

‘Tilting at Windmills’*: Separating Fact from Fiction in the Joust for the new dotAfrica gTLD

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‘Just then they came in sight of thirty or forty windmills that rise from that plain. And no sooner did Don Quixote see them that he said to his squire, “Fortune is guiding our affairs better than we ourselves could have wished. Do you see over yonder, friend Sancho, thirty or forty hulking giants? I intend to do battle with them. With their spoils we shall be rich for this is a righteous war [...] “Take care, sir” cried Sancho. “Those over there are not giants but windmills.”’¹

1. Introduction

The Internet Corporation for Assigned Names and Numbers’ (ICANN) New gTLD Program, the most comprehensive and ambitious expansion of generic Top Level Domains (gTLDs) in the history of the domain name system, has created great anticipation regarding the future of the Internet, particularly within the African community. For the first time, Africa has the opportunity to bring to life a much-needed collective identity within the global network - a unique space that could promise so much for a continent needing desperately to realise its potential.

What began as a fairy tale on the verge of at long last coming true has now become an on going ‘battle’. This article aims to provide an objective and reasoned exposition of the ‘joust’ for the much coveted dotAfrica domain. Hopefully, it will provide some clues to the truth, whose giants are real, and who seems merely to be ‘tilting at windmills’.

2. Background on ICANN’s new gTLD Program and Application Process

Since its inception in the late 1990s, ICANN has had the goal of increasing competition in the domain name market and reducing the strain on some of the burdened and overpopulated gTLDs through the addition of new gTLDs.² In the past ICANN carried out two new gTLD application rounds. The first in 2000 saw the introduction of seven new gTLDs (.pro, .museum, .coop, .info, .aero, .biz, .name) and the second in 2004, the

* ‘Tilting’ means jousting and the figurative meaning of ‘Tilting at windmills’ is ‘attacking imaginary enemies’.

** I write this publication in a personal capacity and all opinions expressed, and possible omissions, are my own.

¹ Cervantes’ Don Quixote – first published in 1605 – under the title, The Ingenious Knight of La Mancha.

² Komatis The Current State of Domain Name Regulation 185.

introduction of six new gTLDs (.travel, .asia, .jobs, .mobi, .cat, .tel).³ Unfortunately, the addition of these new gTLDs did not have the desired effect of dispersing new domain name registrations among the existing 21 gTLDs adequately enough.⁴ Consequently, ICANN's Generic Names Supporting Organisation (GNSO), developed policy recommendations to guide ICANN's introduction of further new gTLDs between December 2005 and September 2007.

In its 'Final Report', the GNSO notes that the reasons for introducing new gTLDs include:

[the] potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.⁵

The 'GNSO Final Report' further recommended not only that the evaluation and selection procedures for new gTLD registries 'should respect the principles of fairness, transparency and non-discrimination',⁶ but also that new gTLDs 'must not infringe [upon] existing legal rights of others that are recognized or enforced under generally accepted and internationally recognised principles of law.'⁷

The most comprehensive and ambitious expansion of gTLDs in the history of the domain name system (DNS) was approved for implementation by ICANN's Board in June 2008.⁸ ICANN consequently undertook work that included public consultations, review and input on multiple draft versions of the Applicant Guidebook⁹ through an 'open, inclusive, and transparent process to address stakeholder concerns.'¹⁰ The Applicant Guidebook was approved, and the launch of the new gTLD Program was authorised by ICANN's Board of Directors in June 2011. The application period for new

³ ICANN Background Information Regarding Previous New gTLD Application Rounds, available at <http://archive.icann.org/en/topics/background-info-newgTld-apps-13feb08.htm>.

⁴ See also Hurter and Pistorius PER 2014 at 1075.

⁵ ICANN GNSO Final Report Part A 2007 <http://gns0.icann.org/en/issues/new-gTlds/pdp-dec05-fr-parta-08aug07.htm>.

⁶ ICANN GNSO Final Report Part A Recommendation 1.

⁷ ICANN GNSO Final Report Part A Recommendation 3.

⁸ ICANN New TLD Program Factsheet <https://archive.icann.org/en/topics/new-gTlds/factsheet-new-gTld-program-oct09-en.pdf>.

⁹ These versions of the Applicant Guidebook are available at <http://newgTlds.icann.org/en/about/historical-documentation>.

¹⁰ ICANN About the Program <http://newgTlds.ican.org/en/about/program>

gTLDs officially opened on 12 January 2012.¹¹ ICANN received 1 930 applications for approximately 1 400 names.¹²

Applicants wishing to submit a 'new' gTLD application needed first to register as users of the TLD Application System (TAS). Applicants needed to answer a series of questions to provide general information, to demonstrate financial capability as well as technical and operational capabilities, and to provide various substantiating documents.¹³

ICANN performed an administrative completeness check, following the closing of the application submission period, thereby ensuring that all applications were complete and ready for evaluation.¹⁴ In line with ICANN's public comment mechanisms, a comments period followed, during which the 'community' was allowed time to review the applications and submit comments. These comments would be considered by the application evaluators when studying an application.¹⁵

Together with this comment period there was also a Government Advisory Committee (GAC) Early Warning period.¹⁶ The Government Advisory Committee (GAC) is one of ICANN's specific advisory committees and, according to ICANN's bylaws, the GAC's key role is to provide advice to ICANN on issues of public policy, especially where there may be an interaction between ICANN's activities or policies and national laws or international agreements.¹⁷ ICANN's GAC would indicate if the application had the potential to be seen as sensitive or problematic by one or more governments.¹⁸

¹¹ ICANN About the Program <http://newgtlds.icann.org/en/about/program> and ICANN CEO Announcement, 6 January 2012, available at <http://www.DotConnectAfrica.icann.org/en/news/announcements/announcement-3-06jan12-en.htm>.

¹² ICANN New gTLD Program Statistics, available at <http://newgtlds.icann.org/en/program-status/statistics>

¹³ ICANN Applicant Guidebook Module 1, available at <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.1.

¹⁴ ICANN Applicant Guidebook Module 1, available at <http://newgtlds.icann.org/en/applicants/agb>_par 1.1.2.2.

¹⁵ ICANN Applicant Guidebook Module 1, available at <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.3.

¹⁶ Additional information regarding the GAC Early Warning Advice is available at <http://newgtlds.icann.org/en/applicants/gac-early-warning>.

¹⁷ ICANN Bylaws as amended 11 April 2013, available at <http://www.DotConnectAfrica.icann.org/en/about/governance/bylaws#I>. Article XI: Advisory Committees

¹⁸ ICANN about the GAC, available at <https://gacweb.icann.org/display/gacweb/About+The+GAC>.

An initial evaluation of all complete applications followed the administrative completeness check. In the initial evaluation the gTLD string applied for was reviewed to ensure that it would not cause problems regarding security or stability in the DNS. Applicants were reviewed in order to determine if they had the necessary technical, operational and financial credentials to operate the applied for gTLD.¹⁹ Third parties could also file formal objections to any application during an objection-filing period.²⁰ Through processes prescribed in the Applicant Guidebook, one of ICANN's appointed dispute resolution service providers (DRSPs) would, during a formal dispute resolution phase, address all the objections filed during this period.²¹

ICANN's GAC also provided public policy advice directly to the ICANN Board, in the form of GAC Advice on a new gTLD during the objection-filing period. It was obligatory for GAC Advice to be considered during the evaluation process of an application. The GAC advice process, however, was not dependent on the filing of a GAC Early Warning that could have been filed earlier in the process.²²

If there were more than one application for the same or similar gTLD - a so-called 'string contention' - the contention needed to be resolved by processes prescribed in the Applicant Guidebook. These processes could include a community priority evaluation and/or an auction, although it should be noted that these specific processes are not applicable to geographic name contentions.²³

After applicants had successfully completed all the required stages as prescribed in the Applicant Guidebook, applicants were expected to follow a number of steps. Applicants, for example, needed to conclude a prescribed registry agreement with ICANN and complete a technical test to validate the

¹⁹ ICANN Applicant Guidebook Module 1, available at <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.5.

²⁰ ICANN Applicant Guidebook Module 1, available at <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.6.

²¹ The objection and dispute resolution procedures are discussed in detail in Module 3 of the Applicant Guidebook, see ICANN Applicant Guidebook Module 3, available at <http://newgtlds.icann.org/en/applicants/agb>.

²² ICANN Applicant Guidebook Module 1, available at <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.7. For detailed information regarding the GAC Advice on new gTLDs see ICANN Applicant Guidebook Module 3, available at <http://newgtlds.icann.org/en/applicants/agb> par 3.1.

²³ ICANN Applicant Guidebook Module 1, available at <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.10.

information provided in the application before delegation of the applied for gTLD.²⁴

The Applicant Guidebook estimates the period of time for a straightforward application to reach the delegation stage to be nine months, while a complex and contentious application could potentially take up to twenty months to reach the delegation phase.²⁵

2.1 Geographic Names Evaluation Panel

As part of the initial evaluation of an application a ‘string review’ is conducted on the applied-for gTLD string to test whether the evidence of requisite government approval has been received for certain geographic names.²⁶ According to the Applicant Guidebook certain types of ‘strings’ may be considered geographic names and must be accompanied by documentation of support or ‘non-objection’ from relevant ‘governments’ or ‘public authorities’. The Applicant Guidebook lists four categories of names to be regarded as a ‘geographic name’, one of which is an application for a ‘string’ listed as a UNESCO region, or that appears on the ‘Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings’ list’.²⁷

‘Africa’ is listed on the stipulated UNESCO list and would be regarded as a ‘geographic name’ for purposes of the Applicant Guidebook.²⁸ An application for the dotAfrica gTLD would therefore require that an applicant for the dotAfrica gTLD provide documentation of support ‘from at least 60% of the respective governments in the region, and [that] 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.’²⁹

²⁴ ICANN Applicant Guidebook Module 1, available at <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.11.

²⁵ ICANN Applicant Guidebook Module 1, available at <http://newgtlds.icann.org/en/applicants/agb> par 1.1.3. A detailed exposition of the application process is provided in diagrammatical form at the end of the Applicant Guidebook Module 1. See discussion on the New gTLD application process in Hurter and Pistorius 2014 PER 1076 – 1078.

²⁶ ICANN Applicant Guidebook Module 2, available at <http://newgtlds.icann.org/en/applicants/agb> par 2.2.

²⁷ ICANN Applicant Guidebook Module 2, available at <http://newgtlds.icann.org/en/applicants/agb> par 2.2.1.4.2.4.

²⁸ Available at <http://unstats.un.org/unsd/methods/m49/m49regin.htm>.

²⁹ ICANN Applicant Guidebook Module 2, available at <http://newgtlds.icann.org/en/applicants/agb> par 2.2.1.4.2.4.

A Geographic Names Panel, constituted by independent evaluators,³⁰ would determine first that the applied-for gTLD string was a geographic name, requiring 'government support'. Secondly it would need to confirm that the applicant had 'provided the required documentation from the relevant governments or public authorities, and that the communication from the government or public authority [was] legitimate and contain[ed] the required consent'.³¹

If an applicant for a geographic name requiring government support could not provide sufficient proof of support or non-objection by the end of the Initial Evaluation period, the applicant would still have additional time in the 'Extended Evaluation' period to submit a 'Notice of Request for Extended Evaluation'. If an applicant were not able to provide the required documentation within at least 90 days from receipt of the notice of failure to pass the Initial Evaluation, the application would not pass the Extended Evaluation, and no further reviews would be available to the applicant.³²

The conclusion that can be drawn from the procedures described above is that any application for a geographic name, not accompanied by the required 60% proof of government or public authority support, would not pass the Geographic Names Panel's evaluation of the 'string review' process of geographic names. According to the 'Decision Tree/Process Flow for Geographic Names Evaluation' document, published by ICANN, an 'immediate fail' of the evaluation phase should be recorded if the applicant were not able to meet the 'complete reporting requirements' for a geographic name.³³

3. The 'Joust' for the dotAfrica gTLD

3.1 The Official African Union (AUC) Endorsed Application

The ministers in charge of Communication and Information Technologies of the African Union countries met in Johannesburg, South Africa, in November 2009. The meeting resulted in the 'Oliver Tambo Declaration',³⁴ in which it was declared by the ministers that Information and Communication Technologies are key to Africa's development and

³⁰ See ICANN Evaluation Panels Selection Process, available at <http://newgtlds.icann.org/en/about/evaluation-panels-selection-process>.

³¹ ICANN Applicant Guidebook Module 2, available at <http://newgtlds.icann.org/en/applicants/agb> par 2.2.1.4.4.

³² ICANN Applicant Guidebook Module 2, available at <http://newgtlds.icann.org/en/applicants/agb> par 2.3.1.

³³ InterConnect Communications New TLD Program Evaluation Panels: Geographic Names: Decision Tree/ ProcessFlow for Geographic Names Evaluation 7 June 2013 geo-names-process-07jun13-en-2.pdf.

³⁴ African Union Oliver Tambo Declaration 5 November 2009 Johannesburg, South Africa.

economic competitiveness. The 'Declaration', expressed the hope that fostering trust in, and the use of, domain names in the new dotAfrica gTLD would bring financial, economic and social-cultural benefits to Africa.³⁵ The published 'Report of the Experts Session of the Extraordinary Conference of the African Union Ministers in Charge of Communication and Information Technologies' (CITMC) stated, as one of the conclusions reached in the discussions, the need to: 'Establish dot Africa as a continental Top Level Domain for use by organizations, businesses and individuals with guidance from African Internet Agencies'.³⁶

The commitments made in the 'Oliver Tambo Declaration', were endorsed by the 14th Assembly of the Head of States and Governments Summit of the African Union, in January 2010.³⁷ This endorsement led the African Ministers in charge of Communications and Information Technologies, who met in Abuja, Nigeria, in August 2010, to re-affirm 'that Information and Communication Technologies are key to Africa's development and economic competitiveness in the attainment of the African Union Vision'. The ministers further requested that the African Union Commission (AUC) 'set up the structure and modalities for the implementation of the DotAfrica project'.³⁸ A task force was subsequently set up by the AUC to implement the decisions reached by the Ministers in Abuja (the 'Abuja Declaration'). The task force recommended that the AUC apply to ICANN for the operation of the dotAfrica gTLD during ICANN's new gTLD Program.

The recommendation included the initiation of a tender process for the selection of a body or organisation to launch and operate the dotAfrica gTLD on behalf of the African Union member states.³⁹ On 12 May 2011, the African Union advised parties interested in managing the dotAfrica gTLD to reply to the AUC 'Call for Expression of Interest' by 3 June 2011.⁴⁰ In the very same communiqué the AUC mentions not only that it, 'would like to categorically state that it is not supporting any one individual or organization in this bid', but also that it wants to make use of the 'opportunity to again assure the people and the governments of Africa of its commitment to a transparent and accountable process in the selection of the winning

³⁵ African Union Oliver Tambo Declaration 5 November 2009 Johannesburg South Africa Commitment 7.

³⁶ African Union Report of the Experts Session of the Extraordinary Conference of African Union Ministers in Charge of Communication and Information Technology par 39 II i.

³⁷ African Union 14th African Union Summit 25 January, 2 February 2010, Addis Ababa, Ethiopia.

³⁸ African Union Third Ordinary Session 6, 7 August 2010, Abuja, Nigeria.

³⁹ African Union Briefing Note on .Africa May 2011, available at http://africanonespace.org/downloads/launch/AUC.africaBriefingNote_ENG.pdf.

⁴⁰ African Union Communique: Clarification on Dot Africa, 12 May 2011, available at <http://www.DotConnectAfrica.nepad.org/crosscuttingissues/knowledge/doc/2201/communique-africa-union-commission-clarification-dot-africa>.

candidate'.⁴¹ Following the Expression of Interest process, the AUC invited interested parties to submit detailed proposals for the registration and operation of the dotAfrica gTLD, on 28 June 2011.

The AUC stated that the 'Request for Proposal':

aims at selecting the best entity based on management and case proposal, including revenue generation, re-investment into the African continent, and sustainability mechanism to partner with the African Union Commission in a view to present a technically and economically sound proposal which meets the requirements of the Applicant Guidebook of the coming launch of the ICANN's new round of gTLDs.⁴²

In the 'Terms of Reference' of the 'Request for Proposals' it is stated categorically that the AUC 'has adopted an open and transparent bidding process to allow qualified African firms, institutions or individuals to compete and offer the best value for Africa...'.⁴³ The 'Request for Proposals' importantly also states that 'The AU requires that officers of the AU, as well as Bidders/ Suppliers/ Contractors/ observe the highest standard of ethics'.⁴⁴

The evaluation criteria were:

- (a) the experience of the applying institution in the management of similar projects
- (b) the quality of the proposal in addressing the technical requirements to operate the dotAfrica registry
- (c) the quality of the solution proposed for the management of the registry and business case, including revenue generation and re-investment into the African continent
- (d) the financial soundness of the applying entity, and
- (e) the quality of the strategic partnerships of the applicant with renowned registries.

⁴¹ African Union Communique: Clarification on Dot Africa, 12 May 2011, available at <http://www.DotConnectAfrica.nepad.org/crosscuttingissues/knowledge/doc/2201/communique-africa-union-commission-clarification-dot-africa>.

⁴² African Union Letter of Invitation, 28 June 2011.

⁴³ African Union Request for Proposals by the African Union Commission for the Operation of Dot Africa.

⁴⁴ African Union Request for Proposals by the African Union Commission for the Operation of Dot Africa.

The final date for submitting proposals was set for 8 December 2011.⁴⁵

Dr Elham M A Ibrahim, the Commissioner of Infrastructure and Energy of the African Union, on behalf of the African Union, officially informed UniForum SA, trading as the ZA Central Registry (ZACR), of its appointment as the 'Official Applicant and Registry Operator for dotAfrica gTLD', in a letter dated 4 April 2012.⁴⁶ The AUC thereafter released a 'Communique on the dotAfrica gTLD', wherein it informs the community that the AUC had selected UniForum SA/ZACR to administer and operate the dotAfrica gTLD on behalf of the African community. The communique stated that the 'endorsement of the ZACR is the only formal endorsement provided by the African Union and its member states with regard to' the dotAfrica gTLD.

The ZACR and the AUC formally concluded the agreement to regulate the relationship between the parties for the application and operation of the new dotAfrica gTLD 'on the margins' of the ICANN-43 meeting in San Jose, Costa Rica, during March 2012.⁴⁷

UniForum SA/ZACR⁴⁸ submitted the official new gTLD application for the dotAfrica geographic gTLD to ICANN, with application reference number 1-1234-89583, on 13 June 2012.⁴⁹ The primary objective and mission of the proposed new dotAfrica gTLD were described, as follows, in the answer to question 18 of the application:

To establish a world class domain name registry operation for the dotAfrica Top Level Domain (TLD) by engaging and utilising African technology, know-how and funding; for the benefit and pride of Africans; in partnership with Africans governments and other ICT stakeholder groups.

Our mission is to establish the dotAfrica gTLD as a proud identifier of Africa's online identity, fairly reflecting the continent's rich cultural, social and economic diversity and potential. In essence we

⁴⁵ African Union Request for Proposals by the African Union Commission for the Operation of Dot Africa.

⁴⁶ African Union Letter of Appointment, 4 April 2012. See <http://africanonespace.org/content.php?tag=1&title=&title=The%20African%20Union%20and%20.africa> for an exposition of the African Union's involvement in the .africa application.

⁴⁷ African Union Communique on the Implementation of the .africa gTLD, not dated, available at <http://africanonespace.org/downloads/AUC-.africa-Communique--2.pdf>.

⁴⁸ Detailed information regarding dotA UniForum SA trading as the ZACR is available at <http://co.za/> and <https://www.DotConnectAfrica.registry.net.za/content.php?gen=1&contentid=100&title=About%20Us>.

⁴⁹ ICANN New TLD Application, 13 June 2012 available at <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1184>.

will strive to develop and position the dotAfrica gTLD as the preferred option for individuals and businesses either based in Africa or with strong associations with the continent and its people.⁵⁰

The application further stated that the new dotAfrica gTLD would be a gTLD 'by Africa, for Africa',⁵¹ benefiting both the African and Global Internet Communities through reinvestment in Africa,⁵² by way of the development of African ccTLDs, the African registrar market, and African online content.⁵³ According to the application, support would also be given to socio-economic development projects and initiatives, and the building of a global brand with a focus on Africa.⁵⁴

In claiming that Africa also presents an economic opportunity the application explained:

The economies of the fastest growing African nations experienced growth significantly above the global average rates. Many international agencies are gaining increasing interest in investing in emerging African economies, especially as Africa continues to maintain high economic growth despite the current global economic recession. The rate of return on investment in Africa is currently the highest in the developing world.⁵⁵

The ZACR's application passed the initial evaluation for the dotAfrica gTLD, on 12 July 2013, the result of which was published with ICANN's Initial Evaluation Report.⁵⁶ ICANN and the ZACR signed the official dotAfrica gTLD 'Registry Agreement' in Singapore, on 24 March 2014.⁵⁷ At the signing ceremony of the Registry Agreement one of the AUC and ZACR dotAfrica Steering Committee members enthusiastically stated: 'We've

⁵⁰ ICANN New TLD Application 7.

⁵¹ ICANN New TLD Application 7.

⁵² ICANN New TLD Application 7.

⁵³ ICANN New TLD Application 8.

⁵⁴ ICANN New TLD Application 9.

⁵⁵ ICANN New TLD Application 10.

⁵⁶ ICANN New gTLD Program Initial Evaluation Report 12 July 2013 <http://newgtlds.icann.org/sites/default/files/ier/bqe3so7p3lu2ia8ouwp7eph9/ie-1-1243-89583-en.pdf>.

⁵⁷ The Registry Agreement is available at <https://www.DotConnectAfrica.icann.org/resources/agreement/africa-2014-03-24-en>.

come to the end of the beginning, and the beginning of great things for Africa on the Web'.⁵⁸

This unfortunately, would not yet be the case in reality. A competitor for the dotAfrica gTLD had been seeing 'giants on the horizon' throughout the application process and was adamant to 'slay' them in its extended 'battle' for the coveted dotAfrica gTLD.

3.2 The Second 'Private' and 'Unofficial' DotConnectAfrica Application

The AUC's endorsed applicant, ZACR, was not the only application to ICANN for the delegation of the dotAfrica gTLD. Another organisation, DotConnectAfrica Trust, submitted a competing 'private' application, application number 1-1165-42560.⁵⁹ DotConnectAfrica Trust had been an active and vocal participant in the 'battle' for the dotAfrica gTLD that started as early as 2000,⁶⁰ years before the official launch of ICANN's new gTLD programme. According to DotConnectAfrica Trust, its active lobbying for the dotAfrica gTLD started as early as 2005.⁶¹ In a letter dated 29 October 2008, addressed to the Chairperson of the AUC, in which it seeks support for its 'project' for the dotAfrica gTLD, DotConnectAfrica Trust sets out its various efforts and states that the 'collaboration of the AU will be a necessity if not a prerequisite', because of ICANN's policy regarding new geographic names which would require 'African government endorsement'.⁶²

After meeting both the Chairperson of the AUC, and the Commissioner of Infrastructure of the AUC during July 2009, DotConnectAfrica Trust sent a letter to the Chairperson of the AUC, on 31 July 2009, again seeking to

⁵⁸ Ivan Booth ICANN and ZACR Sign Landmark DotAfrica Agreement http://africainonespace.org/news_item.php?id=617&title=ICANN%20AND%20ZACR%20SIGN%20LANDMARK%20DOTAFRICA%20AGREEMENT.

⁵⁹ On the release of ICANN's list of applications for new gTLDs on 12 June 2012 it became clear that DotConnectAfrica had mistakenly applied for the .dotAfrica gTLD and not for the coveted .africa gTLD. However, ICANN allowed DotConnectAfrica to change its initial application. DotConnectAfrica's application, Application ID 1-1165-42560, is available at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1276>.

⁶⁰ See Rebecca Wanjiku DotAfrica History Paper, September 2012, available at http://www.DotConnectAfrica.dotconnectafrica.org/wp-content/uploads/2013/09/Dot-Africa-History-Paper-September-2012_Rebecca-Wanjiku.pdf.

⁶¹ See DotConnectAfrica Trust Letter to Chairperson of the African Union Commission, 29 October 2008 available at <http://www.DotConnectAfrica.dotconnectafrica.org/wp-content/uploads/2014/07/35236319-Letter-of-Plea-for-DotAfrica-to-AU-Chairman.pdf>.

⁶² See DotConnectAfrica Trust Letter to Chairperson of the African Union Commission, 29 October 2008 available at <http://www.DotConnectAfrica.dotconnectafrica.org/wp-content/uploads/2014/07/35236319-Letter-of-Plea-for-DotAfrica-to-AU-Chairman.pdf>.

obtain an 'endorsement letter' for its dotAfrica 'project'.⁶³ The Chairperson responded to this letter, on 7 August 2009, stating that the AUC 'welcomes' the initiative of DotConnectAfrica Trust.⁶⁴ In a letter to DotConnectAfrica Trust, dated 27 August 2009, the Chairperson of the AUC went a step further, and stated that the AUC 'expresses its endorsement of the DotConnectAfrica "dotAfrica" initiative wishing you success in all your endeavours'.⁶⁵

This 'endorsement' by the AUC was, however, rather short lived. In a letter, dated 16 April 2010, the Deputy Chairperson of the AUC, referring to the 'endorsement' letter of 27 August 2009, informed DotConnectAfrica Trust that, following 'consultations with relevant stakeholders', the AUC had 'reconsidered its approach in implementing' the dotAfrica gTLD and no longer endorsed 'individual initiatives'. The AUC 'will go through an open process that certainly will involve the private sector'.⁶⁶ DotConnectAfrica Trust responded to the letter by stating that 'we fully support the open process and we are quite confident based on our due diligence to date, to be one of the leading contenders'.⁶⁷

Following the AUC's 'Call for Expression of Interest', on 12 May 2011, referred to in 3.1 above, in which the AUC stated that it 'would like to categorically state that it is not supporting any one individual or organization in this bid',⁶⁸ DotConnectAfrica Trust contended, on 17 May 2011, that the AUC's 'Expression of Interest' is 'an extraordinary process introduced AFTER THE FACT', and insisted that its 'previous endorsement from the

⁶³ DotConnectAfrica Trust Letter to Chairperson of the African Union Commission, 31 July 2009 available at http://www.DotConnectAfrica.dotconnectafrica.org/wp-content/uploads/2014/07/Status-update-dotafrica_-July312009_-meeting-Commissioner-of-Infrastructure-Dr-Elham-Ibrahim.pdf.

⁶⁴ African Union Letter of Chairperson to DotConnectAfrica Trust, 7 August 2009, available at <http://www.DotConnectAfrica.dotconnectafrica.org/wp-content/uploads/2014/07/AU-Infrastructure-Commision-Endorsment-of-dotafrica.pdf>.

⁶⁵ African Union Letter of Chairperson to DotConnectAfrica Trust, 27 August 2009, available at <http://www.DotConnectAfrica.dotconnectafrica.org/wp-content/uploads/2013/09/AUC-Endorsement.jpg>.

⁶⁶ African Union Letter of Deputy Chairperson to DotConnectAfrica, 16 April 2010, available at <http://www.DotConnectAfrica.dotconnectafrica.org/wp-content/uploads/2014/01/AU-Deputy-Letter-to-Dotconnectafrica.jpg>.

⁶⁷ DotConnectAfrica Trust Letter to Chairperson of African Union Commission, 17 April 2010, available at <http://www.DotConnectAfrica.dotconnectafrica.org/wp-content/uploads/2014/07/Letter-to-AU-Chairman-on-dotafrica-endorsment-response-to-Deputys-comment.pdf>.

⁶⁸ African Union Communique: Clarification on Dot Africa, 12 May 2011, <http://www.DotConnectAfrica.nepad.org/crosscuttingissues/knowledge/doc/2201/communique-africa-union-commission-clarification-dot-africa>.

AUC is still valid'.⁶⁹ DotConnectAfrica Trust consequently did not submit a proposal for 'The Operation of Dot Africa' after the AUC's 'Request for Proposal' on 28 June 2011.⁷⁰

In a letter to the AUC, dated 30 December 2011, DotConnectAfrica Trust set out the reasons for its not submitting a proposal. The reasons provided in essence were that DotConnectAfrica Trust:

- (a) is not convinced that the process is 'transparent and accountable'
- (b) 'trusts' that the process will not be 'favourable' to it because of various 'acts of sabotage' by 'the people overseeing the current process'
- (c) believes that the outcome of the 'Request for Proposals' process was 'pre-determined'
- (d) believes that the 'Request for Proposals' process is an 'extraordinary process that allows 'Task Force members' to receive in advance details of its 'bid strategy' and 'confidential corporate information', and
- (e) believes that only ICANN's 'process' should be used to determine 'who should be awarded the mandate for the operation of DotAfrica geographic Top Level Domain and the registry'.⁷¹

In its 'Communique on the Implementation of the DotAfrica Top Level Domain' the AUC consequently made it clear that DotConnectAfrica Trust's second 'private' application was 'an unwarranted and unnecessary intrusion on the AUC's mandate from African governments and, if allowed to proceed, will lead to confusion with the AUC's officially endorsed application'.⁷²

DotConnectAfrica Trust, apparently undeterred, wrote an 'Open Letter' to a Senator of the United States in charge of the Senate Committee on Commerce, Science and Transport, informing the Senator of the 'huge

⁶⁹ DotConnectAfrica Trust DCA Commentary: Response to the African Union Communique', 17 May 2001, available at <http://www.DotConnectAfrica.prlog.org/11490290-dca-commentary-response-to-the-african-union-commission-communiqu-clarification-on-dotafrika.html>.

⁷⁰ African Union Request for Proposals by the African Union Commission for the Operation of Dot Africa.

⁷¹ DotConnectAfrica Trust Letter to AUC Stating Reasons for not Participating in RFP Process, 30 December 2011, available at <http://www.DotConnectAfrica.dotconnectafrica.org/wp-content/uploads/2014/01/Letter-to-AU-leaders-to-inform-unwillingness-to-participate-in-RFP-8th-December-2011.pdf>.

⁷² African Union Communique on the Implementation of the .africa gTLD, not dated, <http://africainonespace.org/downloads/AUC-.africa-Communique--2.pdf>.

application fees', 'mandatory reserves' and 'large sums of money' expended on its application for the DotAfrica gTLD. In essence, the aim of the letter, apart from informing the Senator of the expenses it had incurred in submitting its application for the new gTLD, seemed to be to profess its support for the current 'Global Internet Governance Architecture' ('stakeholder model') overseen by ICANN. This was in contrast to the Internet governance models proposed by some individual governments and 'multilateral United Nations Organisations'. A change in the 'ICANN-led stakeholder model' DotConnectAfrica Trust argued, could possibly have a 'disastrous impact not only on the new gTLD program' but on the various positive aspects of the Internet at large, that are based on the 'ideals and values that are considered pillars of American culture and a buttressed democratic ethos'.⁷³

3.2.1 The Government Advisory Committee (GAC) Early Warnings

The AUC officially submitted a GAC Early Warning against the application submitted by DotConnectAfrica Trust through the GAC Early Warning System, on 20 November 2012.⁷⁴ Another fifteen individual African governments (including Benin, Cameroon, Egypt, Gabon, Nigeria, Senegal, South Africa and Uganda) also submitted additional 'Early Warning Reports' to ICANN against the DotConnectAfrica Trust application.⁷⁵ The Republic of Kenya, who in August 2012 had written to DotConnectAfrica Trust, by way of its Minister for Information and Communications wishing it 'success in all the endeavors' regarding the 'dotAfrica initiative',⁷⁶ subsequently submitted an 'Early Warning' against DotConnectAfrica Trust's application, on 20 November 2012.⁷⁷

In its 'Early Warning' the AUC states that DotConnectAfrica Trust's application fails to meet the minimum requirements prescribed by ICANN in the Applicant Guidebook concerning geographic names in that:

- (a) it is a geographic string application that does not have the requisite minimum support from African governments

⁷³ DotConnectAfrica Trust Open Letter to United States Senator, 4 June 2012, available at <http://origin.library.constantcontact.com/download/get/file/1102516344150-278/Letter+from+DotConnectAfrica+to+US+Congress+on+Global+IG.pdf>.

⁷⁴ GAC Early Warning – Submittal Africa – AUC 42560b, 20 November 2012, available at <https://gacweb.icann.org/download/attachments/27131927/Africa-AUC-42560.pdf?version=1&modificationDate=1353382039000&api=v2>.

⁷⁵ These Early Warning Reports are available at <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>.

⁷⁶ Republic of Kenya Letter of Minister of Communications to DotConnectAfrica Trust, 7 August 2012, available at <http://www.DotConnectAfrica.dotconnectafrica.org/wp-content/uploads/2013/05/Kenya-Government-Endorsement-of-the-Dotconnectafrica-Initiative.pdf>.

⁷⁷ GAC Early Warning Africa-KE-42560-3, 20 November 2012, available at <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>.

- (b) that the application constitutes an unwarranted intrusion and interference on the AUC's mandate from African governments to establish the structures and modalities for the implementation of the dotAfrica gTLD, and
- (c) that DotConnectAfrica Trust's application for the dotAfrica gTLD does not sufficiently differentiate it from the AUC's officially endorsed dotAfrica gTLD application and will therefore confuse and deceive the public.⁷⁸

3.2.2 The Government Advisory Committee (GAC) Consensus Advice

On 11 April 2013 ICANN's GAC released its Beijing Communique, in which it released a GAC Advice in the form of an official 'Objection' to DotConnectAfrica Trust's application for the dotAfrica gTLD.⁷⁹ In the advice statement the GAC states that it had reached consensus on the 'Objection Advice', according to Module 3 Part 1 of the Applicant Guidebook, and that the GAC advised ICANN that the application of DotConnectAfrica Trust should not proceed. The GAC further advised that this should create a strong presumption for the ICANN Board that the application should not be approved. On 8 May 2013 DotConnectAfrica Trust submitted its 'GAC Advice' response form for applicants in which it expressed its 'disappointment and outrage' at the 'objection' filed against its application'.⁸⁰

The ICANN New gTLD Committee (NGPC) issued a response to the GAC Beijing Communique on 4 June 2013.⁸¹ In its response the NGPC stated that it accepted the Beijing GAC Advice that the application of DotConnectAfrica Trust for the dotAfrica gTLD should not proceed. The NGPC directed ICANN's staff, pursuant to the 'Beijing Advice', and section 3.1 of the Applicant Guidebook, that the DotConnectAfrica Trust application should not be approved. DotConnectAfrica Trust consequently received an official notification from ICANN stating that, because of the NGPC's resolution to accept the Beijing GAC Advice, the status of 'not approved' would be reflected on the application status page of the new gTLD web site.⁸²

⁷⁸ GAC Early Warning – Submittal Africa – AUC 42560b 20 November 2012 <https://gacweb.icann.org/download/attachments/27131927/Africa-AUC-42560.pdf?version=1&modificationDate=1353382039000&api=v2>.

⁷⁹ GAC Communique – Beijing, People's Republic of China 11 April 2013 <https://gacweb.icann.org/display/GACADV/2013-04-11-Obj-Africa>.

⁸⁰ GAC Advice Response Form for Applicants 8 May 2013 <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1165-42560-en.pdf>.

⁸¹ ICANN New gTLD Program Committee Scorecard 4 June 2013 <http://www.DotConnectAfrica.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm#1.a.rationale>.

⁸² DotConnectAfrica Trust Update on Initial Evaluation for .Africa Application, 5 July 2013 available at http://www.DotConnectAfrica.circleid.com/posts/20130705_update_on_initial_evaluation_result_for_africa_application.

3.2.3 The ICANN Ombudsman

DotConnectAfrica Trust approached the 'ICANN Ombudsman' citing a conflict of interest of two board members during the decision-making process regarding the dotAfrica gTLD, at the end of 2012.⁸³ The ICANN Ombudsman stated in reply that the allegations were 'unfounded' and 'premature'.⁸⁴ To put the Ombudsman statement in a more precise context: 'it is clearly apparent when the records are examined, that the two board members have not participated in any decision-making about dotAfrica, and indeed there has been little discussion other than at a higher level about the program in general'. An unhappy DotConnectAfrica Trust, disgruntled by the Ombudsman's decision replied: 'no recommendation was made by the Ombudsman regarding any future Conflict of Interests'.⁸⁵

In a letter, dated 20 February 2013, DotConnectAfrica Trust again approached the United States Senator who chairs the 'United States Senate Committee on Commerce, Science and Transportation', and other 'Congressional Leaders', claiming 'illegality' and 'corruption' on the part of many individuals and organisations, including, the 'African Internet Community', the AUC 'Task Force', the 'African Top-Level Domains (AfTLD) Organisation', the ZACR and by implication ICANN's bodies and structures involved in the New gTLD application processes. The letter concludes by DotConnectAfrica's calling '... for the swift intervention of Congress as the

⁸³ This was first raised by DotConnectAfrica, which sent 2 separate letters dated 9 July, 2012 to report a matter of 'Conflict of Interest' on .Africa new gTLD applications regarding Mr. Mike Silber, a member of the ICANN Board from South Africa, and Mr. Chris Disspain, a member of the ICANN Board from Australia. Subsequently a complaint was made to the office of the ombudsman in relation to the issue on October 2012 – see ICANN Ombudsman Blog 'Case 12-00241 In a matter of a Complaint by Sophia Bekele for DotAfrica Report', 10 December 2012, available at <https://omblog.icann.org/?p=823>.

⁸⁴ See Evans Taylor DotConnectAfrica writes 4th letter to ICANN, calling ICANN Ombudsman's conclusion 'Convenient' and 'No Brainer', DomainNewsAfrica, 19 February 2013, available at <http://domainnewsafrica.com/dotconnectafrica-writes-4th-letter-to-icann-on-ombudsmans-conclusion-was-convenient-and-no-brainer/> where it is noted: 'However it is clearly apparent when the records are examined, that the 2 board members have not participated in any decision-making about .africa, and indeed there has been little discussion other than at a higher level about the program in general. It is in my view premature to consider whether there can even be apparent bias, because it is too remote to link the suggested connections with the very generic discussions which have taken place, and in addition, where the actual decisions about the applications are still some distance from being made.'

⁸⁵ See Evans Taylor "DotConnectAfrica writes 4th letter to ICANN, calling ICANN Ombudsman's conclusion 'Convenient' and 'No Brainer'" DomainNewsAfrica , 19 February 2013, available at <http://domainnewsafrica.com/dotconnectafrica-writes-4th-letter-to-icann-on-ombudsmans-conclusion-was-convenient-and-no-brainer/>.

only respected and empowered institution that can save the day by appointing an Independent Council as New gTLD Ombudsman'.⁸⁶

3.2.4 The 'Reconsideration Request'

DotConnectAfrica Trust took yet another 'charge' at ICANN, during June 2013, by refusing to accept the NGPC's decision that it withdraw its application for the dotAfrica gTLD. It sought still further relief in accordance with ICANN's accountability mechanisms,⁸⁷ by filing a 'Request for Reconsideration' of the NGPC's decision, not to approve its application with the ICANN Board Governance Committee.⁸⁸ The ICANN Board Governance Committee, after considering all the material evidence, determined on 1 August 2013, that DotConnectAfrica Trust had not furnished proper grounds for reconsideration and denied the 'Request for Reconsideration'.⁸⁹ This decision seems to be merited considering that the clear lack of the requisite 60% 'government' and 'public authority' support, in this instance, African government and African Union support, in reality meant that DotConnectAfrica Trust's 'private' and 'unofficial' application for the dotAfrica gTLD was fatally flawed from the outset.

But alas, DotConnectAfrica Trust's failure to slay the perceived 'giants' during all of the above mentioned ICANN accountability review processes did not deter it from making another charge in 'its righteous war'. DotConnectAfrica Trust pointed its lance towards ICANN, yet again, by turning to the very last ICANN accountability mechanism available to them: the Independent Review Process (IRP).

4. The Independent Review Process (IRP)

DotConnectAfrica Trust sought further relief, the only possible relief still at its disposal, before an Independent Review Panel in terms of ICANN's Bylaws, on 19 August 2013.⁹⁰ Article IV, Section 3 of the ICANN Bylaws provides for a process for the independent third party review of the actions of the ICANN Board alleged by an affected party to be inconsistent with the

⁸⁶ DotConnectAfrica Trust Letter to United States Senator and Congressmen, 20 February 2013, available at <http://origin.library.constantcontact.com/download/get/file/1102516344150-408/Letter+to+US+Senate+on+UniForum+escalation+21+Feb+2013+from+DotConnectAfrica.pdf>.

⁸⁷ ICANN Bylaws, as amended, 11 April 2013, available at <http://www.DotConnectAfrica.icann.org/en/about/governance/bylaws#I> Articles IV and V.

⁸⁸ DotConnectAfrica Request for Reconsideration 13-4 19 June 2013 <http://www.DotConnectAfrica.icann.org/en/groups/board/governance/reconsideration>.

⁸⁹ ICANN Recommendation of the Board Governance Committee, 1 August 2013 available at <http://www.DotConnectAfrica.icann.org/en/groups/board/governance/reconsideration/recommendation-dca-trust-01aug13-en>. See Hurter and Pistorius 2014 PER 1083.

⁹⁰ ICANN's Bylaws are available at <https://www.DotConnectAfrica.icann.org/resources/pages/bylaws-2012-02-25-en#IV>.

Articles of Incorporation or Bylaws. The ‘independent third party’ must be an internationally recognised dispute resolution service provider. The International Centre for Dispute Resolution (ICDR) was appointed as the independent third party to preside over the IRP between DotConnectAfrica Trust and ICANN.

Both ICANN and DotConnectAfrica Trust took part in a prescribed ‘Cooperative Engagement Process’ (CEP),⁹¹ in an effort to resolve the dispute regarding DotConnectAfrica Trust’s unsuccessful (‘not approved’) application for the new dotAfrica gTLD.⁹² Unsurprisingly, considering all the ‘giants’ in the room, the parties were unable to reach a consensus decision. DotConnectAfrica Trust expectedly filed a ‘Notice of the Independent Review Process’ in terms of the ICANN Bylaws, on 24 October 2013.⁹³ In its ‘Amended Notice of the Independent Process’, submitted on 14 January 2014,⁹⁴ DotConnectAfrica Trust in essence averred that ICANN not only violated its Articles of Incorporation, Bylaws, and both ‘local’ (presumably United States, in particular the law of the state of California) and international law, but also that ICANN’s decision regarding its application was ‘unfair, discriminatory’, and lacked the ‘appropriate due diligence and care’.⁹⁵

ICANN rebutted DotConnectAfrica Trust’s accusations in its ‘Response to the Notice of Independent Review’ submitted on 10 February 2014, by stating that:

- (a) the NGPC ‘unanimously’ accepted the Beijing GAC Advice not to approve DotConnectAfrica Trust’s application
- (b) the ICANN Board did ‘exactly’ what it was supposed to do under its Bylaws, Articles of Incorporation and the Applicant Guidebook

⁹¹ Article IV, section 3 of the ICANN Bylaws.

⁹² ICDR Decision on the Interim Measures of Protection, 12 May 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/decision-interim-measures-of-protection-12may14-en.pdf>.

⁹³ DotConnectAfrica Trust Notice of Independent Review Process, 24 October 2013, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/dca-notice-irp-24oct13-en.pdf> and ICDR Decision on the Interim Measures of Protection 12 May 2014 available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/decision-interim-measures-of-protection-12may14-en.pdf>.

⁹⁴ DotConnectAfrica Trust Notice of Independent Review Process, 14 January 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/dca-amended-notice-irp-10jan14-en.pdf>

⁹⁵ ICDR Decision on the Interim Measures of Protection, 12 May 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/decision-interim-measures-of-protection-12may14-en.pdf>.

- (c) ICANN properly investigated the assertion that two of ICANN's Board members had conflicts of interest with regard to the dotAfrica gTLD applications
- (d) numerous individual African countries submitted 'warnings' to the DotConnectAfrica Trust application
- (e) GAC's Beijing 'Consensus Advice' not to approve DotConnectAfrica Trust's application, and
- (f) according to the evidence the process proceeded 'exactly' the way it was meant to proceed.⁹⁶

4.1 Interim Measures of Protection

After an exchange of emails during January and February 2014, in which ICANN rejected a request from DotConnectAfrica Trust to cease any further processing of all applications for the delegation of the dotAfrica gTLD, DotConnectAfrica Trust submitted a 'Request for Emergency Arbitrator and Interim Measures Protection', on 28 March 2014.⁹⁷ In its request DotConnectAfrica Trust averred that it 'is entitled to an accountability proceeding with legitimacy and integrity, [and] with capacity to provide a meaningful remedy'.⁹⁸ ICANN, in its response to the 'Request for Emergency Arbitrator and Interim Measures Protection', submitted on 4 April 2014,⁹⁹ asked that DotConnectAfrica Trust's request be denied.

DotConnectAfrica Trust's request was referred for review and consideration to the ICDR Panel constituted to preside over the IRP on 13 April. After conference calls between the ICDR Panel members, and between the Panel and the parties, during which parties could make submissions on their written submissions made during late April and early May 2014, the

⁹⁶ ICANN Response to Claimant's Amended Notice of Independent Review Process, 10 February 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/icann-response-dca-amended-notice-10feb14-en.pdf>. See also, ICDR Decision on the Interim Measures of Protection 12 May 2014 available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/decision-interim-measures-of-protection-12may14-en.pdf>.

⁹⁷ DotConnectAfrica Trust Request for Interim Relief, 28 March 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/dca-request-arbitrator-protection-28mar14-en.pdf>.

⁹⁸ ICDR Decision on the Interim Measures of Protection, 12 May 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/decision-interim-measures-of-protection-12may14-en.pdf>.

⁹⁹ ICANN Response to Request For Interim Relief, 4 April 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/icann-response-arbitrator-protection-04apr14-en.pdf>.

ICDR Panel released its 'Decision on Interim Measures of Protection', on 12 May 2014.¹⁰⁰

The Panel, providing details as to its reasoning stated that:

In the Panel's unanimous view, therefore, a stay order in this proceeding is proper in order to preserve DCA Trust's right to a fair hearing and a decision by this Panel before ICANN takes any further steps that could potentially moot DCA Trust's request for an independent review....'

The Panel therefore concluded that ICANN had to refrain immediately from any further processing of any application for dotAfrica until the Panel had heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same.¹⁰¹

4.2 Further Orders and Declarations regarding the Procedure of the IRP

After the 'Decision on Interim Measures of Protection', both parties filed various documents and the Panel reached certain decisions, all dealing with procedural issues relevant to the IRP Process during the period from May to August 2014.¹⁰² The most significant of these was the 'Declaration on the IRP Procedure', issued by the Panel on 14 August 2014.¹⁰³

In this declaration the Panel provided the following answers to three critically important questions regarding the IRP Process:

- (a) The Panel, firstly, determined that it had the power to interpret and determine the IRP Procedure as it related to the future conduct of the proceedings
- (b) Following from its first determination the Panel made a number of 'procedural directions' including
that the parties should reach an agreement before 29 August 2014 on 'a form, method and schedule of exchange of documents between them'

¹⁰⁰ ICDR Decision on the Interim Measures of Protection, 12 May 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/decision-interim-measures-of-protection-12may14-en.pdf>.

¹⁰¹ ICDR Decision on the Interim Measures of Protection 12 May 2014 paragraphs 31 and 51 respectively, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/decision-interim-measures-of-protection-12may14-en.pdf>.

¹⁰² These documents can be accessed on the ICANN web site at <https://www.DotConnectAfrica.icann.org/resources/pages/dca-v-icann-2013-12-11-en>.

¹⁰³ ICDR Declaration on the IRP Procedure available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-en.pdf>.

the Panel allow for a video hearing, reserving its decision to order an in-person hearing

that the parties are permitted to challenge and test the veracity of statements made by witnesses during the hearing

- (c) In what can be described as a blow to ICANN, the Panel very importantly concluded that its future ‘Declaration on the Merits’ of the case would be binding on the parties. In short, DotConnectAfrica Trust argued that the IRP is an international arbitration in all but name and that the parties would therefore be bound by any decision reached by the Panel. ICANN, on the other hand, was adamant that it was not bound by a decision of an Independent Review Panel, based on the wording of its Bylaws, and that such a decision merely had an ‘advisory’ effect.

The Panel agreed with DotConnectAfrica Trust and in essence decided that because of

- (a) the fact that an applicant for a new gTLD waives all judicial remedies
- (b) the *contra preferentem* doctrine (This doctrine simply implies that ICANN drafted the rules for, and was the architect of, its IRP Procedure and should therefore have made it clear that IRP Panel decisions are advisory only.), and
- (c) ICANN’s questionable commitment to accountability, and fair and transparent processes in its Articles of Incorporation and Bylaws

the Panel’s decision on the merits would be binding on the parties.¹⁰⁴

Following the important ‘Declaration on the IRP Procedure’, the Panel proceeded to make two further procedural orders during September 2014. ‘Procedural Order No 3’, issued on 5 September 2014, in essence provides a detailed timetable for the processes to be followed by the parties in preparation for, and leading up to, an in-person hearing before the Independent Review Panel. The Order stipulates the dates of the in-person hearing to be 19 and 20 December 2014. The hearing is to take place in Washington, D.C.¹⁰⁵

The ‘processes’ set out in ‘Order No 3’ include the request of documents, objections to documents requested and the exchange of the necessary

¹⁰⁴ ICDR Declaration on the IRP Procedure, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-en.pdf>.

¹⁰⁵ ICDR Procedural Order No 3, 5 September 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/procedural-order-3-05sep14-en.pdf>.

documents between the parties. 'Order No 3' further provides for the filing of briefs and witness statements.

Because an in-person hearing is to be held, the parties are also ordered to:

- (a) provide notifications of the names of the witnesses they plan to call
- (b) inform their witnesses of the date of the in-person hearing in order to secure their presence at the hearing, and
- (c) provide details of the facts to which the witness will be testifying.

The Order includes numerous directions by the panel regarding the format, numbering and other technical aspects of the documentation to be submitted by parties, as well as the procedures for examining and cross-examining of witnesses during the in-person hearing. These technical directions have no substantive significance and are aimed at ensuring due process and the orderly functioning of the hearing. According to 'Order No 3' there would also have been a pre-hearing conference call on 6 December 2014.¹⁰⁶

'Procedural Order No 4', issued on 25 September 2014,¹⁰⁷ deals with two issues regarding the request and exchange of documents as previously ordered in 'Procedural Order No 3' discussed above:

- (a) The Panel reproduces for completeness the fact that the parties agreed to a confidentiality stipulation providing that documents must be kept confidential and that the documents exchanged may not be used for any other purpose, or be publicly posted
- (b) Both parties requested documentation from the other party. 'Procedural Order No 4' renders final the decision of the Panel as to which of the requests for documents must be adhered to by the parties.¹⁰⁸

4.3 The Effects of the Independent Review Process

Article IV, section 3 of ICANN's Bylaws, which regulates the Independent Review Process states that an IRP Panel should strive to issue its 'written

¹⁰⁶ ICDR Procedural Order No 3, 5 September 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/procedural-order-3-05sep14-en.pdf>.

¹⁰⁷ ICDR Procedural Order No 4, 25 September 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/procedural-order-4-25sep14-en.pdf>.

¹⁰⁸ ICDR Procedural Order No 4, 25 September 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/files/procedural-order-4-25sep14-en.pdf>.

declaration' (decision) no later than six months after the filing of a 'Request for Independent Review'.¹⁰⁹ It was at the time of the last update to this publication already close to eighteen months since the start of the IRP Procedure. The in-person hearing that was set to take place only at the end of December 2014 has been continued due to one panelist resigning for personal reasons. A date for a new hearing was as late as February 2015 still not determined. The newly constituted Panel will then still need to render its decision. The IRP matter between ICM and ICANN regarding the .xxx gTLD took close to two years to be concluded.¹¹⁰ This IRP matter seems very likely to exceed that period. It is quite understandable, therefore, that a number of the affected parties have become rather anxious for the IRP process to be concluded.

In a letter dated 2 June 2014, the Commissioner for Infrastructure and Energy of the African Union, Dr Elham M A Ibrahim, on behalf of the African Union Commission, wrote to Mr Fadi Chehade, President and CEO of ICANN on the delay of the dotAfrica gTLD 'accreditation'. In her letter the Commissioner again asserts the AUC's and individual African Government's support of the ZACR application, before expressing her 'great concern' about the further delay in delegating the dotAfrica gTLD caused by the IRP Process. The Commissioner concludes the letter by urging the ICANN President to ensure that, as soon as the IRP decision is communicated, there are no further delays in allowing the ZACR to 'finally launch this long awaited DotAfrica TLD'.¹¹¹

The Assistant Secretary for Communications and Information of the United States Department of Commerce, Mr Lawrence E Strickling, wrote to the Chairman of the ICANN Board, Dr Stephen Crocker, on 13 June 2014. In this letter the Assistant Secretary states that, as a member of the GAC, the United States is committed to the GAC Consensus Advice that DotConnectAfrica Trust's application should not be allowed to proceed. He urges ICANN to 'bring this matter to a closure and delegate the .africa TLD pursuant to the registry agreement signed between ZACR and ICANN', once the IRP Panel renders its decision.¹¹²

On 15 June 2014, the President and CEO of ICANN, Mr Fadi Chehade, responded to Commissioner Ibrahim, by expressing ICANN's frustration with the time required for a final determination to be made in the dotAfrica

¹⁰⁹ ICANN's Bylaws are available at <https://www.DotConnectAfrica.icann.org/resources/pages/bylaws-2012-02-25-en#IV>.

¹¹⁰ ICM v ICANN IRP available at <https://www.DotConnectAfrica.icann.org/resources/pages/icm-v-icann-2012-02-25-en>.

¹¹¹ African Union Letter to ICANN President, 2 June 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/correspondence/ibrahim-to-chehade-02jun14-en.pdf>.

¹¹² United States Department of Commerce Letter to Chairman of ICANN Board, 13 June 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/correspondence/strickling-to-crocker-13jun14-en.pdf>.

IRP. He ensures the Commissioner that ICANN had encouraged the IRP Panel to proceed with expediency and that it would continue to do so.¹¹³

The GAC, at its meeting in London on 25 June 2014, issued a GAC Advice Communique advising the ICANN Board to 'provide timely communication to the affected parties' and 'that following the release of the IRP recommendation, that the Board should act expeditiously in prioritising their deliberations and delegate .africa pursuant to the registry agreement signed by ICANN and the ZACR'.¹¹⁴

On 20 September 2014, the CEO of the ZACR, Mr Lucky M Masilela, also expressed his concern in a letter to the Vice President of GDD Operations of ICANN, Ms Christine A Willet. Mr Masilela wrote that the ZACR is 'concerned at the time that has lapsed, apparently without a final outcome being close, and the longer the delay the more prejudice we suffer....As you will appreciate, we have incurred considerable expenses, and continue to incur such expenses, without any prospect of us being able to exercise our rights under the Registry Agreement in the foreseeable future'.¹¹⁵

Ms Willet responded to the ZACR letter, on 26 September 2014, stating that ICANN did not know how long it would take the Panel to render its decision after the hearing scheduled for 19 December 2014, but that ICANN was optimistic that the Panel would issue its decision swiftly.¹¹⁶

There is clearly much at stake for a number of parties who eagerly await the outcome of the IRP Procedure. It would in fact not be an exaggeration to state that the whole of Africa is holding its breath.

Some very interesting scenarios may arise after the IRP Panel has rendered its decision. At this point, these are purely speculative but nonetheless critical to consider:

(a) If the IRP Panel finds in favour of ICANN, will DotConnectAfrica Trust finally wave the white flag in its 'righteous war'? Or will it make a charge, this time via the United States court system, realistically speaking the only avenue left if the Panel finds in ICANN's favour?

(b) If the IRP Panel finds in DotConnectAfrica Trust's favour, will ICANN regard itself as being bound by the decision, considering that it

¹¹³ ICANN Letter from President to AUC Commissioner, 15 June 2014, available at <https://www.DotConnectAfrica.registry.net.za/downloads/u/2014-06-15-ICANN-to-AUC-FINAL.pdf>.

¹¹⁴ GAC Advice Communique, London, 25 June 2014, available at GAC London Communique FINAL -2.pdf.

¹¹⁵ ZACR Letter to ICANN Vice President GDD Operations, 20 September 2014, available at <https://www.DotConnectAfrica.icann.org/en/system/files/correspondence/masilela-to-willet-20sep14-en.pdf>.

¹¹⁶ ICANN Letter to ZACR CEO, 26 September 2014, available at <https://www.DotConnectAfrica.registry.net.za/downloads/Letter%20from%20Christine%20Willet%20to%20Lucky%20Masilela.pdf>.

claimed in the documents submitted to the Panel that it was not bound by the Panel's decision?

(c) If ICANN is unwavering on the view that it is not bound by the decision of the Panel, the matter is likely to play out in a United States courtroom.

(d) If ICANN, however, regards itself as being bound by a decision in favour of DotConnectAfrica Trust, where does that leave the African Union and the ZACR? The ZACR has signed an enforceable Registry Agreement with ICANN.

(e) Will ZACR also need to turn to an United States court to enforce its rights in terms of the signed Registry Agreement?

Whatever the outcome, ICANN is likely to be faced with unique challenges unprecedented in its history. Will a United States judge ultimately determine the fate of the African continent's presence on the Internet?

Conclusion

The aim of research should always be to provide an accurate and objective view, based on fact, in order to advance the understanding and knowledge base regarding the topic at hand. Only then does research have meaning. Researchers are often confronted with the challenge of separating 'fact', from the endless misrepresentation of the facts and pure speculation, 'fiction'. Telling the 'true' story of the 'battle' for the dotAfrica gTLD is just such a challenge.

Based, however, on the detailed exposition of all the 'official' documentation discussed above, the writer can reach only one inescapable conclusion: DotConnectAfrica Trust is doing battle with imaginary enemies. It is merely 'tilting at windmills'. Is it really credible that all the respected role-players that DotConnectAfrica Trust perceive to be 'giants', such as the African Union, the GAC, the ICANN Board, individual African governments, the whole of the African Internet community, and the ZACR, are in cahoots with each other? Have they all conspired against DotConnectAfrica Trust in a 'corrupt' manner? Surely this is exceptionally unlikely.

The ZACR has more than 75% support from African governments, and it is unequivocally supported by the African Union which officially represents the continent at large. For an applicant to be successful in an application for a geographic gTLD, like the dotAfrica gTLD, a minimum of 60% government support is required for an application to proceed. DotConnectAfrica Trust does not have the required 60% support. Thus the simple fact remains that DotConnectAfrica Trust's application was fatally flawed from the outset and should rightly not have proceeded past the evaluation stages of the new gTLD Program.

It is hoped that the 'righteous war' for the dotAfricagTLD will soon end, so that the African continent can take up its rightful place on the global

network, and that the dotAfrica gTLD will bear the fruits it promises. The 'battle' for this most valuable asset must not lead to Africans being forced to lament: 'Cry, the Beloved Continent'.¹¹⁷

¹¹⁷ Alan Paton *Cry the Beloved Country*, first published in 1948.