UPDATE & CONSULTATION ON
New gTLD Subsequent Procedures

OBJECTIONS (v2)

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5 October 2019

ALAC STATEMENTS have touched on:

- General aspects for Objection process – Code of Conduct & COI Guidelines, guidance for panelists & IO
- 1-or-3 person panels
- Role of GAC Advice
- Continued provision for & role of IO
- Continued provision for & role of ALAC
- Community Objections
- String Confusion Objections

* Did not comment on Legal Rights Objections

RELATED SubPro Areas/Topics include:

- GAC Advice / GAC Early Warning
- Objections by GAC Individual Member? *Mechanism to specifically allow objections by individual GAC members and means to challenge assertions of fact by GAC members; opportunity to engage in dialogue to address warning*
- **PICs,** App. Change Requests
- Substantive Appeal Mechanism specific to Program
- Preventative protection mechanisms for Geonames

COMPETITION, CONSUMER CHOICE & TRUST (CCT) RECOMMENDATIONS

- Rec. 33:
  - ❖ GAC Advice to include rationale and be subject to timelines; also when does GAC Advice apply to categories of TLD applications vs individual TLD application; to allow ICANN Board to determine how to apply advice
- Rec 12:
  - ❖ Create incentives and/or eliminate current disincentives that encourage gTLD registries to meet user expectations ... *re String Confusion*

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SNAPSHOT OF SUBPRO WG DELIBERATIONS
Objections as at 5 Oct 2019

- SubPro WG deliberations on public comments to Initial Report on topic of Objections was undertaken on 16, 19, 23, 26 Sep and 1 Oct 2019.
- Applicable 2007 policy
  - ❑ Rec #2 "Strings must not be confusingly similar to an existing top-level domain."
  - ❑ Rec #3 "Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law." Examples cited.
  - ❑ Rec #6 "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law"
  - ❑ Rec #12 "Dispute resolution and challenge processes must be established prior to the start of the process."
  - ❑ Rec #20 "An application will be rejected if it is determined, based on public comments or otherwise, that there is substantial opposition to it from among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support."
- Other Policy goals
  - ❑ Processes for handling objections should be transparent and clear.
  - ❑ In order to ensure a fair process for all parties, panelists, evaluators, and Independent Objectors must be free from conflicts of interest.
  - ❑ Costs should be reduced where feasible without sacrificing the quality of proceedings.

In General

ALAC STATEMENTS support/state:

- Transparent process to ensure panellists, evaluators, IOs are free from COI to supplement existing Code of Conduct Guidelines for Panellists and COI Guidelines for Panellists. Difficulty in subjectivity in determining what constitutes COI and who should decide this.

SUBPRO WG Deliberations:

High Level Agreement for all types of objections:

- A transparent process for ensuring that panelists, evaluators, and Independent Objectors are free from conflicts of interest must be developed as a supplement to the existing Code of Conduct Guidelines for Panelists and Conflict of Interest Guidelines for Panelists. (High-Level Agreement A)

- In other words, state in AGB,
  "All panelists for providers will be free from conflicts of interests and there will be an appeal mechanism should a party believe that a panelist or a provider has an unresolved conflict of interest."

In General – Cont'd

ALAC STATEMENTS support/state:

- Single or 3-person panel? Up to parties. More important to pay attention to (1) making overall cost of filing and completion of objections more affordable to communities and non-profits and (2) disallow wealthier party from putting less wealthy opponent at disadvantage

- Increased detail in guidance for panellists, especially re: panel decisions related to "community" and "public interest", COI allegations, need to examine on purpose and use of applied-for string.

- No reason not to extend "quick look" mechanism beyond LPIO to all objection types, if feasible.

SUBPRO WG Deliberations:

High Level Agreement for all types of objections:

- For all types of objections, the parties to a proceeding should be given the opportunity to agree upon a single panelist or a three-person panel - bearing the costs accordingly. (High-Level Agreement B)

- [Prior to the application round commencing,] ICANN must publish, for each type of objection, all supplemental rules as well as all criteria to be used by panelists for the filing of, response to, and evaluation of each objection. Such guidance for decision making by panelists must be more detailed than what was available prior to the 2012 round. (High-Level Agreement C)

- Extension of the "quick look" mechanism, which currently applies to only the Limited Public Interest Objection, to all objection types. The "quick look" is designed to identify and eliminate frivolous and/or abusive objections. (High-Level Agreement D)

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Re: PICs resulting from Objection(s)

ALAC STATEMENTS support/state:

- Providing applicants with the opportunity to amend an application or add Public Interest Commitments in response to concerns raised in an objection. Subject to:
    - ❖ Applicant must have the choice of withdrawing its application in the event the objector prevails.
    - ❖ WG should consider refunds for withdrawals as well as an appeals mechanism (for the Community Objection dispute resolution process).

SUBPRO WG Deliberations:

High Level Agreement for all types of objections:

- Provide applicants with the opportunity to amend an application or add Public Interest Commitments in response to concerns raised in an objection. (High-Level Agreement E)

Role of GAC Advice / Early Warning

ALAC STATEMENTS support/state:

- GAC Advice:
  - ❖ **(1) should** *[sic]* **include clearly articulated rationale, including national or international law or policy basis.**
  - ❖ (2) GAC Advice and ensuing Board action on categories should be issued prior to finalization of next AGB, thereafter GAC Advice issued during application period to apply to individual strings based on merit and details of application.
  - ❖ (3) No GAC Advice if no full consensus support by GAC.
- Issuance of GAC Early Warnings should be during a specified time and to include both written rationale/basis and specific action requested of applicant.

SUBPRO WG Deliberations:

GAC Comment:

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

Other New Ideas:

- ❑ Modify language in AGB to say, "GAC Advice should include clearly articulated rationale, including the (i) national or international law; and/or (ii) merits-based public policy reasons, upon which it is based".
- ❑ Require that GAC Advice nominate and provide contact details for an authorized GAC contact who is knowledgeable about the grounds for the objection and authorized to discuss solutions with a view to trying to reach a resolution.

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Role of GAC Advice / Early Warning -- Cont'd

ALAC STATEMENTS support/state:

- GAC Advice:
    - ❖ (1) should *[sic]* include clearly articulated rationale, including national or international law or policy basis.
    - ❖ **(2) GAC Advice and ensuing Board action on categories should be issued prior to finalization of next AGB, thereafter GAC Advice issued during application period to apply to individual strings based on merit and details of application.**
    - ❖ **(3) No GAC Advice if no full consensus support by GAC.**
- Issuance of GAC Early Warnings should be during a specified time and to include both written rationale/basis and specific action requested of applicant.

SUBPRO WG Deliberations:

Outstanding

- Future GAC Advice, and Board action thereupon, for categories of gTLDs should be issued prior to the finalization of the next Applicant Guidebook. Any GAC Advice issued after the application period has begun must apply to individual strings only, based on the merits and details of the application, not on groups or classes of applications
- Individual governments should not be allowed to use the GAC Advice mechanism absent full consensus support by the GAC. The objecting government should instead file a string objection utilizing the existing ICANN procedures

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SNAPSHOT OF SUBPRO WG DELIBERATIONS
Objections as at 5 Oct 2019

Role of GAC Advice / Early Warning -- Cont'd

ALAC STATEMENTS support/state:

- GAC Advice:
    - ❖ (1) <u>should</u> *[sic]* clearly articulated rationale, including national or international law or policy basis.
    - ❖ (2) GAC Advice and ensuing Board action on categories should be issued prior to finalization of next AGB, thereafter GAC Advice issued during application period to apply to individual strings based on merit and details of application.
    - ❖ (3) No GAC Advice if no full consensus support by GAC.
- <u>Issuance of GAC Early Warnings should be during a specified time and to include both written rationale/basis and specific action requested of applicant.</u>

SUBPRO WG Deliberations:

<u>Outstanding</u>

- The application process should define a specific time period during which GAC Early Warnings can be issued and require that the government(s) issuing such warning(s) include both a written rationale/basis and specific action requested of the applicant.
- The applicant should have an opportunity to engage in direct dialogue in response to such warning and amend the application during a specified time period.
- Another option might be the inclusion of Public Interest Commitments (PICs) to address any outstanding concerns about the application

Role of GAC Advice / Early Warning -- Cont'd

Question: Is there a presumption of GAC "veto right"?

ALAC STATEMENTS support/state:

- Section 3.1 of 2012 AGB does not create "veto right" for GAC
- Board should consider but is not obligated to accept GAC Advice although Board is expected to provide reasons why
- Reference to "presumption" that a "string will not proceed" is misleading. Section 3.1 AGB actually says "a presumption that an application should not proceed" not that it will not proceed.

- Suggestion to remove of all references to a strong presumption to be taken by the ICANN Board

SUBPRO WG Deliberations:

Outstanding

- Most commenters thought that Section 3.1 of 2012 AGB unintentionally created a presumption of "veto right" for GAC to any application or string
- In line with changes to ICANN Bylaws with respect to Board's consideration of GAC Advice, there is general agreement that this 'presumption' should not exist
- Responses include suggestions to provide more flexibility for the Board to accept Advice and take action to address underlying concerns and incorporate requirements for GAC Advice to include a clearly articulated rationale

Role of Independent Objector (IO)

Questions: Should all funding for the IO come from ICANN? Any limit on number?

ALAC STATEMENTS support/state:

- IO has specified role in safeguarding interest of public who use the Internet so ICANN should continue to fund IO in the next round.
- No limits on number of objections filed by IO.

SUBPRO WG Deliberations:

- Council of Europe, Brand Registry Group, INTA, Registry SG and IPC agreed, but
    - ❑ Registry SG's support is contingent on adoption of recommended reforms (e.g., conflict of interest policy, elimination of extraordinary circumstances exception, naming/identification of one or more parties that initiated or supported the objection)
- NCSG does not support IO. If IO is kept, it should be significantly reduced, given track record and expense. IO should be able to obtain background, procedural information from ICANN Legal. Actions of IO should be transparent
- Council of Europe, BRG, RySG support no limit on number of objections filed by IO.

Role of Independent Objector (IO) – Cont'd

Questions: Should the IO continue to be allowed only under extraordinary circumstances to file an objection to an application where an objection had already been filed on the same ground?

ALAC STATEMENTS support/state:

- Yes. Retain extraordinary circumstances exception for permitting IO to file an objection whether an objection had already been filed on the same ground – IO obligation to act independently, in best interest of public Internet users, evidenced by automatic standing to file LPIO or CO. Mandate should be constrained with as few obstacles as possible. The extraordinary circumstances allows flexibility.

SUBPRO WG Deliberations:

- Council of Europe agreed
- INTA said circumstances should be defined upfront.
- BRG, Neustar, RySG disagreed: Support removing the extraordinary circumstances provision.

Role of Independent Objector (IO) – Cont'd

Questions: Should the IO continue to be limited in her ability to file LPIOs and COs only? Should multiple IOs be appointed? Division of work?

ALAC STATEMENTS support/state:

- Consider lifting restriction on IO to file only LPIO and CO, include SCO
- No need for additional IOs. Why?
    - ❖ (1) Dependent on number of applications
    - ❖ (2) risk of COI on single IO best addressed by suitable candidate
    - ❖ (3) present prerequisite constraint of at least one (publicly available) comment opposing application
    - ❖ (4) existing resources
    - ❖ (5) budgetary concerns

SUBPRO WG Deliberations:

- Council of Europe, BRG, INTA, RySG support keeping limitation
    - ❑ RySG: IO should be required to name one or more parties that initiated or supported the objection but would otherwise be unable to file
- There seems to be enough support for small standing panel to be established to allow alternative panelist to be appointed to eliminate COI in event COI arose

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SNAPSHOT OF SUBPRO WG DELIBERATIONS
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Role of ALAC

Should ICANN continue to fund all objections filed by the ALAC?

ALAC STATEMENTS support/state:

- YES! ICANN should continue funding all ALAC objections in future rounds, pursue LPIO or CO. No additional limits/conditions.
- Need for substantial guidance for DRSP panellists in respect of adopting definitions of "community" and "public interest", objector standing to address panellist unfamiliarity with ICANN Community structure, divergent panellist views/values which conflict with goals in ICANN Bylaws or GNSO consensus policy.

SUBPRO WG Deliberations:

- Council of Europe and Registry SG agreed, but suggested to:
  - ❖ Clarify ALAC's task in the Bylaws
  - ❖ Prioritize cost-controlling mechanisms, where possible, associated with any objection funded by ICANN.
- Registrar SG said to impose limit on objections and funding, if allowed to continue.
- NCSG opposes special rights and privileges for ALAC, or any party, unless they have standing

=> There could be a recommendation to look at budgetary limitations on ALAC's ability to file objections, but WG should refrain from stipulating detailed requirements for ALAC process, provision in existing AGB sufficient

Community Objections

**Question: Should the same entity be allowed to apply for a TLD
as community and also file a Community Objection for the same string?**

ALAC STATEMENTS support/state:

- Does not object to applicant applying as a community to file CO against other applicants for same string as objector needs to meet (1) standing (2) merit in objection criteria. **No justification for prohibiting this.**
- But concerned about possible bias/conflict plus conflicting determinations if a community-based applicant were allowed to file a CO and a SCO.

SUBPRO WG Deliberations:

- Council of Europe: There is a public interest in allowing all concerned parties to be heard
- RySG/NCSG: Oppose allowing this and consider it unfair (RySG) and a form of "double dipping" (NCSG)

Community Objections – Cont'd

Question: How to lower fees, increase predictability, while ensuring evaluations of objections are both fair and comprehensive?

ALAC STATEMENTS support/state:

- Recognised delicate balance between keeping objections processes affordable vs reliance on reputable DRSPs: suggested paying attention to:
  - ❖ (1) ICANN facilitating meeting of minds between applicant and objector
  - ❖ (2) Mandate clear advance notice if cost of objection resolution proceeding varies, appointed DRSP held to account by ICANN for significant increases in costs – **greater transparency for appointment of DRSPs**
  - ❖ (3) Allow greater flexibility in consolidating COs filed against same string using pre-agreed criteria, including collaboration with IO without compromising IO's independence

SUBPRO WG Deliberations:

Some other suggestions:

- ICANN should negotiate better rates, publish cost projections with more care, and stand behind published cost projections. If costs inflate, ICANN and/or providers should bear the burden
- Ensure that fees are clear and communicated to participants up front.
- Costs should be transparent up front with a fixed fee absent extraordinary circumstances. ICANN should also prioritize cost in choosing any vendor.
- The arbitrator forums could shorten the learning curve for arbitrators by providing education and DNS background.

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Community Objections – Cont'd

Question: Should we allow those filing a CO to specify PICs they want to apply to string, and if objector prevails, these PICs become mandatory for successful applicant?

ALAC STATEMENTS support/state:

• Yes. Allow those filing CO to specify PICs to apply to string and if objector prevails, then PICs becomes mandatory

SUBPRO WG Deliberations:

Other Comments:

• Caution against making PICs mandatory, preferred if objector and applicants to use PIC as starting point for discussion towards resolution of objection by way of negotiated settlement

• Applicant can work with objector to modify application to accommodate the interests / concerns of objecting community

Additional caution:

• Need to be able to distinguish Community Objections from opposition to CPE to not disadvantage or add further burden on Community applicants; have clear separate guidelines (incl. timelines) for both

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SNAPSHOT OF SUBPRO WG DELIBERATIONS
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String Confusion Objections

Question: Should we allow for a single SCO to be targetted at all applications for a particular string instead of requiring a unique objections to be filed against each application?

ALAC STATEMENTS support/state:

- Allowing single SCO to be filed against all applicants for a particular string rather than requiring a unique objections to be filed against each application. (To ensure same panel determines the same SCO against the same string)

- Support for exact translations of existing string that is in a highly regulated sector should be grounds for an SCO

SUBPRO WG Deliberations:

High Level Agreement for all types of objections:

- Allow a single String Confusion Objection to be filed against all applicants for a particular string, rather than requiring a unique objection to be filed against each application. Under the proposal: (High Level Agreement F)

  - ❖ An objector could file a single objection that would extend to all applications for an identical string.

  - ❖ Given that an objection that encompassed several applications would still require greater work to process and review, the string confusion panel could introduce a tiered pricing structure for these sets. Each applicant for that identical string would still prepare a response to the objection.

  - ❖ The same panel would review all documentation associated with the objection. Each response would be reviewed on its own merits to determine whether it was confusingly similar.

  - ❖ The panel would issue a single determination that identified which applications would be in contention. Any outcome that resulted in an indirect contention would be explained as part of the [determination].

String Confusion Objections – Cont'd

Question: Should there be grounds for a SCO if an applied-for string is an exact translation of existing string that is in a highly regulated sector, and the applied-for string would not employ the same safeguards as the existing string?

ALAC STATEMENTS support/state:

- Yes. Support for exact translations of existing string that is in a highly regulated sector to be grounds for an SCO

SUBPRO WG Deliberations:

Other Comments

- NABP, USPS: Yes. New TLDs that mimic existing verified TLDs in highly regulated sectors but that lack the same safeguards stand to create confusion and place consumers at risk of fraud and abuse; need to protect consumers and promote trust and confidence in Internet

- IPC: Agrees, provided ""exact translation" is clearly defined, objection grounds are limited, and additional details are filled in

- BRG, RrSG, RySG: No. Extends purpose of SCO unnecessarily; rely on other mechanisms (GAC EW); should be business decision and string evaluated on its own merit; different rules should not apply to something not under GAC Advice

- The Thai Network Information Center Foundation: Homonyms should be explicitly included in the similarity to existing top-level domain consideration of the new gTLD Applicant Guidebook to prevent future confusions and costly disputes

Legal Rights Objections

Question: Should standard for LRO remain the same as in 2012 round?

ALAC STATEMENTS:

- We did not comment on Legal Rights Objections

SUBPRO WG Deliberations:

Approach

- In general, there was concern that provisions in AGB s.3.5.2 LRO got obfuscated somehow – infringement cannot happen through application alone, there must be actual use; also what constitutes "bad faith"

- Small team comprising trademark lawyers in WG to draft language to address weakness/omissions in s.3.5.2 – including working in "bad faith" and other aspect of INTA's comment on standard of proof