



The .ZA Central Registry (NPC)

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Date: 15 July 2015

To: Mr. Steve Crocker (chairperson)  
Internet Corporation for Assigned Names and Numbers (ICANN)  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA, USA  
[Steve.crocker@icann.org](mailto:Steve.crocker@icann.org)

Dear Mr Crocker,

**ZACR RESPONSE ON THE INDEPENDENT REVIEW PROCESS (IRP) FINAL DECLARATION**

With reference to the correspondence dated 13 July 2015, received from Mr Akram Atallah (President Global Domains, ICANN), inviting us to submit our views on the IRP Declaration:

1. We would like to thank the Board for treating this matter with the urgency and priority that it deserves, and for convening a special board meeting on Thursday (16 July 2015) to consider this issue. We hope that our views, as outlined below, will assist you in your deliberations.
2. We received news of the final IRP Declaration with mixed feelings. On the one hand we are very concerned that the Declaration appears to undermine, or contradict, some of the fundamental principles underpinning the Applicant Guidebook. On the other, we are relieved that this runaway process has now finally been concluded. Attention can now be focused on the real issues facing the DotConnectAfrica Trust (DCA) application, namely government opposition.
3. Contrary to what DCA has proclaimed in the media, we confirm that the Declaration did not comment on, and cannot agree to, DCA's request for an 18-month extension on the evaluation of their application, nor did it agree to DCA's request for ZACR's application to be removed from the process altogether.
4. For the record, to avoid any doubt, we confirm that our Registry Operator (RO) agreement, concluded with ICANN on the 24<sup>th</sup> of March 2014, is not conditional and remains in full force and effect. Apart from the IRP Panel's "recommendation" that ICANN continue to refrain from delegating the gTLD, which recommendation is surely not binding on ICANN, now that the IRP has been concluded, there is a binding obligation on ICANN to proceed with the delegation of the .AFRICA TLD to the ZACR. In addition, the Interim Protection Measures imposed during the IRP have lapsed.



5. It is our understanding that should ICANN elect to follow the recommendations of the Declaration, DCA's application [1-1165-42560], as submitted during the application window, will be reinstated and referred back to the evaluation panels for review.
6. If any such request is made, we would strongly oppose any consideration to grant DCA an extension in order to supplement their application, as this would constitute a deviation from the Applicant Guidebook and is extremely prejudicial to us, and the broader African Internet community. We have already experienced significant delays in this process, all of which have resulted in unforeseen costs and lost opportunities for the .AFRICA project as administered by the ZACR. As ICANN will appreciate, we have incurred considerable expenses, and continue to incur such expenses, without there having been any prospect of us being able to exercise our rights under the Registry Agreement until the Final Declaration was issued. Further delays will increase our prejudice. The DCA dispute was submitted to the IRP on 24 October 2013, the ICANN bylaws stipulate that the IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review, it is now 21 months since the submission to the IRP.
7. We urge ICANN to ensure that, should the DCA application be referred to evaluation, all concerned parties are informed of the urgency and priority of this matter and that they be requested to complete their assessments and tasks within the shortest permissible timeframe. Where possible time periods should be expedited as much as possible to avoid any further delays.
8. Further, it appears to us that one of the critical conclusions resulting in the IRP Panel's Final Declaration was based on the evidence that the GAC did not identify a rationale for the government objections. Whilst we are not privy to all the evidence that was led, we believe that the AUC and the governments put up a properly motivated basis for their objections. Accordingly, if any further evaluation of DCA's application is to take place, we urge the GAC and ICANN to ensure that no such criticism could (rightly or wrongly) again be levelled at them. Summarising aspects of 1.1.2.7 of Module 1, ICANN's website<sup>1</sup> states that (the underlining is ours for emphasis):

*"If GAC Advice is based on a consensus of the GAC, it will create a strong presumption that the application should not be approved. If the ICANN Board does not act in accordance with this type of advice, it must provide rationale for doing so.*

*If the GAC advises that there are concerns about a particular application, the ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns and provide rationale for its decision.*

*If the GAC advises that an application should not proceed unless remediated, this will create a strong presumption that the application should not proceed unless there is a remediation method available in the Applicant Guidebook (such as securing the approval of one or more governments) that is implemented by the applicant. If the issue identified by the GAC is not remediated, the ICANN Board is expected to provide a rationale for its decision if it does not follow GAC advice.*

### **The Applicant Guidebook:**

9. The principles underlying the protection of geographic names are clearly outlined in the Applicant Guidebook. It deals with the requirement for substantive government support and also outlines the processes through which the community and governments can raise objections and concerns to a particular application.

<sup>1</sup> <http://newgtlds.icann.org/en/applicants/gac-advice>

<sup>2</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/5452>

10. The Applicant Guidebook was developed and adopted in a broad-based, consensus driven, multi-stakeholder process to regulate, without fear or favour, the implementation of the new gTLD program. In its own right, it is the epitome of a process that is open, transparent and fair. Even before the application window opened, all prospective applicants and affected stakeholders would have been familiar with the processes, requirements and consequences relating to the new gTLD program.
11. As a participant in the new gTLD program ourselves, we were acutely aware of the criteria we had to satisfy in order to successfully apply for the .AFRICA TLD. We were also aware of the consequences that we would face if we were not able to meet these criteria. Furthermore, we also took it upon ourselves to understand the relevant protection mechanisms available to affected communities, including governments. Any reasonable applicant in our position would have done the same.
12. To be clear, we appreciated from the very start of the new gTLD program that the Applicant Guidebook contained pivotal protection mechanisms for geographic names. This included the requirement for substantive government support and the mechanisms through which governments could raise their concerns and objections to our application. Early Warnings and GAC Advice were key elements of the new gTLD program and were described in detail in the Applicant Guidebook. There is simply no excuse for DCA not to have known about these processes and factored them into their application strategy.
13. The IRP Declaration raises serious concerns about the effectiveness and reliability of government protection mechanisms as outlined in the Applicant Guidebook. This is however a matter for ICANN and the GAC to deal with.

#### **GAC Advice**

14. According to section 1.1.2.7 (Module 1 of the Applicant Guidebook): The procedure for GAC Advice on new gTLDs is described in Module 3 of the Applicant Guidebook. To be considered by the Board during the evaluation process, the GAC Advice on new gTLDs must be submitted by the close of the objection-filing period. If the Board receives GAC Advice on new gTLDs stating that it is the consensus of the GAC that a particular application should not precede, this will create a strong presumption for the ICANN Board that the application should not be approved.
15. Due to the fact that GAC Advice had to be submitted before the end of the objection filing period and that it is dealt with under Module 3 of the Applicant Guidebook, relating to objection procedures, any reasonable person would have concluded that GAC Advice is essentially the apex of the government objection process.
16. The GAC Advice process was designed in such a way that it created a clear and indisputable channel through which governments could raise their concerns and objections to a particular application.
17. At the very least the consensus GAC Advice on the DCA application (the Beijing Communiqué) should be regarded as a form of substantive objection against the DCA application by relevant governments.
18. Following the submission of Public Comments, the issuance of Early Warnings and the delivery of consensus GAC Advice (all of which have been outlined in detail in the Applicant Guidebook) the relevant governments had taken every reasonable step expected of them to ensure transparency and fairness in raising their concerns and objections against the DCA application.

## Geographic Names Panel (GNP), Evaluating Government Support

19. Module 2 of the Applicant Guidebook outlines the evaluation process for new gTLD applications, including those that incorporate geographic domains.
20. According to section 2.2 (Module 2 of the Applicant Guidebook), the Initial Evaluation (IE) process is divided into two parts. In the first part, in relation to a geographic TLD application, consideration is given to whether the applicant has the requisite government support. In the second part the technical and operational aspects of the applicant's offering are considered.
21. The evaluation procedures applicable to a geographic TLD application, are dealt with under section 2.2.1.4 (Module 2).
22. It is now an accepted fact that the application for the .AFRICA gTLD is regarded as an application for a geographic domain name and therefore requires government support in terms of section 2.2.1.4.2.
23. Part 4 of the above section reads - *"An application for a string listed as a UNESCO region or appearing on the composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" list will be considered to represent a geographic name and will therefore require: "documentation of support... from at least 60% of the respective national governments in the region, and there may be no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the continent or the region."*
24. The fact that an application may not be subject to more than one written statement of objection from governments is an important consideration that we will deal with in more detail below. Let us first consider the aspects relating to the evaluation of government support.
25. In relation to the .AFRICA gTLD, the Geographic Names Panel (GNP) has already agreed, as per the ZACR's successful application, that the AUC is to be regarded as the "relevant government authority" for purposes of determining government support. The AUC has been mandated by African governments, through the Abuja Declaration, to *"set up the structure and modalities for the implementation of the dotAfrica Project."* ICANN has itself acknowledged this fact as is clearly evident in its arguments to the IRP panel (see paragraph 25 of ICANN's submission quoted at paragraph 88 of the Final IRP Declaration).
26. Section 2.2.1.4.3 (Module 2) regulates the type of documentation required to indicate government support. In this regard it is important to note that the letter of support must *"... demonstrate the government's or public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available"*.
27. Section 2.2.1.4.4 (Module 2) deals with the review procedures for geographic name applications. According to this section the Geographic Names Panel (GNP) will *"... verify the relevance and authenticity of all the supporting documentation when necessary"*.
28. Furthermore, *"... the GNP will confirm that the applicant has provided the required documentation from the relevant governments or public authorities, and that the communication from the government or public authority is legitimate and contains the required content"*.

29. *"In cases where an applicant has not provided the required documentation, the applicant will be contacted and notified of the requirement, and given a limited time frame to provide the documentation."*
30. If DCA is not able to produce the required documentation by the end of the Initial Evaluation (IE) period, which in our view is likely, the Applicant Guidebook provides that it should be afforded additional time in which to do so. This additional time must be at least 90 calendar days from the date of notice (see section 2.3.1 of Module 2). Only after this additional period has expired and the documentary support remains insufficient will the application be considered incomplete and therefore ineligible for further review. It is our understanding that no board action or intervention will be required in this process.
- 31. Government Opposition (objection) in the GNP Evaluation**
32. Much attention has been focused on the need for minimum government support (the 60% margin), but very little attention has been placed on the consequences of direct government objection. As indicated above, section 2.2.1.4.2 (Module 2) requires that whilst the applicant must have a minimum of 60% government support, there cannot be more than one written objection from relevant governments against its application.
33. Our understanding of this important provision is that the existence of more than one written statement of objection by relevant governments defeats an application, so that it must fail the IE process, regardless of the level of alternative government support the applicant is able to garner.
34. We turn now to the various channels through which governments (and other stakeholders) are able to communicate their objections and the manner in which these channels have been used in relation to DCA's application, to emphasise the depth and breadth of the government objections thereto.

**a. Comment Period:**

- i. According to section 1.1.2.3 (Module 1 of the Applicant Guidebook), *"Governments may provide a notification using the application comment forum to communicate concerns relating to national laws. However, a government's notification of concern will not in itself be deemed to be a formal objection. A notification by a government does not constitute grounds for rejection of a gTLD application. A government may elect to use this comment mechanism to provide such a notification, in addition to or as an alternative to the GAC Early Warning procedure described in subsection 1.1.2.4 below."*
- ii. Over 16 comments were submitted against the DCA application by a variety of different African community stakeholders, including governments. Included are these important comments submitted by African government organisations, available at the links below:
  - [AUC<sup>2</sup>](#) (the African Union Commission)
  - [UNECA<sup>3</sup>](#) (the United Nations Economic Commission for Africa)

<sup>2</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/5452>

<sup>3</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/6481>

- ii. Although we understand that public comments are not to be regarded as formal objections, the number of public comments made in opposition to the DCA application is noteworthy.

**b. *The Independent Objector (IO)***

- i. Section 3.2.5 of Module 3: Acting solely in the best interests of global Internet users, the Independent Objector (IO) can lodge objections in cases where no other objection has been filed.
- ii. The IO is limited to filing objections on the following grounds:
  - Limited Public Interest: The applied-for gTLD string contradicts generally accepted legal norms of morality and public order recognized under principles of international law; and/or
  - Community objection: There is substantial opposition to the gTLD application from a significant portion of the community that the gTLD string is targeting.
- iii. The IO did consider filing an objection against the DCA application and made the following comments in his final assessment:
  - *"... it is the public policy of the IO not to make an objection when a single established institution representing and associated with the community having an interest in an objection can lodge such an objection directly."*
  - *"This does not exclude that the IO deems it nevertheless appropriate to file a community objection in particular circumstances, e.g. if the established institution representing and associated with the community has compelling reasons not to do so, or if several communities are in the same interest and an application could raise issues of priority or in respect to the modalities of the objection."*
  - *"In the present case, the IO is of the opinion that the African Union is an established institution representing and associated with a significant part of the targeted community. The African Union Commission is already fully aware of the controversial issues and is better placed than the IO to file an objection, if it deems it appropriate. For these reasons the IO, who is primarily acting as a "safety net", does not in principle intend to file an objection on the community ground."*
- iv. Without saying as much, the IO seemed to indicate that the AUC, having access to the GAC Advice objection process, was in a far better position to appreciate and counter the controversial application submitted by DCA.
- v. The IO also concluded that it would be appropriate for him to file an independent objection against the DCA application on community grounds, but that this would not be necessary as the AUC was better placed to do so through the government objection processes.

**c. *GAC Early Warnings:***

- i. According to section 1.1.2.4 (Module 1 of the Applicant Guidebook) *"Concurrent with the 60-day comment period, ICANN's Governmental Advisory Committee (GAC)*

*may issue a GAC Early Warning notice concerning an application. This provides the applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments. The GAC Early Warning is a notice only. It is not a formal objection, nor does it directly lead to a process that can result in rejection of the application. However, a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC Advice on New gTLDs (see subsection 1.1.2.7) or of a formal objection (see subsection 1.1.2.6) at a later stage in the process”.*

- ii. Whilst GAC Early Warnings can be issued for “any reason” according to the Applicant Guidebook. The AUC and African governments did in fact provide DCA with a number of substantive reasons when they lodged an unprecedented 16 (sixteen) Early Warning notices with the GAC relating to the DCA application. The AUC provided a good example of one of these Early Warning notices, which can be accessed at the following link ([AUC](#))<sup>4</sup>.
- iii. Again, we understand that Early Warnings do not constitute formal objections, however, these notices do provide a strong indication of governmental opposition to a particular application.

d. **GAC Advice:**

- i. We refer to paragraphs 14 and 15 above.
  - ii. It is common knowledge, that the GAC did indeed issue consensus GAC Advice against the DCA application. According to the Applicant Guidebook the ICANN Board therefore predictably should have rejected the DCA application, which it did.
35. The relevant governments and government organisations have made use of the opportunity to make Public Comments and to issue Early Warnings to raise their concerns and objections. In addition, consensus GAC Advice in opposition to the DCA application was delivered. It is thus clear that there are strong and compelling governmental objections to the DCA application.
36. Through its recommendations, the IRP Panel has effectively indicated that ICANN should go against the strong presumption, created by the delivery of the GAC Advice, that the DCA application should not proceed. The evidence of governmental opposition to the DCA application outlined above provides a convincing reason not to follow the recommendation in the Final Declaration. The strong evidence of government objection to the DCA application and the consensus GAC Advice, which constitutes government’s formal objection process, shows that even if the DCA application should proceed to Initial Evaluation (IE) it should fail.
37. The IRP Declaration does not negate the fact that governments, through the issuance of consensus GAC Advice, have objected to the DCA application.
38. In the event that ICANN elects to refer the DCA application to the Geographic Names Panel (GNP) for evaluation we must insist that, at the very minimum, the GAC Advice should be regarded as an objection, by relevant governments, against the DCA application. The effect of this would be that the priority of the GNP would not be to only gauge the level of government support for the DCA application, but also what effect the government objection has on its survival.

<sup>4</sup> <https://gacweb.icann.org - Africa-AUC-42560.pdf>



39. If the ICANN Board and/or the GNP is not prepared to consider the GAC Advice as a formal objection from the relevant governments against the DCA application, then ICANN must provide substantive reasons for its refusal to do so, together with an expedited process through which the relevant governments, the community and the Independent Objector (IO) can raise and prosecute their objections. We anticipate that in this instance, there may be African governments wishing to file formal objections to the DCA application, in which case we would also request that this process be expedited.
40. The Applicant Guidebook, as it currently stands, does not adequately provide for this scenario. As outlined in the Applicant Guidebook, consensus GAC advice would ordinarily have constituted the “*coup de grâce*” for DCA’s application. If the GAC Advice does not stand up as an objection from relevant governments then ICANN will almost certainly need to provide a reasonable and urgent alternative to deal with government objection against the DCA application.

Assuring you of our continued support and participation in this matter,

Yours sincerely,



**Lucky Masilela**  
**CEO, ZA Central Registry (NPC)**

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