

Stakeholderism in African Internet Governance: the Case of the .africa gTLD¹

¹ UPDATE: The .africa domain name was delegated to ZACR on 15 February 2017.

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Declaration

I hereby declare that this dissertation is my own original work.

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26th December 2015, Nairobi, Kenya

Acknowledgement

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Dedication

To Kaarie. My good reason.

Indeed, life begets life.

Abstract

In 2012, ICANN announced plans to delegate over 1000 new generic top level domain names, one of which was the long awaited .africa. To date, the .africa domain has not gone live due to a dispute involving two similar applications- one endorsed by the African Union while the other made by a private entity. The dispute points to planning and policy gaps in the African Internet governance multistakeholder community. It also shows the capacity challenges that have hindered Africans from participating strategically and fully in ICANN. This study discusses the dispute with the proposition that inclusion of more stakeholders in policy and decision making will help Africa navigate international policy discussions more effectively and efficiently.

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Glossary of Terms

Abbreviations and Definitions

Af* institutions	These are non-state African Internet governance institutions. They include AISI, AfriNIC, ISOC, AfNOG, AfTLD, AfREN, AfPIF, CERT and AIGF
.africa	A top level domain name associated with Africa
AfriNIC	African Network Information Center: an organization that manages the assignment of Internet number resources within the African continent
AfrICANN	An online discussion community for Africans in ICANN
AfNOG	African Network Operators Group
AfPIF	African Peering and Interconnection Forum
AfREN	African Research and Education Networking
AfTLD	African TLD Administrators
AIGF	Africa Internet Governance Forum: an annual meeting co-convened by UNECA and AUC
AISI	African Information Society Initiative: a forum supported by UNECA
APA	Administrative Procedure Act: a US Statute
AU	African Union

AUC	African Union Commission
ccTLD	Country Code Top Level Domain: a domain name associated with a country e.g .ke for Kenya, .uk for United Kingdom and .mt for Malta
CEMAC	Economic and Monetary Community of Central Africa
COMESA	Common Market for Eastern and Southern Africa
CERT	Africa Computer Emergency Response Team
DCA	DotConnectAfrica: one of the two not-for-profit organisation that applied for the .africa domain name
DNS	Domain Name System: hierarchical method for naming computers and network services so that the computers can communicate with each other on the Internet
DoC	Department of Commerce of the US Federal Government
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
FTC	Federal Trade Commission, a US Federal agency
GAC	Government Advisory Committee of ICANN
gTLD	Generic Top Level Domain: a highest level internet domain name extension with three or more characters for example .com, .net and .africa
IANA	Internet Assigned Numbers Authority

IANA Functions	This is a set of functions performed by ICANN on behalf of the US government through a contract between ICANN and NTIA. The functions include the coordination of assignment of IP parameters; allocation of numbering resources; and management of the .arpa and .int TLDs
ICANN	Internet Corporation for Assigned Names and Numbers: the organization that manages the infrastructure that supports the Internet
ICT	Information and Communication Technology
IDNs	Internationalised Domain Names: Internet identifier names in other languages and non ACSII characters such as Chinese and Arabic
IETF	Internet Engineering Task Force: a technical body that develops standards for the Internet
IG	Internet governance
IGF	Internet Governance Forum: a UN annual meeting
IP	Internet Protocol: the system through which computers and devices communicate on the Internet. It involves assignment of an IP address to each device on the Internet
ITU	International Telecommunication Union: a UN member state agency
IXP	Internet Exchange Point
LDC	Least Developed County

NSF	National Science Foundation: a US Federal agency
NTIA	National Telecommunications and Information Administration: a US Federal agency that advises the President on telecommunications and information policy issues
PDDRP	Post Delegation Dispute Resolution Procedure: an alternative dispute resolution procedure under the new gTLD programme
RECs	Regional Economic Communities of the AU. These include the EAC, ECOWAS, ECCAS, CEMAC and SADC
RFCs	Request for Comments: document series that contain technical and organizational notes about the Internet. RFCs are developed through peer review by IETF members and some RFCs are adopted as Internet Standards.
RPM	Rights Protection Mechanisms: a trademark protection framework under the new gTLD programme
Root Zone	DNS is hierarchical. The root zone is the top most in the system and TLDs such as .com, .mt and .africa are placed in the root zone
SADC	Southern African Development Community
TLD	Top level domain: the last segment of the domain name that identifies an address on the Internet for example in www.um.edu.mt, .mt is the top level domain There are

	<p>several types of TLDs such as country code where that indicate country names and generic TLDs that use generic terms (for example .com for commercial and .edu for educational domains on the Internet). Regional and community TLDs such as .africa are treated as generic TLDs but given special protection.</p>
UDRP	<p>Uniform Dispute Resolution Procedure: the out of court dispute resolution process for ICANN domain name disputes</p>
UN	<p>United Nations</p>
UNECA	<p>United Nations Economic Commission for Africa</p>
UNESCO	<p>The United Nations Educational, Scientific and Cultural Organization</p>
URS	<p>Uniform Rapid Suspension System: a rapid alternative domain name dispute resolution procedure introduced in the new gTLD programme for clear cut trade mark violation cases</p>
WHOIS	<p>A protocol through which the public can query databases that store information on the registered owners of domain names/websites</p>
WIPO	<p>World Intellectual Property Organisation: a member state UN body</p>

WSIS	World Summit on the Information Society: an ITU organized meeting held in 2003 (Geneva) and in 2005 (Tunis)
WTO	World Trade Organisation, a member state global body
ZACR	ZA Central Registry: a South African not for profit Company that also applied for the .africa domain name

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Introduction

Jon Postel² famously stated, “A name indicates what we seek. An address indicates where it is. A route indicates how we get there.”

On the Internet, naming, addressing and routing are done through the domain name system (DNS). This is a hierarchical organisation through which all computers and devices on the Internet are assigned names with which they can communicate with each other.

The hierarchy classifies domain names in clusters. At the top level are five types of domain names namely: infrastructure top-level domains (ARPA), generic top-level domains (gTLD), restricted generic top-level domains (grTLD), sponsored top-level domains (sTLD), country code top-level domains (ccTLD) and test top-level domains (tTLD).

gTLDs are well known to ordinary Internet users..com is the most popular TLD, having registered over 271 million domains by 2014. Examples of other gTLDs are .biz, .gov and .edu.

² Jon Postel is referred to as the father of the Internet for his contribution to the development of the Internet through Internet standards. He directed the Internet Assigned Numbers Authority (IANA) until his death in 1998.

Many countries also have domain names associated with them. Country code TLDs were developed in conjunction with the International Standards Organisation (ISO) and they are assigned to recognized countries and territories.

When one types Google.com, “google” is the 2nd level domain name while “.com” is the generic top level domain name.



Figure 1: Generic and second level domain names

In um.edu.mt, “um” is a third level domain, “edu” indicates the 2nd level domain while .mt is the country code top level domain.

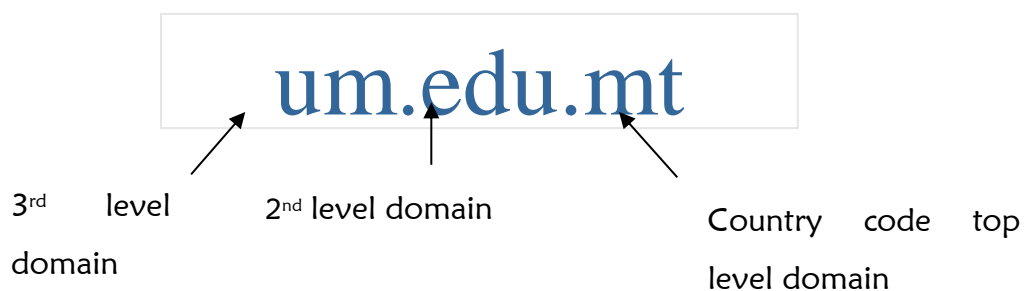


Figure 2: Country code top level domain names

The Internet Corporation for Assigned Names and Numbers (ICANN) is a private US company that is charged with managing and coordinating the DNS. It carries out this role through a multistakeholder model that brings together governments, civil society,

private sector, the technical community as well as Internet users. In 2012, ICANN opened the process for delegation of new gTLDs. Among the new gTLDs that was up for taking was .africa, which would join other regional domain names such as .eu and .asia that give cultural identity to a region. The rules and procedure for the new gTLD programme were set out in a policy known as the Applicant Guidebook.

Two organizations, DotConnectAfrica (DCA) and ZA Central Registry (ZACR), applied for the .africa name. ZACR was backed by the African Union Commission (AUC). DCA's application was rejected by the ICANN Board for not having met all the prerequisites. DCA however felt that its application was rejected because of among others, the undue influence by governments on ICANN's Board. The matter was heard by an Independent Review Panel that gave its final declaration in July 2015 where DCA prevailed. However, DCA's win is not a guarantee that DCA will be delegated the .africa gTLD as DCA still has to go through evaluation by ICANN.

The .africa case was followed by many around the world as it brought to fore the dynamics of policy development and decision making in a multistakeholder environment. For Africans, an emerging question is, after delegation of the .africa gTLD, then what? For instance, how will the domain be managed and by whom? Where will the proceeds of the venture be applied? This paper seeks to investigate the concept of stakeholderism in ownership and management of public goods which is the root of the of the .africa case.

The proposal for this research sought to look at three questions: under what circumstances DCA would be successful applicant for .africa; the role of the African

Union in the .africa application; and lessons learnt from the case. During the course of the study, the Independent Review Panel made its determination and ICANN was compelled to revisit the DCA application. The study therefore focused on the last two questions.

CHAPTER ONE: METHODOLOGY AND LITERATURE REVIEW

1.1 Methodology

The .africa domain dispute has been going on since around 2009 when DotConnectAfrica Trust (DCA) met opposition in its preparatory work for applying for the .africa domain from ICANN. Evidence of the dispute, which was widely discussed in African mailing lists and Internet governance circles, may be found in the list serves, press releases and communiqués from all parties. In October 2013, DCA initiated the Independent Review Process (IRP) to protest treatment of its application by the ICANN Board. The materials on the IRP including the Notice of the IRP by DCA, Reply by ICANN, Requests by the Parties and third parties such as ZACR and AUC as well as Declarations by the IRP Panel are all available on the ICANN website. While some of the IRP material was redacted, it represented primary sources of the issues in question.

All material related to ICANN was available on its website. This included letters to ICANN, Board minutes, communiqués, press releases as well as various versions of the Applicant Guidebook- the policy document containing the rules and procedure for applications under the new gTLD programme. Views on ICANN's policies were found in mailing lists and forums where the various stakeholder groups in ICANN participate.

The research was carried out using library resources and published material on the .africa applications, ICANN and multistakeholderism in general. It involved a

substantive amount of desktop research and examination of primary documents from the ICANN website regarding the .africa case. There was also review of literature from authorities on Internet Governance, multistakeholderism, trademark law and domain names as well as African studies.

An online survey was also administered. It targeted a small number of participants from online policy discussions on Internet governance (IG) in African mailing lists. The survey was sent to three mailing lists namely: KICTANet³ that discusses Kenya ICT policy; AfriCANN⁴ a discussion for the Internet community in Africa, and more precisely for those involved or willing to be involved in the ICANN processes; and ISOC which is a broader Internet Society membership list.

There were also interviews with stakeholders from government, civil society and the ICANN community during local and global internet governance fora and these informed some of the views in the paper.

1.1.1 The Survey

The survey targeted practitioners in the African IG space from various stakeholder groups, hence it was shared in some mailing lists. It sought to get perceptions on the .africa domain name, whether we need a .africa domain name and if yes, under what

³ See <http://kictanet.or.ke> accessed 14 Dec 2015

⁴ AfriCANN <https://lists.afrinic.net/mailman/listinfo/cgi/africann> accessed 14 Dec 2015

general principles it should be managed. The survey also tried to establish the role of various stakeholders in the governance of the top level domain.

The questionnaire was designed to profile respondents per their region, age and stakeholder group. It was administered through the online tool, [surveymonkey.com](https://www.surveymonkey.com)⁵ with anonymous responses.

29 people responded. Of these, 14 were in the age bracket of 25-34 years. There were 10 respondents in the 45-64 age group, a group of people who were likely policy development actors and policy makers.

On regional representation, a high number of respondents (13) came from the Eastern Africa Region, with the rest being scattered fairly across the rest of the continent's regions and 5 coming from North America and Europe. The respondents' stakeholder groups were diverse, with at least 4 coming from each of these groups: government, civil society, academia, technical community and private sector.

22 out of the 29 respondents thought that we needed a .africa domain. The highest number of respondents perceived that the main purpose of .africa was "to identify Africa as a geographical and cultural region on the Internet". Other rationales were to "give an African touch to products and services in the African market" and to "identify African brands on the Internet". A few respondents (5) thought that the .africa domain was a domain like any other.

⁵ The survey is still available at <https://www.surveymonkey.com/r/N55GPSX> accessed 14 Dec 2015

About 40% of the respondents thought that .africa was public goods. Close to 35% thought that .africa is a domain name like any other while 13% thought that it is “a pan-African brand that should be available to all African businesses”. A negligible number opined that it was “a brand that should be available to all African individuals and all African governments”.

Respondents linked the possible benefits of a .africa domain to commercial and cultural branding. In this question, respondents could select as many choices as applied. About 60% thought that .africa would support a pan-Africa cultural identity while a similar number were of the view that the domain would raise Africa’s cultural image. A significant number (about 50%) thought that the domain would increase Internet traffic to Africa yet only about 30% saw the domain as increasing traffic within Africa. Other benefits cited were to: “increase general awareness about the Internet in Africa” (40%); “raise funds to support Africa projects” (30%), “offer free or low-cost Africa domains” (30%); and to “protect African intellectual property such as trademarks and community names” (27%).

On the question of how best to manage the .africa domain name, the responses varied. About 30% were for a socio-entrepreneurship⁶ model while another 30% favoured a non-profit making venture. The rest selected commercial principles, government/regulatory agency and public private partnership model. One

⁶ Hybrid between commercial principles and solving social problems

respondent suggested that the multistakeholder model-with public, private and civil society representatives in the strategic management- should be adopted.

The next issue was how best to direct the revenue generated from the .africa domain name. Close to 60% of the respondents were of the view that any revenue or profit should be used to equitably fund projects for Internet development in Africa. Other responses included that: "those who invest in setting up the domain should earn profits from that venture"; "any profits should be ploughed back into expansion of the domain and incidental activities"; "interested Africans should be able to own shares in the domain and earn dividends from the profits of the venture"; "the domains should be priced so cheaply that there is not much revenue/profit to be earned"; and "any revenue/profit should be used to fund research in Internet by African scholars and entities".

The final question was a weighted choice query that sought to get perceptions on what the roles of the various stakeholders in the management of the domain should be. The role sets defined for respondents to match to stakeholders were: "ownership of the domain", "day to day management of the domain", "resale of the domains", "regulation of the domain" and "dispute resolution".

Table 1 below illustrates the responses. As can be noted, many thought that the domain should be owned by the general public while day to day management ought to be left to the technical community. Private sector would have the role of resale of the domains while regulation of the domain was seen as a role distributed across all sectors other than the general public. Dispute resolution was to be played by academia

and governments while consumer protection was a shared role between civil society and government.

From the responses, a desire for multistakeholder management of the domain where there are defined roles for each of the stakeholders can be inferred.

	ownership of the domain	day to day management	day to day resale of domains	sub regulation of the domain	dispute resolution	consumer protection	Total	Weighted Average
General public	86.96% 20	0.00% 0	4.35% 1	0.00% 0	4.35% 1	4.35% 1	23	2.35
Private Sector	26.92% 7	7.69% 2	53.85% 14	11.54% 3	0.00% 0	0.00% 0	26	2.77
Technical Community	0.00% 0	69.57% 16	8.70% 2	21.74% 5	0.00% 0	0.00% 0	23	2.52
Academia	8.33% 2	12.50% 3	4.17% 1	37.50% 9	25.00% 6	12.50% 3	24	4.04
Civil Society	13.04% 3	8.70% 2	0.00% 0	13.04% 3	8.70% 2	56.52% 13	23	4.78
Governments	8.33% 2	4.17% 1	4.17% 1	29.17% 7	20.83% 5	33.33% 8	24	4.58

Table1: Weighted responses on the roles of various stakeholders in management of the .africa domain name⁷

⁷ Source: <https://www.surveymonkey.com/r/N55GPSX> accessed 14 December 2015

From the survey responses as well as conversations with African IG community emerges the conclusion that .africa is public goods that should be managed prudently for the benefit of all Africans. Public goods is defined as goods as "non-rivalrous" and "non-excludable" (Cowen, no date). Non-rivalrous means that it is not possible to exclude others from enjoying the benefits of the good and in the case of the Internet, its use by some does not deplete it or reduce what can be used by others. Non-excludable implies that because one person is enjoying the benefits of the good, in this case the Internet, it does not deny others the benefits of the same goods.

It has however been argued that for the Internet to maintain a public goods stature, there is need to protect its non-rivalrous and non-excludable characteristics. This is because, unless the Internet remains open in its technical architecture, it cannot be available for all. (The Internet Society, 2013). Openness can be maintained by having a governance model that supports consultation among the people affected by the Internet as well as accountability by those who manage it on behalf of the public.

The survey revealed a desire for a .africa domain that would assist in bridging the digital divide. This can be inferred from the responses to the questions on the perceived benefits of the domain as well as the suggestions on how to utilise revenue accrued from the venture. The responses also show that there are respective roles for the various stakeholders. It is therefore desirable that .africa create a management and policy development platform that is consultative and inclusive.

1.2 Literature Review

There is not a very large body of work on the new gTLDs. This is perhaps because ICANN is a relatively new organisation, as is the topic of Internet Governance and multistakeholderism. Nevertheless, most of the available literature is authored by practitioners within IG circles and therefore provides a practical perspective of the issues under discussion. The resources also lay the background for consideration of the .africa scenario as this is a case that stretches the limit as to what a non-state actor is entitled to in a multistakeholder model.

Benkler (2013) in discussing the changes to market systems in the recent past observes that technology has created disruptions to the traditional market models. He opines that the disruption, which he calls anarchism, may help improve the markets and even state imperfections. In his arguments, he gives the example of ICANN that has a unique governance model. He notes that ICANN was established to inject state power in Internet governance and was indeed a means of the US government avoiding internationalisation of Internet governance while promoting internationalisation of US businesses.

The paper provides the underpinning philosophy and is useful in understanding ICANN in the context of a new model that was a creative solution to a problem created by the advancement of technology. A combination of market factors to which the international community did not respond to fast enough led to the creation of ICANN. ICANN's governance model has time and again assured the international community that their interests are secure. It should be noted however that in March 2014, the US

government through the National Telecommunications and Information Administration (NTIA) announced plans to delink itself from ICANN and handover the stewardship to the multistakeholder Internet community. NTIA outlined 5 conditions for the transfer:

“...retain and enhance the multistakeholder model; maintain the security, stability, and resiliency of the Internet DNS; meet the needs and expectation of the global customers and partners of the IANA⁸ services; and, maintain the openness of the Internet”

The transition is in progress.⁹

Froomkin (2000) argues that the creation of ICANN was misadvised in law and that therefore ICANN is a legal anomaly performing what should be state roles. He explores the legal history of ICANN and the involvement of the US government in DNS management and concludes that the architecture and mandate of ICANN violates domestic US law particularly the Administrative Procedure Act (APA) as ICANN regulates entities outside the US on behalf of the US government. The paper gives the geo political justification for formation and mandate of ICANN.

⁸ IANA is the Internet Assigned Numbers Authority. It carries out the following main functions: coordination of assignment of IP parameters; allocation of numbering resources; management of the .arpa and .int TLDs

⁹ Initially the transition was meant to be done by September 2015 but was postponed to 2016 to allow adequate consultations among stakeholders. See <https://www.ntia.doc.gov/blog/2015/update-iana-transition> <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions> accessed 13 Dec 2015

Some of the landmarks in ICANN's journey include the 1998 memorandum of understanding with the US Department of Commerce (DoC); the 1999 takeover of the IANA functions and the commercialisation of ICANN to become revenue generating, hence financially independent.

While the paper makes a strong argument against the legality of ICANN, it also gives rationale for some of the landmarks in ICANN's history, including the contracts with the DoC as well as NTIA. It is useful in understanding the diplomatic anomaly where ICANN performs duties of a public international nature, yet it is a private entity. The exposition of the early reforms that opened ICANN up to be a global, transparent and accountable entity serves to explain how ICANN gained international legitimacy.

Froomkin concludes by recommending further reform of ICANN and proposes a decentralized structure in which the namespace of the DNS is spread out over a transnational group of "policy partners" with DoC. As explained above, ICANN has undergone several changes that have seen the DoC progressively¹⁰ sever its relationship with ICANN.

Schiavetta and Komaitis (2010) explore ICANN's role in regulating information on the Internet and discuss the controls that ICANN has over online information through management of DNS. They recall how the US government formed the Integrated

¹⁰ For example the DoC in 2009 entered into a new agreement with ICANN known as "Affirmation of Commitments" with an object to institutionalise and memorialise the technical coordination of the DNS globally. This was followed by the March 2014 NTIA proposal which will see the handover of ICANN to the global Internet community.

Network Information Centre (InterNIC) to provide domain name administration and the journey towards privatisation of domain name management through the formation of ICANN. The paper highlights moments in ICANN's history including the 2000 round of gTLD applications where ICANN selected applicants that were subject to DoC's approval before delegation. This is in contrast to the current round where there was a long participatory policy development process.

The authors note that involvement of governments in ICANN was a delicate balancing act. While the Internet had grown as a free and open resource to all, fears were rife that not all governments would support the open model. On the other hand, many governments for example, the European Union, Russia and China were not comfortable with Internet resources being under the control of one country, the US.

The paper makes several relevant predictions on ICANN's role in management of Internet resources. When ICANN was incorporated, Department of Commerce (DoC) retained important functions in management of the Internet for instance, being the ultimate policy authority over the root zone as well as having general oversight on ICANN. However with several reforms such as widened Board composition, introduction of public elections in the supporting organisations and regional representation in all the organs, ICANN has progressively ¹¹been able to make policy decisions on management of the root system without veto from DoC.

¹¹ For instance, the 2000, issuance of new gTLDs was done by the Department of Commerce through ICANN. The 2012 round involved intense consultations with the multistakeholder community and was entirely done by ICANN.

ICANN therefore has gained substantial political and economic power. This power is however tempered by governments, which the authors argue, have other avenues of influencing ICANN's policy direction. For instance, government agenda has been introduced to ICANN through the World Intellectual Property Organisation (WIPO)¹². Additionally, at the time, the authors correctly predicted more involvement of governments in ICANN through the Government Advisory Committee (GAC), the organ in ICANN where governments are represented. At that time GAC only had a role in advising the Board through the GAC Chair, but that was enhanced when GAC representatives started participating in discussions, debates and meetings, albeit without voting. As shall be seen in Chapter Three of this paper, in the new gTLD programme, GAC had more control than any other stakeholder group in ICANN as it had several avenues for intervention in any application for a new gTLD.

The paper also considers ICANN's indirect authority on human rights, notably the freedom of expression and the right to privacy versus access to information. This is in the context of dot-sucks domain names where a person registers a protest domain using a trademark, for instance if there was a trademark.com, a trademarksucks.com domain.

¹² For example, WIPO's advice on how to protect intellectual property in domain names that led to creation of the Dispute Resolution Procedure (UDRP) was developed mainly with input from Member States, and hence it missed the perspectives of other stakeholders. This is in contrast to for instance, Nominet's, (the .uk ccTLD administrator) Alternative Dispute Resolution Procedure that was developed with more consultation and is therefore more responsive and not restricted to strictly protecting trademarks as is the case of the UDRP.

It is noted that the available dispute resolution mechanism, the Uniform Dispute Resolution Procedure (UDRP) limits the grounds for complaining about a domain as ICANN was avoiding getting into the realm of content control. On the other hand however, the issue of how much information a registrar should provide to the public about the ownership of a domain on the WHOIS database is a delicate balance between protecting the domain owner's privacy versus the public's right to information. The authors suggest reforms to the WHOIS policy to realise this balance by for instance distinguishing business domains from personal domains and offering differing protections. In the new gTLD programme, successful applicants are at liberty to formulate their WHOIS policy as long as it conforms to minimum requirements such as ensuring WHOIS accuracy through provision and verification of registrant information as well as policies and procedure for managing abusive behaviour (ICANN, 2012)¹³. An important lesson from the paper is that there is always an avenue to influence policy changes in ICANN and going forward, Africans have the opportunity to participate more meaningfully in ICANN.

Not all are in support of ICANN's new gTLD programme. Smith III (2014) argues against the agenda on five grounds: necessity, violation of generic principle in trademark, increased difficulty in prosecuting online fraud and ethical concerns about ICANN. He opines that ICANN has not made a case as to why over 1000 more generic domains are required yet there is no scarcity of top level domains. Recalling the former

¹³ Applicant Guidebook Module 5.2.3

GAC¹⁴ chair also questioned the design of the new gTLD programme as it was not supported by economic studies, he also states that the large number of new domains will cause unprecedented confusion to Internet users.

Over expansion of the domain name space magnifies the current problem of enforcement of cyber laws and consumer protection online. The Federal Trade Commission (FTC) raised concerns¹⁵ about protecting consumers from online fraud. It is expected that online fraudsters will easily register misspellings of business domains, create copycat websites, obtain consumer information and then shut down such websites. They could then proceed to register new ones to carry out the same fraudulent practices.

Smith III further argues that some of the available names violate the principle of generic terms in trademark law. Under this principle, one may not acquire trademarks for broad names such as “car”, “lamp” etc. This is in order to allow competitors be able to identify their products and also to avoid confusion among consumers. It is based on the premise that a trademark identifies a producer of goods or services as opposed to a type of goods or services. Domain names are considered extensions of trademarks and therefore, delegating a generic term such as “app” or “music” to one

¹⁴ Letter from Janis Karkins to Peter Dengate Thrush, Chairman, ICANN Board (19 Aug 2009) available at <https://www.icann.org/en/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf> accessed 10 Dec 2015

¹⁵ Letter from the Jon Leibowitz et al., Fed. Trade Commission, to Stephen D. Crocker and Rod Beckstrom, ICANN President and Chair respectively (Dec. 16, 2011) available at http://www.ftc.gov/sites/default/files/documents/public_statements/icanns-plan-increase-available-generic-top-level-domains/111216letter-icann.pdf accessed 12 Dec 2015

private company would encourage a monopoly as was with the case of .com that is run by a private company, Verisign.¹⁶

Smith's other ground for non-support for the new gTLD programme is concern over unethical conduct of some ICANN Board members. He cites the example of two former Board members who joined boards of domain holding corporations barely a month after leaving the ICANN Board.¹⁷ In the case of .africa application, he refers to a communication from DCA informing the Board of a potential conflict of interest where a then GAC member sat on the board of Kenya's ccTLD administrator, KENIC who was perceived to oppose DCA's application.¹⁸ Another example is that the European Broadcasting Union was admitted to the GAC while it had a pending application for .radio. The author therefore opines that ICANN must begin by enhancing its transparency and accountability by among others, detailing how the expected surplus from the new gTLD programme, roughly 30 million US dollars, will be spent. This being significant revenue for a not-for-profit company, he recommends that ICANN reworks the application costs so as not to appear to be overcharging applicants beyond the cost incurred in rolling out the new gTLD programme.

¹⁶ In 2008, Deborah A Garza, Assistant Attorney General, wrote to Meredith A Barker, Assistant Secretary for Communications and Information raising the question whether Verisign enjoyed monopoly of domain names because of its .com domain

¹⁷ See Eric Engleman, *ICANN Departures After Web Suffix Vote Draw Criticism*, WASH. POST (Aug. 20, 2011), http://www.washingtonpost.com/business/icann-departures-drawcriticism/2011/08/19/gIQAzpeDTJ_story_1.html. accessed 13 Dec 2015

¹⁸ Letter from Sophia Bekele, DotConnectAfrica, to ICANN (July 18, 2012), available at <http://www.dotconnectafrica.org/wp-content/uploads/2012/09/Letter-to-ICANN-CEO-on-Alice-Munyua-conflict-of-interest-18-July-2012.pdf>. accessed 14 Dec 2015

He further advises that ICANN ought to expand its conflict of interest policy to cover committees and organisations involved in the new gTLD application process. The policy was developed to regulate cases of ICANN staff transition to prospective new gTLD applicants.

He is also against the Uniform Rapid Suspension System (URS) domain name protection mechanism, explained in further detail below. In his view, it will result in trademark bullying as trademark owners are afforded extra protection. Since trademark owners also have the UDRP mechanism, he argues that they do not require another protection mechanism. He concludes by calling for implementation of a pilot new gTLD programme to minimise the negative effects described above.

While Smith gives compelling arguments on the demerits of the new gTLD programme, the programme is now under implementation. The implementation is in stages, thereby mitigating some of his concerns, to wit, those stemming from introduction of too many top level domains at the same time. The new gTLD applications were handled as expeditiously as the applicants could supply all the prerequisites, resulting in phased delegation of the gTLDs. In other cases, such as the .africa application, disputes occurred and these had to be resolved before the applications could proceed further. That said, his arguments on the trademark protection mechanisms have elicited discussion.¹⁹ It is worth noting that in the case of

¹⁹ For instance, Burton, in gTLD litigation argues for future proofing mechanisms of gTLD applications especially where more than one organisation has a claim to a similar string as was the case in *Merck & Co, Inc. v. Merck KGaA*, 2013 WIPO [Case Nos. LRO02013-0068 and LRO02013-0069]

.africa, ZACR intends to have a modified trademark verification mechanism that is explained below.

Hurter and Pistorius (2014) give an African perspective of ICANN and .africa gTLD. They chronicle the history of ICANN and the policy development process for the new gTLD programme. The process of AU endorsement of the ZACR application is also narrated as is DCA's journey. The authors consider the implications of the new gTLD programme for trademark management. Registry operators to whom a new gTLD is delegated are required to implement Rights Protection Mechanisms (RPM) to protect trademark owners against infringing second level domains. This affords a higher protection for existing domain owners against those who may want to rush to register new domains under the .africa gTLD, a practice commonly known as cybersquatting. For this to work, the .africa policy includes the trademark clearinghouse and dispute resolution mechanisms under the World Intellectual Property Organisation (WIPO) regime.

A trademark clearinghouse is a centralised database of trademark rights where marks registered in a national or regional registry or court ordered trademarks are registered. This eases verification of the trademark ownership and protects the trademark owner at two levels. One, there is a period set aside after delegation of the domain names, known as sunrise period, where trademark owners get priority for registration of domain names identical to their trademarks. Two, there exists a trademark claims service where notice is sent to a prospective domain name registrant of a potential conflict between the domain name being sought. The same notice is sent to the

trademark owner. This occurs where the registrant proceeds to register the domain name after being notified of a potential conflict.

Hurter also discusses two dispute resolution mechanisms provided for under the new regime. The URS is aimed at addressing abusive domain name registrations. It is an improvement of ICANN's existing out of court dispute resolution procedure, the Uniform Dispute Resolution Procedure (UDRP). It is designed to be faster but the burden of proof on the part of the complainant is higher.

The Post Delegation Dispute Resolution Procedure (PDDRP) is an administrative procedure for trademark owners against a registry whose conduct is alleged to cause or contribute to trademark abuse. It is a mechanism for intervention based on a registry operator's use of a domain name in infringement of the complainant's rights.

The paper then discusses the .africa strategy, ZACR's plan to implement the .africa gTLD. In the initial phase, known as pre-sunrise, African governments and pioneers will set aside names in the reserved names list. Examples of names that may be reserved include names of countries, territories or areas, religious, cultural or linguistic names and names used for the promotion of trade tourism, cultural or linguistic heritage.

The second phase will be the sunrise phase where trademark holders have an opportunity to register domain names similar to their trademarks while the last is the open delegation phase that will be open to everyone. The authors emphasise the importance of trademark in the new gTLD programme as well as in ZACR's .africa

strategy. Under .africa, there are two methods of validating trademarks: the first being the ICANN trademark clearing house described above and the second being the Marks Validation System (MVS) an alternative service to be operated by .africa.

The paper also notes that both the UDRP and URS are available under .africa. It paints a picture of the possibilities to be created by .africa common cultural perspective. It however does not identify or propose avenues for stakeholder engagement in .africa policy development processes.

Mamadou (2012) reflects on African Union's involvement in the new gTLD process particularly AU's selection of the .africa applicant, request to be in the reserved names list and the apparent conflict of interest [when] AUC made an objection to DCA's application. She interrogates the extent to which the African Union should have involved itself in the .africa application process. She opines that the African Union Commission (AUC) should have let the ICANN process proceed to its logical conclusion and that for instance, AU or its organs should not have attempted to get .africa in the reserved names list at that point in time.

This paper supports the view that Africans under the auspices of the African Union need to have more meaningful participation in global policy processes such as ICANN. With such consultations, Africans would have sought protection of the .africa domain name during the policy development process.

Malcom (2015) in proposing the principles for meaningful participation in a multistakeholder process gives a four point test. First is the correct choice of

stakeholders in terms of adequate numbers, their nexus to be problem under discussion, their knowledge as well as capacity to resolve the problem. He is of the view that while individuals who have a stake in an issue can be represented by others, it is important to have varied stakeholder groups with government, civil society, academia and others represented. Moreover, a good multi-stakeholder process must provide avenues to admit new entrants and have flexible structures and process to accommodate divergent views within the community.

Second is the balance of participation, which he explains to mean how stakeholder participation is weighted. Multistakeholderism assumes that every stakeholder group contributes equally but in reality, this may be difficult to achieve as some stakeholders may have more capacity than others. He discusses the constituency and deliberative models through which consensus amongst stakeholder groups can be built before a decision is formally taken by the governing council of the multistakeholder community. A functioning multistakeholder process, he opines, should acknowledge unique roles to be played by some of the stakeholders due to historical or other reasons. It should also have modalities for achieving rough consensus thereby avoiding a minority veto.

Third is accountability of the governing authority of the multistakeholder body to the stakeholder groups as well as the stakeholder groups to the governing authority. The authority ought to be accountable for the obvious reason- to gain the trust of the stakeholder groups and therefore keep them participating in policy processes. Conversely, the stakeholder groups also need to be accountable to their members to

achieve legitimacy. Their accountability is measured in terms of participation in the multistakeholder organisations processes as well as in the groups' internal processes. A meaningful multistakeholder process therefore has mechanisms that promote transparency of both the governing body and the stakeholder groups.

Last is the empowerment test or the enforcement of the resolutions of multistakeholder discussions. For this reason governments play a key role in a multistakeholder process as they have the authority to implement policies. Nevertheless, in Internet governance, technical and administrative bodies may also have similar powers, though in a narrower sense. A meaningful multistakeholder process will therefore analyse the extent of its empowerment and it has little of such authority, create linkages with an empowered institution. At any rate, the resolutions from the process should be reduced to recorded, actionable points that may be used by others.

The four point test espoused in the paper provides a good basis for examining the extent of multistakeholder processes in the African IG space. Calandro and others (2013) analyse the participation of Africans in multistakeholder IG processes. They note with concern that all stakeholder groups have generally had very poor representation in international IG debates. They consider Africa's representation in major fora such as the ITU, ICANN, IGF, WTO and the UN and find that the under-representation has cost Africa. This is in terms of Africa's perspective missing in policy formulation as well as in transfer of knowledge among experts in Internet Governance. In ICANN for example, the authors are concerned that there have not

been many Africans in leadership. Many, including ICANN's current CEO acknowledge that African participation is below par, yet African has the lowest Internet access. In the new gTLD programme, having only 17 out of about 2000 applications being from Africa was as a result of the lack of capacity in Africa. They lament that while the ICANN fellowship programme contributes to capacity development by exposing Africans to the workings of ICANN through supporting them to attend ICANN meetings, the resolution of the problem of African participation cannot be simply be fellowships. They therefore call for more concerted efforts to build African capacity for multistakeholder processes.

The paper also considers the impact of African IG initiatives and the extent to which regional bodies have included IG in their agenda. They look at the AU, ECOWAS, SADC, EAC, COMESA, ECCAS, CEMAC, the AF* and the Nigeria Internet Governance Forum.

While the AU is faulted for not having a strong Internet Governance agenda, its efforts in getting governments to take interest and action on the .africa gTLD are commendable. This is evidenced by the two declarations, Abuja and Oliver Tambo that gave basis for the AUC to engage in the .africa project. It is however noted the .africa project did not visibly or meaningfully involve other stakeholders such as private sector, academia and civil society.

AU is made up of regional economic communities (RECs). Each of the RECs has a policy on harmonisation of Information and Communication Technology (ICT) and transport that is either under development or in implementation. SADC for example

began harmonisation in 1997 with the SADC Protocol on Transport, Communication and Meteorology that was updated in 2012. The Protocol is lauded for being comprehensive in its approach to ICT. Its implementation however has had various national as opposed to a regional outlook. Also, the secretariat meant to administer the policy is not adequately funded.

EAC on the other hand boasts of a Regional Framework for Harmonisation of National ICT Policies as well as a Study on Harmonisation of EAC Communications Regime. It is under these frameworks that for instance the East African Legislative Assembly (EALA) passed the East African Electronic Transactions Bill in 2014 to pave way for a harmonised e-commerce market in the region.

COMESA adopted an ICT Policy in 2003 but its full implementation across member states has not been realised. The policy has not been effected as national legislation in most instances and does not have binding effect.

ECCAS has a yet to be implemented 2009 Regional ICT Development Policy that has been cited for not having well founded implementation mechanisms. CEMAC on the other hand developed a Regional Harmonisation Policy for Regulation of Electronic Communications.

How do African non-state actors score? The paper considers the Af* technical institutions: AISI, AfriNIC, ISOC, AfNOG, AfTLD, AfREN, AfPIF, CERT and AIGF. Their contribution especially in capacity building of technical personnel such as engineers and network operators is laudable. Additionally, some like ISOC have

played key roles in setting up infrastructure such as Internet Exchange Points (IXPs) across the continent. The AfIGF, a multistakeholder engagement supported by the AUC and UNECA also brings together Africans for policy dialogue. Private initiatives often precede government led enterprises especially in the Internet governance area and this is evident by the activities of the Af* institutions. Their contribution would however get more traction if there was closer collaboration with governments. For example, IXPs can be replicated in every major city in Africa if the AU developed a policy on this.

The authors conclude that stakeholder involvement in African IG processes is very low, uncoordinated and fragmented. It cannot therefore be said that every stakeholder is playing their proper role in Internet governance as described in the definition of IG by World Summit on the Information Society (WSIS). There are very few examples of fora where African stakeholders gather to discuss African positions on IG policy either within the continent or at international spaces. Among the reasons for this fragmentation are: most African countries are least developing countries (LDCs) with competing agenda for available limited resources; there are few African experts and institutions on Internet Governance; and Africans have not embraced multistakeholder consultations as a policy development process. Other obstacles include the high cost of participating in IG meetings, language barrier and lack of access to the Internet, the medium through which most working groups for IG processes conduct their work.

The paper challenges Africans to develop African solutions to challenges as opposed to waiting for interventions by the international community. It is with this in mind that this study views .africa as an opportunity for creating a model African IG institution. The revenue generated from the .africa venture can also be of great assistance in bridging the knowledge gap and creating a critical mass of African IG experts.

1.3 Conclusion

The survey and material on ICANN and new gTLDs give the perception that the issues in this study are relatively new and the policies experimental. For instance, on multistakeholderism, literature points that while there are inferences that may be drawn from practices that define multistakeholderism, the principles of multistakeholderism are still “under construction”. It is not also definite that the features of multistakeholderism as seen in Internet governance can be successfully applied in other fields. Some observations from the Chapter are as follows:

- a) The survey, whose respondents were largely young people and policy development actors, depict the low number of African experts in Internet governance. This is supported by existing research on multistakeholderism in Africa where the authors identify lack of resources and opportunities to train Africans as some of the impediments to development of African specialists who can meaningfully participate in shaping international policy. To a large extent, Africans have not met the four point test of meaningful multistakeholderism

(choice, balance, accountability and enforcement of resolutions) within continental IG fora as well as while participating in global processes.

- b) The governance model of ICANN was not achieved at inception and it is still work in progress. Literature traces a history of reforms that have seen ICANN steer itself to a more transparent and accountable organisation. Some of the questions that ICANN has had to tackle include its role in content control on the Internet as well as the public international nature of its role in managing the DNS. Through community consultations, resolutions to these problems are progressively emerging.
- c) Globally, multistakeholderism is taking more root with ICANN becoming more autonomous. In Africa however, Internet policy discussions are largely fragmented. There is need to strengthen multistakeholderism by supporting existing institutions as well as advancing expertise in African Internet governance issues. However, it is not enough to advance multistakeholderism if the same does not meet the proposed four point test of meaningful multistakeholderism.
- d) The new gTLD programme has not been without hurdles. There are those who opposed it with good reasons. For Africans, there is excitement over the .africa gTLD as it represents an opportunity to increase the African digital footprint. It is also a chance for Africa to showcase innovative local solutions to problems such as trademark and other rights management and dispute resolution.

Chapter Two will delve into contextual issues such as the history of ICANN, its organs and decision making process. The background is important in formulating the

conceptual framework for the geopolitical considerations and African perspectives to trademarks and dispute resolution.

CHAPTER TWO: BACKGROUND

2.1 Introduction

The story of ICANN defies diplomatic customs. For starters, as Froomkin (2000) explains, ICANN is a private corporation playing a role that is of a public international nature. Ordinarily, such a role would be carried out by an intergovernmental body established under a treaty.²⁰ ICANN has a specific, narrow and defined mandate- the management of the technical infrastructure that supports the Internet- and as shall be seen in this Chapter, ICANN's development was private sector driven.

While there is no international body that formally regulates the Internet, two fora under the UN system deal specifically²¹ with aspects of the Internet. The first is the International Telecommunication Union (ITU), a UN member state specialised agency for information and communication technologies. In the recent past ITU has attempted to enter into the realm of internet governance proper through the

²⁰ ICANN is in charge of Internet infrastructure. ICANN regulates among others how domains are created and shared globally. This is akin to how ITU, a UN body established pursuant to the 1865 International Telegraph Convention that among other things regulates radio frequencies or the Bretton Woods Agreement (1944) that set out the rules for commercial and financial relations among major industrial states.

²¹ There are other fora where aspects related to the Internet are discussed for instance the World Trade Organisation (WTO), United Nations Education and Scientific Council (UNESCO) as well as the various Rapporteurs under the United Nations High Commissioner for Human Rights. For example, in 2011, the UN Special rapporteur on the promotion and protection of the right to freedom of opinion and expression reported on the state on freedom of expression online and later that year, the UN Human Rights Council adopted the famous General Comment No. 34 on Freedom online. See <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> and http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf accessed 11 Dec 2015.

International Telecommunications Regulations (ITRs).²² The second forum is the annual Internet Governance Forum (IGF), a UN conference that stems from WSIS²³. Although no concrete international agreement on the Internet has emerged from IGF, the discussions from the IGF result in soft law- policies and guidelines for participants, including states. (Mueller, 2010). The golden thread in the Internet governance institutions is the multistakeholder governance model, where non state actors have a stake in policy and decision making.

This Chapter gives a background of issues relating to the .africa dispute. It starts by introducing multistakeholderism and juxtaposing it to the history and decision making process in ICANN. To bring an African perspective to the issue, the Chapter also delves into the geopolitical concerns that shaped the development of ICANN, pointing out how states gained considerable power in the multistakeholder model. A brief on intellectual property rights as well as domain name dispute resolution policies is also given.

²² The International Telecommunications Regulations (ITRs) are the general principles related to international telecommunication services including interconnection and interoperability of telecommunication facilities, radio frequencies and international agreements among members. The ITRs were revised in 2012 under a process that was considered by some as an attempt to govern the Internet.

²³ WSIS was a pair of UN conferences that took place in Geneva (2003) and Tunis (2005) that considered the impact of information on society.

2.2 Multistakeholderism and Internet Governance

Berridge (2001) defines multistakeholderism as multilateral diplomacy that admits non-state actors. He gives the example of the 2000 Kimberly Conference on cessation of trade in conflict diamonds, which was largely initiated by a nongovernmental organisation²⁴ working in conflict regions in Africa. The conference brought to the table government, civil society and diamond producers. The outcome was a certification procedure for diamonds that was later adopted by the UN. (Kimberly Process Website, no date)

There are other examples of the multistakeholderism described above in other UN meetings. For example, the International Telecommunications Union (ITU), an intergovernmental organization, has over 700 accredited non-state actors²⁵ who are allowed to participate as observers, without the right to vote, in deliberations in plenary and, as appropriate, in committees or subcommittees on questions within the scope of their activities. They may also make oral statements at the invitation of the presiding officer (ITU, 2012).

²⁴ Global Witness, a London based NGO caught global attention after releasing a report about conflict diamonds titled: "A Rough Trade". They were key in organising the Kimberly Conference as well as the resultant Kimberly Certification Process <https://www.globalwitness.org/campaigns/conflict-diamonds/> accessed 13 Dec 2015

²⁵ These include entities and organizations that have received a standing invitation to participate as observers in the sessions and work of the General Assembly; UN Secretariat and organs including UN funds and programs; UN specialized agencies; other invited intergovernmental organizations; accredited civil society entities (including NGOs in consultative status with ECOSOC); accredited business sector entities including ITU sector members and associate members of regional commissions

In Internet Governance, multistakeholderism has taken a deeper meaning. It is described in the WSIS Tunis Agenda (2005) as:

“Internet Governance is the development and application by governments, private sector, and civil society, in their respective roles, of shared principles, norms, rules, decision making procedures and programs that shape the evolution and use of the Internet”

While the definition has been criticised for being ambiguous as to what “respective roles” of the various actors are, it is practiced in IG fora such as the IGF and ICANN where different actors participate in shaping policy (Kurbalija, 2014). This spirit is similar to the notion of people centred development where development actors recognise the inherent right of human beings to form societies and to participate in making decisions about their destiny within those societies (Japan Official Development Assistance , 1996).

Multistakeholderism in practice is a community driven process where interested groups and persons can participate in shaping policies. Gurstein (2013) describes multistakeholderism as involvement of those most impacted by a change or an issue or a circumstance, in the management, governance and ultimately resolution of the issue. Multistakeholderism opens up governance to other actors apart from the traditional actors-states. For example, civil society is expanded to include advocacy organizations; service providers/operating entities; professional associations; academic and research institutions; social movements and networks as well as individual citizens. (Drake, 2007).

Kummer (2013) notes that there are no laid down rules for multistakeholderism. De la Chapelle (2011) identifies the features of multistakeholderism which include openness, transparency, equal footing of stakeholders, bottom up agenda setting, iterative consultation processes, a governance workflow, self-organisation, linkage with initial legitimating authority, self-improvement, forum working groups and replication format. The next section takes a look of ICANN and the development of multistakeholderism.

2.3 History of ICANN

The Internet developed in the 1960's as a technical project under a group of scientists in the US who sought to increase the utility of the computer networks they were using. The US National Science Foundation (NSF) initially took up the role of delegating the root- the servers that contain the unique Internet addresses of the top level domain registry organisations that maintain the global domains such as .com, .net, .gov and so on. In 1995, NSF made a policy decision to charge a fee for delegation of top level domain names. This decision attracted criticism from the community of Internet users, many of whom felt that the US, through the NSF was unilaterally making decisions about a global service- the Internet (Weinberg, 2001). There was a global call for reform of management of the resources underlying the Internet.

Many solutions were proposed. One involved formation of the Internet Assigned Numbers Authority (IANA), to oversee the allocation of Internet Protocol (IP)

addresses to Internet Service Providers (ISPs). Another was the initiative under the International Ad Hoc Committee (IAHC), a group with representation from the standards as well as trademarks fraternity. Its members were drawn from IANA, the Internet Society (ISOC), the Internet Architecture Board (IAB), the International Telecommunications Union (ITU), the Federal Networking Council (FNC), International Trademark Association (INTA) and the World Intellectual Property Organisation (WIPO). IAHC midwived the Generic Top Level Domains Memorandum of Understanding (gTLD-MOU) that was signed on 1st May 1997. The gTLD-MOU transferred management of the DNS from the US government to a self-regulatory multistakeholder organisation.

The US companies and state agencies who viewed the Internet as a home grown US product, did not support this position. As Benkler (2013) explains, they sought government intervention to avoid internationalisation of IG through a treaty. The then President Bill Clinton instructed the Department of Commerce (DoC) to develop an alternative proposal. “A Proposal to Improve Technical Management of Internet Names and Addresses” was circulated for public comments. After an official government report on the same²⁶, the Internet Corporation for Assigned Names and Numbers (ICANN) was incorporated as a private corporation in the US state of California in 1998. Part of the justification for incorporation of ICANN was that since

²⁶ The “Proposal to Improve Technical Management of Internet Names and Addresses” was a Green Paper released by the National Telecommunications Information Administration (NTIA) on Feb 20, 1998. After receiving comments from the public, it was transformed into a White Paper, or a US government policy statement titled Management of Internet Names and Addresses. See http://icannwiki.com/White_Paper accessed 8 June 2015

the Internet was taking a commercial route, it was important to increase competition in domain name registrations. This would be best achieved by having a more formal management structure as opposed to management by US research agencies. (ICANNWiki, no date). ICANN entered into a Memorandum of Understanding (MoU) with the US Department of Commerce to “coordinate the development, structure, and test the mechanisms and processes for management of DNS by the private sector”.

The MoU between the DoC and ICANN came to an end in 2003 but was extended by mutual agreement to September 2006. The expiry of the MOU however did not give any significant entry points for other states to enter into the management of ICANN or the Internet. Instead, it strengthened the multistakeholder model, by giving the different stakeholder groups in ICANN enhanced roles in ICANN’s affairs.

On the other hand, the UN mainly through the ITU organised WSIS in Geneva in 2003. This was a landmark conference which opened discussions on Internet Governance to a wider range of people, including ITU member states, non-state actors and developing countries that had previously not participated in the processes that led to the formation of ICANN. WSIS was viewed by some as an alternative to the ICANN regime and from the start, it conformed more to UN and diplomatic norms for example by having preparatory committees for meetings and regional meetings. It is also significant that WSIS was first held in Geneva, one of the largest diplomatic

capitals of the world²⁷. However, WSIS took a life of its own and after the 2005 Tunis meeting, a resolution for a five year annual Internet Governance Forum (IGF) was adopted. IGF is also a multistakeholder meeting where all sectors- government, academia, private sector, civil society and Internet users – have space on the table. The IGF mandate expired in 2010 and was extended for a 5 years then further extended for 10 years in 2015. IGF been progressively improving in terms of management and participation and although there is still no binding agreement emanating from this meeting, it has been an interesting experiment in multistakeholder diplomacy (Kurbalija, 2014).

With growth in the Internet space came a number of changes, among them a desire to increase the number of gTLDs. In 2000, seven new gTLDs were introduced, these being: .aero, .biz, .coop, .info, .museum, .name and .pro. Another round of such six domains- .asia, .cat, .jobs, .mobi, .tel and .travel - came to being in the 2004 round. In 2005, ICANN started a long process that culminated in significantly opening the domain name space by putting up about 1100 new gTLDs for delegation.

The Department of Commerce in 2009 entered into a new agreement with ICANN known as “Affirmation of Commitments” with an object to institutionalise and memorialise the technical coordination of the DNS globally²⁸. Through this, the US

²⁷ Geneva hosts the headquarters of 32 UN bodies such as the International Telecommunications Union (ITU), World Intellectual Property Organisation (WIPO), World Trade Organisation (WTO) and has over 168 permanent missions of UN Member states as well as a host of international aid organisations and multinational corporations <http://www.swissinfo.ch/eng/in-depth/the-capital-of-peace> accessed 14 Dec 2015

²⁸ Affirmation of Commitments by the DoC and ICANN is a further agreement signed on September 30, 2009. It reiterates the commitment by DoC to maintain the stability of the Internet to the international

sought to assure the world that although it had a hand in the management of Internet infrastructure, it posed no threat of interfering with the free and open nature of the Internet. Needless to say, concerns were raised by other governments about the extent of US involvement in management of a global resource, the DNS. The US asserted that the affirmation of commitments was meant to provide a smooth transition to internationalisation of ICANN. (Beckstrom, 2009)

Come 2007, ICANN begun preparations for introduction of new gTLDs. One of the most controversial issues was the .xxx gTLD, meant to provide a space for adult only content on the Internet. This led to the question whether ICANN had crossed the Rubicon from being a technical manager to content policy development (Kurbalija, 2014). Other contentious domain names were .god, to which the Vatican through its representative to the GAC urged ICANN to reject arguing that the introduction of religious gTLDs of whatever nature would lead to “bitter disputes” that would eventually take ICANN to the realm of religious dispute resolution.²⁹ ICANN also faced criticism for allowing the .sucks top domain. The Federal Trade Commission (FTC) for instance expressed concern that the domain would be used by trolls to disparage existing trademarks. In 2015, the FTC called for ICANN to halt the rollout

community through multistakeholderism. See <https://www.icann.org/news/announcement-2009-09-30-en> accessed 30 Dec 2015

²⁹ See letter from Mons. Carlo Maria Polvani, the Holy See's Representative to the GAC to Paul Twomey [then] President of ICANN available at <https://www.icann.org/en/system/files/files/polvani-to-twomey-20feb09-en.pdf> accessed 11 Dec 2015

of .sucks protesting that the pricing strategy by Vox Populi, the .sucks domain administrator, was “predatory, coercive and exploitive”³⁰

In 2010, ICANN approved the .xxx domain together with a raft of other changes. These included the introduction of Internationalised Domain Names (IDNs) - Internet identifier names in other languages and non-ASCII characters such as Chinese and Arabic.³¹ This was with an object of spurring more use of Internet in non-English speaking countries.

Later in 2012, ICANN finalised the preparations for a new round of applications for new gTLDs, the process through which the disputed .africa domain names that are the subject of this study, came to be.

2.4 ICANN

The Internet Corporation for Assigned Names and Numbers (ICANN) is a multistakeholder organisation whose role is administration of core Internet infrastructure. ICANN manages three main systems- the Domain Name System (DNS), Internet Protocol (IP) addresses, the autonomous system numbers and

³⁰ See letter by Edith Ramirez, Chair FTC to John O Jeffrey, General Counsel and Secretary, ICANN available at <https://regmedia.co.uk/2015/05/28/ftc-icann-sucks-27may15.pdf> accessed 11 Dec 2015

³¹ ASCII (American Standard Code for Information Interchange) is the common format for exchanging files on the Internet where each alphanumeric character is represented as code in binary. Non ASCII codes are those represented in languages other than standard Latin, which comprises 10 digits (0-9) and 26 alphabets.

underlying structures. IP addresses are a unique string of numbers separated by full stops that identify each computer using the Internet Protocol to communicate over a network. The DNS generates user friendly names that can easily be remembered by users who wish to access the Internet. The autonomous number system on the other hand groups connected and jointly administered IP addresses in one routing policy.

Before ICANN came into being, management of critical Internet infrastructure was done by the technical community through open and consultative processes. Major decisions were undertaken through requests for comments (RFCs) where institutions and individuals gave their input on emerging issues. For instance, delegation of domain names stems from RFC 920 which outlined a plan to deploy top level and county code domain names once DNS was in place. (Rader 2001)

Klein (2002) quoting Dahl (1989) identifies four ingredients of governance. These are authority, law, sanction and jurisdiction. While many other international bodies achieve these ingredients through multilateral agreements, ICANN has fulfilled the same through the multistakeholder model. For instance, authority is achieved through having a Board that is the formal decision maker. As shall be seen below, the decisions are made in consultation with the "Internet community" hence authority also lies with the community through this participation.

As earlier argued by Smith III (2014), ICANN's authority would under normal circumstances be achieved through a multilateral process. ICANN however realises the four ingredients of governance through administration of the DNS or the Internet addressing system. The DNS converts alphabetic names into numeric IP addresses,

thereby allowing computers on the global Internet, which are identified using IP addresses to communicate with each other. As Albitz and Liu, (1993) explain, the DNS is centrally managed through ICANN. ICANN develops the policies for DNS management (authority) and implements those policies through the Board (law). This model also allows ICANN to have jurisdiction over the Internet and to impose sanctions to those who violate the policies.

But how has the corporation achieved the four ingredients of governance without a multilateral approach? The next sections explore decision making processes in ICANN.

2.5 Mandate of ICANN

ICANN is a private corporation whose articles of incorporation give it a very narrow mandate:

- (i) “coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet;
- (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space;
- (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system;
- (iv) overseeing operation of the authoritative Internet DNS root server system; and

- (v) engaging in any other related lawful activity in furtherance of items (i) through (iv)". (ICANN Articles, 1998)³²

2.6 Organs

ICANN has a Board consisting of 16 voting directors and 4 non-voting liaisons. 3 of the liaison members come from ICANN advisory committees while the fourth is sourced from the Internet Engineering Task Force (IETF).

8 of the voting members are selected through a competitive process while the other 8 are drawn from constituencies of ICANN: the Address Supporting Organisation (ASO), the Country-Code Names Supporting Organisation (CCNSO), the Generic Names Supporting Organisation (GNSO) and the At-Large Community (ALC). As their names suggest, the sponsoring organisations are policy development bodies that advise the Board as well as the community on policy issues related to their areas of expertise. The organisations are in their nature technical and draw membership from experts, practitioners and academia. (ICANN By-Laws, 2014a)³³

ICANN has three standing advisory committees. The Government Advisory Committee (GAC) draws its membership from various national governments and intergovernmental organisations such as the African Union (AU). GAC advises the ICANN Board on public policy issues and has one liaison (non-voting) seat on the

³² Article 3, ICANN Articles of Incorporation

³³ Article VI, Section 2

Board. The Security and Stability Advisory Committee (SSAC) is a Board appointed committee that advises on the security and integrity of the Internet's naming and address allocation systems. The Root Server System Advisory Committee (RSSAC), also appointed by the Board offers advice on matters related to the operation, administration, security, and integrity of the Internet's Root Server System. RSSAC also has a liaison seat on the Board. The At-Large Advisory Committee (ALAC) advises on issues that affect individual Internet users. Its membership is drawn from ALAC's regional organisations to ensure regional diversity. (ICANN By-Laws, 2014b)³⁴

As shall be seen below, GAC's seat on the Board was as a result of reforms in ICANN. Although the GAC representative does not vote, advice from GAC is highly regarded by the Board.

2.7 Decision Making

While the final decision maker is the Board, ICANN seeks extensive input from the various groups to build consensus before decisions are made. In the case of the new gTLDs, the policy process for having new gTLDs began in 2005 with the GNSO undertaking lengthy consultation with various stakeholders such as governments,

³⁴ Article VI Section 9

civil society, private sector, intellectual property right holders and the technical community.³⁵

In 2008, ICANN Board adopted 19 of the GNSO policy recommendations for implementing new gTLDs. These included criteria for allocation of the domains and contractual conditions between ICANN and the successful applicants. Thereafter, the Board held consultations on guidelines for prospective applicants, a result of which was the Applicant Guidebook, approved in 2011. The justifications for the new gTLD programme include: that it was consistent with ICANN's expansion plan; to accommodate more scripts and symbols in top level domains; and to satisfy demands for more top level domain names, thereby also reducing the monopoly of the .com domain name. (Smith III, 2014)

Some of the benefits expected from the programme are brand control, increased competition in the top level domain space, effective domain administration as a result of the rigorous checks in the Applicant Guidebook and creation of niche marketplaces where consumers can find immense resources related to a product for instance music related products and information in .music. In the case of .africa, survey respondents thought that the new .africa gTLD would increase African visibility online as a

³⁵ See ICANN Generic Names Supporting Organisation (GSNO) Final Report (2008) that contains annexes of individual as well as ICANN community organisation's comments on the GSNO interim report. Available at <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm> accessed 12 Dec 2015

geographical and cultural brand, give an African touch to products and services in the African market and also identify African brands on the Internet (Mutung'u, 2015).

After the close of the application period for the new gTLDs in April 2012, 1930 applications had been received. Of these, 66 were geographical names while 17 were from the African continent. The 17 included two similar applications for the .africa domain.

2.8 Stakeholder Weights

Does all stakeholder input count equally in ICANN decision making processes? Over the years, stakeholders have found different footing in ICANN. For instance, governments through GAC have enhanced their participation through their seat on the ICANN Board (Schiavetta and Komaitis, 2010).

GAC's influence can be seen in various ICANN activities. Its advice "Principles and Guidelines for Delegation of Country Code Top Level Domains (ccTLDs) to Countries", was largely adopted in the delegation of ccTLDs. (GAC, 2005) GAC also pronounced itself on the issue of new Generic Top Level Domains (gTLDs), giving three communiqués on the matter. In the first one, GAC sought community input on protection of geographic names and on two letter second level domains (GAC, no date). Subsequently GAC gave early warnings on some of the gTLD applications, including DotConnectAfrica's application for .africa. Apart from the issue of gTLDs, GAC has progressively positioned itself as a powerhouse in ICANN leading some to question whether though in multistakeholderism, the various stakeholders in ICANN

hold the same weight (Berkens 2013)³⁶. It is however understandable that GAC has a special place in ICANN. As has been noted from the history of ICANN, it's establishment and evolution has revolved primarily on the need to assure that they have a real stake in governance of ICANN and the Internet. (Simon, 2006).

Contrariwise, civil society, although active, has had more challenges in having their positions adopted by ICANN (Gross, 2011). Civil society has consistently advocated for two issues, human rights and balancing trademark rights against other rights. In many instances, the position of the private sector which has had more experience at ICANN has prevailed.

As noted previously, Africans as a stakeholder group and Africans as stakeholders within other groups have not adequately participated in ICANN (Calandro et al, 2013).

2.9 Geopolitical Considerations

At its inception, the US government had a huge though silent stake in the management of ICANN.³⁷ This is because ICANN was founded on a memorandum of understanding between the DoC and the private commercial entity, ICANN.

³⁶ In this article, ICANN Board was reportedly waiting for GAC consensus on the new gTLD programme and it wasn't until GAC was assured of safeguards on the new gTLDs that the programme could continue. See <http://www.thedomains.com/2013/04/11/the-gac-puts-the-brakes-on-hundreds-of-new-gtld-applications-including-closed-generics/> accessed 12 Dec 2015

³⁷ Some even imagined that the US had power to "switch off the Internet" For instance John D. Sutter, in a CNN Article explores this question after Egypt's government "shut down" the Internet for a day

Over time developed regions interest in Internet Governance increased and for instance the Council of Europe in 2001 enacted the first and model law on cybercrime, the Council of Europe Convention on Cybercrime³⁸. As can be imagined, Africa, composed almost entirely of developing and least developed countries, largely lagged behind in matters Internet development. For instance the continent has the largest digital divide with a bulk of its countries ranking low in the information society index (ITU, 2013). In matters such as uptake of IPv6, ³⁹African countries are yet to catch up with the rest of the world (NRO, 2015). Indeed Internet governance for development, an area of interest for many Africans, was identified as a key area in discussions at the annual IGF since 2010.

Meanwhile, with massive capacity building interventions by different groups among others UN bodies, the Internet Society (ISOC) and Diplo Foundation, Africa and other developing regions have picked up and to date, the global south is contributed positively to Internet development. For instance Brazil was the first country to enact an Internet Bill of Rights while Kenya boasts of the most innovative mobile money

following violent protests that ousted the government of the day. See <http://edition.cnn.com/2011/TECH/web/02/03/internet.shut.down/> accessed 19 Dec 2015

³⁸ The Convention aims to harmonise national laws on cybercrime and to improve international cooperation in handling cross border cybercrime. It has been signed by non-Council of Europe states including Australia, Canada, Dominican Republic, Japan, Mauritius, Panama, Sri Lanka, and the United States. See <http://conventions.coe.int/treaty/EN/Treaties/html/185.htm> accessed 8 June 2015

³⁹ IP v6 is the latest version of the communications protocol that supports the Internet. It will facilitate a larger scale of available IP addresses to enable more computers as well as devices such as cars, fridges and other gadgets to connect the Internet. It is thought that the next revolution in Internet will be “the Internet of things” where more things will be connected to the Internet, making the universe more automated. See <http://www.ipv6.com/articles/general/ipv6-the-next-generation-internet.htm> accessed 8 June 2015

platform, MPesa.⁴⁰ South Africa on the other hand is lauded for having an exemplary *sui generis* domain dispute resolution mechanism that adapts to the African situation and involves use of local community experts.⁴¹

In the 21st Century, a new narrative, “Africa rising”⁴² is attracting many international brands to the expanding African middle class. Since 2010, the IMF list of growing economies has had at least seven African countries.⁴³ Some of the factors that have supported this growth are availability of energy, uptake of technology and reforms in governance. Technology has enabled previously inaccessible parts of Africa to open up. For instance, the Eastern Africa Submarine Cable System (EASSY) that connects 21 African countries was the first to link Ethiopia and Sudan to broadband connectivity. The Global Systems for Mobile Communications Association (GSMA) reports that as at June 2014, there were about 608 million mobile phone connections in sub Saharan Africa. It is projected that the subscriber base will continue to grow by an annual rate of 7%. It is also estimated that with the current growth rate in smartphone

⁴⁰ MPesa which means mobile money in street Swahili, is mobile money micro banking platform developed in Kenya. It allows cell phone subscribers to have virtual money on their mobile phones with which they can shop for goods, pay for services, save, borrow loans and send money to other subscribers. See <http://safaricom.co.ke/personal/m-pesa> accessed 8 June 2015

⁴¹ See Part 6, Chapter X of South Africa’s Electronic Communications and Transactions Act, 2002 (Domain Name Authority and Administration) available at http://www.internet.org.za/ect_act.html accessed 12 Dec 2015

⁴² Africa Rising is an alternative narrative to the hopelessness that depicted news from Africa in the 20th Century with images of starving children, dirt and disease. With more Africans joining the middle class and other positive news such as democratic handover of power and educated Africans returning home, major news networks increasingly gave space to positive stories from Africa. See for example <http://www.economist.com/node/21541015> accessed 8 June 2015

⁴³ Examples of countries mentioned are Angola, Ethiopia, Ghana, Kenya, Nigeria, South Africa and Rwanda. See for instance <http://www.imf.org/external/ns/cs.aspx?id=29> accessed 12 Dec 2015

use, by the year 2020, the region will have close to half of the world's smartphone connections (GSMA, 2014). As regards policy development processes however, Calandro and others (2013) note that African RECs and the African Union have had fragmented processes where regional policies are sometimes implemented with a national outlook.

Many global brands, including tech giants such as Google, Facebook and Mozilla are therefore setting shop in Africa. Meanwhile, homegrown brands are gaining prominence within the continent. For instance, the Nigerian film industry "Nollywood" produces the highest volume of home videos and films per annum, coming only second to Indian films (AlJazeera, 2015). The African films, together with other forms of expression such as blogs, music videos, memes, documentaries and recordings have benefitted from technological advances such as digital editing and distribution platforms and are readily available online.

There is therefore little doubt that in any discourse on expansion of the Internet space, African have a significant interest. Indeed even within the new gTLD application process, Africans raised several issues about the process among them, that the application fees were too prohibitive for many Africans (KICTANet, 2011). ICANN responded by requesting those who found were unable to raise the fees to apply for rebates where each case would be considered on its own merit.

In the period following the dispute involving the .africa domain name applications, ICANN supported formation of an African group to consider and propose resolutions to other issues faced by the African community. (ICANN, 2012). Under the banner,

“A New Approach to Africa”, ICANN established an African office which was tasked with developing a strategic plan for the continent. The July 2015-June 2020 plan has nine strategic objectives, among them: strengthening ccTLD development in Africa; enhancing regional and international co-operation with DNS stakeholders; regionalisation of IANA and ICANN operations in Africa; capacity development of Internet governance in Africa and promotion of the multistakeholder model. (ICANN Africa Strategic Plan, 2015). Planned activities include DNS roadshows, Africa DNS Forum and workshops on topical issues. Funding for the strategy remains a challenge and the steering group proposes to partner with traditional donors as well as African actors to mobilise resources for the intended programmes. It will be interesting to watch how the initiative develops and whether it forges a relationship with AUC and .africa. As was suggested by some of the respondents to the survey for this research, proceeds from .africa should be used to propagate development of the Internet in Africa (Mutung’u , 2015)

2.10 Intellectual Property Rights

Intellectual property refers to products created from the human mind and therefore the “legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields” (WIPO, no date). Africa is an oral society where for many centuries, traditional knowledge was not reduced to writing but rather passed on by word of mouth from generation to generation (Vansina, 1985). In contrast, global

regime for intellectual property protection is premised on individual ownership and recording of the rights.

The Stockholm Convention (1967) that established the World Intellectual Property Organization (WIPO) describes the following intellectual property rights:

“literary, artistic and scientific works, performances of performing artists, phonograms and broadcasts, inventions in all fields of human endeavour, scientific discoveries, industrial designs, trademarks, service marks and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”

Under this regime, copyright grants the author of artistic or literary works exclusive rights to its use and distribution. Copyright need not be registered and it extends to performances, phonograms and broadcasts as well as works derived from such lots. In the conceptualisation of rights related to the Internet, copyright is viewed as relating to content within the Internet but not in ownership of domain names.

Trademarks on the other hand protect a word, symbol, or phrase, used to identify a particular manufacturer or seller's products and distinguish them from the products of another. A trademark that represents a service is known as a service mark and is generally treated as a trademark. Trade marks have to be registered in order for the owner to enjoy legal protection.

With commercialisation of the Internet, domain names were naturally considered as marks that would distinguish one trader from the other, hence trademarks. Domains

were registered on a first come first served basis. Commercial entities faced the problem of cybersquatting where non trademark holders registered domain names with the object of reselling them to trademark owners at a higher price. ICANN therefore developed the Uniform Dispute Resolution Policy (UDRP) under which WIPO arbitrates over domain name disputes related to trademark infringement (UDRP, 1999).

The UDRP is a private sector led mechanism which does not recognise the status of parties.⁴⁴ Therefore, if a state disputed registration of a name associated with it, it would be subjected to the same dispute resolution procedure as any other party. This explains the paradigm shift in protection of geographic TLDs where states are accorded extra protections in the new gTLD programme. There are also several channels through which GAC may intervene⁴⁵ in geographic TLDs as shall be explained below.

An emerging area in intellectual property rights on the Internet is geographical indications. In 1994, the World Trade Organisation (WTO) concluded an agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). The agreement defines geographical indications as:

⁴⁴ See Note 3 of the ICANN UDRP available at <https://www.icann.org/resources/pages/policy-2012-02-25-en> accessed 12 Dec 2015

⁴⁵ As explained below, GAC has various intervention points in the new gTLD programme that may result in rejection of an application for a domain name on public policy grounds. In the same vein, for a geographical name application, the applicant must get support from their region and they may seek GAC's assistance in this. See Applicant Guidebook Module 1

“ indications that identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin. ”

Traditionally, geographical indications were associated with foods produced in local industries such as Champagne wine and parmigiano cheese from specific European regions. These products had attained international acclaim due to the unique features associated with the environmental factors as well as methods of their production. Geographical indications was a special class of trademarks that protected against products not produced from that region passing off as the authentic products from the specific regions.

Over the years geographical indications expanded to include other products such as handicrafts, perfumes and agricultural produce from other origins in the world. As nation branding became a large part of states public diplomacy, tourism products and services associated with specific areas fell under the protection of geographical indications. In the new gTLD programme, protections of geographical marks was an issue of concern, and GAC pointed out some potential conflicts. For instance, an early warning for the application for .amazon by the large online trading company “Amazon” was issued in favour of the people of the amazon region in South America.⁴⁶ As mentioned in the survey results, many Africans see .africa as a cultural

⁴⁶ GAC representatives of Brazil and Peru recommended the withdrawal of the application on the basis that “amazon” refers to an important region in South America that spans many countries and also that it coincides with an international organisation in the region. See <http://www.icannwiki.com/.amazon> accessed 8 June 2015

branding resource that will give an African touch to brands. A .africa application by an entity that did not have the blessings of the African Union was therefore cited in the early warning advisories by GAC.⁴⁷

2.11 African Perspectives on Intellectual Property

The intellectual property regimes discussed above envisage that the rights are held by an individual. This is in contrast to the traditional property ownership regimes of many African communities where rights were held communally (Mugabe, and others, 2001). For example, before colonisation, many farming communities had knowledge on seed selection and planting methods that assured high yields. Traditional knowledge also existed in fields such as animal breeding, medicine, folklore and industrial productions and in many communities, it was unheard of for an individual to “own” a song or a story, even when the individual(s) had composed it.

Africans and other people from the south have repeatedly sought alternatives to the intellectual property regime that is viewed to be averse to their organisation of traditional knowledge. WIPO in 2009 established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore tasked with spearheading an agreement on traditional knowledge and folklore. The African Regional Intellectual Property Organisation (ARIPO) finalised the Swakopmund Protocol on the Protection of Traditional Knowledge and

⁴⁷ .africa application by DCA received 17 GAC member states early warnings as well as a unanimous GAC recommendation for withdrawal See <http://www.icannwiki.com/.africa> accessed 8 June 2015

Expressions of Folklore that aims to protect and promote African standards of knowledge, customs and folklore. It was expected to come into force in May 2015 after getting the requisite number of ratifications by member states.⁴⁸ In addition, South Africa which is not a member of ARIPO established up a *sui generis* framework for protection of traditional knowledge that among other things amends the Trademarks Act to “provide for the recognition of indigenous terms and expressions as trademarks...and to provide for further protection of geographical indications”.⁴⁹

In the Internet space, African countries with best practices in domain name dispute resolution have expanded the scope of protected rights from trademark only as practiced in ICANN to other rights including language, cultural and community rights.⁵⁰ In the establishment of the new gTLD programme, rights such as community rights, language rights and cultural rights were therefore recognised and protected.

2.12 Domain Name Dispute Resolution

As observed, ICANN is a multistakeholder organisation that is largely driven by community interests. At its formation, the main legal rights foreseen for protection

⁴⁸ Available at http://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt_ap010.pdf accessed 8 June 2015

⁴⁹ In December 2014 South Africa enacted the “Traditional Knowledge Act”, which amends 5 intellectual property laws to recognise and protect indigenous knowledge in the existing laws. The Act provides for a registration mechanism for indigenous works. See http://www.ip-watch.org/weblog/wp-content/uploads/2014/02/SA-TK-Act-37148_gon996_act28-2013.pdf accessed 8 June 2015

⁵⁰ The South Africa Domain Name Dispute Resolution Regulations are such an example as it contemplates any rights as a basis for lodging a domain name complaint.

were trademarks. This was partly driven by an upsurge in cybersquatting, where speculators registered domain names similar to well-known trademarks, only to resell them at a higher price. Hence ICANN in partnership with WIPO developed the UDRP.

ICANN's UDRP model has three broad applicable disputes: trademark violation, legitimate interests in the domain and bad faith registrations. To show trademark violation, one needs to produce their trademark registration evidence while for other legitimate interests, it may suffice to show that the applicant has been popularly associated with the domain name, even if they have not acquired trademark or service mark rights. Bad faith registrations on the other hand require one to prove aspects of misleading consumers to tarnish a trademark or service mark. (UDRP, 1999).

According to WIPO records, some countries to whom ccTLDs have been delegated have adapted the UDRP to their local situation. While some have accredited WIPO as arbitrator for such disputes, others such as Nominet which is the administrator for .uk have appointed local experts to determine disputes.

Other countries have included ccTLD administration in their legal frameworks. For example, under the Electronic Communications and Transactions Act No. 25 of 2002 South Africa enacted Regulations that govern domain name dispute resolution. While the Regulations are similar to the UDRP in the sense that they encourage out of court settlement of disputes, they differ in the definition of applicable disputes, having lower costs and making use of local experts.

The South African Regulations provide for offensive or abusive registrations. Abusive registrations are those where the domain name was registered or acquired in a manner detrimental to the complainants rights, or has been used in a manner that takes unfair advantage of, or is unfairly detrimental to the complainant's rights. This definition allows communities whose names, language or cultural rights have been affected to have a recourse in law. Offensive registrations on the other hand are those in which the complainant cannot necessarily establish rights but the registration of which is contrary to law, *contra bonos mores* or is likely to give offence to any class of persons. This definition affords a remedy to cultural values held by various communities.⁵¹

2.13 New Domain Name Dispute Resolution Mechanisms

The new gTLD programme introduces two more domain name dispute resolution mechanisms. The first is the Uniform Rapid Suspension System (URS) that offers a fast resolution where there is a clear cut case of trademark infringement. The sole remedy available under URS proceedings is suspension of the domain name in question. A URS complaint is determined by a provider appointed by ICANN.

The Post-Delegation Dispute Resolution Procedures (PDDRP) are available to those who allege to have been harmed by a new gTLD Registry Operator's conduct. The grounds for complaints under PDDRP are trademark infringement, registration

⁵¹See Regulation 1 on definition of rights which includes “intellectual property rights, commercial, cultural, linguistic, religious and personal rights protected under South African law, but is not limited thereto” available at http://www.acts.co.za/electronic-communications-and-transactions-act-2002/index.html?38_application.php accessed 8 June 2015

restriction and public interest commitments. Trademark disputes would occur where a complainant alleges that a registry's conduct amounts to trademark abuse. Registration restrictions and public interest commitments occur where a community based new gTLD operator deviates from the conditions for registration set out in the registry agreement.

Under the new gTLD programme, each gTLD administrator is expected to develop a policy for domain name dispute resolution in line with ICANN objectives. This therefore presents an opportunity for the African community to develop a domain name policy that not only appreciates African views on intellectual property but that is also cognisant of the prevailing conditions in Africa. A home grown policy would also build African capacity by developing local intellectual property law experts is desirable.

2.14 Other Regional Geographic TLDs

After creation of ICANN, the European Union (EU) took steps towards establishment of an online EU space. Europe is home to many trademarks and geographical indications and creation of a regional TLD would allow trademark holders together with other interested stakeholders to have a European identity (Christou and Simpson, 2006). Thus after public consultation in 2000, the EU Parliament and Council adopted a regulation in 2002 which set the framework for recruitment of a private entity to run the TLD. After a call for applications, EURid, a consortium created by three national registries of Belgium, Italy and Sweden was selected to administer .eu, at first for a period of five years.

In 2004 the Commission developed the policy and rules for the domain that cover among others speculative and abusive registrations of domain names, intellectual property and other rights, language and geographical concepts, and alternative dispute resolution mechanisms. This was adopted through EC Regulation 874 (2004). ICANN delegated .eu in March 2005.

.eu is therefore run through policies created by the European Union Commission and Parliament. The administration of the domain is done by EURid which has developed an administrative policy on registration of names under the .eu TLD. Dispute resolution is through the Prague based Arbitration Court.

At its launch, .eu faced challenges, among them dissatisfied trademark owners who did not get their preferred domain names. This was despite having sunrise and landrush periods reserved for right holders. However, within the first year it registered about 2.5million domains, most of which were from Germany. It currently has over 3.7 million domains with a renewal rate of about 80%.

.asia on the other hand is a sponsored TLD for the asia region. It is run by a membership organisation comprising of ccTLD operators in the Asia region as well as other stakeholders. The TLD was delegated in 2007.

In addition to the traditional sunrise and landrush periods where governments and trademark owners get first priority in registration of domain names, .asia applied the pioneer domains programme. This was a method whereby domain name applications were vetted by .asia, as opposed to the first come first serve basis. Another innovative

step with .asia was the successful introduction of internationalised domain names (IDNs).⁵²

.asia policies are developed by members. The governing board has 8 sponsor members and 2 co-sponsor members (such as civil society, academia and individuals). To date, it has nearly 250,000 registered domain names.

These two regional TLDs have been successful not only in getting more online presence in their regions but also in implementing renowned projects. .asia runs a capacity building programme for Internet governance for young Asians known as NetMission. EURid on the other hand has a well organised international policy programme where Internet governance debates in various fora are followed usefully. It is also a key supporter of the European Summer School on Internet Governance (Euro-SSIG). (EURid, no date)

The relationship between regional TLDs such as .eu and .asia and national ccTLDs is an interesting one to observe. While these two TLD types are competitors in the domain name business, they can also collaborate to ensure more persons get an online identity. As has been noted in the case of .asia, good strategies and cooperation have resulted in growth of ccTLDs as well as the regional TLD (Michuki, 2009). The AUC had acknowledged the importance of ccTLDs. In the recruitment of the organisation to run .africa, AUC had indicated that the ideal candidate should have been a

⁵² IDNs are domain names in non Latin script, for instance in Chinese, Japanese and other languages. (ICANN Wiki, n.d.)

consortium of ccTLDs or related businesses. As it turned out, as the sole applicant ZACR, is not a consortium, neither is the other applicant, DCA. It is desirable that the .africa operator has policies that enhance relationships with ccTLDs and the African Internet community at large.

2.15 Conclusion

The history of ICANN provides a good study on multistakeholderism and a community based decision making process. Although there have been legitimate concerns about transparency and accountability of ICANN, arising from the relationship between ICANN and the US government, ICANN largely exhibits a multistakeholder approach where decisions on Internet governance are not made by states alone but by a collection of stakeholders as represented in ICANN's governance structures.

Some concluding remarks from this discussion are:

- a) The Internet brought about disruption in many spheres. The multistakeholder model is one among these disruptions and it was as a result of stakeholders other than government having been at the forefront in technical and policy development of the Internet. Multistakeholderism is a healthy model as it has resulted in innovative policies, as can be seen in Internet governance where the Internet has remained stable and open, allowing millions of people to connect worldwide.

- b) While ICANN's history was a soft geo-political war, it has developed into an accommodating institution where stakeholders, including governments have adequate influence in policy development. With an increase in stakeholders, both within the stakeholder groups as well as in ICANN comes new perspectives. The ICANN model must expand to new stakeholders, for example Africans, who hold different views on issues such as protection of rights. Africans must also take up their policy development role in order to influence global DNS policy if they craft a strategy to that end.
- c) .africa is not the first regional geographic TLD as .eu and .asia were implemented before the new gTLD programme. These two gTLDs provide some best practices that .africa could learn from. For example, the governance of both TLDs has a consultative aspect. While .eu policy making is mainly through EU channels, the EU has established public participation processes. .asia on the other hand is a membership organisation that incorporates ccTLDs in the region as well as other stakeholders. It is also noteworthy that .asia has avenues through which new entrants can join, this being one of the tests for meaningful multistakeholderism espoused by Malcom (2015).
- d) Some of the best practices that can be picked from other regional gTLDs are the value of inclusivity in policy making, avenues that exist for new members to join the organisation, innovative solutions that respond to local situations as well the relationship between the gTLD with stakeholders such as ccTLDs, civil society, academia and the technical community.

This Chapter has given the history of ICANN, ICANN's decision making processes and some possible areas for improvement. The next Chapters will discuss the .africa domain dispute against the backdrop provided in this Chapter and propose principles under which a domain for Africans should be delegated and managed.

CHAPTER THREE: THE DOT AFRICA DISPUTE

3.1 Introduction

Chapter Three will give a brief overview of the gTLD application process, as outlined in the Applicant Guidebook (AGB) highlighting stages that are important to the .africa dispute. Then follows a narration of the dispute, pointing out the issues in contention as well as the status of the application. This will lay the groundwork for recommendations in Chapter Four.

3.2 Highlights of the gTLD Application Process

As was explained in Chapter Two, the new gTLD process was launched in 2012. During this round 1100 domain names were available for delegation. Provided there were no hitches, a typical application was expected to go through an administrative check, evaluation and transition to delegation within a period of 9 months. (ICANN), 2012)⁵³

However, applications for community names or geographical names, were envisaged to be take longer as there were more prerequisites as shall be explained below. This section points skims through the processes in the application process as a foundation to discussion the the .africa dispute.

⁵³ Applicant Guidebook (AGB) Module 1.1.3

3.2.1 Eligibility and Application Submission

The application process was open to established corporations and organisations or institutions in good standing. Individuals, sole proprietorships, yet to be formed legal entities, presupposed future formations such as joint ventures were ineligible. (ICANN, 2012a)⁵⁴

The application submission window opened in January 2012. Applicants submitted their applications through an online portal and ICANN staff carried out an administrative completeness check to ensure that for each application, the mandatory information, supporting documentation as well as application fees had been provided. Some of the information required for submission of an application included general information as well as demonstration of financial, technical and operational capabilities. (ICANN, 2012b)⁵⁵

At the close of the application submission period, the public had an opportunity to comment on the applications. The Guidebook provided that public comments would be used to score the applications. ICANN staff were therefore expected to verify the accuracy of the information provided in the comments. (ICANN, 2012c)⁵⁶

⁵⁴ AGB Module 2.1.1

⁵⁵ AGB 1.1.2.1

⁵⁶ AGB 1.1.2.3

3.2.2 Unavailable names

Certain names were unavailable for application in the 2012 round. These included top country codes that would be handled in a later dedicated process. There were also three lists of protected names. First was reserved names that would be delegated to the organizations affiliated to them or not delegated at all to avoid confusion, for example .alac, .whois, .icann, .gac, .local, .www and .example. (ICANN, 2012d)⁵⁷

Second, the International Olympics Committee (IOC) as well as International Committee of the Red Cross and Red Crescent Movement successfully lobbied for special legal protection for names associated with them. These include .olympic in various languages as well as .redcross, .redcresent and related variations. (ICANN, 2012e)⁵⁸

Third was the declared variants list where names considered variants of existing TLDs would be placed pending determination of the potential contention arising from the similarity. (ICANN, 2012f) ⁵⁹

The reserved names and special protection afforded to the two international organisations came as a result of consultations during the development of the

⁵⁷ AGB 2.2.1.2.1

⁵⁸ AGB 2.2.1.2.2

⁵⁹ AGB 2.2.1.2.3

Applicant Guidebook.⁶⁰ During that process, Africans did not take action to protect .africa name. However, as shall be narrated below, the African Union later requested ICANN to place .africa in the reserved names list after the application process had already commenced. The request was declined.

3.2.3 GAC Intervention

There were several ways in which GAC could intervene in the application process: One, it was expected that those applying for geographical names would consult their relevant GAC representatives for advice on how to secure non-objection from the appropriate government or administrative body (ICANN, 2012g)⁶¹. Two, GAC as a body or through its individual members could give comments on the process through the public comments forum. (ICANN, 2012h)⁶²

Three, while comments were open to the public, GAC could also issue an early warning. An early warning was a notice given by a government through GAC, indicating that an application could raise issues such as potential violation of national laws or sensitivities. On receiving an early warning, the applicant had the

⁶⁰ GAC continues working on protection for Inter-governmental organisations and for instance in June 2015 reiterated its advice on the same, calling for the group working on protection mechanisms to hasten its work. See <https://gacweb.icann.org/pages/viewpage.action?pageId=39059707> accessed 13 Dec 2015

⁶¹ AGB 2.2.1.4.3

⁶² AGB 1.1.2.3

option to withdraw the application in question in which case they were eligible for part refund of their application fees. (ICANN, 2012i)⁶³

Four, GAC could advise the ICANN Board on a specific application. Such advice could take the three forms:

- a) an objection to a particular application by consensus which would create a strong presumption on the part of the Board that the application should not continue;
- b) concerns about some aspects of a particular application or that an application should not proceed in response to which the Board could dialogue with GAC to better understand the concerns; and
- c) a recommendation that an application should not proceed unless remediated in which case the Board needed to seek expert advice (ICANN, 2012j)⁶⁴.

Five, GAC has a wide power to provide the ICANN Board with advice on any public policy issue, even if such issue was not enumerated in the Applicant Guidebook (ICANN, 2012k)⁶⁵. The enumerated grounds for objection include

⁶³ AGB 1.1.2.3

⁶⁴ AGB 1.1.2.7 as read with 3.1

⁶⁵ AGB 3.2

string confusion, legal rights, limited public interest and community objection (ICANN, 2012l)⁶⁶.

Six, in the process of transition to delegation of the new gTLD, applicants for a geographical name were expected to implement measures for protection of country and territory names in the new gTLD. These measures could be developed in consultation with GAC, although they would take effect after being subjected to a community discussion in ICANN. (ICANN, 2012m) ⁶⁷

3.2.4 Initial Evaluation

During this period, background screening of the applying entity and individuals named in the application was conducted. Two important aspects checked at this process included:

- a) String reviews to ensure that the proposed string was not likely to cause DNS insecurity or instability, including problems brought about by similarity to existing TLDs or reserved names.
- b) Geographic names would be subjected to an assessment by the Geographic Names Panel (GNP) to ensure that they met the criteria set out in the Guidebook, discussed in more detail below.

⁶⁶ AGB 3.2.1

⁶⁷ AGB 5.2.3

- c) Applicant reviews to determine the suitability of the applying entity and its proposed registry services. The technical, operational and financial capabilities of the applying entity were considered. (ICANN, 2012n)⁶⁸

3.2.5 Geographic Names Review

ICANN sought to protect the interests of governments and public authorities in processing applications for geographic names (ICANN, 2012o)⁶⁹. The protections provided for in the Guidebook include:

- a) Country and territory names were not available. During negotiations for the new gTLDs, GAC recommended that country and territory names be handled in a dedicated process.
- b) Geographic names such as names of a capital city, city, sub-national place, continental, region or geographic sub region were available for delegation as long as applicant got support from the relevant government or public authority.
- c) A Geographic Names Panel (GNP) would assess all applications, identify those for geographic names and determine the relevant government or public authority whose support or non-objection was required.

⁶⁸ AGB 1.1.2.5

⁶⁹ AGB 2.2.1.4.2- 3

- d) It was the duty of a geographic name applicant to identify, consult and seek the required government or public authority support. For applications listed as a region by UNESCO, the applicant was required to get support of at least 60% of the governments of the region and no more than one objection to the application.
- e) Government endorsement was voluntary. Governments could support multiple applications for the same or similar names.
- f) A government could withdraw its support at any time including after delegation in the event that the registry operator deviated from the conditions of support.
- g) ICANN committed to comply with a legally binding court order in event of a dispute between a registry operator and government.
- h) An applicant who had not provided all the required documentation could be given up to 90 calendar days to provide the said documentation, failure to which the application would be considered incomplete and abandoned for the round.

Although the available strings or domains were available for any applicant, the geographic names protections ensured that governments had a hand in the delegation of domains associated with them. The African Union as the intergovernmental body in charge of continental resources such as .africa could therefore invoke these protections.

3.2.6 Objection Filing and Dispute Resolution

The GAC advice discussed above served as an objection to an application. Additionally, a formal objection could be filed by a third party.

The grounds for filing public formal objections, which could also be made by GAC, were: string confusion, legal rights, limited public interest and community objection (ICANN, 2012p).⁷⁰ Public objections were filed with dispute resolution service providers (DRSP) and not with ICANN. The third party or complainant was responsible for paying the filing fees.

The objection process can be summarized thus: filing, administrative review by the DRSP, consolidation of objections if applicable, mediation, expert panel selection if mediation fails, adjudication and finally determination of the dispute. (ICANN, 2012q)⁷¹

However, as shall be discussed below, in the case of the .africa gTLD one of the applicants (DCA) felt aggrieved by the ICANN Board. DCA requested for an independent review of the actions of the Board as provided for under ICANN's By-Laws.

⁷⁰ AGB 3.5.1- 3.5.4

⁷¹ AGB 3.3.1

3.2.7 Independent Objector

The Guidebook provided for an Independent Objector (IO) who, autonomous of the Board and GAC could file objections against highly objectionable applications in the public interest. (ICANN, 2012r)⁷² The IO was limited as follows:

- a) The objection could either be:
 - i. in public interest
 - ii. a community objection
- b) The IO was only expected to file objections where no other objections existed, although they could file a limited public interest objection against an application even if a community objection was already filed, and vice versa. In extraordinary circumstances, the IO could also file an objection on the same grounds as an already filed application.

3.2.8 Extended Evaluation

This was only meant to be applied to those applications that did not pass the initial evaluation. An application could fail initial evaluation due to reasons such as little technical viability of the registry services. Extended evaluation was an opportunity

⁷² AGB 3.2.5

for the evaluators to carry out further investigations and an application that did not pass the extended evaluation died. (ICANN, 2012s) ⁷³

3.2.9 String Contention

It is important to have differentiated strings of domains so as to minimize confusion to Internet users. Where more than one qualified application has the same or similar gTLD strings, it creates a string contention.

The Guidebook encouraged the applicants with string contentions to work out a settlement among themselves. Where an agreement was not reached, the contention was resolved either through a community priority evaluation in cases where the string was a community application or through an auction of the contested string. (ICANN, 2012t)⁷⁴

3.2.10 Transition to Delegation

Once all issues were resolved, or where an applicant passed all the evaluation stages, they executed a registry agreement with ICANN. After that, pre delegation tests were undertaken to assure that the technical capability of the applicant before the gTLD could be delegated into the root zone. Where an applicant failed pre-delegation

⁷³ AGB 1.1.2.8

⁷⁴ AGB 4.1

testing, ICANN had the discretion to terminate the registry agreement. (ICANN, 2012u)⁷⁵

3.3 The .africa case

There were two applications for the .africa gTLD; the first by ZACR and the other by DCA. A string contention was therefore imminent. Additionally, as shall be illustrated in this section, the application was a geographical name and it was highly probable that a dispute resolution procedure would be applied. However, DCA complaints were against the Board and not the competitor, ZACR. DCA's case was based on violation of natural justice and it alleged the Board had handled the DCA application with bias. The case also brought to fore the special privilege enjoyed by GAC where despite there being a conflict of interest, GAC had significant influence on the Board. The conflict occurred because the African Union Commission, a GAC member, was for all intents and purposes applying for .africa through ZACR.

The .africa case did not begin at ICANN but was rather a continuing struggle that had played out within the African Internet governance community circles. This section narrates the genesis of the .africa case within the African Union and at ICANN. We therefore start with a background of the African Union, after which a chronological account of the case is narrated.

⁷⁵ AGB 1.1.2.11

3.3.1 The African Union and Internet Governance

The African Union (AU) is a continental body that brings together 53 of 54 African states for solidarity, defence of sovereignty, peace-building and socio-economic objectives (AU, no date). It began as the Organisation of African Unity (OAU), a Pan African movement of African States in the quest for the independence of Africa in 1963. Over the years however, the organisation underwent transformation to give rise to the AU in 1999.

AU comprises of regional economic communities which include the East African Community (EAC), Southern African Development Community (SADC), Economic and Monetary Community of Central Africa (CEMAC) and the Economic Community of Western African States (ECOWAS). AU is described as a manifestation of regional diplomacy and one that has borrowed heavily from the European Union model (Rana, 2011)

The AU is presently implementing Agenda 2063, a framework for the socio-economic transformation of the continent over the next 50 years (African Union, no date). Agenda 2063 is founded upon several aspirations. Aspiration 6 is on people centred and inclusive development while Aspiration 7 is for Africa to be a strong, united and influential global player and partner.

The Union has 12 organs. The Assembly is the supreme organ, comprising of Heads of State and Government from all Member States. The African Union Commission

(AUC) serves as a secretariat to the AU. Among other activities, it convenes, together with UNECA, the annual Africa IGF, modelled after the global IGF.

Another organ is the Executive Committee that coordinates and takes decisions on policies in areas of common interest to Member States, considers issues referred to it and monitors the implementation of policies of the Assembly. There are also 14 Specialised Technical Committees (STCs) responsible to the Executive Council. One of the STCs is the Communication and Information Communications Technology (STC-CICT).

The mandate⁷⁶ and activities of the STC-CICT aim to increase access to technology in Africa and promote more use of ICTs in Africa to lessen the digital divide and improve the quality of life for Africans. Some of the reports of this committee are adopted in form of Ministerial Declarations. The Abuja and Oliver Tambo Declarations referred to below are examples of output originating from the STC-CICT. Implementation of the .africa project however is under the AUC Information Society Division.

The next sections relate the source of .africa, beginning with the bidding process under the AUC to the various interventions at ICANN.

⁷⁶ STC-CICT's mandate and activities include to: "Oversee the promotion, co-ordination and the strengthening of CIT programmes for the accelerated economic growth of Africa; Develop mechanisms through which CIT contributes to the establishment of the African information Society; Promote public investments on CIT infrastructure services and applications; and develop frameworks for the harmonization policies and regulations in the Continent."

3.3.2 Call for Expression of Interest

The AUC in May 2011 called for expression of interest (EOI) for a company to run the .africa gTLD as:

“a continental top level domain for use by organisations, businesses and individuals with guidance from African Internet agencies” (AUC, 2011)

This was in line with the Oliver Tambo (2009) and Abuja (2010) Declarations that mandated the African Union Commission (AUC) to:

“set up the structure and modalities for the Implementation of the dotAFRICA project.” (AUC, 2010)

Both declarations were made by the Extra-ordinary Conference of African Union Ministers in charge of Communication and Information Technologies (ICTs) in line with the general objective of using ICTs to help Africa achieve her vision and the Millennium Development Goals.

The EOI required applicants to demonstrate their experience requiring among others:

- i. a detailed company profile indicating verifiable previous experiences within the last three years;
- ii. copies of registration certificates and business licenses; and
- iii. audited financial statements for the past three years (AUC, 2010)

3.3.3 The Two Applicants for .africa

DotConnectAfrica Trust (DCA) is a not-for-profit organisation registered in Mauritius in 2010. It has a registry operation in Kenya. ZA Central Registry (ZACR), is also a not-for-profit company managing the .co.za domain. Although registered in 1998, it has administered the domain since 1995. Also known as UniForum, it applied for the .africa gTLD under the trade name of Registry.Africa.

Before the call for expression of interest, DotConnectAfrica (DCA) had, in August 2009 acquired the AUC's endorsement to apply for .africa gTLD. In the letter, the then AUC Chairperson Jean Ping, expressed willingness to work with DCA to coordinate with African Governments and Ministers (AUC Letter, 2009). However, due to the interest shown by other entities including ZACR, to run the .africa domain, the .africa endorsement came up during the Ministerial meetings in Pretoria and Abuja and subsequently, the AUC put out the call for expression of interest.

3.3.4 Response to EOI

In response to AUC's EOI, three entities publicly declared their interest. African Top Level Domain (AfTLD), a non-profit organization composed of registry operators in Africa in its Annual General Meeting in April 2011 resolved to apply for the AUC endorsement (AfTLD Press Release, 2011). African Registry Consortium (ARC)⁷⁷, an

⁷⁷ Interestingly, ARC was founded by among others Neil Dundas, who was between 2010 and 2014 working for ZACR. He later joined ZACR's dotAfrica project as CEO.

African based registry operator and South Africa's .co.za administrator, ZACR also announced they would bid. AfTLD later threw its support behind ZACR, so did ARC.

DCA did not participate in the AUC process, giving three reasons. First, it perceived that the process would not be transparent or that there would be no accountability. This was because the AUC had not disclosed that it had previously endorsed DCA to apply for .africa. Second, and subsequently, it opined that the EOI process a front to hijack the DCA development. Third, DCA believed that participating in the EOI would be sanctifying what it regarded as an opaque process. (DCA, 2011)

In reality, it would have been very challenging for DCA to emerge as winner against ZACR for several reasons. For starters, ZACR had a good financial standing and had, in addition to .africa, applied for other geographic TLDs, namely: .durban, .joburg, and .capetown. ZACR had also had experience of being Africa's top registry, reaching a million domains in August 2015 (van Zyl, 2015). At any rate, ZACR won over other competing prospective bidders and presently, ZACR's steering committee for the .africa project is composed of two AfTLD members, African Union representatives and other Africans with long experience with ICANN. A former ARC founder is also a senior manager at ZACR.

It is not in the public domain whether DCA and ZACR endeavoured to partner in running .africa at any time.

3.3.5 Terms of Reference

Bidders who expressed interest were required to fill a Request for Proposal (RFP), an AU standard bidding document. The following can be inferred from the RFP:

- a) The RFP was an outsourcing venture as AUC intended to seek a firm to run the .africa gTLD on its behalf. The RFP sought an entity to:

“partner with the [AUC] 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” (AUC, 2011)

- b) The vision for the entity was one that would not only run a revenue generating business but also reinvest proceeds in the African continent.
- c) The roles of the prospective bidder would include running the registry as well as making the policy for the name space.
- d) The winning bidder would also be expected to relate with core African Internet institutions such as Aftld, Afrnic, Afnog and others to enhance linkages in the continent.
- e) Eligibility for the RFP was to:
 - i. Consortium of African Country Codes Top Level Domains (ccTLDs), Registrars, Businesses, Community Organizations or
 - ii. Consortium of African ccTLDs and International Registrars, Businesses, Community Organizations

- f) It would be an added advantage to the bidder if their consortium represented 3 or more African regions.

In February 2012, AUC announced ZACR, the only applicant, as the preferred domain administrator for the upcoming .africa gTLD and related strings such as .afrique and .afrika. (AUC, 2012).

Some questions emerge from this process:

- a) Was AUC fair and inclusive in the selection process for the .africa applicant?
- b) Having selected and thereby endorsed an applicant for the new gTLD application process, what other role should AU have had in the application process?

In many ways, the processes leading to selection of ZACR as AUC's preferred applicant for .africa were top down decisions made in AU circles as opposed to bottom up multistakeholder process. There was not enough consultation of stakeholders such as Af* organisations and the civil society on their role in management of public goods such as .africa or these consultations were not done openly.

Moving forward, there is still opportunity to build a multistakeholder institution to manage .africa along the four point test of meaningful multistakeholderism, to wit: correct stakeholders, balanced participation, accountability and empowerment as espoused by Malcom (2015).

3.3.6 AUC Attempt to Reserve .africa

After AUC's outsourcing process, the AU attempted to have .africa placed in the reserved names list by making a request to the ICANN Board. DCA successfully lobbied against it, asserting that putting the name under reservation would give AUC special legislative protection to decide who manages the domain name while this was ICANN's mandate (DCA, 2012). Those in favour of ICANN's community driven approach have supported this position. Mamadou (2012) for example argues that allowing the reservation would have denied other actors an opportunity to participate in multistakeholder negotiations that are typical of ICANN decisions. It also buttresses the view that allowing .africa into the reserved names list at that point would open the door for other actors to make domain delegation decisions outside of ICANN.

3.3.7 Similar Applications

As described by Hurter and Pistorius (2014), many in the continent expected that the AUC backed ZACR application would be the sole bid for .africa. However, DCA also lodged an application⁷⁸. Being geographical name applications, they were expected to proceed through the following processes:

Process	Other (possible) concurrent processes
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⁷⁸ Initially, DCA applied for .dot africa but this was later amended to .africa after requesting that it be treated as an error. See <http://archive.constantcontact.com/fs053/1102516344150/archive/1110237447043.html> accessed 18 June 2015

Application for the gTLD	Early warning period by GAC Objection period (7months)
(Elective) Withdrawal by applicant who receives early warning	Objection period (7months)
Initial evaluation including review by Geographic Names Panel	GAC advice
Extended evaluation for applicant who does not pass initial evaluation or applicant with early warning who elects to proceed despite early warning	
Board consideration of GAC advice	
String contention procedures in case of multiple similar applications	Dispute resolution
Contract execution for successful string contender or application without string contention	
Pre delegation checks	
Delegation of gTLD	

Table 2: Probable process for the .africa applications

3.3.8 Early Warning

The DCA application received an early warning from AUC on 20th November 2012 from AUC. AUC contended that having been mandated by African governments to establish .africa as a continental domain, it was aware that DCA had not acquired the requisite support of African governments to apply for the domain. The DCA application was also noted to be confusingly similar to the AUC endorsed ZACR's.

DCA however chose to ignore the early warning and proceed with its application. AUC issued the early warning despite being an interested party in the .africa applications, because as observed above, AUC had outsourced the function of applying for .africa to ZACR.

3.3.9 GAC Advice

At its meeting in Beijing in April 2013, GAC gave a consensus advice that the DCA application should not proceed. The import of consensus advice was that it created a strong presumption on the part of the Board that the application should not continue. (ICANN, 2012 v)⁷⁹

The issue of whether the advice was by consensus of all GAC members at the time was disputed by DCA, who produced evidence to show that one GAC members did not agree with the Beijing advice.

⁷⁹ A.G.B 1.1.2.7

3.3.10 Independent Objection

Although the IO did not formally file an objection to the DCA application, he contacted both DCA and ZACR informing them of investigations on potential community objections. In reply, while ZACR opined that indeed there was reason to object, while DCA was of the view that since there were other objections on the application, the IO need not object (DCA Bundle, 2014).

3.3.11 Independent Review

In June 2013, ICANN's new gTLD Programme Committee (NGPC) informed DCA that it had rejected DCA's application. DCA filed a request for reconsideration by the ICANN Board Governance Committee (BGC). BGC declined to reconsider. DCA thereafter entered into the Independent Review Process as provided for under ICANN's By-laws.

Article IV of ICANN's By-Laws provides for accountability and transparency mechanisms including independent review of ICANN's Board's actions or inactions. The procedure as well as the general principles for independent review is anchored in section 3 of Article IV.

Pending constitution of the IRP Panel, DCA wrote to ICANN in January 2014 seeking to place the process of delegation of .africa in abeyance pending the conclusion of the review. ICANN, believing that DCA's IRP was weak opined that holding off the process of delegation would be unfair to the rights of others (ICANN, 2014).

DCA made a request for emergency arbitrator and interim measures of protection especially after learning that ICANN had signed an agreement with ZACR on .africa. The Panel ordered ICANN to refrain from further processing of the .africa applications pending determination of DCA's claims before the IRP. A request by ICANN to reconsider parts of the interim order was denied by the Panel.

The Panel comprised of Prof. Catherine Kessedjian, Hon. Richard C. Neal (Ret.) and Babak Barin who presided. Hon. Richard C. Neal (Ret.) passed away in January 2015 and was replaced by Hon. William J. Cahill (Ret.)

3.3.12 Grounds for Review

DCA instituted proceedings on grounds of discrimination and bias against DCA in processing the two applications. It alleged that ICANN breached its articles of incorporation and its bylaws by:

- a) failing to provide procedural fairness and failing to permit competition for the .africa gTLD; and
- b) giving excessive deference to the GAC, thus failing to "exercise due diligence and care in having a reasonable amount of facts" before it.

DCA therefore wanted ICANN cited for failing to apply ICANN's procedures in a neutral and objective manner and with procedural fairness when it accepted the GAC objection advice against DCA. (IRP, 2015). DCA made the following assertions among others to support the review:

- i. History: DCA had the requisite knowledge and experience to run a gTLD having begun the processes for applying for the .africa domain name in 2007. It had also obtained endorsement from two important public institutions, namely the UN Economic Commission for Africa (UNECA) and the African Union Commission (AUC) and had publicly announced its intention to apply for the .africa gTLD as early as September 2010.
- ii. Conflict of interest: The AUC was competing with DCA for the .africa namespace but was unfair its dealings. This was evidenced by its (unsuccessful) attempt to reserve⁸⁰ the .africa name and the preceding processes in which AUC that led to the appointment of the AUC backed ZACR.
- iii. Bias: ICANN improperly treated the DCA application as evidenced by :
 - a. ICANN's refusal to declare a conflict of interest in the composition of the NGPC whose members included Mike Silber, then treasurer of the ccTLD .co.za which is administered by ZACR and Chris Disspain CEO of a company affiliated with ARI Registry Services, which provided consulting services to the South African Domain Names Authority.
 - b. Use of GAC by AUC to frustrate DCA's application as seen by GAC/AUC's interventions⁸¹ against the DCA application. Relatedly,

⁸⁰ Reserved names are names that are unavailable during this round of applications.

⁸¹ GAC gave an early warning against AUC's application and later gave advice to the Board that DCA's application should not proceed.

DCA alleged a conflict of interest because AUC was an observer and at the same time an applicant in the ZACR application.

- iv. The Independent Objector sought to object to the application outside the objection period and despite other objections. This imputed improper motive as the proposed objection followed an objection raised by interested parties.
- v. GAC's "consensus advice" was not by consensus as Kenya's GAC representative, Mr. Sammy Buruchara had expressed reservation to filing the advice. Despite DCA pointing out these irregularities, ICANN proceeded to heed GACs advice without further investigation or examination by an expert as provided for in the Applicant Guidebook.
- vi. ICANN erred in denying DCA's request for reconsideration despite DCA's claim of a conflict of interest
- vii. DCA had availed itself to the cooperative engagement process⁸² provided for in ICANN's By-Laws but the same had been unsuccessful.

In its responses, ICANN denied the allegations and asserted that:

- i. ICANN had declined to reserved .africa for AU and advised that AU would be afforded available protection for the geographic names.

⁸² The procedure for Independent review provided for in Article IV section 3 in Rule 14 encourages the complainant to enter into a period of "cooperative engagement" with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP prior to initiating the independent review.

- ii. ICANN Board was not privy to the inner workings of GAC including membership status, meetings and voting rights of AUC as that was the prerogative of GAC.
- iii. ICANN Board through NGPC properly accepted GAC advice on the DCA application. NGPC was not required to seek further advice or give reasons for its actions.
- iv. Besides GAC, 16 other African countries objected to DCA's application.
- v. DCA had elected not to participate in AUC's process for selection of the .africa operator.
- vi. ICANN recognised Mr. Michael Katundu as Kenya's GAC representative and not Mr. Sammy Buruchara and therefore accepted GAC's advice as consensus advice. Besides, ICANN noted that the alleged GAC representative according to DCA (Mr. Sammy Buruchara) once served in DCA's board.
- vii. DCA did not have the requisite support of African governments to succeed in its application. During the application period, no country supported DCA.
- viii. The BGC did not need to reconsider the Board's decisions as ICANN had properly acted within the established framework.

3.3.13 Procedural Issues

Before the Panel could hear evidence and make a determination, some of the preliminary issues that came up included:

- a) Whether the decision of the Panel would be binding or advisory: The Panel, noting that the new gTLD application process ousted the jurisdiction of courts ruled that parties would be bound by its decision.
- b) Whether or not witnesses were required to testify in person: ICANN was of the view that it would not be necessary to cross examine witnesses as the IRP was an alternative dispute resolution mechanism. The Panel ruled that witnesses were required to give their statements in person after which the Panel and other party would have the option to ask follow up questions.
- c) Whether interested parties such as the AUC and ZACR could attend the hearing: It was found that since ICANN's IDR provided for IRP as a private process, third parties could not attend unless both parties agreed to have them. DCA was opposed to AUC and ZACR attending.

3.3.14 Relief Sought

After filing of documents by both parties and conducting an in person hearing at Washington DC, DCA sought that a declaration that the Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB) by:

- a) Discriminating against DCA and wrongfully assisting the AUC and ZACR to obtain rights to the .AFRICA gTLD;
 - b) Failing to apply ICANN's procedures in a neutral and objective manner, with procedural fairness when it accepted the GAC Objection Advice against DCA;
- and

- c) Failing to apply its procedures in a neutral and objective manner when it approved the BGC's recommendation not to reconsider the NGPC's acceptance of the GAC Objection Advice against DCA.

DCA prayed to be awarded costs for the review as well as any other appropriate remedy. It also wanted the delegation of .africa to ZACR halted and for ICANN to continue processing its (DCA's) application. DCA sought 18 months to comply with the requirement to get relevant government endorsement and in the alternative, for ICANN to treat its endorsement by UNECA as satisfactory.

ICANN while not opposing the form of the prayers by DCA, was of the view that some of the reliefs sought by DCA were outside the purview of the Panel. For instance, while the Panel could find that the Board erred in its actions and inactions, it could only direct the Board to set aside its decision and reconsider the matter. Any further directions to the Board such as to extend the time for DCA's compliance would be outside the IRP's mandate.

3.3.15 The IRP Decision

The Panel made its final ruling on 9th July 2015 where it declared DCA the prevailing party in the proceedings. It found that ICANN Board had violated its Articles of

Incorporation and By-laws in its handling of the DCA application. Consequently, ICANN was ordered to pay the costs of the IRP.⁸³

ICANN was refrained from proceeding with delegation of .africa to ZACR. In a communication after the ruling, ICANN stated that the DCA application would proceed from initial evaluation stage. (ICANN, 2015)⁸⁴

The IRP decision did not grant DCA the request that ICANN give it 18 months to get government support. Neither did it compel ICANN to accept UNECA's endorsement of DCA as satisfactory to ICANN's requirements for new gTLD applications. It is not probable that the DCA application would pass the test of endorsement or non-objection as it is. However, there exists a window in the provision for documentation for geographic names where the GNP may extend the period for compliance with required documentation. This is however limited to a maximum of 90 days (ICANN, 2012w)⁸⁵

⁸³ This is pursuant to Pursuant to Article IV Section 3 paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules

⁸⁴ In January 2016, DCA sought a temporary injunction to restrain ICANN from delegating the .africa domain to ZACR. This was after DCA was unable to garner support of 60% of African governments as required for geographic TLDs. DCA had been given 90 days to comply with this requirement and the 90 days expired on 28 January 2016. The court declined to grant the injunction as the Applicant Guidebook ousted the jurisdiction of courts in the new gTLD application process. See <https://www.icann.org/resources/pages/dca-v-icann-2016-01-26-en> accessed 28 Jan 2016

⁸⁵ AGB 2.2.1.4.4.

3.4 Conclusion

The independent review of the acts of ICANN in the handling of the .africa applications exposes procedural biases against DCA. It also displays the power of governments through GAC in a multistakeholder engagement, whose use in this case, while public interest, were muddled with a conflict of interest. This is because AUC was a bidder for .africa through ZACR and should therefore not have participated in GAC interventions against the DCA bid for .africa. Some concluding thoughts from this Chapter:

- a) As noted in earlier Chapters, the new gTLD programme had a well thought out process documented in the Applicant Guidebook. From a reading of the Guidebook, the probability of the DCA application succeeding as it was, was very low. This therefore begs the question why the AUC through its influence pulled all stops to kick out the already weak application. If AUC had faith in ICANN, there was a high chance that .africa would have been delegated by now. However, AUC's intense lobbying and invocation of every available avenue against DCA gave DCA a lot of material for its defence against the actions of the Board.
- b) The AUC process for selection of the .africa applicant do not inspire confidence in the intergovernmental organisation. In future, AUC could gain the trust of the multistakeholder community by employing methods that encourage Africans on their chances of succeeding in open AUC processes. This would include for example, divulging the rationale through which decisions on the

.africa application were arrived at. It would also serve Africans to know the terms of the agreement between AUC and ZACR, and disclosure of issues such as the duration of the contract, exit clauses, the consideration expected by either party and revenue sharing terms of the contract.

The question of a balanced relationship between ICANN and governments in the Internet governance multistakeholder ecosystem remains. Governments have an obligation to represent public interest in ICANN and they must remain alive to the interests of other stakeholders. They must as far as possible act in transparency and with fairness. The conflict of interest where AUC, a party with an active new gTLD application participated in actions meant to frustrate the application by another party is undesirable and ought to be avoided in future.

The .africa applications provide important lessons in Internet Governance and contemporary diplomacy. These include transparency and accountability, consensus building, participation in global processes as well as public engagement in important conversations such as the future of .africa.

CHAPTER FOUR: CONCLUSION

4.1 Introduction

This research set to investigate the concept of stakeholderism in ownership and management of public goods, using the .africa case as a study. It started with a discussion of ICANN, the body tasked with management of critical Internet resources such as domain names. It found that ICANN, while very Western in its history, has space for other voices. While it is conceded that ICANN participatory processes are technical and time consuming, Africans can participate more meaningfully in matters that affect them if their capacity is enhanced. There are two applications for the domain and it is up to ICANN to determine the successful one. However, it is upon Africans, particularly the Internet community to shape .africa according to local needs and ensure the success of the domain.

The proposal for this research was based on three questions: under what circumstances DCA would be successful applicant for .africa; the role of the African Union in the .africa application; and lessons learnt from the case. As earlier explained, the Independent Review Panel made its determination during the course of the study. This necessitated a review of the research questions and the study dwelt mainly on the role of Africans in .africa as well as lessons learnt.

As to the role of the African Union, it was established that:

- a) There were not adequate consultations with stakeholders on the .africa domain. For instance, issuing of the letter to DCA in support of DCA's

application was premature as there could have been other interested parties. In any case, this was a decision with huge implications for Africans and more stakeholder input could have been invited. Also, after the bidding process for the .africa applicant, it was obvious that ZACR had not met the prerequisites set out. The Commission could have done more to mainstream registrars in the process and to sensitize them on their role and opportunities for management of the continent's Internet resources.

- b) AUC overstepped its mandate by influencing GAC and the ICANN Board to reject DCA's proposal. From the onset, DCA's application was not strong and was unlikely to pass the evaluation by the Geographic Names Panel, as it did not meet the endorsement or non-objection requirements as set out in the Guidebook. It was therefore unnecessary for AUC to invoke every possible protection under the process. In fact, this over intervention by AUC was among the reasons that the ICANN Board was found not to have acted in fairness in handling the DCA application. Moreover, AUC was a member of the GAC, creating a conflict of interest as AUC had a preferred applicant for .africa.

The lessons for .africa are many. The gTLD has the potential to bring a revolution in online branding in Africa. If a large number of persons, states, corporates and individuals, buy into the domain, the revenue expected is also massive. It behooves the African community to participate in developing the policy for .africa to cover the following areas among others:

- a) How the organisation of .africa will incorporate true multistakeholderism by allowing the African Internet community to participate, in their various stakeholder groups, in policy development and decision making. As was noted above, there are some initiatives in Internet governance at the AU level as well as in the Af* institutions. Indeed, one of the terms in the AUC bid documents was for the bidding organisation to relate to existing Internet governance institutions. Such relation would ideally be along multistakeholder principles such as consultation, working groups, equality in decision making and open structures that allow any of the stakeholders to initiate policy proposals.
- b) Related to multistakeholderism is the issue of governments. States are already organised under the African Union. However, as was described above, states sometimes undertake national processes oblivious of regional initiatives on the same issue. This has been the case for instance with implementation of harmonised ICT policies where some states enact national (inward-looking) legislation, thereby defeating the purpose of harmonisation. For .africa to succeed as a multistakeholder organisation, there would be need for layering of multistakeholderism to ensure that nationals of member states participate in formulating their country positions. In the larger scheme of things, there is need for the AUC to promote multistakeholder consultations amongst its members at national level. This would not only help in shaping a robust .africa policy but also improve African participation in global internet governance fora including ICANN.

4.2 Summary of Recommendations

The following is a summary of recommendations discussed throughout the Chapters:

- a) The Internet is a disruptive technology that requires innovative solutions for its governance. Africans have largely lagged behind in global IG policy development processes but .africa is an opportunity for Africans to chart their own Internet development agenda.
- b) Although the decision as to who will manage .africa lies with ICANN, the African Union and the African Internet community ought to develop the policy for running of a successful domain. Most of the survey respondents were of the view that it is possible to achieve a model domain name through a multistakeholder approach where each group of actors has a role to play in shaping the organisation's policy.
- c) The domain should be run in such a way that all stakeholders participate meaningfully in policy and decision making. It must also be open to new entrants and policy proposals. Additionally, the structures for the .africa organisation must promote and protect openness within all stakeholder groups and meet the proposed four point test of meaningful multistakeholderism that is: correct stakeholders, balanced participation, accountability and ability to implement decisions.
- d) .africa is an occasion for Africans to adapt policies that resonate with the continent's peoples, cultures and heritage. For example, there is an opportunity to create new and innovative modes of protection for community rights while

respecting the global trademark regime. Similarly, there exists a chance for a simplified dispute resolution mechanism and development of African IG experts. Overall, the new gTLD programme requires each domain administrator to create policies for among others WHOIS, rights protection and dispute resolution. Such policies require wide stakeholder input from Africans in the IG community.

- e) .africa is a big deal for among other reasons, it will generate revenue for the continent. While the continent has many competing needs even in the Internet sphere, it would be desirable to use some of the proceeds from this venture to build Africa's capacity so as to participate qualitatively in global Internet governance fora. Such revenue could serve as a complement to donor funding and assist Africans to contribute more meaningfully in shaping their destiny. Funds would also be useful in helping Africans to consultatively develop strategies for African participation in global IG fora. Eventually, it would also build African expertise on Internet governance.
- f) AUC in the bidding documents intimated that the winning organisation would be expected to come up with the policy for .africa. It is imperative that the successful organisation undertakes a consultative policy development process that is open to all interested persons. In the spirit of multistakeholderism, the organisation must create conditions for a consultative and consensus building environment. This would include facilitating the stakeholder groups to develop their policy positions through internal mechanisms. Other factors that would enhance a robust governance model include transparency and

accountability, regional representation and deliberate actions for enhancing the capacity of all stakeholder groups.

- g) ICANN's "New Approach to Africa" is a good strategy for enhancing African participation in ICANN activities. However, a more robust means of meaningful participation in global Internet governance is urgently required for Africa. The African Union as a continental body is well placed to develop a homegrown African IG strategy. It would be desirable that such a strategy be made in a multistakeholder environment so that all actors- government, civil society, academia, the technical community and Internet users- can participate and own the strategy. This would help the continent to generally pull in the same direction in Internet governance discussions. It would also help to anchor .africa policy within a global framework.
- h) There are best practices from other regional TLDs that can be studied to help .africa flourish. For instance, the policy development processes of both .eu and .asia are two models worth considering. The projects that are funded by these regional domains as well as the unique programmes that have been undertaken in those regions may also inspire Africans to design solutions to local challenges in the IG sector.

4.3 Recommendations for Further Study

In the course of the research, some questions that invoke further study emerged. These include:

- a) The conditions that would facilitate a people centred development approach in governance in African IG issues and particularly in management of the .africa gTLD
- b) The Africa Union grievance redress mechanisms, especially for aggrieved non state actors. This would be an important support to the multistakeholder model.

4.4 Concluding Remarks

It is expected that come 2016, the .africa domain name shall be delegated. The celebration of a continental resource for African branding online will only be as meaningful as the degree of participation of Africans management of the domain and the extent to which Africans truly own it. To achieve this calls for deliberate action to open up .africa to quality participation by the multistakeholder community in policy and decision making in .africa.

-END-

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