

NGPC Agenda – 28 September 2013

Consent Agenda:

- Approval of Minutes from 13 August 2013

Main Agenda:

- Remaining Items from Beijing and Durban GAC Advice: Updates and Actions
 - a) .VIN, and .WINE (Fadi Chehadé)
 - b) .SHENZHEN, .SPA, .GUANGZHOU and .YUN (Chris Disspain)
 - c) .AMAZON (Chris Disspain)
 - d) IGO Protections (Chris Disspain)
 - e) Category 1 Safeguards (Chris Disspain)
 - f) Category 2 Safeguards (Chris Disspain)
- Name Collision Discussion (Akram Atallah)
- String Similarity Discussion (Mike Silber)
- AOB

ICANN NGPC PAPER NO. 2013.09.28.NG2a

TITLE: **Remaining Items from Beijing and Durban GAC
Advice: Updates and Actions**

PROPOSED ACTION: **For Resolution**

EXECUTIVE SUMMARY:

The GAC delivered advice on the New gTLD Program in its Beijing Communiqué issued 11 April 2013, and its Durban Communiqué issued 18 July 2013. The NGPC developed a GAC scorecard to respond to the advice in the Durban Communiqué (adopted 10 September 2013), similar to the one used to address the Beijing Advice (adopted 4 June 2013). At this time, the NGPC is being asked to consider adopting another iteration of the scorecard that lists the remaining items from the Beijing and Durban GAC advice to be resolved by the NGPC. The scorecard provides updates on the NGPC's progress, and where appropriate, includes actions to be undertaken to continue to make progress on resolving the remaining advice.

The NGPC may consider additional iterations of the scorecard at subsequent meetings as it continues to address the remaining items of GAC advice.

STAFF RECOMMENDATION:

Staff recommends the NGPC adopt the scorecard to address remaining items from Beijing and Durban GAC advice as presented in the attached scorecard so that the greatest number of new gTLD applications are able to continue to move forward as soon as possible.

PROPOSED RESOLUTION:

Whereas, the GAC met during the ICANN 46 meeting in Beijing and issued a Communiqué on 11 April 2013 ("Beijing Communiqué").

Whereas, the GAC met during the ICANN 47 meeting in Durban and issued a Communiqué on 18 July 2013 ("Durban Communiqué").

Whereas, the NGPC adopted a scorecard to respond to the GAC's advice in the Beijing Communiqué and the Durban Communiqué, which were adopted on 4 June 2013 and 10 September 2013, respectively.

Whereas, the NGPC has developed another iteration of the scorecard to respond to certain remaining items of GAC advice in the Beijing Communiqué and the Durban Communiqué.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2013.xx.xx.NGxx), the NGPC adopts the "Remaining Items from Beijing and Durban GAC Advice: Updates and Actions" (28 September 2013), attached as Annex 1 to this Resolution, in response to remaining items of GAC advice in the Beijing Communiqué and the Durban Communiqué as presented in the scorecard.

PROPOSED RATIONALE:

Article XI, Section 2.1 of the ICANN Bylaws

<<http://www.icann.org/en/about/governance/bylaws - XI>> permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013 and its Durban Communiqué dated 18 July 2013. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

The NGPC has previously addressed items of the GAC's Beijing and Durban advice, but there are some items that the NGPC continues to work through. The NGPC is being

asked to consider accepting remaining Beijing and Durban GAC advice items as described in the attached scorecard dated 28 September 2013.

As part of its consideration of the GAC advice, on 18 April 2013, ICANN posted the Beijing GAC advice and officially notified applicants of the advice, <<http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en>> triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. Additionally, on 1 August 2013, ICANN posted the Durban GAC advice and officially notified applicants of the advice <<http://newgtlds.icann.org/en/announcements-and-media/announcement-01aug13-en>>, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The complete set of applicant responses are provided at: <<http://newgtlds.icann.org/en/applicants/gac-advice/>>.

In addition, on 23 April 2013, ICANN initiated a public comment forum to solicit input on how the NGPC should address Beijing GAC advice regarding safeguards applicable to broad categories of new gTLD strings <<http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>>. The NGPC has considered the applicant responses in addition to the community feedback on how ICANN could implement the GAC's safeguard advice in the Beijing Communiqué in formulating its response to the remaining items of GAC advice.

As part of the applicant response period, several of the applicants indicated that they have entered into dialogue with the affected parties, and they anticipated reaching agreement on the areas of concern. Some of the applicants noted that they have proposed additional safeguards to address the concerns of the relevant governments are unsure as to whether a settlement can be reached. These applicants asked that the ICANN Board allow their applications to proceed even if an agreement among the relevant parties cannot be reached. Additionally, inquiries have been made as to whether applicants and the relevant governments will have the opportunity to comment on conversations among the GAC, ICANN Board, and ICANN staff. There have been requests that that the GAC, NGPC, and ICANN staff consult with applicants before decisions regarding any additional safeguards are made.

Other applicants noted the important role of governments in the multi-stakeholder model, but advised the NGPC that it should not allow governments to exercise veto power over ICANN policies adopted through the multi-stakeholder process.

Additionally, some members of the community opposed the NGPC accepting the GAC's advice concerning safeguards. Opposing commenters generally expressed concern that this is new and unanticipated policy, contrary to the bottom-up process. They also indicated that the safeguards are vague and not adequately defined, and are therefore not possible to implement.

As part of its deliberations, the NGPC reviewed the following materials and documents:

- GAC Beijing Communiqué:

https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2

GAC Durban Communiqué:

https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2

- Letter from H. Dryden to S. Crocker dated 11 September 2013 re: .vin and .wine: https://gacweb.icann.org/download/attachments/27132037/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board_20130909.pdf?version=1&modificationDate=1379026679000&api=v2
- Applicant responses to GAC advice: <http://newgtlds.icann.org/en/applicants/gac-advice/>
- Applicant Guidebook, Module 3: <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

In adopting its response to remaining items of Beijing and Durban GAC advice, the NGPC considered the applicant comments submitted, the GAC's advice transmitted in the Communiqués, and the procedures established in the AGB. The adoption of the GAC advice as provided in the attached scorecard will assist with resolving the GAC advice in manner that permits the greatest number of new gTLD applications to continue to move forward as soon as possible.

There are no foreseen fiscal impacts associated with the adoption of this resolution, but fiscal impacts of the possible solutions discussed will be further analysed if adopted. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS.

As part of ICANN's organizational administrative function, ICANN posted the Durban GAC advice and officially notified applicants of the advice on 1 August 2013. Likewise, ICANN posted the Beijing GAC advice and officially notified applicants of the advice on 18 April 2013. In each case, this triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.

Annex 1 to ICANN NGPC Resolution 2013.09.28.NG2a

Text Superseded by Annex 1 to Resolution 2013.09.28.NG02: <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-28sep13-en.pdf>

ICANN NEW gTLD PROGRAM COMMITTEE PAPER NO. 2013.09.28.2c

TITLE: Update on String Similarity Objection Decisions

PROPOSED ACTION: For Information

EXECUTIVE SUMMARY:

At its 10 September 2013 meeting, the New gTLD Program Committee (NGPC) discussed concerns raised by some members of the community that some Expert Determinations of the String Confusion Objection dispute resolution service provider (DRSP) panels are seemingly inconsistent. The NGPC requested that staff prepare a summary of certain String Confusion Objection Expert Determinations so that the NGPC could understand the scope of the expressed concerns. The Reference Materials provide a more detailed summary of the String Similarity Objection Expert Determinations.

Overall, there are three purported inconsistencies have been brought to ICANN's attention. First, there are conflicting determinations as to whether .CAM and .COM are confusingly similar (two Determination say they are not and one Determination says they are confusingly similar). Community members have questioned why these objections were not consolidated to avoid this result. Section 3.4.2 of the AGB states that "ICANN strongly encourages all of the DRSPs to consolidate matters whenever practicable." Further, any applicant or objector may propose to consolidate objections if the DRSP itself has not decided to consolidate two or more objections. Consolidation is at the discretion of the DRSP. As discussed in the Reference Materials, consolidation was suggested in relation to the three relevant objections, but one of the .CAM applicants objected to consolidation arguing that applicants may have a different basis for responding to these objections, and "consolidating these objections and evaluating their merits collectively to reach a universal ruling has the potential to harm one or more of the [a]pplicants."

Second, while some panels have held that a plural string is not confusingly similar to a string of the same word in singular form, other panels reached the opposite conclusion. Some have argued that this result is contrary to the GNSO policy regarding string

confusion. To note, the GNSO Final Report on the introduction of new generic top-level domains approved by the GNSO in September 2007 recommended that “[s]trings must not be confusingly similar to an existing top-level domain or a [r]eserved [n]ame.” The GNSO did not recommend that all plural strings are confusingly similar to a string of the same word in singular form. During the policy development and implementation design phases of the New gTLD Program, aural and conceptual string similarities were considered. These types of similarity were discussed at length, yet ultimately not agreed to be used as a basis for the analysis of the string similarity panels’ consideration because on balance, this could have unanticipated results in limiting the expansion of the DNS as well as the reach and utility of the Internet. However, the grounds for string confusion objections include all types of similarity, including visual, aural, or similarity of meaning. As noted in the Reference Materials, the panels provided a rational basis why in some cases a plural string is not confusingly similar to a string of the same word in singular form.

Third, while one panel held that a string made up of the Japanese characters denoting .ONLINE SHOPPING was confusingly similar to the English string .SHOP, a plethora of panels have held that non-English strings denoting bazaar, shop, mall and similar words were not confusingly similar to the English string .SHOP.

While on their face some of the decisions may appear inconsistent, there are reasonable explanations for these seeming discrepancies, both procedurally and substantively. First, on a procedural level, each expert panel generally rests its Determination on the materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two panels confronting identical issues could – and should – reach different Determinations, based on the strength of the materials presented. Second, on a substantive level, each of the identified disputes presented nuanced distinctions relevant to the particular objection. Further, the standard guiding the panels involves some degree of subjectivity, and thus independent expert panels would not be expected to reach the same conclusions on every occasion, as there is no objectively-verifiable standard for string confusion.

STAFF RECOMMENDATION:

While the NGPC should continue to monitor the expert panel Determinations to guard against inconsistencies that could undermine the public's faith in the dispute resolution process, staff recommends that none of the supposed inconsistencies that have been identified thus far rise to a level that should trigger NGPC intervention at this time.

Signature Block:

Submitted by: Christine Willett

Position: Vice President, gTLD Operations

Date Noted: 20 September 2013

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