GAC/ICANN Board Communique Clarification Call - ICANN77 Communiqué
28 July 2023 - 1600 UTC

In the spirit of issue spotting and candid information exchange, these high-level summary notes are intended to reflect the general nature of the discussion during the GAC/ICANN Board Communique Clarification Call - ICANN77 Communique. Certain specific aspects of the meeting discussions are provided to enable understanding of the flow and context of the discussions.

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I. Introduction

Tripti Sinha (ICANN Board Chair) welcomed all participants, noted the importance of discussing advice from the most recent GAC communiqué and recalled that the ICANN Board takes GAC advice very seriously. In this context, the ICANN Board seeks to secure a clearer understanding of the advice before addressing it. Regarding the 7 topics under Issues of Importance in the GAC Washington D.C. Communiqué, these are expected to be the subject of another GAC/Board call before ICANN78.

Nicolas Caballero (GAC Chair) welcomed participants and recognized the impact of the schedule time for many GAC members, especially in Asia, Africa and Europe. Recalling the recent history of policy developments regarding future rounds of New gTLDs, he stressed that this matter requires careful consideration by, and collaboration among governments given its impact on the public interest and international law. He further suggested that discussions such as this are needed to ensure a successful implementation and operation of the New gTLD program with consideration of all GAC questions and concerns.

Becky Burr (ICANN Board) reminded everyone that this is a regular and very important call which enables the ICANN Board to finalize its response to GAC Advice. In these constructive calls, she reiterated that the Board seeks to ensure it understands the Advice, and is eventually able to respond with precision.

II. Clarifying Discussion On GAC Advice regarding Predictability in New gTLD Applications

<u>GAC Advice §1.a.i</u>

    a. *The GAC advises the Board:*

        i. *To take steps to ensure equitable participation in the proposed Standing Predictability Implementation Review Team (SPIRT) by all interested ICANN communities, on an equal footing.*

> **<u>Board Clarifying Question(s):</u>**
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> Given that the GNSO Council will charter the SPIRT, what actions or contributions does the GAC recommend the Board should undertake, given the GNSO's remit in this matter?.

<u>Discussion</u>

Becky Burr noted that the ICANN Board certainly understands the importance of predictability in the New gTLD application process, and the interest of the GAC, as well as other parts of the ICANN community, in this matter. She recalled that the GNSO Council will be the chartering organization for the Standing Predictability Implementation Review Team (SPIRT), and called for input in response to the Board's clarifying question.

Kavouss Arasteh (Iran) suggested that one expectation is for the ICANN Board to convey GAC views to the GNSO.

Jorge Cancio (Switzerland) highlighted that while the SPIRT will be chartered by the GNSO, it is embedded in a conversation about the implementation of the frameworks governing the next round of New gTLDs. Noting that ICANN org is expected to participate in the SPIRT, and that there is some level of connection between the SPIRT and ICANN Board, he clarified that the GAC expects that its view be conveyed, that there should equitable representation of the GAC within the spirit.

III. **Clarifying Discussion On GAC Advice regarding Registry Voluntary Commitments (RVCs) / Public Interest Commitments (PICs) in New gTLDs**

<u>GAC Advice §2.a.i</u>

    a. *The GAC advises the Board:*

        i. *To ensure that any future Registry Voluntary Commitments (RVCs) and Public Interest Commitments (PICs) are enforceable through clear contractual obligations, and that consequences for the failure to meet those obligations should be specified in the relevant agreements with Contracted Parties.*

    <u>*RATIONALE*</u>

    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 resolve disputes (the Public Interest Commitments Dispute Resolution Process or PICDRP) and recommends that these issues are remedied in any subsequent rounds.

> **Board Clarifying Question(s):**
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> 1. The Board has not yet resolved on the recommendations that pertain to PICs/RVCs. Can the GAC provide more information on its stated concerns of "weak implementation" and where there is a "lack of clarity and effectiveness" relating to the PICs within the 2012 round, so that the Board can better understand the rationale supporting this advice?

2. The Board notes that enforceability of PICs cannot be made consistent with the Bylaws merely by adding PICs to contracts. There are two concerns regarding the enforceability of PICs - those being whether the PIC is allowable under the Bylaws and whether the contractual language is enforceable.

Discussion

Becky Burr assured that the ICANN Board is absolutely in lockstep with the GAC in that if a Registry Voluntary Commitment is added in a contract it has to be both practically enforceable and enforceable under the ICANN bylaws. She noted that the ICANN Board is still working through the implications of this principle. Specifically, the Board is concerned that commitments made by applicants could be challenged and invalidated for inconsistency with the Bylaws which provide that ICANN should not act outside of its mission. The ICANN Board will be initiating a conversation with the ICANN community on this issue after the Board's summer break. In the meantime, acknowledging concerns expressed by the GAC regarding the implementation and lack of clarity and effectiveness of PICs in the 2012 round of New gTLDs, she asked for more information and specific examples to assist the Board's consideration of these matters.

Nigel Hickson (United Kingdom) recalled productive discussion of this matter between the GAC and the Board in Washington D.C. and noted the Board's understanding then of the GAC's concerns, and its consideration of ways for addressing those concerns. He suggested that the GAC could follow-up on this conversation at a later time and potentially provide some examples.

Jorge Cancio trusted the Board's awareness of the GAC's desire to be involved in the discussion of potential bylaw changes to ensure that PICs and RVCs are allowable and enforceable. In the context of such conversation, he suggested that it would be very helpful for ICANN org and Board to share their knowledge of any challenge of the validity of PICs during the 2012 round.

Becky Burr responded that there hasn't been any such challenges given that this had been anticipated during the development of the 2016 Bylaws, which grandfathered all of the existing PICs, thus enabling their enforcement under the current Bylaws. The Board's concern is that future such commitments would not be covered by this grandfathering provision, thus the anticipation that there could be challenges. While stressing that the ICANN Board has not made any decision to move forward with a Bylaw change, Becky Burr indicated that the expected conversation with the ICANN community on this matter this fall would help determine whether this is the right way to proceed. She confirmed that this will be a transparent process in which the GAC is encouraged to take part.

IV. Clarifying Discussion On GAC Advice regarding Applicant Support in New gTLD Applications

<u>GAC Advice §3.a.i</u>

    a. ***The GAC advises the Board:***

        i. ***To specify ICANN's plans related to steps to expand financial support and engage with actors in underrepresented or underserved regions by ICANN78 in order to inform GAC deliberations on these matters..***

Board Clarifying Question(s):

1. Recommendation 17.2–calling for expanded scope of financial support– is pending consideration by the Board. It may not be possible for ICANN to specify its plans to expand financial support by ICANN78 if 17.2 is still pending Board consideration. The Board continues to discuss methods of financial support. Though, ICANN plans to provide communications engagement plans related to engaging underrepresented and underserved regions by ICANN78.

2. The Board understands that the GAC believes it is important to increase the number and geographical distribution of applications from under-represented or underserved regions in future rounds of New gTLDs through the Applicant Support Program. The Board agrees it is important to mitigate barriers to entry for applicants that face genuine and objective barriers to entry, but also notes the challenge of objectively and specifically defining "underserved" and "under-represented" in practice. For example, the Board is not aware of an authoritative list of countries and territories that ICANN could use to objectively include and exclude certain applicants based on some aspect of their application. How would ICANN develop such a list? In addition, there are likely "underserved" communities within otherwise "adequately served" jurisdictions and, in addition, potential applicants with a presence in "underserved" jurisdictions that, considering the overall circumstances, may not be underserved despite such presence in the jurisdiction (e.g. a large multinational corporation with a presence in a jurisdiction that would be categorized as underserved). There are also many ways that entities that are not intended to benefit from this advice could affiliate themselves with those within the target jurisdictions so as to take advantage of potential discounts.

<u>Discussion</u>

Becky Burr stressed the ICANN Board's understanding and agreement with the GAC that engagement and communication on this matter is critical. The Board expects that a communications and engagement plan for underrepresented and underserved regions will be available by ICANN78. However, since work is still ongoing on some of the recommendations regarding Applicant Support, the ICANN Board can't specify exactly how financial support could be expanded by then.

Kavouss Arasteh highlighted concerns with the absence of a definition of "underserved" in the context of Applicant Support discussions. He suggested that ICANN considers categorizations of countries in use in the United Nations, ITU or at the World Bank. He also expressed concerns with the notion of geographic diversity on the basis of ICANN's geographical regions, the imbalance of which he stressed, suggesting that it should be compared to the practice in other international organizations.

Nigel Hickson reflected on the Applicant Support Program during the 2012 round of New gTLDs and suggested that the next round is an opportunity for ICANN to do a lot better. He recognized this would require more resources and more effort, including in terms of engagement, and a substantial "push" from the ICANN Board. He noted that a community group [GGP on Applicant Support] is currently looking at the issue of defining "underserved" and proposed that even in some developed countries, there may be underserved regions.

Becky Burr proposed that the most important objective, in the context of Applicant Support, is to expand the use of Internationalized Domain Names (IDNs). She welcomed, on behalf of the Board, any input the GAC could propose to develop criteria and priorities for Applicant Support. She also noted the Board's awareness of concerns with ICANN geographical regions and suggested this be considered separately, at a later time, so as to not lose focus in the Applicant Support discussions.

GAC Advice §3.a.ii

a. *The GAC advises the Board:*

      ii. *To take steps to substantially reduce or eliminate the application fees and ongoing ICANN registry fees to expand financial support for applicants from underrepresented or underserved regions.*

Board Clarifying Question(s):

1. Comment from previous section also relevant here: Recommendation 17.2–calling for expanded scope of financial support– is pending consideration by the Board. It may not be possible for ICANN to specify its plans to expand financial support by ICANN78 if 17.2 is still pending Board consideration. The Board continues to discuss methods of financial support. Though, ICANN plans to provide communications engagement plans related to engaging underrepresented and underserved regions by ICANN78.

2. Could the GAC specify whether they envisioned 'eliminating ongoing ICANN registry fees' for a specific period of time? Does the GAC envision that reduced fees could be available to existing Registry Operators that apply for and qualify for Applicant Support?

Discussion

Becky Burr shared that the ICANN Board is still working on the issue of Applicant Support and has some concerns about recommendations from the GNSO Council. She noted the GAC's suggestion to significantly reduce application fees, to reduce or eliminate ICANN registry fees and confirmed the ICANN Board is considering these options. Regarding the elimination of ICANN fees, she wondered whether the GAC believes this should be forever, or for a limited period. She noted that the ICANN Board has not considered this specific mechanism and wondered whether criteria could be defined to qualify applicants for such measures as well as to determine the duration of a grace period.

Tracy Hackshaw confirmed that the current thinking pertained to elimination of fees during a startup period and proposed that the Small Group of GAC representatives on the GGP on Applicant Support could make a more concrete recommendation.

Nigel Hickson concurred that fees can be a significant deterrent in the early years of operation of a TLD, and agreed that the GAC could consider more concrete proposals in view of ICANN78. He deemed that determining eligibility for such measures would require judgment calls, possibly based on the nature of the applicant, including whether it would be an existing or new operator.

Ashwin Sasongko (Indonesia) suggested Applicant Support could be provided for applicants in countries where no gTLD operators exist.

Kavouss Arasteh requested that the ICANN Board propose a course of action and a range of possibilities in response to the GAC's advice.

GAC Advice §3.a.iii

   a.   *The GAC advises the Board:*

      iii.   *To take timely steps to facilitate significant global diversification in the New gTLD program by ensuring increased engagement with a diverse array of people and organizations in underrepresented or underserved markets and regions, including by:*
         ● *Raising awareness of the Applicant Support Program;*
         ● *Providing training and assistance to potential applicants;*
         ● *Exploring the potential to support the provision of back-end services; and*
         ● *Providing adequate funding for the Applicant Support Program consistent with diversification targets.*

Board Clarifying Question(s):

1. Could the GAC elaborate on the thinking behind "Exploring the potential to support the provision of back-end services" or provide an example?

Discussion

Becky Burr expressed Board interest in the GAC suggestions and requested further information.

Kavouss Arasteh suggested that existing cloud services, including for Registry Operators could be leveraged.

V. Clarifying Discussion On GAC Advice regarding Auctions (Mechanisms of Last Resort/Private Resolution of Contention Sets in New gTLDs)

GAC Advice §4.a.i

    a. The GAC advises the Board:

        i. 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.

> **Board Clarifying Question(s):**
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> 1. As discussed with the GAC at our ICANN77 meeting, the Board foresees a number of challenges with the advice regarding identifying commercial and noncommercial applicants. Can the GAC provide its thinking on how these distinctions could be made given that jurisdictions may have different criteria for delineating commercial vs. non-commercial entities? Does this presume that all non-commercial entities have a non-profit designation; that all commercial entities have a for-profit status? What if a commercial entity is partnering with or affiliated with a non-commercial entity for an application?
>
> 2. In the 2012 round, applicants who prevailed in Community Priority Evaluations (CPE) would 'win' their contention sets without the need for auctions. CPE will be part of the next round of new gTLDs, too. With that in mind, what mechanisms, in addition to CPE, does the GAC envisage could be put in place that would avoid auctions of last resort to resolve contention sets? (noting that the proceeds of ICANN's auction of last resort, other than private auctions, could add to ICANN's auction proceeds fund, if the community agreed upon adding those funds)?
>
> 3. Is the phrase "such as drawing lots" material to the GAC's advice? ICANN has legal prohibitions in its ability to run a lottery.

Discussion

Becky Burr recalled the GAC/Board discussion in Washington D.C. during ICANN77 and challenges related to the distinction of commercial and non-commercial applicants, the appreciation of which may vary depending on jurisdiction. She also reminded participants that during the 2012 round an applicant prevailing in Community Priority Evaluation would not face any other Contention Set resolution (auctions). She noted the Board's interest in similar ideas for the next round, given the Board's understanding that purely financial resolution of contentions discourages applicants with lesser financial means.

Kavouss Arasteh proposed that auctions should not be used as a revenue generation mechanism for ICANN, nor at the expense of non-commercial applicants.

Jorge Cancio stressed that the goal of the GAC Advice and the distinction between commercial and non-commercial applications is to avoid resolution of their contentions on the basis of financial means and goes beyond Community Priority Evaluation. He further stressed that the advice is about the features of the applications, including their business plans, rather than the applicants or legal entities applying for the TLDs. Regarding drawing lots, he clarified that this refers to mechanisms based purely on chance which provides any party with equal chances to prevail, such as the flipping of a coin, rather than to a lottery.

Nigel Hickson noted that the 2012 round witnessed competition for the same TLD between charities and online platforms.

VI. Conclusion

Becky Burr and **Nicolas Caballero** thanked the participants for their attendance and active engagement, noting that these exchanges between the Board and the GAC help the Board prepare sharp responses to items included in GAC Communiqués, especially pertaining to advice.

Tripti Sinha, ICANN Board Chair, reinforced appreciation for the constructive discussion, noting the group navigated complicated topics and are aligned in serving the ICANN community and public policy. Finally, she underscored the agreement of the importance of clarity in the Applicant Guidebook.

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V. Meeting Participants

GAC

Nico Caballero, GAC Chair
Luciano Mazza de Andrade, Brazil
José Carlos, Brazil
Jason Merritt, Canada
Rida Tahir, Canada
Jose Hernandez, Cayman Islands
Wang Lang, China
Thiago Dal-Toe, Colombia
Martina Barbero - European Commission
Mzia Gogilashvili, Georgia
T. Santhosh, India
Ashwin Sasongko, Indonesia
Kavouss Arasteh, Iran
Amy Mulcahy, Ireland
Adriano Daddario, Italy
Zeina Bou Harb, Lebanon
Laxmi Prasad Yadav, Nepal
Ibiso A. Kingsley-George, Nigeria
Davide Coluccini, Holy See - Vatican City State
Mohamed El Moctar Mohamedine, Mauritania
Aderonke (Adeniyi) Sola-Ogunsola, Nigeria
Olatokunboh Oyeleye, Nigeria
Jorge Cancio, Switzerland
Wen-Fong Tsen, Chinese Taipei
Shelley-Ann Clarke-Hinds, Trinidad and Tobago
Nigel Hickson, UK
Chris Lewis-Evans, PSWG Co-Chair
Danny Kelly, PSWG
Susan Chalmers, USA
Owen Fletcher, USA
Laureen Kapin, PSWG Co-Chair

Rodney Taylor, CTU
Tracy F. Hackshaw, UPU

ICANN Board

Tripti Sinha, ICANN Board Chair
Alan Barrett
Avri Doria
Becky Burr
Edmon Chung
James Galvin
Katrina Sataki
Matthew Shears
Patricio Poblete

ICANN Org:

Andrew Chen
Amy Bivins
Amy Stathos
Antonietta Mangiacotti
Daniel Halloran
David Olive
Erika Randall
Eleeza Agopian
Elena Plexida
Jamie Hedlund
Jared Erwin
John Jeffrey
Karen Lentz
Kristy Buckley
Lars Hoffmann
Laurent Ferrali
Sally Newell Cohen
Sam Eisner
Theresa Swinehart
Veni Markovski
Vinciane Koenigsfeld
Wendy Profit
Yuko Yokoyama

GAC Support Staff :

Rob Hoggarth
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