SUMMARY PAPER
ICANN BOARD & ORG ACTIONS IN RESPONSE TO GAC ADVICE ON THE 2012 NEW GTLD PROGRAM

DATE: 20 SEPTEMBER 2022

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Overview

The ICANN organization (org) has prepared this paper for the Governmental Advisory Committee (GAC). The paper outlines the actions that were taken by the ICANN Board and ICANN org in response to advice that the GAC had issued concerning the Generic Names Supporting Organization's (GNSO) recommendations from its 2007 Policy Development Process (PDP) on the Introduction of New gTLDs and during the implementation of those policy recommendations for the 2012 New gTLD Program round.

I.   **BOARD CONSIDERATION AND TRACKING OF GAC ADVICE**

Scope of GAC Advice and Board Consideration Process
Under the current ICANN Bylaws, the GAC is the body that issues advice *"on the activities of ICANN as they relate to concerns of 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''* (See Article 12, Section 12.2(a)(i)). Comprising national governments, Distinct Economies as recognized in international fora, and multinational governmental organizations and treaty organizations that are invited by the GAC through the GAC Chair, the GAC *"may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies"*.

The Bylaws require that public policy advice issued by the GAC be *"duly taken into account, both in the formulation and adoption of policies"*. Specifically, in relation to any proposed policies that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, in those cases where the proposed policies affect public policy concerns, the Bylaws require that the Board inform the GAC and take duly into account any advice timely presented by the GAC. Under the Bylaws, each of ICANN's four Advisory Committees, including the GAC, should ensure that it communicate its advice *"in a clear and unambiguous written statement, including the rationale for such advice"*. The Board is required

to respond to Advisory Committee advice *"in a timely manner … explaining what action it took and the rationale for doing so"*.

Where the Board determines to take an action that is not consistent with GAC advice, the Bylaws require the Board to inform the GAC and state its reasons. The Board may only reject GAC Consensus Advice (meaning decisions by general agreement in the GAC and in the absence of any formal objection) by a vote of no less than 60% of the Board. In such cases, the Bylaws require the Board and the GAC to then try, *"in good faith and in a timely and efficient manner, to find a mutually acceptable solution"*.

Where a Board resolution is consistent with GAC Consensus Advice, the Bylaws also require the Board to determine whether the GAC Consensus Advice was a material factor in the Board's adoption of such resolution. If that is the case, the Board must indicate this fact in the resolution approving the decision and cite the relevant GAC advice.

For further information, see the ICANN Bylaws Article 3, Section 3.6, and Article 12, 12.2(a): https://www.icann.org/resources/pages/governance/bylaws-en (as of June 2022).

Tracking GAC Advice

The Board receives recommendations from a variety of sources from the ICANN community, including advice from the GAC and other Advisory Committees as set forth in Article 12 of the ICANN Bylaws. ICANN's Action Request Register (ARR) tracks the progress of the Board's consideration of GAC (and other Advisory Committee) advice and is conducted in five phases. Developed by ICANN org in 2015, the ARR enables the Board and ICANN org to track the processing of GAC advice in a consistent and transparent manner. ICANN org provides the GAC with regular reports on the status of GAC advice as tracked in the ARR.

Between October 2017 and September 2022, ICANN org provided nine (9) ARR reports to the GAC (see https://gac.icann.org/activity/icann-action-request-registry-of-gac-advice#act-documentation). Of the over 130 items of GAC advice that were considered closed (under Phase 5) in the October 2017 report, over 60 of these pertained to GAC advice regarding the 2012 New gTLD Program round.

As of September 2022, there were twenty-three (23) open items of GAC advice, with a further 23 that were closed during the preceding twelve (12) months (see https://www.icann.org/en/system/files/correspondence/botterman-to-ismail-02sep22-en.pdf).

Of the 23 open items of GAC advice:
- 17 are in Phase 3 of the ARR (Evaluate and Consider) - 13 relate to protections for International Governmental Organizations (IGOs) at the second level of the domain name system; 3 relate to the General Data Protection Regulation (GDPR) and WHOIS; and 1 relates to Phase 2 of the GNSO's Expedited Policy Development Process (EPDP) on the Temporary Specification relating to gTLD Registration Data.
- 5 are in Phase 4 (Implement) - 1 relates to IGO protections; 2 relate to GDPR, WHOIS and data privacy; and 2 relate to the Second Stability, Security & Resiliency Specific Review.
- 1 is in Phase 5 (Closed) - this relates to guidelines on the minimum information required for data disclosure requests under Part 2 of the EPDP.

For further information on the ARR, see https://features.icann.org/board-advice/gac.

ACTIONS TAKEN IN RESPONSE TO GAC ADVICE CONCERNING THE 2012 NEW GTLD PROGRAM ROUND

Board Decisions & Org Implementation of GAC Advice on the Introduction of New gTLDs
In June 2011, in authorizing the ICANN President and CEO to implement the 2012 New gTLD Program round, the ICANN Board specifically noted that it had conducted extensive consultations with the GAC. The consultations were held in Brussels in February 2011, San Francisco in March 2011, by conference call in May 2011, and in Singapore in June 2011. The consultations resulted in substantial agreement on a wide range of issues noted by the GAC for which the Board directed that changes be made to the Applicant Guidebook to reflect such agreement (see https://www.icann.org/resources/board-material/resolutions-2011-06-20-en). ICANN org collated and published the notes, correspondence and other materials from the 2011 Board-GAC consultations as well as statements by various other ICANN community structures on the consultations (see https://newgtlds.icann.org/en/about/historical-documentation/board-gac-consultations).

In addition, and following consultations with the GAC to try to find mutually acceptable solutions on areas where the implementation of the GNSO's policy recommendations on the introduction of new gTLDs would not have been consistent with GAC advice, the Board decided on implementation characteristics that differed from the GAC advice and noted its reasons for doing so (see https://www.icann.org/en/system/files/bm/rationale-gac-response-new-gtld-20jun11-en.pdf).

In January 2012, ICANN org opened applications for new gTLDs, and the 1930 applications received were published in June 2012. As these applications were processed throughout the 2012 New gTLD Program round, the GAC issued both Early Warnings to applicants as well as advice to the Board about the Program.

The 2012 New gTLD Program round included the ability for one or more members of the GAC to issue Early Warnings for applications that they considered potentially sensitive or problematic. While these Early Warnings are not considered GAC advice or a formal objection from the GAC, recipients of such warnings had the opportunity to withdraw their applications or elect to continue with the process. ICANN org published the list of Early Warnings that were issued via email to the relevant applicants, and the list continues to be maintained on the GAC website (see https://gac.icann.org/activity/gac-early-warnings).

During ICANN46 in Beijing, the GAC met and issued a Communiqué on 11 April 2013 ("Beijing Communiqué"). The Beijing Communiqué included advice to the Board about the New gTLD Program, including GAC objections to specific applications, safeguards that should be applicable to board categories of gTLD strings, strings for further GAC consideration, IGO protections, and other areas.

In February 2014, following a Public Comment proceeding, the Board's New gTLD Program Committee (NGPC)[1] adopted an Implementation Framework for a broad category of gTLD strings for which the GAC had advised the Board to impose specific safeguards. The NGPC's adoption of the Implementation Framework allowed those new gTLD applications that were subject to the GAC advice to proceed once other eligibility criteria were satisfied. These "Category 1" strings related to consumer protection, sensitive strings, and regulated markets, and the Implementation Framework required that one of three specific mandatory levels of safeguards be added to Specification 11 of the new gTLD base Registry Agreement as Public Interest Commitments. See https://newgtlds.icann.org/en/applicants/gac-advice/cat1-safeguards for a summary of the issue and the Implementation Framework.

In its Beijing Communique, the GAC had advised that where new gTLD applications for strings representing generic terms were intended for "exclusive registry access," these should "serve a public interest goal". The GNSO's policy recommendations on the Introduction of New gTLDs had not included a recommendation regarding this type of string. In June 2015, the NGPC took

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[1] On 10 April 2012, the ICANN Board of Directors approved the formation of the New gTLD Program Committee (NGPC) and delegated decision-making authority to the new committee regarding ICANN's New gTLD Program for the 2012 round. The NGPC's purpose was to make strategic and financial decisions relating to ICANN's New gTLD Program for the current round of the program and as it relates to the Applicant Guidebook.

action that created a path forward for those applicants that had submitted applications and indicated their intention to use the string(s) for exclusive registry access, while requesting that the GNSO specifically include the issue in its policy development work concerning future gTLD expansion rounds. See https://newgtlds.icann.org/en/applicants/gac-advice/cat2-safeguards for a summary of the issue and the NGPC's decision as well as the implementation status of all the affected strings.

In October 2015, ICANN org published a comprehensive scorecard documenting the NGPC's handling of GAC advice that had been issued between April 2013 and June 2015 on multiple aspects of the New gTLD Program. The NGPC scorecard enumerated seventy-four (74) items of GAC advice and described the NGPC's response and status of work on each item: https://www.icann.org/en/system/files/files/gac-advice-scorecard-07oct15-en.pdf.

In combination, the above-noted documentation and tracking processes for GAC advice regarding the 2012 New gTLD Program round provide a thorough record of how the ICANN Board and org have handled each item of GAC advice and the timing of such actions and responses.

Reporting On the Status Of Cooperative Engagement And Independent Review Processes
The Cooperative Engagement Process (CEP) and the Independent Review Process (IRP) are important accountability mechanisms under ICANN's Bylaws. A number of applicants for new gTLDs in the 2012 round invoked the CEP, which is voluntary and designed to be a first step toward an IRP proceeding, which in turn allows for independent third-party review of actions (or inactions) by the ICANN Board or staff that allegedly violate the Bylaws or Articles of Incorporation. Several new gTLD applicants also proceeded to file IRP complaints against ICANN.

The GAC provided Consensus Advice that four particular applications received for the 2012 New gTLD Program round should not proceed. The Board accepted the GAC Consensus Advice relating to all four of those applications. The Board did so, citing Section 3.1 of the Applicant Guidebook which states that this type of GAC advice "will create a strong presumption for the ICANN Board that the application should not be approved." Four separate IRPs were initiated on all four of the applications regarding the Board's acceptance of the GAC Consensus Advice that those four applications should not proceed. One of those IRPs was closed and never completed. Two have been completed and one is in process. With respect to the IRPs that have been completed, both IRP Panels found, among other things, that the lack of a stated rationale from the GAC was problematic (ICANN org notes that, at the time of the 2012 round, the GAC was not required to state a rationale along with its advice. As noted above, the GAC is now

required to provide a stated rationale along with its advice. Going forward, should there be future GAC advice that specific applications should not proceed (if any), a robust stated rationale will be helpful in the event that potential future IRPs are filed.

Since 2014, ICANN org has maintained a public webpage that contains status updates on all active and pending CEP and IRP proceedings (see https://www.icann.org/resources/pages/cep-irp-pending-archive-2014-09-26-en#2021). ICANN org also maintains a webpage that contains all the documents that were filed in all IRP proceedings (see https://www.icann.org/resources/pages/cep-irp-pending-archive-2014-09-26-en#2021).

In addition to enhancing transparency and accountability, ICANN org's provision of these reports and web pages allows the public to view the progress of all the CEP and IRP proceedings involving ICANN.