

Briefing for Board-GAC Consultation Call: ICANN77 GAC Advice

Tuesday 3 September 2024, 13:00-14:30 UTC

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1. Context

The ICANN Bylaws require the Board to take into account public policy advice from the GAC when formulating and adopting public policy matters. (Art. 12, Sec. 2.2(x)). When the Board intends to take an action that is inconsistent with GAC advice, the Bylaws and other ICANN governing procedures, including the GAC Operating Principles, establish a consultative process between the Board and the GAC to find a mutually acceptable solution. At the core of the consultative process is the requirement that the Board notify the GAC when it intends to take an inconsistent action and explain why it is doing so. Additionally, the GAC and the Board must engage with each other in good faith to try to find a solution to their differences. If in the end the Board and the GAC cannot find a solution, the Board is required to explain in its final decision why it is not following the GAC's advice.

2. Purpose and remit of the GAC-Board consultation call

The Board-GAC consultation call on 3 September (13:00-14:30 UTC) is intended to satisfy the requirement in the [Process for Consultations between the ICANN Board of Directors \("Board"\) and the Governmental Advisory Committee \("GAC"\)](#) for the Board and GAC to have a Bylaws Consultation in the event that the Board determines, through a preliminary or interim recommendation or decision, to take an action that is not consistent with GAC advice. At issue in this Bylaws Consultation is item 1.a.i of the GAC's advice from its [ICANN77 Communiqué](#).

"To take steps to avoid the use of auctions of last resort in contentions between commercial and non-commercial applications; alternative means for the resolution of such contention sets, such as drawing lots, may be explored."

The [Board resolved](#) that it "intends to take an action that is not consistent or may not be consistent with [the Washington advice] and hereby initiates the required Board-GAC Bylaws Consultation Process."

The Board noted in its [rationale](#) "that ICANN org does not review business plans as part of the gTLD application process and that there would be numerous challenges in establishing a method for evaluating such plans for a commercial vs. noncommercial status."

The Board's understanding is that concerns that the GAC tried to address with its ICANN77 advice are related to well-resourced applicants (referred to by the GAC as "commercial") being likely to outbid less-well-resourced ("noncommercial") applicants in an auction scenario. Therefore, this consultation call is intended for the Board and GAC to focus on whether there are measures to reduce the likelihood of such a scenario in relation to relevant Board-adopted policy recommendations and applicable GAC advice, and also avoid inconsistencies, where possible, with [SubPro PDP Working Group](#) discussions noted in the [Final Report](#). The August

2024 [community discussion](#) on contention set resolution was held also to inform this Bylaws Consultation.

3. Possible solutions¹

The following program design elements have been identified as possible options for discussion to address some of the GAC's concerns around well-resourced and less-well-resourced applicants resolving contention in a way that favors the well-resourced one.

- **Prohibit private auctions**
- **Reduce likelihood of contention sets being formed**
- **Use a methodology other than an auction to resolve contention.**

a. Prohibit private auctions

On 29 July 2024, the [Board adopted](#) the scorecard titled "[GAC Advice – ICANN80 Kigali Communiqué: Actions and Updates \(29 July 2024\)](#)", which states: "The ICANN Board accepts this advice to prohibit the use of private auctions in resolving contention sets in the Next Round of the New gTLD Program. The Board notes the GAC's advice is related to private auctions only, and that acceptance of this advice would not preclude the use of other forms of private resolution, such as joint ventures."

Private auctions will not be permitted during the Next Round and this will be clearly indicated in the Next Round's Applicant Guidebook.

b. Increasing the chances that applicants secure a desired string

Use of an Alternate String

An alternative to allowing string changes as described above is to give applicants the option to submit an alternate string as part of their application. Applicants could either submit one (primary) string, which cannot be changed, or opt to submit an additional (alternate) string. Before reveal day, ICANN org would determine which applied-for strings are identical. If an applicant's primary string is identical to another, they would be moved to their alternate string. Whether this is automatic or a post-reveal day choice is to be determined.

This switch to the alternate string would only occur if it does not create a new or add to an existing contention set.

c. Raffle

¹ This section lays out some options and is intended for the discussion. The options presented should not be considered as a limitation to the discussion and possible solution.

i. Precedent

In the 2012 round, ICANN held a "Prioritization Draw" to assign priority numbers to all new gTLD applications. Each application was assigned a randomly-drawn priority number. The priority numbers were used to determine the order in which initial evaluation results are released. Only those Applicants who purchased a ticket were able to participate in the Draw. The Draw was intended to be conducted in accordance with applicable laws and regulations, including - but not necessarily limited to California Penal Code, Section 319-329. The GAC, and others in the community, have raised the possibility of potentially using a similar draw or raffle to resolve contention.

If raffles were used to resolve contention sets, each applicant could only buy one raffle ticket - as there would likely be a run on raffle tickets for highly desirable strings as applicants try to maximize their chances of winning by buying multiple tickets, and buying multiple tickets would favor well-resourced applicants.

ii. Not aligned with another part of ICANN77 GAC advice

The GAC has advised the Board to "ban or strongly disincentivize private monetary means of resolution of contention sets, including private auctions."² With the resolution of contention via a raffle being a matter of chance (assuming no one manages to game the rules, see below), the likelihood of using private resolutions (via joint ventures) would be incentivized, especially for well-resourced applicants. For example, if an applicant's chances are 50%, 33% or even lower of prevailing in a raffle, and they have resources at their disposal, an applicant may be incentivised to use the joint venture mechanism to resolve the contention using - possibly significant - side payments.

iii. Wrong incentives

If only one raffle ticket per application is permitted, this could incentivise well-resourced applicants to apply for the same string multiple times. Depending on how much an applicant values the string, some applicants may decide to put forward dozens of applications for the same string. While a rule could be introduced to limit every applicant to just one application per identical string, this could incentivize applicants to create shell companies and/or submit applications with near identical strings so that they would likely be in contention after the string similarity review. So, raffles may increase the opportunities for well-resourced applicants to game the system to their advantage.

iv. May raise wider concerns

Relying on chance to resolve contention sets may be seen as inconsistent with ICANN's obligation to preserve "the stable and secure operation of the Internet's unique identifier systems [...]". Also, the fact that ICANN would be raffling off gTLDs, some of which may

² See [ICANN77 Washington D.C. Communiqué](#), p.12.

be considered worth (tens of) millions of dollars, could raise concerns beyond the ICANN ecosystem, including national regulators and media.

v. Does not align with SubPro PDP Working Group deliberations

The [SubPro PDP Working Group](#) discussed how to resolve contention sets. Several ideas were deliberated, including using a sealed-bid auction method and organizing a raffle. Ultimately there was no consensus among the community to recommend any change to the 2012 second-choice ascending-clock methodology.³

³ For more details on the 2012 auction methodology, please see <https://newgtlds.icann.org/en/applicants/auctions>.

4. Overview Table of possible solutions

a. Increasing the chances that applicants secure a desired string

<i>Possible adjustment</i>	<i>Impact</i>	<i>Pros</i>	<i>Cons</i>
Provide applicants with the option to submit an alternate string at the time of application.	<ol style="list-style-type: none"> 1. Would likely reduce the number of contention sets formed. 2. Would provide especially less-well-resourced applicants with the opportunity to make a strategic decision about their alternate string to be near certain to evade contention. 3. Would lead to fewer funds going to ICANN's 'auction fund'. 4. Would likely increase the number of gTLD allocated in the Next Round. 	<ol style="list-style-type: none"> 1. Aligns with GAC advice. 2. Would provide applicants with an easy, low-cost option to increase the likelihood that they evade contention. 3. Likely reduces somewhat the number of objections, the use of PICs, and the overall risks of the program. 4. Likely somewhat reduces the number of objections, the use of PICs, and the overall risks of the program. 	<ol style="list-style-type: none"> 1. Some may argue this does not align with the intent of policy recommendation 20.8 and the rationale provided in the accompanying rationale. 2. Could be perceived as too complex.

b. Use a charitable raffle

<i>Possible adjustment</i>	<i>Impact</i>	<i>Pros</i>	<i>Cons</i>
Make an implementation decision to use a charitable raffle to resolve contention sets that are not resolved via the alternate string (if applicable) or the formation of a joint venture.	<ol style="list-style-type: none"> 1. Would lead to no funds going to ICANN's 'auction fund'. 2. Would turn the assignment of names and numbers into a matter of luck. 	<ol style="list-style-type: none"> 1. Would, on the face, remove financial resources as a determinant of whether an applicant is more or less likely to prevail in a contention set (see Cons). 	<ol style="list-style-type: none"> 1. Well-resourced applicants may be incentivized to game the system by, for example, submitting multiple applications, making side payments, etc. 2. Raffles may instead increase the opportunities for well-resourced applicants to game the system to their advantage. 3. Relying on chance to resolve contention sets may be seen as inconsistent with ICANN's obligation to preserve“ the stable and secure operation of the Internet's unique identifier systems [...]”. 4. The PDP Working Group did not reach consensus to recommend a change to the 2012 second-price ascending clock methodology.

4. Background information

4.1. Advice, Board Action and correspondence that is relevant to the upcoming dialogue

a. Excerpts from [ICANN77 \(Washington DC\) Communiqué](#)

GAC Advice: “To take steps to avoid the use of auctions of last resort in contentions between commercial and non-commercial applications; alternative means for the resolution of such contention sets, such as drawing lots, may be explored.” (p.12)

GAC Rationale: “While the GAC acknowledges that, in an attempt to reduce potential gaming, recommendation 35.3 of the [SubPro PDP Working Group](#) Final Report included the need for applications to be submitted with a “bona fide” intention to operate a TLD, the GAC reiterates concerns regarding the implementation of this condition, and notes that punitive measures for non compliance with the condition of submission of a “bona fide” intention are not sufficiently defined. Regarding Auctions of Last Resort, the GAC reaffirms its view that they should not be used in contentions between commercial and non-commercial applications. In addition the GAC reiterates that private monetary means of resolution of contention sets should be banned or strongly disincentivized, to prevent applications under false pretenses for monetary gain. Other means, like drawing lots, may be used to resolve contention sets. The GAC supports [ALAC's view expressed in its advice to the ICANN Board](#) noting that they believe there “should be a ban on private auctions” and that “by mandating ICANN only auctions, the proceeds of any such ICANN auctions can at least be directed for uses in pursuit of public interest, such as was determined through the CCWG on Auction Proceeds.” (p.12)

b. Excerpts from Board [resolution from 8 June 2024](#)

“Resolved (2024.06.08.15), the Board has determined that it intends to take an action that is not consistent or may not be consistent with GAC Consensus Advice item 4.a.i. in the Washington, D.C. Communiqué concerning Auctions: Mechanism of Last Resort/Private Resolution of Contention Sets, and hereby initiates the required Board-GAC Bylaws Consultation Process. The Board will provide written notice to the GAC to initiate the process as required by the Bylaws Consultation Process.”

Board Rationale: “Specifically, the Board notes concerns with the feasibility of implementing the GAC's advice. The GAC clarified in the Board-GAC exchange of 28 July 2023 that the advice is regarding features of the application, including the applicant's business plan, rather than the applicant's legal entity (e.g., a for-profit vs. non-profit status). However, the Board notes that ICANN org does not review business plans as part of the gTLD application process and that there would be numerous challenges in establishing a method for evaluating such plans for a commercial vs. noncommercial status. Additionally, the Board notes concerns related to potential legal prohibitions against the use of “drawing lots” as a method of resolving contention, as such methods for choosing “winners” may not be within the bounds of California law. Finally,

the Board notes that the use of "drawing lots" is also not supported by or consistent with the [SubPro Final Report](#) recommendations and therefore the current plans for implementation of these recommendations may not be consistent with the GAC's advice."

c. Excerpts from [ICANN80 \(Kigali\) Communiqué](#)

Advice: "To urgently initiate a focused community-wide discussion (including with the GAC and ALAC) on the resolution of contention sets, with a view to finding alternatives to private auctions and ICANN auctions of last resort, before the ICANN Board takes any action in a manner that may be inconsistent with the ICANN77 Washington D.C. Communiqué GAC Consensus Advice." (p.11)

d. Excerpts from [Letter from Sinha to Caballero](#) (1 July 2024)

"[...] the Board has concerns about the timeline implications with respect to the GAC's advice to:

"[U]rgently initiate a focused community-wide discussion (including with the GAC and ALAC) on the resolution of contention sets, with a view to finding alternatives to private auctions and ICANN auctions of last resort, before the ICANN Board takes any action in a manner that may be inconsistent with the ICANN77 Washington D.C. Communiqué GAC Consensus Advice." The Board notes that this issue was discussed at length during the Subsequent Procedures Policy Development Process ([SubPro PDP](#)). Despite extended consideration of this issue, the [SubPro PDP Working Group](#) was unable to achieve consensus on the matter, and the Board is not confident that additional community discussion on this topic will result in a different outcome. To minimize the impact of this advice on the Next Round timeline, and in light of the pending Board-GAC consultation, the Board intends to run these processes in parallel, with the expectation that one may inform the other. Accordingly, the Board will hold, as a matter of priority, a series of virtual webinars with the community to discuss the GAC's advice and options for the resolution of contention sets and, simultaneously, engage in the Bylaws-mandated Board-GAC consultation. The Board understands that this may require the process to move more quickly than what would typically occur, e.g., waiting for four to six weeks to conduct a Board-GAC clarification call, followed by development of a final scorecard one month prior to the next face-to-face meeting. However, the Board believes that staying with the typical timeline for addressing GAC advice and holding the Board-GAC consultation after any action by the Board on the advice could risk a delay to the New gTLD Program overall."

e. Excerpts from [Letter from Caballero to Sinha](#) (8 July 2024)

"The GAC recognizes and greatly appreciates the Board's support for prohibiting private auctions in the next round of the new gTLD program, while understanding the Board is considering taking steps which may be inconsistent with the ICANN77 GAC advice on the overall matter (per the 8 June 2024 ICANN Board Resolution). The GAC is awaiting written notification of this Bylaws-mandated consultation process to identify appropriate next steps. The GAC would like to further reiterate its understanding that this topic was thoroughly discussed during the Subsequent Procedures Policy Development Process ([SubPro PDP](#)), where unfortunately no satisfactory solution could be found. It is important to recall that the GAC

provided extensive written input on this topic to the [SubPro PDP Working Group](#) and to the Board in [2020](#) and [2021](#). The content of the [ICANN80 GAC advice](#) fundamentally is a reiteration of strong continued government concerns with the use of private auctions and on using ICANN auctions in contention sets between commercial and non-commercial entities. As such, on private auctions, the GAC seeks, consistent with its advice, a firm commitment or Board resolution that private auctions will not be allowed in the next round of new gTLDs and memorializing such a commitment in the Applicant Guidebook (AGB), with clear consequences for non-compliant applicants. The GAC recognizes and appreciates that the Board letter presents a possible way forward to its advice to “urgently initiate a focused community-wide discussion (including with the GAC and ALAC) on the resolution of contention sets, with a view to finding alternatives to private auctions and ICANN auctions of last resort, before the ICANN Board takes any action in a manner that is inconsistent with the ICANN77 Washington DC Communiqué GAC Consensus Advice” by proposing to hold a community-wide dialogue in parallel to the Bylaws-mandated Board/GAC consultation process regarding the ICANN77 advice. On this, the GAC would like to flag that substantive discussions in the Board/GAC consultation process would need to await the results from the community wide dialogue to avoid prejudging the outcome of this [community consultation](#). In this sense, the GAC considers that such dialogue should, amongst other things, consider the alternative auction mechanisms being proposed by ALAC in its latest Advice to the Board on the matter, which could serve as a basis for a new system of ICANN auctions of last resort in the forthcoming round, which would be more responsive to the concerns raised by the GAC since 2020.”

f. Excerpts from [Letter from Sinha to Caballero](#) (23 July 2024)

“The Board plans to accept this Advice during its 29 July 2024 meeting, directing ICANN org to facilitate and moderate the community-wide discussion using two 90-minute webinars concluding no later than 23 August 2024 (see rationale in the risk factor below). ○ During its July 2024 meeting, the Board also plans to direct ICANN org to prepare a framework paper on private auctions and auctions of last resort and share the document with the community to inform the community-wide discussion. ○ During its Workshop from 6-8 September, 2024, the Board plans to review the outcome of the community-wide discussion and provide ICANN org with any necessary direction on the implementation for the resolution of contention sets.”

4.2. Community Discussion on Contention Set Resolution

a. Context

Following direction from the ICANN Board, ICANN org facilitated two two-hour community discussions on 13 and 14 August 2024. The goal of this discussion was to consider which mechanisms could be established for the resolution of contention sets in the next round of new gTLDs, considering that any proposal should be consistent with existing policy, operationally viable, agreeable to the community, and not have an impact on the current implementation timeline. To ensure the concerns expressed in the ICANN80 Kigali Communiqué and related [GAC](#) and [ALAC](#) Advice, the discussion was structured to focus on two issues related to the resolution of contention sets:

1. Alternatives to private auctions for the voluntary private resolution of contention sets by applicants, and
2. Alternatives to the ICANN auction of last resort as the mechanism to resolve contention sets in the absence of any private resolution.

b. Discussion Summary

- Participants noted that the method to resolve contention should not inherently favor those applicants with the largest financial resources.
- Support for adopting a sealed bid, second-price (Vickrey) auction method to resolve contention.
- Support and opposition to allowing string changes to resolve contention.
- Support for a charitable raffle to resolve contention - using the same methodology that was used to determine priority during the 2012 round.
- A significant number of participants suggested exploring the possibility for the Board to undo its adoption of Recommendation 20.6 which allows the formation of joint ventures to resolve contention, in order to minimize gaming opportunities and further minimize the opportunities for private resolution of contention sets.
- Concerns from participants that ICANN should minimize the amount of proceeds it receives from contention set resolution.

c. Read-Out and Recordings

Read-Out: <https://community.icann.org/x/vwGxFQ>

Recording 13 August 2024: <https://community.icann.org/x/wgGxFQ>

Recording 14 August 2024: <https://community.icann.org/x/zAGxFQ>