

6 December 2017

Submission of GNSO Council Review of the Abu Dhabi GAC Communiqué

From:

Heather Forrest, GNSO Chair
Donna Austin, GNSO Council Vice-Chair
Rafik Dammak, GNSO Council Vice-Chair

To:

Cherine Chalaby, Chair
ICANN Board

Dear Members of the ICANN Board,

On behalf of the GNSO Council, we are hereby transmitting to you the adopted GNSO Council's review of the Abu Dhabi GAC Communiqué, which was unanimously adopted by Council during its meeting on 30 November 2017.

As noted previously, the GNSO Council's review of each GAC Communiqué is an effort to provide feedback to you, in your capacity as members of the ICANN Board, as you consider issues referenced in the Communiqué that we believe relate to policies governing generic top-level domains. Our intent is to inform you and the broader community of gTLD policy activities, either existing or planned, that may directly or indirectly relate to advice provided by the GAC.

The GNSO Council hopes that the input provided through its review of the GAC Communiqué will enhance co-ordination and promote the sharing of information on gTLD related policy activities between the GAC, Board and the GNSO.

Heather Forrest
Chair, GNSO

Donna Austin
Vice-Chair, GNSO Council

Rafik Dammak
Vice-Chair, GNSO Council

Cc: Manal Ismail, Chair, GAC

GNSO REVIEW OF THE [ABU DHABI GAC COMMUNIQUE](#)¹

GAC Advice - Topic	GAC Advice Details	Does the advice concern an issue that can be considered within the remit ² of the GNSO (yes/no)	<i>If yes, is it subject to existing policy recommendations, implementation action or ongoing GNSO policy development work?</i>	<i>How has this issue been/is being/will be dealt with by the GNSO</i>
<p>1. Intergovernmental Organization (IGO) Protections</p>	<p>The GAC recalls its longstanding advice on the topic of IGO protections and is closely monitoring the ongoing PDP on IGO-INGO Access to Curative Rights Protection Mechanisms. The GAC remains open to working with the GNSO to try to find a mutually-agreeable resolution to this issue. The GAC also recalls the values of openness, transparency and inclusion, and representativeness and process integrity, that are respectively enshrined in ICANN’s Bylaws and GNSO Operating Procedures.</p>	<p>Yes</p>	<p>Subject to ongoing GNSO policy development work.</p>	<p>The GNSO Council notes that the GAC has recalled its previous advice regarding access to curative dispute resolution mechanisms by IGOs. Similarly, we refer the Board to our earlier responses, noting that the work of the Policy Development Process (PDP) on this topic (IGO/INGO Access to Curative Rights) is nearing completion, and that this working group (WG) anticipates publication of its Final Report and recommendations prior to the conclusion of 2017. The Council notes favorably that the GAC remains open to working with the GNSO to try to find a</p>

¹ Only of “Section VII of the Communiqué: GAC Advice to the ICANN Board”

² As per the ICANN Bylaws: ‘There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.

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	<p>a. The GAC advises the ICANN Board to:</p> <p>i. review closely the decisions on this issue in order to ensure that they are compatible with these values and reflect the full factual record.</p> <p>RATIONALE Although the ICANN Community is still awaiting the final report for the PDP on IGO-INGO Access to Curative Rights Protection Mechanisms, preliminary communications indicate that the Working Group’s proposal will conflict with GAC advice on the issue and GAC input to the PDP as well as the comments of over 20 IGOs who submitted comments to the Working Group’s draft report. The Board plays an important role in</p>			<p>mutually agreeable resolution to this issue, and we share that goal. In regard to the GAC’s reference to the values of openness, transparency and inclusion, as well as representativeness and process integrity, that are respectively enshrined in ICANN’s Bylaws and GNSO Operating Procedures, the Council is likewise committed to these values and their application to the ongoing work of the PDP WG.</p> <p>The Council further notes that the referenced WG has held itself open to receive all viewpoints relevant to its efforts, has operated in a transparent and fully inclusive manner, enjoys representation from a broad spectrum of the ICANN community, and has engaged in a work process displaying high integrity and rigorous policy</p>

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	<p>ensuring the proper application of the ICANN Bylaws and GNSO Operating Procedures, and the GAC expects that a basic safeguard would be a close Board review of GNSO policy recommendations, especially where such recommendations directly contradict GAC advice.</p>			<p>analysis. The Council further notes that the WG held an open working session regarding the likely content of its Final Report during the ICANN 60 meeting for the purpose of receiving community feedback; that this session was attended by IGO representatives as well as by the ICANN CEO and other senior executives, and by several ICANN Board members; and that further input on its likely recommendations was provided at that session.</p> <p>As regards that the GAC's concern that the Working Group's final proposal may conflict with GAC advice on the issue, GAC input to the PDP, and the comments of over 20 IGOs who submitted comments to the Working Group's draft report, the Council would first note that its prior</p>

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				<p>response to the GAC’s ICANN 59 Johannesburg Communique on this topic stated: “The PDP recently conducted a Public Comment period on its Initial Report, and received multiple thoughtful submissions including many from IGOs. Each comment from the community containing new data or ideas was extensively considered and discussed by the PDP working group, and the PDP leadership reports that its Initial Report is likely to be materially amended as a result of taking these comments on board.” The PDP WG also considered the October 2016 “IGO Small Group Proposal”, and included it in their Initial Report analysis. Notwithstanding that thorough consideration, Council acknowledges that it remains likely that the WG’s Final</p>

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				<p>Recommendations will diverge from GAC Advice and the “IGO Small Group Proposal” in at least two respects. First, the PDP WG does not recommend the creation of a new, separate dispute process solely for the use of IGOs, but instead outlines the means by which these organizations can better access existing processes like UDRP and URS; integral to the WG’s conclusion on this matter was its inability to find any basis for an IGO’s standing to utilize ICANN-provided alternative to judicial process other than trademark rights. Second, the PDP WG does not conclude that it is within their (or the GNSO’s, or ICANN’s) remit to grant, extend, or restrict the jurisdictional immunity protections of IGOs, or to limit the legal rights of registrants who are party to a</p>

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				<p>dispute with an IGO, because these are matters within the jurisdiction of national legislatures and courts. Overall, the WG was careful to observe a clear demarcation between the limits of ICANN's authority and the powers of national courts and legislatures, and we would hope that the GAC would welcome that respect for sovereign powers. Finally, the GNSO Council notes that some parties have advised the GAC that the WG's likely recommendations are based upon a decision to elevate commercial interests over GAC input, and the GNSO Council is not aware of any evidence supporting that assertion. The GNSO Council chartered this PDP with the objective of ensuring that IGOs and INGOs have ready access to low-cost and</p>

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				<p>effective rights protection mechanisms, in order to mitigate abuse of their identities in the DNS and to support in their work serving the public needs of citizens across the globe. The PDP WG continues to believe that its Final Report will meet that goal. We eagerly await publication of the PDP’s final recommendations, and subsequent discussions among the community preceding and at ICANN61. The GNSO Council is committed to a rigorous review of the Final Report when we consider whether to approve its transmission to the Board. We would likewise urge the Board and GAC to accord that Report a complete and comprehensive reading before taking a position on the recommendations contained therein.</p>

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<p>2. Enabling inclusive, informed and meaningful participation in ICANN</p>	<p>a. The GAC advises the ICANN Board to instruct ICANN Org to:</p> <p>i. Develop a simple and efficient document management system that allows non-experts to easily and quickly access and identify documents, starting with defining minimal requirements that ensure that every document has a title and a date or reference number, identifies the author and indicates intended recipients, makes reference to the process it belongs to and explains the acronyms used in the document; and</p> <p>ii. Produce easily understandable executive summaries, key points and synopses (using e.g., infographs, videos and other innovative ways of presenting information)</p>	<p>Yes</p>	<p>Not subject to policy development work, but directly impacting and contributing to the effectiveness of policy development work.</p>	<p>The GNSO Council supports this GAC advice, which we consider timely and consistent with ICANN org’s efforts that are underway to improve “findability” of information on ICANN website, as part of the recently launched Open Data (or Information Transparency) Initiative (https://www.icann.org/news/blog/creating-content-governance-and-rebuilding-the-infrastructure-of-icann-s-public-sites).</p> <p>The ICANN org and the community have long recognized the changing environment and the need for lowering barriers to broaden participation in ICANN and the GNSO policy development process. To this end, implementation of recommendations relating to participation improvement from the most recent GNSO review is</p>

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	<p>for all relevant issues, processes and activities, so that also non-expert stakeholders will be able to (a) quickly determine if a particular issue is of concern to them and (b) if yes, to participate in the policy process easily and effectively, on equal footing with other stakeholders. This should be done at least, but not only, before putting issues up for public comment. Attention should be paid to using plain English (and if possible translations into other languages) in order to allow non-English native speakers to understand the issues;</p> <p>RATIONALE This advice is consistent with a joint statement developed by the GAC and the At Large Advisory Committee (ALAC)</p>			<p>underway https://community.icann.org/display/GRWG?preview=/61610342/64069440/GNSO%20Review%20 In addition, the draft recommendations to improve diversity as part of the CCWG-Accountability Work Stream 2 have been finalized and are currently open for public comment https://www.icann.org/public-comments/accountability-diversity-2017-10-26-en. Implementation of this GAC advice could go some way to lowering information and language barriers for many community stakeholders. It should also improve operational efficiency of the ICANN org and ICANN staff.</p>

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	<p>which will be published separately.</p> <p>One of ICANN's core values is to seek and support <i>"broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent"</i> (Bylaws Section 1.2.c.ii)</p> <p>In the view of the GAC and the ALAC it is not only among ICANN's core values but also critical to ICANN's legitimacy to act in the global public interest to allow non-expert stakeholders to meaningfully</p>			

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	<p>participate in ICANN's processes and make their voices, their needs and interests heard, and duly take them into account in order to act and take decisions that are in fact, in the global public interest. These proposed measures will go some way to address this.</p>			

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3. GDPR/WHOIS	<p>a. The GAC advises the ICANN Board that: i. the 2007 GAC WHOIS Principles (attached) continue to reflect the important public policy issues associated with WHOIS services. Accordingly, ICANN should take these issues into account as it moves forward with its planning to comply with the European Union’s General Data Protection Regulation (GDPR). In these principles, the GAC has notably recognized that WHOIS data (also known as Registration Directory Services) is used for a number of legitimate activities, including:</p> <ol style="list-style-type: none"> 1. Assisting law enforcement authorities in investigations and in enforcing national and international laws, assisting in combatting against abusive use 	<p>Yes</p>	<p>Subject to ongoing GNSO policy development work.</p>	<p>As part of the Board-initiated GNSO policy development process to define the purpose of collecting, maintaining and providing access to gTLD registration data, and consider safeguards for protecting data, the Next-Generation Registration Directory Services (RDS) to replace WHOIS Policy Development Process Working Group (WG) is closely following the developments with regards to GDPR. To assist in informing the RDS WG’s deliberation on key concepts related to the WG’s charter questions that are impacted by data protection laws, such as the GDPR, the WG has taken two additional steps:</p> <p>(1) the WG solicited input from ccTLD Registry Operators on their approaches to GDPR compliance,</p>

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	<p>of internet communication technologies;</p> <p>2. Assisting businesses, other organizations, and users in combatting fraud, complying with relevant laws, and safeguarding the interests of the public;</p> <p>3. Combatting infringement and misuse of intellectual property; and</p> <p>4. Contributing to user confidence in the Internet as a reliable and efficient means of information and communication by helping users identify persons or entities responsible for content and services online.</p> <p>Accordingly,</p> <p>b. the GAC advises the ICANN Board that:</p> <p>i. as it considers how to comply</p>			<p>and</p> <p>(2) retained the services of independent legal counsel to answer questions about the impact of data protection laws on registration data and directory services previously answered by senior EU data protection experts (both inputs can be found here: https://community.icann.org/x/J1zWAw)</p> <p>The GNSO Council is concerned about the future of WHOIS in light of the impact of GDPR and acknowledges that this topic continues to be under significant discussion in our community.</p>

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	<p>with the GDPR with regard to WHOIS, it should use its best efforts to create a system that continues to facilitate the legitimate activities recognized in the 2007 Principles, including by:</p> <ol style="list-style-type: none"> 1. Keeping WHOIS quickly accessible for security and stability purposes, for consumer protection and law enforcement investigations, and for crime prevention efforts, through user-friendly and easy access to comprehensive information to facilitate timely action. 2. Keeping WHOIS quickly accessible to the public (including businesses and other organizations) for legitimate purposes, including to combat fraud and deceptive conduct, to combat infringement and 			

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	<p>misuse of intellectual property, and to engage in due diligence for online transactions and communications.</p> <p>In order to promote the public interest, and in response to the ICANN CEO's invitation to contribute questions pertaining to legal advice on the interpretation and application of the GDPR,</p> <p>c. the GAC also advises the ICANN Board to:</p> <p>i. seek information from its outside counsel tasked with providing guidance on GDPR issues that addresses the following issues:</p> <p>1. What are the options under the GDPR to ensure the lawful availability of WHOIS/RDS data</p>			

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	<p>for consumer protection and law enforcement activities? In particular, are there changes to policy or the legal framework that should be considered with a view to preserving the functionality of the WHOIS to the greatest extent possible for these purposes and others also recognized as legitimate? This question includes tasks carried out in the public interest and tasks carried out for a legitimate purpose, including preventing fraud and deceptive activities, investigating and combatting crime, promoting and safeguarding public safety, consumer protection, cyber-security etc.</p> <p>2. What are the options under the GDPR to ensure the lawful availability of WHOIS/RDS data</p>			

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	<p>for the public, including businesses and other organizations? This question includes tasks carried out in the public interest and tasks carried out for a legitimate purpose, including preventing fraud and deceptive activities, investigating and combatting crime as well as infringement and misuse of intellectual property, promoting and safeguarding public safety, consumer protection, cyber-security etc.</p> <p>Finally,</p> <p>d. the GAC also advises the ICANN Board that:</p> <p>i. it is urgent to address these issues and that the GAC should be fully involved in the design and implementation of any (including interim) solution and</p>			

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	<p>requests that ICANN practice transparency vis-à-vis the multistakeholder community in its GDPR activities.</p> <p>RATIONALE This advice reflects the view of governments that the continued and lawful availability of WHOIS/RDS data for consumer protection, intellectual property rights protection and law enforcement activities is a vital public concern and that ICANN should strive to explore all possible mechanisms under the GDPR to ensure that this data remains available for legitimate activities that protect the public and promote a safe, secure, and trustworthy online environment.</p>			
4. Applications for	a. The GAC advises the ICANN	Yes	Subject to existing policy	The GNSO Council joins with the

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<p>.amazon and related strings</p>	<p>Board to: i. continue facilitating negotiations between the Amazon Cooperation Treaty Organization’s (ACTO) member states and the Amazon corporation with a view to reaching a mutually acceptable solution to allow for the use of .amazon as a top level domain name.</p> <p>RATIONALE The GAC recognizes the need to find a mutually acceptable solution for the countries affected and the Amazon corporation to allow for the use of .amazon as a top level domain name. The GAC considers that the Board could continue to assist in facilitating the negotiations between the parties.</p>		<p>recommendations and implementation actions.</p>	<p>GAC in encouraging an agreement between the parties which will be mutually constructive, but we also take note of the Board’s recent resolution (1) adopting the IRP’s declaration for the Board to reconsider the .amazon applications and (2) delineating the time to ICANN61. Since this is the first test of accountability and transparency under the new bylaws for ICANN, we believe it is vital that ICANN hold fast to its commitment to the multi-stakeholder model and ICANN’s own processes and procedures.”</p>

