

San Juan, Puerto Rico, 15 March 2018

GAC Communiqué – San Juan, Puerto Rico ¹

I. Introduction

The Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN) met in San Juan, Puerto Rico from 10 to 15 March 2018.

Fifty-nine GAC Members and nine Observers attended the meeting.

The GAC meeting was conducted as part of ICANN61. All GAC plenary and working group sessions were conducted as open meetings.

II. Inter-Constituency Activities and Community Engagement

Meeting with the ICANN Board

The GAC met with the ICANN Board and discussed:

- The proposed ICANN model for compliance with the European General Data Protection Regulation (GDPR) and the role of the GAC;
- Protections for Inter-Governmental Organisation (IGO) names and acronyms;
- The applications for dot.Amazon;
- 2-character country and territory codes at the second level; and
- GAC key goals for the short and longer terms.

Meeting with the Generic Names Supporting Organization (GNSO)

The GAC met with members of the GNSO Council and discussed:

- The status of current Policy Development Processes (PDPs);
- The re-convened PDP dealing with Red Cross Red Crescent protections;
- Completion of implementation of recommendations of the GAC-GNSO Consultation Group;

¹ To access previous GAC Advice, whether on the same or other topics, past GAC communiqués are available at: <https://gac.icann.org/contentMigrated/icann60-gac-communication>

- Procedures for effective communication between the GNSO Liaison and the GAC Leadership; and
- The ICANN FY19 Draft Budget and Operating Plan.

Meeting with the Country Code Names Supporting Organization (ccNSO)

The GAC met with the ccNSO and discussed:

- Policy for geographic names at the top level;
- Next steps with the FAQs on delegation, transfer and revocation of ccTLDs;
- A new ccNSO-GAC agenda committee;
- The ccNSO Policy Development Process (PDP) on retirement of ccTLDs;
- Consideration of the ICANN FY19 draft budget; and
- Country Code Top Level Domain (ccTLD) registries and the GDPR.

Meeting with the At Large Advisory Committee (ALAC)

The GAC met with the ALAC and discussed:

- Policies for geographic names at the top level;
- The proposed ICANN Org model for GDPR compliance;
- Cooperation in capacity building in underserved regions;
- Follow-up to the joint GAC-ALAC statement on enabling inclusive, informed and meaningful participation in ICANN; and
- The DNSSEC Root Key Signing Key (KSK) rollover.

Meeting with the Non-Commercial Stakeholder Group (NCSG)

The GAC met with representatives of the NCSG. NCSG members provided information to the GAC and discussed:

- The work and values of the NCSG;
- Privacy in the context of the proposed ICANN model for GDPR compliance; and
- Rights protection mechanisms and freedom of expression.

Meeting with ICANN Multi-Stakeholder Strategic Initiatives (MSSI)

The GAC met with ICANN MSSI staff and discussed draft operating standards for specific reviews, including GAC input to the recent public comment process.

Meeting with the Universal Acceptance Steering Group (UASG)

The GAC was briefed by the UASG and agreed to help to progress universal acceptance issues at the national level. These include universal acceptance by government online

forms and introducing universal acceptance concepts and the UASG to government Chief Information Officers at the national, provincial and local levels.

Cross-Community Discussions

GAC Members participated in relevant cross-community sessions scheduled as part of ICANN61, including sessions on GDPR and WHOIS.

III. Internal Matters

1. GAC Membership

The GAC welcomed Bangladesh, Bosnia and Herzegovina and Myanmar as new members. This brings the number of GAC members to 176.

2. GAC Leadership

The GAC will conduct an inter-sessional process to fill the vice-chair vacancy created by the departure of Ms. Milagros Castañon (Peru). The GAC thanks Ms. Castañon for her service and wishes her well for the future.

3. GAC Working Groups

The GAC notes and welcomes the appointment of Laureen Kapin (United States Federal Trade Commission) as PSWG Co-Chair, and endorses the PSWG 2018/2019 [work plan](#).

- **GAC Public Safety Working Group (PSWG)**

Regarding WHOIS compliance with GDPR, the PSWG and GAC plenary discussed the public policy impacts of ICANN Org's proposed interim model. The PSWG reported that it had engaged with relevant stakeholders to identify practical solutions that provide for uninterrupted access to full WHOIS data consistent with appropriate data privacy safeguards.

In relation to the ongoing Privacy and Proxy Services Accreditation Implementation Review Team (PPSAI IRT), the PSWG reported its concern that prospective service providers are reluctant to agree to respond to emergency requests by law enforcement within 24 hours.

The PSWG explained the importance of public reporting on DNS Abuse through the Domain Abuse Activity Reporting (DAAR) initiative and welcomed the efforts of ICANN's Office of the CTO (OCTO) in spearheading this project. The ICANN CTO provided a briefing to the GAC on the DAAR. Upon completion of an independent analysis of

DAAR's methodology, the PSWG expects ICANN to regularly publish specific data identifying parties most associated with DNS Abuse.

- **GAC Working Group to Examine the Protection of Geographic Names for Future Expansion of gTLDs**

The working group met and reviewed the status of work being done in the New gTLD Subsequent Procedures PDP Work Track 5 on geographic names. The group provided an update about content of the terms of reference of Work Track 5, and the present analysis of the different categories of geographic names included in the New gTLD Applicant Guidebook and previous 2007 GNSO PDP.

- **GAC Working Group on Underserved Regions (USRWG)**

Since ICANN60, the USRWG conducted two more regional Capacity Development Workshops - in Nepal in February and at the beginning of ICANN 61 in San Juan. The working group will continue to work with the Government Engagement (GE), the Global Stakeholder Engagement (GSE) and Public Responsibility Support (PRS) teams of ICANN Org to coordinate and facilitate the upcoming Capacity Development Workshops scheduled for Senegal in May 2018 and during ICANN 62 in Panama in June 2018.

The USRWG will work with the PRS Team to develop a comprehensive online learning platform (ICANN Learn) for GAC members as part of the ongoing efforts and potential strengthening of the Onboarding Program for GAC members. As an outcome, the working group will work to evaluate the capacity development initiative.

The working group welcomes joint efforts with other ICANN communities to address topics and specific issues that will be used to inform the GAC and members of those respective communities.

- **GAC Working Group on Human Rights and International Law (HRILWG)**

The working group received an update from the leadership of the Cross Community Working Group on Accountability regarding the further process for adopting the Framework of Interpretation (FoI) and considerations relating to the Human Rights Core Value expressed in the ICANN Bylaws. An information exchange on implementation efforts of the FoI was held with the Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights (CCWP-HR), ALAC representatives and other members of the community.

- **GAC Working Group on GAC's participation in NomCom**

The working group concluded a drafting in session to revise its document "GAC Criteria for NomCom". The revised draft document has been circulated to the working group

members for comments and feedback. Once agreed, it will be circulated to the full GAC for comment and eventual endorsement before sending to the NomCom.

4. Board GAC Recommendation Implementation Working Group (BGRI WG)

The BGRI-WG met in GAC plenary session and:

- Noted proposed improved timelines for the Board responding to the GAC Communique;
- Reviewed the operation of the new ICANN Action Request Register as it applies to GAC advice; and
- Discussed possible onboarding and training improvements to help new GAC members better understand ICANN and GAC issues and procedures. Board members offered to conduct a pre-ICANN62 webinar for interested GAC members.

5. Auction Proceeds

The GAC reviewed the current work of the CCWG on New gTLD Auction Proceeds and will continue to monitor and participate in its further work.

6. Independent Secretariat

The GAC re-affirmed the importance of an independent secretariat function to support its work and will review options for longer-term sustainable arrangements to secure this capability.

7. Enhancing ICANN Accountability

The GAC reviewed progress by the CCWG on Enhancing ICANN Accountability Work Stream 2.

Several GAC members expressed major concerns regarding the report from the sub-group on jurisdiction. These members consider that it falls short of the objectives envisaged for Work Stream 2, and that its recommendations only partly mitigate the risks associated with ICANN's subjection to U.S. jurisdiction, which makes the adoption of the report unacceptable.

Several other GAC members welcomed the recommendations on jurisdiction and stressed in particular the importance of industry having options, including a menu, for choice of law and venue for contracts with ICANN.

In relation to the discussion on jurisdiction, GAC members took note of the acknowledgement by the Cross Community Working Group that “‘further discussions’ to address unresolved concerns” are needed.

The GAC reiterates its support for the open, multi-stakeholder process by which the recommendations were developed and will continue to remain actively engaged with the work of the CCWG.

IV. Other Issues

1. New gTLD Policies: Geographic Names

The GAC reviewed developments in Work Track 5 of the GNSO PDP on New gTLD Subsequent Procedures, regarding Geographic Names at the Top Level. This remains an area of policy priority for GAC members.

Some GAC members noted that discussions in Work Track 5 should take into account any material available or being produced outside the ICANN context relating to names with geographical significance.

Regarding discussions in Work Track 5 held in San Juan, the issue of whether country names at the Top Level are generic names under the purview of the GNSO was a debated subject. Concerns were expressed regarding the envisaged timeline for the completion of Work Track 5, highlighting the need for allowing GAC members to provide timely input.

The GAC will work inter-sessionally on further analysis of the public policy aspects of this work. The GAC will seek to provide coordinated input (including at the Secretariat level) to the Work Track before finalization of any initial report. GAC members noted that the Work Track’s current timeline may be challenging.

2. New gTLD Policies: General

The GAC met with one of the Co-Chairs of the GNSO PDP on New gTLD Subsequent Procedures. It was noted that while existing GAC advice has been considered, the PDP would benefit from more detailed GAC views and information on issues with public policy implications, for example support for developing countries and community-based applications. GAC members suggested that it would be helpful for the PDP Working Group to indicate to the GAC where specific developing issues have public policy implications, and where they may diverge from GAC advice and provide relevant supporting information.

3. High Level Governmental Meeting: Barcelona

The GAC was briefed by the Government of Spain on arrangements for the High Level Governmental Meeting to be held as part of ICANN 63 in Barcelona.

V. GAC Consensus Advice to the Board

The following items of advice from the GAC to the Board have been reached on the basis of consensus as defined in the ICANN Bylaws.²

1. GDPR and WHOIS

The GAC highlights the importance of complying with the European General Data Protection Regulation (GDPR), which protects the privacy of natural persons and allows for the processing of and access to data for legitimate purposes.

The GAC encourages ICANN to continue its efforts to ensure full and timely compliance with GDPR while involving the multi-stakeholder community and European data protection authorities.

The GAC reiterates its previous advice, including the Abu Dhabi Communiqué, to maintain, to the greatest extent possible, the current structure of the WHOIS, while ensuring full and timely compliance with GDPR.

The GAC does not envision an operational role in designing and implementing the proposed accreditation programs but reiterates its willingness to advise the Board and engage with ICANN Org and the community on the development of codes of conduct from a public policy perspective.

The GAC notes the opportunity for individual governments, if they wish to do so, to provide information to ICANN on governmental users to ensure continued access to

² Bylaws section.12.2.(a)(x) The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the Board determines to take an action that is not consistent with Governmental Advisory Committee advice, it shall so inform the Governmental Advisory Committee and state the reasons why it decided not to follow that advice. Any Governmental Advisory Committee advice approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection (“**GAC Consensus Advice**”), may only be rejected by a vote of no less than 60% of the Board, and the Governmental Advisory Committee and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. The Governmental Advisory Committee will state whether any advice it gives to the Board is GAC Consensus Advice.

WHOIS. Regarding the proposed draft interim model, consistent with the GAC's comments to ICANN filed on March 8, 2018,

a. the GAC advises the ICANN Board to instruct the ICANN Organization to:

- i. Ensure that the proposed interim model maintains current WHOIS requirements to the fullest extent possible;
- ii. Provide a detailed rationale for the choices made in the interim model, explaining their necessity and proportionality in relation to the legitimate purposes identified;
- iii. In particular, reconsider the proposal to hide the registrant email address as this may not be proportionate in view of the significant negative impact on law enforcement, cybersecurity and rights protection;
- iv. Distinguish between legal and natural persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;
- v. Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties;
- vi. Ensure that limitations in terms of query volume envisaged under an accreditation program balance realistic investigatory cross-referencing needs; and
- vii. Ensure confidentiality of WHOIS queries by law enforcement agencies.

Furthermore,

b. the GAC advises the ICANN Board to instruct the ICANN Organization to:

- i. Complete the interim model as swiftly as possible, taking into account the advice above. Once the model is finalized, the GAC will complement ICANN's outreach to the Article 29 Working Party, inviting them to provide their views;
- ii. Consider the use of Temporary Policies and/or Special Amendments to ICANN's standard Registry and Registrar contracts to mandate implementation of an interim model and a temporary access mechanism; and
- iii. Assist in informing other national governments not represented in the GAC of the opportunity for individual governments, if they wish to do so, to provide information to ICANN on governmental users to ensure continued access to WHOIS.

RATIONALE

The core mission of ICANN is to “ensure the stable and secure operation of the internet’s unique identifier systems.”³ Accordingly, ICANN’s Bylaws include a commitment to preserve and enhance “the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.”⁴ ICANN’s commitments and required reviews emphasize that it must “adequately address” issues related to “consumer protection, security, stability, resiliency and malicious abuse.”⁵

The current WHOIS system helps achieve many such public policy interests, including enhancing trust in the DNS, ensuring consumer protection, protecting intellectual property, combating cyber-crime, piracy and fraud, to cite but a few of the elements highlighted already in the GAC’s 2007 WHOIS Principles.

The GDPR provides for mechanisms to balance the various legitimate public and private interests at stake, including privacy and accountability. We note that the legitimate interests reflected in ICANN’s Bylaws are consistent with the recitals to the GDPR, which provide examples such as “preventing fraud”; “ensuring network and information security,” including the ability to resist “unlawful or malicious actions” and reporting possible “criminal acts or threats to public security” to authorities.⁶

Regarding registration data specifically, ICANN’s Bylaws recognize that WHOIS data is essential for “the legitimate needs of law enforcement” and for “promoting consumer trust.”⁷ These rules reflect the nature of the Internet as a public resource whose governance not only serves the interests of the private parties operating the DNS but also serves a number of important public policy interests.

ICANN’s new interim proposal suggests significant changes to the WHOIS system, including masking several categories of previously public information. The GAC is concerned that the interim model may not maintain the current WHOIS system to the fullest extent possible and that these changes are not supported by the necessary analysis and supporting rationale which poses the question whether the choices reflected in the current proposal are required by the law. As it stands, the proposed system risks hindering the efforts of law enforcement, intellectual property and other actors in combatting illicit activities and mitigating DNS abuse.

³ ICANN Bylaws Article One, Section 1.1, Mission.

⁴ ICANN Bylaws Section 1.2 (a) Commitments and Core Values.

⁵ See ICANN Bylaws Section 4.6 (d), Specific Reviews, Competition, Consumer Trust, and Consumer Choice Review.

⁶ See GDPR Recitals 47, 49 and 50.

⁷ ICANN Bylaws, Registration Directory Services Review, §4.6(e).

A rationale is required for the decision to hide certain WHOIS data elements from the public database. Firstly, there is no need to hide non-personal information (including information related to legal entities), such as the name (to the extent they are legal entities, *e.g.*, companies or organizations) or the Administrative and Technical contact's state/province and country. Secondly, when it comes to personal data, the GDPR permits its processing, including publication, under certain circumstances. As clarified by the Article 29 Working Party, publication of some personal data is not excluded, as long as this is justified in light of the legitimate purposes pursued with the WHOIS directory and is based on a legal ground, such as performance of a contract or the legitimate interests pursued by the controller or by a third party. In particular, publication of the registrant's email address should be considered in light of the important role of this data element in the pursuit of a number of legitimate purposes and the possibility for registrants to provide an email address that does not contain personal data. Finally, legal entities are explicitly excluded from the remit of GDPR.

2. IGO Reserved Acronyms

Noting ongoing developments in the PDP on IGO access to curative rights protection mechanisms, which the GAC is monitoring closely, the GAC affirms its advice from previous Communiqués concerning preventative protection of IGO identifiers, recalls the importance of maintaining temporary protections until a permanent resolution on IGO identifiers is reached in order prevent irreparable harm to IGOs and

a. advises the ICANN Board to:

- i. Ensure that the list of IGOs eligible for preventative protection is as accurate and complete as possible.

RATIONALE

Despite indications to the contrary, the GNSO has still not concluded its PDP on curative rights protection mechanisms. The GAC and IGOs remain fully engaged on this issue and emphasize that a removal of interim protections before a permanent decision on IGO acronym protection is taken could result in irreparable harm to IGOs. In the interim, ICANN has moved forward to implement GAC advice related to protection of IGO full names at the second level. These protections will be based on a list of IGOs that fulfil previously agreed-upon criteria.

To ensure this advice is effectively implemented, following significant work undertaken by IGOs resulting in significant progress on compiling this list, a focused effort is needed to contact remaining IGOs, so their names are protected accurately in the chosen two languages. ICANN has been in contact with the OECD and WIPO on this initiative, which the GAC supports.

VI. Follow-up on Previous Advice

The following items reflect matters related to previous consensus advice provided to the Board.

1. Applications for dot Amazon and related strings

The GAC received an update from several of its members regarding the proposal submitted by Amazon.com at ICANN 60. The GAC understands that member governments of the Amazon Cooperation Treaty Organization (ACTO) have established a process for analyzing the proposal, and that this analysis is progressing. The GAC was informed that Amazon.com and Board members have made themselves available to assist if requested.

The GAC considered Board Resolutions 2017.10.29.02 and 2017.10.29.03. The GAC decided, in a spirit of good cooperation, to reply to the Board's request for any additional information the GAC wishes to provide regarding the .amazon case. The GAC's letter to the Board is attached to this Communique.

2. 2-Character Country/Territory Codes at the 2nd Level

Some GAC members note that important concerns regarding the release of 2-Character Country/Territory codes at the 2nd Level, as expressed in previous GAC advice, still remain.

The GAC also notes the availability of certain measures to mitigate governments concerns with regard to the release of 2 letter codes at the second level.

Some GAC members noted that the current measures have not been used. Some GAC members considered that these measures are insufficient.

The GAC intends to follow up on implementation of the proposed initiative at ICANN62, bearing in mind that all previous GAC advice on the matter stands.

VII. Next Face to Face Meeting

The GAC will next meet during ICANN 62 in Panama City, scheduled for 25-28 June 2018.

Attachment to ICANN61 GAC Communique

15 March 2018

Mr Cherine Chalaby
Chair
Internet Corporation for Assigned Names and Numbers (ICANN)

Subject: Request for additional information re applications for dot.Amazon

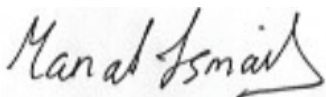
Dear Cherine,

I am writing in response to Steve Crocker's letter of 29 October 2017 which conveyed the terms of a Board Resolution asking the GAC if it has: (i) any information to provide to the Board as it relates to the "merits-based public policy reasons," regarding the GAC's advice that the Amazon applications should not proceed; or (ii) any other new or additional information to provide to the Board regarding the GAC's advice that the Amazon applications should not proceed.

The GAC has received an update at the ICANN 61 meeting from several of its members regarding the proposal submitted by Amazon.com at ICANN 60. We understand that member governments of the Amazon Cooperation Treaty Organization (ACTO) have established a process for analysing the proposal, and that this analysis is progressing. The GAC has been informed that Amazon.com and Board members have made themselves available to assist if requested.

At this time the GAC does not have any additional information to provide to the Board on this matter, **beyond referring to the GAC Abu Dhabi Communique, in particular, to the Advice to the Board contained therein i.e. to "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"**), the expressed "...need to find a mutually acceptable solution in the case of the .amazon gTLD applications for the countries affected and for the Amazon corporation", as well as to the call drawing the attention of "...all parties to the final transcript of the relevant sessions where these issues were discussed, these will be available at <https://icann60abudhabi2017.sched.com/event/CbHz/gac-meeting-with-amazoncom>".

Yours sincerely,



Manal Ismail
Chair, Governmental Advisory Committee