



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

GAC Advice & Early Warning (v06)

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Key Issues in SubPro

GAC Advice & GAC Early Warning

(part of "Objections")

- Timing and nature of Advice/Early Warning
- Impact on applicants/applications

- What is the New gTLD Subsequent Procedures ("SubPro")?
 - ❖ 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
 - ❖ "An update" to the 2012 Round rules and mechanisms

GAC Advice / GAC EW: Consensus Building



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.

Impact of SubPro Recommendations * as at 8 June 2020

SubPro PDP WG on “GAC Consensus Advice”

Affirmation #1

- GAC has ability to issue GAC Consensus Advice in accordance with the ICANN Bylaws
- Keep GAC Early Warning mechanism, having served intended purpose

Implementation Guidance

- GAC should provide GAC Consensus Advice on categories of TLDs (if any) prior to the finalization and publication of the next AGB
- If GAC Consensus Advice is issued after the finalization and publication of the next AGB, 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

WG’s Rationale

- Acknowledges the role of GAC Consensus Advice as defined in the ICANN Bylaws
- Predictability: Need for GAC Consensus Advice on categories (if any) before next AGB is finalized and published, so that prospective applicants and the Internet community fully understand implications, scope before application process begins.
- RE: ‘late’ GAC Consensus Advice, ICANN Board should take into account the circumstances resulting in such timing and the possible detrimental effect of such timing in determining whether to accept/override GAC Consensus Advice, per Bylaw.
- Considered input from individual GAC members who emphasized that it is important for the GAC to have flexibility in providing Consensus Advice. So, WG revised the IG to provide for flexibility while also encouraging Board to consider all relevant factors when making a decision on GAC Advice.

Recommendation #2

- Per ICANN Bylaws, GAC Consensus Advice must include a clearly articulated rationale.
- GAC Consensus Advice 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 GAC Consensus Advice is based on public policy considerations, well-founded merits-based public policy reasons must be articulated.

WG’s Rationale

- ICANN Bylaws require that Advice provided by ACs must be clear, unambiguous and accompanied by a rationale.
- Notes that CCT-RT Recommendation 33 specifically references this requirement with respect to GAC Consensus Advice related to gTLDs.
- Providing a rationale that is in line with the scope of GAC Consensus Advice per ICANN Bylaws, will not only permit the Board to determine how to apply that Advice, but it also gives applicants an opportunity to remedy concerns raised in GAC Consensus Advice while still proceeding with application process if those concerns have been sufficiently addressed.
- Requirement to provide a rationale supports transparency and predictability, which are essential in processes related to the New gTLD Program.

* From SubPro PDP WG, not limited to recommendations, but also affirmations and implementation guidance

Impact of SubPro Recommendations as at 8 June 2020

GAC Input on “GAC Consensus Advice”

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

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”

Impact of SubPro Recommendations as at 8 June 2020

For At-Large Consensus Building on "GAC Consensus Advice"

Impact

- Affirmation #1 + Recommendation #2 :
 - (1st limb) Recognizes GAC Consensus Advice per Bylaws
 - GAC Consensus Advice:
 - Must include clearly articulated rationale
 - 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
- Implementation Guidance: 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"*

Additional intervention

- **Any concerns?**

Impact of SubPro Recommendations

SubPro PDP WG on “GAC Consensus Advice”

Recommendation #3

- 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.

WG’s Rationale

- Consistency between policy - future versions of the AGB - applicable provisions of the ICANN Bylaws
- In the 2016 revisions to the ICANN Bylaws, changes made to sec. 12.2, which describes the role of the GAC and GAC Consensus Advice – do not indicate that GAC Consensus Advice “will create a strong presumption for the ICANN Board that the application should not be approved”.
- By omitting “strong presumption”, the Board has greater flexibility to facilitate a solution that both accepts GAC Consensus Advice and allows for the delegation of a string if the underlying concerns that gave rise to the GAC Consensus Advice are addressed.
- Allowing for mutually acceptable solutions is consistent with the relevant section of the Bylaws.
- Considered input from individual GAC members, noting that a number of GAC members, although not all, favored retaining the existing “strong presumption” language in the Applicant Guidebook. WG appreciates this input but nonetheless believes that it is appropriate to omit the language for the reasons stated above.

Impact of SubPro Recommendations

GAC Input on “GAC Consensus Advice”

Prior GAC Input (Pre-ICANN67)

- Current concerns with PDP WG consideration to remove, in future editions of the Applicant Guidebook, language included in the 2012 AGB section 3.1 that GAC Advice “will create a strong presumption for the ICANN Board that the application should not be approved.”

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”.

For At-Large Consensus Building

Impact

- Removes strong presumption for ICANN Board that GAC Consensus Advice means the application should not be approved. Bringing in line with Bylaws.

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.”*

Additional intervention

- **Any concerns?**

Impact of SubPro Recommendations as at 8 June 2020

SubPro PDP WG on “GAC Early Warning”

Affirmation #1

- GAC has ability to issue GAC Consensus Advice in accordance with the ICANN Bylaws
- Keep GAC Early Warning mechanism, having served intended purpose

WG’s Rationale

- GAC Early Warning mechanism served its intended purpose of allowing GAC members to raise concerns about applications...
- WG supports continuation of these mechanisms in subsequent rounds, subject to the recommendations included in this report.

Recommendation #4

- GAC Early Warnings are issued concurrent 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

WG’s Rationale (for Rec. #4)

- WG supports processes that provide the GAC with a fair and consistent opportunity to provide Early Warnings while also ensuring that that application process is transparent and predictable for all parties.
- Believes that by providing a clear timeframe in which GAC members may provide Early Warning(s) on applications, predictability will be increased in the application process for all parties

Recommendation #5

- 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.

WG’s Rationale

- Written explanation in Early Warning needed as to why it is being issued and how the applicant may potentially be able to address the underlying concerns.
- This measure provides greater transparency in the process and also enables applicants to propose specific changes to the application to address concerns raised by GAC members.

Impact of SubPro Recommendations as at 8 June 2020

GAC Input on “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 and
 - giving applicant subject to Early Warnings the opportunity for direct dialogue with the GAC

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.
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For At-Large Consensus Building

Impact

- Affirmation #1, Recommendations #4 and #5:
 - (2nd limb) **Continue to have GAC EW mechanism:**
 - Applicable to single applications /strings, not category of strings
 - Distinct to GAC Consensus Advice, so can be issued by one or more GAC members
 - During application comment period unless extended as specified in AGB (Rec #4)
 - Must include rationale and how to address concerns (Rec #5)

Additional intervention

- **Any concerns?**

Impact of SubPro Recommendations

SubPro PDP WG on both “GAC Advice” & “GAC Early Warning”

Recommendation #6

- 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.

WG’s Rationale

- To the extent that applicants can address concerns raised in GAC Early Warnings or GAC Consensus Advice through proposed changes to the application, they must have the opportunity to make such changes and continue with the application process.
- Potential amendments could include the addition of RVCs.
- Application changes would be subject to evaluation by ICANN as discussed under “Application Change Requests”.
- Believes that applicants and GAC members both benefit from the opportunity to engage directly in dialogue about the content of Early Warnings and GAC Consensus Advice, as well as underlying concerns that the GAC members may have about an application - provides parties the opportunity to avoid misunderstandings, address any incorrect assertions of fact, and potentially come to a mutually agreeable solution.

Impact of SubPro Recommendations

GAC Input on both “GAC Advice” & “GAC Early Warning”

Prior GAC Input (Pre-ICANN67)

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For At-Large Consensus Building

Impact

- 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”

Additional intervention

- **Any concerns?**

New Issue as at 8 June 2020

SubPro PDP WG

1. Harmonizing PDP recommendations with CCT-RT recommendation 33 – additional work?

Recommendation 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 recommendation #2 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 (recommendation #6) 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.

For At-Large Consensus Building

Impact

- 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 to be recommended

Additional intervention

- **Do you have further concerns, suggestions on what should be done?**