



14 May 2013

Re: Comments on the GAC's Beijing Communiqué

ICANN has exceptionally invited public comments on the GAC's Advice provided in its Beijing Communiqué. We view this as a positive indication that while ICANN respects governments' policy input, it also recognizes that a broader global public interest, which transcends national borders, must be considered. We look forward to continuing to work with ICANN as it impartially considers the interests of all stakeholders, including governments, business, consumers, and civil society.

With the GAC's recent Advice, ICANN has an opportunity to demonstrate its commitment to the multi-stakeholder model of Internet governance by timely adherence to the principles and Guidebook text that have been agreed on by the global Internet community – including governments – over the course of many years now.

While we support of the principles behind the GACs safeguard Advice, we have concerns about the process and implementation of such Advice

In the wake of years of online abuse, we are acutely aware that, weary of scores of defensive registrations, many brand applicants have applied for new gTLDs to “reclaim” their online identities.

We therefore support the *principles* underpinning the GAC's recent Advice, in particular concerning strings corresponding to commercial sectors that have traditionally been targets of abuse, and frankly which concerns have yet to be fully resolved from a consumer protection or intellectual property perspective.

We share governments' interest in making the Internet safe for consumers.

Having said that, we have concerns about the process and timing, expansive yet imprecise scope, and implementation and normative repercussions of the GAC's recent Advice.

We believe that the GAC's Advice should not hold up the New gTLD Program, but should guide GNSO-led policy development discussions related to ICANN's contractual compliance undertakings for applications delegated in this and later rounds. Such approach would strike the appropriate balance of progressing discussion on important safeguards while not upsetting community expectations.

We are concerned that with this recent Advice, some governments seem to be setting the stage for an Internet governance model where the legitimate interests of businesses and civil society are relegated; we prefer an inclusive model where robust discourse is encouraged, and innovation and the global digital economy are given the opportunity to flourish.

Post hoc changes to the Guidebook would unfairly prejudice applicants' legitimate expectations

If governments alone – however well-intentioned – are now allowed to apply new and unexpected changes to the rules agreed on by the ICANN community, this could unfairly prejudice the legitimate expectations of applicants who have relied in good faith on the Guidebook.

It is recalled here that governments themselves appreciate this risk; in their *GAC Principles Regarding New gTLDs* dated 28 March 2007, the GAC expressed their consensus view that:

“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 criteria should be used in the selection process.”¹

The New gTLD Program will be delayed while ICANN and applicants react to the GAC's Advice

Applications that fall under the GAC's “safeguard” concerns may find it difficult to comply with the GAC's Advice, in particular as the rationale for such Advice may not always be immediately apparent.

Moreover, we note a discernible lack of meaningful implementation guidance. For example where the GAC suggests that applicants “[e]stablish a working relationship with the relevant regulatory...bodies”, we note that it will not always be clear, within one jurisdiction, let alone on a global basis, which body is the competent regulatory body.

The language proposed by some governments to block or delay consideration of specific applications sets a dangerous precedent

ICANN's Applicant Guidebook codified lists of protected terms agreed on by, and for the benefit of, governments; these lists provided much needed clarity and predictability to the application process.² The GAC's proposal to add new terms to these previously-agreed lists, based on certain unarticulated rationale, opens up current and future applicants to limitless uncertainty.

ICANN's unmitigated acceptance of the GAC's Advice risks eroding the confidence of global businesses (many of whom are future ICANN-contracted parties) who relied in good faith on the community-agreed terms of the GAC-approved Guidebook.³

Applicants are committed to providing new opportunities for growth in the global digital economy; the new proposal of certain governments however to now delay a number of applications from proceeding – without any discernible rationale – will not only delay innovative commercial opportunities, but seriously risks delaying the New gTLD Program altogether.

¹ We also note that the New gTLD Applicant Guidebook states that “For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period.”

² The Guidebook rules, which were based on application of GAC Principles, employed internationally-agreed lists (e.g., ISO 3166-1 and 3166-2), and blocked seven categories of names from approval as new gTLDs, and mandated governmental approval of a further four categories of names (these categories comprise some 5300 names altogether).

³ (The GAC's communication in this regard is available at: <https://gacweb.icann.org/download/attachments/28278837/GAC%20Comments%20on%20the%20new%20gTLDs%20-%2026%20May%202011.pdf?version=1&modificationDate=1312360275000&api=v2>.)

In the GAC's comments on the Applicant Guidebook (April 15th, 2011 version) dated 26 May 2011, the GAC signaled their approval of an extraordinary set of recommendations for the protection of geographic names under ICANN's New gTLD rules.

In that communication, the GAC advised ICANN that:

"Given ICANN's clarifications on 'Early Warning' and 'GAC Advice' that allow the GAC to require governmental support/non-objection for strings it considers to be geographical names, the GAC accepts ICANN's interpretation with regard to the definition of geographic names." [emphasis added]

The recent GAC proposal to delay certain strings could allow individual governments to inappropriately create new international norms through the auspices of ICANN

The GAC's proposal to delay from approval applications referring to place names, in an undefined number of languages, is unreasonably overbroad and likely to have unintended consequences.

The GAC's new Advice with respect to certain geographic terms amounts to a wholesale re-write of the agreed rules set out in the Guidebook. More worryingly, it would allow an individual country's undefined "sensitivities" to trump all other legitimate considerations.

This risks placing veto power in the hands of any individual government, and should concern all applicants that the GAC is effectively resetting the clock on government review of applications.

This is not in line with the multi-stakeholder model and risks turning individual governments into global arbiters of morality and public order, intellectual property rights, and commercial interests.

This plainly exceeds the role of the GAC under the ICANN Bylaws/Guidebook and should be rejected outright as consistent with the Board's obligation to act in the best interests of the corporation and its global shareholders/stakeholders.

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Finally, to be clear, while we do support the GAC-suggested concept of a range of appropriate safeguards to protect consumers and businesses, if ICANN is to consider requiring implementation of such safeguards, the appropriate process set out in the ICANN Bylaws must be followed – this should occur through a GNSO-led Policy Development Process for application to all registries, not just all or certain "non-exhaustive" categories of new gTLD registries.

Thank you for considering the above suggestions; please do not hesitate to contact us if we can provide any clarification.

Yours sincerely,

/s/

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