



## Governmental Advisory Committee

12 April, 2011

### **GAC comments on the ICANN Board's response to the GAC Scorecard**

#### **1. Objections Procedures:**

The GAC can accept the Board's classification as a 1B, in view of the Board's intention to retain the "Limited Public Interest Objection" process for entities other than GAC members and other governments, instead of the original GAC recommendation that the entire section be deleted. However, the GAC recommends that ICANN amend the title of the procedures to either "Objections Procedures", or "Public Objections Procedures", as this would more accurately reflect the intention to provide the GAC and individual governments with a separate procedure for objections based on public policy concerns.

#### **2. Procedures for the Review of Sensitive Strings:**

**2.1.1: String Evaluation and Objections:** While the Board has accepted the core component of the GAC's recommendation that governments will use the GAC as a platform to raise objections, its classification of this recommendation as a 1B appears to relate to conditions it expects the GAC to follow in considering objections from GAC members.

##### **GAC response:**

The GAC maintains its intention to follow its Operating Procedures when developing advice for the Board's consideration related to objections raised by its membership.

In addition, the Board's response indicates its expectation that the GAC will provide its advice within 45 days. From the GAC's perspective, the requirement that the GAC should provide advice within the 45 day period appears to be in conflict with the Bylaws provision which does not include a time limitation on the provision of GAC advice.

In recognition of the process developed by the ICANN community, the GAC will endeavor to provide advice about a string or application during the objection period, as already established in the Applicant Guidebook. Consistent with its current practices, the GAC would normally provide its advice at the conclusion of its face-to-face meeting where that meeting falls towards the end of the objection period. Where a GAC meeting does not fall towards the end of the objection period, the GAC will provide advice at its next face-to-face meeting.

The GAC notes that there is no requirement in the by-laws or GAC's own operating procedures for it to provide consensus advice to the Board. The GAC will advise the ICANN Board on both consensus concerns and the concerns of several members as required. The GAC will advise whether the advice provided is consensus advice or not.

As an additional assistance to applicants, the GAC proposes a separate early warning process to allow it to provide initial GAC views to applicants on a no-prejudice basis. Warnings provided by the GAC as part of the early warning process are not GAC advice for the purposes of the ICANN by-laws and will only serve as assistance to applicants. Based on early warnings issued by the GAC, ICANN should allow applicants to amend their applications for a minimal or nil fee. Furthermore, as per the advice below at 2.1.2, ICANN should allow applicants to withdraw as a result of an early warning with a refund in line with the limited actual costs incurred by ICANN at this early stage in the process balanced with the need to deter frivolous applications.

The GAC proposes that the early warning period should be at least 60 days, finishing prior to the initial evaluation period. To assist the GAC and applicants, ICANN should pass details of applications to the GAC as soon as they are lodged. Whether or not a warning is issued at this stage would have no bearing on whether the GAC ultimately provides advice to the Board about a string or application.

**2.1.2:** The Board has rejected the recommendation that GAC advice during the Initial Evaluation could also suggest measures to mitigate concerns, on the basis that this approach introduces subjective assessments into the evaluation process.

**GAC response:**

ICANN's by-laws do not limit the GAC's ability to provide advice on public policy matters (including public policy matters raised by a string or application), and it should not attempt to do so in the new gTLD process.

The GAC continues to believe that applicants should be provided opportunities to either withdraw their application or to amend it to address the specific concerns raised during the "early warning" process.

**2.1.3:** The Board has accepted the GAC’s advice that it must provide a rationale for decisions in the event that the Board determines to take an action that is inconsistent with GAC advice.

**2.2.1, 2.2.2, 2.2.3: Expand Categories of Community-Based Strings:** The Board has categorically rejected the core components of the GAC’s advice, and is substituting a Community objections procedure for the more proactive and preventative mechanism that would require an affirmative demonstration of Community support.

**GAC response:**

The GAC does not believe the Board’s alternative proposal is responsive to the GAC’s concerns. As currently drafted, the Community objections procedure requires governments to pay fees to file such objections, and the procedure itself is triggered fairly late in the processing of applications. Furthermore the Community objections procedure in its current form does not meet the requirements of governments. The GAC’s domestic constituents have a reasonable expectation that applicants for new gTLD strings that clearly suggest they represent specific communities should be required to so indicate in their application and should demonstrate that they have the support of that community or the relevant authorities/entities responsible for that community.

**2.2.4:** The GAC will provide a response once it receives the revised wording the Board is proposing be developed by ICANN staff.

**2.2.5:** The GAC is awaiting a presentation from the Board on such a mechanism. But as the GAC advice states, objection mechanisms should be available free of charge for governments without any constraints.

### **3. Root Zone Scaling:**

#### **3.1. - 3.3. Monitoring and early warning**

**Board response:**

Root zone monitoring systems are currently in place. ICANN will work with root zone operators to identify relevant reporting metrics and to establish a process for reporting such metrics to the GAC and the Internet community. Furthermore, a process will be implemented that enables the delegation of TLDs to be slowed or stopped in the event that there is a strain on the root zone system. ICANN also commits to review the effects of the new gTLD program on the operations of the root zone system, and to defer delegations in a second round until it is determined that the delegations in the first round have not jeopardized the root zone system’s security or stability.

**GAC response:**

The GAC welcomes the concurrence of views between the Board and the GAC concerning the mechanisms and safeguards needed to address the issue of root zone scaling. The GAC also welcomes the commitment of the Board to implementing the necessary mechanisms and to postponing delegations in the second round until it has been determined that delegations in the first round have not jeopardized the root zone system's security or stability.

The GAC looks forward to a document describing the various elements (monitoring systems and their parameters; metrics and reporting mechanisms; the process in the event that there is a strain on the root zone system and inclusion of its implications in the Applicant Guidebook; review before the second round; the limitation of the first round and other elements described in 3.1 - 3.3) and a timeline for implementation. The monitoring must cover all relevant functions in the Root Server System, including at least the steps from change requests to publishing changes in all authoritative root servers, as well as the way in which the synchronization process between the authoritative servers copes with the various changes. The GAC believes that it is imperative that this should be a single and authoritative document issued by ICANN, with the support of the root zone operators and other relevant actors involved in root zone operations. This document should be presented to the community and GAC in time for sufficient consultation and finalization before the launch of the new gTLD program. We believe also that the Applicants Guidebook should have a contingency planning document attached as an annex, and that should be relevant to and easy to find for applications.

**3.4. - 3.7. Operational, resource issues**

Although some fields are unmarked, we assume from the context that the Board categorised all these points as A1.

**Board response:**

ICANN commits that the operation of the IANA functions and ICANN's coordination of the root zone system will not be negatively affected.

**GAC response:**

ICANN's commitment is appreciated and the GAC welcomes the Board's position as consistent with the advice given by the GAC on these points. The GAC looks forward to the Board's answer as to how they will implement the advice given in these separate points and in order to fulfill their commitment.

**4. Market and Economic Impacts:**

**GAC Scorecard proposal:**

1. Amend the final DAG to incorporate the following:  
Criteria to facilitate the weighing of the potential costs and benefits to the public in the evaluation and award of new gTLDs.

**Board Response: 2**

It is not planned that information gathered as part of the application will be used to predict the net benefit of the prospective TLD – that would be too speculative to be of real value. However, during the discussions between the GAC and the Board in Brussels, the GAC indicated that the weighing of costs and benefits should instead take place as part of the new gTLD program review as specified in section 9.3 of the Affirmation of Commitments.

**Revised GAC proposal and GAC response:** The Board should identify criteria to facilitate the weighing of the potential costs and benefits to the public in the evaluation and award of new gTLDs as part of the new gTLD program review as specified in section 9.3 of the Affirmation of Commitments. As such, the GAC believes the Applicant Guidebook should affirmatively inform new gTLD applicants that the one year review will take the following factors, at a minimum, into account:

- Costs to IP (trademark) owners. Questions such as: what were the average costs of engaging in Sunrise challenge procedures; how many disputes occurred during Sunrise periods; what was the average time for the resolution of a dispute; and what were the total costs; did the brand owner have to resort to litigation; etc.;
- Costs to registrants. Questions such as: what protections were made available to registrants; what type of dispute resolution mechanisms were provided for the protection of registrants in the event of a dispute between the registrant and the registry or the registrant and the registrar; etc.; and
- Costs to Internet Users/Consumers. Questions such as: were consumers protected from malicious registries and/or from malicious domain names or domain name use; did the registry provide sufficient protections against domain name hijacking; etc.

In addition, ICANN should devise a systematic means, such as using surveys, to collect information from individuals in each of the three groups that might incur costs as a result of the new gTLD implementation to inform the one year review.

**Rationale:**

The market and economic impact studies done so far are inconclusive. While acknowledging the difficulties of currently finding data needed for such studies, the GAC believes that a process for developing appropriate criteria for evidence-based studies and for collecting the necessary data must be put in place. The GAC urges the Board to acknowledge the results of

the two phases of economic studies conducted by Katz, Rosston et al that finds identifiable costs related to the introduction of new gTLDs, whether in the form of the costs of defensive registrations by brand owners or potential harms to consumers (e.g. from spam, phishing, illegal sales of online pharmaceuticals, or other deceptive practices).

**GAC Scorecard proposal:**

2. A requirement that new gTLD applicants provide information on the expected benefits of the proposed gTLD, as well as information and proposed operating terms to eliminate or minimize costs to registrants and consumers.

**Board response: 1B**

As clarified through the discussions with the GAC in Brussels, ICANN will continue to explore with the GAC during the ICANN Public meeting in March 2011 what data might be included in the application to provide useful input to later economic studies and community analysis.

**GAC response:**

In keeping with the Board's acceptance of the GAC's proposal in principle that registry operators should include a statement of the benefits of a proposed string, the Guidebook should require new applicants to not only specify the intended purpose and use of the proposed string, but the expected benefits. Registry operators should also identify any augmented policies and procedures they intend to follow to minimize abusive registrations or abusive uses of domain names. This requirement is comparable to the current requirement that registrars seeking accreditation provide a detailed business plan for ICANN's review. From the GAC's perspective, building on this obligation with an additional statement that specifically outlines the benefits the applicant expects to accrue from its application would provide a constructive, if not critical, element in the Board's determination that the application meets the global public interest. The GAC also notes that this proposal was well received during the community discussions in San Francisco.

**GAC Scorecard proposal:**

3. Due diligence or other operating restrictions to ensure that Community-based gTLDs will in fact serve their targeted communities and will not broaden their operations in a manner that makes it more likely for registries to impose costs on existing domain owners in other TLDs.

**Board response:**

**1A** - The Board has accepted the GAC's advice that due diligence or other operating restrictions to ensure that Community-based TLDs will in fact serve the targeted communities and will not broaden their operations in a manner that makes it more likely for registries to impose costs on existing domain owners in other TLDs.

**GAC response:**

The GAC welcomes the Board's commitment to continue work to ensure that post-delegation dispute mechanisms adequately address this concern, and looks forward to reviewing and providing further advice on those mechanisms.

## **5. Registry-Registrar Separation:**

The Board response is considered insufficient by the colleagues of some GAC members who are responsible for Competition and anti-Trust issues. They have requested that ICANN provide a more reasoned argument as to why they have rejected the GAC's proposal and why the Board feels that ex-ante measures are less preferable to ex-post measures for minimising problems associated with anti-competitive behavior.

## **6.4. Consumer Protection and Law Enforcement Proposals**

### **1. GAC Scorecard Proposal:**

Amend the "Maintain an abuse point of contact" paragraph in the DAG to include government agencies which address consumer protection:

#### **Board Response:**

ICANN agrees that the registry operator must assist appropriately in law enforcement investigations. There might be a difference between local and International law enforcement agencies. There is a question about whether this requirement would be stronger than what is already required by law. Changes to the Guidebook will be made after consideration of those issues.

#### **GAC Response:**

The GAC proposes to change the text of the amendment as follows:

*A registry operator must respond in a timely manner to a request concerning any name registered in the TLD from any government agency that is conducting a lawful investigation or official proceeding inquiring into a violation of or failure to comply with any criminal or civil statute or any regulation, rule, or order legally issued pursuant thereto.*

#### **Rationale:**

To mitigate harm in circumstances in which abuse has been identified, the registry should be obligated to respond promptly to requests from government agencies investigating abuse. The proposed text does not limit the obligation to reply to requests received only from "law enforcement" because that term, in certain parts of the world, does not encompass

regulatory bodies or government entities with civil authority that investigate and enforce laws prohibiting other types of malicious conduct, such as consumer protection and data protection agencies. *Contrary to the concern raised by the Board, the amendment would not obligate the registry to provide any type of assistance or data that would contravene a national law.* Rather, the amendment merely imposes on the registry an affirmative obligation to respond to the governmental inquiry promptly (even if that response indicates other procedures that must be used to obtain the actual data). In regard to jurisdictional concerns related to obligating registries to respond to both domestic and foreign law enforcement agencies, we believe the amendment should not contain a jurisdictional limitation, as it would significantly slow down the governmental inquiry and inhibit the agency's ability to respond promptly to an abuse incident. If the registry operator has a concern about verifying the legitimacy of the agency's status, it can use alternative methods, such as resorting to publicly available information about an agency, or contacting its local enforcement contacts to obtain verification. It can also request verifying information from the enforcement agency itself in the event that there is a concern.

#### **GAC Responses to questions raised by the Board in San Francisco:**

##### **1. What is the scope of the laws the agencies are enforcing?**

LEAs enforce a wide range of laws, including those related to cybercrime, child pornography, illegal sale of drugs and pharmaceuticals, financial matters, privacy/data protection, and consumer protection. We would not envision that the obligation to respond to an inquiry would be restricted based on the type of law being enforced, because domain name abuse could be implicated in a wide variety of matters.

##### **2. Would designating a national point of contact for each country be a possible way to implement this particular element of the GAC's advice?**

No, it is not possible to develop such a roster or list. The GAC appreciates the Board's consideration of these issues and understands that national points of contact have been contemplated in some circumstances, particularly for the implementation of international treaties. However, designating national points of contact for all law enforcement agencies is not a feasible solution for this issue, especially in jurisdictions with large populations and a significant number of enforcement agencies. It would be impractical under those circumstances to create a single national point of contact who could handle daily requests from all over the country to hundreds of registries and registrars. In addition, such a framework would undoubtedly impose time delays, which would be particularly problematic given the fast-moving nature of domain name abuse. Currently, law enforcement agencies contact registrars and registries directly regardless of the jurisdiction, and the intention is not to limit this practice. Rather, the aim is merely to impose an affirmative obligation on the registry operator to respond to the law enforcement agency's inquiry in a timely manner.

## **2. GAC Scorecard Proposal:**

**Effective Contract Compliance:** The GAC advises the Board to ensure that ICANN's contract compliance function is adequately resourced to build confidence in ICANN's ability to enforce agreements between ICANN and registries and registrars.

### **Board Response:**

1A designation. Augment ICANN's contractual compliance function with additional resources to support the program of contracts between ICANN and the registries and registrars.

### **GAC Response:**

The GAC appreciates the Board's agreement to strengthen ICANN's contractual compliance function. The GAC respectfully requests ICANN, in the coming weeks, to identify the amount of personnel it intends to hire to support the compliance function and the timeline for hiring. In particular, the GAC would like to know how many staff ICANN intends to have in place prior to the expected launch of new gTLDs. As ICANN adds new resources to its compliance program, the GAC encourages ICANN to ensure that it is staffed globally, perhaps using regional compliance officers consistent with the five RIR regions. The GAC believes that a robust compliance program is necessary to enforce registry and registrar contracts and that a strengthened contract compliance function must be in place prior to the launch of new gTLDs.

## **3. GAC Scorecard Proposal:**

**Vetting of certain strings** - gTLD strings which relate to any generally regulated industry (e.g. .bank, .dentist, .law) should be subject to more intensive vetting than other non-geographical gTLDs.

During the discussions, the GAC suggested that this category would be expanded to incorporate other strings that are particularly susceptible to abuse (e.g., .kids, .pharma).

### **Board Response:**

ICANN has requested clarification from the GAC of the intended meaning of "generally regulated industries", but generally believes that *a priori* categorization of strings is inherently problematic.

### **GAC Response:**

In light of the Board's rejection of a categorization of strings related to regulated industries, or strings that are particularly susceptible to abuse, the GAC proposes that ICANN conduct more stringent vetting (to the highest degree) of all new gTLD applicants to ensure that registries are not operated by entities/individuals who will use the platform for criminal purposes or otherwise abuse the domain name system. The GAC notes that the community discussions in San Francisco supported this concept of more stringent vetting for all new gTLD applicants.

#### **4. GAC Scorecard Proposal:**

Include other criminal convictions as criteria for disqualification, such as Internet-related crimes (felony or misdemeanor) or drugs.

#### **Board Response:**

ICANN accepts the principle that screening should be as effective as possible. ICANN is willing to meet with law enforcement and other experts to ensure that all available expertise is focused on this issue. (ICANN notes however that there is no consistent definition of criminal behavior across multiple jurisdictions, and the existing proposed Applicant Guidebook consciously targets "crimes of trust".)

#### **Board Lead Question:**

What kind of drug convictions (or other convictions) is the GAC envisioning? (Module 1 Number 1)

#### **GAC Response:**

The type of drug convictions the GAC envisions are anything other than simple possession, e.g., the illegal sale, manufacture, or distribution of illicit or pharmaceutical drugs. In addition, the background screening should inquire about acts of terrorism, arms trafficking, human trafficking, money laundering, smuggling (including of weapons), IP crime, and cybercrime, including civil or criminal judgments involving spam, hacking, or the deployment of botnets. In addition to the criminal conduct, the due diligence should also inquire whether the applicant, or any individuals named in the application, have been subject to court or administrative orders involving violations of laws prohibiting unfair or deceptive practices.

#### **5. GAC Scorecard Proposal:**

Assign higher weight to applicants offering the highest levels of security to minimize the potential for malicious activity, particularly for those strings that present a higher risk of serving as venues for criminal, fraudulent or illegal conduct (e.g. such as those related to children, health-care, financial services, etc.)

#### **Board Response:**

ICANN could consider providing extra points in some aspects of the qualification evaluation scoring process. (ICANN notes however that a priori categorization of strings is inherently problematic.)

#### **Board Lead Question:**

Has the GAC determined parameters to determine what strings are more easily to be used as venues for criminal conducts ?

#### **GAC Response:**

The GAC would appreciate it if greater weight is given to those applicants who offer more security. In addition, the GAC requests that ICANN publicly disclose whether the applicant has offered augmented security levels. In regard to the categorization of strings, please refer to the GAC response to this issue with respect to the consumer protection concerns.

**6. GAC Scorecard Proposal:**

Add domestic screening services, local to the applicant, to the international screening services.

**Board Response:**

ICANN accepts the principle that screening should be as effective as possible. ICANN is willing to meet with law enforcement and other experts to ensure that all available expertise is focused on this issue. (ICANN is mindful that this particular recommendation could lead applicants to locate in certain regions in order to gain the depth of domestic screening. International screening is likely to include the reports of local agencies and could therefore be duplicative.)

**Board Lead Question:**

What level of local screening is the GAC considering as appropriate?  
(Module 2 Number 1 )

**GAC Response:**

The GAC agrees that screening should be as effective as possible. To resolve this issue, it would be helpful to know the screening services that ICANN intends to use. Perhaps law enforcement agencies could recommend the use of additional services to supplement, rather than replace, the existing screening to ensure a comprehensive, but not duplicative, search is conducted. ARIN, for example, uses several different resources when it conducts background screenings prior to IP address allocation, including KnowX, Dun & Bradstreet, Westlaw, and relevant federal and state websites for corporate and financial information. In regard to specific law violations that should be considered, please refer to the GAC response to the question above.

**7. GAC Scorecard Proposal:**

Add criminal background checks to the Initial Evaluation

**Board Response:**

ICANN accepts the principle that screening should be as effective as possible. ICANN is willing to meet with law enforcement and other experts to ensure that all available expertise is focused on this issue. (ICANN notes that there is no consistent definition of criminal behavior across multiple jurisdictions, and the existing proposed Applicant Guidebook already addresses serious crimes of trust.)

**Board Lead Question:**

The background screening that happens before the Initial Evaluation

(IE) does check for criminal convictions. Is the GAC proposing moving this to IE, as opposed to before IE? Is the GAC considering something different from the criminal background checks that are already envisioned in the Guidebook? (Module 2 Number 2)

**GAC Response:**

The GAC is not proposing to change the timeline for the background screening but rather expand its scope to ensure a comprehensive review. As noted in response to an earlier question, the screening should also include the illegal sale, manufacture, or distribution of illicit or pharmaceutical drugs, acts of terrorism, arms trafficking, human trafficking, money laundering, smuggling (including of weapons), IP crime, and cybercrime, including civil and criminal judgements involving spam, hacking, and the deployment of botnets. In addition to criminal conduct, the due diligence should also inquire as to whether the applicant, or any individuals named in the application, have been subject to court or administrative orders involving violations of laws prohibiting unfair or deceptive practices.

**8. GAC Scorecard Proposal:**

Amend the statement that the results of due diligence efforts will not be posted to a positive commitment to make such results publicly available.

**Board Response:**

ICANN will explore possible ways to make results public, but is concerned that posting such information poses concerns about privacy that should be explored further.

**GAC Response:**

The GAC appreciates that ICANN will explore these issues. At a minimum, the identification of the individuals named in the application, e.g., officers, controlling shareholders, should be publicly released. The disclosure of the identity of these individuals is necessary for stakeholders to have full information when filing objections or submitting public comments, particularly if they are aware of other matters related to these individuals that could be of concern. Currently, the Attachment to Module 2 indicates that the identity of the individuals associated with the application will be withheld from public disclosure.

The GAC would also draw the Board's attention to the original Law Enforcement (LEA) Recommendations for Due Diligence and amendments to the Registrar Accreditation Agreement that were endorsed by the GAC in June, 2010, as very complementary contributions to our shared goals of mitigating criminal activity and abuses of the domain name system. The GAC requests the Board to provide a written indication of how it intends to implement these LEA recommendations prior to the ICANN/GAC meetings in Singapore in June, 2011.

**7. Post-Delegation Disputes:**

The GAC advises the ICANN Board to instruct ICANN staff to amend the Applicant Guidebook in the following way:

1. Change the wording in the sample letter of Government support in the Applicant Guidebook back to the wording in DAGv4 and keeping the new paragraph 7.13 of the new gTLD registry agreement with the changed wording from “may implement” to “will comply”. E.g change the wording from “may implement” back to “will comply” with a legally binding decision in the relevant jurisdiction.
2. In addition, outline in the Applicant Guidebook that ICANN will comply with a legally binding decision in the relevant jurisdiction where there has been a dispute between the relevant government or public authority and registry operator.

**Explanation:**

Even though ICANN’s commitment to comply with court orders is to the government or public authority, the registry agreement between ICANN and the registry should have clear wording on this commitment to make sure that this obligation to the Government stands out as a clear and underlying premise for entering into the agreement.

**Board Response to 7.1**

1BICANN will modify the suggested wording of the letter of support or non-objection, and make clear its commitments to governments in additional text of the Applicant Guidebook. However, the registry agreement will continue to indicate that ICANN “may implement” instead of “will comply” with such decisions for legal reasons. As discussed previously with the GAC, ICANN’s commitment to comply with legally binding decisions is made to governments, not to registries. Therefore, it is not necessarily in the interest of ICANN, or of governments, to place that obligation in registry agreements, giving registry operators the ability, and perhaps duty, to force ICANN to implement decisions in every case. (ICANN has a mechanism to enforce its contracts with registry operators.)

**GAC Response:**

GAC welcomes the Board's position to revert back to the following wording in the sample letter of Governments support from DAG version 4:

*[Government / public authority] further understands that the Registry Agreement provides that ICANN will comply with a legally binding decision in the relevant jurisdiction where there has been a dispute between [government/public authority] and the applicant.*

However GAC insists on having the following wording in the registry agreement:

*7.13 Government Support.*

*In the event that the TLD was delegated to Registry Operator pursuant to the consent of a governmental entity to use a geographic name related to the jurisdiction of such governmental entity, the parties agree that, notwithstanding any*

*provision contained in this Agreement, in the event of a dispute between such governmental entity and Registry Operator, ICANN will comply with a legally binding decision in such jurisdiction in favor of such governmental entity related to the TLD.*

**Rationale:**

Governments need assurance that they can enforce the conditions given when providing a letter of support or non-objection. If not, Governments will be unable to support an application for geographical gTLD - and the result will be that many geographical TLDs will not be implemented.

ICANN cannot take the role of judging or denying the consequences of a legally binding decision under different jurisdictions. That is in fact what ICANN is doing when the possibility is kept open in the registry agreement on whether ICANN will follow a legally binding decision taken on a national level. Governments set conditions for providing support or non-objection based on the law under their own jurisdiction - in the case of a dispute with the registry, Governments will have to, and will also want to, take the consequences of a legal decision even if it is not in the favor of the Government.

**Board response to 7.2**

1B. The suggestion to change “court decision” to “legally binding decision” requires further discussion as it may in some cases amount to a redelegation request. Also, there could be multiple jurisdictions that have given their support to one application (e.g., multiple “Springfield”s), thus it may not be appropriate to implement a particular action based on one such decision.

**GAC response:**

A dispute between a government and a registry operator may very well be legally binding without having the decision challenged in a court. The GAC suggests that the wording be changed to “final legally binding decision”. Often an administrative decision can be challenged in court within a certain timeframe. If the registry operator decides not to go to court, the decision will be standing as legally binding for the parties.

Regarding support or non-objections from several governments in multiple jurisdictions, this needs further clarification. If the Applicant Guidebook does not have provisions for this then it should. When there is a need to get support or non-objections from several entities in multiple jurisdictions, there must be an agreement between the implementing parties on what jurisdiction a dispute must be settled under.-

**8. Geographic names:**

## **GAC comments on the Board's position.**

### **1. Definition of geographic names**

**General Remarks:** The Definition of geographic names, early warning and procedures for community-objections are inter-related and need to be considered jointly with the Board's proposal presented orally during the meeting between the ICANN Board and the GAC in San Francisco. The following answers do not reflect this proposal, yet. The GAC recalls that it would be necessary to receive a written presentation of the Board's suggestions for an in-depth analysis and a final evaluation.

#### **8.1.1.1 (1B)**

**GAC Scorecard proposal:**

Implement a free-of-charge objection mechanism that would allow governments to protect their interest.

**Board response:**

ICANN will investigate a mechanism for the forthcoming round under which GAC members could be exempted from paying fees for objections in some circumstances (subject to constraints imposed by budget and other considerations).

**GAC response:**

The GAC is awaiting a presentation from the Board on such a mechanism, but as the GAC advice states, objection mechanisms should be available free of charge for governments without any constraints.

#### **8.1.1.2 (2)**

**GAC Scorecard proposal:**

... and to define names that are to be considered geographic names.

**Board response:**

The process relies on pre-existing lists of geographic names for determining which strings require the support or non-objection of a government. Governments and other representatives of communities will continue to be able to utilize the community objection process to address attempted misappropriation of community labels. ICANN will continue to explore the possibility of pre-identifying using additional authoritative lists of geographic identifiers that are published by recognized global organizations.

**GAC response:**

The GAC still strongly prefers the position given in its advice. However, the GAC is prepared to further discuss the Board's response. In this case, the GAC wants to highlight that **the community objection procedure** in its current form does not meet the requirements of governments. Some of the GAC's concerns are:

- A government might be obliged to demonstrate that it is representing (has a relationship with) the community. As the text stands, a central government might not qualify to file an objection to the use of a region or city name.
- The objector (government) needs to demonstrate that there is substantial opposition (governments/city administration would probably need some results from surveys);
- The objector needs to prove a strong association between the applied for gTLD string and the community. This might be difficult for some abbreviations.
- The government need to prove the likelihood of material detriment to rights or legitimate interests. The GAC does not see how a government might be able to prove that ex-ante.

Further, the GAC asks the Board to clarify which additional lists it considers to be used for identifying geographic names. The GAC recalls, that if there were an option urging governments and applicants to resolve disputes on the use of geographic names as a result of an early warning, it would not be necessary "to rely solely on pre-existing lists of geographic names".

### **8.1.2 (1B)**

#### **GAC Scorecard proposal:**

This implies that ICANN will exclude an applied for string from entering the new gTLD process when the government formally states that this string is considered to be a name for which this country is commonly known as.

#### **Board response:**

ICANN will continue to rely on pre-existing lists of geographic names for determining which strings require the support or non-objection of a government. This is in the interest of providing a transparent and predictable process for all parties. (See related note above.)

#### **GAC response:**

The GAC seeks clarification as to how ICANN intends to ensure national interests in those cases where country names are not listed in the established list.

### **8.1.3 (2)**

#### **GAC Scorecard proposal:**

Review the proposal in the DAG in order to ensure that this potential [city name applicants avoiding government support requirement by stating that use is for non-community purposes] does not arise. Provide further explanations on statements that applicants are required to provide a description/purpose for the TLD, and to adhere to the terms and condition of submitting an application including confirming that all statements and representations contained in the application are true and accurate.

**Board response:**

There are post-delegation mechanisms to address this situation. In addition, the "early warning" opportunity will offer an additional means to indicate community objections.

**GAC response:**

GAC would **seek clarification:** It would be interested what kind of post-delegation mechanisms the Board has in mind if a registry for a standard TLD does not have any restrictions for its registration policies. The post-delegation mechanisms for withdrawal of governmental support would not be applicable in this case since the TLD was delegated without governmental support.

**8.1.4 (1B)**

**GAC Scorecard proposal:**

Governments should not be required to pay a fee for raising objections to new gTLD applications. Implementing a free objection mechanism would allow governments to protect their interest.

**Board response:**

ICANN will investigate a mechanism for the forthcoming round under which GAC members could be exempted from paying fees for objections in some circumstances (subject to constraints imposed by budget and other considerations).

**GAC response:**

See response to 8.1.1.1

**2. Further requirements regarding geographic names**

**8.2.1 (1A)**

**GAC Scorecard proposal:**

The GAC clarifies that it is a question of national sovereignty to decide which level of government or which administration is responsible for the filing of letters of support or non-objection. There may be countries that require that such documentation has to be filed by the central government - also for regional geoTLDs; in other countries the responsibility for filing letters of support may rest with sub-national level administrations even if the name of

the capital is concerned. GAC requests some clarification on this in the next version of the Applicants Guidebook.

**Board response:**

This principle is agreed, and this can be clarified in the Guidebook. ICANN invites governments to identify appropriate points of contact on this issue.

**GAC response:**

GAC welcomes these considerations and looks forward to elaborating further steps.

**8.2.2 (1B)**

**GAC Scorecard proposal:**

According to the current DAG, applications will be suspended (pending resolution by the applicants), if there is more than one application for a string representing a certain geographic name, and the applications have requisite government approvals. The GAC understands such a position for applications that have support of different administrations or governmental entities. In such circumstances it is not considered appropriate for ICANN to determine the most relevant governmental entity; the same applies, if one string represents different geographic regions or cities. Some governments, however, may prefer not to select amongst applicants and support every application that fulfils certain requirements. Such a policy may facilitate decisions in some administrations and avoid time-consuming calls for tenders. The GAC encourages ICANN to process those applications as other competing applications that apply for the same string.

**Board response:**

ICANN will continue to suspend processing of applications with inconsistent/conflicting support, but will allow multiple applicants all endorsed by the same authority to go forward, when requested by the government.

This area needs further discussion on the potential situations that could lead to re-delegation requests.

**GAC response:**

GAC welcomes these considerations and looks forward to further discussing this issue with the Board.

**9. Legal Recourse for Applications:**

**GAC Scorecard proposal:**

The GAC reiterates its concern that excluding the possibility of legal recourse might raise severe legal problems. The GAC therefore urges the ICANN Board to seek legal advice in major jurisdiction whether such a provision might cause legal conflicts – in particular but not limited to US and European competition laws. If ICANN explains that it has already examined these legal questions carefully and considering the results of these examinations still adheres to that provision, the GAC will no longer insist on its position. However, the GAC expects that ICANN will continue to adhere to the rule of law and follow broad principles of natural justice. For example, if ICANN deviates from its agreed processes in coming to a decision, the GAC expects that ICANN will provide an appropriate mechanism for any complaints to be heard.

**Board Response to 9:**

As discussed with the GAC, ICANN has examined these legal questions carefully and considering the results of these examinations still adheres to this provision. ICANN will clarify in the Applicant Guidebook that: if ICANN deviates from its agreed processes in coming to a decision, ICANN's internal accountability mechanisms will allow complaints to be heard.

**GAC response:**

The GAC welcomes the Board's clarification that the legal implications of the clause have been considered for various jurisdictions. The GAC appreciates the Board's notice that the Applicant Guidebook will be amended to clarify that internal accountability mechanisms will allow complaints to be heard.

**10. Providing opportunities for all stakeholders including those from developing countries:**

**GAC Scorecard proposal:**

**1. Cost Considerations**

Set technical and other requirements, including cost considerations, at a reasonable and proportionate level in order not to exclude stakeholders from developing countries from participating in the new gTLD process.

**Board response:**

**TBD** ICANN's Board recognized the importance of an inclusive New gTLD Program and issued a Resolution forming a Joint Working Group (JAS WG) which is underway. ICANN would like to receive the report of the JAS WG as soon as possible. JAS WG is requested to provide a possible deadline for this work during the ICANN meeting in SFO allowing the Board to act.

**GAC response:**

GAC welcomes the commitment of the Board to implement the necessary mechanisms to ensure an inclusive new gTLD program.

The GAC would appreciate clarity from ICANN on whether cost considerations for developing and least developed country applications will be given due attention. The reduction of costs should be applied to all the steps (including but not limited to objections by SMEs, trademark clearing house) of the process.

GAC looks forward to the final JAS WG report. The report will need to propose sustainable mechanisms for implementation within a deadline that ensures the introduction of new gTLDs is inclusive.

(Additional reaction: we propose 70% fees reduction for developing country applicants and free for least developed countries)

**Board Response:**

It is noted that one of the challenges in developing support mechanisms for applicants is to ensure that such support is actually received by those applicants with the most need, rather than being used advantageously by other participants. This issue has also been taken into account in the work of the JAS WG.

**GAC response:**

The GAC shares the same concerns regarding the challenges and welcome JAS and community proposals on developing criteria to determine “real” needy applicants. The GAC wishes to participate in the process to develop these criteria.

The minimum technical requirements for operating a registry are expected to be consistent across applications.

**GAC response:**

The GAC wishes to know the “certain mechanisms for technical and logistical support” ICANN has agreed to provide?

**GAC Scorecard proposal:**

**2. Language diversity**

- 2.1 Key documents produced by ICANN must be available in all UN languages within a reasonable period in advance of the launch of the gTLD round.
- 2.2 The GAC strongly recommends that the communications strategy for the new gTLD round be developed with this issue of inclusiveness as a key priority.

## **Board response**

Some documents are already available in the 6 UN languages. The Final Application Guidebook will be also in due course, and the web site will be organized to find easily all the documents available in each language.

### **GAC response:**

GAC welcomes the concurrence of views between the Board and GAC on language diversity. GAC further recommends that the outreach and communications strategy for the new gTLDs be developed with this in mind and extend the same provision to other languages in least developed and developing countries where there are relevant numbers of internet users.

### **GAC Scorecard proposal:**

#### **3. The need for technical and logistics support for applicants from developing and least developed countries.**

#### **Board Response:**

ICANN has agreed to provide certain mechanisms for technical and logistical support, such as assisting with matching needs to providers. ICANN is also considering setting up regional help desks to provide more responsive and relevant technical support to new gTLD applicants in developing countries.

### **GAC response:**

The GAC welcomes this provision. The GAC requests further clarity on what *“certain mechanisms for technical and logistical support”* ICANN has agreed to provide?

### **GAC Scorecard proposal:**

#### **4. Outreach**

#### **Board response 1A**

GAC reaction: the GAC welcomes the concurrence of views between the Board and GAC on the critical need for outreach to developing countries and further proposes that outreach should include not just information on how to apply or manage a string but on all aspects of the new gTLD process.

### **GAC Scorecard proposal:**

#### **5. Joint AC/SO Working Group on support for new gTLD applicants.**

The GAC urged ICANN to adopt recommendations of the Joint AC/SO Working Group.

**Board response: TBD** This item from the GAC Scorecard appears to reflect the interim report of the JAS WG. ICANN is awaiting their final report. (ICANN would like to receive the report of the JAS WG as soon as possible.)

**GAC response:**

The GAC looks forward to ICANN providing an end date for the final report of this working group during the San Francisco meeting.

**GAC Scorecard proposal:**

**6. Special consideration for cost reductions should be given to applications from Governments or National authorities (especially municipal councils and provincial authorities) from developing and least developed countries.**

**Board Response: TBD** This set of issues overlaps with and is addressed in the other items in this section.

**GAC response:** ICANN should adopt a different cost structure for applications from governments or National authorities (especially municipal councils and provincial authorities) from developing and least developed countries.