. Crocker to Elham Ibrahim on 8th of
20 March 2012. And I'd like you to just turn over to
21 the second page, please.

22 On the second page, in bold, it says,
23 Request 1: Include (.africa, Afrique, et cetera.
24 It says, Response to Request 1.

25 And I'm going to go to the last

1 sentence of the first paragraph. If you would
2 just follow along with me, please.

3 ICANN does wish to explain, however,
4 that protections exist that allow the
5 African Union and its member states to play a
6 prominent role in determining the outcome of any
7 application for these top-level domain name
8 strings.

9 We'll stop.

10 So please feel free to take a look at
11 the paragraphs preceding -- or the language
12 preceding the language I just read and following
13 that, so you get some context.

14 And my question to you, Ms. Dryden,
15 is, Could you explain to us what it is that you
16 understand Mr. Crocker to be saying in the
17 sentence I've just read out?

18 A. I believe he is referring to this
19 particular role that was given to the GAC as part
20 of the Guidebook rules to explain to the AUC that
21 this is one of the -- the options available to
22 them if they did wish to raise concerns.

23 Q. What do you believe he means by "to
24 play a prominent role"? What would have been your
25 understanding of that language when you read the

1 draft back in February of 2012?

2 A. It was to point to the fact that
3 governments were given a specific role as part of
4 this program, to -- to advise on -- on new gTLDs.

5 Q. Does that mean, at this particular
6 point in time, that the AUC was already a voting
7 member of the GAC?

8 A. Offhand, I don't know, but I do not
9 link those two things.

10 Q. I see.

11 But if they weren't, if they were only
12 in observer status, they wouldn't have been able
13 to play a prominent role in determining the
14 outcome of any applications; isn't that correct?

15 A. No, it's not correct.

16 So members and observers can come and
17 contribute to discussions in the GAC and to the
18 development of advice. And, for example,
19 observers that have expertise, a particular
20 expertise -- and WIPO is a member, so if we're
21 talking about trademark-related issues, they may
22 have useful input to provide to that.

23 So, again, it's really about this
24 particular role being given as part of the gTLD
25 program, which hadn't existed in the past for the

1 GAC.

2 Q. Okay. And so, just to be clear,
3 you're saying -- you're telling us that a -- a --
4 a member of the GAC that is there in observer
5 status can issue Early Warning advice?

6 A. No, that's not what I said --

7 Q. I'm sorry.

8 A. -- as far as the -- the link between
9 observers and members and what specific actions
10 they can take generally or with regard to Early
11 Warnings or something else is not -- is not
12 entirely -- it's not something that can be
13 summarized very quickly, or there may be existing
14 lack of clarity today about some of those
15 questions.

16 It's -- it's -- not everything has
17 been tested adequately to an absolute answer.

18 As far as Early Warnings were
19 concerned, the -- the -- there was no particular
20 constraint on issuing those Early Warnings.

21 Q. So an observer could issue an Early
22 Warning?

23 A. I can't tell you that, because none
24 did.

25 Q. It's a simple yes or no.

1 A. I can't tell you that, so --

2 Q. Yes or no.

3 HONORABLE JUDGE CAHILL: Wait, wait.

4 Don't argue with her.

5 Why can't you tell him that?

6 PRESIDENT BARIN: Let her answer.

7 THE WITNESS: None -- none -- other
8 than those that did issue Early Warnings
9 provoked an actual discussion or anyone
10 raising concerns about who issued an
11 Early Warning. So that wasn't a barrier
12 up-front.

13 BY MR. ALI:

14 Q. So I understand what -- your testimony
15 to be that an observer can issue an Early Warning,
16 but it doesn't really matter?

17 A. That's not how I would sum up my
18 comments at all.

19 Q. How would you?

20 HONORABLE JUDGE CAHILL: Why can't
21 you say yes or no? Is that because you
22 don't know the rules or there were no
23 rules? What is the reason? Or you can't
24 tell us because it's secret or something?

25 THE WITNESS: To deal with the Early

1 Warnings specifically, there wasn't
2 adequate clarity beforehand about that.
3 It happens that none that are currently
4 classified as observers issued an Early
5 Warning to any applicant. And so, for
6 that reason, it's -- it's not possible to
7 draw the kind of conclusion that I'm
8 being asked to.

9 BY MR. ALI:

10 Q. Well, let's just continue with this,
11 then.

12 In terms of -- so in terms of the AUC
13 joining the GAC as an observer, that request
14 would come to you?

15 A. Yes. That's the process.

16 Q. Do you recall whether that particular
17 request came to you?

18 A. I don't specifically recall a request,
19 but that is the process. So . . .

20 Q. Okay. So, presumably, it came to you?

21 A. Yes.

22 Q. Thank you.

23 And the movement --

24 PRESIDENT BARIN: If I may

25 interrupt --

1 MR. ALI: Yes.

2 PRESIDENT BARIN: -- the AUC request
3 was not a typical request, was it? In
4 other words, the request for --

5 THE WITNESS: For which request?

6 PRESIDENT BARIN: For the observer
7 status that Mr. Ali was just referring
8 to.

9 THE WITNESS: To become a member?

10 PRESIDENT BARIN: Yeah.

11 THE WITNESS: It's not common, no.

12 PRESIDENT BARIN: Okay. So when you
13 receive an uncommon request, what -- what
14 do you usually do? Is that something you
15 decide? Is that something you consult
16 on? Is that something you pass on to
17 somebody else?

18 THE WITNESS: So the -- the only
19 time that I have to deal with the issue
20 of someone that was an observer becoming
21 a member was in the case of the AUC while
22 I was Chair.

23 And so when that request was made,
24 there was a discussion in -- in the
25 meetings. It would have been the Prague

1 meetings, I believe.

2 ARBITRATOR KESSEDJIAN: And when was
3 that?

4 THE WITNESS: Prague?

5 ARBITRATOR KESSEDJIAN: Can we find
6 it on the Internet?

7 THE WITNESS: Oh, certainly, I think
8 we can.

9 MR. LEVEE: We can figure it out.

10 ARBITRATOR KESSEDJIAN: Okay.

11 BY MR. ALI:

12 Q. So there's a discussion --

13 MR. ALI: I apologize.

14 PRESIDENT BARIN: No, no. That's
15 okay.

16 BY MR. ALI:

17 Q. -- so there's a discussion -- so a
18 request comes from ICANN or the request comes from
19 the AUC that the AUC should move from observer
20 status to voting member status?

21 A. The requests never come from ICANN.
22 If they did, they shouldn't.

23 So it would have come via the usual
24 process when they asked to become an observer.

25 And then -- because they were already in the GAC,

1 then they made a request at a meeting to be
2 considered or to ask why they're not a member and
3 to -- to explore that point.

4 So that resulted in a discussion at
5 the following meeting of the GAC, which, as I
6 say, I believe was the Prague meeting where the
7 AUC was accepted as a member.

8 Q. So I'm being told that the Prague
9 meeting was in June 2012. So, presumably, it was
10 sometime after June 2012 or at the Prague meeting
11 June 2012 when the AUC was moved from a nonvoting
12 to voting.

13 A. The distinction isn't voting to
14 nonvoting.

15 As I mentioned earlier, there isn't
16 enough experience with -- with voting in the GAC
17 to actually have clarity on that point.
18 The -- the GAC is a consensus-based committee and
19 is always working towards consensus as a general
20 practice.

21 The -- the consensus objection
22 mechanism that was part of gTLDs, that was the
23 first time we had done anything like that, and we
24 didn't refer to it as a vote --

25 Q. I see.

1 A. -- so I can understand why some might
2 construe it.

3 Q. That's helpful.

4 But what was the purpose of the
5 discussion at the Prague meeting with respect to
6 AUC? If there really is no difference or
7 distinction between voting/nonvoting, observer or
8 whatever might be the opposite of observer, or
9 the proper terminology, what was -- what was the
10 point?

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

20 Q. So not all countries share the same
21 view as to what entities, such as the AUC, should
22 be able to do.

23 Is that what you said? I'm sorry. I
24 didn't --

25 A. Right, because that would only get

1 clarified if there is a circumstance where that
2 link is forced.

3 In our business, we talk about
4 creative ambiguity. We leave things unclear so
5 we don't have conflict.

6 ARBITRATOR KESSEDJIAN: This is
7 beautiful. I love it.

8 MR. ALI: I'll take that.

9 BY MR. ALI:

10 Q. Thank you. I understand.

11 So -- but -- let's just leave it in
12 your world --

13 PRESIDENT BARIN: Can I just follow
14 up on it for a second, then?

15 MR. ALI: I was kind of hoping you
16 wouldn't.

17 HONORABLE JUDGE CAHILL: No; he gets
18 to.

19 PRESIDENT BARIN: Is it possible,
20 then, that certain countries would have
21 had a different view of whether AUC
22 should have been a member or not?

23 THE WITNESS: That -- that agreement
24 to list them as a member along with other
25 governments described as members in the

1 GAC's records, the GAC agreed to do that.

2 As to which part of the operating
3 principles they might have referred to or
4 national policy or positions on the
5 matter they might have referred to, that
6 will vary.

7 And so the only way to test that is
8 if you have one particular question or
9 situation where -- where that is brought
10 to light. And it's actually -- when you
11 get into the specifics of -- of -- of how
12 that should work, it is very delicate.

13 HONORABLE JUDGE CAHILL: Why would
14 ASU [verbatim] be a member? You know, it
15 seems like it's so unusual -- I don't
16 mean to give -- it's not a leading
17 question, but it seems like -- why --
18 what were the considerations to letting
19 them become a member? I understand why
20 the EU would be there, but the ASU [sic]
21 is something different, isn't it?

22 THE WITNESS: The considerations are
23 always going to be political, at least to
24 some degree. They tend to be primarily
25 political in the GAC.

1 So it's very difficult for me,
2 again, to go beyond that -- that decision
3 that was recorded in the communiqué or
4 that would have been recorded in the
5 communiqué at the end of that meeting to
6 say that we're now being welcomed as a
7 member.

8 PRESIDENT BARIN: In terms of the
9 AUC becoming a member, the buck stops
10 with the GAC? The GAC makes that
11 decision?

12 THE WITNESS: Absolutely.

13 PRESIDENT BARIN: Okay. It doesn't
14 have to explain itself as to why it's
15 making that decision or on what basis?
16 It can just simply make it, is what
17 you're saying?

18 THE WITNESS: Right. And it refers
19 to its own guidance and rules. And
20 members have particular views on that,
21 yes.

22 PRESIDENT BARIN: Let me just follow
23 up.

24 When you say members may have
25 particular views on it -- earlier, I

1 think I understood correctly, you said
2 some members may -- may be for it, some
3 may be against it, but at the end of the
4 day, it doesn't really matter, because
5 GAC decides if they become a member or
6 not.

7 Or am I mistaken?

8 THE WITNESS: Yes, the -- so -- so
9 it has to be a GAC decision. And,
10 certainly, on a question like this, it's
11 brought to the full GAC. It was a
12 discussion of the full GAC.

13 And the main consideration is
14 respective powers and influence, and it's
15 always that way between governments. So
16 does that mean one region gets more
17 represented than another? Does it mean
18 that a particular region end up with more
19 votes if we were to vote? That --

20 HONORABLE JUDGE CAHILL: The GAC
21 could have said no to this, right, the
22 application?

23 THE WITNESS: Yes.

24 HONORABLE JUDGE CAHILL: And it
25 didn't take into consideration that

1 .africa was -- I don't know. I imagine
2 it was one of the biggest things you guys
3 were all dealing with.

4 THE WITNESS: Not that I recall.

5 It was really about the -- the
6 guidance we had from our operating
7 principles, national positions
8 governments have used about what you
9 might call the additionality for regional
10 organizations like the AUC or others.
11 And that all had to be worked through in
12 that exchange.

13 BY MR. ALI:

14 Q. Ms. Dryden, you talked about the GAC
15 governing principles. Perhaps we could go to
16 Exhibit 44.

17 PRESIDENT BARIN: Is that C-44,
18 Mr. Ali?

19 MR. ALI: It's C-44 and Page 3 of
20 C-44.

21 BY MR. ALI:

22 Q. My colleagues will help you find the
23 document.

24 (Pause.)

25

1 BY MR. ALI:

2 Q. Are you there?

3 A. Yes.

4 Q. Okay. Thank you.

5 Principle 15, Membership is open to
6 all national governments. Membership is also
7 open to distinct economies as recognized in
8 international fora. Multinational governmental
9 organizations and treaty organizations may also
10 participate as observers on the invitation of the
11 GAC through the Chair.

12 So based on Principle 15, the
13 limitations of the AUC would have come from you
14 or there would have been a request by the AUC.
15 And in your sole discretion, the AUC would have
16 joined the GAC.

17 Is that correct -- sorry.

18 Which is it of those various scenarios
19 that I just put to you?

20 A. So the communication comes to the
21 GAC Chair, and if I confirm them as -- as an
22 observer, then that is on behalf of the GAC.

23 Q. So then Principle 16 -- and you
24 would -- before we go to Principle 16, you would
25 put the AUC into the category of a multinational

1 governmental organization or treaty organization,
2 correct?

3 A. That is what I did.

4 Q. Okay. And so then we go to the next,
5 which is Principle 16. Accredited representatives
6 of governments and other public authorities,
7 members of GAC, have voting rights. Accredited
8 representatives of international organizations and
9 entities other than public authorities participate
10 fully in the GAC and its committees and working
11 groups, as observers, but do not have voting
12 rights.

13 As I take it, Principle 16 does make
14 the distinction between voting rights and
15 nonvoting rights.

16 Could you explain that to us in terms
17 of what that -- what the practical implications
18 are and how that applies to the AUC?

19 A. So, as I commented earlier, these
20 principles are subject to interpretation by GAC
21 members. And so they would read different parts
22 of it and understand it in a way that the -- that
23 accords with their -- their view. And they would
24 come to a GAC discussion about this based on -- on
25 a national view about how observers and members

1 and so on should be participating in the
2 Committee.

3 So unless there's a GAC decision
4 elaborating -- so in the case of the -- the AUC
5 becoming a member, there was no clarity
6 deliberately about the -- the -- the GAC's
7 understanding of what the full implications were
8 of them joining as member.

9 PRESIDENT BARIN: Sorry. What do
10 you mean by that? Deliberately -- there
11 was no clarity?

12 THE WITNESS: So some GAC members
13 found, in the part of the operating
14 principles, that they liked a way to be
15 flexible and arrive at a consensus to
16 accept the AUC as a member, but leaving
17 the -- the specifics unclear.

18 PRESIDENT BARIN: But correct me if
19 I'm wrong, but if I understand it
20 correctly, it doesn't really matter
21 because, at the end of the day, they
22 become a member, and that's because GAC
23 decides they become a member.

24 THE WITNESS: They became listed as
25 a member along with other governments

1 also described as members in the GAC's
2 records. That, I can tell you.

3 ARBITRATOR KESSEDJIAN: What is very
4 strange is we are talking about a
5 commission which is the kind of
6 Secretariat to an organization and not
7 the organization itself. You know, I
8 could have understood the AU,
9 the African Union, would have become a
10 member, but the AUC, the Commission
11 itself, I have a hard time understanding
12 that.

13 Do you see the difference? I mean,
14 the Commission is not an organization;
15 the Commission is a Secretariat to an
16 organization.

17 So why was the AUC becoming a member
18 and not the African Union?

19 HONORABLE JUDGE CAHILL: Good point.

20 THE WITNESS: So I have the record
21 of the result of the GAC accepting them
22 to become a member without further
23 clarification. They invited me to
24 comment on things that -- colleagues in
25 the GAC will have to give their

1 individual perspectives on -- you would
2 have to ask them.

3 PRESIDENT BARIN: I guess, as the
4 person who was responsible for that
5 position at the time, would you have, I
6 guess, no power or requirement or
7 obligation to raise any questions, such
8 as the one that my colleague just asked
9 you? In other words, if something didn't
10 seem right to you, could you not question
11 that?

12 THE WITNESS: As far as the running
13 of the GAC, as part of my
14 responsibilities, yes, I may have
15 questions or -- but --

16 PRESIDENT BARIN: But in this case,
17 did you not have any questions or do you
18 not remember, or . . .

19 THE WITNESS: As Chair, my concern
20 was around the longer-term challenge of
21 having observers -- as described now on
22 the list of observers, those
23 organizations, having a greater role than
24 they do now and how that would impact the
25 Committee.

1 PRESIDENT BARIN: Okay. So you're
2 saying you were sort of focused on the
3 more big picture thing as to why a
4 particular case -- I'm not trying to put
5 words in your mouth. I'm just trying to
6 get a sense of what --

7 THE WITNESS: Yes, that was my -- my
8 concern.

9 HONORABLE JUDGE CAHILL: Why didn't
10 the membership meet the requirements of
11 your organization? Because it looks
12 like -- if you just read the words, they
13 don't quite fit with the AUC.

14 THE WITNESS: As I say, the -- the
15 operating principles are -- are guidance
16 to us, they're principles. And
17 governments have national positions that
18 they bring to any discussion and have the
19 right to --

20 HONORABLE JUDGE CAHILL: It's hard
21 to say no to governments who want to do
22 what they want to do?

23 THE WITNESS: Yes. They can express
24 their view however they want.

25 HONORABLE JUDGE CAHILL: Okay.

1 BY MR. ALI:

2 Q. I guess what I've taken away from this
3 discussion -- by the way, please do indicate if
4 you need a break, because you're getting questions
5 from the Panel, from me. And I can appreciate
6 that that's not the easiest to deal with.

7 So that is not by any means
8 gratuitous, so do let me know.

9 PRESIDENT BARIN: Would you like to
10 take a break?

11 THE WITNESS: Will this go much
12 longer?

13 MR. ALI: I probably have another
14 hour, 45 minutes --

15 PRESIDENT BARIN: I don't --

16 MR. ALI: -- at least.

17 PRESIDENT BARIN: -- I frankly don't
18 think so, but --

19 MR. LEVEE: I will go for about two
20 minutes.

21 MR. ALI: I do have some questions
22 associated with what happened prior to
23 this advice.

24 HONORABLE JUDGE CAHILL: Do it after
25 the break.

1 PRESIDENT BARIN: Let's take a
2 few minutes to give her a chance to . . .

3 - - -

4 (Whereupon, a brief recess was taken
5 from 4:58 p.m. to 5:10 p.m.)

6 - - -

7 PRESIDENT BARIN: We're back on the
8 record.

9 Mr. Ali, I request that we move
10 along as efficiently and as quickly as we
11 can.

12 MR. ALI: I will do my best.

13 HONORABLE JUDGE CAHILL: He told me
14 not to ask any more questions, so . . .

15 MR. ALI: Well, I will try and stop
16 before I receive the same instruction.

17 BY MR. ALI:

18 Q. Let's go to a different topic.

19 Before we do that, just to confirm, my
20 final understanding is that this -- there is
21 discretion in the GAC Chair to -- with respect to
22 who is invited to join the GAC.

23 What is the scope of your discretion?

24 A. So anything that I would do is in,
25 obviously, this -- within the capacity of -- of

1 Chair on behalf of the GAC.

2 Q. I understand.

3 It sort of sounds a little bit like
4 you're trying to herd sheep within the context of
5 a political -- very politicized environment from
6 what you were telling us earlier.

7 Would that be a colloquial and
8 colorful but fair -- fair description?

9 A. You're speaking generally about --
10 about the GAC?

11 Q. Yes.

12 A. So it is only the GAC that can make
13 decisions. I can confirm them and identify where
14 there is consensus or where we have concluded a
15 negotiation on something.

16 Q. Thank you. I think I asked a
17 different question, and you answered a different
18 one. But let's leave it at that.

19 Let's move on to what happened on
20 June 4th when the NGPC -- sorry -- when the GAC
21 consensus advice was issued -- I may have the
22 date there wrong --

23 MR. LEVEE: April 10th.

24 MR. ALI: April 10. Thank you,

25 Jeff.

1 HONORABLE JUDGE CAHILL: April
2 10th, right.

3 BY MR. ALI:

4 Q. -- April 10th when the so-called
5 consensus advice was -- was issued.

6 Redacted - GAC Designated Confidential Information

1

Redacted - GAC Designated Confidential Information

11 BY MR. ALI:

12 Q. While they're doing that, let me ask
13 you the following question: When is the agenda
14 developed?

15 And I should say that we don't have
16 the agenda on record, so we don't really know
17 what it says. So we're going to ask you to help
18 us with that.

19 A. Right.

20 So the agenda for the consensus
21 objection agenda was -- was not published. It's
22 confidential as some meetings of the Committee
23 are closed. And related materials also are not
24 publicly published.

25 So that was the case with this

1 consensus objection agenda. It's not something
2 that has been published.

3 Q. So it was -- when was it developed?

4 A. It was developed in advance of the
5 meetings. There was a deadline for countries
6 to -- to request that a particular application be
7 placed on that agenda.

8 Q. So this would have happened three days
9 before, four days before, a week before, two weeks
10 before April 10th?

11 A. I don't recall precisely, but the
12 deadline would have been around three weeks or so.
13 Because governments need time to -- to consult
14 nationally to prepare for a meeting, so you're
15 always wanting to give them adequate notice
16 regarding the -- an issue, whether it's this
17 agenda or any other issue under consideration in
18 the GAC.

19 Some of their internal processes are
20 lengthy, and they need approvals and so on and so
21 forth. So that's the reasoning.

22 Q. I follow you. Indeed.

23 So --

24 PRESIDENT BARIN: Sorry.

25 Who decides if it's confidential

1 or if it gets published or not?

2 THE WITNESS: The GAC does.

3 HONORABLE JUDGE CAHILL: Is that
4 you?

5 THE WITNESS: The GAC does, as a
6 whole.

7 In this case, the -- the current --
8 well, the practice up until I was --
9 until I left the role was to have most of
10 the meetings open, except for the
11 decisional portions.

12 In Beijing, we had more closed
13 meetings than usual because the issues
14 were so sensitive for governments. And
15 we were doing something -- we needed a
16 new capacity, and so the -- the GAC took
17 that decision to -- to close the meetings
18 that they did.

19 BY MR. ALI:

20 Q. So two to three weeks before the
21 meeting, you set a deadline for governments to
22 provide agenda items; is that correct?

23 A. Yes.

24 Q. Okay. And then, with those agenda
25 items, two to three weeks before the meeting, you

1 circulate a draft agenda to all governments?

2 A. That's right. So there's an agenda
3 that is a compilation of all the requests.

4 Q. From all of the different governments?

5 A. Governments.

6 Q. And how many are there again?

7 A. How many governments in the GAC?

8 Q. Yes.

9 A. About 150.

10 Q. So -- I see.

11 So it's 150 governments that decide
12 that it's going to be confidential or not?

13 A. Not all of them will weigh in, but it
14 has the effect of being the full GAC.

15 Q. Okay. And how does that happen?

16 A. In this case, there was a discussion
17 beforehand on GAC calls and some requests to close
18 the meeting. And I believe, at the beginning of
19 our meetings in Beijing, it was further clarified.

20 Q. I think I'm talking about the agenda.

21 So with respect to the -- to the
22 agenda being confidential, you propose it or
23 somebody proposes it or it's presumptively
24 confidential?

25 A. It's not presumptive, but these --

1 these issues are discussed either, as I say, on
2 the preparatory teleconferences we have, we might
3 receive requests. In this case, we received
4 requests from some -- some in the GAC expressing
5 the desire to have the discussions be closed.

6 And then it's confirmed again when we
7 begin our meetings to -- on the basis of -- of
8 people making requests, if necessary, if they
9 feel something should be closed.

10 Q. So it just takes the request of one
11 government in order for the agenda to be kept
12 confidential?

13 A. No. If other governments said they
14 really thought it should be open, and we discussed
15 it and it turned out one government wasn't going
16 to continue to -- to persist to ask that the
17 meetings be closed, then maybe they would still be
18 open --

19 Q. So in this instance --

20 A. -- it's an exchange.

21 Q. I apologize. I didn't mean to
22 interrupt.

23 But in this particular instance,
24 they -- do you recall whether there was any
25 objection as to the confidentiality of the

1 agenda?

2 A. I recall one country did say that they
3 thought all the meetings should be open --

4 Q. Okay.

5 A. -- and that wasn't enough to result in
6 opening up the meetings.

7 Q. Okay. And how many items ended up on
8 the agenda?

9 A. Offhand, I don't recall. I would say,
10 roughly, 20.

11 Q. Okay. And with respect to those 20
12 items, how was the item relating to DCA Trust
13 described?

14 A. It was just the -- listing the
15 countries that had asked it to be and naming the
16 string and the application; a simple list.

17 Q. So it just says .africa?

18 A. Essentially, yes. In the application
19 numbers we were wanting to try --

20 PRESIDENT BARIN: I'm going to ask
21 that we sort of --

22 MR. ALI: Mr. President, we don't
23 have this agenda. It's fairly important.

24 What we have here is -- and just to
25 shortcut this, because I don't need to

1 elicit testimony when we have the
2 documents -- we have now been told that
3 there was an agenda circulated three
4 weeks beforehand, that this agenda has
5 been kept confidential.

6 This agenda has not been produced.
7 This agenda apparently says nothing but
8 .africa and an application number.

9 This -- this agenda does not include the
10 ZACR application for purposes of any kind
11 of discussion.

12 We understand that may be because
13 nobody asked that the ZACR application be
14 put on this undisclosed agenda.

15 Now, what we do know is that a --

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But we do now know, based on her

1 testimony, that there's an agenda that's
2 not been disclosed to us but that
3 reflected an item that we have been told
4 is somehow an objection agenda -- or
5 objection advice agenda.

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8 PRESIDENT BARIN: And I have no
9 problem, Mr. Ali, looking at these
10 tomorrow if you wish and going through
11 them, but if you have a question, in all
12 fairness to Ms. Dryden, then let's get
13 those questions out.

14 I'm happy to and I'm sure the rest
15 of the Panel is happy to hear that.

16 MR. LEVEE: I also state this is the
17 second time that counsel has stated that
18 there's an agenda that somehow I hid from
19 the Panel.

20 There was no request for any agendas
21 to me at any time. The request that came
22 through was for the e-mail in reference
23 to Ms. Dryden's declaration, and those
24 were produced.

25 PRESIDENT BARIN: Understood.

1 And I think, frankly, the way I
2 understood was that this is an issue that
3 came up during the testimony of
4 Ms. Dryden --

5 HONORABLE JUDGE CAHILL: That was
6 going to be a question I asked.

7 Did you ask for it or --

8 MR. LEVEE: It was not requested.

9 And the only other point I want to
10 make, given the hour, I have no problems
11 with questions about this. The parties
12 raised these e-mails in her opening
13 statement. We're going to discuss them
14 tomorrow.

15 What I would prefer or hope for is
16 if there are factually based questions
17 that Mr. Ali wants to ask the witness,
18 fine. If he wants to make his closing
19 argument, let him do it in the morning.

20 PRESIDENT BARIN: That was the point
21 that I just made as well.

22 MR. LEVEE: Thank you.

23 MR. ALI: Thank you. Thank you for
24 the guidance, Judge.

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7 Q. I see.

8 And what's the appropriate amount of
9 time?

10 A. Well, if there are no raised hands and
11 several moments pass, then we have a consensus.
12 Silence is agreement.

13 PRESIDENT BARIN: Enough for you to
14 look around the room to see if
15 anybody else --

16 THE WITNESS: Absolutely.

17 BY MR. ALI:

18 Q. Silence is agreement?

19 A. In -- in that case, yes.

20 Q. I see.

21 Consensus by acquiescence?

22 A. It is a very important tool in -- in
23 the tool kit for governments, yes.

24 Q. I see.

25 So consensus by -- well, I

1 participated in many UN meetings and many
2 international organization meetings and, frankly,
3 I don't believe that I've ever seen a
4 situation --

5 PRESIDENT BARIN: Mr. Ali --

6 HONORABLE JUDGE CAHILL: That's
7 tomorrow.

8 PRESIDENT BARIN: -- let's ask
9 questions, please.

10 MR. ALI: I apologize. That was
11 uncordial.

12 BY MR. ALI:

13 Q. So consensus by acquiescence, by
14 silence.

15 So what's the consequence in this
16 instance of GAC consensus advice?

17 A. You would need to ask the Board. It's
18 their responsibility to interpret.

19 PRESIDENT BARIN: Frankly, Mr. Ali,
20 I asked her that question, and she
21 responded by saying the same thing. So
22 it may not be a satisfactory answer --

23 MR. ALI: It's not.

24 BY MR. ALI:

25 Q. I would like to know what it is that

1 you, as the GAC Chair, understand to be the
2 consequences of the actions that the GAC will take
3 --

4 HONORABLE JUDGE CAHILL: The GAC
5 will take?

6 BY MR. ALI:

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

10 HONORABLE JUDGE CAHILL: There you
11 go.

12 THE WITNESS: That isn't my concern
13 as the Chair. It's really for the Board
14 to interpret the outputs coming from the
15 GAC.

16 BY MR. ALI:

17 Q. Okay. I'll take that.

18 MR. ALI: And I have no further
19 questions. Thank you.

20 PRESIDENT BARIN: Thank you.

21 Mr. LeVee.

22 MR. LEVEE: I'll be very brief.

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1 EXAMINATION ON BEHALF OF RESPONDENT
2 INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

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24 MR. LEVEE: Thank you.

25 HONORABLE JUDGE CAHILL: How did

1 that happen? Did somebody call you or
2 got a note?

3 THE WITNESS: There were deadlines
4 issued, communications coming out from
5 GAC Support Staff to the membership about
6 how to signal that they would like this
7 added to that agenda. The process laid
8 out deadlines, and then those are
9 compiled and communicated to the GAC.

10 BY MR. LEVEE:

11 Q. So to clarify, the AUC did not ask for
12 this to be placed on the agenda?

13 A. Correct.

14 Q. Okay.

15 And the AUC did not -- at the meeting
16 that we're talking about on April 10th, the AUC
17 did not speak?

18 A. Correct.

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22 Q. Okay. And you said something before,
23 and it got swallowed up, I think, in the
24 questioning.

25 When you announced that the GAC had

1 achieved consensus with respect to DCA's
2 application, what happened next?

3 A. Applause, unanimous applause.

4 Q. So the room broke out into applause?

5 A. Yes.

6 PRESIDENT BARIN: Is that usual,
7 Ms. Dryden?

8 THE WITNESS: In those situations,
9 yes, if it's a particularly difficult
10 discussion. The -- the agenda was, of
11 course, sensitive and delicate. I don't
12 want it to sound like I'm contradicting
13 with my description of the discussion
14 being very quick and straightforward. It
15 was.

16 But then colleagues are very keen
17 to -- to show comity and that we have
18 reached agreement on something.

19 PRESIDENT BARIN: Let me just
20 finish.

21 To be precise, this was in relation
22 to the DCA Trust application?

23 THE WITNESS: Right, directly after
24 and before we went to the next --

25 PRESIDENT BARIN: To the next item?

1 THE WITNESS: Yes.

2 MR. LEVEE: Those are all the
3 questions I have.

4 MR. ALI: I have one follow-up
5 question, if I may.

6 PRESIDENT BARIN: Okay.

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16 EXAMINATION (CONTINUED) ON BEHALF OF CLAIMANT

17 DOTCONNECTAFRICA TRUST

18 - - -

19 BY MR. ALI:

20 Q. So just maybe one, perhaps two
21 questions very quickly on that.

22 Do you recall who the Kenyan
23 representative was at the time when the agenda
24 was developed?

25 A. It would have been Michael Katundu.

1 Q. It would have been Michael Katundu?
2 You're sure of that?

3 A. He's been the representative for
4 many years. He's been in the GAC longer than I
5 have. And my first meeting was 2007, so . . .

6 Q. Okay.

7 PRESIDENT BARIN: Can you be more
8 precise when you say "would have been"?
9 Was it?

10 THE WITNESS: Yes.

11 HONORABLE JUDGE CAHILL: How are you
12 so sure? Did you talk to him or get a
13 note or see something?

14 THE WITNESS: I'm quite good at
15 knowing who's who. It's part of the job
16 knowing who the people are and which part
17 of government is responsible and what --

18 HONORABLE JUDGE CAHILL: Sure.
19 How do you know he's the one who did
20 it?

21 THE WITNESS: It's in the GAC
22 records that he would be the
23 representative.

24 As to how Support Staff would have
25 handled the details, I don't know

1 precisely how they administered --

2 HONORABLE JUDGE CAHILL: That's not
3 consistent with some of these other
4 e-mails from --

5 THE WITNESS: GAC preparations are
6 handled by Support Staff.

7 HONORABLE JUDGE CAHILL: Okay.

8 MR. ALI: I said one, and that's
9 one.

10 PRESIDENT BARIN: Okay.

11 Professor Kessedjian?

12 No?

13 HONORABLE JUDGE CAHILL: No, I'm
14 fine.

15 PRESIDENT BARIN: Thank you,
16 Ms. Dryden. I appreciate your help and
17 your time.

18 THE WITNESS: Okay. All right.
19 Good luck.

20 PRESIDENT BARIN: Have a safe flight
21 back home.

22 THE WITNESS: Thank you.

23 (The witness was excused.)

24 MR. LEVEE: With the Panel's
25 permission, I would just avoid a break at

1 this point and just go straight into
2 the -- actually, to the next witness. We
3 just broke 15 minutes ago.

4 (Pause.)

5 PRESIDENT BARIN: Good evening,
6 Ms. Bekele. I realize it's 20 to 6:00.
7 It's been a long day --

8 MS. BEKELE: Yes.

9 PRESIDENT BARIN: -- so we'll have
10 this go forward as -- as long as we can.
11 And hopefully we'll finish it tonight.

12 But if -- at whatever point you feel
13 that it's time and you want to stop, then
14 we can consider that as well.

15 MS. BEKELE: Sure.

16 PRESIDENT BARIN: Okay. As I did
17 with the other witnesses, we'll swear you
18 in.

19 - - -

20 S O P H I A B E K E L E E S H E T E ,
21 after having been first duly sworn by
22 President Barin, was examined and
23 testified as follows:

24 - - -

25 PRESIDENT BARIN: Thank you.

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EXAMINATION ON BEHALF OF THE PANEL
BY PRESIDENT BARIN
- - -

PRESIDENT BARIN: So you are sworn in. And I'm not going to start asking you the same background questions that I began with the other witnesses because your detailed statement does spell out what your background is and what you've done.

I'm going to start with referring you to Page 23 of your statement, which you have.

And you don't have any other notes or anything that you want to refer to or that you're using other than your statement?

THE WITNESS: No.

PRESIDENT BARIN: Okay. The question I have for you, it somewhat, if you will, resonants throughout the statement that you prepared. You will find as a background Paragraph 51 and 52 of your statement. If you take a look at

1 it.

2 So you've given us the background.
3 And the title is The AUC's Purported
4 Withdrawal for its Support for DCA.

5 You say, Whilst in the middle of
6 collecting individual endorsements and
7 making announcements through our public
8 relations campaign, you learned that the
9 AUC had e-mailed you in a letter dated
10 April 16th, stating that they no longer
11 endorsed the individual initiatives for
12 Africa.

13 And then you go on to say this was
14 shocking to you.

15 Did you know that that was coming?

16 THE WITNESS: No, not at all.

17 PRESIDENT BARIN: So what is the
18 background of what this e-mail is there?

19 THE WITNESS: Okay. So after we've
20 been endorsed by AUC in 2009 and, prior
21 to that, another organization called
22 UNECA, U-N-E-C-A, in 2008, we proceeded
23 with collecting individual endorsements
24 from different African governments, as
25 well as starting our awareness to the

1 African campaign to raise awareness for
2 the gTLD in Africa.

3 In the midst of that, we received
4 this letter.

5 So I went back to the AUC to
6 reconcile what happened, and what they
7 told me was that ICANN Staff has come a
8 few weeks before and has presented a
9 .africa presentation for them. And they
10 going through a regulatory framework, and
11 they will be working with ICANN and the
12 African community and perhaps private
13 sector to coordinate what is best suited
14 for .africa for Africa.

15 PRESIDENT BARIN: Are you saying
16 that prior to this, if you will, contact,
17 you were totally in the dark as far as --

18 THE WITNESS: Absolutely. No, I'm
19 not aware.

20 PRESIDENT BARIN: Okay. And so what
21 else were you told by AUC about the
22 presentation by ICANN?

23 THE WITNESS: What else was I told?

24 PRESIDENT BARIN: Yes.

25 THE WITNESS: It was a brief

1 meeting. They --

2 PRESIDENT BARIN: Put it in context,
3 if you will, just so we have a better --

4 THE WITNESS: Who was the contact
5 there?

6 PRESIDENT BARIN: Who was the
7 contact, when was it, where were -- you
8 know -- yeah. Let me finish the
9 question, and then you can -- because,
10 otherwise, we're going to -- she's going
11 to have a problem.

12 So I just asked if you could put it
13 in context so that we could better
14 understand how this -- this news is
15 coming to -- to --

16 THE WITNESS: You want to know the
17 contact?

18 PRESIDENT BARIN: The context.

19 THE WITNESS: Oh, the context. Oh,
20 I'm sorry. I thought you said "contact."

21 The context of how this news came
22 about. As I said, it came through
23 e-mail --

24 PRESIDENT BARIN: Right.

25 THE WITNESS: -- so it was a

1 shocking surprise to me.

2 And so I had contacted the
3 African Union headquarters when we
4 received the -- the original endorsement,
5 which is from the Chairman's office.

6 So the Chairman's office facilitated
7 the Chief of Staff, and I went to meet
8 with the Chief of Staff at the time to
9 request. And he's the one that told me
10 this particular presentation was made
11 and -- by an ICANN Staff, and they're
12 very -- they're going to start working
13 with ICANN.

14 And as the letter strictly says, it
15 says it would coordinate with ICANN, the
16 African community and the private sector
17 to -- to -- they didn't even say endorse
18 to come up with what's best for Africa.

19 So what that means is it's not that
20 they withdrew our letter; they were just
21 saying there's another alternative way of
22 coming up with the regulatory framework.

23 PRESIDENT BARIN: Did he tell you
24 who at ICANN had visited?

25 THE WITNESS: Yeah. Anne-Rachel,

1 which is the ICANN Staff -- the Africa
2 ICANN Staff.

3 So I thought it was very
4 inappropriate for ICANN Staff to come and
5 do a presentation for Africa, because I
6 thought a bidding party, like ICANN, who
7 develops an RFP, should be independent
8 and should not be working with
9 stakeholder organization. They're not
10 certainly working with DCA to assist how
11 to go about .africa.

12 So I brought it to the attention of
13 the general counsel; I brought it to the
14 attention of the ombudsman; and I brought
15 it to the attention of the Chairman at
16 the time --

17 PRESIDENT BARIN: Okay.

18 THE WITNESS: -- and, somehow, I
19 think the ombudsman did not feel that was
20 irregular; however, the Chairman of ICANN
21 at the time informed me that they have
22 reprimanded her and not to do that any
23 more.

24 PRESIDENT BARIN: Did you have any
25 other reaction from ICANN as a result of

1 your --

2 THE WITNESS: No. That was it. I
3 was expecting after that there's not
4 going to be much contact between ICANN
5 and the AUC.

6 PRESIDENT BARIN: Okay. So can you
7 then move forward and tell us what
8 happens with --

9 THE WITNESS: So after that, we just
10 continued the campaign. Obviously, we
11 have an endorsement and support from
12 UNECA, which is a equivalent organization
13 to AUC, what we believe. And according
14 to the Guidebook, it's a legitimate
15 endorsing entity. So we moved on with
16 our -- with our campaign.

17 What's important for us was to
18 create that awareness within the
19 governments and within the stakeholders
20 in Africa to sensitize them to what the
21 gTLD is, because it's the first gTLD
22 entry for Africa.

23 And then we started preparing for --
24 for our application upcoming. And then
25 what we found as a result, there was a

1 Dakar meeting, ICANN meeting, and we
2 found out that sort of regulatory
3 framework that the Chief of Staff
4 mentioned turned out to be an AU reserve
5 name agenda.

6 So what that means is they -- AUC
7 and ICANN had consulted to reserve the
8 name, in my opinion, to -- for the three
9 names, .afrique, the Arabic, and
10 .afrikia, the French; and .africa, to be
11 a reserve for AUC under special
12 legislation.

13 So that request was made in Dakar.
14 And DCA -- I stood up in front of the
15 Board and say that's against the
16 guidelines of the gTLD procedure. It's
17 anticompetitive. Had we known that was
18 an arrangement that AUC would have
19 requested, then we would not have spent
20 all this time and monies.

21 And -- and ICANN knows that gTLD has
22 led the process for a very long time
23 before that. We had sponsored ICANN
24 meetings. I have announced my intention
25 to run for the gTLD at Board meetings,

1 public meetings. So the ICANN is very
2 much aware of it.

3 So we were kind of surprised that
4 occurred in Dakar. But in any case,
5 after a while, ICANN, I think maybe
6 three months later -- Dakar was like
7 five minutes before the application
8 started -- they -- they wrote a letter to
9 AUC confirming that they would not
10 reserve that name or the gTLD after the
11 application process started.

12 So we submitted our application with
13 the current support that we've collected
14 from various governments and the AUC and
15 as well as the UNECA. And we proceeded
16 with our application.

17 PRESIDENT BARIN: Okay. And when
18 was it that you found out that the AUC
19 was going to be a member now of -- of --
20 of ICANN?

21 THE WITNESS: The -- the Prague
22 meeting, which is --

23 PRESIDENT BARIN: Can you just -- I
24 don't mean to interrupt you, but --

25 THE WITNESS: -- that was after the

1 application process.

2 PRESIDENT BARIN: Right. So give
3 the Panel the context.

4 THE WITNESS: So around March was
5 the application process, and June -- 2013
6 March, the application opened, and the
7 Prague meeting, which was about
8 June 2013, it was announced that AUC was
9 going to be a member of GAC.

10 PRESIDENT BARIN: Okay. And your
11 reaction to that was --

12 THE WITNESS: Very shocked, myself
13 and many --

14 HONORABLE JUDGE CAHILL: You've got
15 to let him finish his question.

16 THE WITNESS: Oh, I'm sorry.

17 PRESIDENT BARIN: That's okay.

18 So you were shocked?

19 THE WITNESS: Yes.

20 PRESIDENT BARIN: And what did you
21 do after you got over being shocked?

22 THE WITNESS: I think we -- we wrote
23 to ICANN, because there was the AUC in
24 the African community and ZACR, they had
25 a meeting with the new CEO. The new CEO

1 joined ICANN at about that time. And
2 they had a presentation, and they came up
3 with what's called ICANN Africa Strategy.

4 And we were not included. We were
5 not invited to the meeting. So we wrote
6 a letter to ICANN stating that DCA has
7 been included -- excluded from this
8 meeting, while AUC and the rest of the
9 supporters of the AUC application held a
10 meeting jointly to pursue an ICANN
11 African strategy.

12 PRESIDENT BARIN: That's why I asked
13 you the question.

14 Why do you think you were excluded
15 from the meeting?

16 THE WITNESS: Because we are not --
17 there was sort of -- we felt there was
18 always a divide as to who the group
19 that -- the group that actually is
20 coordinated with AUC and the group that's
21 not part of AUC.

22 And so we are competitors, in a
23 sense. So the competitors of the AUC are
24 not privy to what's going on with that.

25 So . . .

1 PRESIDENT BARIN: So, initially, you
2 were actually on the same side as AUC?
3 Is that -- is that a fair description?
4 And thing changed?

5 THE WITNESS: "Same side" means,
6 like, when they endorse --

7 PRESIDENT BARIN: The same team, if
8 you will, because you just described as
9 there being two camps --

10 THE WITNESS: Yes, there has been
11 two camps because of the .africa -- two
12 .africa applications.

13 PRESIDENT BARIN: Right.

14 But, initially, I think you just
15 told us you did have a rapport with the
16 AUC and things were going forward the
17 way, perhaps, you initially anticipated.

18 But then, subsequently, that
19 changed?

20 THE WITNESS: Yes. What's the
21 point --

22 PRESIDENT BARIN: Pardon me?

23 THE WITNESS: I'm not sure.

24 PRESIDENT BARIN: What was that?

25 THE WITNESS: I was saying, as was

1 pointed -- I'm asking a question, which I
2 shouldn't. I'm sorry.

3 PRESIDENT BARIN: So my question to
4 you is, What -- why -- why do you think
5 the change was there?

6 THE WITNESS: Oh, the change
7 occurred when AUC was introduced and was
8 told they could have the reserve name to
9 themselves. And there was a consultation
10 by the -- by ICANN and the vested group
11 of community that wants to have our
12 competition, who would like to have AU
13 endorsements so they can proceed with
14 their own application.

15 PRESIDENT BARIN: So who would you
16 say would be -- in your own words, who
17 would you say is responsible for --

18 THE WITNESS: Well, I think,
19 initially, if AUC did not get the support
20 of ICANN, I would not think that -- I
21 mean, AUC had no idea of applying for --
22 for a gTLD when I went to them. They
23 supported our efforts. I made various
24 presentations with the relevant bodies.

25 And I went -- finally, after it's

1 been approved, like almost a year's worth
2 of communication with AUC, e-mails and
3 correspondences and presentations on
4 .africa initiatives. So they had no
5 idea, and they were not interested in
6 applying for .africa until the incident
7 happened where they were advised,
8 obviously, that they could reserve the
9 name and/or, you know, buy.

10 And we totally feel responsible that
11 ICANN approach to .africa had an
12 influence in it.

13 PRESIDENT BARIN: Okay. But is it
14 fair to say or ask -- I mean, AUC could
15 have also changed its mind?

16 THE WITNESS: Obviously, if it
17 consulted, it would change its mind.

18 HONORABLE JUDGE CAHILL: I'm sorry.
19 Say it again.

20 THE WITNESS: If it's consulted,
21 there's another approach to .africa, it
22 will change its mind.

23 ARBITRATOR KESSEDJIAN: It would
24 change its mind again, you mean?

25 THE WITNESS: No, no. At the time,

1 after they've given us endorsements,
2 right, if they think that they could have
3 it to themselves or work with another
4 organization to have it to themselves,
5 definitely, they would have changed their
6 mind. That's all I'm saying.

7 They become the competitor, right,
8 to have the same thing that we're going
9 after.

10 HONORABLE JUDGE CAHILL: You think,
11 as a competitor, they took your idea?

12 THE WITNESS: They took our idea
13 because the whole proposal that we
14 submitted for 18 months going back and
15 forth and -- and -- and even the
16 endorsement they collected from the other
17 governments, and what they showed to them
18 was our idea, our proposal.

19 So -- but we didn't have a problem
20 with the competition, in a sense, because
21 the ICANN gTLD, you know, it allows for
22 competition. But when your endorser
23 becomes a competition and they're trained
24 after that, how they went about it and
25 the GAC advice and how they came through

1 GAC to stop our application completely,
2 it was -- it was not a competition; it
3 was more like --

4 PRESIDENT BARIN: I want to come to
5 that in a minute.

6 But when you say -- but do you
7 attribute that to, if you will -- and I
8 think you alluded to it earlier, that the
9 meeting with the ICANN representative, is
10 that -- is that --

11 THE WITNESS: That's very key --
12 that's a very key meeting.

13 PRESIDENT BARIN: But a key I can
14 understand. But the point was made, I
15 guess -- and you heard it this morning,
16 submissions by ICANN -- that they could
17 have changed their mind. AUC could have
18 changed its mind at any time they wanted
19 to.

20 THE WITNESS: But I was told by the
21 Chief of Staff exactly what happened,
22 right, so they didn't tell me that
23 they --

24 PRESIDENT BARIN: What were you
25 told?

1 THE WITNESS: They said the ICANN
2 representative came and made a .africa
3 presentation, and they're going to come
4 up with the regulatory framework.
5 Obviously, they do not understand the
6 language of what the reserve name is
7 really what happened with the regulatory
8 framework.

9 When you think about it, they're
10 trying to say it's -- there's a way to
11 govern the gTLD to the benefits of the --
12 of Africa. So the regulatory framework
13 is what they're told. And so that really
14 turned out in the card to me, the reserve
15 name directly to the AUC.

16 PRESIDENT BARIN: If I can perhaps
17 summarize, what you're saying is AUC
18 found out through, according to you, the
19 presentation that ICANN made to them that
20 they no longer really needed you; they
21 could do it themselves?

22 THE WITNESS: Exactly. That's what
23 they have on their letter. That's what
24 the letter says. It does not withdraw
25 our application. It says, In

1 coordination with ICANN and the
2 stakeholder community, we will identify
3 what's best for Africa.

4 So it's very clear.

5 - - -

6 EXAMINATION ON BEHALF OF THE PANEL

7 BY ARBITRATOR KESSEDJIAN

8 - - -

9 ARBITRATOR KESSEDJIAN: Ms. Bekele,
10 I have a -- the first question for you,
11 and it concerns the -- what you mentioned
12 Page 30, Paragraph 66 of your written
13 statement, that's the request for
14 proposal that was issued by AUC.

15 You heard this morning in the
16 opening statement, I think it was from
17 ICANN, that you refused -- and correct me
18 if my recollection is not correct -- that
19 you refused, quote/unquote, to
20 participate in this request for proposals
21 that AUC has put out.

22 Could you explain to us what --
23 first of all, can you confirm that you
24 refused, and if you do confirm that you
25 refused, can you confirm why you did

1 refuse?

2 THE WITNESS: Sure thing.

3 We made a strong point as to our
4 refusal and communicated it to ICANN --
5 to ICANN as well as AUC executives about
6 it. And the point being this RFP was
7 issued right after Dakar when ICANN could
8 not reserve the name for -- for AUC, when
9 that was known.

10 And so, therefore, the first point
11 of -- the first step that AUC took was to
12 directly appoint ZACR as -- as a registry
13 operator on behalf of AUC. And then we
14 fought that, and we explained to AUC
15 saying that it's only ICANN who has a
16 mandate to appoint a registry. AUC
17 cannot do that.

18 At that point, then they turned that
19 appointment to an RFP, and then they
20 issued the RFP with certain conditions.
21 And, primarily, the people behind -- they
22 put together an African Union Task Force,
23 which is a task force made up of all the
24 people within the African community that
25 has vested interests in .africa.

1 And some of the members of the
2 .africa -- this task force, in fact, have
3 failed to get a direct endorsement from
4 AUC in competition to us, even after we
5 got endorsement. So these are sort of
6 vested group that went and, on behalf of
7 AUC, was executing the RFP.

8 So that was one of the biggest
9 problems we have.

10 But when we saw the RFP
11 requirements, it was extraordinarily
12 different from the ICANN RFP. So one --
13 for example, one is -- first of all, it
14 says, Take a geographic name and apply it
15 for a community.

16 So that means that per -- the
17 application that's going to be endorsed
18 is going to have to apply on behalf of
19 the African community. And we felt that
20 that's irregular, because the .africa
21 gTLD is not a community gTLD; it's a
22 standard gTLD.

23 So that's one constraint we saw.

24 And then the second we saw was that
25 it required ccTL- -- alignment with the

1 ccTLDs -- African ccTLDs. And that's not
2 something that the main ICANN RFP
3 requires. So we didn't have to go with
4 some extraordinary request again.

5 So we felt like there's no need to
6 do that. But the other competition does
7 have already an existing relationship
8 with the ccTLDs. So we felt like it's
9 going to favor them.

10 So the whole thing was, we felt
11 like, contrived by that -- that task
12 force to favor a particular group and
13 come up -- come out with a predetermined
14 outcome.

15 And also, the fact that it's not in
16 compliance with the -- with an
17 ICANN-regulated gTLD, which we've come up
18 with six years of requirements now has
19 changed with a different kind of
20 requirement where we're forced to
21 participate, and we probably will not
22 even win it. And then, when we go to
23 ICANN, it's just a contrary to the RFP.

24 And two things I forgot in there,
25 actually, is that the con- -- the

1 confidentiality of our proposal, because
2 it requires the financial and the
3 technical and all the application
4 proposal they had asked us to submit,
5 which means we're exposing that to our
6 competitors as well, who will have --
7 who, again, are the vested group, as well
8 as the other competition.

9 So we didn't feel like that should
10 be given at the AUC level; it should be
11 given at the ICANN level.

12 Okay. So there many, many reasons.

13 I mean, I have -- my organization
14 has bid in international bids for a long
15 time, my private organizations and so
16 forth. We have experience in
17 administering bids. So we thought that
18 the whole thing is irregular in terms of
19 how they came about it.

20 And, also, one more point on this is
21 that the ICANN RFP, as you know, it's
22 taking, like, six, seven, eight months to
23 evaluate the whole technical, financial
24 application. You know, it's an extensive
25 process that requires expertise,

1 independent evaluators and so forth.

2 The AU RFP was extremely simple, and
3 it required us to give all this
4 information, but the award is going to be
5 given in seven days. So it's just -- you
6 know it was predetermined outcome.

7 So we didn't want to be falling a
8 victim to something that's extraordinary.
9 That was not part of the ICANN rules.

10 ARBITRATOR KESSEDJIAN: You are
11 saying a lot of things at the same time,
12 so I'm trying to understand the main
13 points.

14 Are you saying that because AUC was
15 requiring a filing -- an open filing of
16 everything, contrary to what ICANN
17 does -- ICANN has some parts which are
18 confidential in the applications and
19 other parts which are public -- are you
20 saying that AUC was asking you to
21 basically give to the open public and
22 to -- therefore, to the competition all
23 of your application?

24 Is that -- is that what you said?

25 THE WITNESS: No.

1 Let me clarify. What I'm saying is
2 when you actually submit a bid for any
3 RFP, right, you have to -- there's a
4 requirement, which is the financial,
5 technical and whatever requirement they
6 would ask.

7 So that would be -- the
8 confidentiality of that data would fall
9 on the evaluators. And the evaluators of
10 that RFP was our competition.

11 So it would not be fair to give all
12 of our confidential information to them
13 and then we go apply again as a
14 confidential in ICANN as well.

15 So it's like double exposure. Yeah.

16 ARBITRATOR KESSEDJIAN: Now, I don't
17 know whether, in your opinion, the fact
18 that you refused to participate for the
19 reasons you just explained basically made
20 you an opponent to whoever was in power
21 to decide at the AUC what they were going
22 to do next.

23 So the call was actually a difficult
24 call?

25 THE WITNESS: It was an extremely

1 difficult call. Also, the fact that --
2 the major issue is that AUC wanted that
3 applicant -- the successful applicant to
4 apply on behalf of the community.

5 And this is not a community
6 application; this is a gTLD standard
7 application. So the -- our opponents'
8 differentiation strategy from ours was to
9 apply on behalf of a community. And,
10 even so, they did not apply at ICANN on
11 behalf of the community. That was their
12 differentiation strategy.

13 And we couldn't participate in that
14 process because we would not know the
15 impact of getting an endorsement under --
16 being a successful applicant to apply on
17 behalf of the community, how it would
18 affect us on the ICANN level, because
19 it's ultra contrary to the RFP of ICANN.

20 ARBITRATOR KESSEDJIAN: Okay. My
21 second question goes to the processes
22 that you describe in your -- in your
23 written statement.

24 And, in fact, at several moments in
25 your written statement -- I'm not going

1 to cite them, but you cite names of
2 people who we have no idea basically who
3 they are. And I'm just taking an
4 example, this Pierre Dandjinou.

5 THE WITNESS: Um-hum.

6 ARBITRATOR KESSEDJIAN: So you go
7 for quite a long time in your statement,
8 probably several paragraphs, at least the
9 ones that I have here, Page 33,
10 explaining what he did and so on.

11 But why is it -- I have to ask the
12 question -- why is Mr. Dandjinou not
13 here? I mean, if he's that important
14 that you really spend so much time
15 explaining to us what he has done so
16 wrong, why aren't we, you know, listening
17 to him?

18 Can you explain that? What's
19 the --

20 THE WITNESS: I don't know. He's
21 currently an ICANN employee, so I'm not
22 sure exactly. I'm not the one calling
23 the witnesses, so why he's not here --

24 ARBITRATOR KESSEDJIAN: Okay. Fine.

25 THE WITNESS: -- but just to briefly

1 describe the relationship, that, you
2 know, the gentleman was the head of the
3 ICANN Task Force -- I mean, the African
4 Union Task Force during the time the RFP
5 was being administered.

6 So we thought there was a conflict
7 of interest because he's one of the
8 vested groups of .africa that wanted the
9 community to own, the current ones.

10 So the reason we mention him all
11 over is because there is sort of an
12 incestuous relationship with this African
13 community and ICANN and the .africa gTLD
14 in general. And we felt like there's a
15 huge amount of conflicts of interests
16 that are not resolved.

17 ARBITRATOR KESSEDJIAN: Let's be
18 precise for a minute about this conflict
19 of interest. I mean, you, yourself, have
20 been involved in ICANN. So it seems like
21 in the Internet community, there's a lot
22 of going back and forth.

23 I mean, at some stage, you know, you
24 are -- and I guess in this country, in
25 the U.S. -- and that's why ICANN has this

1 kind of special status in a way -- there
2 is -- I mean, for a French person, I can
3 tell you it's more -- more shocking
4 that -- and we have actually an
5 expression which is "pantouflage."

6 You know, pantouflage is really bad.
7 It's really bad, because that means
8 you're using your contacts that you have
9 been -- you know, your network that you
10 have been crafting at the time you were
11 in an institution for private interests.
12 But it seems that the Internet community,
13 it happens all the time.

14 Would you agree with me?

15 THE WITNESS: I completely agree.

16 ARBITRATOR KESSEDJIAN: But then how
17 does that influence the analysis that we
18 have to have on the conflict of interest
19 that you are raising? You are raising --
20 you know, your case is based partly on
21 the conflict of interest. That is
22 very common.

23 If the going back and forth from
24 public to private, from ICANN to other
25 institutions, is pretty common, what is

1 the conclusion for us or what is the
2 analysis for us?

3 I mean, you may not want to answer
4 the question. I don't know. But, you
5 know, this is something that is important
6 for us.

7 THE WITNESS: Well, there could be a
8 measure of response. I mean, I was at
9 ICANN since 2005. I'm very familiar with
10 the environment.

11 When we were given the opinion of
12 gTLDs, a consideration of conflict of
13 interest came in fact and was prevalent
14 while -- during the final stages of the
15 gTLD, I would say. That's why we have
16 about, I think -- maybe I could confirm
17 that -- but maybe about 18 out of 18
18 Board of Directors. About 16 have
19 recused themselves, so that process went
20 in place.

21 And that's why you start identifying
22 people to curtail perceptions of
23 interest -- of -- of -- the thing we were
24 talking about all day today, the
25 perceived conflict versus the actual

1 conflict and so forth.

2 So it's very normal to report it to
3 the upper management of the ICANN Board,
4 and it's within the integrity of the
5 person to step down and recuse themselves
6 so they are not perceived as that. And
7 the consequences are up to the person, I
8 would believe.

9 So . . .

10 ARBITRATOR KESSEDJIAN: Okay. Thank
11 you.

12 - - -
13 EXAMINATION ON BEHALF OF THE PANEL
14 BY HONORABLE JUDGE CAHILL

15 - - -
16 HONORABLE JUDGE CAHILL: Do you
17 under -- do you agree you need the
18 support of the 60 percent of the African
19 countries to --

20 THE WITNESS: Yes.

21 HONORABLE JUDGE CAHILL: And you --
22 you knew it before you got the warning
23 letters?

24 THE WITNESS: Sure.

25 HONORABLE JUDGE CAHILL: And did you

1 ever get 60 percent?

2 THE WITNESS: We have, according to
3 the Guidebook, almost 100 percent, right,
4 because we have the AUC -- in our
5 opinion, it's not withdrawn -- and also
6 UNECA, which is another equivalent
7 organization.

8 So the point of the 60 percent was
9 not determined, in fact, until the
10 Dakar -- the Dakar meeting, where I
11 remember we had a discussion with some of
12 the Board members saying, Sophia, in
13 fact, the 60 percent might imply that it
14 would be about 36 governments, instead
15 of, like, a blanket 60 percent -- a
16 blanket endorsement.

17 So there was a tiptoeing about
18 exactly the interpretation of that, what
19 that 60 percent was. But irrelevant to
20 that, when we developed the Guidebook, it
21 was very clear that geographic name
22 applicants -- it's not only .africa --
23 they could come in with the current
24 endorsement they have.

25 And at the end, after the

1 independent evaluators look at them,
2 there is a 90-day period where we can --
3 again, if the -- if the -- the
4 application is viable.

5 Because the application I know we
6 focused here --

7 HONORABLE JUDGE CAHILL: What
8 application is viable?

9 THE WITNESS: The application being
10 viable means the --

11 HONORABLE JUDGE CAHILL: You mean
12 the AUC --

13 THE WITNESS: -- no, no, the
14 actual -- the registry application that
15 you put --

16 HONORABLE JUDGE CAHILL: Okay.

17 THE WITNESS: Yeah.

18 -- so I know we focused a lot --
19 because of the GAC advice, we focused a
20 lot on the merits of .africa on -- on the
21 support.

22 But the merits of an application,
23 really, according to the gTLD Guidebook,
24 is the successful applicants should pass
25 technical, financial and support,

1 obviously, for -- for geographic name.

2 So most people, you know, you may
3 not have -- you may have a viable
4 application and not the support. So the
5 gTLD Guidebook says that, you know, if
6 your application is viable, you can go
7 get support. You have 30 days to go get
8 support.

9 So we -- we are counting on the gTLD
10 system to work as it's constructed.

11 So when we apply -- when we went in
12 there, we had already the -- the current
13 endorsements that we had in our hands,
14 but if our application -- that's what we
15 were hoping, that when the two applicants
16 were going -- being evaluated, the
17 applicant who successfully evaluated
18 could go back to the AUC or go back to
19 the African countries to get
20 endorsements. And we had no problem to
21 get them.

22 HONORABLE JUDGE CAHILL: Okay. You
23 said the AUC endorsement, as far as
24 you're concerned, is not withdrawn?

25 THE WITNESS: No.

1 HONORABLE JUDGE CAHILL: Why do you
2 say that?

3 THE WITNESS: Because it was not
4 withdrawn. They did not say we did not
5 withdraw your application. They just
6 said we will work with a framework with
7 ICANN and --

8 HONORABLE JUDGE CAHILL: I thought
9 they did withdraw.

10 You don't think they withdrew their
11 application?

12 THE WITNESS: We don't think they
13 withdraw it.

14 HONORABLE JUDGE CAHILL: You don't
15 think they changed their mind --

16 THE WITNESS: They changed their
17 mind in the way it's implemented -- they
18 want it implemented.

19 HONORABLE JUDGE CAHILL: Are they
20 still endorsing you, even though you're a
21 competitor?

22 THE WITNESS: They did not say
23 withdraw. We didn't see it as a legal
24 withdraw.

25 HONORABLE JUDGE CAHILL: Okay.

1 THE WITNESS: Yeah. But we have the
2 UNECA, so, for us, it's equivalent. So
3 if we're competitors, then we will
4 compete with each other on that.

5 But the point is the successful
6 evaluate -- the person -- the applicant
7 who is going to be successfully
8 evaluated, at the end, we still have
9 three months to get endorsements.

10 And what we are saying to ICANN is,
11 The GAC advice somehow has stopped us
12 from participating further, so we don't
13 even know -- go to that.

14 HONORABLE JUDGE CAHILL: You had 17
15 countries give you Early Warnings, and
16 one of the -- I think most of them, not
17 all of them, said you need 18
18 countries --

19 THE WITNESS: There are 17, yes.

20 HONORABLE JUDGE CAHILL: Yeah.

21 So what did you do when you got that

22 --

23 THE WITNESS: Okay. Again --

24 HONORABLE JUDGE CAHILL: -- those

25 complaints are invalid or --

1 THE WITNESS: -- the specifics of
2 that says that you didn't have support.
3 But the 17 countries had no idea of our
4 submission of application. We already
5 have support.

6 So how could they come in and say
7 You don't have support? It's their own
8 perception of what AUC --

9 HONORABLE JUDGE CAHILL: Did you
10 respond and say, Look, I do have support?
11 I have AUC --

12 THE WITNESS: Yes, in our early GAC
13 response -- actually, we should not be
14 discussing because, obviously, ICANN did
15 not put even that as a con- -- you know,
16 the endorsements, they are not in public
17 domain.

18 So that's -- the discussion was not
19 if we had support; the discussion is that
20 they -- their response to us was not
21 legitimate. Their objection to us was
22 not legitimate without them knowing that,
23 if we have support or not. Because
24 they're acquiescing to the AUC statement.

25 HONORABLE JUDGE CAHILL: There's a

1 writing somewhere where you write back
2 and you go, Wait a minute, I don't need
3 18, I've got enough already?

4 THE WITNESS: We did say that, and
5 we also said, Your supported applicant
6 does not also have the proper
7 endorsements, so why are we evaluated
8 differently?

9 HONORABLE JUDGE CAHILL: Whether or
10 not AUC's endorsement program is proper
11 or not, that's not really before us --

12 THE WITNESS: I understand.

13 HONORABLE JUDGE CAHILL: -- what's,
14 really, kind of before us is the action
15 of the GAC to stop your application,
16 right?

17 THE WITNESS: Right.

18 HONORABLE JUDGE CAHILL: Did you
19 know before the Beijing meeting that that
20 was on the agenda --

21 THE WITNESS: No.

22 HONORABLE JUDGE CAHILL: -- that one
23 of the things was to stop your -- going
24 forward?

25 THE WITNESS: No.

1 HONORABLE JUDGE CAHILL: You didn't
2 know that?

3 THE WITNESS: No. We only know
4 about the Early Warning, which could
5 potentially lead to us --

6 Redacted - GAC Designated Confidential
 Information

1 Redacted - GAC Designated Confidential
Information

5 HONORABLE JUDGE CAHILL: But you had
6 no idea that there was going to be
7 anything consensus -- consensus request
8 at the Beijing meeting?

9 THE WITNESS: Obviously, once we got
10 there, we --

11 HONORABLE JUDGE CAHILL: You were
12 there?

13 THE WITNESS: Yeah, I was there --

14 HONORABLE JUDGE CAHILL: You were
15 there?

16 THE WITNESS: -- yes.

17 HONORABLE JUDGE CAHILL: Oh.

18 THE WITNESS: I was not at the GAC
19 meeting, but I was at the meeting for
20 ICANN.

21 HONORABLE JUDGE CAHILL: Okay. Did
22 you talk to anybody to try to get
23 support?

24 THE WITNESS: Yeah. We have intel
25 after -- over there with the government?

1 No.

2 HONORABLE JUDGE CAHILL: No, not
3 with the Beijing government.

4 What I'm hearing is everybody's
5 walking around all this talking --

6 THE WITNESS: We do that, yeah.

7 HONORABLE JUDGE CAHILL: -- and you
8 needed -- according to the testimony, you
9 needed only one country to stand up and
10 say, Don't take this off the agenda or
11 don't adopt this opinion?

12 THE WITNESS: Kenya objected --

13 HONORABLE JUDGE CAHILL: Who?

14 THE WITNESS: -- Kenya objected.

15 That's what --

16 HONORABLE JUDGE CAHILL: Kenya
17 objected on the e-mails?

18 THE WITNESS: Yes.

19 HONORABLE JUDGE CAHILL: Did you
20 know that you had to be present --
21 present in the room?

22 THE WITNESS: No. The actual GAC
23 principle says that a member country can
24 send an e-mail when they are not present.
25 We put that as part of our GAC response

1 to ICANN.

2 HONORABLE JUDGE CAHILL: Did you
3 know the position of the -- of GAC, that
4 the person who is sending e-mails is not
5 even the proper person to make the
6 objection?

7 THE WITNESS: That's not still,
8 again, what is the GAC principles. There
9 is no clarity on that. It's only the
10 GAC Chair that says that.

11 So as to who is the one that's
12 supposed to send an objection, a
13 representative versus advisor, it's not
14 in the GAC -- it's not clearly stated in
15 the GAC principle.

16 HONORABLE JUDGE CAHILL: When you
17 got all the Early Warnings, did you think
18 that those countries were going to oppose
19 your -- your --

20 THE WITNESS: We still had like,
21 according to the GAC principles, that
22 unless it's a policy advice or .africa,
23 they cannot hijack it, the Geographic's
24 Name objection, which is supposed to be
25 done by an independent group, and just

1 stop our application. We thought it was
2 not right. It was very wrongful for
3 ICANN to accept that as advice.

4 If we didn't count on the
5 governments, which I think a lot of
6 confusion is there -- as we say, they can
7 say whatever they like about an
8 applicant, if they don't like the
9 applicant, but it's up to the Board, we
10 think, that should be determining if this
11 is the right sacrifice or not.

12 And we expected the Board to know
13 that Geographic Names Panel would be
14 responsible for objections over --
15 over -- over endorsements and not GAC.

16 So, yeah.

17 HONORABLE JUDGE CAHILL: Okay.

18 So on Paragraph 101 of your
19 declaration on 46 -- Page 46 --

20 PRESIDENT BARIN: Which paragraph?

21 HONORABLE JUDGE CAHILL: I'm sorry.
22 Page 46 -- Page 46, Paragraph 101.

23 PRESIDENT BARIN: Page 46,
24 Paragraph 101.

25

1 HONORABLE JUDGE CAHILL: Right.

2 The second-to-last sentence, you
3 say, AUC used its position on the GAC to
4 persuade GAC members to advise the Board
5 that DCA's application should not
6 proceed.

7 Why did you -- what facts do you
8 have to support that?

9 THE WITNESS: Which one is that --

10 HONORABLE JUDGE CAHILL: I'm
11 sorry --

12 THE WITNESS: -- it's 46, Page 101?

13 HONORABLE JUDGE CAHILL: Page -- no.
14 Page 46 --

15 THE WITNESS: Yeah.

16 HONORABLE JUDGE CAHILL: --
17 Paragraph 101.

18 THE WITNESS: Yeah.

19 HONORABLE JUDGE CAHILL: You can
20 read the whole paragraph.

21 The second-to-last sentence says,
22 Instead, the AUC used its position on the
23 GAC to persuade GAC members to advise the
24 Board that DCA's application should not
25 proceed.

1 What facts do you have that support
2 that?

3 THE WITNESS: Because I believe the
4 Early Warning was coordinated by AUC
5 assistant. So, obviously --

6 HONORABLE JUDGE CAHILL: You believe
7 that? Does anybody ever tell you that
8 or --

9 THE WITNESS: No. The AUC has
10 submitted an Early Warning --

11 HONORABLE JUDGE CAHILL: The AUC
12 did, yes, that's true.

13 THE WITNESS: -- for the Early
14 Warning, so why wouldn't they submit --

15 HONORABLE JUDGE CAHILL: Why what?

16 THE WITNESS: -- it's very natural
17 to actually coordinate further on the GAC
18 advice as well, yeah.

19 HONORABLE JUDGE CAHILL: And then,
20 in Paragraph 102, you say, ICANN allowed
21 the AUC to circumvent the formal
22 objection process.

23 Why do you say that?

24 THE WITNESS: Because the formal
25 objection process for ICANN gTLD requires

1 four different kinds of objection
2 criteria, and one is that -- that of a
3 community.

4 And, unfortunately, the AUC and
5 the -- the successful applicant that they
6 endorsed and should have applied on
7 behalf of the community did not apply on
8 behalf of the community. But they were
9 very unsuccessful in objecting many of
10 our application, including at the IO
11 level, the independent objector, and so
12 forth on a community ground.

13 So it's known that the community --
14 the community want -- if an applicant
15 does not apply as a community, since --
16 it's known that they will not pass the
17 evaluation; so, therefore, the only way
18 they could -- they could formally object
19 to us is through the GAC means, because
20 that's the only power that they have to
21 object.

22 Because the legal objection criteria
23 that's listed under the -- the -- the
24 Guidebook will not apply. So that advice
25 that was given by ICANN in Dakar to tell

1 them to use the GAC as a way of objecting
2 or -- or as a way of prevailing in the
3 applications to the -- to the desired
4 outcome of AUC as another way of saying
5 circumventing them.

6 HONORABLE JUDGE CAHILL: Let me go
7 back to Beijing a second.

8 So when they had the meeting where
9 they had the consensus -- what they say
10 is consensus. I know you dispute that --

11 THE WITNESS: Right.

12 HONORABLE JUDGE CAHILL: -- did you
13 know that was going to happen during that
14 meeting, that they were going to go
15 through that?

16 THE WITNESS: No, I did not know.
17 There may be an exchange of e-mails, but
18 we did not anticipate it.

19 HONORABLE JUDGE CAHILL: When did
20 you find out for the first time when --

21 THE WITNESS: When it was announced
22 at the GAC -- at the public meeting.
23 Yeah.

24 HONORABLE JUDGE CAHILL: Now,
25 what -- you have two people you say have

1 conflicts.

2 THE WITNESS: Yeah.

3 HONORABLE JUDGE CAHILL: Yeah. And
4 Mr. Disspain, I understand -- what
5 exactly is the conflict?

6 THE WITNESS: For --

7 HONORABLE JUDGE CAHILL: He's the
8 one from South Africa, I think --

9 THE WITNESS: Yeah.

10 HONORABLE JUDGE CAHILL: -- no.
11 He's the one from Australia. Sorry, got
12 the wrong guy.

13 THE WITNESS: -- he sits on --
14 and -- on the .au, which is Australian
15 ccTLD, and the -- the .au is affiliated
16 with dot -- I mean -- the ARI Registry
17 Services, which is the registry services
18 that provided ZACR with the registry
19 software.

20 So they've consulted with ZACR. And
21 so by way of business affiliation, we
22 didn't feel it's comfortable that is --

23 HONORABLE JUDGE CAHILL: Why would
24 they object? Would there be an economic
25 or otherwise advantage to them?

1 THE WITNESS: It's always economic
2 advantage during -- with the registries
3 and the consultancy to provide and so
4 forth. There's always a relationship
5 between -- that's why a lot of the Board
6 members recuse themselves.

7 HONORABLE JUDGE CAHILL: So if
8 Mr. Disspain voted against your proposal,
9 he would gain how economically?

10 THE WITNESS: Well, I don't know the
11 direct -- the direct financial gain he
12 would have, but they have a business
13 relationship with ARI, which is --
14 supplies software for ZADNA.

15 Usually, when the back-end registry
16 supplies software for you, it depends --
17 I don't know their contractual
18 relationship, but there could be --

19 HONORABLE JUDGE CAHILL: They could
20 use something -- they could lose
21 something, right?

22 THE WITNESS: Yeah, there's
23 always --

24 HONORABLE JUDGE CAHILL: Mr.
25 Silber -- you heard me say that maybe

1 Mr. Silber was --

2 THE WITNESS: Yes, Mr. Silber is a
3 South African national. He sits on the
4 dot -- he is a treasurer on the .z- --
5 ZADNA, which is a regulator of the .za,
6 which is the country code for
7 South Africa.

8 So .za is managed by UniForum, and
9 UniForum applied for, obviously, the
10 .africa TLD, and they were the ones that
11 are endorsed. And the .za general
12 manager is Vika Mpisane, South African
13 national, and she is also the Chairman of
14 the African ccTLDs that have aligned
15 themselves with ZACR's application.

16 And Mr. -- Vika recommended UniForum
17 to AUC to be endorsed. So, again, there
18 is that very, very close relationship of
19 Mike Silber being a treasurer and -- and
20 ZADNA endorsing UniForum as part of the
21 "dotAfrica Initiative." It's a public
22 record, that they openly endorse them.

23 So I don't know about financial
24 trail, but all I can say is there's a
25 very close working relationship of

1 approvals.

2 HONORABLE JUDGE CAHILL: It wouldn't
3 be an independent vote?

4 THE WITNESS: I cannot see that.

5 HONORABLE JUDGE CAHILL: Okay. What
6 else?

7 Did you see the ombudsman report
8 when it came out that says there's no
9 conflict?

10 THE WITNESS: Yes.

11 HONORABLE JUDGE CAHILL: It was very
12 narrow. It just said, No conflict right
13 now because there's never been any
14 discussion.

15 Is that right?

16 THE WITNESS: Right. It was a point
17 in time, like an audit.

18 HONORABLE JUDGE CAHILL: A point in
19 time.

20 Did you ever renew that later when
21 it was obvious -- well, did you ever
22 review it later -- did you ever renew
23 your objection to the conflict?

24 THE WITNESS: No.

25 What happened was, during that

1 investigation, the ombudsman, in fact,
2 consulted with ICANN Internet counsel,
3 and then he consulted with the two Board
4 members before he actually decided to
5 go --

6 HONORABLE JUDGE CAHILL: Right.

7 THE WITNESS: -- so we felt that
8 was -- the whole threesome relationship
9 was not independent to begin with.

10 But after -- right after that, that
11 advice came from DCA. The two Board
12 members, in fact, published their -- or
13 updated their statements of interest
14 publicly, which means disclosure, they
15 did the disclosure.

16 After that, we did not submit any
17 other update.

18 HONORABLE JUDGE CAHILL: When I was
19 asking questions earlier, there was a new
20 fact. And then, as they started, you
21 know -- they say there's never been any
22 votes or any discussion, according to the
23 ombudsman; therefore, at that point in
24 time, there's no conflict. But later,
25 there was.

1 I don't know who's supposed to
2 rejuvenate that. Maybe ICANN --

3 THE WITNESS: ICANN -- sorry.

4 HONORABLE JUDGE CAHILL: -- maybe
5 ICANN can.

6 THE WITNESS: ICANN Board is what he
7 was saying, right, and Mr. Chalaby. The
8 ICANN Board brought it to their attention
9 because of --

10 HONORABLE JUDGE CAHILL: That was
11 the second one.

12 THE WITNESS: Right.

13 HONORABLE JUDGE CAHILL: I'm fine.
14 I understand the answer. I think I'm
15 done.

16 - - -

17 EXAMINATION ON BEHALF OF THE PANEL
18 BY PRESIDENT BARIN

19 - - -

20 PRESIDENT BARIN: I have one quick
21 question for you, and then we'll move on.

22 Did I understand correctly that you
23 said that, in your view, the way the
24 process should work -- the gTLD
25 process -- ICANN should evaluate the

1 technical and financial capabilities of
2 Africans and that the political support
3 should then be left to the applicant and
4 the runnerup, or whoever it is, to then
5 deal within a certain period of time -- I
6 think you said it was 30 days or --

7 THE WITNESS: Ninety.

8 PRESIDENT BARIN: -- 90 days -- is
9 that -- is that what your position is?

10 THE WITNESS: Right. That's why
11 it's on the gTLD Guidebook so you can
12 collect endorsement at any time
13 throughout. Even if you don't submit
14 your application without endorsement, you
15 can still collect endorsements. You have
16 90 days after you're approved as a viable
17 applicant, you can collect endorsements.

18 PRESIDENT BARIN: So are the -- are
19 you separating the political issue and
20 the evaluation of technical and financial
21 capability?

22 THE WITNESS: Yeah. We don't
23 consider endorsement as a political; we
24 consider it as -- as a requirement to
25 fulfill, like any other. So -- it only

1 gets political if there's a yes or no.

2 For example -- for example, just let
3 me say -- the -- the Guidebook allows an
4 entity to endorse two applicants, right?
5 That's apolitical. That means the
6 organization is neutral and independent.

7 So the predetermination of something
8 that's political endorsement is political
9 is incorrect. It's only -- ours just
10 only got political because the competitor
11 wanted the same thing -- the AUC wanted
12 to be the competitor, they endorsed an
13 application.

14 PRESIDENT BARIN: So if we were to
15 turn the clock back and -- and have
16 you -- that's DCA -- and ZACR go forward
17 together, the evaluation then would be
18 one of financial and technical
19 capabilities?

20 THE WITNESS: Um-hum.

21 PRESIDENT BARIN: And then there
22 would be a period, as you said, 90 days
23 for --

24 THE WITNESS: Right.

25 PRESIDENT BARIN: -- either one of

1 the two --

2 THE WITNESS: Right.

3 PRESIDENT BARIN: -- to go out and
4 get endorsements, as you said, or
5 support?

6 THE WITNESS: Right.

7 If I may add to this, that is what
8 we recommended for ICANN. Knowing that
9 the ZACR application did not satisfy
10 the -- the endorsement requirement as
11 well, we thought that ICANN was at a
12 crossroad of not knowing what to do.

13 And that is why we responded to our
14 Early Warnings when we say, you know,
15 waive the endorsements. This is not to
16 the benefit of DCA; it was to the benefit
17 of .africa gTLD, because we wanted to
18 make sure at least we saved .africa.
19 It's been -- a lot of work has been gone
20 through it.

21 So that was the recommendation we
22 make, because we knew -- we have
23 intelligence that the ZACR application
24 did not have endorsement either. And
25 because the endorsement has not been made

1 public by ICANN, which I do not
2 understand why, because during the
3 application -- during the RFP period,
4 when we did that, there was no reason
5 that endorsement should not be public.

6 Because if it was public, we would
7 not have gone through this step of, you
8 know, issues. People would have known if
9 that endorsement by AUC was legitimate or
10 not, because all those endorsements that
11 was collected were on behalf of a reserve
12 name for AUC, and it wasn't a proper
13 endorsement.

14 So had that been disclosed at the
15 beginning of the application, then we
16 would all know what to do for the next
17 nine months trying to see -- consult with
18 AUC or authorities or governments to do
19 the right thing.

20 But the nondisclosure of that has
21 caused a lot of confusion.

22 PRESIDENT BARIN: Thank you.

23 HONORABLE JUDGE CAHILL: I'm done.

24 PRESIDENT BARIN: So in the normal
25 course, that's you, Mr. LeVee.

1 Is there a need for a very punctual
2 short break?

3 MR. LEVEE: Not for me, but if
4 Ms. Bekele wants a break, she can take
5 one.

6 THE WITNESS: It's okay.

7 PRESIDENT BARIN: Are you okay?

8 THE WITNESS: Yeah.

9 PRESIDENT BARIN: How much time do
10 you think you'll need?

11 MR. LEVEE: I'm very cognizant of
12 the hour --

13 PRESIDENT BARIN: It's fine --

14 MR. LEVEE: -- I'll be much shorter
15 than the cross-examination.

16 HONORABLE JUDGE CAHILL: That
17 doesn't help.

18 MR. LEVEE: What I'm handing to
19 Ms. Bekele, just so you know, is the
20 binder that has my opening statement
21 slides and exhibits, because there are a
22 couple of exhibits that I'd like to turn
23 to.

24

25

1 - - -

2 EXAMINATION ON BEHALF OF RESPONDENT
3 INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS
4 BY MR. LEVEE:

5 Q. The exhibit number that I started
6 with, Ms. Bekele, is Exhibit C-R-10.

7 Do you see that in front of you?

8 A. Um-hum.

9 PRESIDENT BARIN: I don't mean to
10 interrupt you before you even get
11 started.

12 Are you able to give me an idea,
13 because I need, personally, a nature
14 break.

15 MR. LEVEE: If you need a break,
16 then you should take one.

17 HONORABLE JUDGE CAHILL: Right now?

18 PRESIDENT BARIN: I'd rather take it
19 now, maybe five minutes, if that's okay?

20 MR. LEVEE: Five minutes is good. I
21 won't even leave the room.

22 - - -

23 (Whereupon, a brief recess was taken
24 from 6:36 p.m. to 6:41 p.m.)

25 - - -

1 PRESIDENT BARIN: We're back on the
2 record.

3 Mr. LeVee.

4 MR. LEVEE: Thank you, Mr. Chairman.

5 BY MR. LEVEE:

6 Q. Ms. Bekele, you understood when you
7 submitted your application to ICANN that you were
8 supposed to submit with the application whatever
9 governmental support you had at that time, right?

10 A. Yes.

11 Q. So when you -- you submitted your
12 application in the spring or so, March of 2012?

13 A. Yes.

14 Q. And you attached the letter that you
15 had received from the AUC in 2009, correct?

16 A. Correct.

17 Q. And you characterized that as the AUC
18 supporting your application, right?

19 A. Correct.

20 Q. Okay.

21 So let me ask you to look at -- it was
22 the page -- when I gave you the binder, it was
23 the page that was open -- Exhibit C-R-10.

24 So this is a letter dated April 16th,
25 2010, correct?

1 A. Correct.

2 Q. And it's written by the Deputy Chair
3 of the African Union Commission., correct?

4 A. Yes.

5 Q. And it says, The African -- and it's
6 addressed to you, right?

7 A. Correct.

8 Q. Okay. And it says, The African Union
9 Commission has reconsidered its approach in
10 implementing the subject Internet domain name
11 (.africa) and no longer endorses individual
12 initiatives in coordination with Member states
13 continental.

14 You see that, right?

15 A. Correct.

16 Q. You were pretty unhappy by that,
17 right?

18 A. Surprised.

19 Q. Okay. And you knew that this letter
20 was the withdrawal of the support that you had
21 worked so hard to earn?

22 A. No.

23 Q. Okay. Well, let's test that.

24 Why don't you look, then, at

25 Exhibit C-26 at the beginning of the binder?

1 You tell me when you're there.

2 Are you with me?

3 A. Yes.

4 Q. Okay. If you look at the second page,
5 that's your computer-generated signature, correct?

6 A. Yes.

7 Q. And this is your letter to the Chief
8 of Staff of the African Union Commission, right?

9 A. Correct.

10 Q. And in that, you say, quote, We have
11 been waiting patiently for the past several months
12 to receive an official response from your office
13 regarding the need to properly redress our wishes
14 as conveyed at different times for the official
15 reinstatement of our earlier endorsement received
16 from the AU for the .africa gTLD and registry.

17 Now, you wrote that, right?

18 A. Correct.

19 Q. So you knew what you were asking for
20 was to be reinstated, right?

21 A. A confirmation.

22 Q. Well, that's not how I read it.

23 It looks to me that you knew that your
24 support from the African Union Commission had
25 been withdrawn by the exhibit we just looked, and

1 you were asking for it to be reinstated.

2 You weren't asking for a confirmation,
3 right?

4 A. We did not say anything about
5 withdrawal, though.

6 HONORABLE JUDGE CAHILL: I'm sorry.

7 Say what?

8 THE WITNESS: We did not say
9 anything about withdrawal; we just say
10 reinstated. We wanted to make sure that
11 they confirm what they already have.

12 BY MR. LEVEE:

13 Q. Well, let's look at the next page.
14 There's a lot in the middle here.

15 And -- and in the middle -- well, hold
16 on. Let's stay with the first page.

17 You referred to the fact that DCA had
18 received an endorsement as early as 2009, which
19 it was believed was valid at the time. And in
20 the subsequent months thereafter, the issues
21 became controversial.

22 You see that, right?

23 A. Um-hum.

24 Q. And then, a couple of paragraphs down,
25 you say, We wish to inform our willingness --

1 unwillingness, I should say, to participate in the
2 new AU RFP process.

3 So this was the letter where you
4 informed the AUC that you were not going to
5 submit an RFP response, correct?

6 A. (No audible response.)

7 Q. So, here, we've got the AUC, and it
8 has announced that it's going for an RFP process,
9 correct?

10 A. (No audible response.)

11 Q. You need to answer audibly so the
12 court reporter can type something down.

13 A. Yes.

14 Q. Okay. And you knew that ZACR was
15 going to apply, correct?

16 A. At that time, it was UniForum, yes.

17 Q. So you knew UniForum was going to
18 apply?

19 A. We don't know who is going to apply.

20 Q. Well, you said earlier that you
21 thought the whole thing was wired for UniForum.
22 You expected them --

23 A. For a predetermined outcome. And it
24 was UniForum, but then it became ZACR, right? So
25 we really don't know which organization in name

1 that's going to be endorsed, but we know it's the
2 one associated with the group that has vested
3 interest in it. That's it.

4 Q. But you knew, whichever group it was,
5 ZACR or UniForum, or somebody else that might have
6 won the RFP, they were going to get the
7 endorsement of the AUC?

8 A. Certainly not us.

9 Q. Yes.

10 But even so, if you turn to the second
11 page, you say, you know what, I don't like this
12 RFP project, right?

13 You didn't think it was fair, right?

14 A. We thought it was an extraordinary
15 process.

16 Q. Okay.

17 And then you say, In conclusion -- and
18 this is highlighted so you can see it -- In
19 conclusion, we think it would be good for the AU
20 leadership to do what is right and, just in the
21 present circumstances, redress our case
22 satisfactorily and reinstate our endorsements to
23 enable us to go ahead with our application to
24 ICANN.

25 You said that, right?

1 A. Sure.

2 Q. Those are your words?

3 A. Sure.

4 Q. What you're saying is you weren't
5 asking for a reinstatement; you were actually
6 asking for something -- a further endorsement?

7 A. Okay. Mr. LeVee, by the time you have
8 started the very beginning and the highlight and
9 then the end, you missed the whole redress points
10 that were, like, five points in there that we
11 wanted them to redress.

12 So we thought the whole exercise of
13 creating an extraordinary process on the gTLD and
14 creating a parallel policy process, like ICANN --
15 sort of parallel policy process, like ICANN, and
16 extraordinary process of RFP was unfair.

17 And in the process, we're trying to
18 educate them. They did not do the right thing.

19 Q. I know you didn't think they did the
20 right thing --

21 A. Right.

22 Q. -- but my point is you knew that the
23 AUC was no longer endorsing your application. You
24 knew they had pulled their endorsement.

25 A. They have re- -- as they state in that

1 letter, they have reconsidered on the
2 implementation plan.

3 Q. And they -- you knew that they were no
4 longer endorsing you?

5 I'm just trying to get a yes or no.

6 A. Support.

7 Q. You knew that they were no longer
8 supporting you?

9 A. We had the endorsement, but we didn't
10 have support.

11 Q. So you had a piece of paper, right?
12 That was the endorsement?

13 A. We didn't have political support.
14 That's the difference.

15 Q. What you had was a piece of paper from
16 2009 --

17 A. That was called an endorsement, yes.

18 Q. Okay. And you had another piece of
19 paper written in 2010 saying that the earlier
20 piece of paper was no longer valid, right?

21 A. (No audible response.)

22 Q. You have to answer audibly for the
23 court reporter.

24 A. The -- what they said was the -- they
25 want -- they are reconsidering the approach on how

1 they're implementing .africa.

2 Q. It says, No longer endorses individual
3 initiatives --

4 A. Right.

5 Q. -- you were the only individual
6 initiative, right?

7 A. No, actually, it wasn't. There was a
8 lot of people. Those vested group I talked about,
9 they used to go and request AUC, like the AfTLD.
10 There were other groups that used to go and ask
11 it -- to be endorsed.

12 So what their mandate is saying is
13 they don't want individual initiatives.

14 Q. Right.

15 But who else was applying for .africa
16 at that time other than you?

17 A. No. There's AfTLD.

18 Q. They were going to apply to .africa?

19 A. Right. We had --

20 Q. So the letter says they're not going
21 to endorse any individual initiatives, and that
22 included DCA -- you're saying it included DCA,
23 among others?

24 A. Among others.

25 Q. Okay. So you had the letter that says

1 no endorsement of DCA, and you had this other
2 letter where you asked for the reinstatement.

3 But the AUC didn't you give you a
4 reinstatement, right?

5 A. No.

6 Q. No.

7 So when you applied to ICANN in March
8 of 2012, why did you tell ICANN that you had the
9 official endorsement of the AUC?

10 A. We submitted the 2009 letter, which is
11 not withdrawn, and based on a conversation that I
12 had with the Chairman at the time, who endorsed
13 us, he did not withdraw our letter.

14 The letter that you are referring to
15 seems extremely inconsistent. As you can see, it
16 even says, Sophia Bekele, United States of
17 America, While the endorsement was given to
18 Sophia Bekele, DotConnectAfrica, in Africa.

19 We felt like this letter came out of
20 the Deputy's office, while the other one came out
21 of the Chairman's office, which could have easily
22 been done by the Chairman.

23 So we thought there were a lot of
24 irregularities with this letter that confirmed to
25 us that it's not authentic. We --

1 Q. You asked the AUC to send you a second
2 letter, right?

3 A. Right.

4 Q. Saying that the AUC endorses your
5 application, correct?

6 A. Right.

7 Q. And you never got the letter?

8 A. No --

9 Q. Okay.

10 A. -- because they wanted it for
11 themselves now --

12 Q. Okay.

13 A. -- so they consulted differently.

14 Q. You also said in response to one of
15 the Panel's questions that you had, at the time
16 that you submitted your application, the support
17 of governments of Africa.

18 Which governments was that?

19 A. There was the Ethiopian Government and
20 whichever one we filed with our application.

21 Q. Did you also file with your
22 application that you had the support of the Kenyan
23 Government?

24 A. Yeah, because we had the
25 endorsement --

1 Q. Okay.

2 A. -- issued to us, right.

3 Q. And the Kenyan Government later issued
4 an Early Warning advice against your application,
5 correct?

6 A. I'm not familiar with that.

7 Q. You didn't see me use that today?

8 A. I think we discussed that Early
9 Warning. The ccTLDs -- we believe it was the
10 ccTLDs, not the actual governments, that issued
11 the Early Warning. And we are aware of that
12 because if you had gone back, we -- even in our
13 Early Warning, we stated to ICANN that none of
14 the -- these Early Warnings could be justified if
15 it has to actually go back to the government, the
16 Minister level, and -- to see if they were --
17 would be authenticated.

18 So we still felt like the ccTLDs
19 within the GAC structure originated the Early
20 Warnings. It wasn't the actual governments.

21 Q. Well, you're saying what you think.
22 You don't know that, right?

23 A. That's why we say -- that's why it
24 should have been gone to be authenticated by the
25 government.

1 Q. Okay. And GAC Early Warning notice
2 doesn't actually have any legal significance,
3 right? Correct?

4 A. I don't think so.

5 Q. And you responded to it with a lengthy
6 response, correct?

7 A. Right.

8 Q. And did you -- did you say that the --
9 that you had the support of the AUC?

10 A. Our -- our -- our endorsement was just
11 submitted. Whatever we have of support, it was
12 submitted during the application open.

13 And after that, we were waiting for
14 the evaluation by ICANN of all our -- the
15 technical and financial evaluation, which I think
16 the other competition was 301, and ours was about
17 1500. So we would assume -- we were hoping the
18 results of the evaluation coming first and if
19 they have a viable application or not.

20 And then ours were 1500, the number.
21 This is a lottery system that you pick. So
22 whichever viable application comes out of
23 .africa, we expected then to work with AUC and
24 the other governments to show if our application
25 was viable, then we will ask support.

1 Q. Okay. But in the period between the
2 time you submitted your application and the time
3 that the GAC issued the consensus advice -- so
4 that's about a 13-month period, right, March of
5 2012 to April of 2013?

6 A. Right.

7 Q. -- in that period, you did not submit
8 to ICANN any additional written support from any
9 country in Africa, correct?

10 A. No.

11 Q. Okay. No, I'm not correct; or, yes,
12 I'm correct?

13 A. No, no; you are correct.

14 Q. Okay.

15 Now, the Panel asked you a bunch of
16 questions about the impetus of why the AUC
17 changed its mind. So let me ask you few
18 questions about that.

19 You said that -- first of all, you're
20 clear, in your own mind, right, that the AUC was
21 entitled to support an applicant other than
22 DotConnectAfrica, correct?

23 A. That's okay.

24 Q. Okay. And the AUC was also entitled
25 to change its mind -- it was entitled to have a --

1 support your application and then change its mind
2 to support somebody else later, right?

3 A. Sure.

4 Q. Pardon?

5 A. Sure.

6 Q. Okay. So what I think I heard you say
7 was -- is that ICANN told the AUC that it could
8 "reserve" the name for itself.

9 Is that what you said?

10 A. What I said was the Chief of Staff
11 said that the reason we wrote you that letter is
12 because ICANN made a presentation in our offices,
13 and we are now going to go through a regulatory
14 framework.

15 Q. But the word you used -- I wrote it
16 down because you said it at least three times --
17 was that the AUC could "reserve" .africa for
18 itself.

19 That's what you said earlier today,
20 right?

21 A. Right.

22 Q. Okay. Here's what I'm struggling,
23 because you heard my opening statement this
24 morning, right?

25 A. Um-hum.

1 Q. And you saw that I put Dr. Crocker's
2 letter up on the Board. It's Exhibit C-24. It's
3 in your binder.

4 And Dr. Crocker made it very clear to
5 the AUC that it could not reserve .africa, right?

6 So what you're saying is that someone
7 told you in the fall of 2011 that the reason that
8 the AUC changed its mind was because it thought
9 it would get .africa as a reserve name.

10 A. But of course.

11 Q. Okay. But it turns out that whoever
12 told the AUC that, if, in fact, it was told, they
13 were wrong, right? Because ICANN did not permit
14 the AUC to reserve .africa.

15 A. Yes.

16 Q. Okay. But irrespective of whether --
17 whether the name is reserved or not -- we know now
18 it was never reserved -- the AUC was entitled to
19 endorse an applicant, right? Originally, they
20 endorsed you.

21 What was wrong with the AUC deciding
22 that they wanted to sponsor their own application
23 through their own RFP process? Was there
24 anything in the Guidebook that prevented that?

25 A. The Guidebook does not specifically

1 say to applicant -- to another regulatory
2 authority to -- that they can develop their only
3 policies and RFP and endorse an applicant. It's
4 not specific.

5 Q. Just silent?

6 A. Right.

7 Q. Okay. So the -- the premise of your
8 objection to the AUC's role was that the AUC was
9 endorsing an application, but there's actually
10 nothing in the Guidebook that says it can't do
11 that?

12 A. No. They endorsed ours, so we don't
13 have any premise of any --

14 Q. Let me rephrase it. Maybe I didn't
15 say it the way I should have.

16 The AUC selected what became the ZACR
17 to apply for .africa.

18 They submitted an actual application,
19 right?

20 A. (No audible response.)

21 Q. Again, you're nodding your head, so --

22 A. Yes, yes, they did.

23 Q. And my point is, there's nothing in
24 the Guidebook that says that the AUC could not do
25 exactly what it did, correct?

1 A. No.

2 Q. Okay. And there's -- there's --

3 HONORABLE JUDGE CAHILL: Correct no?

4 That's a double negative.

5 Was that -- there was nothing in the

6 Guidebook that prevented them from doing

7 this.

8 That's correct, right?

9 THE WITNESS: Right.

10 HONORABLE JUDGE CAHILL: Okay.

11 BY MR. LEVEE:

12 Q. Okay. And so you then asked ICANN to

13 change the Guidebook, right? You said, Now that

14 the AUC's involved, we should -- ICANN should

15 change the Guidebook by eliminating the

16 requirement for the 60 percent support.

17 You saw the exhibits I put up this

18 morning?

19 A. I think we said a lot more detail than

20 that.

21 Q. But you did ask ICANN to do that,

22 right?

23 A. But we have a whole page or maybe many

24 written as to why we say that --

25 Q. I understand.

1 A. -- and I -- may -- may I continue?

2 Q. Of course.

3 A. Okay.

4 -- that is in response to the fact
5 that AUC's support letter is as -- is for the
6 reserve name, that same reserve name that you
7 rejected, ICANN has rejected, and you have
8 managed to accept it as part of the application
9 process.

10 And so we say the other applicant,
11 ZACR, does not also have support. Their support
12 letter -- their purported support is not in
13 compliance with the New gTLD Process.

14 So, therefore, we knew ICANN -- when
15 the Early Warning was being issued to us, we knew
16 ICANN did not know what to do, either ICANN will
17 be exposed giving an application to, you know --
18 because, again, we are not able to see the -- the
19 endorsements publicly -- either ICANN will
20 complicate the .africa process so Africa will not
21 have the .africa gTLD, which actually resulted in
22 that right now, as we speak, and -- or -- so we
23 were trying to advise ICANN to do the right
24 thing.

25 It wasn't trying to say give a

1 favorable position for DCA. It was trying to
2 save the project, because we knew that the
3 support provided by AUC/ZACR was not correct.

4 Q. I think what you're saying is you were
5 trying to help both applications because neither
6 one of them had support?

7 A. I think it's only fair to advise to
8 say give it to the one that's viably -- that has a
9 viable application based on financial, technical
10 and other criteria that's evaluated by ICANN, and
11 then, eventually, try to work with that particular
12 applicant to get the right support.

13 And isn't that what you guys did,
14 Mr. LeVee?

15 Q. Let's be clear, Ms. Bekele.

16 That's not what you asked the Board to
17 do, right?

18 A. Okay. Let's -- we can review it --

19 Q. Yeah, let's do that.

20 You asked the Board to eliminate --

21 A. To waive. That's the word we used,
22 "waive."

23 Q. Let's look first at Exhibit C-35,

24 Page 5.

25 Now, this is your response to the

1 Early Warning notices that were submitted,
2 correct? Yes?

3 A. Yes.

4 Q. Okay. And on Page 5, why don't you
5 read the paragraph that I highlighted?

6 A. We believe that the endorsement issue
7 should no longer being considered as relevant in
8 the evaluation of the .africa gTLD as a geographic
9 strength. We therefore urge the ICANN Board to
10 waive this requirement because of the confusing
11 role that -- that was played by the African Union.
12 The organization has created huge problems of
13 legitimacy regarding the endorsement issue by
14 acting both as endorser and the coapplicant for
15 .africa. It's also our view that the final
16 decision by ICANN regarding the delegation of
17 .africa string should now only be based on
18 evaluated technical, operational and financial
19 criteria, and not the issue of endorsement, which
20 has been highly politicized.

21 Q. Okay. Let me ask you about
22 Mr. Buruchara. I'm sure I'm not pronouncing his
23 name correctly. I'm not sure anyone here has.

24 He was the chairman of your -- of the
25 DCA Strategy Committee at one point in time,

1 correct?

2 A. Correct.

3 Q. Are you and he friends?

4 A. No.

5 Q. Have you worked together on any
6 business matters before?

7 A. Before? No.

8 Q. Okay. Did you consider it a conflict
9 of interest that he was the chairman of your
10 Strategy Committee before being appointed as the
11 GAC advisor to the Government of Kenya?

12 A. No.

13 Q. Okay. Did you ask him to object to
14 the GAC advice?

15 A. I don't remember. But if I did, it's
16 within the context of our application.

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23 Q. Okay. The last question: You knew
24 that Mr. Buruchara was the GAC advisor for Kenya,
25 not the GAC representative, correct?

1 A. To be honest with you, I wouldn't know
2 the difference between the two. I was only aware
3 of it after the fact --

4 Q. Okay.

5 A. -- I'm not a GAC person or --

6 Q. Okay. I thought DCA had issued a
7 press release announcing that he had been
8 appointed as the GAC advisor.

9 Do you remember that?

10 A. Okay.

11 Q. And it says that --

12 A. Again, I would not know the difference
13 between an advisor and a representative. I only
14 came to learn the difference between the two after
15 the issue became an issue.

16 Q. Okay.

17 MR. LEVEE: Well, in that case, I'll
18 conclude.

19 Thank you.

20 PRESIDENT BARIN: Thank you,

21 Mr. LeVee.

22 Mr. Ali.

23 MR. ALI: I have nothing further.

24 ARBITRATOR KESSEDJIAN: Nothing.

25 HONORABLE JUDGE CAHILL: No.

1 PRESIDENT BARIN: Okay.

2 MR. LEVEE: Thank you. Thank you,
3 Ms. Bekele.

4 (The witness was excused.)

5 MR. LEVEE: Just as a reminder,
6 tomorrow morning, 300 New Jersey, which
7 is the glass building that you walked by
8 this morning and that you'll walk by this
9 evening, and -- there will be someone
10 there by 8 a.m.

11 So feel free to come at any time,
12 and we'll have people who physically get
13 you here. It's not far at all, but there
14 are these little fobs --

15 THE COURT REPORTER: Do you want me
16 to go off the record?

17 MR. LEVEE: Yes.

18 HONORABLE JUDGE CAHILL: Yes.

19 PRESIDENT BARIN: Yes. Off the
20 record.

21 - - -

22 (Whereupon, the Hearing on the
23 Merits adjourned at 7:10 p.m., to
24 reconvene on Saturday, May 23, 2015, at
25 9:00 a.m.)

1 CERTIFICATE OF

2 CERTIFIED REGISTERED MERIT REAL-TIME COURT REPORTER

3 I, CINDY L. SEBO, Registered Merit Reporter,
4 Certified Real-Time Reporter, Registered
5 Professional Reporter, Certified Shorthand Reporter,
6 Certified Court Reporter, Certified LiveNote
7 Reporter, Real-Time Systems Administrator and
8 LiveDeposition Authorized Reporter, do hereby
9 certify that the foregoing transcript is a true and
10 correct record of the Hearing on the Merits, that I
11 am neither counsel for, related to, nor am employed
12 by any of the parties to the action; and further,
13 that I am not a relative or employee of any attorney
14 or counsel employed by the parties thereto, nor
15 financially or otherwise interested in the outcome
16 of the action.

17 The witnesses being duly sworn by the
18 President of the proceedings, BABAK BARIN, to tell
19 the truth, the whole truth, and nothing but the
20 truth.

21 Signed this 1st day of June 2015.

22
23 _____
24 CINDY L. SEBO, RMR, CRR, RPR, CSR,
25 CCR, CLR, RSA, LiveDeposition
Authorized Reporter

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