Agenda Item 9: GNSO PDP on New gTLD Subsequent Procedures Work Tracks 1-4

Issues

1. Review the most recent GAC input to this PDP.

2. Note that the Final Report of the Competition, Consumer Trust and Consumer Choice (CCT) Review has been sent to the ICANN Board.

3. Confirm next steps for the PDP with PDP Co-Chairs.

4. Agree on future GAC engagement with this PDP.

GAC Action Required

NOTE: This session is about Work Tracks 1-4 of the PDP on New gTLD Subsequent Procedures. Geographic names are being dealt with separately in Work Track 5 (see Agenda Item 17).

Review the most recent GAC input

The PDP published its Initial Report on 3 July 2018. The GAC has made a (late) submission as follows:

"These comments are submitted by the Governmental Advisory Committee (GAC) to the Public Comment process for the Initial Report on the New gTLD Subsequent Procedures Policy Development Process (Overarching Issues & Work Tracks 1-4), which opened on 3 July 2018.

The GAC provides these as interim comments pending (a) further consideration of these issues within the GAC in the lead-up to and at the ICANN 63 meeting; and (b) discussions with the PDP Working Group at ICANN 63, on which the GAC places high priority and noting that invitations have been sent to the PDP leadership for the relevant GAC sessions.

The GAC also reiterates the input that it has previously provided by way of relevant GAC advice to the Board and inputs to the PDP Community Consultation processes.

1. Further releases of new gTLDs (2.2.1)

The GAC reiterates its previous advice to the Board[1] that there should be a review of the costs and benefits of new gTLDs before any further rounds. This does not seem to have been addressed directly by the PDP, possibly because the final report of the Competition, Consumer Trust and Consumer Choice (CCT) Review was not available at the time of publication. Further expansion of the gTLD space should take into account the recommendations of the CCT report which are identified as a prerequisite for such expansion.

2. Predictability (2.2.2)

The GAC reiterates the following points made in its comments to the PDP Community Consultation 1 (July 2016):

Many gTLD policy issues require resolution at the global rather than the national level. For many purposes, in practice this means resolution within ICANN processes to ensure consistency, as application of national laws country-by-country may not be sufficient. The GAC – and others – need a degree of flexibility to respond to emerging issues in this global space which is operated by

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[1] GAC Helsinki & Hyderabad Communiques; GAC input to PDP Community Comment 1

ICANN and the community according to contractual arrangements and community-developed policies and procedures. The need for such flexibility continues after the conclusion of a GNSO PDP.

3. Different TLD types (2.2.4)

The GAC reiterates its previous advice that further categories of new gTLDs should be explored, as follows:

Finally, the GAC reiterates the importance of fully exploring the potential benefits of further categories (or track differentiation) that could simplify rather than add complexity to the management of the new TLD program and in that way help to accelerate the new gTLD program. In particular, the GAC believes that:

i. *This could create greater flexibility in the application procedures to address the needs of a diversity of categories or types of string - including common nouns (e.g., "music"), cultural/linguistic communities, brand names and geographical strings - would likely make application processes more predictable and create greater efficiencies for ICANN, both in ASCII and IDN spaces;*

ii. *Taking into account that applicants and users of new TLDs of a high public interest for a specific community, such as city TLDs or country-region and other geographical TLDs, may expect the legal framework of the territory in which the community is located to be applicable to the TLD, ICANN should allow for ways to respect the specific legal framework under which the respective community is operating in the TLD regime. This will also help ICANN, the applicants and national or local public authorities to avoid the risk of large scale legal challenges.*

iii. *Instead of the currently proposed single fee requirement, a cost-based structure of fees appropriate to each category of TLD would a) prevent cross subsidisation and b) better reflect the project scale, logistical requirements and financial position of local community and developing country.[2]*

4. Global public interest, including safeguards included in Public Interest Commitments (PICs) (2.3.2)

The GAC welcomes the Working Group's consideration of issues surrounding the Public Interest Commitments (PICs). As noted, the PICs emerged in large part as a result of GAC advice in its Toronto and Beijing Communiqués. In assessing whether to codify the current implementation of mandatory PICs as policy recommendations, the GAC notes that the actual adoption and implementation of the PICs differed in many respects from the stated GAC advice, most notably on the issue of safeguards applicable to highly regulated gTLDs.

GAC advice originally required registries to screen registrants for proper credentials at the time of registration to ensure that they are what they purport to be before they may do business with the public using the name of a regulated sector such as a bank or pharmacy. As implemented by ICANN, registrants themselves were to self-report that they possessed the necessary credentials. The GAC indicated that the looser requirement that registrants provide some "representation" that they possess the appropriate credentials (e.g., as a bank, insurer, pharmacy, etc.) poses the risk of consumer fraud and potential harm because bad actors will not hesitate to make false

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[2] GAC Nairobi (2010) Communique

representations about their credentials.[3] The background of the GAC's safeguard advice, PICs, and implementation by ICANN is discussed in the CCT Review Team's Final Report.[4] Moreover, the GAC also noted in its advice that the procedures available to enforce the PIC are "complex, lengthy, and ambiguous, raising questions as to its effectiveness in addressing serious threats."[5]

The GAC also notes that the CCT Review Final Report states that there are difficulties with assessing the effectiveness of new gTLD consumer safeguards, particularly PICs, due to lack of a reporting framework and associated data.[6] Accordingly, before making any final recommendations, the PDP should consider the GAC's prior safeguard advice and any recommendations in the CCT final report on these issues should be fully considered in the next stage of the PDP's work.

The recommendations of the Verified [TLD] Consortium and the National Association of Boards of Pharmacy on applications for strings linked to highly regulated sectors should be supported.

PICs can only truly reflect the global public interest if Registry commitments are effectively monitored by ICANN to ensure compliance, with appropriate struct sanctions for breaches of PICs.

5. Applicant freedom of freedom of expression (2.3.3)

The GAC notes that there does not appear to be any clear evidence of an infringement of an applicant's freedom of expression rights (as protected under internationally recognised principles of law) in the recent gTLD round. Freedom of expression rights for registrants, and end users generally, could reasonably be considered to be of at least equal importance.

Freedom of expression, especially from commercial players, is important but not absolute. As in any fundamental rights analysis all affected rights have to be considered, including, inter alia, intellectual property rights, applicable national laws on protection of certain terms etc. This means that procedures have to be inclusive of all parties whose interests and rights are affected by a specific string application, and all need to be given a fair say in the process.

6. Applicant support (2.5.4)

The GAC notes that the CCT Review has also made recommendations in this area. These should be considered in conjunction with work already done by the PDP.

7. Auctions (2.5.4 & 2.7.4)

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[3] ICANN GAC (25 June 2014), *London Communiqué,* p. 10; ICANN GAC (11 February 2015), *Singapore Communiqué*, pp. 4, 10; GAC (15 October 2014), *Los Angeles Communiqué*, accessed 8 August 2018, https://www.icann.org/en/system/files/correspondence/gac-to-board-15oct14-en.pdf, p.5. The Communiqués all question ICANN's failure to implement the GAC's advice regarding verification and validation of credentials for strings in highly-regulated markets.
[4] CCT Final Report at pp. [insert cites to safeguards sections and PICs sections]
[5] ICANN GAC (2014), "London Communiqué" and ICANN GAC (2015), "Singapore Communiqué."
[6] CCT-RT Draft Report March 2017

Auctions of last resort should not be used to resolve contention between commercial and non-commercial applications. As to private auctions, incentives should be created to strongly disincentivise that instrument.

8. Reserved names (2.7.1)

Existing reservations of names at the top level substantially reflect the GAC Principles Regarding New gTLDs.[7] The GAC would expect that any changes should be consistent with these Principles.

The GAC wishes to draw the attention of the PDP to its most recent advice[8] on certain 2-character codes at the second level, which is for the Board to:

(i)   *Work, as soon as possible, with those GAC members who have expressed serious concerns with respect to the release of their 2-character country/territory codes at the second level in order to establish an effective mechanism to resolve their concerns in a satisfactory manner, bearing in mind that previous GAC advice on the matter stands.*

(ii)   *Immediately take necessary steps to prevent further negative consequences for the concerned GAC members arising from the November 2016 Board Resolution.*

9. Closed generic names (2.7.3)

The GAC re-affirms its previous advice that for strings representing generic terms, exclusive registry access should serve a public interest goal.[9]

10. String Similarity (plurals) (2.7.4)

The GAC welcomes the WG's detailed guidance on the standard of confusing similarity as it applies to singular and plural versions. The GAC reaffirms its prior advice that singular and plural versions of the same string as a TLD could lead to consumer harm as this practice risks confusing consumers and could make users more vulnerable to deceptive practices that exploit this confusion. (2014 Beijing and Singapore Advice).

11. Applicant Reviews and Accreditation Program (2.7.7 and 2.2.6)

The GAC believes the Applicant evaluation and RSP pre-approval process should include consideration of potential security threats. Such consideration should include using tools such as ICANN's DAAR to identify any potential security risks (and affiliated data) associated with an application.

12. GAC Early Warnings and other objections to proposed strings (2.8.1)

The GAC believes that the Early Warning arrangements applied in the recent gTLD round were a useful mechanism to identify applications that raise public policy concerns. This also applies to GAC advice to the Board and the specific "AGB-GAC consensus advice." They should be an

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[7] March 2007
[8] GAC Panama City Communique
[9] GAC Beijing Communique, Annex 1, Category 2 Safeguards

integral part of any future rounds. 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.

The GAC would welcome the opportunity to discuss options to increase the transparency and fairness of these arrangements (including providing a rationale for objections and giving applicants subject to Early Warnings the opportunity for direct dialogue with the GAC). Any rationale provided by the GAC would be 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."[10]

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

13. Community-based applications (2.9.1)

The GAC supports the proposals in the Initial Report on procedures for dealing with community-based applications as being consistent with previous GAC advice, and as being a reasonable start in the right direction.
The Council of Europe study on this issue should be further considered by the PDP. The Council has indicated that it will be making its own submission to the public comment process. However, the GAC wishes to draw your attention to the range of concerns expressed by the Council in a paper submitted with these GAC comments."

One GAC Observer (Council of Europe) also made a submission to the Public Comment process.

Final Report of the Competition, Consumer Trust and Consumer Choice (CCT) Review

The Final Report of the CCT Review was sent to the ICANN Board on 9 September 2018. Briefing was circulated on the GAC e-mail list on 10 September as follows:

> This is one of the "Specific Reviews" required to be conducted periodically under the ICANN Bylaws. It makes recommendations concerning the impact of the last new gTLD round on the domain name sector on competition and consumers.
>
> The Review Team had two GAC-nominated members: Laureen Kapin (US Federal Trade Commission) and Megan Richards (European Commission – former GAC member).
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> The Report covers a range of issues that are relevant to public policy, and on some of which the GAC has previously provided public comments, including:
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> - New procedures for GAC advice, in general and for specific TLDs.
> - Significantly increased data collection by ICANN Org in a wide range of areas.
> - Competition at the first and second levels.
> - A proposed new PDP for a "consistent privacy baseline" for Registries.
> - New public interest commitments for consumer trust.
> - New preventative measures against DNS abuse.

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[10] ICANN Bylaws 12.2.(a)(i)

- Expand and improve outreach to the Global South.

The Board is required under the Bylaws to conduct a public comment process on the report before finalising its response.

The Report will be an input to the ongoing work of the New gTLD Subsequent Procedures PDP. In accordance with the Bylaws, some of the Report's recommendations are identified as a prerequisite for any new gTLD round.

At this stage it is unclear if the Report will be discussed in any detail, and if so in what forum, at the ICANN 63 meeting.

Confirm next steps for the PDP with the Co-Chairs

The PDP Co-Chairs (Jeff Neumann and Cheryl Langdon-Orr) have been invited to this GAC session.

The PDP (Work Tracks 1-4 and Work Track 5) will be meeting on Saturday 20 October 2018.

The GAC may wish to seek clarification of:

a) How Work Tracks 1-4 and Work 5 will be coordinated so as to work towards a single Final Report.

b) How the CCT Review Final Report (above) will be dealt with by the PDP. This is the subject of discussion within the PDP at present. Issues include whether the CCT recommendations are separate advice to the Board, to be dealt with on their own merits under a process yet to be settled; or essentially an input to the PDP, which will assess the Recommendations through its own process.

Future GAC engagement with this PDP

The GAC should consider:

a) The request from the Co-Chairs for each group participating in the PDP to appoint a liaison to clarify agreed group positions. GAC views on this were sought in September 2018. There was no disagreement with a proposal to have GAC positions coordinated through a small group. There was one volunteer to be a member of this group (Switzerland) but no volunteers to lead it.

b) How the GAC wishes to engage with the PDP in future. This could be linked to the possible creation of a small coordinating/liaison group noted above.

Further Information

[PDP on New gTLD Subsequent Procedures: General Workspace](#)

Document Administration

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