May 12, 2013

Dear ICANN,

I thank the new gTLD Board Committee for the the opportunity to comment on Section IV.1.b (Safeguard Advice for New gTLDs) and Annex I of the Communiqué of the Government Advisory Committee, issued on April 13 from Beijing. This entire extraordinary document certainly deserves the full attention of the ICANN Board and of the entire ICANN community. In it, the GAC has provided advice on a total of 517 applications – a breathtakingly wide reach. Our specific comments are restricted to just the sections mentioned above, but these sections must be read in context, and so we offer more general comments on the GAC's role as well.

The substantive points in Section IV.1.b give us pause from a process perspective, but we agree with some of them and proactively anticipated most of them in our own Public Interest Commitments. Following most of the advice in the Communiqué is not a hardship for our company. But we deeply concerned by the lack of enunciated principles underpinning the Communiqué or any reference to ICANN by-laws, to the GNSO role in originating ICANN policy, or to the GAC's previous advice on new gTLDs, which in places plainly contradict the advice in this section. Previously-issued GAC Communiqués called for transparency of process, support for the multi-stakeholder model, support of the ICANN by-laws, and an insistence that applicants deserve to know the rules and process of the new gTLD program prior to application:

> 2.5. The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency, and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the process.[1]

Most troubling to us as a friend of the ICANN multi-stakeholder process, the GAC Beijing Communiqué as enunciated in Section IV.1.b unilaterally expands the role of the GAC from an advisory committee, with a remit of providing advice on policy originating in the GNSO, into a policy-making body from which other members of the ICANN community are excluded. If GAC advice were followed, the new gTLD program would be changed from an objective process in which qualified applicants are granted new gTLDs into a ongoing subjective regime in which new policies and rules can be issued by the GAC on ad-hoc basis without reference to principles, rationales, or access to any appeal by affected parties – it would turn the multi-stakeholder model on its head. The Board should resist the GAC's

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[1] http://archive.icann.org/en/topics/new-gtlds/gac-principles-regarding-new-gtlds-28mar07-en.pdf

efforts to re-invent itself as a permanent upper house at ICANN with policy-making and veto-issuing powers that it can exercise at will, based on whatever criteria the GAC determines at the time.

The safeguards, proposed as they are without reference to other parts of ICANN, are liable to be viewed either as an effort to undermine the GNSO policy-making prerogative, or as showing an alarming unfamiliarity with the Guidebook or GNSO processes now in progress:

- Whois Policy – this is already being addressed in a comprehensive manner by ICANN, beginning with the work of the Expert Working Group on gTLD Directory Services; the GAC advice would undermine this process.

- Mitigating abusive behavior – the Applicant Guidebook already asks applicants to detail their plans to combat abusive behavior; those failing to propose measures to mitigate them will fail the Initial Evaluation.

- Security Checks – this is new policy being initiated by the GAC, and imposes costs and liabilities on registries without seeking their advice or consent. Furthermore, security threats such as those enumerated may not be detectable by "technical analysis."

- Documentation on Whois – this new requirement may well be illegal in European states, and, as previously stated, there is an ongoing GNSO policy-making effort dealing with Whois.

- Complaint mechanism – while we are implementing just such a policy, it is the prerogative of the GNSO to require it.

- Consequences – again the GAC introduces open-ended costs and liabilities on registries with regard to Whois policy, which is already being considered by ICANN.

The safeguards are not in themselves bad ideas, but the concept that new policies can be formulated by the GAC without the participation of the GNSO would be a sea-change in how ICANN operates, and would threaten the multi-stakeholder model. The Communiqué seems to regard ICANN's policy processes as having no weight or consequence. (We re-iterate that our company has already proactively committed to implementing the majority of these safeguards.)

If the Communiqué's overreach is troubling in principle, the application of it to specific strings is terrifying in practice. We are concerned that any principles that charitable observers might discern are undermined by the choice of applications to which these principles might apply. As an example, .kids is flagged as needing

safeguards for children, but .baby is not. Industry observers[2] have recounted in detail the seemingly haphazard nature of the GAC's categorization and choice of strings.

The Communiqué's prescriptions define the opposite of a well-regulated sector. Instead of a clear process in which all concerns are weighed, the Communiqué sets up an ad-hoc GAC process from which the views of applicants are excluded. Instead of clear rules to which industry players must adhere, ill-defined categories have been set up that applicants have a hard time even to understand. Instead of a clear authority on who will determine policy, the ICANN community must now wonder who is in charge. The ICANN Board will perceive a challenge to the core principles of ICANN; applicants are left wondering how to respond. In calling for poorly defined safeguards pertaining to particular strings, the Communiqué gives applicants cause to be concerned that they are proceeding without any idea of when, or for what reason, or under pain of what penalties, they will be called upon to explain their registry policies to the GAC.

In sum, while the Communiqué addresses several issues which should rightly concern everyone in the ICANN community, it does so in an unsystematic and confusing way, without adequate enunciation of the principles supporting its pronouncements, without reference to ongoing efforts in the GNSO, and in contradiction of the GAC's previously stated positions. Furthermore, in arrogating to itself the role of a permanent oversight body which functions without transparency and without review, and which claims a policy-making function in violation of ICANN by-laws, the GAC Communiqué threatens the multi-stakeholder model.

The GAC has known the strings, and the applicants, for nearly a year, and has met several times prior to Beijing. That its Communiqué now lists a hodgepodge of ill-defined and haphazardly enumerated concerns covering a wide swath of non-brand applications is in itself sufficient reason to be very skeptical of a larger role for the GAC. The Internet is too important to have decisions made by any authority other than that of broad consensus supported by empirical evidence. The Board should communicate to the GAC, as the GAC has repeatedly told the Board, that decisions without adequate explanations or rationales are not acceptable[3] – most obviously, the GAC needs to explain the discrepancy between its written position that applicants must be fully aware of all the rules before applications could be accepted, and the Beijing Communiqué in which new policies are proposed.

In our opinion, the Board should communicate to the GAC that its concerns as

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[2] http://domainincite.com/12944-this-is-how-stupid-the-gacs-new-gtlds-advice-is
[3] See for examplehttps://gacweb.icann.org/download/attachments/27131989/GAC_39 _Cartagena_Communique.pdf, page 4

enunciated in Section IV.1.b may be valid, but that any new policies, and any policy changes to the Applicant Guidebook, must be initiated by the GNSO. (The fact that ICANN staff are also attempting to make policy on the fly hurts the Board's credibility in this regard, but that is a separate matter.) The Board should also issue a clear statement upholding the multi-stakeholder model and the exclusive prerogative of the GNSO in formulating policy.

Finally we urge the Board, if it does reject portions of GAC advice, not to allow a delay in the program to result from the consultation between the Board and the GAC as required by the ICANN by-laws. In this case, the Board should immediately set a date for the by-law mandated consultation during the upcoming Durban meeting.

I thank the new gTLD Board Committee again for the opportunity to comment.

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