



26th August, 2015

H.E. Dr. Nkosazana Dlamini-Zuma
Chairperson of the African Union Commission
AUC Headquarters Complex
P. O. Box 3243
Addis Ababa
Ethiopia

Copy to: Dr. Elham M.A. Ibrahim, Commissioner for Infrastructure & Energy, AUC

Your Excellency,

Subject: Special Communication to the African Union Commission following the Conclusion of the DCA vs. ICANN IRP on .Africa

DotConnectAfrica Trust (DCA Trust) is pleased to write to the African Union Commission (AUC) following the successful conclusion of the DCA vs. ICANN Independent Review Panel (IRP) Process on the .africa new generic Top-Level Domain project.

As you have probably gathered by now, DCA Trust prevailed in the IRP and the Internet Corporation for Assigned Names and Numbers (ICANN) lost in the IRP. We think that the IRP loss is a major philosophical and legal failure for ICANN, since the organization lost in an IRP process that was chiefly based on its own accountability mechanism.

The International IRP Panel unanimously ruled in its Final Declaration that ICANN broke its Bylaws and Articles of Incorporation when it found that: ***“both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN”***¹ The entire IRP [Declaration](#) [PDF, 1.04 MB] may be found [here](#).

As the prevailing party in the IRP, our reading of the deeper implications and other ramifications of this IRP outcome is that:

1. ICANN could not have delegated or signed a legitimate contract with ZACR (a co-applicant with AUC) for the .Africa new gTLD since ICANN executed the contract when the IRP was already in progress – and as such, ICANN could not have lawfully delegated a name string that was under legal dispute at the time the contract agreement was signed.

¹ Cf. No. 148 on page 61 of IRP Final Declaration <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>

2. We believe therefore, that the contract that was signed between ICANN and ZACR is a nullity as far as the law is concerned since ICANN was signing a registry services contract for the .Africa gTLD with one party at the same time that it was also violating its own Bylaws and Articles of Incorporation regarding the .Africa new gTLD with respect to its relationship with another party. Thus ICANN was not in correct standing with the law to the extent that it was committing other violations and irregularities when it was signing a contract that can also be construed as irregular: by signing a contract for a domain name string that was under a commercial dispute (pending judicial resolution) with another party. For example, nobody will enter into a conveyance of a piece of real estate when the title to the property that is being sold is under a separate legal dispute. Such an act of conveyance would be in outright breach of the law. Drawing an applicable parallel based on this example, it is also quite clear that ICANN lacked the *bona fides* to legally convey the new gTLD Registry Agreement to ZACR at the same time that ICANN was deemed by the IRP Panel to be acting unlawfully (or to have acted unlawfully).
3. Since the IRP Panel has already ruled that ICANN should continue to refrain from delegating the .Africa new gTLD, we think that ZACR, as the evident beneficiary of ICANN's serious violations of its Bylaws and Articles of Incorporation, should be removed from the new gTLD Program.

Based on this understanding, we have since written to the Internet Corporation for Assigned Names and Numbers to officially convey the following important points for their attention and earnest consideration:

- a) ICANN should immediately remove the ZACR application from the new gTLD Program, as per the reason already adduced.
- b) ICANN should compensate DCA Trust for injuries and harms suffered as a result of ICANN's violations of its Bylaws and Articles of Incorporation which materially affected DCA Trust.
- c) A Joint Cooperative Framework should be immediately established between DCA Trust and ICANN to enable us reach common ground on .Africa going forward, and resolve differences if any.
- d) DCA Trust's application should be permitted by ICANN to proceed through the remainder of the new gTLD application process with a view to delegating the .Africa string to DCA Trust based on its application that has already satisfied all evaluation criteria.
- e) DCA Trust should be allowed to reach mutual accommodation with the AUC regarding .Africa new gTLD.

DCA Trust also mentioned that if ICANN is not willing to do what we have indicated (as summarized above), then we think that there is a difference of opinion, and the disagreement should be resolved through another juridical process or direct negotiations between DCA Trust and ICANN. **A copy of our communication to ICANN is attached herewith for your attention**². This would assist the AUC in understanding DCA Trust's position post-IRP.

Notably, DCA Trust was the first organization to be endorsed by the AUC for the .Africa name string in 2009. Now, following our victory against ICANN at the IRP Panel, our position is that we should be allowed to work with the African Union Commission on a joint cooperative framework for the implementation of .Africa new generic Top-Level Domain.

² DCA Trust Letter to ICANN following the DCA vs. ICANN IRP Panel Ruling
<https://www.icann.org/en/system/files/correspondence/bekele-to-crocker-chehade-21jul15-en.pdf>

So far, DCA Trust has proved that its .Africa application is viable in all aspects (as it has passed all financial, technical and operational evaluation) outside the contentious issue of 'governmental objection' that was brought against DCA Trust's application for the simple reason that the ZACR application was being supported by dint of the AUC-RFP process which we all know was also irregular. DCA Trust had refused to participate in the RFP because of the irregularities that pervaded the entire process and we have also reported the same to the AUC at the time. **See attached letter to AUC.**³

Therefore, to all practical intents and purposes, and as far as the law is concerned, we believe that the Registry Operator contract between ICANN and ZACR for the .Africa new gTLD Registry is of no consequence because **it is null and void** as already explained, and a judicial process would also reach the same conclusion.

We understand that ZACR has already written to ICANN on 15th July 2015 (See [ZACR Response on the Independent Review Process \(IRP\) Final Declaration](#)) to confirm that its "Registry Operator (RO) agreement with ICANN remains in full force and effect", but DCA Trust believes that ZACR has no legal basis to insist on the continuing validity of its putative contract that was signed when ICANN was also adjudged by an IRP Panel to be violating its Bylaws and Articles of Incorporation.

On the other hand, we also understand that ICANN intends to resume the evaluation of DCA Trust's .Africa application, but DCA Trust will not accept to be evaluated for a new gTLD name string that has already been 'given away' by ICANN to ZACR, *albeit* illegally. Based on a strictly commercial consideration, no organization will accept to participate and be evaluated in a competitive bid opportunity for which the expected contract has already been awarded to another organization.

Therefore, we think that the present complications regarding the .Africa gTLD would have been avoided if ICANN had been conscientious enough not to delegate, and enter into a new gTLD Registry Agreement for the .Africa name string that was already under legal disputation at the time the purported contract was signed. It must be emphasized that whilst the IRP Notice was filed in October 2013, ICANN signed the new gTLD Registry Agreement with ZACR on 24th March 2014. DCA Trust believes that ICANN should not have acted with such impunity amidst legal uncertainties. The decision by ICANN to sign a new gTLD Registry Agreement with ZACR when an IRP was already ongoing with DCA Trust over the .Africa new gTLD was rather arbitrary and unlawful.

We therefore think that if parties that have performed irregular actions in the past would rescind such actions so that legal good standing can be re-established, this matter can be simplified for all our mutual benefits. Even so, we believe that the rule of law anchored on natural justice must prevail at all times.

We have already informed ICANN that DCA Trust would prefer to explore cooperative mechanisms with guaranteed redress for any wrongdoings that have been committed against DCA Trust, so as to achieve a successful resolution of this issue between DCA and ICANN within the shortest possible time.

Accordingly, this is our position, and we wish to once again request the good offices of the African Union Commission to adopt a statesman-like attitude of remaining impartial and non-partisan in this dispute so as to

³ Letter to AU leaders to inform DCA will not participate in AU RFP <http://www.dotconnectafrica.org/wp-content/uploads/2014/01/Letter-to-AU-leaders-to-inform-unwillingness-to-participate-in-RFP-8th-December-2011.pdf>

allow negotiations between the AUC and DCA Trust under a joint (bilateral) cooperative framework that would define a workable strategy for the implementation of .Africa.

Only a tripartite arrangement that involves DotConnectAfrica Trust (DCA), the African Union Commission (AUC) and the Internet Corporation for Assigned Names and Numbers (ICANN) as cooperative partners would guarantee a successful framework for the implementation of the .Africa new gTLD.

However, we think that ZACR as the evident beneficiary of ICANN's patent violations of its Bylaws and Articles of Incorporation should not be part of such discussions.

Notwithstanding, we sincerely believe that the African Union Commission should resolve the many conflicts of interest by certain parties who continue to serve as auxiliaries on the Board of ZACR, while also claiming to represent the African Union Commission on ICANN policy/advisory organs. Without over-emphasizing the obvious, we believe that such serious conflicts of interests are the principal problems that continue to plague the .Africa new gTLD, and should no longer be ignored by the AUC. Many of those who claim to speak for the African Internet Community are either deeply ensconced in ICANN Engagement Structures or firmly embedded as auxiliaries within the ZACR Board whilst acting as advisers or consultants to the AUC.

We think that the AUC will never receive impartial advice and proper guidance at any time until such deep-seated ethical problems are thoroughly resolved and firmly dealt with, without fear or favour.

In closing, we wish to emphasize that, in our estimation, this is a commercial dispute or disagreement with ICANN, and not a problem between DCA Trust and a political organization which the AUC is. Moreover, the .Africa new gTLD application that was submitted by DCA Trust has already survived all objection processes that were introduced against it. Going forward, we think that the road map for the future should be anchored on positive actions that are constructive and collaborative in nature and not based on the type of measures that were utilized unsuccessfully in the past to stop DCA's .Africa new gTLD application.

Thanking you in anticipation, as we look forward to hearing from you soonest.

Yours sincerely,
For & On Behalf of DotConnectAfrica Trust

Sbekele

Ms. Sophia Bekele, B.S., M.B.A., C.I.S.A, C.C.S, CGEIT
Executive Director & CEO
DotConnectAfrica Trust (Applicant for the .Africa gTLD) Application ID: 1-1165-42560