GAC Advice Response Form for Applicants

The Governmental Advisory Committee (GAC) has issued advice to the ICANN Board of Directors regarding New gTLD applications. Please see Section IV of the GAC London Communiqué for the full list of advice on individual strings, categories of strings, and strings that may warrant further GAC consideration.

Respondents should use this form to ensure their responses are appropriately tracked and routed to the ICANN Board for their consideration. Complete this form and submit it as an attachment to the ICANN Customer Service Center via your CSC Portal with the Subject, "[Application ID] Response to London GAC Advice" (for example "1-111-11111 Response to London GAC Advice"). All GAC Advice Responses to the GAC London Communiqué must be received no later than 23:59:59 UTC on 04-August-2014.

Please note: This form will be publicly posted.

Respondent:

Applicant Name	DotConnectAfrica Trust
Application ID	1-1165-42560
Applied for TLD (string)	AFRICA

Response:

This document has been prepared in response to the GAC Advice conveyed in the ICANN 50 GAC London Communiqué. DotConnectAfrica Trust ("DCA") received the notice of GAC Advice on July 14, 2014, through the ICANN Customer Service Center Notification Portal for New gTLD applicants and was instructed to respond using this GAC Advice Applicant Response form by August 4, 2014 23:59:59.

The GAC Advice given to ICANN during ICANN 50 in London concerning the dispute over .africa, as well as other recent communications between the GAC and ICANN regarding this dispute, demonstrates both the African Union's inappropriate efforts to determine the outcome of the applications for .africa and ICANN's improper acquiescence to the GAC's demands. We strongly urge ICANN not to accept this advice.

Only two applicants applied for .africa. One, UniForum/ZACR, applied at the behest of the African Union Commission ("AUC").[1] The other applicant, DCA is a Mauritian non-profit organization led by Sophia Bekele Eshete.

[1] The AUC became a member of the GAC in June 2012, apparently in response to advice from ICANN in March 2012, informing the AUC that it could "play a prominent role in determining the outcome of any application for these top-level domain name strings [i.e., .africa, .afrique and .afrikia]" by acting through the GAC. *See* Letter from Stephen Crocker to Commissioner Elham Ibrahim dated March 8, 2012, pages 2-3, 6-7 (Responses to Requests 1 & 8). In November 2012, a mere five months after taking ICANN's advice and joining the GAC, the AUC orchestrated the issuance of a GAC early

ICANN halted the processing of DCA's application in June 2013 on the basis of advice from the GAC – rendered at the request of the AUC, but contested by the Kenyan GAC representatives – to reject DCA's application because it allegedly did not have enough governmental support. DCA subsequently initiated an Independent Review Process ("IRP") challenging ICANN's acceptance of that advice. The IRP is currently ongoing.

In order to preserve DCA's right to be heard and its right to meaningful relief should it prevail in the IRP, the IRP Panel issued an interim order directing ICANN not to take any further action on the UniForum/ZACR application, since delegation of .africa to ZACR would effectively deny DCA any remedy whatsoever. In response, the AUC has once again begun using the GAC to pressure ICANN to take actions favoring its own candidate for .africa, UniForum/ZACR.

It was in this context that the GAC provided its advice as two numbered items, advising the ICANN Board:

1. "…to provide timely communication to the affected parties, in particular to provide clarity on the process and possible timelines;" and

2. "…that, following the release of the IRP recommendation, the Board should act expeditiously in prioritizing their deliberations and delegate .africa pursuant to the registry agreement signed between ICANN and ZACR."[2]

Remarkably, in the GAC's view, "the affected parties" to the IRP are not DCA and ICANN, the actual parties to the IRP, but the GAC, the AUC, and UniForum/ZACR. Indeed, ever since the Panel issued its order on interim measures, the GAC has been sending a steady message to ICANN that it must ensure that the IRP does nothing to interfere with the presumptive delegation of .africa to UniForum/ZACR. Thus, the GAC's second item of advice urges ICANN to "expeditiously" delegate .africa to UniForum/ZACR as soon as the IRP is completed, *regardless of what the IRP Panel recommends*.

ICANN can and must reject this advice.

I. The GAC's Advice That ICANN "Provide Timely Communication" To Non-Parties To The .africa IRP

It is surprising for the GAC to advise ICANN to keep the so-called "affected parties" informed of what is going on in the .africa IRP, since all documents filed in the IRP and decisions made by the IRP Panel are posted to ICANN's website[3] (as well as DCA's

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warning against DCA's application for .africa, and succeeded in obtaining so-called GAC advice against DCA's application in April 2013.

[2] GAC Communique – London, United Kingdom (25 June 2014), Section IV (3)(a).

[3] ICANN undertakes to publish the pleadings and decisions relating to all IRPs—as well as all litigations involving ICANN—on its website. Pleadings and decisions from DCA

website[4]). The AUC and UniForum/ZACR have only to monitor these sites in order to be fully informed as to the status of the IRP.

To the extent that the GAC is advising ICANN to provide confidential information to the AUC and UniForum/ZACR concerning this proceeding, such advice is highly inappropriate and jeopardizes the integrity of the IRP proceedings. The IRP is independent of ICANN and the GAC, and neither the AUC nor UniForum/ZACR has any right to confidential information concerning this dispute resolution process.

Indeed, the AUC and UniForum would do better to keep track of what is posted on ICANN's and DCA's websites concerning the IRP, since ICANN staff members have provided information that is incorrect.[5]

In fact, ICANN, in its communications with the AUC, has provided very misleading information concerning the nature of the IRP. ICANN has given every indication that it agrees with the AUC that the IRP is merely a dilatory tactic to push back what is treated as the inevitable delegation of .africa to ZACR:

- On June 15, 2014, ICANN CEO Fadi Chehadé wrote to Dr. Elham Ibrahim, the AUC Infrastructure and Energy Commissioner indicating that

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v. ICANN may be found at the following site: https://www.icann.org/resources/pages/dca-v-icann-2013-12-11-en.

[4] DCA has also committed to post all pleadings, decisions and non-confidential communications relating to the IRP on its website, available here: http://www.dotconnectafrica.org/icann-related-2/independent-review-process-dca-vs-icann/.

[5] For example, on the afternoon of June 21, 2014, during ICANN 50 in London, ICANN staff erroneously informed the AUC representatives present that discussions relating to DCA v. ICANN began in October 2013 and that the first memorial was not filed until May 2014. *See* Transcript, GAC Meeting on New gTLDs - Compliance and Implementation of GAC Safeguard Advice (21 June 2014), pages 4-5. In fact, following a CEP process which began in late August 2013, the Notice of IRP was filed on October 24, 2013, and DCA's Amended Notice of IRP was submitted on January 10, 2014. By May 2014, the IRP panel was already constituted and it enjoined ICANN from further delegating .africa to ZACR on May 12, 2014.

Likewise, ICANN staff erroneously informed the GAC that the IRP is a three-party process, when in fact the IRP is strictly between the ICANN Board and the party challenging Board action. Most remarkably, ICANN staff was unsure where to direct GAC members to find the complete rules relevant to the IRP process. *See id.* at pages 9, 31.

ICANN did not approve of DCA v. ICANN[6] and promising to proceed expeditiously with delegating .africa to ZACR and the AUC as soon as would appear appropriate following the IRP.[7]

- During the ICANN Press Conference on June 24, 2014, Mr. Chehadé publicly cast the IRP as a battle waged by DCA's founder Sophia Bekele against the entire African Union, obscuring the actual parties and issues in the IRP.[8]
- At the ICANN Public Forum on June 26, 2014, Mike Silber of the ICANN Board publicly championed the current CEO of ZACR, "my friend Lucky Masilela" in his tirade against the DCA v. ICANN IRP, agreeing with Masilela that "It's unfortunate that [ZACR's] effort has been hamstrung by initiatives which are not positive" and assuring him that ICANN is working expeditiously to resolve the IRP and avoid further delay in delegating .africa to ZACR.[9]

In reality, the IRP is an independent process created in order to adjudicate the rights that DCA has asserted in its Notice of IRP, and in particular, the right to have its application treated fairly, transparently, and with due diligence by ICANN in accordance with ICANN's Bylaws, Article of Incorporation, and the gTLD Applicant Guidebook.

ICANN does not have the right to simply delegate .africa to ZACR – or to promise to do so in its dealings with the AUC – unless and until the IRP Panel tasked with evaluating DCA's claims has completed its mission ***and the ICANN Board has acted on the Panel's decision***, whatever that decision may be and regardless of whether the AUC views that decision as favorable to itself or to ZACR.

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[6] Letter from Fadi Chehadé to Commissioner Ibrahim dated June 15, 2014 ("Even when challenges are not well taken (such as the way that we view the .AFRICA IRP)…) (ICANN is also frustrated…").

[7] *Id.* ("You have my commitment that our Global Domains Division team and all other necessary teams at ICANN will work expeditiously with ZACR to bring the .AFRICA TLD to delegation and launch, just as soon as it is appropriate for that work to proceed. I am excited to see the opportunities that the launch of the .AFRICA TLD will bring to the constituents of the AUC, and we look forward to working with you in the future.").

[8] ICANN Press Conference (June 24, 2014), *available at* https://www.youtube.com/watch?v=QsGZolSaJQA&feature=youtu.be ("Similarly, we have the case of ".africa" where a single applicant has filed an IRP. She decided that this is her right and we should let her pursue her right even if the whole African Union has a different view. Her right is to say I don't agree with the decision").

[9] Transcript, ICANN Public Forum (June 26, 2014), page 24 ("We're working with staff to monitor the process, and staff has committed to doing everything that they can to try and speed up the process; that this not be held up any longer than is absolutely necessary.").

II. The GAC's Advice That ICANN "Act Expeditiously" To Delegate .africa To ZACR On Release Of The IRP Recommendation

The GAC's advice that ICANN should simply delegate .africa to ZACR once the IRP has been completed (regardless of what the Panel decides) is highly inappropriate. It assumes that the IRP concerning .africa is mere window dressing, an empty formality put in place so that ICANN can claim that it is meeting its obligations of transparency and accountability, but which will have no effect whatsoever on the presumptive delegation of .africa to the party favored by the GAC.

However, pursuant to ICANN's Bylaws and the rules applicable to the IRP, the Board must give due consideration to and act on the Panel's decision.[10] Indeed, it is DCA's position that the IRP Panel's decision is binding on ICANN.[11] Thus, ICANN cannot simply delegate .africa to ZACR as the GAC urges it to do. ICANN must comply with the Panel's decision.

III. Additional Observations: Education of GAC Representatives on the ICANN Process Which they Are Intended to Comment and Advise Upon

It is our understanding that GAC representatives are officials sent by their own governments on the assumption that they are or will become sufficiently knowledgeable in the ICANN processes to provide educated feedback to ICANN on how its processes relate to the laws and international agreements of each government.[12] Where the New

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[10] ICANN Bylaws, Article IV §3(21) ("…the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value"). *See also*, DCA's Submission on Procedural Issues (May 5, 2014), ¶¶ 27-28, 34-44, *available at* https://www.icann.org/en/system/files/files/dca-submission-procedural-issues-05may14-en.pdf (discussing in detail why the language of the Bylaws and ICANN's Supplementary Procedures for IRPs indicate that the IRP declaration is final and binding on both DCA and ICANN.).

[11] *See* DCA's Submission on Procedural Issues (May 5, 2014), *available at* https://www.icann.org/en/system/files/files/dca-submission-procedural-issues-05may14-en.pdf; DCA's Response to the Panel's Questions on Procedural Issues (May 20, 2014), *available at* https://www.icann.org/en/system/files/files/dca-response-procedural-issues-20may14-en.pdf. All pleadings are also available at http://www.dotconnectafrica.org/icann-related-2/independent-review-process-dca-vs-icann/.

[12] *See* ICANN Bylaws, Art. XI, §2(1)(e) ("the accredited representative of a member must hold a formal official position with the member's public administration. The term "official" includes a holder of an elected governmental office, or a person who is employed by such government…"); *id.* at Art. XI, §2(1)(a) ("The [GAC] should consider and provide advice on the activities of [ICANN] as they relate to concerns of governments, particularly where there may be an interaction between [ICANN]'s policies

gTLD Program is concerned, this role requires the representatives to understand the gTLD Applicant Guidebook, the ICANN Bylaws and the IRP process contained therein, a process which as noted is independent of both ICANN and the applicants.

In contrast to this understanding, many of the GAC members who opposed DCA's application through the April 2013 Advice were new to the ICANN system, with the African Union Commission joining as a member in June 2012 during the Prague meetings, after the application process closed in March 2012.[13] Based upon the discussions during ICANN 46 in Beijing and ICANN 50 in London, these new members do not appear to have been educated by ICANN on the critical documents namely, the gTLD Applicant Guidebook, the ICANN Bylaws and the IRP process which is—by contract—the only independent method of review available to any applicant under the new gTLD program.[14]

From the questions raised in the GAC Advice and in the available transcripts of the various GAC meetings during ICANN 50 and during past ICANN meetings, it is our deep concern that ICANN allows the GAC to intervene in ICANN's evaluation and delegation of new gTLDs without ensuring that the GAC representatives actually understand ICANN processes. A lack of proper education is the clear explanation for certain GAC members urging ICANN to truncate the IRP and/or compromise the independence of the proceeding, which is according to ICANN, an applicant's only method of legal recourse.[15]

Nonetheless, if the GAC representatives lack an understanding of ICANN, the onus is on ICANN itself, as the organization which created the GAC and is supposedly supported by the GAC and its policy advice, to ensure that GAC representatives are properly educated and that GAC advice is based upon thorough understandings of the ICANN policies it

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and various laws and international agreements or where they may affect public policy issues").

[13] See ICANN GAC Communiqué - Prague 28 June 2012, *available at* https://gacweb.icann.org/download/attachments/27131919/FINAL_GAC_Communique_20120628.pdf?version=1&modificationDate=1341949563000&api=v2. The African Union Commission joined the GAC presumably at the invitation of the Chair Heather Dryden, as this is the only method for a non-state to join the GAC. *See* ICANN Bylaws, Art. XI, §2(1)(b) ("Membership shall also be open to…multinational governmental organizations and treaty organizations, on the invitation of the [GAC] through its Chair.").

[14] *See* gTLD Applicant Guidebook, Module 6(6) (purporting to waive all recourse to any court or other judicial forum for every applicant filing for a gTLD under the New gTLD Program "provided, that applicant may utilize any accountability mechanism set forth in ICANN's Bylaws" to instead including the IRP).

[15] *Id.*

comments upon. ICANN has a duty to educate the members of the Internet community at large as well as the members of the GAC themselves, as part of its obligation to act in a transparent and accountable manner.

Based upon the GAC's recent actions and advice, we raise the following questions to ICANN:

- **GAC representatives' knowledge and competence:** Is there a proper mechanism within the GAC rules to ensure individuals with the requisite knowledge and experience are recommended to represent governments? A minister of agriculture meets the requirement of "official" representation but likely would not be informed on ICANN. Likewise, even an expert understanding of computers and coding does not guarantee that an official will be familiar with ICANN's policies.
- **GAC Training:** Does the GAC have a mechanism to train its members' representatives in ICANN's rules and constitutive documents? What mechanisms does ICANN make available to GAC representatives to educate them on ICANN programs and procedures?
- **GAC Voting:** How exactly does ICANN assess whether advice was obtained by consensus? Asking members to indicate if they vote against certain consensus advice does not mean that all others are in favor of the advice. A non-vote could be an abstention. Likewise many items of GAC advice are published by way of communiqués without noting whether they are offered following consensus. What mechanism does ICANN have to communicate to the GAC and clarify challenged consensus?
- **Conflicts of Interest:** DCA is not the only applicant to publicly notify ICANN that a competing applicant is utilizing a legitimate ICANN process or organ—like the GAC—to quash its competition. Does ICANN anticipate putting in place any mechanisms to protect against the misuse of the GAC or politicization of GAC Advice by applicants to defeat competing applications?

Based upon these concerns and for the above noted reasons, we object to the GAC's advice as improper and betraying a failure on the part of ICANN to adequately educate and inform GAC representatives. We expect ICANN to decline to follow the London GAC Advice with regard to .africa, consistent with its obligations under the Bylaws and other documents governing ICANN and the IRP.