GAC/ICANN Board Discussion on SubPro Topic 30 - GAC Consensus Advice and GAC Early Warnings

28 July 2023

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 discussion pertaining to Topic 30 of the SubPro PDP WG Final Report (GAC Consensus Advice and GAC Early Warnings). 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. GAC/ICANN Board Discussion on Implementation Guidance 30.2 on the timing of GAC Advice

> **SubPro PDP WG Final Report Implementation Guidance 30.2 on "GAC Advice/GAC Early Warning"**
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> *"[...] the GAC should provide [Consensus] Advice prior to the finalization and publication of the next Applicant Guidebook. In the event that GAC Consensus Advice is issued after the finalization and publication of the Applicant Guidebook [...] the ICANN Board should take into account the circumstances resulting in such timing and the possible detrimental effect of such timing in determining whether to accept or override such GAC Consensus Advice as provided in the Bylaws."*

GAC Comment on Draft Sub Pro Final Report (1 June 2021)

"[...] [t]he GAC does not consider that recommendations should constrain 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 the recommended limitation (Implementation Guidance 30.2) regarding the timing of GAC Consensus Advice on future categories of TLDs and particular applications, oriented to disincentivizing any such Advice being submitted after the finalization and publication of the next Applicant Guidebook."

> **Board Clarifying Question(s):**
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> 1. The Board agrees with the GAC when it notes that GAC Early Warnings are useful mechanisms that "may help the applicant to know how it can mitigate concerns and find a mutually acceptable solution."
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> 2. The Board will always consider GAC consensus advice in accordance with the relevant Bylaws provisions. At the same time, the Board encourages the GAC to issue advice as timely as practicable in order to minimize unpredictable impacts on the next round of the new gTLD program. Final Report.
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> 3. In implementation, Org takes implementation guidance into account and the Board expects that Org will do so for this item, too.

<u>Discussion</u>

Becky Burr (ICANN Board) flagged that GAC Early Warnings are useful tools of the new gTLD program next round, especially for applicants to potentially mitigate concerns. Becky Burr noted that the Board understands the GNSO Council Implementation Guidance 30.2 pertaining to timing of GAC advice. The Board recognizes that the GAC will continue to issue advice to the Board as timely as possible, and as such, the Board will take into account GAC advice, no matter when it is received.

II. GAC/ICANN Board Discussion on Implementation Guidance 30.4 on GAC Consensus Advice and Associated Presumption

> **SubPro PDP WG Final Report Implementation Guidance 30.4 on "GAC Advice/GAC Early Warning"**
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> *"[...] the 2012 Applicant Guidebook states that GAC Consensus Advice "will create a strong presumption for the ICANN Board that the application should not be approved." [...] the Working Group recommends omitting this language in future versions of the Applicant Guidebook to bring the Applicant Guidebook in line with the Bylaws language. [...]"*

[GAC Comment on Draft Sub Pro Final Report (1 June 2021)](#)

"Some GAC Members disagree with Recommendation Guidance 30.4 which notes the removal of language regarding possible changes to Section 3.1 of the 2012 Applicant Guidebook [...]" Some GAC Members "propose the following alternative wording to [...] Section 3.1: "will create a strong presumption for the ICANN Board that the application should not be approved, without prejudice to the applicable provisions of the Bylaws".

> **Board Clarifying Question(s):**
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> 1. As the Board will always consider GAC advice in accordance with the relevant Bylaws provisions, the Board believes that adopting recommendation 30.4 as written retains the necessary affirmation of how the Board must consider GAC advice that the GAC members appear to be seeking as noted in the comment.
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> 2. The Bylaws specify that GAC advice shall be taken into consideration "in the formulation and adoption of policies" (Bylaws 12.2.a.x).

<u>Discussion</u>

Becky Burr (ICANN Board) noted that the Board will continue to consider GAC advice as per the ICANN Bylaws, regardless of the language in the Applicant Guidebook on the "strong presumption". Becky Burr flagged that GAC advice to the ICANN Board triggers a specific procedure to find a mutually acceptable solution, providing a strong tool for the GAC. Effectively, this process creates a presumption that GAC advice will be followed, otherwise the Bylaws procedures would be triggered. Becky Burr underscored that adopting recommendation 30.4 as proposed by the GNSO Council, still supports the importance of GAC advice and the weight of the Board's consideration of said advice, while removing the possibility of someone unhappy with

the Board's consideration of the advice using this language to their advantage. Relying on the ICANN Bylaws to provide the weight the GAC is seeking in its consideration of advice is the best way to honor language in GAC advice.

Luciano Mazza (Brazil), underscored the importance of the language to be maintained in the Applicant Guidebook, and expressed confusion on the Board's legal reasoning for agreeing to remove it. Luciano Mazza noted that Brazil believes this language should be maintained and it wouldn't be advisable for it to be removed since this text is symbolic and removing the language could be perceived as the GAC losing a part of its prerogative. Luciano Mazza offered the possibility of finding a compromise between the legal concerns expressed by the Board, while maintaining the symbolic intention of the current language.

Becky Burr (ICANN Board) further reinforced that the ICANN Bylaws include specific instructions on what steps the Board needs to take upon reception of GAC Advice. While recognizing the importance of the symbolic aspect of the "strong presumption" language, the Board expressed concerns that retaining the language makes reliance on GAC advice riskier rather than the opposite. Becky Burr reassured GAC members that the purpose of the recommendation guidance is not intended to remove weight to GAC advice in any way, and this should not be perceived as such.

Kavouss Arasteh (Iran), underscored the critical, complex and sensitive nature of this issue. Kavouss Arasteh flagged that all areas of this item need to be considered, including legal concerns expressed by the Board, while noting that the ICANN Bylaws essentially override all other processes, and that policy recommendations should in no way override the Bylaws. Kavouss Arasteh agreed with Luciano Mazza about finding a potential middle ground to include a clarification in the Applicant Guidebook while not being inconsistent with the Bylaws, implicitly or explicitly. Kavouss Arasteh asked the Board to confirm the urgency of this item to understand whether potential compromise language or agreed solutions need to be addressed prior to ICANN78. **Becky Burr** (ICANN Board) responded that the Board's interest is ensuring this issue is dealt with correctly, and that timing is not an issue.

Jorge Cancio (Switzerland), further underscored the various levels of conversation involved in this issue, aligning with interventions from Brazil and Iran.

Action Item: GAC Members agreed to hold an internal discussion on Implementation Guidance 30.4, to attempt to find a middle ground between language in the recommendation and GAC membership concerns.

III. GAC/ICANN Board Discussion on Implementation Guidance 30.6 on Written Explanations for GAC Early Warnings

> **SubPro PDP WG Final Report Implementation Guidance 30.6 on "GAC Advice/GAC Early Warning"**
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> *"Government(s) issuing Early Warning(s) must include a written explanation describing why the Early Warning was submitted and how the applicant may address the GAC member's concerns.*

GAC Comment on Draft Sub Pro Final Report (1 June 2021)

The GAC agrees with the 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 recall the compromise language brought forward by the GAC, as 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 the adoption of an updated language to Recommendation 30.6 as follows: "[...] how the applicant may potentially address the GAC member's concerns to the extent feasible".

> **Board Clarifying Question(s):**
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> 1. The Board notes that the GAC had previously proposed to amend the recommendation with the same language ("to the extent feasible"), see the 2020 GAC's public comment on the Draft Final Report, and also the 2021 GAC's public comment on the Final Report.
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> 2. The Board believes that the intent of this recommendation can be met if a GAC member provides a rationale why a remedy to their early warning is not possible.

Discussion

Becky Burr (ICANN Board) introduced this final implementation guidance on GAC Early Warnings, and the need for the GAC to provide a written explanation about how to potentially mitigate concerns. The Board conceded that it is not always possible for concerns to be remedied or mitigated, however recognizing that the intent of this recommendation is not to tell the GAC there must always be a way to fix concerns, but that one way to fix it or address it is by withdrawing the application. Becky Burr noted that the GAC could issue withdrawal as a potential remedy, noting that the applicant could withdraw the application if a remedy isn't possible. As such, the Board and the GAC appear to be on the same page and the GAC's intent is already accomplished in current text.

Kavouss Arasteh (Iran) responded that the GAC's proposal of the addition of "to the extent possible" increases flexibility in the recommendation.

Jorge Cancio (Switzerland) further noted that as previously flagged, the Board's understanding should be explicit in the Applicant Guidebook, i.e., if there is a recognition from the Board that concerns sometimes cannot be remedied and that withdrawal is a fair outcome, this should be explicitly noted in the Applicant Guidebook. Jorge Cancio noted that the current language may be interpreted to note that all concerns can be

remediated, which is not always the case and some applications may be completely unacceptable to public policy. China, Iran, and the UK expressed support for Switzerland's input.

Becky Burr (ICANN Board) expressed understanding of the GAC's desire for clarity and the fundamental agreement between the Board and the GAC that the Applicant Guidebook should be clear. Becky Burr noted this is an implementation issue which the Board will take back for further consideration.

IV. Conclusion

Tripti Sinha, Becky Burr and **Nicolas Caballero** thanked participants for their active participation and engagement and adjourned the meeting.

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

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

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

Theresa Swinehart
Veni Markovski
Vinciane Koenigsfeld
Wendy Profit
Yuko Yokoyama

GAC Support Staff :
Rob Hoggarth
Fabien Betremieux
Benedetta Rossi
Julia Charvolen
Daniel Gluck

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