ICANN 1 APRIL 2015 NGPC MEETING
Committee Papers and Reference Materials

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NGPC Agenda – 1 April 2015

1. (T) Approval of Minutes

2. Category 2, Exclusive Access (papers; for discussion only)

3. Category 2, Non-discrimination (papers; for discussion only)

4. Update on the preparation for the 7 April meeting on Public Interest Commitments (for discussion only)

5. AOB

ICANN NGPC PAPER NO. 2015.04.01.NG2a

TITLE:	**GAC Advice in the Beijing Communiqué regarding Category 2 Safeguards – Exclusive Registry Access**
PROPOSED ACTION:	**For Discussion**

EXECUTIVE SUMMARY:

This paper provides options for the NGPC to consider as it continues to deliberate on how to address the GAC's Category 2 Safeguard advice in the Beijing Communiqué. The GAC advice states that, "For strings representing generic terms, exclusive registry access should serve a public interest goal."

ICANN solicited responses from 186 applicants for the strings identified by the GAC's Category 2 advice asking whether they planned to operate the applied-for TLDs as exclusive access registries (defined as a registry restricted to a single person or entity and/or that person's or entity's Affiliates (as defined in Section 2.9c of the Registry Agreement)). Of the 186 responses:

- 139 indicated that the applied-for TLDs will not be operated as exclusive access TLDs.
- 12 indicated that the applied-for TLDs will be operated as exclusive access registries.
- 35 indicated that their applications currently state that the applied-for TLDs will be operated as exclusive access registries, but the applicants will not operate them as exclusive access registries. These applicants submitted change requests to change their applications.

While the number of applicants originally included on the GAC's Category 2 list indicating their applied-for TLD would be operated as an exclusive access registry continues to decline, additional applicants not named on the original list have notified ICANN that they intend to operate as an exclusive access registry. As of 23 March 2015, five applicants representing six TLDs maintain that their applied-for TLD would be operated as an exclusive access registry as noted below. These applicants provided an explanation for how exclusive access registry for the applied-for TLD would serve a public interest goal. Staff continues to peruse its outreach efforts to the applicants to encourage them to consider operating the applied-for generic string in a non-exclusive manner so that they may continue to move forward in the Program.

- .CRUISE (Viking River Cruises (Bermuda) Ltd.) – in contention with one other application
- .DATA (Dish DBS Corporation) – in contention with two other applications
- .DVR (Hughes Satellite Systems Corporation) – not in a contention set
- .FOOD (Lifestyle Domain Holdings, Inc.) – in contention with two other applications
- .GROCERY (Wal-Mark Stores, Inc.) – not in a contention set
- .PHONE (Dish DBS Corporation) – in contention with one other application

Five potential options to address the open item of GAC advice are as follows:

1. Prohibit Exclusive Generic TLDs – Under this option, the NGPC would take action not to move forward with applicants who proposed to provide exclusive registry access for a generic string. Although this option may satisfy members of the community that believe ICANN should prohibit exclusive access for generic strings, this approach is inconsistent with the GNSO's position (ICANN should not have responsibility to restrict the use of gTLDs in any manner; *see* http://gnso.icann.org/en/correspondence/robinson-to-crocker-chalaby-07mar13-en.pdf) and the Applicant Guidebook, and appears inconsistent with the GAC's advice. (Note: the GAC advice does not say that exclusive registry access for a generic string should be prohibited, but rather says that the exclusive registry access should serve a public interest goal.)

2. Reject the GAC advice, and permit Exclusive Generic TLDs – By selecting this option, the NGPC would take an action that would allow applicants who proposed to provide exclusive registry access for a generic string to continue to move forward in the New gTLD Program. This action would appear to be consistent with the Applicant Guidebook and the GNSO position on exclusive access for generic TLDs. If this option is selected, the NGPC would need to begin the GAC-Board consultation process since the NGPC's action would not be consistent with GAC advice, which provides that exclusive registry access should serve a public interest goal. Electing this option may also cause many applicants for generic strings that currently say they intend to provide non-exclusive registry access to change their registration policies to provide exclusive access.

3. Initiate a public comment period – At its 8 September meeting, the NGPC requested that staff prepare a list of questions to frame a discussion in the event a public comment forum is initiated to gather community feedback on how to implement the GAC's Category 2 safeguard advice. As the NGPC previously discussed, defining the public interest is a complex matter because "public interest" is an amorphous, malleable concept. The questions presented below are intended to help define a framework based on key issues that a registry operator would need to address to demonstrate that its proposed exclusive registry access serves a public interest goal.

    a. Describe the user community whose needs you seek to meet?

    b. What are the needs of the target user community?

    c. How do you propose to meet the needs of the target user community (e.g. what are your implementation plans)?

    d. Will meeting the needs of the target user community conflict with the needs or interests of others? How will you address this conflict/tension?

    e. How will you measure your effectiveness in meeting your public interest goal? How will you report on your effectiveness?

f. How and to whom will you be held accountable for meeting your public interest goal?

4. <u>Accept the GAC advice, and implement the advice by requesting the impacted applicants to submit a PIC to be included in Specification 11 of the New gTLD Registry Agreement</u>. This option is consistent with the treatment of other GAC advice, but has the potential to present future enforcement challenges if the PICs extend too far beyond the scope of ICANN's technical remit. For example, Wal-Mart Stores, Inc., which indicated that it planned to operate .GROCERY as an exclusive registry access TLD, identified the following as some of the public interests goals its exclusive registry access will serve: enhanced competition; a unique secure marketplace; brand protection; cost reduction for Wal-Mart by reducing the need for defensive registrations in other TLDs; and increased consumer trust by providing a secure and reliable commercial platform. If the NGPC adopts this option, these public interest goals would need to be transformed into binding commitments to be included in the Registry Agreement and enforcement of those commitments, whether by ICANN's compliance team or through the PICDRP, could be problematic.

5. <u>Defer the matter for possible development of consensus policy</u> – At its 12 – 14 October 2014 meeting in Los Angeles, the NGPC discussed that the GAC's advice may raise policy considerations. The NGPC may wish to consider consulting with the GNSO about any policy considerations raised by the GAC advice, and whether the development of consensus policy may be needed to address/implement the advice. As part of this option, staff can continue to peruse its outreach efforts to the applicants to encourage them to consider operating the applied-for generic string in a non-exclusive manner. As part of this option, the NGPC may need to consider whether to defer the impacted applications to the next round of the New gTLD Program.

The Reference Materials document includes possible pros and cons of selecting a particular approach outlined above.

STAFF RECOMMENDATION:

This paper is provided for discussion purposes. There is no staff recommended action at this time. Staff will prepare a resolution for action by the NGPC, pending the outcome of the discussion.

Signature Block:

Submitted by: Jamie Hedlund

Position: Vice President, Strategic Programs, Global Domains Division

Date Noted: 23 March 2015

Email: jamie.hedlund@icann.org

REFERENCE MATERIALS - NGPCPAPER NO. 2015.04.01.NG2a

TITLE: **GAC Advice in the Beijing Communiqué regarding Category 2 Safeguards – Exclusive Registry Access**

Options for Consideration of GAC Category 2 Safeguard advice

#1 - Prohibit Exclusive Generic TLDs		#2 - Reject GAC Advice Permit Exclusive Generic TLDs		#3 – Public Comment - Framework to Evaluate Public Interest Goals		#4 - Accept GAC Advice Implement Advice by Requesting Voluntary PIC	
Pro	**Con**	**Pro**	**Con**	**Pro**	**Con**	**Pro**	**Con**
Will satisfy community members that think ICANN should prohibit Exclusive Generic TLDs	Inconsistent with GNSO position	Consistent with GNSO position	Will dissatisfy community members that think ICANN should prohibit Exclusive Generic TLDs	Seeks implementation direction from the community, potentially including the GAC	Public comments may not be able to provide additional clarity to assist implementation	Consistent with treatment of other GAC Advice	Will dissatisfy community members that think ICANN should prohibit Exclusive Generic TLDs
Simple	Inconsistent with AGB	Consistent with AGB	May lead existing registry operators to ask for contract amendment to be Exclusive Generic		May be seen as unreasonable delay at this juncture	Publication of PICs provides an opportunity for the community to offer feedback on the proposed PICs	May lead existing registry operators to ask for contract amendment to be Exclusive Generic
	Arguably inconsistent with GAC Advice; may require GAC consultation	Consistent with view that ICANN should adhere to its remit and not regulate business models	Will require GAC consultation		Not clear who would ultimately be responsible to evaluate the public interest goals submitted	PICs become contractually binding obligation in the Registry Agreement	Enforcement of PICs may extend ICANN beyond remit

#5 - Defer the matter for possible development of consensus policy	
Pro	**Con**
Seeks implementation direction through the bottom-up consensus policy development process	May be seen as unreasonable delay at this juncture
	If applications deferred until next round, will require new process to be created to implement

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ICANN NGPC PAPER NO. 2015.04.01.NG2b

TITLE: **GAC Advice in the Beijing Communiqué regarding Category 2.1 Safeguards – Non-Discrimination**

PROPOSED ACTION: **For Discussion**

EXECUTIVE SUMMARY:

This paper provides options for the NGPC to consider as it continues to deliberate on how to address the GAC's Category 2.1 Safeguard advice regarding non-discrimination. The advice originally appeared in the Beijing Communiqué (11 April 2013), and has been reiterated in various other Communiqués. In the Los Angeles Communiqué, the GAC "strongly advised" the Board to "focus its attention on… [a]mend[ing] the PIC specification requirement for Category 2 new gTLDs to include a non-discriminatory requirement for registrants an avenue to seek redress for discriminatory policies." More recently, the Singapore Communiqué (12 February 2015) states that, "The GAC urges the NGPC to provide greater clarity as to the mechanisms for redress in the event registrants believe they have been unduly discriminated against." The Reference Materials provide an overview of the GAC's advice regarding non-discrimination from each of the Communiqués.

Currently, every New gTLD Registry Agreement signed to date, includes a PIC in Specification 11 with a non-discrimination provision that states that "Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies." (See Registry Agreement Section 3.c.)

The NGPC was previously briefed on some of the implementation challenges and questions raised by the GAC's advice in the Los Angeles Communiqué, including whether (and if so how) to amend the PIC included in every Registry Agreement. Another related complex issue would be the PICs in the already-signed agreements, which could not be amended easily.

Additionally, implementing the GAC's advice may pose challenges because the GAC advice may be interpreted as asking ICANN to transform a non-discrimination requirement in a manner which is generally thought to be a "legal right" (i.e. granted to a person by the legal system of a specific jurisdiction) into a "contractual right" via the Registry Agreement. This presents several challenges, including the following:

- Non-discrimination is legislated in some jurisdictions but not others.
- Even in jurisdictions where non-discrimination is legislated there are differences between what individual jurisdictions view as non-discriminatory.
- From a contractual compliance standpoint, how should ICANN evaluate the dividing line between discrimination and market segmentation? (e.g. Would it be considered discrimination to have registration policies that allow only architects of residential, commercial or public buildings to register names in the .ARCHITECT TLD, but not landscape architects? Would it be considered discriminatory for the Roman Catholic church to refuse to sell a .CATHOLIC domain name to a church that considers itself to be "catholic" but that separated from the Roman Catholic Church centuries ago and does not recognize the authority of the Roman Catholic Pope and Cardinals?)
- If non-discrimination is interpreted to extend to anticompetitive practices, complex issues of economics, pricing and consumer welfare will potentially be implicated, which vary from jurisdiction to jurisdiction and which ICANN is neither empowered nor competent to interpret or enforce.
- Is it discriminatory for a brand to refuse to sell .BRAND domain names to third parties or competitors?

In January 2015, staff provided some options for the NGPC to consider to address the GAC's advice. Those options are provided below for further discussion.

- Option A – In the GAC's December 9th letter, the GAC urged the NGPC to amend the PIC about non-discrimination or provide clarification as to any other means by which a registrant could remedy potential harm caused by discriminatory registration policies. A possible solution for the NGPC to address the GAC's advice it to provide the requested clarification. An argument might be made that Section 3.c. of Spec 11 could be read to require that more than just transparency is required. ("*Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.*") One possible reading of that requirement is that the registration policies must be consistent with general principles of openness and non-discrimination. Interpreting the Registry Agreement in this way would permit a harmed party to submit a compliance complaint or file a PICDRP against a registry operator who is allegedly violating the non-discrimination requirement.

- Option B – Without accepting or rejecting the advice, as an interim step the NGPC could pose a series of questions to the GAC, including questions posed by the community, to help clarify the intent of the advice and to help better understand how the advice might be implemented. Some of the questions that could be presented to the GAC are as follows:

  a. What is the basis of the GAC's assertion that there exists a "general rule that the gTLD domain name space is operated in an open manner"?
  b. The GAC implied that certain TLDs must be restricted (Category 1B). May all the other TLDs choose whether or no to be restricted? Are there certain TLDs that must not be restricted? How could ICANN discern the difference between those categories of TLDs?

  As noted above, answers to the questions posed could prove challenging and may not result in clear direction.

- Option C – The NGPC could consider rejecting the GAC's advice, because of the implementation concerns or for other reasons. If the NGPC is thinking about rejecting the advice, it would need to invoke the Board-GAC consultation process.

- Option D – The NGPC may consider accepting the advice by amending the PIC Spec for any Registry Agreement signed *going forward* to include additional language about non-discrimination. The new language would prohibit registry operators from engaging in any *illegal* discrimination, for example based on civil rights or antitrust laws. (ICANN would thus not engage in economic regulation of business practices that are legally permitted.) One challenge with this approach is how to determine the applicable jurisdiction to assess whether the discrimination is illegal (i.e. the location of the alleged harmed party? The location of the Registrar or Registry Operator?)

- Option E – Without accepting or rejecting the advice, as an interim step the NGPC could consult with the GNSO about any policy concerns raised by the GAC's advice. However, it should be noted that the GNSO may not have any further policy advice or guidance on the issue of appropriate restrictions for gTLDs. As part of previous community discussions on "closed generics", the NGPC reached out to the GNSO requesting that the GNSO provide guidance on the issue. As part of its 7 March 2013 response to the NGPC on this matter, the GNSO stated:

  > *In addition, the Council would like to point out that, although the GNSO did not explicitly consider the issue of "closed generic" TLDs as part of the new gTLD PDP, we recall that the issue of restricting new gTLDs was, in general, considered and discussed. At that time,* ***it was the view within the GNSO that it should not be the responsibility of ICANN to restrict the use of gTLDs in any manner, but instead to let new gTLD***

<u>applicants propose various models</u>; *open or closed, generic or not.* (Emphasis added)

STAFF RECOMMENDATION:

This paper is provided for discussion purposes. There is no staff recommended action at this time. Staff will prepare a resolution for action by the NGPC, pending the outcome of the discussion.

Signature Block:

Submitted by: Jamie Hedlund

Position: Vice President, Strategic Programs, Global Domains Division

Date Noted: 23 March 2015

Email: jamie.hedlund@icann.org

REFERENCE MATERIALS - NGPCPAPER NO. 2015.04.01.NG2b

TITLE: **GAC Advice in the Beijing Communiqué regarding Category 2.1 Safeguards – Non-Discrimination**

This document provides an overview of the advice from the Governmental Advisory Committee (GAC) regarding the Category 2.1 Safeguards addressing non-discrimination for restricted access gTLDs.

In the GAC's Beijing Communiqué (11 April 2013), the GAC provided safeguard advice to apply to broad categories of strings to "reinforce existing processes for raising and addressing concerns". The GAC advised that all safeguards should:

- *Be implemented in a manner that is fully respectful of human rights and fundamental freedoms as enshrined in international and, as appropriate, regional declarations, conventions, treaties and other legal instruments – including, but not limited to, the UN Universal Declaration of Human Rights.*
- *Respect all substantive and procedural laws under the applicable jurisdictions.*
- *Be operated in an open manner consistent with general principles of openness and non-discrimination.* (Emphasis added)

The GAC further advised the Board in the Beijing Communiqué about "restricted access." (This is referred to as the GAC's Category 2.1 Safeguard advice). The GAC stated:

> *As an exception to the general rule that the gTLD domain name space is operated in an open manner registration may be restricted, in particular for strings mentioned under category 1 above. In these cases, the registration restrictions should be appropriate for the types of risks associated with the TLD. The registry operator should administer access in these kinds of registries in a transparent way that does not give an undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue disadvantage.*

To implement the advice, in June 2013 the NGPC included a new provision in Spec 11 of the Registry Agreement for every TLD stating that "Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies." (See Registry Agreement Section 3.c.)

In the 27 March 2014 Singapore Communiqué and the 25 June 2014 London Communiqué, the GAC asked the Board to provide a written response to address whether ICANN considered that for restricted TLDs transparency alone might not only be insufficient to deter unduly preferential or discriminatory registration policies, but it will be equally difficult for anyone seeking redress to meet the standard of harm required in the Public Interest Commitments Dispute Resolution Procedure (PICDRP).

The NGPC provided responses to the GAC's questions and explained its rationale for how it implemented the advice about non-discrimination. The NGPC explained that the NGPC adapted the language of the Category 1 safeguards as appropriate to meet the spirit and intent of the advice in a manner that allowed the safeguards to be implemented as PICs in the Registry Agreement.

In the Los Angeles Communiqué (15 October 2014), the GAC strongly advised that the Board to "focus its attention on Category 2 Safeguards: Ensuring Non-Discriminatory Registration Policies:

> 1. Amend the PIC specification requirement for Category 2 new gTLDs to include a non-discriminatory requirement to provide registrants an avenue to seek redress for discriminatory policies."

On 9 December 2014, the GAC issued a letter to the ICANN Board to assist the NGPC in its work regarding safeguards applicable to new gTLDs by providing further explanation and background about the GAC advice in the Los Angeles Communiqué. With respect to the Category 2.1 Safeguard advice about restricted access TLDs, the GAC clarified that:

- The GAC remains concerned about ensuring non-discriminatory registration policies.
- The fundamental problem created by the NGPC's response is the absence of any remedy for a registrant who encounters a discriminatory registration regime, as the discriminatory registration policy only needs to meet the requirement of transparency.

- It is imperative that registrants be afforded an avenue to seek redress in the event a Category 2 registry implements preferential or discriminatory registration policies.
- The GAC strongly urges the NGPC to reconsider its position, particularly since the GAC has advised that it does not believe the current requirements in Specification 11 actually meet either the spirit or the intent of the GAC's advice.
- The GAC urges the NGPC to either amend the PIC to include a non-discriminatory requirement, or to provide clarification as to any other means by which a registrant could remedy potential harm caused by discriminatory registration policies.

Most recently, in the 11 February 2015 Singapore Communiqué, the GAC advised that "The GAC urges the NGPC to provide greater clarity as to the mechanisms for redress in the event registrants believe they have been unduly discriminated against."

New gTLD Program Committee Members,

Attached below please find Notice of the following New gTLD Program Committee Meeting:

1 April 2015 - NGPC Meeting at 22:00 UTC. This Committee meeting is estimated to last 90 minutes.

http://www.timeanddate.com/worldclock/fixedtime.html?msg=Board+New+gTLD+Program+Committee+&iso=20150401T22

Some other helpful time zones:
1 April 2015 – 3:00 p.m. PDT Los Angeles, CA
1 April 2015 – 6:00 p.m. EDT Washington, D.C.
2 April 2015 – 12:00 a.m. CEST Brussels
2 April 2015 – 6:00 a.m. CST Taipei
2 April 2015 – 9:00 a.m. AEDT Sydney

Consent Agenda

1. **(T) Approval of Minutes**

Main Agenda

1. **Category 2, Exclusive Access (papers, for discussion only)**
2. **Category 2, Non-discrimination (papers, for discussion only)**
3. **Update on the preparation for the 7 April meeting on Public Interest Commitments (for discussion only)**
4. **AOB**

Materials can be found here on BoardVantage

If you have trouble with access, please let us know and we will work with you to assure that you can use the BoardVantage Portal for this meeting.

If call information is required, it will be distributed separately.

If you have any questions, or we can be of assistance to you, please let us know.

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