

## ICANN call for public comments re: GAC Beijing Communiqué and Safeguard Advice

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### Comments submitted by Istituto Bruno Leoni

Founded in 2003, Istituto Bruno Leoni is an Italian-based think-tank which provides research and analysis on economic policy at large. Over the years, we have frequently dealt with internet governance issues as part of our digital policy research program. IBL is grateful for the opportunity to submit this comment.

In its Beijing Communiqué of April 11, 2013, the Governmental Advisory Committee recommended that a number of “Safeguards” be imposed upon new generic top-level domains (gTLDs) and thus upon those registry operators seeking to administer them. Under these provisions, registry operators would in fact be required to police the web by making sure, among other things, that the registrants comply with a varied set of security measures and do not engage in fraudulent activities or intellectual property infringements.

The views expressed in the Communiqué raise a number of concerns on a theoretical as well as practical level. Hopefully, the ICANN Board will adopt a cautious attitude toward these suggestions.

To begin with, the timing is extremely unfortunate. Prospective registry operators invested energy and resources and spent several hundreds of thousands of dollars to take part in the application process, based on the rules set forth in the 2011 Applicant Guidebook. As the GAC itself pointed out in 2007, «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.» The GAC was closely involved in designing the relevant framework and had ample opportunity to voice its opinions throughout the preliminary steps. At this point in time, any change of direction would be detrimental to the interests of all parties.

Secondly, this line of intervention doesn't align well with ICANN's mission and proper scope of action. ICANN should only ensure that the domain name system works well and orderly. If the GAC's advice were to be followed, ICANN would be required to enforce a full regulatory agenda which would cover issues as diverse as cybersecurity, privacy, intellectual property, gambling, health services, financial regulation or even "organic farming" – in other words, it would be required to take over the same legal challenges that the governments represented by the GAC are losing domestically.

Thirdly, implementing a burdensome regulatory regime would penalize registry operators by raising their costs and would ultimately push toward a narrower participation in the domain name market. This is especially troublesome, as the whole point of the new gTLD program was to boost competition in the industry and let internet entrepreneurs envision new business models to better serve the needs of their customers.

Finally, the GAC's advice is self-contradictory. While calling for a clear and comprehensive regulatory regime, it leaves plenty of room for discretion:

- 1) it favors open gTLDs but allow for "restricted access" when such arrangement advances its own regulatory goals;
- 2) it recognizes a role for closed gTLDs ("exclusive access") on the condition that they serve the "public interest", but it fails do define the notion of public interest, thus paving the way for uncertainty and disagreements: it should be clear, for instance, that the public interest is not necessarily promoted by industry-wide gTLDs, as some of the advocates of the public-interest requirement implicitly assume;
- 3) by listing an arbitrarily-defined set of strings that require closer scrutiny, it reserves the ability to add new ones but doesn't spell out the underlying criteria; also it creates disparities between those companies and industries which are listed and those which are not;
- 4) it singles out a list of strings that should demand further GAC consideration, but again fails to identify the reasons that should make them unavailable to registry operators: in some cases there seems to be a geographic concern at stake (but gTLDs such as .amazon and .patagonia appear to be warranted by trademark law), in some others it is much more difficult to guess what motivated the GAC (.date, .wine...).

ICANN should think twice before enforcing proposals that would radically overhaul its mission and would change its role in the internet industry for good. The regulatory scheme put forward by the GAC leaves several questions unanswered. Its overall effect would be that of making the internet industry less

open and dynamic than it has been for the past twenty years. Governments should take the responsibility to pursue their own regulatory goals under public scrutiny and within the boundaries of their powers, instead of hijacking ICANN procedures. ICANN, on the other hand, should reject the advice and keep doing what it does best: managing the domain name system as effectively as possible.