

**Governmental Advisory Committee
Chairman**



Mr. Peter Dengate Thrush
Chairman of the Board
ICANN

Cc: Rod Beckstrom
President and CEO
ICANN

23 September 2010

RE: GAC Comments on new GTLDs and DAGv4

Dear Peter,

Further to the Brussels communiqué and following national consultations and exchanges between GAC members, the GAC is now able to provide more detailed comments regarding the new gTLD round. This letter also takes into account points made in your letter of 5 August 2010 in response to the GAC's earlier comments relating to version 3 of the draft applicant guidebook (DAG).

The GAC reiterates its support for the proposed introduction of new gTLDs in view of their potential for increasing competition, promoting innovation and diversity, and increasing access to the Internet. The GAC recognises the efforts of the Board and staff to address the issues raised by the GAC and the wide range of stakeholders with regard to the DAG and the new gTLD programme generally.

The GAC has expressed throughout its engagement with the Board on the launch of the new gTLD programme its overarching concern that ICANN should accurately determine the permissible scale of the new round in terms of both the technical impacts on the stability and operation of the domain name system, and the economic and market impacts, in particular with regard to competition, innovation and trade mark protection.

Root scaling

With regard to the technical impacts and in particular the "root scaling" issues which continue to be a paramount concern for governments in the expectation that ICANN will continue to guarantee the security and stability of the root zone as its top priority,

the GAC notes your expectation that “the rate of growth of the root zone would remain linear”. The GAC would be grateful for sight of the analysis in support of this statement in your letter, together with a definition of how many TLDs which ICANN expects to be able to add within this parameter of linear growth of the root zone.

Given the unpredictability of the number of applications for new gTLDs, the GAC asks that consideration be given to creating a procedure, akin to a control or brake mechanism. This procedure should be used by ICANN to prevent the root from growing too rapidly and allow ICANN to mitigate any strain on the overall domain name system caused by the new gTLD programme at a time when it is expected that the rate of adding internationalized domain names (IDNs) to the root is expected to increase significantly.

There is clearly a need to avoid root change congestion at the operational level and the potential problems that might flow from resource demands on the root operators already faced with extra strings being to be added to the root to accommodate IDNs. It is quite conceivable for example that a major commercial gTLD such as a “dot.bank” would require labels in up to 20 scripts. The ability of the root operators to keep in step with the number of IDN labels and at what rate of addition will need careful assessment. The GAC considers that this would further justify a control procedure in the rate of gTLD delegations that would serve to keep all the actors in line including the root operators as well as ensuring that the system remains properly integrated.

This control mechanism would of course require carefully designed and clearly understood public policy criteria to be established in the applicant guidebook before implementation.

Market and Economic Impacts

Although it was published too late to be taken into account at the Brussels meeting, the GAC welcomes the publication of “An Economic Framework for the Analysis of the Expansion of gTLDs” (the report). The GAC looks forward to receiving the case analysis that is to follow this report.

A key issue identified in the report is that ICANN has insufficient information to enable it to predict with certainty the economic impacts of the delegation of a large number of new gTLD strings. The GAC notes in this context the suggestion contained in the economic analysis that ICANN address this problem through conducting a small pilot programme with the aim of collecting relevant information and then using this data to refine and improve the application rules for the subsequent rounds. Such a proposal would have the support of many governments as consistent with sound technical and management practice when embarking on such a transformative initiative as the full opening up of the gTLD space in the domain name system.

At the same time, the GAC is aware that there may be a number of relatively straightforward, non-sensitive and uncontroversial gTLD proposals – including community-based initiatives – which are being unduly delayed as a result of wider operational and policy development issues that do not directly concern or involve

them. In the GAC's view, these applications could be considered as part of a fast track first round. Instituting such a first phase of the gTLD round would also serve to "road test" the core application procedures and bed them in before subjecting them to the handling of more complex applications. The GAC also notes in this respect that the fast track process for IDN ccTLDs could serve as a useful benchmark.

The GAC concludes therefore that an initial fast track round for a limited number of non-controversial applications which should include a representative but diverse sample of community, cultural and geographical applications, would be a preferable course for ICANN to take rather than a single open-ended launch. Ensuring equity and fair play in the application process for this limited first round would require a fully open community discussion and clear direction in the applicant guidebook. The GAC recommends that ICANN undertake a full review of the results of the fast track process before embarking on subsequent rounds.

Furthermore, such a limited approach to the initial launch round would be consistent with the several cross-community discussions that have taken place since the Nairobi meeting which in the GAC's view have successfully highlighted the social and economic benefits of track differentiation between categories. Specifically, the GAC recommends that such categorization be used in a more clearly defined version of the application batching process set out in version 4 of the DAG. It will be important of course in the design and implementation of this process to be mindful of the risk of potential "gaming" by applicants and there should be provisions to prevent market distortions.

Registry-registrar separation

The GAC notes the significant work being done within the ICANN community to resolve the difficult issue of registry-registrar separation. The GAC looks forward to further discussion of this important issue.

The GAC notes that ICANN has incorporated strict rules in version 4 of the DAG under which registrars are not able to provide registry services or to operate a new gTLD. Governments generally support restrictions on vertical integration and cross-ownership as important devices for promoting competition, preventing market dominance and averting market distortions. The GAC notes in this regard the Salop and Wright report and recognizes that vertical separation may be warranted where a market participant wields, or may in the future wield, market power.

However, the GAC also recognises that if market power is not an issue, the ability of registrars with valuable technical, commercial and relevant local expertise and experience to enter the domain names market could likely lead to benefits in terms of enhancing competition and promoting innovation.

An important additional benefit which the GAC expects would flow from such an exemption would be that community-based TLD applicants would be able to cast their net more widely in securing partners with the necessary expertise and experience in the local market to undertake what would be relatively small scale registry functions.

The GAC therefore urges ICANN to resolve the current debate about registry-registrar separation with a solution that fosters competition and innovation in the DNS market by allowing exemptions, subject to some form of regulatory probity that ensures a level playing field, for certain registrars as potentially valuable newcomers to the registry market. ICANN may find it useful to consider the experience of competition regulators around the world in addressing this issue.

Protection of rights owners

The GAC notes with great concern that brand-owners continue to be faced with substantial and often prohibitive defensive registration costs which constitute a negative impact on their business planning and budgeting over which they have no control. Consultations by individual GAC members with business stakeholders underline how this issue remains a fundamental downside to the expansion of the gTLD space, far outweighing any perception of opportunities for innovation and customer-orientated benefits from the creation of corporate brand TLDs.

In the current financial and economic climate, these consultations reveal that many individual businesses (including small and medium-sized enterprises) and media entities – some with large families of brands - find themselves without a sound business case to justify high levels of expenditure on large numbers of domain name registrations, most of which they are unlikely ever to use. Many of those that do decide to commit valuable financial resources for acquiring such defensive registrations will need to take some difficult decisions as to how to prioritize their efforts to avoid as much abuse of their trademarks as possible, in the knowledge that they will not be able to prevent all the potential abuse of their brands that the new gTLD round will facilitate.

This problem is exacerbated by lack of awareness: a recent survey carried out by ‘World Trademark Review’ showed that over 50% of respondents did not understand the implications for them of the gTLD programme.

The GAC remains of the view, therefore, that more concerted attention needs to be paid by ICANN to mitigate the costs to brandowners of new gTLDs arising from the need to acquire defensive registrations. The GAC urges ICANN therefore to reach out more effectively to the business community to set out both the opportunities for corporate business and the cost implications for brandowners of the expansion of the gTLD space.

The GAC notes the efforts to enhance through *process* the protection of rights owners as recounted in your letter of 5 August and developed in version 4 of the DAG.

In particular, the GAC welcomes the expansion of the Trademark Clearing House to allow all nationally registered trademarks including those not substantially reviewed. However, the GAC shares the views of the World Intellectual Property Organisation (WIPO) that ICANN should ensure that the Trademark Clearing House operates on

non-discriminatory terms and does not impose a validation fee depending on the source of the trademark. The GAC also recommends that the match criteria for searches be extended to include results that combine a trademark and a generic term (e.g. “Kodakcameras”).

The GAC also urges ICANN to ensure that all new rights protection mechanisms complement the existing UDRP. The GAC has serious concerns with regard to the way in which the draft Uniform Rapid Suspension System (URS) which governments had supported has evolved so as to require a much higher burden of proof while limiting marks eligible for a URS claim to only those which have been subject to substantive review or validated in the Clearing House with the associated cost and time implications. As a result, the GAC believes that the aim of achieving a light-weight mechanism has been compromised with the successive drafting of the URS, to the extent that it no longer serves as a viable alternative for rightsholders to the UDRP in securing the timely suspension of domain names.

The GAC looks forward to the opportunity for further consultations with ICANN staff on these issues relating to the operation of the Clearing House and the URS.

Post-delegation Disputes with governments

The GAC welcomes the proposal for contractual clauses in the registry agreement to respect a legally binding decision in the relevant jurisdiction in the event of dispute between a Government which has provided a letter of support or non-objection and a gTLD registry.

However, the GAC would appreciate a response from ICANN on an outstanding point concerning the GAC view that the operations of registry operators of “geo-TLDs” should be conducted under the legal framework of the country the government administration of which provided the letter of support letter or non-objection to ICANN. The GAC believes that this requirement would remove any doubt or concern about legal conflict.

Use of geographical names

The GAC appreciates the work undertaken by ICANN to address the GAC’s concerns relating to the use of geographical names. In particular, the GAC welcomed the addition of the clearly stated provision in version 4 of the DAG that country and territory names are to be excluded from the first application round. However, as stated in its Nairobi communiqué, the GAC underlines that this exclusion should be prolonged until the completion of the ccPDP.

The GAC notes that the guide still does not take fully into consideration the GAC’s concerns about extending the protection of geographical names. The GAC remains of the view that the definition of geographical strings continues to be insufficient and inconsistent with GAC gTLD principles and earlier advice by the GAC. In particular, names by which countries are commonly known as and which do not appear in ISO lists should also be given the same protection as country names that do appear.

The GAC notes that ICANN referred governments to the “secondary avenue of recourse available by way of objections” in the Chair’s letter of 5 August 2010. The GAC therefore asks ICANN to ensure that the criteria for community objections are implemented in a way that appropriately enables governments to use this instrument to protect their legitimate interests.

Applications for gTLDs which are city names will need careful handling. The GAC considers that the provisions in version 4 of the DAG in relation to city names carry the danger that an applicant could seek to avoid the safeguards of government support or non-objection if the application simply states that the intended use of the name is for non-community purposes. The GAC asks ICANN to review the proposal in the DAG in order to ensure that this potential loophole does not arise.

The GAC takes this opportunity to remind the Board that governments need time to consult internally before deciding on whether or not to deliver a letter of approval or non-objection, in particular in cases there is more than one application for a string with a geographical name. This timeline needs to be factored into the DAG advice.

The GAC also reiterates its position that governments should not be required to pay a fee for raising objections to new gTLD applications. There are a number of reasons why sovereign nations should not pay fees to object to strings which they consider to be objectionable:

- sovereign nations are not protecting a commercial interest (as opposed, for example, to the protection of trademarks) but are instead protecting their national interests and the public interest (as they see it);
- the cost of blocking a controversial gTLD for a Government may be less than the upfront cost of opposing a controversial gTLD. If ICANN’s policy objective is for one unified Internet, it should ensure that sovereign nations have low costs in raising their concerns about individual gTLDs in the first instance; and
- as a general principle of public policy, the group responsible for causing a regulatory response should bear the cost of that regulatory response. This is consistent with the principle that the collective (i.e. tax payers, citizens) does not bear a burden caused by special interest groups, without a substantial and identifiable public benefit.

Legal Recourse for Applicants

The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application. The GAC believes therefore that the denial of any legal recourse as stated in Module 6 of the DAG under item 6 is inappropriate. The GAC cannot accept any exclusion of ICANN’s legal liability for its decisions and asks that this statement in the DAG be removed accordingly.

Addressing the needs of developing countries

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The GAC notes the concerns expressed at the Internet Governance Forum in Vilnius on 16 September that the new gTLD round as currently framed carries the risk of excluding the participation of developing countries in the gTLD round and thereby ensuring cultural and linguistic diversity.

The GAC reiterates its strong belief that the new gTLD process should meet the global public interest in promoting a fully inclusive and diverse Internet community and infrastructure, consistent with the Affirmation of Commitments. The GAC therefore urges ICANN to 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. 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. The GAC strongly recommends that the communications strategy for the new gTLD round be developed with this issue of inclusiveness as a key priority.

Yours sincerely,

Heather Dryden
Interim Chairman of the Governmental Advisory Committee,
Senior advisor to the Government of Canada