

GAC Attendees, Abu Dhabi 28 Oct-2 Nov 2017

GAC Members		
African Union Commission	Germany	Pakistan
Argentina	Guinea, Republic of	Palestine
Australia	Guyana	Peru
Austria		Portugal
Azerbaijan	Haiti	
	Hungary	Romania
Bahrain		Russian Federation
Belgium	India	Rwanda
Brazil	Indonesia	
Burundi	Iran	St Kitts and Nevis
	Italy	Sao Tome and Principe
Canada		Senegal
Central African Republic	Jamaica	Singapore
China	Japan	South Africa
Colombia		Spain
Comoros	Kenya	Swaziland
Congo, Republic of	Kiribati	Switzerland
Cook Islands	Korea	Sweden
Cote d'Ivoire	Kuwait	
Czech Republic		Chinese Taipei
	Luxemburg	Thailand
Denmark		Tokelau
Dominican Republic	Macedonia	Trinidad and Tobago
	Madagascar	Tunisia
	Malaysia	Tuvalu
Egypt	Mexico	
Ethiopia	Morocco	Uganda
European Commission	Mali	Ukraine
	Nauru	United Kingdom
Fiji	Nepal	United States
Finland	Netherlands	
France	New Zealand	Vatican City State
	Nigeria	Vietnam
	Niue	
	Norway	Zimbabwe
GAC Observers		
Caribbean Telecommunications Union (CTU)	International Telecommunications Union (ITU)	Organisation Internationale de la Francophonie (OIF)
Commonwealth Telecommunications Organisation (CTO)	International Criminal Police Organisation (INTERPOL)	West Africa Telecommunications Regulators Assembly (WATRA)
Council of Europe	International Red Cross Red Crescent Movement	World Intellectual Property Association (WIPO)

Economic Community of Central African States (CEEAC)	Organisation for Islamic Cooperation (OIC)	
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ATTACHMENT 2: GAC Abu Dhabi Communiqué

The Johannesburg Communiqué can be found on the [GAC website](#).

ATTACHMENT 3: Statement circulated by Brazil and Peru to the GAC prior to ICANN 60

Based on Bylaws Article 12, Section 12.2(a)(i), (ix) and (x), the Governmental Advisory Committee (GAC) issues to the Board the following comment and advice in relation to the Independent Review Panel's (IRP) declaration of 10 July 2017.

I. General comment

1. On 10 July 2017, the IRP recommended that the Board reviews ICANN's New gTLD Program Committee (NGPC) decision of 14 May 2014, which denied Amazon EU S.a.r.l. ("Amazon")'s application for release and delegation of top level domain names .amazon and its IDN equivalents in Chinese and Japanese characters. In particular, the IRP recommended that, in re-evaluating the application denied by the 2014 NGPC decision, "the Board should make an objective and independent judgment regarding whether there are, in fact, well-founded, merits-based public policy reasons for denying [the] application [in question]". The IRP based its recommendation on the argument that the NGPC decision of 14 May 2014 relied primarily on GAC consensus advice, and that it did not provide a rationale for its decision other than reliance on GAC consensus advice.

2. In that regard, the GAC notes that the 2012 Applicant Guidebook entitles the Board to reject an application under the new gTLD program based on GAC consensus advice objecting to the application. Indeed, the Applicant Guidebook of 2012 states that GAC consensus advice objecting to an application for new gTLDs creates a "strong presumption for the ICANN Board that the application should not be approved". The 2012 Applicant Guidebook then immediately goes on to explain the meaning of the "strong presumption" GAC consensus advice creates: "If the Board does **not** act in accordance with this type of advice, it must provide rationale for doing so."

3. Clearly the 2012 Applicant Guidebook establishes that, in case there is GAC consensus advice objecting to an application under the new gTLD program, there are two different standards applicable to Board decisions depending on whether they accept or reject an application. A decision to accept an application, contrary to GAC consensus advice, needs to be justified by the Board lest it violates the Applicant Guidebook of 2012 and the policy and rules established therein. But a decision to reject an application will comply with the 2012 Applicant Guidebook if it is supported by GAC consensus advice.

4. It follows that the IRP's opinion of 10 July 2017, according to which, despite GAC consensus advice supporting the 2014 NGPC decision, the Board should have provided reasons for the 2014 NGPC decision to follow GAC consensus advice, openly contradicts the policy and rules established in the 2012 Applicant Guidebook. The IRP's opinion effectively nullifies the role attributed to the GAC in the Applicant Guidebook of 2012, for it recommends the Board to act in respect of an application for new gTLDs that is the object of GAC consensus advice in the same way the Board should have acted had there been no GAC consensus advice at all.

5. Furthermore, also contrary to the policy and rules established in the 2012 Applicant Guidebook is IRP's recommendation that "the Board should make an objective and independent judgment regarding whether there are, in fact, well-founded, merits-based public policy reasons for denying [the] application [in question]". The 2012 Applicant Guidebook enables the GAC to oppose applications under the new gTLDs program

"that are identified by governments to be problematic, e.g. that potentially violate national law or raise sensitivities". The Applicant Guidebook of 2012 explains that

"the GAC has indicated that strings that could raise sensitivities include those that 'purport to represent or that embody a particular group of people or interests based on historical, cultural, or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non-exhaustive)' and "those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse."

6. Clearly, the 2012 Applicant Guidebook expressly authorize the GAC to oppose applications for new gTLDs, through consensus advice, based on an assessment that only Governments can make, notably the assessment of Governments' sensitivities. What is more, the Applicant Guidebook of 2012 entitles the Board to rely on GAC consensus advice based on that very assessment in order to reject an application for new gTLDs. Hence it is readily understandable why the 2012 Applicant Guidebook only requires the Board to provide additional and independent rationale for decisions NOT to follow GAC consensus advice, for the Board is in no position to confirm or contradict the consensus view of the GAC on whether an application for new gTLDs raises sensitivities among Governments.

7. It is important to bear in mind that GAC consensus advice opposing specific applications for new gTLDs reflects GAC opposition, not just the opposition of one or few Governments. According to the Applicant Guidebook of 2012, the opposition by Governments, individually, may impede applications under the new gTLD program relating to certain narrowly defined categories of names. But the opposition of Governments to applications for new gTLDs "that are identified by governments to be problematic, e.g. that potentially violate national law or raise sensitivities" constitutes an effective bar to such applications only in case their opposition emanates from the GAC through consensus advice. Hence there is an extremely high threshold to be met for GAC opposition to be effective. [There have been over 1,900 applications for new gTLDs and less than 20 have been addressed by GAC advice]. It is in this context that the Applicant Guidebook of 2012 established the policy and rules governing the process of application for new gTLDs that is the object of GAC consensus advice: GAC consensus advice may not always be followed by the Board, in which case the Board has to provide reasons for why it is acting contrary to GAC consensus advice; but, again, the Board is not required, nor is it in a position, to judge why the GAC considers an application to be problematic from Governments' perspective in case it decides to follow GAC consensus advice.

8. Finally, the IRP's recommendation that the Board should provide its own "public policy reasons" for denying an application for new gTLDs, independently from and in addition to GAC consensus advice contrary to the application, constitutes a direct attack against the multi-stakeholder model of governance on which ICANN is based. In particular, the IRP's recommendation runs contrary to the fundamental principle that Internet governance should be based on the full participation of all stakeholders within their respective roles and responsibilities, and that such public policy issues as may justify GAC consensus advice fall under the exclusive authority of Governments (see paragraph 35 of the Tunis Agenda). The principle is expressly embodied in ICANN Bylaws, which recognizes "that governments and public authorities are responsible for public

policy". Therefore, IRP's recommendation that, in order to act in accordance with GAC consensus advice, the Board should undertake an independent examination of the "public policy reasons" underlying its decision to do so effectively nullifies the role and responsibility of Governments in ICANN's multi-stakeholder governance model.

9. It should be noted that the IRP members seem to have focused primarily on two specific documents, namely the "early warning" issued by Brazil and Peru, on the one hand, and the GAC consensus advice, on the other. They seem to have ignored, on the other hand, that, in between, several steps were dutifully taken, not only by Amazon, but also by the interested governments with a view to paving the way for submission of a draft GAC consensus advice on the matter. These included, for example, the holding of a face-to-face meeting with Amazon representatives in Brasilia, at the seat of the Amazon Cooperation Treaty Organization in March 2013 in which different proposals from each side were explored but no decision was made. All the initiatives undertaken by the interested countries were communicated to the GAC in support of the request for a GAC consensus advice. It should be recalled, in that context, that the report of the Independent Objector was also available at the time. Therefore, upon deliberating on the matter, the GAC relied not only on the contents of the "early warning" but rather on a much wider basis of information.

10. In sum, the IRP's recommendation of 10 July 2017 must not be followed. In this respect, the GAC notes that the IRP's recommendation does not constitute a binding decision on the Board, according to Bylaws Article IV, Section 3.11 (as amended July 2014 and applicable to the 2014 NGPC decision).

II. GAC consensus advice

1. Considering that the 2012 Applicant Guidebook represents the most specific law governing the new gTLD program, for which it was specifically enacted, and that it was the result of negotiations involving all interested parties, and that it establishes policy and rules that were agreed on taking into account the views of all interested parties;

2. Considering that the 2012 Applicant Guidebook establishes, for the purposes of string delegation under the new gTLD program, that GAC advice against an application for new gTLDs "will create a strong presumption for the ICANN Board that the application should not be approved", and that the Board has to provide reasons in case it does NOT act in accordance with GAC advice;

3. Considering that the 2012 Applicant Guidebook acknowledges that the process for GAC Advice on new gTLDs is intended to address applications "that are identified by governments to be problematic, e.g., potentially violate national law or raise sensitivities" (see Module 3.1, second paragraph, Applicant Guidebook of 2012);

4. Considering that ICANN Bylaws as applicable to the NGPC decision of 2014 recognise that "governments and public authorities are responsible for public policy" (Article I, Section 2.11, Bylaws as amended July 2014);

5. Considering that the 2012 Applicant Guidebook entitles the Board to reject an application for string delegation under the new gTLD program, either, (i) by judging the application on its own merits or (ii) by relying on GAC advice to reject the application;

6. Considering that there was GAC consensus advice to reject the delegation of the string rejected by the NGPC decision of 2014 because of the sensitivities it raised among Governments;

7. Considering that the aforementioned GAC consensus advice was the outcome of a process which was developed in full adherence to the relevant provisions of the 2012 Applicant Guidebook and which included face-to-face meeting among all interested parties:

- a.** The GAC advises the Board not to follow the recommendation of the IRP of 10 July 2017.
- b.** The GAC also advises the Board not to take any further action relating to the string delegation request denied in the NGPC decision of 14 May 2014

Rationale: TEXT TO BE DRAFTED