



UPDATE & CONSULTATION ON
New gTLD Subsequent Procedures
Consensus Building on Recommendations

GAC Advice & Early Warning (v12)

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Key Issues in Subsequent Procedures

Topic 30: GAC Advice & GAC Early Warning

(originally part of “Objections”)

How should GAC Advice and GAC Early Warning be treated?

- Harmonize role of GAC per ICANN Bylaws
- Timing and nature of (1) GAC Consensus Advice vs (2) GAC Early Warning
- Impact on applicants/applications – Registry Voluntary Commitments

What is the New gTLD Subsequent Procedures (“SubPro”)?

- o The set of rules and mechanisms applicable to the next round for New gTLDs i.e. they DO NOT apply to legacy TLDs, ccTLDs, or delegated new gTLDs or those still unresolved from the 2012 application round
- o “An update” to the 2012 Round rules and mechanisms

Review of existing positions on GAC Advice / GAC 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.
- Suggestion to remove of all references to a strong presumption to be taken by the ICANN Board



RELATED SubPro Areas/Topics include:

- Mandatory PICs, Voluntary PICs
- Safeguards for Sensitive Strings – Verified TLDs
- Appeal Mechanism



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.
 - ❖ 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.

Summary/Impact of SubPro Recs/IGs: GAC Consensus Advice (part 1)

SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

Affirmation 30.1 (1st limb)

- Recognizes GAC has ability to issue GAC Consensus Advice per ICANN Bylaws

Implementation Guidance 30.2

- 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 timing in deciding on what to do with the GAC Consensus Advice, per Bylaws

Recommendation 30.3

GAC Consensus Advice:

- 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.

IMPACT For At-Large Consensus Building

- Aff 30.1 (1st limb) + Rec 30.3:
 - Recognizes GAC Consensus Advice per Bylaws
 - GAC Consensus Advice, if issued:
 - ❑ 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
- IG 30.2 deals with treatment of GAC Consensus Advice provided, prior to vs post finalization & publication of AGB
 - ❑ Re: after – regardless of categories, groups or classes of applications or string types, or to a particular string, encourages Board to consider all relevant factors
- 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 .."
- **GAC input: "there should be some flexibility on still allowing, in well-justified cases, for instance, that consensus advice on categories because we cannot foresee everything"**

Details of GAC Input re: GAC Consensus Advice (& GAC Early Warning)

Prior GAC Input (Pre-ICANN67)

- GAC Early Warning and GAC Advice were a useful mechanism to identify applications that raise public policy concerns
- GAC Early Warning and GAC Advice should be an integral part of any future rounds.
- The GAC would welcome the opportunity to discuss options to increase the transparency and fairness of these arrangements, including:
 - providing a rationale for objections
 - giving applicant subject to Early Warnings the opportunity for direct dialogue with the GAC

ICANN67 GAC Communiqué Language:

"The GAC notes that the current recommendations of the Sub Pro PDP WG contrast to some extent from GAC input on its Initial Report, since, inter alia, it is considering removing in future editions of the Applicant Guidebook that GAC Consensus Advice on an application "will create a strong presumption for the ICANN Board that the application should not be approved". Additionally, GAC Members expressed the need for further discussion of draft PDP WG recommendations regarding: the scope of the rationale of GAC Advice; and proposing that "GAC Advice issued after the application period has begun must apply to individual strings only, based on the merits and details of the applications for that string, not on groups or classes of applications." Sub Pro PDP WG discussions on this topic noted that, with the intent to take into account the concerns expressed by GAC participants, alternative language will be drafted possibly referring recommendations back to the new ICANN Bylaws. The GAC noted the need for further discussion within the GAC and with the PDP WG".

GAC Individual Member Input via Written Consultation - May 2020

- Mixed input received by individual GAC Members/Observers.
- Some members/observers support current PDP WG Language (noting the language reviewed by the GAC did not include the most recent changes flagged in previous slide);
- Some members/observers note that GAC Advice on categories or groups of applications should remain possible once application period has begun.
- Multiple members/observers noted that a mention of the ICANN Bylaws would suffice in rationale 1 relative to "GAC consensus advice be limited to the scope set out in the applicable Bylaws provisions"

Summary/Impact of SubPro Recs/IGs: GAC Consensus Advice (part 2)

SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

Recommendation 30.4

- 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.

IMPACT For At-Large Consensus Building

- Rec 30.4:
 - Removes strong presumption for ICANN Board that GAC Consensus Advice means the application should not be approved.
 - Presumption included pre 2016 Bylaws Now bringing role of GAC in line with Bylaws.
 - Doesn’t prevent GAC from issuing Consensus Advice (Aff 30.1)
 - Bylaws Sec. 12.2(a)(x) provides for how Board handles GAC Consensus Advice

GAC input: *“three positions within the GAC.:-*

- *One position saw the merit in the argument that this strong presumption could be against, reaching an agreement with the applicants concerned by that GAC consensus advice.*
- *Then there were others who agreed with the argument: “Let’s just make a reference to the bylaws and to the threshold.”*
- *Then there were others who said this strong presumption wasn’t mentioned in the bylaws and went into the Applicant Guidebook and it [is] mentioned in the new bylaws, so it could still be maintained in the Applicant Guidebook.”*

Summary/Impact of SubPro Recs/IGs: GAC Early Warning

SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

Affirmation 30.1 (2nd limb)

- Supports 2012 implementation of GAC Early Warning mechanism

Recommendation 30.5

GAC Early Warnings

- 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

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 concerns.

IMPACT For At-Large Consensus Building

- Aff 30.1 (2nd limb) + Rec 30.5 + Rec 30.6 **retain GAC EW mechanism**
 - Applicable to single applications /strings, not category of strings
 - Distinct from GAC Consensus Advice, so can be issued by one or more GAC members
 - During application comment period unless extended as specified in AGB
 - Must include rationale and how to address concerns

GAC input:

- *GAC Early Warning were a useful mechanism to identify applications that raise public policy concerns*
- *GAC Early Warning should be an integral part of any future rounds.*
- *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 applicant subject to Early Warnings the opportunity for direct dialogue with the GAC*

Summary/Impact of SubPro Recs/IGs: Registry Voluntary Commitments

SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

Recommendation 30.7

- 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.

IMPACT For At-Large Consensus Building

- Rec 30.7
 - 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, subject to Application Change Request process – evaluation, PC.

GAC input: “some of the individual GAC input welcomes the fact that the applicant can make changes in response to the GAC early warning - that’s an important addition was very much recognized and welcomed by several GAC members”

Harmonizing PDP recs with CCT-RT rec 33 – need for additional work?

CONTEXT OF REMAINING ISSUE

CCT Rec 33 states: “As required by the October 2016 Bylaws, 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. ICANN should provide a template to the GAC for advice related to specific TLDs, in order to provide a structure that includes all of these elements. In addition to providing a template, the AGB should clarify the process and timelines by which GAC advice is expected for individual TLDs.”

- WG believes that Rec 30.3 is consistent with the CCT-RT’s recommendation that GAC Consensus Advice is “enunciated, actionable and accompanied by a rationale.”
- Not yet made a decision about whether to provide further recommendations corresponding to the other elements of the CCT-RT recommendation, in particular regarding the proposed template for GAC Consensus Advice related to specific TLDs and clarification in the AGB regarding process and timelines for GAC Consensus Advice directed at specific TLDs.
- Re: a mechanism created to specifically allow objections by individual members of the GAC and means to challenge assertions of fact by GAC members, WG believes that creating the opportunity for dialogue between applicants and GAC members as part of the Early Warning and GAC Consensus Advice processes (Rec #30.7) provides a potential means to “challenge assertions of fact by GAC members.”
- Re: some sort of appeals mechanism is imperative, WG believes that the substantive appeals mechanism proposed in “Limited Challenge/ Appeal Mechanism” topic addresses this need expressed by CCT-RT.

IMPACT For At-Large Consensus Building

- CCT-RT Rec 33 elements seemingly partly met? Vis a vis:
 - ❑ GAC Consensus Advice to be clearly enunciated, actionable, with rationale
 - ❑ Process and timelines by which GAC advice is expected for individual TLDs – GAC EW during Application Comment Period
 - ❑ Mechanism to allow objection by individual GAC members, means to challenge assertion of fact – GAC EW + dialogue between applicants and GAC members
 - ❑ Limited Challenge/ Appeal Mechanism has been recommended
- Proposed template for GAC Consensus Advice – still necessary?