



March 24, 2016

**SPECIAL COMMUNICATION BY EMAIL**

Senator John Thune  
Chairman of the US Senate Committee on Commerce, Science, and Transportation  
114<sup>th</sup> United States Congress, Washington, D.C. 20510 6125

Senator Ted Cruz  
Member of the US Senate Committee on Commerce, Science, and Transportation  
114th United States Congress, Washington, D.C. 20510 6125

Senator Marco Rubio  
Member of the US Senate Committee on Commerce, Science, and Transportation  
114th United States Congress Washington, D.C. 20510 6125

Dear Chairman Senator John Thune and Honourable Senators,

**Subject: *Important update and Submission for the record to US Congress on the DCA Trust vs. ICANN Court case on .Africa New gTLD & ICANN's Final Transmission of the IANA Transition to US Government***

We hereby write to provide you with a general update regarding the *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers, Court case CV 16-00862* at the United States Federal District Court, Central District of Los Angeles California - Western Division.

**On January 20 2016**, DCA filed its Complaint due to ICANN's failure to fairly administer its own accountability process.<sup>1</sup>

**On March 4 2016** the Court granted DCA Trust an Ex Parte Application for TRO enjoining ICANN from issuing the .Africa gTLD until the Court decides DCA Trust's Motion for Preliminary Injunction, scheduled for hearing on April 4, 2016.<sup>2</sup> DCA's receipt of an Ex Parte Application for a TRO by the Courts is of precedential significance since DCA Trust is the first organization in the history to take ICANN to Court, as an applicant to the new top level domain (New gTLDs).

The above follows our update on **August 18, 2015** informing your good offices on the final ruling of the IRP Panel in July 9, 2015, over DCA Trust vs. ICANN case on .Africa new gTLD.<sup>3</sup> Also, in a case of precedential significance, the DCA Trust vs. ICANN IRP Panel declared 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*". The Panel declared DCA Trust to

<sup>1</sup> DCA Trust First Complaint <https://www.icann.org/en/system/files/files/dca-v-icann-complaint-20jan16-en.pdf>

<sup>2</sup> Minute Order re Plaintiff's *Ex Parte* Application for TRO [PDF, 24 KB]

<https://www.icann.org/en/system/files/files/litigation-dca-minute-order-plaintiff-ex-parte-application-04mar16-en.pdf>

<sup>3</sup> Update on DCA Trust vs. ICANN IRP on .Africa new gTLD following the July 9, 2015 Final IRP Panel Ruling

<http://dotconnectafrica.org/wp-content/uploads/2016/03/DCA-Trust-letter-to-US-Senators-Update-on-DCA-Trust-vs.-ICANN-IRP-on-.Africa-new-gTLD-following-the-July-9-2015-Final-IRP-Panel-Ruling.pdf>

be the prevailing party in the IRP. The entire **unredacted** IRP Declaration [PDF, 1.04 MB] may be found here<sup>4</sup>

We are aware that our case was part of a Statement for the Record for the Subcommittee on communications and Technology Energy and Commerce Committee United States House of Representatives on **March 17, 2016** by Brett D. Schaefer and Paul Rosenzweig for The Heritage Foundation<sup>5</sup> for the hearing on Privatizing the Internet Assigned Number Authority which you were the honourable Chair.

The citation is related to the Enhanced power for governments as regards the IANA Transition draft document that was recently transmitted to the NTIA. The statement specifically cites that The CCWG-Accountability proposal would see governments significantly increase their power in ICANN versus the status quo and as a relevant reference No. 25 extracted below;-

<sup>25</sup>*A good example of the pernicious potential that arises from GAC intervention is the controversy that continues to plague ICANN over the question of the delegation of the .africa domain name. Initially, the board accepted the GAC's advice to favor one applicant over another—a decision it adopted in apparent violation of its own internal procedures. The losing applicant, DotConnectAfrica, was compelled to seek redress through the Independent Review Process—an adjudication that led, in the end, to a declaration that the board had acted improperly. See DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers (July 9, 2015), <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf> (accessed March 21, 2016).*

*More recently, when the board sought to restart the .africa delegation (again awarding the domain to another applicant), DotConnectAfrica sought, and received, a temporary restraining order from a California court. See DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers, No. CV 16-00862 (C.D.Calif., Mar. 21, 2016), <https://www.icann.org/en/system/files/files/litigation-dca-minute-order-plaintiff-ex-parte-application-04mar16-en.pdf> (accessed March 21, 2016 ). The case remains pending and a final adjudication on the merits has yet to be made, but it should trouble all observers that the Board's apparent deference to the GAC has embroiled ICANN in such a long-running and contentious piece of litigation.*

**On March 03, 2016**, despite DCA's case being active in court, the ICANN Board has [issued an emergency resolution](#)<sup>6</sup> authorizing the ICANN CEO to resume the delegation for .Africa: *"to prepare to move forward toward delegation of .AFRICA with the party that has signed a Registry Agreement to operate .AFRICA". "...Resolved (2016.03.03.01), the Board authorizes the President and CEO, or his designee(s), to proceed with the delegation of .AFRICA to be operated by ZACR pursuant to the Registry Agreement that ZACR has entered with ICANN."*

<sup>4</sup> DCA Trust Vs ICANN IRP Panel's Final Declaration <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>

<sup>5</sup> Statement for the Record for the Subcommittee on Communications and Technology Energy and Commerce Committee United States House of Representatives March 17 , 2016 by Brett D. Schaefer and Paul Rosenzweig for The Heritage Foundation <http://docs.house.gov/meetings/IF/IF16/20160317/104682/HHRG-114-IF16-20160317-SD003.pdf>

<sup>6</sup> Approved Board Resolutions | Regular Meeting of the ICANN Board 03 Mar 2016 <https://www.icann.org/resources/board-material/resolutions-2016-03-03-en#1.a>

Our continued prevailing against ICANN, based on ICANN's own accountability mechanism illustrates that an organization which was deemed by a juridical panel to have violated its own Bylaws and Articles of Incorporation **cannot be trusted by the US Congress to act independently and regulate itself on matters of Global Internet Governance**. DCA Trust believes that some continuing governmental oversight should be imposed on ICANN even after the IANA Transition is approved by Congress.

To buttress our point above, we want to bring to your attention the deep concerns we expressed in a public commentary in the industry blog – Circle-ID "**ICANN Africa Strategy - A View from the Inside**"<sup>7</sup>, on the dangers and rise of ICANN's "**Multi-stakeholder**" model, when left unchecked. In another public commentary on The Hill - **2016 elections will determine fate of the internet: Why fix what is not broken**<sup>8</sup> we asked a pertinent question that remains unanswered. Those facilitating the program have been allowed to develop elaborate proposals, however, identifying what problems exist with current IANA functions management that the transition would need to fix, has not been satisfactorily answered.

### **Our acknowledgement of accomplishments by US Congress**

As we give this update and recommendations that are important for the future of ICANN, we would also like to **acknowledge the key developments by the US Congress on ICANN** regarding the new gTLDs especially focusing on .Africa, role of Governmental Advisory Committee (GAC) in the multi-stakeholder process, and the IANA Transition process:

Recalling that on **February 20 2013**, DCA Trust wrote its very first complaint to Congress titled "New generic Top-Level Domain Program (gTLD) for Global Internet Expansion - Need for Direct Congressional Oversight & Recommendation for the Appointment of an Independent Counsel as Congressional new gTLD Ombudsman to Investigate & Report to Congress on Matters of Illegality and Irregularities in new gTLD Program of ICANN"<sup>9</sup>

Recalling that on **March 28, 2014**, DCA Trust reported our progress and submitted the status on our Independent Review Process ("IRP") with ICANN to the House Judiciary Subcommittee in accordance with the request of the Subcommittee's staff request. DCA is such a party affected by ICANN's wrongful decision.<sup>10</sup>

Recalling that on **March 13, 2015** DCA Trust wrote to your honourable offices respectfully submit<sup>11</sup> a copy of a recently published public commentary titled: "**No Legal Basis for IANA Transition**"<sup>12</sup>: A

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<sup>7</sup> ICANN Africa Strategy- A View from the

Inside:[http://www.circleid.com/posts/20150216\\_icann\\_africa\\_strategy\\_a\\_view\\_from\\_the\\_inside/](http://www.circleid.com/posts/20150216_icann_africa_strategy_a_view_from_the_inside/)

<sup>8</sup> November 2016 elections will determine fate of the Internet: <http://thehill.com/blogs/congress-blog/technology/254566-november-2016-elections-will-determine-fate-of-internet>

<sup>9</sup> DCA Trust Complaint Letter to Congress <http://dotconnectafrica.org/wp-content/uploads/2016/03/DCA-Trust-Letter-to-US-Congress-on-the-new-gTLD-Program-and-Recommendation-for-Appointment-of-an-Independent-Counsel-as-Congressional-new-gTLD-Ombudsman.pdf>

<sup>10</sup> DCA Trust Statement of Interest on whether US should relinquish direct oversight of ICANN <http://dotconnectafrica.org/wp-content/uploads/2016/03/DCA-Trust-Statement-of-Interest-on-ICANN-With-Annexes-March-28-2014.pdf>

<sup>11</sup> Submission of Public Commentary: "No Legal Basis for IANA Transition"-A Post-Mortem Analysis of Senate Committee Hearing on 'Preserving the Stakeholder Model of Internet Governance' [http://dotconnectafrica.org/wp-content/uploads/2015/03/DotConnectAfrica-letter-to-US-Senators-on-Post-Hearing-Commentary\\_No-Legal-Basis-for-IANA-Transition-2015-March-13.pdf](http://dotconnectafrica.org/wp-content/uploads/2015/03/DotConnectAfrica-letter-to-US-Senators-on-Post-Hearing-Commentary_No-Legal-Basis-for-IANA-Transition-2015-March-13.pdf)

<sup>12</sup> [http://www.circleid.com/posts/20150309\\_no\\_legal\\_basis\\_for\\_iana\\_transition\\_post\\_mortem\\_senate\\_hearing/](http://www.circleid.com/posts/20150309_no_legal_basis_for_iana_transition_post_mortem_senate_hearing/)

*Post-Mortem Analysis of Senate Committee Hearing for your attention during the Wednesday, February 25, 2015 US Senate Commerce, Science, and Transportation Committee full committee hearing on “Preserving the Multi-stakeholder Model of Internet Governance”. We implored and called for the need for Congress to establish a US Internet Regulatory Authority (USIRA), also with another commentary (See Congress will Oversight ICANN – CircleID<sup>13</sup>).*

Recalling that on **May 15 2015** the undersigned submitted a Testimony for the record to US congress on Stakeholder Perspectives on the IANA Transition in summary recommended the following:<sup>14</sup>

**Recommendations:**

- 1) Congressional oversight of the 'IANA Transition' should be deepened to ensure that any proposals developed and submitted by the ICANN-led Global Multi-Stakeholder Community are independently evaluated, but not by the same group of people that prepared the proposal in the first place.*
- 2) The legal loopholes that have been identified need to be properly closed by the US Congress.*
- 3) It must be reinforced that the duties of Internet Policy-Setting should be separated from Internet Technical Program Management, so that the same organization does not handle policy governance and technical implementation like ICANN is currently doing, i.e. there should be a formal separation of duties.*
- 4) An Internet Regulatory Agency that reports directly to Congress is now required more than ever to help shepherd this complex process. Only proper regulation by an independent agency with full Congressional mandate will ensure that a 'FIFA-Mafia type' organization of systematic corruption does not emerge. ICANN should not be trusted by Congress to regulate itself.*
- 5) and finally, Congress must act as soon as possible to ensure that there are no process irregularities, so as to help mitigate identified risks. The process should be driven by critical-thinking and considered consultations with Congressional leaders and not based on scare-mongering and other tactics of dissimulation.*

Recalling that on **May 13, 2015** the Communications and Technology subcommittee held a hearing on Stakeholder Perspectives on the IANA Transition<sup>15</sup>

Recalling that on **June 10, 2015** 11 members of the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet led by Congressman Blake Farenthold wrote to urge the Internet Corporation for Assigned Names and Numbers (ICANN) to address concerns that it may become susceptible to governmental interference without due consideration of policies developed through the multi-stakeholder process under its current structure.<sup>16</sup>

Recalling that on **June 19, 2015**, The co-chairs of the Congressional Trademark Caucus, Rep. Randy Forbes [R-VA4] and Rep. Suzan DelBene [D-WA1] wrote a letter regarding ICANN and GAC

<sup>13</sup> Congress will Oversight ICANN – CircleID

[http://www.circleid.com/posts/20150105\\_congress\\_will\\_oversight\\_icann\\_and\\_you\\_can\\_take\\_that\\_to\\_the\\_bank/](http://www.circleid.com/posts/20150105_congress_will_oversight_icann_and_you_can_take_that_to_the_bank/)

<sup>14</sup> Testimony to US congress on Stakeholder Perspectives on the IANA Transition <http://dotconnectafrica.org/wp-content/uploads/2015/12/Sophia-Bekele-Testimony-to-US-congress-on-Stakeholder-Perspectives-on-the-IANA-Transition-15th-May-20151.pdf>

<sup>15</sup> hearing on Stakeholder Perspectives on the IANA Transition <https://energycommerce.house.gov/hearings-and-votes/hearings/stakeholder-perspectives-iana-transition>

<sup>16</sup> [http://farenthold.house.gov/uploadedfiles/icann\\_letter.pdf](http://farenthold.house.gov/uploadedfiles/icann_letter.pdf)

concerning the .Amazon new gTLD application where they noted that “ICANN can demonstrate to Congress that it is accountable to the global community, independent of governmental interference, and respectful of international trademark law; such a demonstration is crucial before the IANA functions transition.”<sup>17</sup>

Recalling that on **June 23, 2015**, The House of Representatives approved H.R. 805, the Domain Openness Through Continued Oversight Matters (DOTCOM) Act, bipartisan legislation authored by Rep. John Shimkus (R-IL). The DOTCOM Act aims to protect the future of the Internet by ensuring that Congressional oversight of the administration’s transition of the Domain Name System to the global Internet community.<sup>18</sup>

Recalling that **March 17 2016**, The Communications and Technology Subcommittee, chaired by Rep. Greg Walden (R-OR), held a [hearing](#) examining the recent [proposal](#) from the multi-stakeholder community to transition stewardship of the Internet Assigned Numbers Authority (IANA) to the Internet community.<sup>19</sup>

Finally, we wish to note that ICANN is in a critical time and still needs an important oversight within the US government until it can fully prepare its own systems for transparency and accountability for the benefit of the public. We therefore highlight that the findings of the DCA Trust vs ICANN case is very important in the observation of the accountability mechanisms that are available to applicants’ and clients of ICANN and also for the administration of best practices in the internet governance platform.

Kindly find available all resources on the DCA vs ICANN US cases at these references:

- Court Case (*DCA Trust v. ICANN*)<sup>20</sup>
- Independent Review Process (DCA Trust vs ICANN)<sup>21</sup>
- Post IRP press coverage, archived at this site<sup>22</sup>
- DCA Trust letters to US Congress<sup>23</sup>

Once again, we appreciate your sustained engagement on internet governance and public service leadership.

Most respectfully yours,



Ms. Sophia Bekele, BS, MBA, CISA, CCS, CGEIT  
Founder/Executive Director, DotConnectAfrica Trust  
Former Policy Advisor to ICANN gNSO Policy Council  
For and on Behalf of: DotConnectAfrica Trust (Africa) & CBS International (USA)

<sup>17</sup> Letter from J. Randy Forbes Co-Chair and Suzan DelBene Co-Chair to Fadi Chehadé and Steve Crocker <https://www.icann.org/en/system/files/correspondence/forbes-delbene-to-chehadé-crocker-19jun15-en.pdf>

<sup>18</sup> House Passes Bipartisan Legislation to Protect the Internet <http://energycommerce.house.gov/press-release/recordofsuccess-grows-dotcom-approval>

<sup>19</sup> #SubCommTech Reviews Internet Transition Proposal <https://energycommerce.house.gov/news-center/press-releases/subcommtech-reviews-internet-transition-proposal>

<sup>20</sup> DotConnectAfrica Trust v. ICANN: <https://www.icann.org/resources/pages/dca-v-icann-2016-01-26-en>

<sup>21</sup> DCA vs ICANN IRP <http://dotconnectafrica.org/communications/independent-review-process-dca-vs-icann/>

<sup>22</sup> Media and Press coverage on IRP <http://dotconnectafrica.org/communications/independent-review-process-dca-vs-icann/media-and-public-comments-post-irp-ruling/>

<sup>23</sup> DCA Letters to US Congress <http://dotconnectafrica.org/communications/us-congress/>