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AT-LARGE ADVISORY COMMITTEE
ALAC Responses to Clarifying Questions from the ICANN Board regarding ALAC Advice on Subsequent Procedures

Preamble

The ALAC appreciates the opportunity to refine and clarify its 16 April 2021 Advice to the ICANN Board, with respect to the recommendations and implementation guidance contained in the Final Report of the Subsequent Procedures PDP Working Group (SubPro PDP WG). Two issues were raised during the ALAC's 20 October 2021 discussion with the Board that deserve discussion here, independent of the specific responses to questions.

First, the ALAC have appeared to have created the impression that a new round of New gTLDs is undesirable and that the recommendations below are meant to stall or stymie a launch of a new round of applications. To clarify, the ALAC are not opposed to new applications for New gTLD strings and, in fact, view Subsequent Procedures as an inflection point during which many logjams can be broken and back burner reform efforts can find momentum. What the ALAC have specifically stated is:

1. It is difficult to ascertain registrant demand for an additional inventory of second level domains. This means we are, as a community, only under pressure to launch a new round by potential applicants and therefore have time to "get it right."
2. We should learn from the 2012 round and endeavor not to repeat the mistakes from that period. Many of the recommendations deal specifically with the health and success of a new round of applications and are not intended to prevent them.
3. A new round represents an opportunity where interests are sufficiently aligned to break logjams surrounding possible best practices and changes to ICANN contracts.

So, contrary to the impression that the Board appeared to hold, the ALAC supports movement towards a new round but seeks improvement from the previous round, and takes the opportunity to leverage that movement in related reform efforts. The analogy that is often used about the 2012 round is building an airplane while in the air. In context of the new round of applications, the ALAC are simply more interested in building the airplane first.

The second impression, that surfaced during the ALAC discussions with the Board, was that the ALAC was looking for "perfection," which is impossible, and therefore fits the narrative that the ALAC are opposed to a new round. Nothing could be further from the truth. Instead, the ALAC Advice stems from a desire to move away from an "efforts" based approach to issues such as DNS Abuse, Applicant Support and IDNs, and towards a "goals and metrics" approach. In each case, the ALAC have advocated for concrete, measurable goals for DNS Abuse mitigation, Universal Acceptance and Applicant Support. The ALAC believes that these are areas in which movement is necessary both for the community generally

and for the success of a new round and, therefore, suggests that the launch of a new round should be precipitated by some specific movement. That is not to say "perfection" but instead accomplished goals, rather than just a new or ongoing effort. The ALAC have endeavored not to be overly prescriptive as to what these goals should be but are willing to make an attempt at greater specificity if such an effort would be welcomed.

Again, the ALAC wishes to express gratitude for the Board's new approach to addressing ALAC Advice and will do everything possible to provide more clarity and specificity to our concerns and recommendations.

ALAC Responses to Clarifying Questions from the ICANN Board regarding ALAC Advice on Subsequent Procedures

Topic #0: Timing and Operational Design Phase (ODP)

What we understand to be the Board's Question

The ICANN Board would like to clarify the ALAC's expectations for when the Board should take action on this ALAC Advice on the Subsequent Procedures PDP Recommendations.

ALAC Response

At the time this ALAC Advice was submitted to the Board circa April 2021, the Board had not resolved to initiate the SubPro ODP, although the ALAC had anticipated that an ODP would take place. Thus, the ALAC intends for the Board to utilize this Advice in making its decision on the SubPro Outputs – i.e. that it be taken into account while carrying out the ODP – and the ALAC would appreciate a response to its Advice at the Board's earliest convenience thereafter.

Topic #1: New gTLD Program Objectives and Metrics

What we understand to be the Board's Question

The Board would like to clarify the ALAC's intention in the statement "Any expansion of the New gTLD Program must be beneficial to all stakeholders" and how such a statement aligns with ICANN's remit and public interest goals.

ALAC Response

Firstly, the ALAC wishes to stipulate that it is not opposed to a new round of applications for New gTLDs. We continue to support and hope for more IDNs, Community/Niche TLDs in future. Instead, we are saying that the anticipated expansion of the New gTLD Program must be beneficial to all stakeholders, meaning that we are asking the Board, to the extent possible, to take into account all interests which includes the interests of those who do not regularly participate in ICANN's policy development processes.

As such, we believe our Advice to be entirely consistent with the ICANN Commitments and Core Values stated in the ICANN Bylaws Article 1, Section 1.2(b)(vii) and Section 1.2(c) as the Advice reiterates the need for the Board "*to strive to achieve a reasonable balance between the interests of different stakeholders while also avoiding capture*" and "*to apply in the broadest possible range of circumstances*" in acting for ICANN.

Secondly, in addition to Commitments and Core Values in Section 1.2(b)(vii) and Section 1.2(c), the ALAC wishes to draw the Board's attention to Core value (b)(iii) which essentially asks – as also framed in the Board's Global Public Interest Framework – whether the Board will, where feasible and appropriate, depend on market mechanism to promote and sustain a competitive environment in the DNS market? We have simply advised that the objectives for the New gTLD Program be sufficiently reviewed and particularized to enable formulation of suitable metrics for effective evaluation beyond just general consumer choice, and Domain Name System (DNS) marketplace competition aspects.This is also consistent with Section 4.6(d) of the Bylaws which is expected to be updated by ATRT3 Recommendation 3.2. In other words, without suitable metrics to evaluate market mechanisms, how do we identify and assess relevant data to be collected in order to tell if mechanisms are good or bad or actually sustain a competitive environment?

Topic #2: CCTRT Recommendations related to Subsequent Procedures

<u>What we understand to be the Board's Question</u>

The Board has reminded the ALAC that the CCT Recommendations do not exist as a monolith and, instead fall in to several different categories, including those recommendations which fall outside the Board's remit to act, those which are in the process of being implemented and those still being evaluated by ICANN org (staff). The Board proposes the ALAC consider reframing any CCT recommendations that are not being actively implemented, but remain a priority, be restated as new Advice to the Board.

<u>ALAC Response</u>

Our response is twofold: First, those recommendations that have been accepted by the Board and were designated as "prerequisite" by the CCRT should, in fact, be fully implemented prior to a new round of applications for gTLD strings. Second, the ALAC will endeavor to revisit the CCT recommendations, as a whole, and look for ways to restate some of them as new ALAC Advice which is more topical and doesn't suffer from the dispersion of the CCTRT recommendations. We will coordinate with the former members of the CCTRT, the GAC and the SSRT2 members to cull and modernize our specific Advice.

Topic #3: DNS Abuse Mitigation

<u>What we understand to be the Board's Question</u>
The Board seeks recognition that efforts are taking place and that, by necessity, such efforts will be ongoing and never truly complete. Additionally, the Board has asked if the ALAC agrees with the CPH definition of DNS Abuse.

<u>ALAC Response</u>
Without question, discussions surrounding DNS Abuse, within the ICANN community, have intensified considerably since ICANN66. The ALAC have endeavored to take a leadership role in these discussions and engage constructively with the rest of the community. There have also been some very promising voluntary efforts including the Framework for Domain Generation Algorithms and the Framework for Trusted Notifiers. ICANN org too has engaged in valuable efforts including the DAAR and direct efforts regarding Conflicker. A new plan for DAAR is pending and the ALAC anticipates that the next version will prove more actionable. It is a certainty that efforts to combat DNS Abuse will be ongoing and never reach anything close to perfection. The ALAC wishes to clarify that perfection is not our goal but rather the establishment of official metrics, related to DNS Abuse, goals established for improvement and measurement of efforts against those goals. Again, to be clear, the ALAC does not suggest that the Board dictate the substance of these objectives, but instead demand that such metrics and objectives be put in place, by the community, including measurable objectives that precede the launch of a new round. It would be the intention of the ALAC to participate in the community discussions around what might represent reasonable objectives. The ALAC looks forward to discussing this further with the Board to achieve the most possible clarity because creating an impossible task, to prevent a new round is most certainly *not* the objective of the Advice. Instead, the ALAC take a new round to be a given and are looking to accomplish as much as possible, with regards to DNS Abuse, before a new round is initiated.

Definition of DNS Abuse
The At-Large community have not yet reached consensus on a definition of DNS Abuse. Consequently, the ALAC has no intention to endorse the CPH definition per se. Instead, the ALAC wishes to table the discussion of definition and simply work with the CPH definition as it is the only definition around which there is community consensus. The ALAC believes there is plenty that can be done to combat DNS Abuse, as defined by the CPH, in the near term, and that those efforts should be the priority. As the ALAC believes that the landscape of DNS Abuse will continue to evolve, thus expanding the definition of DNS Abuse in some way, corresponding anti-abuse measures must be continuously updated to also recognize and address new forms of harm being perpetrated by bad actors.

Topic #4: Enforceability of Registry Voluntary Commitments (RVCs)

<u>What we understand to be the Board's Question</u>

The Board would like to discuss with the ALAC a possible different approach to the enforcement of PICs/RVCs which places more responsibility on an applicant / Registry to develop RVCs which incorporate an objective evaluation methodology.

<u>ALAC Response</u>

The ALAC is open to the Board's proposed approach for an applicant / Registry that wishes to apply for an RVC must also demonstrate an objective evaluation methodology for such RVC - to be applicable to RVCs only - and we are prepared to discuss this approach further.

We suggest that such an approach would also benefit from the use of the Board's Global Public Interest Framework on Commitment a.iv, Core value b.ii, and Core value b.vi, and with reference to GAC Consensus Advice.

We further suggest that such an approach must also be subject to community input.

Notwithstanding, there remains a crucial need for more particularized reporting by ICANN Contractual Compliance in respect of thresholds which are derived and used to assess compliance or non-compliance of an RVC for action to be taken by ICANN.

Topic #5: Universal Acceptance

No response needed as the Board did not have any questions pertaining to the ALAC Advice.

Topic #6: Name Collision

No response needed as the Board did not have any questions pertaining to the ALAC Advice.

Topic #7: Closed Generics

<u>What we understand to be the Board's Question</u>

The Board would like to clarify two things: firstly, whether the ALAC believes a consensus policy process is the only solution in addressing closed generics, and secondly, the ALAC's understanding of how to define "global public interest" and how these strings may meet the threshold of "serving a global public interest".

<u>ALAC Response</u>

First of all, the ALAC takes the position that Closed Generics are not allowed as the status quo. It is on that basis that we advised for the continued suspension of any processing or acceptance of any applications for Closed Generics until there is clear consensus on how they could be allowed, if at all. The ALAC also notes that parts of the ICANN community share this position.

Given that the Board continues to remind the community that it accedes to a community consensus policy process, we do not at this point see an alternative solution to addressing the question of permissibility of Closed Generics.

Perhaps the Board's suggested approach for dealing with RVCs - and in using of the Board's Global Public Interest Framework on Commitment a.iv, Core value b.ii, and Core value b.vi, and also with reference to GAC Consensus Advice - could be applied to devising a solution. In any event, the ALAC believes the definition of "global public interest" needs to be objective, as does any threshold of "serving a global public interest".

Topic #8: Applicant Support

<u>What we understand to be the Board's Question</u>

The Board agrees that participation from underserved regions is a top priority... [through SubProODP] ...ICANN Org has been directed to investigate whether it is feasible for "ICANN org to facilitate small in-person or hybrid community meeting(s), should travel and meeting conditions allow, to begin generating awareness in underserved regions regarding the potential opportunity of subsequent rounds, to initiate discussions regarding how ICANN org will provide support for linguistic needs and IDNs, and to provide information regarding ICANN's mission and the goals of the new gTLD initiative."

<u>ALAC Response</u>

The ALAC reiterates that the Board has not specifically addressed our Advice on the need for evaluation metrics, resource allocation and commitment towards the Application Support Program (ASP). We think it is ill advised for the Board to wait for the SubPro Operational Design Assessment (ODA) before acting to at least firm up the ASP because program objectives are the domain of policy, not implementation.

Topic #9: Auctions and Private Resolution of Contention Sets

<u>ALAC Response</u>

The ALAC reiterates that its Advice of April 16 April 2021 in respect of this topic is clear. We are instead unclear on the Board's question and wish to refer the Board again to our said Advice.

Topic #10: Community Priority Evaluation (CPE)

<u>Our understanding of the Board's Question</u>

The ICANN Board would like to understand the ALAC's preferred approach to addressing its concerns regarding the CPE process.

<u>ALAC Response</u>

The ALAC would like to reiterate its concerns regarding the two identified SubPro Implementation Guidance (IG) on CPE and to recommend to the Board the following approaches for addressing the same:

- With respect to IG 34.4, the Board should consider remitting/sending this back to GNSO Council for reconsideration with an explanation. In brief IG 34.4 touches on CPE Criterion 1-A which requires two elements of "awareness **and** recognition of community members" to score [emphasis added]. It is highly conceivable that extenuating circumstances which impedes an applicant's ability to demonstrate "recognition of community members" would equally apply to impede a demonstration of "awareness of community members". While the SubPro PDP WG had accepted the possibility of "recognition" being immeasurable in some cases in IG 34.4, the WG omitted to acknowledge the

possibility of "awareness" being equally immeasurable. Due to the "**and**" conjunctive in Criterion 1-A, an applicant that cannot demonstrate awareness of community members will fail to score points for this criterion even if the requirement to demonstrate recognition of community members were "waived". As a result, the omission renders ineffectual the reform intended in IG 34.4 on this aspect of Criterion 1-A.

● The Board should consider directing ICANN org to conduct its shortlisting and selection of CPE provider(s) subject to community input, in aid of transparency and especially to help avoid a repeat of the widespread criticisms of the CPE evaluations for the 2012 round largely due to biases held by the selected CPE provider.

Topic #11: Geographic Names at the Top Level

ALAC Response

The events arising from the application for ".AMAZON" suggest the problematic nature of existing policy with respect to strings with geographical meaning.

We reiterate that ICANN must respect local laws which sought to provide rights and/or priority to applicable names of places, or even grant protection for such names as a duty for relevant public bodies/authorities to uphold. Examples of such applicable local laws that have been brought to our attention are: (i) Switzerland's Art. 29 of the Civil Code (CC); (ii) Germany's Art. 12 of the Civil Code (BGB); and (iii) France's France: Art. L45-2 of the post and electronic communication Act (Code des postes et des communications électroniques) and art. L.711-4 of the Intellectual Property Code (code de la propriété intellectuelle). We have been made to understand these laws clearly apply in the DNS space, and although the reported cases mostly apply to second level domain name registrations, we see no reason why motivations of these laws would not apply to TLDs also.

We also reiterate that ICANN should respect the interests of local communities/actors to strings that match place names or names with geographical meaning in their location, beyond simply recognizing international trademark laws as the defining basis for determining priority over such strings.

Most significantly we are concerned that strings matching the names of large, populous non-capital cities (for eg, Shanghai) are not subject to a stronger preventive protection of requiring letters of support/non-objection from relevant local governmental/public authorities irrespective of the applicant's declared use of the TLD. Ultimately, we should be amenable to preventing unintended consequences of an application for large non-capital city name strings from being snapped up simply because we assume that the relevant local governmental/public authorities (especially those that aren't well versed with ICANN) are aware that they had the opportunity to object. In this respect, requiring the applicant to approach relevant local governmental/public authorities is more reasonable than placing the burden squarely on the relevant governmental/public authorities to be aware of and to object to applications for such name strings.

Topic #12: ALAC Standing in Community Objection

Not applicable as the Board did not have any questions pertaining to the ALAC Advice.