

At-Large's Subsequent Procedures Scorecard: GAC Advice & Early Warning

CPWG SubPro Small Team

Shared on At-Large Consolidated Policy Working Group (CPWG) Call
On Wednesday, 16 September 2020, 19:00 UTC



DISPUTE RESOLUTION

Topic/Area:	[30] OBJECTIONS – GAC ADVICE & GAC EARLY WARNING [2.8.1]	Priority:	HIGH	Settled On:	14.09.2020
Related:	<ul style="list-style-type: none"> • (Mandatory) Public Interest Commitments (PICs), Registry Voluntary Commitments (RVCs) [2.3.2] • Safeguards for Sensitive Strings – Verified TLDs • Appeal Mechanism – CCT-RT Rec #33 				
Key Issues:	<p>How should GAC Consensus Advice and GAC Early Warning be treated?</p> <ul style="list-style-type: none"> • Harmonize role of GAC per ICANN Bylaws • Timing and nature of GAC Consensus Advice vs GAC Early Warning • Impact on applicants/applications – Registry Voluntary Commitments 				
Policy Goals:	Clarity and predictability around role of GAC Advice and GAC Early Warning for subsequent procedures and next AGB based on 2012 round experience				
Assigned CCT-RT Rec's:	<p>Rec #33:</p> <ul style="list-style-type: none"> • 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. • ICANN should provide a template to the GAC for advice related to specific TLDs; and AGB should clarify the process and timelines by which GAC advice is expected for individual TLDs. • CCT believes there should be a mechanism created to specifically allow objections by individual members of the GAC and means to challenge assertions of fact by GAC members. • Finally, some sort of appeals mechanism is imperative 				
References:	<ul style="list-style-type: none"> • 12. SubPro GAC Advice-Early Warning – CPWG Consensus building, 25 August 2020 • Sub_Pro Draft Final Report, 20 August 2020 • 10. SubPro GAC Advice-Early Warning – CPWG Consensus building, 27 July 2020 • 06. SubPro GAC Advice-Early Warning – CPWG Consensus building, 15 June 2020 • 04. SubPro GAC Advice-Early Warning – CPWG Consensus building, 8 June 2020 				

What has SubPro PDP WG concluded?	<u>What is SubPro PDP WG recommending?</u>	Is this acceptable? If not, why so? What else needs to be done and by/with whom?
<p>1. Clarity on role and timing of GAC Consensus Advice needed.</p>	<p><u>Affirmation 30.1 (1st limb):</u> WG acknowledges ability of GAC to issue GAC Consensus Advice per ICANN Bylaws. In addition, subject to recommendations below, WG supports 2012 implementation of GAC Early Warning. 2012 AGB described GAC Early Warning mechanism, “Concurrent with the [public] comment period, GAC may issue GAC Early Warning notice concerning an application – providing applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments.”</p> <p><u>Recommendation 30.3:</u> GAC Consensus Advice:</p> <ul style="list-style-type: none"> • Must include a clearly articulated rationale, per ICANN Bylaws • Must be limited to scope set out in applicable Bylaws provisions and elaborate on any “interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.” • To extent that rationale for it is based on public policy considerations, well-founded merits-based public policy reasons must be articulated. <p><u>Implementation Guidance 30.2:</u></p> <ul style="list-style-type: none"> • GAC should provide GAC Consensus Advice (per Bylaws) on categories of TLDs (if any) prior to the finalization and publication of the next AGB • If issued after that date, then ICANN Board should take into account the circumstances resulting in such timing and the possible detrimental effect of such 	<p>Yes, there is consensus to support Affirmation 30.1 (1st limb) and Recommendation 30.3 because:</p> <ul style="list-style-type: none"> • Recognizes GAC Consensus Advice per Bylaws • GAC Consensus Advice, if issued: <ul style="list-style-type: none"> ○ Must include clearly articulated rationale (Bylaws sec 12.3) ○ Be limited in scope to ICANN policies-laws-international agreements interactions or public policy issues ○ If rationale based on public policy considerations, must articulate well founded merits- based public policy reasons • Consistent with CCT-RT Rec 33, “...GAC consensus advice to the Board regarding gTLDs should also be clearly enunciated, actionable and accompanied by a rationale, permitting the Board to determine how to apply that advice ..” • Not inconsistent with GAC feedback in that flexibility for GAC input still allowed in well-justified cases, eg. for consensus advice on categories of applications since GAC cannot foresee everything. <p>Acceptable since not unreasonable. In dealing with treatment of GAC Consensus Advice provided, prior to vs post finalization & publication of AGB, for the “after” event – regardless of categories, groups or classes of applications or string types, or to a particular string, Board is encouraged to consider all relevant factors.</p>

	timing in deciding on what to do with the GAC Consensus Advice, per Bylaws	
2. Removing reference to “strong presumptions tied to GAC Advice” in AGB.	<p><u>Recommendation 30.3:</u></p> <ul style="list-style-type: none"> • Sec.3.1 of the 2012 Applicant Guidebook states that GAC Consensus Advice “will create a strong presumption for the ICANN Board that the application should not be approved.” • Noting that this language does not have a basis in the current version of the ICANN Bylaws, WG recommends omitting this language in future versions of the AGB to bring the AGB in line with the Bylaws language. • To avoid unintended consequence of limiting Board’s facilitation of a solution that mitigates concerns and is mutually acceptable to applicant and GAC, per Bylaws. Such a solution could allow an application to proceed. • Instead, include in AGB a reference to applicable Bylaws provisions that describe the voting threshold for the ICANN Board to reject GAC Consensus Advice. 	<p>Yes, there is sufficient consensus to support Recommendation 30.4 because:</p> <ul style="list-style-type: none"> • The presumption was included as a pre-2016 ICANN Bylaw measure; with the current Bylaws in place, removing this presumption will bring the role of GAC in line with the Bylaws • It does not prevent GAC from issuing GAC Advice per Affirmation 30.1 • Bylaws sec. 12.2(a)(x) already provides for how ICANN Board is to handle GAC Consensus Advice, so there should not be a conflicting provision in the AGB • GAC themselves did not reach consensus to oppose this recommendation.
3. Reaffirms on role of GAC Early Warning and clarifies timing as needed.	<p><u>Affirmation 30.1 (2nd limb):</u> WG acknowledges ability of GAC to issue GAC Consensus Advice per ICANN Bylaws. In addition, subject to recommendations below, WG supports 2012 implementation of GAC Early Warning. 2012 AGB described GAC Early Warning mechanism, “Concurrent with the [public] comment period, GAC may issue GAC Early Warning notice concerning an application – providing applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments.”</p>	<p>Yes, there is full consensus to support Affirmation 30.1 (2nd limb) and Recommendation 30.5 and Recommendation 30.6 because they:</p> <ul style="list-style-type: none"> • Retain GAC Early Warning mechanism for subsequent procedures • Clarifies that GAC Early Warning is applicable to single applications/strings, not category of strings (consistent with CCT-RT Rec #33)

	<p><u>Recommendation 30.5: GAC Early Warnings</u></p> <ul style="list-style-type: none"> • To be issued concurrently with application comment period • To the extent that there is a longer period given for the GAC to provide Early Warnings (above and beyond the application comment period), the AGB must define a specific time period during which GAC Early Warnings can be issued. <p><u>Recommendation 30.6: Government(s) issuing Early Warning(s) must include a written explanation describing why the Early Warning was submitted and how the applicant may address the GAC member’s concern</u></p>	<ul style="list-style-type: none"> • Clearly distinguish nature of GAC Early Warning vs GAC Advice, and makes clear that GAC Early Warning can be issued by one or more GAC members (i.e. “full” GAC consensus not needed) • Specify timing for GAC Early Warning to be issued • Provide for GAC Early Warning to include rationale and how to address concerns (again, consistent with CCT-RT Rec #33) • Are consistent with GAC feedback in support of this recommendation
<p>4. GAC’s role in impacting Registry Voluntary Commitments</p>	<p><u>Recommendation 30.7:</u></p> <ul style="list-style-type: none"> • Applicants must be allowed to change their applications, including the addition or modification of Registry Voluntary Commitments (RVCs, formerly Voluntary PICs), to address GAC Early Warnings and/or GAC Consensus Advice • Relevant GAC members are strongly encouraged to make themselves available during a specified period of time for direct dialogue with applicants impacted by GAC Early Warnings or GAC Consensus Advice to determine if a mutually acceptable solution can be found. 	<p>Yes, no issues since:</p> <ul style="list-style-type: none"> • GAC members encouraged to dialogue with applicant impacted by GAC Early Warnings of GAC Consensus Advice to strive for mutually acceptable solution • Solutions which lead to addition or modification of RVCs allowed, <u>subject to Application Change Request process</u> – evaluation, PC • Is consistent with GAC feedback in support of this recommendation
<p>Main Positions of Concern:</p>	<p>None in particular. Most of the recommendations and implementation guidance are consistent with ALAC’s past positions, either consistent or not inconsistent with GAC feedback and reflect many of the more crucial sub-recommendations contained in CCT-RT Recommendation #33.</p>	