

# **GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué**

- scorecard to serve as the basis of the GAC approach to Brussels ICANN Board/GAC consultation meeting 28 February-1 March 2011

## **Introduction**

The scorecard below represents the considered efforts of the GAC to distil the key elements of consensus advice regarding the introduction of new gTLDs it has been providing the ICANN Board since March, 2007.

As the GAC noted in its Cartagena Communiqué, the GAC's initial advice, presented in the form of Principles, pre-dated both the completion of the GNSO's Recommendations on new gTLDs and the ICANN Board's subsequent adoption of those Recommendations in June, 2008. The GAC has sought from the outset of its deliberations regarding the public policy aspects related to the introduction of new gTLDs to contribute to the bottom-up, consensus-based policy development process within ICANN. As per the ICANN Bylaws, the GAC provides advice directly to the ICANN Board. Once the GAC forwards its advice to the ICANN Board, the GAC understands that it is within the ICANN Board's remit to instruct ICANN staff to take the GAC's advice into account in the development of the implementation plan for the introduction of new gTLDs. The GAC therefore welcomes the opportunity presented by the ICANN Board's agreement to hold a meeting with the GAC to review its longstanding and outstanding concerns regarding ICANN's proposed implementation plan for the introduction of new gTLDs. From the GAC's perspective, the Brussels meetings are not only an appropriate but a critical next step in ensuring the perspectives of governments are fully taken into account in the ICANN private sector-led, multi-stakeholder model that ICANN represents.

## **Twelve outstanding issues**

1. The objection procedures including the requirements for governments to pay fees .....	3
2. Procedures for the review of sensitive strings .....	3
1. String Evaluation and Objections Procedure .....	3
2. Expand Categories of Community-based Strings .....	4
3. Root Zone Scaling.....	5
4. Market and Economic Impacts .....	6
5. Registry – Registrar Separation .....	6
6. Protection of Rights Owners and consumer protection issue .....	7
1. Rights Protection: Trademark Clearing House (TC) .....	7
2. Rights Protection: Uniform Rapid Suspension (URS):.....	8

3. Rights Protection: Post-delegation Dispute Resolution Procedure (PDDRP).....	10
4. Consumer Protection .....	11
7. Post-Delegation Disputes .....	12
8. Use of geographic names: .....	12
1. Definition of geographic names.....	12
2. Further requirements regarding geographic names.....	13
9. Legal Recourse for Applications: .....	14
10. Providing opportunities for all stakeholders including those from developing countries.....	14
Main issues .....	14
11. Law enforcement due diligence recommendations to amend the Registrar Accreditation Agreement as noted in the Brussels Communiqué .....	17
12. The need for an early warning to applicants whether a proposed string would be considered controversial or to raise sensitivities (including geographical names).....	17
Appendix: Background Material .....	19
1. Intellectual Property Rights .....	19
2. Root Zone Scaling.....	23
3. Geographic Names: Analysis of GAC’s DAG4 comments and ICANN’s answers.....	25
4. GAC’s position on “Definition of geographic names” .....	26
5. Providing opportunity for all stakeholders including those from developing countries.....	26

## **1. The objection procedures including the requirements for governments to pay fees**

### **Recommended GAC Advice:**

The GAC advises the ICANN Board to instruct ICANN staff to delete the procedures related to “Limited Public Interest Objections” in Module 3.

### **Explanation:**

Although the new heading has been renamed from “Morality and Public Order Objections”, the body of the text remains unchanged and contains the same fundamental flaws which can only be remedied through deletion.

Specifically, the requirement that governments pay fees and must be bound by determinations by the International Centre for Expertise of the International Chamber of Commerce, which will in turn be guided by the findings of “three experts recognized as eminent jurists of international reputation”, is contrary to the sovereign right of governments to interpret and apply principles of international law on a country-by-country basis. Governments cannot be bound by the determinations of private individuals or organizations on matters that pertain to national law.

The requirement is also inconsistent with the provisions in ICANN’s Bylaws that call for governments to provide public policy advice to the ICANN Board through the Governmental Advisory Committee.

Lastly, there are no “generally accepted legal norms relating to morality and public order that are recognized under international principles of law” (Module 3, Article 2, e, iii), nor is it feasible to expect that any panel of “experts” could reach a determination whether a particular proposed new gTLD string would be considered objectionable on such grounds.

## **2. Procedures for the review of sensitive strings**

### ***1. String Evaluation and Objections Procedure***

The GAC advises the ICANN Board to instruct ICANN staff to amend the following procedures related to the Initial Evaluation called for in Module 2 to include review by governments, via the GAC.

At the beginning of the Initial Evaluation Period, ICANN will provide the GAC with a detailed summary of all new gTLD applications. Any GAC member may raise an objection to a proposed string for any reason.

The GAC will consider any objection raised by a GAC member or members, and agree on advice to forward to the ICANN Board.

GAC advice could also suggest measures to mitigate GAC concerns. For example, the GAC could advise that additional scrutiny and

conditions should apply to strings that could impact on public trust (e.g. ‘.bank’).

In the event the Board determines to take an action that is not consistent with GAC advice pursuant to Article XI Section 2.1 j and k, the Board will provide a rationale for its decision.

**Explanation:**

This proposal meets a number of compelling goals. First it provides governments with a more appropriate mechanism than the “Limited Public Interest Objections” procedure to communicate objections via the GAC. It is also intended to diminish the potential for blocking of top level domain strings considered objectionable by governments, which harms the architecture of the DNS and undermines the goal of universal resolvability.

Affording governments the early opportunity, through the GAC, to provide advice to the ICANN Board about particular proposed strings is supportive of ICANN’s commitment to ensure that its decisions are in the global public interest and represent community consensus.

**2. *Expand Categories of Community-based Strings***

The GAC advises the ICANN Board to instruct ICANN staff to amend the provisions and procedures contained in Modules 1 and 3 to clarify the following:

1. “Community-based strings” include those that purport to represent or that embody a particular group of people or interests based on historical, cultural or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non exhaustive). In addition, those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse, should also be considered “community-based” strings.
2. Applicants seeking such strings should be required to affirmatively identify them as “community-based strings” and must demonstrate their affiliation with the affected community, the specific purpose of the proposed TLD, and –when opportune– evidence of support or non-objection from the relevant authority/ies that the applicant is the appropriate or agreed entity for purposes of managing the TLD.
3. In the event the proposed string is either too broad to effectively identify a single entity as the relevant authority or appropriate manager, or is sufficiently contentious that an appropriate manager cannot be identified and/or agreed, the application should be rejected.
4. The requirement that objectors must demonstrate “material detriment to the broader Internet community” should be amended to reflect simply “material detriment”, as the former represents an extremely vague standard that may prove impossible to

satisfy.

5. Individual governments that choose to file objections to any proposed “community-based” string should not be required to pay fees.

**Explanation:**

The proposed approach would remedy the failure in the draft Applicant Guidebook to incorporate the GAC’s previous advice that ICANN’s new gTLD process should respect the legitimate interests of governments regarding terms with national, cultural, geographic and religious significance. It also anticipates the strong possibility that there will be proposed new gTLD strings for which an appropriate manager cannot be identified and/or agreed, which should cause the application to be rejected as a community-based string. It corrects an impossibly vague standard of “detriment to the broader Internet community” with a more practical and realistic standard of “material detriment” to the community in question. Finally, this proposal recognizes the right of governments to protect their perceived national interests through the Community objections process without the obligation to pay fees.

### **3. Root Zone Scaling**

**Recommended GAC Advice:**

1. The Board should continue implementing a monitoring and alerting system and ensure a) that ICANN can react predictably and quickly when there are indicators that new additions and changes are straining the root zone system, and b) that the processes and possible resulting restorative measures that flow from its results are fully described in the Application Guidebook before the start of the first application round.
2. The Board commits to defer the launch of a second round or batch of applications unless an evaluation shows that there are indications from monitoring the root system etc. that a first (limited) round did not in any way jeopardize the security and stability of the root zone system.
3. The Board commits to make the second round or batch of applications contingent on a clean sheet from full technical and administrative assessment of impact of the first round with recommendations which should go out to public comment for approval.
4. The Board commits to avoid the possibility that other activities will be impacted by the possible diversion of resources to processing new gTLD applications.
5. The Board should ensure that ICANN can effectively address the specific needs of applicants from different, perhaps non-English speaking cultures, and with different legal environments.
6. The Board should monitor the pace and effectiveness of ICANN’s management of contract negotiations for new gTLDs in a potential situation of 200 to 300 simultaneous applications and evaluations.
7. The Board is confident that all relevant actors (IANA, root server operators, etc) are sufficiently informed about what is expected from them in terms of work loadings and resources in order to fulfil their respective roles, in particular the pre-

delegation checking, approvals, implementation of potentially 200 to 300 root zone changes a year and expected post-delegation changes.

#### **4. Market and Economic Impacts**

The GAC advises the ICANN Board to instruct ICANN staff to amend the final Draft Applicant Guidebook to incorporate the following:

1. Criteria to facilitate the weighing of the potential costs and benefits to the public in the evaluation and award of new gTLDs.
2. A requirement that new gTLD applicants provide information on the expected benefits of the proposed gTLD, as well as information and proposed operating terms to eliminate or minimize costs to registrants and consumers.
3. Due diligence or other operating restrictions to ensure that Community-based gTLDs will in fact serve their targeted communities and will not broaden their operations in a manner that makes it more likely for the registries to impose costs on existing domain owners in other TLDs.

##### **Explanation:**

The economic studies conducted by Katz, Rosston and Sullivan contain important findings that the past introduction of new gTLDs provided minimal public benefits in terms of competition for existing gTLDs and relieving name scarcity. The studies further state clearly that the introduction of new gTLDs had imposed costs on intellectual property owners in diluted brand strength, defensive registrations, and other costs associated with protecting their brands.

#### **5. Registry – Registrar Separation**

The GAC advises the ICANN Board to instruct ICANN staff to amend the proposed new registry agreement to restrict cross-ownership between registries and registrars, in those cases where it can be determined that the registry does have, or is likely to obtain, market power. The GAC further advises the ICANN Board that it considers the absence of a thorough and reasoned explanation of its decision in November 2010 to reverse its earlier decision of March 2010 to maintain "strict separation of entities offering registry services and those acting as registrars" and that "no co-ownership will be allowed" to be inconsistent with its commitments under the Affirmation of Commitments.

##### **Explanation:**

The CRA International report commissioned by ICANN noted that vertical integration between registries and registrars could foster both pre-competitive and anticompetitive outcomes. As the key issue is whether a gTLD has market power, it would only be

appropriate for ICANN to relax or lift restrictions on vertical integration in cases where it is clear that a gTLD faces or will face substantial competition. Such analysis would benefit from consultations with relevant antitrust authorities.

Further, ICANN has committed to provide a thorough and reasoned explanation of ICANN decisions, the rationale thereof and the sources of data and information on which ICANN relies. This has not been done yet to explain how the Board moved from a position in March 2010, as articulated in a Board resolution, of no cross ownership, to the May 31, 2010 staff proposal contained in draft Applicant Guidebook, version 4 of de minimus (i.e., no more than 2%) cross ownership, to the November 5, 2010 decision allowing full cross ownership. ICANN staff have provided an justification for the second decision but not an explanation of why ICANN's position changed so dramatically in the space of 8 months.

## **6. Protection of Rights Owners and consumer protection issue**

### ***1. Rights Protection: Trademark Clearing House (TC)***

#### **GAC Advice**

The GAC proposes the following refining changes that significantly improve the operation and achieve the maximum impact of the TC:

- The TC should be permitted to accept all types of intellectual property rights that are recognized under the national law of the country or countries under which the registry is organized or has its principal place of business. The only mandatory requirement for new registry operators will be to recognize national and supranational trademark registrations issued before June 26, 2008 and court-validated common law trademarks.
- Sunrise services and IP claims should both be mandatory for registry operators because they serve different functions with IP claims serving a useful notice function beyond the introductory phase.
- IP claims services and sunrise services should go beyond exact matches to include exact match plus key terms associated with goods or services identified by the mark ) e.g. “Kodakonlineshop”) and typographical variations identified by the rights holder.
- All trademark registrations of national and supranational effect, regardless of whether examined on substantive or relative grounds, must be eligible to participate in the pre-launch sunrise mechanisms.
- Protections afforded to trademark registrations do not extend to applications for registrations, marks within any opposition period or registered marks that were the subject of successful invalidation, cancellation or rectification proceedings.
- The IP claims service should notify the potential domain name registrant of the rights holder’s claim and also notify the rights holder of the registrant’s application for the domain name.
- The TC should continue after the initial launch of each gTLD.

- Rights holders, registries and registrars should all contribute to the cost of the TC because they all benefit from it.

### **Explanation and argument**

The GAC believes that the TC as currently framed in the Applicant Guidebook needs to be significantly improved because a) there is lack of clarity as to the modalities of the TC process and operation and b) there are problems with its applicability. While the GAC recognizes that the Trademark Clearing House (TC) mechanism was not introduced as a rights protection mechanism but as a cost reduction tool, the GAC believes it can provide effective and efficient means to enable rights holders to submit their trade mark registrations with a single entity rather than with every registry in which they may wish to obtain a second-level registration.

There is also a major inconsistency between Sunrise and IP Claims services because Sunrise services only recognize trademarks that are registered in countries conducting a so-called substantive review or examination. The consequences of this are significant in terms of eligibility. In Europe, for example, all “Community Trademarks” (i.e. any trademark which is pending registration or has been registered in the European Union as a whole rather than on a national level within the EU) and most national trademarks are excluded from the Sunrise service. These amendments would ensure that all trademark registrations could qualify for participation in the pre-launch sunrise mechanism, consistent with existing best practices (e.g. the policies for .eu, .tel, and .asia).

With regard to presentation in the Applicant Guidebook, the GAC recommends that the text could more clearly indicate (perhaps with a flow chart) at what time during the evaluation process, and by what entity, objections to potential trademark infringements should be submitted.

## ***2. Rights Protection: Uniform Rapid Suspension (URS):***

### **GAC Advice:**

- Significantly reduce the timescales. See attached table for proposed changes.
- The URS processes should be streamlined as follows:
  - The complaint should be simplified by replacing the 5,000 word free text limit + unlimited attachments [para 1.2] with a simple pro forma standardised wording with the opportunity for not more than 500 words of freeform text and limit the attachments to copies of the offending website.
  - Decisions should be taken by a suitably qualified ‘Examiner’ and not require panel appointments..
  - Where the complaint is based upon a valid registration, the requirement that the jurisdiction of registration incorporate substantive examination (paras 1.2f (i) and 8.1a) should be removed.
  - If, as is expected in the majority of cases, there is no response from the registrant, the default should be in favour of the



complainant and the website locked. The examination of possible defences in default cases according to para 8.4(2) would otherwise give an unjustified privilege to the non-cooperating defendant.

- The standard of proof (para 8.2) should be lowered from “clear and convincing evidence” to a preponderance of evidence”.
- The “bad faith” requirement in paras 1.2f), 1.2g) and 8.1c) is not acceptable. Complainants will in only rare cases prevail in URS proceedings if the standards to be fulfilled by registrants are lax. Correspondingly, the factors listed in paras 5.7a) (“bona fide”) and b) “been commonly known by the domain name”) can hardly allow a domain name owner to prevail over the holders of colliding trademarks.
- A ‘loser pays’ mechanism should be added. In addition, registrants who have lost five or more URS proceedings should be deemed to have waived the opportunity to respond to future URS complaints (this amendment corresponds to the “two strikes” provision which applies to rights holders).
- However, there should be a clear rationale for appeal by the complainant. The time for filing an appeal in default cases must be reduced from 2 years to not more than 6 months. In addition, the examination of possible defences in default cases according to para 8.4(2) means an unjustified privilege of the non-cooperating defendant.
- The URS filing fee should be US\$200-US\$300 and minor administrative deficiencies should not result in dismissal of the URS complaint.
- A successful complainant should have the right of first refusal for transfer of the disputed domain name after the suspension period so that the complainant is not forced to pursue a UDRP proceeding to secure a transfer.
- The URS should go beyond ‘exact’ matches and should at least include exact + goods/other generic words e.g. “Kodakonlineshop”.

### **Explanation and argument**

The generally acknowledged rapid escalation of the opportunity for cybersquatting caused by the proposed new gTLD round is an issue of major concern for governments in view of its likely impact on business, consumer and economic welfare, both nationally and globally. The URS mechanism was recommended specifically to tackle obvious examples of opportunistic cybersquatting by providing rights holders with a cost effective and swift remedy.

The GAC advises therefore that these proposed amendments to the URS are most important. Without these amendments, the GAC believes that URS will fail to meet its stated purpose and will be rendered ineffective and useless.

In particular, the GAC considers that the current proposals are too cumbersome and lengthy to support public policy objectives of harm reduction. Surveys and consultations undertaken by GAC representatives show that few in-house trade mark counsel believe that the proposed URS system in the final DAG provides a cost effective, expedited process in clear cut cases of trade mark abuse. Furthermore, the process too closely mirrors the UDRP mechanisms which are intended to deal with more complex disputes. The URS

as currently devised does not contain sufficient deterrence to serial cybersquatters. These changes would bring the URS back into line with its original objectives as agreed by the IRT and STI by ensuring that the URS provides an effective and rapid remedy, with more streamlined processes and faster turn round of decisions.

While it is noted that that the URS only covers intentional bad faith conduct, the GAC underlines that ICANN should make every effort to ensure that safeguards are in place to facilitate reinstatement as soon as possible in a genuine case of accidental rights infringement, through illness or some other legitimate absence, an individual or small/medium sized enterprise, has failed to respond within the timescale available.

### ***3. Rights Protection: Post-delegation Dispute Resolution Procedure (PDDRP)***

#### **GAC Advice:**

The GAC recommends that:

- The standard of proof be changed from “clear and convincing evidence” to a “preponderance of evidence”.
- The second level registrations that form the underlying basis of a successful PDDRP complaint should be deleted.
- The requirement of “substantive examination” in para 9.2.1(i) should be deleted.
- A new para 6.1 a) be added: “being identical to the complainant’s mark in relation to goods and services which are identical to those for which the complainant’s mark is registered. This would not apply if the registrant has a better right to the mark. In particular the registrant will in normal circumstances have a better right if the mark has been registered prior to the registration of the complainant’s mark.”
- Regarding the second level (para 6.2), the registrant operator should be liable if he/she acts in bad faith or is grossly negligent in relation to the circumstances listed in para 6.a)-d).
- The requirement in para 7.2.3 lit.d) that the complainant has to notify the registry operator at least 30 days prior to filing a complaint is burdensome and should be reduced to 10 days if not deleted entirely.

Para 19.5 should be amended as follows: “In cases where the Expert Determination decides that a registry operator is liable under the standards of the Trademark PDDRP, ICANN will impose appropriate remedies that are in line with the Determination.

**Explanation and Argument** These changes would ensure that the PDDRP is consistent with the requirements in a civil action for contributory trademark infringement action or unfair competition and that the abusive second level registrations are deleted after a successful PDDRP complaint.

The GAC believes that the liability criteria in the Applicant Guidebook are too lax. In particular, according to para 6, the liability of the registry operator is only triggered by behaviours such as “taking unfair advantage”, “unjustifiable impairment of the distinctive

character of the reputation of the complainant's mark" or "impermissible likelihood of confusion with the complainant's mark". The proposed changes to para 6 are therefore intended to strengthen the criteria.

The GAC considers that para 19.5 grants ICANN too much discretion in choosing the remedies it imposes on the registry operators and recommends that the remedies be consistent with the Expert Determination.

Ensuring full and effective compliance with the rules is a crucial issue post-delegation. The GAC believes therefore that ICANN needs to deploy a sufficiently large team for this purpose with an appropriate budget allocation.

#### ***4. Consumer Protection***

##### **Recommended GAC Advice:**

**Points of Contact for Abuse:** The GAC proposes the following amendment to the "Maintain an abuse point of contact" paragraph in the DAG to include government agencies which address consumer protection:

A registry operator must assist law enforcement, government agencies and agencies endorsed by governments with their enquiries about abuse complaints concerning all names registered in the TLD, including taking timely action, as required, to resolve abuse issues.

**Effective Contract Compliance:** The GAC advises the Board to ensure that ICANN's contract compliance function is adequately resourced to build confidence in ICANN's ability to enforce agreements between ICANN and registries and registrars.

##### **Explanation and argument:**

There are concerns that internationally, "law enforcement" is interpreted as solely referring to police agencies, which would exclude other enforcers that do not fall under this category. Specifically stating "government agencies and agencies endorsed by a government" should (in theory) quash any ambiguity. In addition, the challenges facing ICANN's current contract compliance efforts are expected to be magnified with the introduction of an unknown number of new gTLDs.

##### **Vetting of certain strings**

The GAC proposes that gTLD strings which relate to any generally regulated industry (e.g. .bank, .dentist, .law) should be subject to more intensive vetting than other non-geographical gTLDs.

##### **Explanation and argument**

The evaluation processes in the Applicant Guidebook offer safeguards to minimise abuse through for example objections on "community grounds." However, government authorities and agencies are concerned about the lack of proper safeguards provided by additional rigorous procedures for vetting applicants.

### **Why does the GAC believe that there is a need to enhance consumer protection?**

National consumer protection authorities and fair trading agencies have expressed concern that the expansion of the number of gTLDs will establish certain consumer-orientated gTLDs that will be particularly prone to abuse and risk of increased opportunities for misrepresentation to consumers and generally expansion of the means for conducting online consumer fraud. Moreover, there is a perceived risk that certain gTLDs may become synonymous with criminal activity which may ultimately undermine consumer trust in online markets generally.

## **7. Post-Delegation Disputes**

The GAC advises the ICANN Board to instruct ICANN staff to amend the Applicant Guidebook in the following way:

1. Change the wording in the sample letter of Government support in AG back to the wording in DAGv4 and keeping the new paragraph 7.13 of the new gTLD registry agreement with the changed wording from "may implement" to "will comply". E.g change the wording from "may implement" back to "will comply" with a legally binding decision in the relevant jurisdiction.
2. In addition describe in the AG that ICANN will comply with a legally binding decision in the relevant jurisdiction where there has been a dispute between the relevant government or public authority and registry operator.

### **Explanation:**

Even though ICANN's commitment to comply with court orders or legally binding decisions by public authorities, the registry agreement between ICANN and the registry should have clear wording on this commitment to make sure that this obligation to the Government stands out as a clear and underlying premise for entering into the agreement

## **8. Use of geographic names:**

### ***1. Definition of geographic names***

#### **Recommended GAC Advice:**

**The GAC 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 legal interest.**

ICANN refers to detailed explanations given in the “Final Draft Applicant Guidebook”.

The GAC is of the view that the criteria for community objections do still not meet these requirements. The problem could be solved, if a free of charge objection mechanism would allow governments to protect their interest and to define names that are to be considered geographic names. This implies that ICANN will exclude an applied for string from entering the new gTLD process when the government formally states that this string is considered to be a name for which this country is commonly known as

**The GAC considers that the provisions in DAG4 in relation to city names carry the danger that an applicant could seek to avoid the safeguard of government support or non-objection if the applicant 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 does not arise.

ICANN states that applicants are required to provide a description/purpose for the TLD, and to adhere to the terms and condition of submitting an application including confirming that all statements and representations contained in the application are true and accurate.

The GAC is of the view that this statement does not reflect fully its concerns and asks for further explanations. The problem could be solved, if a free objection mechanism would allow governments to protect their interest.

**The GAC reminds the Board that governments need time to consult internally before deciding on whether or not to deliver a letter of approval or non-objection.**

ICANN explains that it has not been decided how long the application period will be open from the launching of the gTLD program and recalls that there will be a four months communications campaign prior to the launch.

No further action required by now.

**The GAC reiterates its position that governments should not be required to pay a fee for raising objections to new gTLD applications.**

It is the view of the ICANN Board that governments that file objections should be required to cover costs of the objection process just like any other objector.

The problem could be solved, if a free objection mechanism would allow governments to protect their interest.

## ***2. Further requirements regarding geographic names***

The GAC clarifies that it is a question of national sovereignty to decide which level of government or which administration is responsible for the filing of letters of support or non-objection. There may be countries that require that such documentation has to be filed by the central government - also for regional geoTLDs; in other countries the responsibility for filing letters of support may rest

with sub-national level administrations even if the name of the capital is concerned. GAC requests some clarification on this in the next version of the Applicants Guidebook.

According to the current DAG applications will be suspended (pending resolution by the applicants), if there is more than one application for a string representing a certain geographic name, and the applications have requisite government approvals. The GAC understands such a position for applications that have support of different administrations or governmental entities. In such circumstances it is not considered appropriate for ICANN to determine the most relevant governmental entity; the same applies, if one string represents different geographic regions or cities. Some governments, however, may prefer not to select amongst applicants and support every application that fulfils certain requirements. Such a policy may facilitate decisions in some administrations and avoid time-consuming calls for tenders. GAC encourages ICANN to process those applications as other competing applications that apply for the same string.

## **9. Legal Recourse for Applications:**

In commenting DAG4 GAC emphasised that a denial of any legal recourse – as stipulated in the guidebook - is inappropriate. In its response the ICANN Board stated that it does not believe that ICANN should expose itself to costly lawsuits any more than is appropriate.

The GAC reiterates its concern that excluding the possibility of legal recourse might raise severe legal problems. GAC therefore urges the ICANN Board to seek legal advice in major jurisdiction whether such a provision might cause legal conflicts – in particular but not limited to US and European competition laws. If ICANN explains that it has already examined these legal questions carefully and considering the results of these examinations still adheres to that provision, GAC will no longer insist on its position. However, the GAC expects that ICANN will continue to adhere to the rule of law and follow broad principles of natural justice. For example, if ICANN deviates from its agreed processes in coming to a decision, the GAC expects that ICANN will provide an appropriate mechanism for any complaints to be heard.

## **10. Providing opportunities for all stakeholders including those from developing countries**

### *Main issues*

#### **1. Cost Considerations**

“ GAC urged 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.”

GAC: new gTLD applications from municipalities and local governments in developing countries

**2. Language diversity**

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”.

**3. Technical and logistics support**

**4. Outreach – as per Joint AC/SO recommendations**

**5. Joint AC/SO Working Group on support for new gTLD applicants.**

On 10th December 2010 the GAC through its Cartagena GAC communiqué stated as follows: “The GAC welcomed an update on the work of the Joint AC/SO Working Group on support, and encourages the Working Group to continue their efforts, particularly with regard to further outreach with developing countries” further, the GAC urged ICANN to adopt recommendations of the Joint AC/SO Working Group.

**Recommendations of the Joint AC/SO Working Group:**

Who should receive Support?

- Non-governmental Organizations (NGOs), civil society and not-for-profit organizations
- Limited Community based applications such as cultural, linguistic and ethnic
- Applications in languages whose presence on the web is limited
- Local entrepreneurs, in those markets where market constraints make normal business operations more difficult
- Applicants located in emerging economies

Type of support:

- Cost Reduction Support
- Sponsorship and other funding support
- Modifications to the financial continued operation instrument obligation
- Technical support
- Logistical support
- Obligation Technical support for applicants in operating or qualifying to operate a gTLD
- gTLD Exception to the rules requiring separation of the Registry and Registrar function

**6. Applications from Governments or National authorities (especially municipal councils and provincial authorities) – special consideration for applications from developing countries**

GAC communiqué’s on the issue:

- i. Brussels Communiqué

The GAC commented that the new gTLD process should meet the global public interest consistent with the Affirmation of Commitments. It therefore urged ICANN to set technical and other requirements, including cost considerations, at a reasonable and proportionate level in order not to exclude developing country stakeholders from participating in the new gTLD-process. Key documents should be available in all UN languages. The GAC urges that the communications and outreach strategy for the new gTLD round be developed with this issue of inclusiveness as a key priority.

ii. Nairobi Communiqué

The GAC believed that instead of the then proposal of single-fee requirement, a cost-based structure of fees appropriate to each category of TLD would:

- a) prevent cross subsidization and
- b) better reflect the project scale,

This would improve logistical requirements and financial position of local community and developing country stakeholders who should not be disenfranchised from the new TLD round.

Further the board believes that :

- a. New gTLD process is developed on a cost recovery model.
- b. Experience gained from first round will inform decisions on fee levels, and the scope for discounts and subsidies in subsequent rounds.
- c. Non-financial means of support are being made available to deserving cases.
- i. Proposed that the following be entertained to achieve cost reduction:
  - Waiving the cost of Program Development (\$26k).
  - Waiving the Risk/Contingency cost (\$60k).
  - Lowering the application cost (\$100k)
  - Waiving the Registry fixed fees (\$25k per calendar year), and charge the Registry- Level Transaction Fee only (\$0.25 per domain name registration or renewal).
- ii. Proposed that the reduced cost be paid incrementally, which will give the applicants/communities from developing countries more time to raise money, and investors will be more encouraged to fund an application that passes the initial evaluation.
- iii. Believe that communities from developing countries apply for new gTLDs according to an appropriate business model taking into consideration the realities of their regions. ICANN's commitment towards supporting gTLD applicants in communities from developing countries will be a milestone to the development of the overall Internet community in Africa and other developing regions.



#### **A. Other Developing world Community comments**

Rolling out new gTLD and IDNs was done in a hurry and without basis on a careful feasibility study on the impact that this rollout will have on developing countries. For some representatives, this is a massive roll out of gTLDs and IDNs that will find many developing countries unprepared and unable to absorb it. There is the fear that there might be serious consequence in terms of economic impact to developing countries.

### **11. Law enforcement due diligence recommendations to amend the Registrar Accreditation Agreement as noted in the Brussels Communiqué**

The GAC advises the ICANN Board to instruct ICANN staff to amend the final Draft Applicant Guidebook as follows:

#### **Module 1:**

1. Include other criminal convictions as criteria for disqualification, such as Internet-related crimes (felony or misdemeanor) or drugs.
2. Assign higher weight to applicants offering the highest levels of security to minimize the potential for malicious activity, particularly for those strings that present a higher risk of serving as venues for criminal, fraudulent or illegal conduct (e.g. such as those related to children, health-care, financial services, etc.)

#### **Module 2:**

1. Add domestic screening services, local to the applicant, to the international screening services.
2. Add criminal background checks to the Initial Evaluation.
3. Amend the statement that the results of due diligence efforts will not be posted to a positive commitment to make such results publicly available
4. Maintain requirements that WHOIS data be accurate and publicly available.

#### **Explanation:**

These amendments will improve the prospects for mitigating malicious conduct and ensuring that criminal elements are hindered from using the DNS for criminal and illegal activities. The GAC also strongly encourages, and will contribute LEA expertise to this activity, further work on the high level security zone requirements.

### **12. The need for an early warning to applicants whether a proposed string would be considered controversial or to raise sensitivities (including geographical names)**

In conjunction with the GAC's proposed amendments to the Objections Procedures, to Community-based strings, and Geographic

Names, the GAC advises ICANN to reconsider its objection to an “early warning” opportunity for governments to review potential new gTLD strings and to advise applicants whether their proposed strings would be considered controversial or to raise national sensitivities.

## **Appendix: Background Material**

### ***1. Intellectual Property Rights***

National governments have significant public policy concerns that the expansion of gTLDs will increase the level of fraud and abuse on the Internet, which will harm consumers, businesses, and other users of the Internet. The GAC advises the ICANN Board that the current proposed mechanisms to protect consumers and trademark rights from harm and abuse are inadequate and unacceptable. It is crucial that adequate mechanisms be adopted now -- and not after the first round of new gTLDs is introduced -- to ensure that the risk of such increased fraud and abuse is mitigated.

The GAC restates its previously articulated concerns that ICANN have in place an effective compliance program with sufficient staff and resources before ICANN launches the new gTLD program.

#### **Why is this an issue of public policy concern for the GAC?**

Trademark law protects consumers from deception and confusion and protects trademark owners' property rights from infringement. This dual basis, which is reflected in the laws of every GAC member country, mirrors the GAC's public policy concern in the rights protection issue.

The GAC acknowledges the potential commercial opportunities associated with the introduction of new gTLDs subject to a set of rules with adequate mechanisms for rights protection.

However, the GAC has nonetheless always regarded the risks to brand-owners associated with a major expansion of the gTLD space as a major public policy concern that must be carefully addressed to ensure that the opportunities and benefits outweigh the costs. In particular, many trademark owners will be forced to purchase second level defensive registrations in order to avoid misuse of their trademarks. Purchasing second level registrations will be costly and unlikely to prevent all possible misuse. The GAC notes that the significant cost burden for business arising from defensive registrations to protect brands and trade marks was described in the economic analysis undertaken by Katz, Rosston and Sullivan

The rights protection mechanisms to be established in the Applicant Guidebook are therefore crucial and must offer practical and

comprehensive approaches consistent with existing national legal frameworks and established best practice.

Once implemented in the first round of gTLD applications, ICANN should commission an independent review of the operation of the rights protections mechanisms in order to establish their effectiveness and practicability, to identify any deficiencies and scope for further improvement, and to make recommendations for public comment on how they might be changed prior to the second round of applications.

Relevant history:

### **The GAC's recent interaction with the Board on Protection of Rights Owners and consumer protection during 2010**

The GAC noted in its Nairobi communiqué the recommendations of the Special Trade Marks Issues Review Team. The GAC Chair stated in his letter dated 10 March 2010 to the ICANN Chair regarding DAGv3 that it

*is important to ensure that intellectual property rights are properly respected in the new gTLD space consistent with national and international law and standards. The GAC expects that the proposed Trademark Clearing House should be made available to all trademark owners, irrespective of the legal regime they operate under, and that an effective and sustainable Uniform Rapid Suspension (URS), with appropriate remedies, and a Post Delegation Dispute Resolution Policy are established to ensure appropriate trade mark protection. While these initiatives are broadly welcomed therefore in serving to help address the concerns of brand owners, the GAC believes that they require further refining. In particular, "substantive examination" should be re-defined so that registrations examined on "absolute grounds" are included in order to ensure broader availability of the URS.*

The Chair of ICANN responded on 5 August 2010 as follows:

*The GAC comments, in concert with other comments, were taken in account in version 4 of the Applicant Guidebook that, for the first time, included the set of proposed intellectual property rights protection mechanisms. In particular, ICANN has broadened the types of trademark registrations that must be honored in offering a "Sunrise" service and all new registries employing an IP Claims service must honor trademarks registered in all jurisdictions. The types of registrations offered protections have also been broadened for the Uniform Rapid Suspension Service, one of the new post-delegation rights protection mechanisms. The Post Delegation Dispute Resolution Policy has also been amended in response to specific recommendations from the ICANN community.*

**After due consideration of this response and the amendments contained in DAGv4, the GAC took the view, however, that the ICANN response to the GAC's advice and proposals were insufficient. This was communicated in the GAC Chair's letter of 23 September 2010 to the ICANN Chair, with particular reference to the Trademark Clearing House (TC) and the Uniform Rapid Suspension System (URS), as follows:**

*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 brands and businesses 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 prioritise 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 brandholders 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 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. “Kopdakcameras”).*

*The GAC also urges ICANN to ensure that all new rights protection mechanisms complement the existing UDRP mechanism. The GAC has serious concerns with regard to the way in which the draft Uniform Rapid Suspension System 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 ICANN Chair responded in his letter of 23 November to the GAC Chair as follows:**

*The Board understands the concerns expressed by the GAC regarding the potential costs of defensive registrations, and notes that the community spent a significant amount of time considering this issue, notably through the Implementation Recommendation Team and the Special Trademark Issues Working Group. The Board considered the many recommendations and supports the resulting protections now outlined in the Applicant Guidebook. These include:*

- The requirement for all new registries to offer a Trademark Claims service or a sunrise period at launch.*
- The establishment of a Trademark Clearinghouse as a central repository for rights information, creating efficiencies for TM holders, registries, and registrars.*
- The existing Uniform Domain Name Dispute Resolution Policy (UDRP) continues to be available where complainant seeks transfer of names. Compliance with UDRP decisions is required in all new, as well as existing, gTLDs.*
- Implementation of a Uniform Rapid Suspension (URS) system that provides a streamlined, lower-cost mechanism to suspend infringing names.*
- The requirement for all new gTLD operators to provide access to “thick” Whois data. This access to registration data aids those seeking responsible parties as part of rights enforcement activities.*

**Following further individual GAC member national consultations with domestic rights protection agencies and stakeholders, and due consideration of**

**a) the ICANN Chair’s letter of 23 November 2010;**

**b) the non-adoption in the “final” version of the DAG of the GAC’s proposals for the TC and the URS contained in the GAC Chair’s letter of 23 September 2010;**

- c) the briefing the GAC received in Cartagena from ICANN staff on the changes incorporated in the “final” version of the DAG;
- and d) the GAC’s discussions in Cartagena with the GNSO;

at its meeting with the ICANN Board in Cartagena the GAC expressed that it continued to have fundamental concerns about the inadequacy of the proposed rights protection mechanisms.

Furthermore, the Cartagena communiqué stated that

*as a result of the GAC's exchange with the GNSO, the GAC is also mindful that major stakeholder groups within ICANN (such as the Business and Intellectual Property constituencies) do not believe the most recent version of the DAG reflects their advice and concerns.*

## **2. Root Zone Scaling**

### **1. Introduction**

This scorecard summarizes the GAC’s remaining concerns that ICANN provide sufficient safeguards so that the expected scale and rate of change of introduction of new gTLDs will not have a negative impact on the security, stability and resilience of the DNS.

References are made to ICANN Chair’s letter to the GAC Chair of 23 November 2010 in response of the letter of 10th March 2010 from the GAC Chair (‘ICANN’s response’) and to and to the Draft Applicants Guidebook version 4 (‘DAG4’)

### **2. Root growth control and monitoring / early warning system**

In ICANN’s response reference is made to the intention (DAG4) to delegate 200 to 300 TLDs annually, and that in no case more than 1000 new gTLDs be added to the root zone in a year.

The GAC understands that the robustness of the root server system and the way it will react following substantive additions can only be fully understood by the practice and experience of the first round. Therefore the establishment of a monitoring system, as recommended by the community and taken on board by ICANN, is fully supported by the GAC. According to ICANN’s response “(it will) ensure that changes relating to scaling of the root management systems don’t go unnoticed prior to those changes becoming an

issue” This addresses the GAC’s advice that there should be a control mechanism to allow for the mitigation of any strain or unwanted effects of a large scale introduction of new TLDs.

However, the GAC believes that the implications and processes needed to act upon the outcome of such an early warning system need to be elaborated further in the Applicant Guidebook. The GAC accordingly now tables the following questions and proposals for the Board’s consideration:

1. What will be the modus operandi when the system issues a warning that the introduction should slow down or even stopped?
2. There should be scenarios and system responses clearly set out so that ICANN reacts predictably and quickly when there are indicators that new additions and changes are straining the root zone system. The level of detriment should be graded and described, with the resulting restorative measures outlined. These would include stopping further additions for defined periods, more intensive monitoring and in extreme cases suspension of new gTLDs.
3. Such scenarios should be described in the Applicants Guidebook with detailed explanations of how applicants will be informed about potential slowing down or even stopping of their application If the situations are defined and documented then applicants should also be advised of the consequences in certain cases.

The GAC recommends that the control mechanism should be carefully designed and there should be clearly understood (policy) implications reflected in the Applicant Guidebook before ICANN launches the round to open up the gTLD space. In view of the widely acknowledged unpredictability of all the effects of a massive introduction of gTLDs in the root zone system, the GAC also believes that there should be an in depth evaluation of the impacts of the first introduction round on the root zone system followed by a public comment period before a decision is taken to start the second round. The monitoring system for this purpose should therefore be fully operational from the start of the first round in order to deliver the necessary relevant data before the second round starts.

Therefore the GAC requests the Board,

4. to continue implementing a monitoring system and ensure that the processes that flow from its results are fully described in the Application Guidebook before the start of the first application round;
5. not to launch a second round of applications (1) unless there are indications from monitoring the root system that the first round did not in any way jeopardize the security and stability of the root zone system.

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<sup>1</sup> assuming the first one does not exceed 200- 300 application



### **3. Operational and resource issues to avoid root change congestion and maintain continued integration of the system**

The GAC expressed on several occasions its concern that the root change processes could face congestion at the operational level. ICANN's response made clear that the scaling effects can be absorbed by the root zone operators but that these effects are much more likely to be felt within the context of ICANN's internal systems, such as application processing, legal review, IANA process, etc. Therefore the GAC remains concerned as to whether both ICANN's internal systems and the resources of external actors can scale up sufficiently to meet the demands in order to process 200 to 300 applications a year.

The GAC accordingly now tables the following questions for the Board's consideration:

1. How will the necessary increase in resources be accomplished, is there flexibility to deal with changing demands, and how will ICANN avoid the possibility that other activities will be impacted by the possible diversion of resources to processing new gTLD applications?
2. How will ICANN address the specific needs of applicants from different, perhaps non-English speaking cultures, and with different legal environments?
3. How quickly would ICANN expect to complete contract negotiations for new gTLDs in a potential situation of 200 to 300 simultaneous applications and evaluations?
4. Are all the external actors (IANA, USG, root server operators, etc) sufficiently informed about what is expected from them in terms of work loadings and resources in order to fulfill their respective roles, in particular the pre-delegation checking, approvals, and implementation of potentially 200 to 300 root zone changes a year?
5. Following delegation of so many additional TLDs, what is ICANN's projection for the administrative workload for ICANN and IANA for processing requests for changes and additions to TLDs once they have been established in the root? What is ICANN's plan for resourcing these day-to-day operational functions, including staff requirements?

### **3. Geographic Names: Analysis of GAC's DAG4 comments and ICANN's answers**

a) The GAC underlines that country and territory names should be excluded from applications until the ccPDP.

The Board will not consider such applications in the first round.

- The GAC reiterates its understanding that the IDN ccPDP and the use of country and territory names are related. Therefore the question, whether country and territory names need to be excluded has to be reconsidered before the next application round.

The GAC notes that ICANN considers that the use of country and territory names in general is out of scope of the IDN ccPDP, and therefore linking the two processes does not appear appropriate. ICANN therefore suggests that it is a possibility that the use of country and territory names may be considered after the first round of gTLD applications. Modalities for subsequent rounds will be determined by ICANN based on recommendations from the ICANN community and GAC Advice. It is important that GAC restates advice on this issue; see Annex B to Nairobi Communiqué. The GAC's main point was that strings that are a meaningful representation or abbreviation of a country or territory name should be treated outside the gTLD process. If they should be considered as new TLDs, they should be handled through a policy development process in ccNSO.

**b) GAC reiterated its concern about insufficient protection of geographic names.**

The Board does not refer to this concern.

For the GAC appropriate and free objection procedures would be acceptable to provide the protection of geographic names (see also c and e).

**4. GAC's position on "Definition of geographic names"**

The public comment period allows free of charge comments on every applied for string. Individual governments as the entire GAC can inform ICANN, which strings they consider to be geographic names. ICANN commits to process applications for strings that governments consider to be geographic names only if the respective government does support or not object to the use of that string.

GAC recalls that in cases in which geographic names correspond with generic names or brands, such a regulation would not exclude per se the use of generic names and brands as Top-Level Domains. It would, however, be in the area of responsibility of the adequate government to define requirements and safeguards to prevent the use of those Top-Level Domains as geoTLDs.

**5. Providing opportunity for all stakeholders including those from developing countries**

**SUMMARY TABLE**

**A. GAC & ICANN Board Positions**

No.	Issue Topic	GAC Position	ICANN Board Position	Remarks
1.	Recommendations of the Joint AC/SO Working Group	Supported	Supported	Board encouraged to adopt the recommendations
2.	Support on Technical operations and other requirements	ICANN to set technical and other requirements, including cost considerations, at a reasonable and proportionate level in order not to exclude developing country stakeholders from participating in the new gTLD-process	<ul style="list-style-type: none"> <li>• New gTLD process is developed on a cost recovery model</li> <li>• Experience gained from first round will inform decisions on fee levels, and the scope for discounts and subsidies in subsequent rounds</li> <li>• Non-financial means of support are being made available to deserving cases.</li> </ul>	
3.	Concerns from the Internet Government Forum (IGF), Vilnius, Lithuania	Letter from GAC to ICANN 23 <sup>rd</sup> September 2010. 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		

No.	Issue Topic	GAC Position	ICANN Board Position	Remarks
		<p>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.</p>		

**B. Developing Countries/Communities Position.**

No.	Issue Topic	Community Position	Joint SO/AC working Group Recommendation.	ICANN Board Position	Remarks
1.	Roll out of new gTLD's and IDN's.	Rolling out new gTLD's and IDNs was done in a hurry without basis on a careful feasibility study on the impact that this rollout will have on developing countries		The position of ICANN is that in no way this is a massive roll out and in fact there have been only 900 applications for new gTLD for a year and only 200 of them will be reviewed. ICANN holds the position that it has been fair and inclusive in its decision and that also it will help any country in this process	
2.	Eligibility for support	Developing communities strongly believe that entrepreneur applicants from developing countries, where the market is not wide enough for a reasonable profit making industry, are eligible for support. The African Community believe: • Entrepreneur applicants from African countries are	Who should receive Support? • Governments, Municipal and local authorities from developing countries • Non-governmental Organizations (NGOs), civil society and not-for-profit organizations • Limited Community	ICANN board is considering the proposals from the SO/AC joint working group.	

No.	Issue Topic	Community Position	Joint SO/AC working Group Recommendation.	ICANN Board Position	Remarks
		<p>eligible for support.</p> <ul style="list-style-type: none"> <li>• Deem that Civil society, NGOs and non for profit organizations in Africa are the most in need of such support,</li> <li>• Believe that support is of utmost importance for geographic, cultural linguistic, and more generally community based applications.</li> <li>• Support to new gTLD applicants in Africa be prioritized</li> <li>• Support to be provided to applicants of new gTLDs in Africa should include, financial, linguistic, legal and technical</li> <li>• Proposed cost reduction:</li> <li>• Proposed that the reduced cost be paid incrementally,</li> <li>• Applications to be according to the</li> </ul>	<p>based applications such as cultural, linguistic and ethnic</p> <ul style="list-style-type: none"> <li>• Applications in languages whose presence on the web is limited</li> <li>• Local entrepreneurs, in those markets where market constraints make normal business operations more difficult</li> <li>• Applicants located in emerging economies</li> </ul> <p>Type of support</p> <ul style="list-style-type: none"> <li>• Cost Reduction Support</li> <li>• Sponsorship and other funding support</li> <li>• Modifications to the financial continued operation instrument obligation</li> <li>• Technical support</li> <li>• Logistical support</li> <li>• Obligation Technical</li> </ul>		

<b>No.</b>	<b>Issue Topic</b>	<b>Community Position</b>	<b>Joint SO/AC working Group Recommendation.</b>	<b>ICANN Board Position</b>	<b>Remarks</b>
		<p>appropriate business models.</p> <ul style="list-style-type: none"> <li>• Supplementary support and additional cost reduction for gTLDs applications from African countries.</li> </ul>	<p>support for applicants in operating or qualifying to operate a gTLD</p> <ul style="list-style-type: none"> <li>• gTLDs Exception to the rules requiring separation of the Registry and Registrar function</li> </ul>		