



September 28, 2013

The President/Chief Executive Officer
Internet Corporation for Assigned Names & Numbers (ICANN)
12025 Waterfront Drive, Ste. 300
Los Angeles, CA USA 90094
United States of America

Copy to: Dr. Steven Crocker, Chairman of the ICANN Board of Directors

Dear Sirs,

Subject: Submission of Clarifications Sought by ICANN Representatives during our recent CEP Discussions

We hereby write to provide you with some clarifications requested by ICANN representatives during our last CEP telephonic meeting on Thursday, September 19, 2013.

1. Our GAC Advice was a 'GAC Objection Advice'

The GAC Advice that our .Africa application received was a 'GAC Objection Advice'. You may refer to the Beijing GAC Advice of April 11, 2013 for verification. Moreover, the GAC Advice Framework that was published by the ICANN new gTLD Program Committee (NGPC) classified our .Africa application as an 'Objection'. Again, we urge you to refer to the GAC Advice Framework that was prepared and published by the NGPC in May 2013.

Please note that a GAC Objection Advice must not be confused with the type of 'objections' filed under the four (4) main criteria (grounds) such as **Legal Rights Objection, String Confusion Objection, Community Objection, and Limited Public Interest Objection** filed with the respective official (new gTLD Program) Dispute Resolution Service Providers as per Section 3.2.1 of the new gTLD Program Guidebook.

Nevertheless, the new gTLD Program Guidebook also witnesses in Module 3, Section 3.1 of the Applicant's Guidebook that in some cases, a GAC (Objection) Advice could be pertinent to one of the subject matter areas of the objection procedures as per the following statement excerpted from Section 3.1 of the Guidebook: ***"The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures."***

2. If the GAC Objection Advice is related/pertinent to one of the subject matter area of 'Objection Procedures', then Independent Experts may be consulted by the ICANN Board

According to the new gTLD Program Guidebook: ***"The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures"***. We believe that since this was not done by the ICANN Board, DCA Trust shall continue to maintain that the ICANN Board did not exercise the necessary amount of discretion in this regard to ensure that it followed a rigorous and accountable process before reaching its decision.



3. What should be done to consult with Independent Experts

To consult with 'Independent Experts' **“such as those designated to hear objections in the new gTLD Program Dispute Resolution Procedure”**, we believe that the GAC Objection Advice, and the Response to the GAC Objection Advice submitted by DCA Trust to ICANN should be sent by the ICANN Board to the designated Independent Expert for their review and opinion.

We think that the Independent Expert should be asked to **treat the GAC Objection Advice and the accompanying Response to GAC Advice by DCA Trust the same way they would treat a filed Community Objection** – that is, as a new gTLD Dispute with the African Union Commission (acting as a GAC member) as the 'Objector', objecting (through ICANN GAC), on behalf of the African Community, and DCA Trust as the 'Respondent' (responding applicant); **thus, the Independent Expert should be asked to review the process that led to the GAC Objection Advice:**

- Whether it was valid in terms of overall conformance to laid down procedures prescribed in the Guidebook including Section 3.2.2.4; and
- Whether the process that led to the GAC Objection Advice followed the operating principles of the ICANN GAC;
- Determine the overall substantiality of the defense presented by DCA Trust;
- Determine whether the GAC Objection Advice itself is valid in terms of its overall substance and adherence to due process; and also
- Determine whether the arguments and evidences presented by DCA Trust in defense of the GAC Objection Advice are admissible, and on the basis of such considerations and comprehensive determinations, provide an expert opinion to ICANN whether to accept the GAC Objection Advice as issued or not to accept the GAC Objection Advice in the same way that they (Dispute Resolution Service Provider) would make a ruling on a filed Objection Procedure:
- Whether to uphold the Objection as filed or deny the Objection either due to lack of merit or some other deficiency inherent in the filed Objection; or on the strength of the defense that has been presented by the respondent to counter the Objection.

4. Why we believe ICANN violated its own Bylaws

Section 3 (4b) of the ICANN Bylaws infers that the **ICANN Board shall always exercise due diligence and care in having a reasonable amount of facts in front of them before taking their decisions.**

We hereby cite Article IV, Section 3 (No. 4b) of the ICANN Bylaws which states *inter alia*:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. *did the Board act without conflict of interest in taking its decision?;*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?;*”

We have posited that by not consulting with Independent Experts prior to deciding on the GAC Objection Advice that was issued against DCA Trust's .Africa application, even though the GAC Objection Advice against DCA's application had already been correctly assessed by ICANN as an 'Objection' based on the published NGPC GAC Advice Framework, **the ICANN has violated this particular provision (cited above)**



within its Bylaws. We seriously believe that the ICANN Board failed to ensure a rigorous and accountable process which would have proved beyond reasonable doubt that **“the Board exercised due diligence and care in having a reasonable amount of facts in front of them”** when they considered the GAC Objection Advice.

DCA Trust has always maintained the position that by not exercising the discretionary option of consulting with Independent Experts as stipulated in the Guidebook (Section 3.1), the ICANN Board did not exercise due diligence and sufficient care in having a reasonable amount of facts in front of them, since it is quite patent that consultations with independent experts **“such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures”** would have no doubt presented an additional point of view (or other facts based on expert determination) that should have been considered by the ICANN Board NGPC before the decision was taken.

Furthermore, by not exhausting all the likely procedures recommended in the Guidebook (Section 3.1) including consultations with Independent Experts, we deem the resulting decision as inequitable, and as such, is also a violation of the relevant provision within the ICANN Bylaws which states that **“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment”**. Please refer to Section 3 (‘Non-Discriminatory Treatment’) of Article II of the ICANN Bylaws. DCA Trust has always insisted that the decision made by the ICANN NGPC was inequitable.

Conclusion

In concluding, we implore you to please note that we have already conveyed the main points of our arguments in the various communications sent to ICANN in the recent past, and we urge you to read them carefully so as to thoroughly understand our position as presented and what presently constitutes the basis of our continuing disagreement with the decision that has been taken by the ICANN Board NGPC.

Therefore, we believe that if the ICANN representatives participating in the CEP Procedure are (still) unable to correctly understand DCA’s position, **then the matter should be referred (subjected) to independent review by a competent third-party.**

In any case, we hereby opine that acceptance on the part of ICANN to consult with independent experts on the GAC Objection Advice and the Response to GAC Advice submitted by DCA Trust pursuant to relevant stipulations contained in Section 3.1 of the new gTLD Program Guidebook will be a good beginning, and DCA Trust would profoundly welcome such a step as indeed ‘cooperative’.

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

Yours sincerely,

For & On Behalf of DotConnectAfrica Trust

Sbekele

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

cc: Mr. Akram Atallah, President, Generic Domains, Division
cc: Cherine Chalaby, Chair, New gTLD Program Committee
cc: John Jeffrey, ICANN General Counsel & Secretary
cc: Susanna Bennett, ICANN Chief Operating Officer