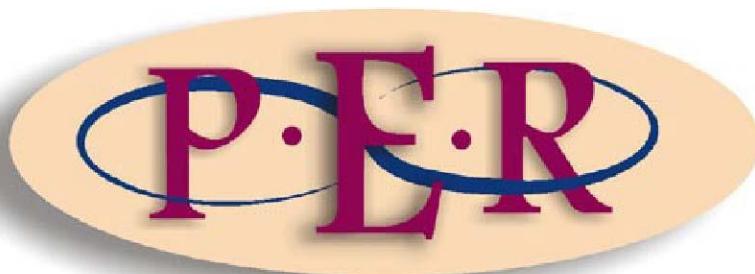


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THE NEW .AFRICA TOP LEVEL DOMAIN: AN AFRICAN INITIATIVE IN ENSURING AFRICA'S RIGHTFUL PLACE ON THE GLOBAL NETWORK

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1 Introduction

The development of the network that is today known as the Internet was a very complex and technical process that spanned a period of close to 45 years.¹ It can be said that the Internet's evolution to its present form of sophistication and its consequent rise to prominence was not meticulously planned or even foreseen, but in reality happened by accident. No grand plan and certainly no appreciation of its future growth and international relevance existed when the United States government funded the initial projects that started it all.²

The United States government accordingly came to control the domain name system (DNS) with its massive appeal and critical strategic and economic importance purely by chance.³ In contrast to the DNS's humble beginnings, the new gTLD programme has been planned meticulously for the future growth of global branding and the geographical positioning of domain name ownership. This new development heralds an innovative era in the management of the DNS, especially for Africa.

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¹ Chivers 2009 <http://www.telegraph.co.uk/technology/news/6415607/The-internets-40th-birthday-anniversary-of-Arpanet.html>.

² The original network of computers, the Advanced Research Administration Network, called the ARPANET, was set up in September 1969 as a joint venture between the Massachusetts Institute of Technology and the United States' Department of Defence as a method of ensuring continued communication between remote computers in the event of war. For a detailed discussion of the history of the Internet, see Leiner and Serf *et al* 2003 <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet>.

³ See Froomkin 2000 *Duke L J* 43-125 for a detailed discussion of the United States government's involvement in the development of and control over the Internet.

2 ICANN and the new generic Top Level Domain (TLD) programme

2.1 Brief background on ICANN

A number of factors, including among others the sensitive intellectual property issues brought to the fore by large-scale trade-mark infringement (particularly cybersquatting), the unacceptable contraction in the creation of new TLDs, controversial policy considerations pertaining to the United States government's effective control over the global network, as well as numerous commercial considerations forced the hand of the United States government to direct their attention to addressing these concerns.⁴ On the 1st of July, 1997, the then President of the United States of America, William J Clinton, charged the United States Department of Commerce with privatising the DNS. This was done to increase competition and facilitate international participation in the management of the DNS by divesting the United States government of authority over critical elements of the Internet's infrastructure.⁵ As a result of the Presidential direction the Department of Commerce issued a request for comments on the administration of the DNS. The request was issued on July 2, 1997, on behalf of an inter-agency working group under leadership of Ira Magaziner.⁶ Pursuant to the comments received, the National Telecommunications and Information Administration (NTIA), an agency of the United States Department of Commerce, issued for response "A Proposal to Improve the Technical Management of Internet Names and Addresses", the so-called "Green Paper".⁷

The Green Paper plotted details regarding the road forward for the United States domain name policy and the management of the DNS. The most noteworthy measure that was put forward was the creation of a new corporation responsible for DNS administration managed by an international and representative Board of Directors.⁸

⁴ Lindsay *International Domain Name Law* para [2.9].

⁵ Clinton and Gore 1997 <http://www.ta.doc.gov/digeconomy/framework.htm>; Lindsay *International Domain Name Law* para [2.9].

⁶ US Department of Commerce *Request for Comments on the Registration and Administration of Internet Domain Names* 62 Fed Reg 35,896 (July 1997); Froomkin 2000 *Duke L J* 63.

⁷ NTIA *A Proposal to Improve the Technical Management of Internet Names and Addresses* 63 Fed Reg 8,825 (February 1998).

⁸ Bettinger *Domain Name Law and Practice* 8.

However, the Green Paper was not received enthusiastically, encountering substantial criticism for the perceived attempt by the United States government to control the once self-governing Internet.⁹

In June 1998, only a few months after the release of the Green Paper, the United States Department of Commerce released its non-binding statement of Policy on the "Management of Internet Names and Addresses", the so-called "White Paper".¹⁰ Learning from previous mistakes, the policy did not address substantive rule-making and took the road less travelled in the United States DNS administration history by conceding to the principle of privatisation. This entailed a call for the creation of a new, private, not-for-profit corporation to take over the coordination of specific DNS functions and spearhead reform for the benefit of the broad-based Internet community. The White Paper placed strong emphasis on the critical importance of representation in ensuring democratic legitimacy for the new body. It stated that the structures of the body must "reflect the functional and geographic diversity of the Internet and its users" and be "broadly representative of the global Internet community".¹¹

A consultative process followed, the International Forum on the White Paper (IFWP), in which a whole spectrum of interested parties participated. The IFWP developed and presented various drafts of the articles of incorporation and the bylaws of the new governing organisation to the United States Department of Commerce.¹² These draft documents for the first time referred to the proposed corporation as the Internet Corporation for Assigned Names and Numbers (ICANN).¹³ ICANN was consequently formally incorporated under Californian law by October 1998,¹⁴ followed shortly afterwards by the conclusion of a Memorandum of Understanding (MOU)

⁹ Council of the European Union and the European Commission 1998 <http://europa.eu.int/ISPO/eif/InternetPoliciesSite/InternetGovernance/MainDocuments/ReplytoUSGreenPaper>. In this document the European Commission clearly expressed its dissatisfaction with the United States' dominance of the administration of the Internet. Mueller *Ruling the Root* 168.

¹⁰ NTIA *Management of Internet Names and Addresses* 63 Fed Reg 31,741 (June 1998).

¹¹ NTIA *Management of Internet Names and Addresses* 63 Fed Reg 31,741 (June 1998) 749, 750 respectively.

¹² Mueller *Ruling the Root* 177; Bettinger *Domain Name Law and Practice* 11.

¹³ Lindsay *International Domain Name Law* para [2.11].

¹⁴ Weinberg 2000 *Duke L J* 209; Froomkin 2000 *Duke L J* 72.

between the United States Department of Commerce and ICANN in November 1998. This placed a seal of approval on the official recognition of ICANN as the organization responsible for the domain name registration functions.¹⁵

According to Article I section 1 of ICANN's Bylaws ICANN's mission is to:

... coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are
 - (a) Domain names (forming a system referred to as "DNS");
 - (b) Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and
 - (c) Protocol port and parameter numbers.
2. Coordinates the operation and evolution of the DNS root name server system.
3. Coordinates policy development reasonably and appropriately related to these technical functions.¹⁶

As the Internet matured and exploded into prominence, especially with the realisation of its immense commercial value, vested interests in DNS policy and rule making led to many conflicts, the most relevant and contentious point of conflict being the question: who has control over the DNS? Since 1998 up until today the answer has very simply been, ICANN. Not surprisingly, therefore, the legitimacy of ICANN and ICANN's control over the DNS has been the subject of heated debate since the establishment of ICANN, and it persists today.¹⁷

¹⁵ US Department of Commerce 1998 <http://icann.org/general/icann-mou-25nov98.htm> accessed.

¹⁶ ICANN 2013 <http://www.icann.org/en/about/governance/bylaws#I>.

¹⁷ For detailed discussions in this regard, see Proffit 1999 *Loy LA Ent L Rev* 601; Liu 1999 *Ind L J* 587; Klein 2002 *The Information Society* 193; Weinberg 2000 *Duke L J*; Froomkin 2000 *Duke L J*.

2.2 ICANN's New gTLD Programme

Eight gTLDs .com, .edu, .gov, .int, .mil, .net, .org and .arpa¹⁸ predated ICANN's creation. One of ICANN's main goals since its creation has been to increase competition in the DNS through the expansion of the Root Server by way of introducing new gTLDs, while at the same time ensuring that the functions of the Internet stay secure and stable. The addition of gTLDs has historically been controlled and constrained by ICANN.¹⁹ ICANN has carried out two application rounds for new gTLDs since its establishment with the seven new gTLDs .aero, .biz, .coop, .info, .museum, .name and .pro being introduced in the 2000 application round, and another six new gTLDs .asia, .cat, .jobs, .mobi, .tel and .travel being introduced during the 2004 application round.²⁰ The addition of these gTLDs, however, did not bring about ICANN's wish that new registrations would be dispersed between the existing 21 gTLDs. ICANN wanted to increase competition in the domain name market and reduce the strain on some of the burdened and overpopulated gTLDs through the addition of the new gTLDs.²¹

ICANN's Generic Names Supporting Organisation (GNSO) developed policy recommendations for the process. The recommendations were the guiding force behind ICANN's introduction of new gTLDs that started in December 2005 and concluded in 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.²²

The Report further recommended not only that the evaluation and selection procedure for new gTLD registries "should respect the principles of fairness, transparency and non-discrimination"²³ but also that new gTLDs "must not infringe

¹⁸ The ".arpa" top level domain is used for reverse IP look-ups.

¹⁹ Komaitis *Current State of Domain Name Regulation* 185.

²⁰ ICANN Date Unknown <http://www.icann.org/en/registries>.

²¹ Komatis *Current State of Domain Name Regulation* 185.

²² ICANN GNSO 2007 <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>.

²³ ICANN GNSO 2007 <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm> Recommendation 1.

existing legal rights of others that are recognized or enforced under generally accepted and internationally recognised principles of law".²⁴

In June 2008 the most comprehensive and ambitious expansion of gTLDs in the history of the DNS was approved for implementation by ICANN's Board.²⁵ It has been noted that this new gTLD programme is probably the most significant change to the domain name system for many years. There are over 2000 different applications for approximately 1100 names.²⁶

2.3 Application process for new gTLDs

After the approval of the GNSO Policy for the implementation of the new gTLDs, ICANN undertook work which included public consultations, review and input on multiple draft versions of the Applicant Guidebook,²⁷ through an "open, inclusive, and transparent process to address stakeholder concerns."²⁸ The Applicant's Guidebook was approved and the launch of the New gTLD Programme was authorised by ICANN's Board of Directors in June 2011. The application period for new gTLDs officially opened on 12 January 2012.²⁹

An applicant wishing to submit a new gTLD application needed to first register as a user of the TLD Application System (TAS). In completing the application applicants needed to answer a series of questions to provide general information, demonstrate financial capability, and demonstrate technical and operational capability accompanied by various substantiating documents.³⁰

Following the closing of the application submission period, which date was set at 12 April 2012, ICANN performed an administrative completeness check, ensuring that

²⁴ ICANN GNSO 2007 <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm> Recommendation 3.

²⁵ ICANN 2009 <https://archive.icann.org/en/topics/new-gtlds/factsheet-new-gtld-program-oct09-en.pdf>.

²⁶ See ICANN Ombudsman Blog 2012 <https://omblog.icann.org/?p=823>.

²⁷ These versions of the Applicant Guidebook are available at ICANN Date Unknown <http://newgtlds.icann.org/en/about/historical-documentation>.

²⁸ ICANN Date Unknown <http://newgtlds.ican.org/en/about/program>.

²⁹ ICANN Date Unknown <http://newgtlds.ican.org/en/about/program>; ICANN 2012 <http://www.icann.org/en/news/announcements/announcement-3-06jan12-en.htm>.

³⁰ ICANN 2012 <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.1

all applications were complete and ready for evaluation.³¹ In line with ICANN's public comment mechanisms, a comment period followed during which the community was allowed time to review the applications and submit comments, which were to be considered by the application evaluators when considering an application.³²

Running concurrently with this comment period was a Government Advisory Committee (GAC) Early Warning period.³³ During this period ICANN's GAC could provide applicants with an indication that the application could potentially be seen as sensitive or problematic by one or more governments.³⁴ 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.³⁵

The administrative completeness check was followed by an initial evaluation of all complete applications. In the initial evaluation the gTLD string applied for was reviewed to ensure that the gTLD string would not cause security or stability problems in the DNS. The applicant was reviewed in order to determine if the applicant had the required technical, operational, and financial credentials to operate the applied for gTLD.³⁶ The application process also makes provision for third parties to file formal objections to any application during an objection filing period.³⁷ All objections filed during this period would then be addressed during the formal dispute resolution phase by one of ICANN's appointed dispute resolution service providers (DRSPs) through processes prescribed in the Applicant Guidebook.³⁸ During the objection filing period ICANN's GAC also provided public policy advice directly to the ICANN Board, in the form of GAC Advice on a new gTLD. The GAC Advice had to

³¹ ICANN 2012 <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.2.

³² ICANN 2012 <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.3.

³³ ICANN Date Unknown <http://newgtlds.icann.org/en/applicants/gac-early-warning>.

³⁴ ICANN Date Unknown <https://gacweb.icann.org/display/gacweb/About+The+GAC>.

³⁵ ICANN 2013 <http://www.icann.org/en/about/governance/bylaws#I> Article XI: Advisory Committees.

³⁶ ICANN 2012 <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.5.

³⁷ ICANN 2012 <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.6.

³⁸ The objection and dispute resolution procedures are discussed in detail in Module 3 of the Applicant Guidebook; see ICANN 2012 <http://newgtlds.icann.org/en/applicants/agb> Module 3.

be considered during the evaluation process of an application. The use of the GAC advice process is not dependent on the filing of a GAC Early Warning that can be filed earlier in the process.³⁹

If there is more than one application for the same or similar gTLD, a so-called "string contention", the contention needs to be resolved by processes prescribed in the Applicant Guidebook. These processes may include a community priority evaluation and/or an auction.⁴⁰ After applicants have successfully completed all required stages as prescribed in the Applicant Guidebook, applicants are expected to follow a number of steps. Applicants, for example, need to conclude a prescribed registry agreement with ICANN and must also complete a technical test to validate the information provided in the application before delegation of the applied for gTLD.⁴¹ The Applicant Guidebook estimates the period of time it will take for a straightforward application to reach the delegation stage at nine months, while a complex and contentious application could potentially take up to twenty months to reach the delegation phase.⁴²

3 The birth of the .africa gTLD

3.1 The "official" African Union endorsed application

In November 2009 African Union ministers in charge of Communication and Information Technologies met in Johannesburg, South Africa. In what was called the "Oliver Tambo Declaration"⁴³ the ministers re-affirmed that information technologies are key to Africa's development and economic competitiveness. The declaration also contained, amongst others, a commitment to work together to ensure that the technical and administrative operations of Africa's TLDs are at international standards. The ministers expressed the hope that fostering trust in and the use of

³⁹ ICANN 2012 <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.7. For detailed information regarding the GAC Advice on new gTLDs, see ICANN 2012 <http://newgtlds.icann.org/en/applicants/agb> par 3.1.

⁴⁰ ICANN 2012 <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.10.

⁴¹ ICANN 2012 <http://newgtlds.icann.org/en/applicants/agb> par 1.1.2.11.

⁴² ICANN 2012 <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.

⁴³ AU 2009 <http://africainonespace.org/downloads/TheOliverTamboDeclaration.pdf>.

African domain names will bring financial, economic and social-cultural benefits to Africa.⁴⁴ The Oliver Tambo Declaration was subsequently endorsed by the Head of States and Governments Summit in January 2010.⁴⁵ Its endorsement led the African Ministers in charge of Communications and Information Technologies, who met in Abuja, Nigeria, in August 2010, to request the African Union Commission (AUC) to "set up the structure and modalities for the implementation of the DotAfrica project."⁴⁶ 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 applies to ICANN for the operation of the .africa gTLD during ICANN's New gTLD Programme.

The recommendation included the initiation of a tender process for the selection of a body or organisation to launch and operate the .africa gTLD on behalf of the African Union member states.⁴⁷ In a Communique dated 12 May 2011 the African Union advised parties interested in managing the .africa registry to apply to the AUC Call for Expression of Interest and set the deadline for the submission of applications on the 3rd of June 2011.⁴⁸ Following the Expression of Interest process, on the 28th of June 2014, the AUC invited interested parties to submit detailed proposals for the registration and operation of the .africa gTLD.

In a letter dated 4 April 2012 the Commissioner of Infrastructure and Energy of the African Union, Dr Elham M A. Ibrahim, on behalf of the African Union, officially informed Uniforum SA/ZACR of its appointment as the "Official Applicant and Registry Operator for dotAfrica gTLD".⁴⁹ The official new gTLD application for the

⁴⁴ AU 2009 <http://africainonespace.org/downloads/TheOliverTamboDeclaration.pdf> Commitment 7.

⁴⁵ AU 2010 <http://www.africa-union.org/root/au/conferences/2010/january/summit/pressR.html>.

⁴⁶ AU 2010 http://africainonespace.org/downloads/AUC_AbujaDeclaration.pdf.

⁴⁷ AU Department of Infrastructure and Energy 2011 http://africainonespace.org/downloads/launch/AUCdotAfricaBriefingNote_ENG.pdf.

⁴⁸ AU 2011 <http://www.nepad.org/crosscuttingissues/knowledge/doc/2201/communique-africa-union-commission-clarification-dot-africa>.

⁴⁹ AU 2012 http://africainonespace.org/downloads/AUC_ZACRLetterofAppointment.pdf. See DotAfrica Date Unknown <http://africainonespace.org/content.php?tag=1&title=&title=The%20African%20Union%20and%20dotAfrica> for an exposition of the African Union's involvement in the .africa application.

.africa domain was submitted to ICANN by Uniforum SA⁵⁰ trading as Registry.Africa or .ZA Central Registry (ZACR) on the 13th of June 2012.⁵¹ The application describes the primary objective and mission of the proposed .africa gTLD as follows:

Our primary objective and mission can therefore be summarised as follows: 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 TLD 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 will strive to develop and position the dotAfrica TLD as the preferred option for individuals and businesses either based in Africa or with strong associations with the continent and its people.⁵²

In answering the question of how the proposed gTLD will benefit registrants, Internet users and others, the application in essence explains that the gTLD will be a gTLD "by Africa, for Africa"⁵³ which will benefit the African and Global Internet Communities through reinvestment into Africa⁵⁴ by way of the development of African ccTLDs, the African registrar market, and African online content.⁵⁵ This will be coupled with support given to socio-economic development projects and initiatives and the building of a global brand with a focus on Africa.⁵⁶ In claiming that Africa also presents an economic opportunity the application states:

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

⁵⁰ Detailed information regarding Uniforum SA trading as the ZACR is available at UniForum Association Date Unknown <http://co.za/> and ZA Central Registry 2013 <https://www.registry.net.za/content.php?gen=1&contentid=100&title=About%20Us>.

⁵¹ ICANN 2012 <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1184>.

⁵² ICANN 2012 <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1184>.

⁵³ ICANN 2012 <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1184>.

⁵⁴ ICANN 2012 <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1184>.

⁵⁵ ICANN 2012 <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1184>.

⁵⁶ ICANN 2012 <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1184>.

economic recession. The rate of return on investment in Africa is currently the highest in the developing world.⁵⁷

On 12 July 2013 the ZACR's application took another step closer to the delegation of the .africa gTLD when the initial evaluation result was published with ICANN's Initial Evaluation Report stating:

Congratulations! Based on the review of your application against the relevant criteria in the Applicant Guidebook (including related supplemental notes and advisories) your application has passed initial evaluation.⁵⁸

3.2 The second 'unofficial' application

The application process for the new .africa gTLD was, however, not without controversy. It was not only the African Union approved applicant, UniforumSA/ZACR, that applied to ICANN for the delegation of the .africa gTLD. Another organisation called DotConnectAfrica Trust also submitted an application.⁵⁹ As part of ICANN's New gTLD Programme the New gTLD Dispute Resolution Procedure referred to above, provided as an attachment to Module 3 of the gTLD Applicant Guidebook, was designed with the intention of facilitating timely and efficient dispute resolution during the application phase for new gTLDs. On 20 November 2012 the African Union Commission officially submitted a GAC Early Warning to the application submitted by DotConnectAfrica Trust through the GAC Early Warning System.⁶⁰ Another fifteen individual African countries including Kenya, Uganda, Nigeria, Egypt, South Africa, Senegal and Cameroon also submitted additional Early Warning Reports with ICANN.⁶¹ In its GAC Early Warning the AUC states that DotConnetAfrica Trust's application fails to meet the minimum

⁵⁷ ICANN 2012 <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/118410>.

⁵⁸ ICANN 2013 <http://newgtlds.icann.org/sites/default/files/ier/bqe3so7p3lu2ia8ouwp7eph9/ie-1-1243-89583-en.pdf>.

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. DotconnetAfrica's application Application ID 1-1165-42560 is available at ICANN 2013 <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1276>.

⁶⁰ GAC 2012 <https://gacweb.icann.org/download/attachments/27131927/Africa-AUC-42560.pdf?version=1&modificationDate=1353382039000&api=v2>.

⁶¹ These Early Warning Reports are available at GAC Date Unknown <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>.

requirements prescribed by ICANN in the New gTLD 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; (b) that the application constitutes an unwarranted intrusion and interference on the African Union Commission's mandate from African governments to establish the structures and modalities for the implementation of the .africa gTLD and (c) that DotConnectAfrica Trust's application for the .africa gTLD does not sufficiently differentiate it from the African Union Commission endorsed .africa application and will therefore confuse and deceive the public.

After the GAC's meeting in Beijing, ICANN's GAC released its GAC Beijing Communique on 11 April 2013 in which the GAC released a GAC Advice in the form of an official GAC Objection to DotConnetAfrica Trust's application for the .africa gTLD.⁶² In its objection the GAC states that it had reached consensus on the GAC Objection Advice according to Module 3 part 1 of the Applicant Guidebook and that the GAC advises ICANN that the application of DotConnetAfrica Trust should not proceed and 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 GAC Objection filed against its application.⁶³ On 4 June 2013 the ICANN New gTLD Committee (NGPC) issued its response to the GAC Beijing Communique issued on 11 April 2013.⁶⁴ In its response the NGPC stated that it accepts the GAC Advice Beijing that the application of DotConnectAfrica Trust for .africa should not proceed and directed ICANN's staff pursuant to the GAC Advice and Section 3.1 of the Applicant Guidebook that the application will not be approved. On 3 July 2013 DotConnectAfrica Trust received an official notification from ICANN stating that because of the NGPC's resolution to accept the GAC Advice Beijing, the

⁶² GAC 2013 <https://gacweb.icann.org/display/GACADV/2013-04-11-Obj-Africa>.

⁶³ GAC 2013 <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1165-42560-en.pdf>.

⁶⁴ ICANN 2013 <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm#1.a.rationale>.

status of "not approved" will be reflected on the application status page of the new gTLD website.⁶⁵

DotConnectAfrica Trust has been aggressively pursuing .africa. At the end of 2012 and before the final decision was made regarding the two competing applications, DotConnectAfrica Trust approached the ICANN Ombudsman citing a conflict of interest of two board members during the decision-making regarding .africa.⁶⁶ The ICANN Ombudsman noted that the allegations were unfounded and premature.⁶⁷ DotConnectAfrica Trust was not impressed with the manner in which this complaint was handled and noted *that no recommendation was made by the Ombudsman regarding any future Conflict of Interests*.⁶⁸ In July 2013 it took a firm stance. Refusing to accept the NGPC's decision DotConnectAfrica Trust did not withdraw its application but sought still further relief in accordance with ICANN's accountability mechanisms⁶⁹ and filed a Request for Reconsideration of the NGPC's decision not to approve its application with the ICANN Board Governance Committee.⁷⁰ On 1 August 2013 the ICANN Board Governance Committee, after considering all the material evidence in taking its decision, determined that DotConnectAfrica Trust had not stated proper grounds for reconsideration and consequently denied DotConnectAfrica Trust's Request for Reconsideration.⁷¹

⁶⁵ DotConnectAfrica 2013 http://www.circleid.com/posts/20130705_update_on_initial_evaluation_result_for_africa_application/.

⁶⁶ This was first raised by DotConnectAfrica, which sent 2 separate letters dated July 9, 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 2012 <https://omblog.icann.org/?p=823>.

⁶⁷ See Taylor 2013 <http://domainnewsafrica.com/dotconnectafrica-writes-4th-letter-to-icann-on-ombudsmans-conclusion-was-convenient-and-no-braine> 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."

⁶⁸ See Taylor 2013 <http://domainnewsafrica.com/dotconnectafrica-writes-4th-letter-to-icann-on-ombudsmans-conclusion-was-convenient-and-no-braine>.

⁶⁹ ICANN 2013 <http://www.icann.org/en/about/governance/bylaws#I> Arts IV and V.

⁷⁰ ICANN 2013 <http://www.icann.org/en/groups/board/governance/reconsideration>.

⁷¹ ICANN 2013 <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dca-trust-01aug13-en>.

It seems clear, considering the GAC Advice Objection against its application and the NGPC's decision not to approve its application, as well as the ICANN Board Governance Committee's rejection of its Request for Reconsideration, that DotConnectAfrica Trust has no realistic expectation of having its application approved and being chosen to host the new .africa domain instead of its African Union-endorsed competitor ZACR, whose application has already been approved without any objection.

4 Implications of the new .gTLDs for the management of trademark rights

4.1 *Introduction*

ICANN has devised a range of trademark-based "Rights Protection Mechanisms (RPMs)" to protect trademark owners against infringing Second Level Domains ("SLDs") that can be registered under the New gTLD Programme.⁷² Registry operators are required, in the registry agreement they sign with ICANN when they obtain the right to run the new gTLD, to implement rights protection mechanisms (RPMs).⁷³

The RPMs may be categorised as mechanisms to assert rights and mechanisms to enforce rights.⁷⁴ The RPMs mechanisms to assert rights include a "Trademark Clearinghouse" to be used during the "sunrise periods" and "Trademark Claims Services". The RPMs mechanisms to enforce rights include a "Uniform Rapid Suspension System (URS)" and a "Post Delegation Dispute Resolution Procedure (PDDRP)". In addition, the existing alternative dispute resolution mechanism

⁷² A WIPO summary of each such RPM found in the authoritative ICANN Applicant Guidebook (ICANN Date Unknown <http://newgtlds.icann.org/en/about/historical-documentation>) follows; the policy background is available in the overview of WIPO Observations on New gTLD Dispute Resolution Mechanisms (WIPO Date Unknown <http://www.wipo.int/amc/en/domains/newgtld/>).

⁷³ ICANN Date Unknown <http://newgtlds.icann.org/en/about/historical-documentation> § 5.4.1, 237-238.

⁷⁴ Also coined "start-up mechanisms" and "post-launch mechanisms" - see Prahl and Null 2011 *The Trademark Reporter* 1778.

established through the Uniform Domain Name Dispute Resolution Policy (UDRP)⁷⁵ will also apply to all new gTLDs.

The most prevalent form of trademark infringement on the Internet is cybersquatting: the bad faith registration of well-known trademarks as domain names. Cybersquatters register existing trademarks as domain names for various nefarious purposes. The expansion of the gTLD could in principle lead to a vast scope for abusive domain name registration practices. It has been noted that a comprehensive and integrated range of solutions is necessary to safeguard rights, as in the absence of these safeguards bad actors will find the weakest link in the chain of consumer trust.⁷⁶ These measures are designed to strengthen the consumer trust chain by giving trademark owners additional protection against cybersquatting, and to alleviate some of the challenges associated with the monitoring and enforcement of trademark rights on the Internet.⁷⁷

4.2 *Mechanisms to assert rights*

The "Trademark Clearinghouse" is basically a centralised database of trademark rights. Trademarks registered in a national or regional registry, a court validated trademark, or a mark protected under statute or treaty in any country may be registered in the Clearinghouse.⁷⁸ Common-law marks and marks that are the subject of opposition proceedings or cancelled trademark registrations are not eligible for registration in the Clearinghouse.⁷⁹ Marks may be registered by the trademark owner or a licensee.

The Clearinghouse process will authenticate contact information and verify mark ownership rights. Trademarks from many jurisdictions and identical marks for

⁷⁵ Adopted 26 August 1999, implemented 24 October 1999, and available at ICANN 1999 <http://www.icann.org/udrp/udrp-policy-24oct99.htm>; see discussion below.

⁷⁶ Palage 2009 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1368895.

⁷⁷ See Prahla and Null 2011 *The Trademark Reporter* 1778.

⁷⁸ The trademark rights can consist of either registered rights; court-validated rights; or "statute/treaty-protected" trademarks (such as well-known unregistered rights or geographical indications). See WIPO Date Unknown <http://www.wipo.int/amc/en/domains/rpm>.

⁷⁹ Van Slyke, Fifield and Nardiello 2013 http://www.lockelord.com/files/Publication/4fbf1a9d-404f-41f4-a1b7-2224a53de3a3/Preview/PublicationAttachment/9815a09a-5583-4f1b-882f-294ef5fb33e5/tca_2013-04_23rd_BrandOwners_VanSlyke.pdf.

different goods or services⁸⁰ or split marks⁸¹ can coexist in the Clearinghouse. Clearinghouse processes are designed to confirm the validity of data, to serve as the underlying database for the Sunrise and Trademark Claims services, and not to make determinations on the substance or scope of rights held by a particular party.⁸² The Clearinghouse⁸³ is intended to act as a "one stop" service to create a centralised database of rights. Such a Clearinghouse will save rights holders time and money as it will obviate the need to register the rights with each new gTLD registry of each new gTLD. Van Slyke, Fifield and Nardiello⁸⁴ note:

Once the trademark owner has documented its registered rights in a mark with Clearinghouse, this information is used each time the trademark owner lodges a challenge to an attempt to register a Second Level Domain incorporating the mark. It also will give new gTLD Registrars easy access to information in order to better review and assess claims by trademark owners.

ICANN has established two rights protection mechanisms available through the Clearinghouse, namely a "Trademark Sunrise Service" and a "Trademark Claims Service". The Trademark Sunrise Service offer trade mark owners the priority to register domain names that are identical to their trade marks before the offer is open to the general public. It has been noted that this will usually be at a premium fee.⁸⁵ In order to register a domain name through the Trademark Sunrise Service, the trademark must be registered in the Clearinghouse. The trademark owner must

⁸⁰ In Pistorius 2009 *SA Merc LJ* 841 the example of two companies that have independent, legitimate rights to a name, such as an American company selling tennis racquets under the name "Prince", and an English company selling software under the name "Prince" - see *Prince Plc v Prince Sports Group Inc* 1998 FSR 21; Halberstam, Brook and Turner *Tolley's Domain Names* 103; *World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Inc* 2002 FSR 33; Murray 1998 *IJLIT* 285; Boroughf 2013 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206764.

⁸¹ Here the same mark is owned and used by different proprietors in different countries in relation to the same goods or services - see Pistorius 2009 *SA Merc LJ* 841 fn 22; see also Boroughf 2013 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206764.

⁸² Van Slyke, Fifield and Nardiello 2013 http://www.lockelord.com/files/Publication/4fbf1a9d-404f-41f4-a1b7-2224a53de3a3/Preview/PublicationAttachment/9815a09a-5583-4f1b-882f-294ef5fb33e5/tca_2013-04_23rd_BrandOwners_VanSlyke.pdf.

⁸³ The Clearinghouse will be available for at least 30 days.

⁸⁴ Van Slyke, Fifield and Nardiello 2013 http://www.lockelord.com/files/Publication/4fbf1a9d-404f-41f4-a1b7-2224a53de3a3/Preview/PublicationAttachment/9815a09a-5583-4f1b-882f-294ef5fb33e5/tca_2013-04_23rd_BrandOwners_VanSlyke.pdf.

⁸⁵ See WIPO Date Unknown <http://www.wipo.int/amc/en/domains/rpm>.

also provide proof that the trademark is in use.⁸⁶ The advantage offered by the Trademark Claims Services⁸⁷ is that owners will be notified if applications are made by third parties for the registration of domain names that conflict with marks registered in the Clearinghouse.

The Clearinghouse, Trademark Sunrise Service, and Trademark Claims Services all operate in a symbiotic and inter-related manner. Registration with the Clearinghouse will thus be of importance. It should be noted that the Sunrise periods and Claims services are limited to exact matches of a domain name application to a word mark.⁸⁸ The Achilles heel of trademark owners, namely typo squatting⁸⁹ and "sucks" domain name registrations⁹⁰ will not be covered.

Owners of the most famous consumer brands are expected to adopt a widely sweeping registration approach. It has been noted that submission of a mark to the Clearinghouse will usually be driven by a desire to participate in the Trademark Sunrise Service - whether for defensive purposes or because a registration in a new gTLD is actually determined to be useful.⁹¹ The authors therefore expect most brand

⁸⁶ Van Slyke, Fifield and Nardiello 2013 http://www.lockelord.com/files/Publication/4fbf1a9d-404f-41f4-a1b7-2224a53de3a3/Preview/PublicationAttachment/9815a09a-5583-4f1b-882f-294ef5fb33e5/tca_2013-04_23rd_BrandOwners_VanSlyke.pdf.

⁸⁷ Claims Services available only for 60 days.

⁸⁸ See WIPO Date Unknown <http://www.wipo.int/amc/en/domains/rpm>.

⁸⁹ For an example of typo squatting, refer to *Standard Bank of South Africa Ltd v Cox* (SAIPL) unreported case number ZA2007-0006 of 12 December 2007. The adjudicator held (at 5) that the domain names standerbank.co.za, standarbank.co.za, wwwstandardbank.co.za, standerdank.co.za, standardank.co.za, stanardbank.co.za, standardban.co.za, standadbank.co.za, standardbak.co.za, stndardbank.co.za, stadardbank.co.za, and standardbank.co.za, were for all interests and purposes identical to the complainant's trade mark STANDARD BANK and amounted to typo squatting.

⁹⁰ See *Skattedirektoratet v Eivind Nag* D2000-1314, Transfer; *Myer Stores Limited v Mr David John Singh* D2001-0763, Transfer; *Triodos Bank NV v Ashley Dobbs* D2002-0776, Transfer; *The Royal Bank of Scotland Group plc, National Westminster Bank plc a/k/a NatWest Bank v Personal and Pedro Lopez* D2003-0166, Transfer; *Kirkland & Ellis LLP v DefaultData.com, American Distribution Systems, Inc.* D2004-0136, Transfer; *Bridgestone Firestone, Inc, Bridgestone/Firestone Research, Inc, and Bridgestone Corporation v Jack Myers* D2000-0190, Denied; *TMP Worldwide Inc v Jennifer L Potter* D2000-0536, Denied; *Howard Jarvis Taxpayers Association v Paul McCauley* D2004-0014, Denied. As to the imposition of further conditions for such domain-name registration and use, see *Covance, Inc and Covance Laboratories Ltd v The Covance Campaign* D2004-0206, Denied.

⁹¹ Van Slyke, Fifield and Nardiello 2013 http://www.lockelord.com/files/Publication/4fbf1a9d-404f-41f4-a1b7-2224a53de3a3/Preview/PublicationAttachment/9815a09a-5583-4f1b-882f-294ef5fb33e5/tca_2013-04_23rd_BrandOwners_VanSlyke.pdf.

owners to adopt a "wait and see" approach to determining the level of protection appropriate across the new gTLDs.⁹²

4.3 Mechanisms to enforce rights

Two new procedures, the "Uniform Rapid Suspension System (URS)", and the "Post Delegation Dispute Resolution Procedure (PDDRP)" have joined the existing UDRP, which used to be the foundational and exclusive mechanism to address disputes between trademarks and domain names.⁹³ The URS is intended to be a swift dispute resolution mechanism that is lighter and quicker than the existing UDRP. The UDRP was developed by ICANN, allowing trademark owners to recover domain names that had been registered in bad faith.⁹⁴ The UDRP is an essential part of the contract between each domain name registrar involved in the registering of gTLDs and each domain name registrant. The UDRP proceedings are a purely administrative procedure conducted largely online, thus reducing the duration and costs of domain name disputes. Useful especially when the parties reside in different countries, the UDRP is an efficient alternative to court litigation.⁹⁵

Like the UDRP, the URS is intended to address abusive domain name registrations. The URS substantive criteria mirror those of the UDRP, but complainants have to satisfy a higher burden of proof and additional defences are available to registrants.⁹⁶ The only remedy which a panel may grant is the temporary suspension of a domain name for the duration of the registration period. Such a suspension may be extended by the prevailing complainant for one year.⁹⁷

The PDDRP is an administrative (court alternative) option for trademark owners to file an objection against a registry whose "affirmative conduct" in its operation or

⁹² Van Slyke, Fifield and Nardiello 2013 http://www.lockelord.com/files/Publication/4fbf1a9d-404f-41f4-a1b7-2224a53de3a3/Preview/PublicationAttachment/9815a09a-5583-4f1b-882f-294ef5fb33e5/tca_2013-04_23rd_BrandOwners_VanSlyke.pdf.

⁹³ Komaitis 2011 *JIPPL* 2.

⁹⁴ The UDRP was adopted on the basis of recommendations in the First WIPO Internet Domain Name Process (WIPO 1999 <http://www.wipo.int/amc/en/processes/process1/report/>).

⁹⁵ See Christie 2002 *JWIP* 105; Donahey 1999 *J Int'l Arb* 115; Wilbers 1999 *Int'l Bus Law* 273; Ryan 2001 *De Rebus* 27-30; Hurter 2007 *SA Merc LJ* 165.

⁹⁶ See WIPO Date Unknown <http://www.wipo.int/amc/en/domains/rpm>.

⁹⁷ See WIPO Date Unknown <http://www.wipo.int/amc/en/domains/rpm>.

use of its gTLD is alleged to cause or materially contribute to trademark abuse.⁹⁸ In this way the PDDRP is intended to act as a higher-level enforcement tool to assist ICANN compliance activities, where rights holders may not be able to continue to turn solely to lower-level multijurisdictional enforcement options in a vastly expanded DNS.⁹⁹

Unlike the existing UDRP, the URS proceeding and the PDDRP require the complainant to have "use[d]" the trademark for which it is asserting rights.¹⁰⁰ This issue is complex as the registered trademark rights that form the basis for a complaint can be located in any jurisdiction, which presumably means that the use requirements from that jurisdiction should apply to the registered rights which are being enforced.¹⁰¹ Prah and Null¹⁰² note that although there is ample case law in the United States as to what constitutes the "use" of a trademark, there is no universal concept of trademark use that is applicable to all countries. South African trademark law recognises that the use of a trademark in respect of goods or services may accrue to an associated mark.¹⁰³ It is an open question whether or not the use of an associated mark will meet the requirement that the complainant must have used the trademark for which it is asserting rights. To complicate matters further, some countries, such as Chile, have no use requirement in trademark law.¹⁰⁴

5 The new .africa gTLD launch strategy¹⁰⁵

5.1 Introduction to the dotAfrica gTLD

The dotAfrica gTLD launch **will take place in distinct phases. During the first phase, the Pre-Sunrise** phase, African governments and "Pioneers"¹⁰⁶ will get a

⁹⁸ See WIPO Date Unknown <http://www.wipo.int/amc/en/domains/rpm>.

⁹⁹ See WIPO Date Unknown <http://www.wipo.int/amc/en/domains/rpm>.

¹⁰⁰ As noted above, this is also true for the Clearinghouse (for Sunrise services).

¹⁰¹ See Prah and Null 2011 *The Trademark Reporter* 1790.

¹⁰² See Prah and Null 2011 *The Trademark Reporter* 1789-1790.

¹⁰³ See s 31(1) of the *Trade Marks Act* 194 of 1993; see also Prah and Null 2011 *The Trade Mark Reporter* 1790.

¹⁰⁴ See Prah and Null 2011 *The Trademark Reporter* 1790.

¹⁰⁵ The discussion under 5 is substantially based on the policy documents published on the web site <http://africainonespace.org> and reproduction of the various policy statements in this article has been authorised by Domain Name Services (Pty) Ltd.

chance to populate a Reserved Names List (RNL). Names which are regarded as important, sensitive, offensive or otherwise in the general interest for the wellbeing of the gTLD will be reserved or blocked.¹⁰⁷

During the Sunrise and Priority Rights phases the holders of pre-existing rights in word marks will get the opportunity to register corresponding domain names before the registration is opened to the general public. Landrush is aimed at the registration of premium and generic domain names for which applicants do not have pre-existing rights. During the land rush domain name registrations are opened to the public but contested names (ie where two or more parties apply to register the same domain name) will be resolved by auction. The last phase will be the **Open Delegation** phase or General Availability phase. During this phase the domain name registrations are open to the public on a first-come-first-served basis.¹⁰⁸

It is an ICANN requirement that ZACR should adopt certain policies as part of its operations. These policies include: Rights Protection Policies; Dispute Resolution Policies; a Sunrise Policy; and Landrush Policies, to name a few.¹⁰⁹ Unique features of the dotAfrica policy considerations are the sensitivity surrounding names, including names that should be reserved for governments; geographical terms; offensive names and generic names.

5.2 The Government Reserve Name List¹¹⁰

According to the draft Government Reserve Name List Policy there are several categories of names that Governments could wish to reserve. The first category of exclusively reserved names contains names describing countries, territories or areas,

¹⁰⁶ Pioneers are typified as partners assisting with raising awareness for dotAfrica before its launch - see Domain Name Services (Pty) Ltd 2013 http://africainonespace.org/downloads/launch/dotAFRICALaunch_OperationalBriefing_ver1.pdf.

¹⁰⁷ See Domain Name Services (Pty) Ltd 2013 http://africainonespace.org/downloads/launch/dotAFRICALaunch_OperationalBriefing_ver1.pdf.

¹⁰⁸ See Domain Name Services (Pty) Ltd 2013 http://africainonespace.org/downloads/launch/dotAFRICALaunch_OperationalBriefing_ver1.pdf.

¹⁰⁹ ZACR is obliged by ICANN to make certain that these policies are part of its operations. The draft policies can be accessed at DotAfrica Date Unknown <http://www.africainonespace.org/content.php?tag=34&title=Policies>.

¹¹⁰ Sections 5.2-5.5 below are substantially based upon ZACR documentation available at <http://africainonespace.org/>. The policies and the strategy for the launch are still in draft form.

including major rivers or lakes that are of geographical interest, and their variants. Variants may include acronyms and common expressions for a country and area of geographical interest.¹¹¹ Names include country names such as Namibia, Rwanda and Lesotho. Names for African economic groupings are also part of the reserved name list.¹¹²

The second category is a priority reservations category containing names describing religious, cultural or linguistic names that are of substantial significance and uniquely linked to Governmental Authorities. Examples include the names of tribes, languages, religious groups and people and places of cultural or historic significance.¹¹³

The third category will contain names that are of substantial economic or public interest and uniquely linked to Governmental Authorities. These could include slogans used for the promotion of trade, tourism, cultural and linguistic heritage.¹¹⁴ In order for such a name to be included in the RNL, the applicant must be able to show that the government or other authority concerned has a compelling economic interest in the name.¹¹⁵

Several other categories of names exist, for example a category of offensive names are described in the dotAfrica Abuse Policy.¹¹⁶ A name will be considered an offensive name if the name itself would inherently have the effect of advocating prejudice or hate on the basis of race, ethnicity, political association, gender, sexuality, religion, conscience, or culture, or have the effect of inciting violence or the causing of harm to any person or class of persons.¹¹⁷

5.3 *Sunrise and priority rights*

¹¹¹ See DotAfrica Date Unknown http://www.africainonespace.org/rnl_policy.php 1.

¹¹² Names such as SADC; COMESA and EAC.

¹¹³ See DotAfrica Date Unknown http://www.africainonespace.org/rnl_policy.php.

¹¹⁴ See DotAfrica Date Unknown http://www.africainonespace.org/rnl_policy.php 3.

¹¹⁵ See DotAfrica Date Unknown http://www.africainonespace.org/rnl_policy.php 3.

¹¹⁶ See DotAfrica Date Unknown http://www.africainonespace.org/rnl_policy.php 10.

¹¹⁷ See DotAfrica Date Unknown http://www.africainonespace.org/rnl_policy.php.

The purpose of the Sunrise phase is the same for all new gTLDs: to provide trademark holders with the opportunity to register corresponding domain names before registration is opened to the general public, and hence to protect their pre-existing rights to particular marks. **It is noted on the ZACR web site that holders of the following will be recognised as having "priority rights" in the Sunrise phase:** all nationally or regionally¹¹⁸ registered word marks; any word mark validated through a court or other judicial proceeding; any word mark protected by statute or treaty in effect at the date of submission; and company and trust names.¹¹⁹

Although all marks or company names will be recognised, marks of African origin will take preference over marks recognised elsewhere. It is accordingly noted that if a brand owner has a trademark registered in several jurisdictions, it should use the trademark registered in an African country for dotAfrica.¹²⁰ The two innovative features are the explicit recognition of names of corporates and the preference given to names of African origin.

5.4 Validation of priority rights

Two validation services are envisaged for dotAfrica: the Trademark Clearinghouse (TMCH)¹²¹ and the Mark Validation System (MVS), which is an alternative service to be operated by dotAfrica.¹²² MVS is a more affordable service and it offers services specifically tailored to dotAfrica, for example the indefinite mark claims service.¹²³ However, the TMCH supports the sunrise periods for all new gTLDs, which offers

¹¹⁸ For example a trademark registered by ARIPO.

¹¹⁹ See DotAfrica Date Unknown http://africainonespace.org/downloads/launch/dotAFRICA_AfricaRightsProtection.mht.

¹²⁰ See DotAfrica Date Unknown http://africainonespace.org/downloads/launch/dotAFRICA_AfricaRightsProtection.mht.

¹²¹ TMCH is mandated by ICANN and operated by Deloitte.

¹²² Domain Name Services (Pty) Ltd 2013 http://africainonespace.org/downloads/launch/dotAFRICALaunch_OperationalBriefing_ver1.pdf.

¹²³ Marks validated using the MVS will benefit from the Marks Claim Service indefinitely (subject to a periodic subscription fee).

advantages to global companies wishing to apply for domain names in more than one of the new gTLDs.¹²⁴

Once the mark has been validated, (either in the TMCH or MVS) the mark holder will receive an SMD (Signed Mark Data) token and she will be automatically notified of the commencement of the dotAfrica Sunrise Phase. The holder of a validated mark will be able to apply for a dotAfrica domain name corresponding to the validated mark or word. If more than one party applies for the same domain name during the Sunrise phase,¹²⁵ the matter will be decided by way of auction.

5.5 *Disputes under dotAfrica*

The established UDRP and the new URS are both available to complainants under the dotAfrica domain. In addition, dotAfrica will be subject to its own dispute resolution mechanisms to give effect to its status as a geographic gTLD.

ZACR¹²⁶ notes as follows:

These will not only allow mark holders to enforce traditional trade mark rights, but also a broader set of rights including commercial, cultural, linguistic, religious and personal rights. The dotAfrica DRM will moreover provide a remedy for so-called "offensive registrations", where the use of the domain name in question is likely to give offence to any class of persons, particularly when the use thereof advocates prejudice or hate on the basis of race, ethnicity, gender, religion, culture, sexuality, or incites causing harm on any of these grounds.

5.6 *Summary remarks on the new .africa gTLD launch strategy*

It is clear that the management of dotAfrica offers several unique features to rights holders of the African continent. As noted at the outset, the RNL policy embraces sensitivity for names that should be reserved for governments and it makes explicit reference to offensive names. Secondly the policies in determining the sunrise and priority rights in names have broadened the scope to include corporate names. The indefinite mark claims services will assist African trademark holders to manage their trademark portfolios more efficiently and lastly, the DRM mechanisms that are

¹²⁴ See DotAfrica Date Unknown http://africainonespace.org/downloads/launch/dotAFRICA_AfricaRightsProtection.mht.

¹²⁵ For example in the case of a "genuine dispute".

¹²⁶ See DotAfrica Date Unknown http://africainonespace.org/downloads/launch/dotAFRICA_AfricaRightsProtection.mht.

envisaged will ensure that dotAfrica domain names take cognisance of a broader set of rights, including commercial, cultural, linguistic, religious and personal rights.

6 Conclusion

The new .africa gTLD presents Africa and its people with an exciting and future-shaping opportunity. dotAfrica is an opportunity to harness and exploit the immense power of the Internet. The dotAfrica policies instil a strong confidence in ZACR's ability to manage this resource, unlike the domain name "gold rush" registration frenzy that typified the domain name registrations in the initial gTLDs, especially the .com gTLD. African trade mark proprietors and other rights holders are protected, initially at least, by various innovative rights protection mechanisms that present these rights holders with the opportunity to ensure that their valuable names do not reside in the hands of opportunistic cybersquatters or cyberspeculators. Although many growing pains and challenges surely still lie on the horizon as the new .africa domain evolves from its infancy, many will share the hope that .africa will be an asset for Africa and its people which will in time meet or even exceed the high expectations formulated in its mandate.

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LIST OF ABBREVIATIONS

ADR Alternative Dispute Resolution

AU African Union

AUC African Union Commission

DNS Domain Name System

DRM Digital Rights Management

DRSPs Dispute Resolution Service Providers

Duke L J Duke Law Journal

GNSO Generic Names Supporting Organisation

GAC Government Advisory Committee

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|------------------|--|
| gTLD | Generic Top Level Domain |
| Int'l Bus Law | International Business Lawyer |
| ICANN | Internet Corporation for Assigned Names and Numbers |
| IFWP | International Forum on the White Paper |
| IFWP | Internet Corporation for Assigned Names and Numbers International Forum on the White Paper |
| IJLIT | International Journal of Law and Information Technology |
| Ind L J | Indiana Law Journal |
| J Int'l Arb | Journal of International Arbitration |
| JIPLP | Journal of Intellectual Property Law and Practice |
| JWIP | Journal of World Intellectual Property |
| Loy LA Ent L Rev | Loyola of Los Angeles Entertainment Law Review |
| MOU | Memorandum of Understanding |
| MVS | Mark Validation System |
| NTIA | National Telecommunications and Information Administration |
| NGPC | New gTLD Committee |
| PDDRP | Post Delegation Dispute Resolution Procedure |
| RNL | Reserve Name List |
| RNL | Reserved Names List |
| RPMs | Rights Protection Mechanisms |
| SA Merc LJ | South African Mercantile Law Journal |
| SAIPL | South African Institute of Intellectual Property Law |
| SMD | Signed Mark Data |
| SLDs | Second Level Domains |
| TAS | TLD Application System |

| | |
|------|---|
| TLD | Top Level Domain |
| TMCH | Trademark Clearinghouse |
| UDRP | Uniform Domain Name Dispute Resolution Policy |
| URS | Uniform Rapid Suspension System |
| WIPO | World Intellectual Property Organisation |
| ZACR | .ZA Central Registry |

THE NEW .AFRICA TOP LEVEL DOMAIN: AN AFRICAN INITIATIVE IN ENSURING AFRICA'S RIGHTFUL PLACE ON THE GLOBAL NETWORK

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SUMMARY

The new gTLD programme of the Internet Corporation for Assigned Names and Numbers (ICANN) is the single most important development since the privatisation of the DNS in 1998. The management of the Domain Name System (DNS) has developed from a modest undertaking to its current explosive expansion through the new gTLD programme. Africa has boldly entered the arena through the delegation of the .Africa gTLD.

This new development heralds an innovative era in the management of the DNS, especially for Africa. The dotAfrica gTLD launch strategy offers several advantages to African governments and traders alike. One of the innovative features of the management of dotAfrica is the fact that a broader set of rights including commercial, cultural, linguistic, religious and personal rights will be protected. Furthermore, African trade mark proprietors and other rights holders are protected, initially at least, by various innovative rights-protection mechanisms. This development is important for African governments and it should form an integral part of right holders' intellectual property management strategy.

KEYWORDS: dotAfrica; new gTLD programme; trade mark rights; sunrise period; priority rights; dispute resolution; ICANN; ZACR; mark validation system; rights protection mechanisms; land rush phase; reserve names list; trademark clearing house; African Union Commission.

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