ICANN | GAC
Governmental Advisory Committee

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Governmental Advisory Committee Comment on Subsequent Rounds for New gTLDs Draft Final Report Public Comment Proceeding

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Introduction

The GAC wishes to thank the Subsequent Rounds of New gTLDs (Subpro) PDP WG for the diligent and tireless effort to draft the Subpro PDP WG Final Report. The GAC is grateful for the opportunity to provide input on the Subpro PDP WG Final Report, in particular on the following topics:

- Predictability
- Registry Voluntary Commitments/ Public Interest Commitments (PICs)
- Applicant Support
- Closed Generics
- GAC Consensus Advice and GAC Early Warnings
- Objections
- Dispute Resolution Procedures After Delegation
- Community Applications
- Auctions: Mechanisms of Last Resort/Private Resolution of Contention Sets

The GAC welcomes further engagement with the Subpro PDP WG.

GAC Comments by Topic (as referenced in Draft Final Report)

- ### Predictability: Topic 2 in Draft Final Report

The GAC appreciates the efforts of the PDP WG to create a Predictability Framework, and notes that some GAC members are still not entirely persuaded of the added-value of creating the new SPIRT structure and therefore wish to reiterate comments raised in the ICANN68 Communique: "*some GAC members raised doubts on the added-value of a SPIRT, and expressed concerns that its creation, if adopted, could add complexity to the current procedure and potential inconsistency with existing roles and responsibilities according to the ICANN Bylaws. It [is] proposed that if established, the new mechanism be lean, inclusive and transparent.*"

The GAC notes that final recommendations were updated by the PDP WG following community input and supports, in principle, Implementation Guidance 2.2 outlined in the PDP WG Final Report which notes that "*the Working Group recognizes the challenges in determining the details of the framework and establishing the SPIRT and therefore emphasizes that implementation of both elements should focus on simplicity and clarity.*"

Additionally, some GAC members would like to ask the PDP WG to further consider what role the GAC would have if the SPIRT is created, noting the idea of a GAC liaison was initially discussed within the PDP WG.

The GAC recommends that any changes made to the new gTLD program should be transparent and shared with community members, in keeping with Implementation Guidance 2.3 noting that "*ICANN Org should maintain and publish a change log or similar record to track changes to the New gTLD Program, especially those that arise and are addressed via the Predictability Framework and the SPIRT*". The GAC finally notes that the annual review of the IRT is very important to ensure revisions and adjustments, and will also contribute to increased transparency.

- **Registry Voluntary Commitments/ Public Interest Commitments (PICs): Topic 9 in Draft Final Report**

The GAC recalls previous GAC ICANN66 Communique Advice to the ICANN Board, whereby "*the GAC advises the Board not to proceed with a new round of gTLDs until after the complete implementation of the recommendations in the Competition, Consumer Trust and Consumer Choice Review that were identified as 'prerequisites' or as 'high priority'.*"

The GAC continues to harbour serious concerns regarding the absence of policy recommendations on DNS Abuse Mitigation in the Subpro PDP WG Final Report, and notes that the WG deems that such future effort should be holistic and must apply to both existing and new gTLDs. On this point the GAC expects swift action from the GNSO Council in triggering such holistic effort, in order for the conditionality expressed in the GAC ICANN66 Communique to be met. The GAC stresses the importance, to address this key issue more effectively, to implement CCT-RT Recommendations, in light of earlier GAC Montreal Advice, before the beginning of the next round of new gTLDs. This should not be postponed. Furthermore, reference to ccTLDs

should be avoided as they do not fall under ICANN's remit but operate under national legislation.

The GAC strongly supports the need for safeguards to address concerns around public interest during the next round of new gTLDs, and expects public interest safeguards for any future rounds. In this sense, the GAC notes that additional mandatory PICs should remain possible in case where unanticipated risks emerge.

The GAC recognizes that the PDP WG has taken into account GAC Beijing Advice in Affirmation 9.3 affirming the framework established by the New gTLD Program Committee (NGPC) to apply additional Safeguards to certain new gTLD strings that were deemed applicable to highly sensitive or regulated industries, creating 10 safeguards of various levels to be implemented among a set of 4 groups.

The GAC also notes that further information should be provided in the implementation phase on the role of the evaluation panel responsible for determining whether each applied-for string falls into one of the four groups, highlighting the need for the process to be inclusive and transparent, and, as outlined in the Final Report, the GAC supports the idea that "*this process must be included in the Applicant Guidebook along with information about the ramifications of a string being found to fall into one of the four groups*."

Consistent with the GAC Montreal Communiqué, the GAC believes that voluntary and mandatory PICs must be effectively enforceable and that this goal should be achieved with clearly expressed contractual obligations and consequences for failure to meet these obligations. Improved clarity for PICs in terms of obligations and consequences will aid ICANN's contractual compliance program in its enforcement of these provisions that safeguard the public interest.

The GAC recalls persistent GAC concerns regarding both the weak implementation of PICs applicable to gTLDs in highly-regulated sectors and the lack of clarity and effectiveness of the mechanism to enforce disputes (the Public Interest Commitments Dispute Resolution Process or PICDRP).

To the extent that any subsequent round includes gTLDs in highly–regulated sectors, the GAC reiterates the advice from the Beijing Communique advocating for safeguards to mitigate the

higher levels of risks of abuse associated with strings in highly-regulated industries, which are likely to invoke a higher level of trust to consumers.

The GAC recommends the incorporation of the GAC advised safeguards regarding highly-regulated gTLDs into the PICs so that applicants for new gTLDs are aware of these requirements in advance.

- **Applicant Support: Topic 17 in Draft Final Report**

The GAC generally supports the final recommendations on applicant support, noting the importance of extending the scope of the program beyond only economies classified by the UN as least developed and also considering the "middle applicant". A suggested approach to benefit the "middle applicant" is to reduce the application fee, not to the extent of the reductions availed to underserved regions, so as to encourage "middle applicants" to cross the threshold in the domain namespace.

The GAC supports recommendations expanding the scope of financial support to also cover costs such as application writing fees among others. The GAC notes that the cost of a new gTLD extends beyond just the application fee to the cost of the application process as well as running a new gTLD. Interested applicants should be provided with a general estimation of fees and cost that would be required by the whole procedure before the filing of the gTLD application.

Furthermore, the GAC urges further consideration on how the Applicant Support Program (ASP) can include the reduction or elimination of the ongoing ICANN registry fees, at least in part, to expand financial support available to eligible applicants, since the Working Group's Initial Report included a preliminary recommendation to this extent which has been removed from the final report.

The GAC highlights the importance of the implementation work as noted in the final report, regarding defining the "middle applicant" and drawing on expertise to develop appropriate program outreach, education and application evaluation.

The GAC agrees, as per the GAC Response to ICANN Board Clarification Questions on the GAC Montreal Communique *"that expanding and improving outreach should be an ongoing effort,*

and expects the Board to make a judgment, in good faith, as to whether it considers outreach has been expanded and improved enough to justify proceeding with the new round of gTLDs."

Outreach efforts regarding financial support and fee reduction should primarily target underdeveloped regions, so as to encourage them to cross the threshold in the domain namespace. Further, the GAC notes that there should be separate outreach activities to target "middle applicants" which are located in struggling regions that are further along in their development compared to underserved or underdeveloped regions, which would focus more on how the new gTLDs may practically benefit them against the more awareness-centric outreach programmes for underdeveloped economies and underserved regions.

The GAC also recommends community based applicants to be eligible to apply for Applicant Support Program, if the community they represent does not have the resources requested to submit an application, regardless of its country of origin.

The GAC also suggests that the ASP can also set up a support system to guide new applicants through the application procedure and deal with all the questions and queries of the applicants about navigating the application process as it can be a daunting task for a first-time applicant.

The GAC supports the intention of the recommendations to continue and to expand the applicant support program, and supports a meaningful evaluation of the program to assess its success.

- **Closed Generics: Topic 23 in Draft Final Report**

The GAC is mindful that the issue of closed generics has generated considerable debate and diverse views. Broadly speaking, while the GAC does not believe closed generics are necessarily inherently anti-competitive, it considers that restricting common generic strings for the exclusive use of a single entity may have unintended consequences, including a negative impact on competition, if appropriate guardrails are not established.

In this respect, the GAC continues to support the retention of the advice contained in the GAC Beijing Communique whereby "*exclusive registry access should serve the public interest goal*" and that adequate means and processes are defined to ensure that public interest goals are

met. The burden of demonstrating the public interest benefit of a closed generic string should rest with the applicant and be subject to comments during the review process.

As no agreement has been found yet within the PDP WG, the GAC encourages further discussions to identify criteria as to how to assess "public interest" within closed generic TLDs.

In this sense, the GAC, recognizing that the PDP WG has not been able to agree on how to treat closed generic TLD applications in future rounds, has taken note of the three proposals submitted by individual/small groups of PDP WG Members:

- A Proposal for Public Interest Closed Generic gTLDs (PICG TLDs), submitted by Alan Greenberg, Kathy Kleiman, George Sadowsky, and Greg Shatan
- The Case for Delegating Closed Generics, submitted by Kurt Pritz, Marc Trachtenberg, Mike Rodenbaugh.
- Closed Generics Proposal, submitted by Jeff Neuman in his individual capacity.

Regarding these proposals, the GAC is not in a position to support "The Case for Delegating Closed Generics", which would allow all closed generics being delegated, and finds common ground in the other two proposals. The GAC notes that the "Proposal for Public Interest Closed Generic gTLDs", which includes a new category of new gTLDs - Public Interest Closed Generic Strings (PICGS) - is aimed to operate within a public interest framework directly in response to the GAC Beijing Advice, and notes that the suggestion of a public interest closed generic review panel and creation of public interest closed generic would require further community work, in order to minimize added complexity and avoid undue overlap with community status applications. The GAC encourages the continued consideration of this proposal together with the "Closed Generics Proposal", both proposals having found explicit support in the GAC.

Regarding the "Closed Generics Proposal" the GAC finds value in the notion of creating a Framework for Evaluating Closed Generic applications to determine whether those applications serve a legitimate public interest goal.

- **GAC Consensus Advice and GAC Early Warnings: Topic 30 in Draft Final Report**

The GAC reiterates that GAC Early Warnings and GAC Advice are useful instruments to identify applications that raise public policy concerns and should be an integral part of any future rounds. The GAC remains open to increasing transparency and fairness of these, including giving applicants an opportunity for direct dialogue with the GAC. In this sense, the GAC sees value in the recommendations regarding specified time periods for early warnings, direct dialogue between the early warning issuing government and the applicant, and the opportunity for the applicant to amend its applications based on those consultations.

The GAC believes that early warnings are a useful mechanism for beginning a discussion with an applicant on particular issues, questions and potential sensitivities by one or more governments, where an application may potentially infringe national laws or raise sensitivities. Constructive dialogue through this process can help applicants better understand the concerns of governments and help governments better understand the planned operation of proposed gTLDs. GAC Early Warnings may help the applicant to know how it can mitigate concerns and find a mutually acceptable solution.

The GAC hence considers an early warning mechanism an essential element of any future round.

However, the GAC does not consider that the PDP should make recommendations on GAC activities which are carried out in accordance with the ICANN Bylaws and the GAC's internal procedures.

In this regard, the GAC does not support:

- PDP WG recommendations limiting the scope of GAC advice. In particular, the GAC does not support PDP WG recommendation 30.3 requiring that if GAC advice is "based on public policy considerations, **well-founded merits-based public reasons must be articulated**", and considers that no additional requirements on what is established in the Bylaws regarding GAC Advice can nor should be established through policy recommendations. In this sense, current Bylaws (Section 12.3) already prescribe that the GAC, as any advisory committee, needs to provide a rationale, a requirement which the GAC has been abiding by consistently since the Bylaws change in 2016. The rationale provided by the GAC is based on its role under the Bylaws to "consider and provide

advice on the activities of ICANN as they relate to governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues", without any need to add any further requirements through policy.

- The PDP WG recommended limitation (Implementation Guidance 30.2) regarding the timing of GAC Consensus Advice on future categories of TLDs and particular applications, oriented to discentivizing any such Advice being submitted after the finalization and publication of the next Applicant Guidebook.

Regarding Recommendation 30.4, some GAC Members continue to consider that the Bylaws changes from 2016 did not introduce any modification to the section on GAC Advice which would require a change of the language included in Section 3.1 of the 2012 Applicant Guidebook which states that GAC Consensus Advice *"will create a strong presumption for the ICANN Board that the application should not be approved"*. In the opinion of said GAC Members this language was part of a delicate compromise during the 2012 round preparations and should therefore be maintained. Finally, said GAC Members consider that the possibility of maintaining a dialogue with the concerned applicant is not hampered by this language, considering that recommendation 30.7 of the PDP WG establishes ways and means to conduct such a dialogue even in the case of GAC Consensus Advice objecting to an application.

Regarding Recommendation 30.6, the GAC agrees with the PDP WG notion that a GAC Early Warning should be explained and that in order to ensure constructive dialogue at an early stage of the procedure and mitigate these concerns it is important for Government(s) issuing Early Warning(s) or the GAC in its advice to provide a written explanation/rationale. However the GAC wishes to note that applications may not always be able to be remedied in the opinion of the Government(s) issuing a GAC Early Warning. Therefore, the GAC proposes updated language to Recommendation 30.6 as follows: "[...] how the applicant may potentially address the GAC member's concerns to the extent feasible". Regarding recommendation 30.7, the GAC agrees that an application should be able to proceed if the concerns raised in the GAC Early Warnings and/or GAC Advice have been suitably addressed. In case a mutually acceptable solution cannot be found the provisions from Section 3.1 of the 2012 Applicant Guidebook should apply.

- **Objections: Topic 31 in Draft Final Report**

Regarding Affirmation 31.1, the GAC notes that the Paris convention protects not only trademarks but also abbreviations or names of international intergovernmental organizations. In addition, some GAC members believe that it is important to consider the issue of protecting names derived from geographical indications and designations of origin for agricultural products and foodstuffs (Controlled designation of origin (DOC), Protected designation of origin (DOP), Protected Geographical Indication (IGP)). These GAC members believe that such names can represent a very important part of the cultural heritage and the identity of a Nation in the world and, not the least, large economic and strategic resources for the home country.

- **Dispute Resolution Procedures After Delegation: Topic 33 in Draft Final Report**

With regard to the Public Interest Commitments Dispute Resolution Process (PICDRP), the GAC has expressed concerns that the PICDRP is "*complex, lengthy, and ambiguous raising questions as to its effectiveness in addressing serious threats*." (See ICANN GAC (2014), "London Communiqué" and ICANN GAC (2015), "Singapore Communiqué." This process must be clarified and improved in order for the PICs to become effective and enforceable.

- **Community Applications: Topic 34 in Draft Final Report**

The GAC supported the proposals in the Sub Pro PDP WG Initial Report for procedures to deal with community-based applications, as consistent with previous GAC advice. Additionally, the GAC notes that PDP WG final recommendations support the GAC's opinion that evaluators should also have necessary expertise in the field of communities and additional resources at their disposal to gather information about a Community Priority Evaluation (CPE) application and any opposition to that application.

PDP WG final recommendations include measures for improved transparency and predictability, aligned with concerns expressed by the GAC regarding the need for greater consistency in the CPE process, and the establishment of an appeals mechanism for the New gTLD Program. The GAC supports the recommendations to improve the community priority evaluation process, particularly with regard to predictability and transparency. In this sense, the GAC supports recommendation 34.2, noting that the Community Priority Evaluation (CPE) process must be efficient, transparent and predictable, which aligns with previous GAC advice.

The GAC notes that consideration should be given to providing support for non-profit community-based applications, which is not included in the final recommendations.

As CPE Guidelines are still being considered by the PDP WG, the GAC encourages the GNSO to improve the CPE process in order to address important shortcoming/uncertainties such as effectiveness, predictability, transparency and independent appeal mechanism.

As for the improvement of information gathering, the GAC appreciates the possibility of a written dialogue between applicant and evaluator but believes it is important that evaluators should also have necessary expertise in the field of communities and additional resources at their disposal, as expressed in ICANN67 Communique.

The definition of "community" would deserve clarification as well as the criteria to be qualified as such. The GAC encourages the consideration of measures to ensure more grassroot participation and expertise, in evaluation panels, in order to improve their understanding about how different "communities" are recognized, organized, administered or developed. The GAC also encourages that recognition of communities as such by regional and/or international institutions dealing with the relevant subject matter (e.g. UN ECOSOC for civil society, IOC for sports, ICRC for humanitarian organizations, etc.) is considered. The GAC further notes that special consideration should be given to marginalized groups, such as linguistic, cultural, ethnic minority groupings, "traditional knowledge" and "Indigenous Communities", and to civil-society advocacy groups, defined as CHR (Community Human Rights based). It is noted that some of the criteria of the CPE were not applicable to these specific communities in previous rounds and scores need to be rebalanced in order to eliminate possible penalization.

The GAC agrees that evaluators ought to be permitted to undertake some level of independent research to verify the veracity of statements made by the applicant in applications. However, such research should not be limited to information available on the Internet, but should include consultation with a subject-matter or community expert, including direct dialogue with the applicant to ensure best possible understanding of the application documentation.

The GAC further agrees that applicants should be given reasonable access to recourse against unfair determinations, but subject to checks against frivolous appeals.

- **Auctions: Mechanisms of Last Resort/Private Resolution of Contention Sets: Topic 35 in Draft Final Report**

While the GAC acknowledges that, in an attempt to reduce potential gaming, the PDP WG recommendation 35.3 includes the need for applications to be submitted with a "bona fide" intention to operate a TLD, the GAC recommends further discussion on how this intention will be ensured and implemented, and notes that punitive measures for non compliance or submission of a "bona fide" intention are not sufficiently defined. The GAC expresses concerns on whether the "bona fide" intention and Contention Resolution Transparency Requirements sufficiently answer the ICANN Board concerns relative to the permission of private resolutions (including auctions) as a mechanism to resolve string contention.

Regarding Auctions of Last resort, the GAC reaffirms its view that they should not be used in contentions between commercial and non-commercial applications, and reiterates that private auctions should be strongly disincentivized.

Other Comments

The GAC reviewed Annex I - Work Track 5 Final Report on Geographic Names at the Top Level, and considers the Work Track 5 results to be a compromise solution.

Some GAC Members noted that the GAC should be involved as early as possible in the application process concerning geo TLD applications. Said GAC members, regarding the Implementation phase, recall GAC input in the ICANN66 Montreal Communique noting that "*in order to facilitate the processing of future applications for gTLDs [...] many GAC members expressed interest in the development of a tool that would provide timely notifications to GAC members of strings that consist in geographic names , drawing inspiration from the existing tool for the 2-character codes*".

Other GAC members consider that there may be difficulty in implementing such a tool in a way that could address names that occur in multiple jurisdictions or which are considered generic.

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