

To: Heather Dryden, Chair  
ICANN Governmental Advisory Committee

RE: GAC Comments on FOIWG Interim Report on “Significantly Interested Parties”

Dear Ms. Dryden,

In its Interim Report on “Support of Significantly Interested Parties for ccTLD Delegation and Redellegation” (the “*Interim Report*”), the Framework of Interpretation Working Group (“FOIWG”) defined “Significantly Interested Parties” to include, without limitation:

*the government or territorial authority for the country or territory associated with the ccTLD and any other individuals, organizations, companies, associations, educational institutions or others that have a direct, material, substantial, legitimate and demonstrable interest in the operation of the ccTLD(s) including the incumbent manager.* Interim Report, Section 7.1.1.

On 22 June 2012, the GAC submitted comments on the *Interim Report* (the “GAC Comments”). In those Comments, the GAC expressed concern that the Interim Report does not adequately reflect to role of the relevant government or public authority with respect to ccTLD operation, as set forth in Section 4 of the GAC Principles and Guidelines for Delegation and Administration of ccTLDs” dated 5 April 2005 (the “GAC Principles”). In particular, the GAC cited Section 7.1.2.3. of the *Interim Report*, which calls on IANA to “develop, publish, and document its compliance with procedures for consideration of input from Stakeholders, taking into account the nature of the commenting party’s interest in the delegation, transfer (uncontested re-delegation), revocation, and operation of the ccTLD and the relevance, substance and weight of such input.” In the view of the GAC, this could undermine the government’s “ultimate public policy authority,” referenced in Section 4.1 of the GAC Principles.

In the ordinary course, where an Administrative Contact resides in-country, the government/public authority will have the practical ability, consistent with applicable law and due process requirements, to exercise ultimate public policy authority with respect to a ccTLD. In those cases, and assuming that a prospective ccTLD manager possesses the requisite technical skills, the FOIWG agrees that the IANA functions manager should not duplicate or second-guess processes and procedures established under applicable law for selecting a ccTLD manager, particularly where those processes and procedures take into account the “views of all local stakeholders” in accordance with Section 7.1 of the GAC Principles. The GAC Principles, however, explicitly acknowledge that situations may arise where this is not the case.

- For example, as the GAC Principles state, “where the Registry operating the country code TLD does not have a formal communication with its national government and its core functions are operated under a different jurisdiction, any action to re-delegate needs to take account of the legal framework in the country where the Registry is based.” GAC Principles, Section 7.21.
- Section 7.2.2. of the GAC Principles notes that disputes may arise in cases where the relevant country code TLD Registry is based in another country and where there is not a contract specifying which national law should apply. GAC Principles, Section 7.2.2.
- The GAC Principles are, by their terms, “not intended to be binding and need both Governments and Registries voluntarily to agree to apply them within their legal framework. If either the

Government or the Registry decides not to adopt the principles, this cannot be held against the Registry, and the Registry still has a valid existence.” GAC Principles, Section 1.3.

In addition, even where the relevant government/public authority has the practical ability to exercise “ultimate policy authority” over a ccTLD, it may elect not to exercise that authority in any particular situation.

In any of the situations described above, ICANN may be called upon to determine whether or not the views of Stakeholders, including Significantly Interested Parties, have been considered. In fact, the GAC Principles affirmatively contemplate this role, stating in reference to disputes between a government and a TLD Registry based in another country where choice of law agreements are not spelled out, “ICANN may contribute to identifying alternative solutions to resolve the problem.” GAC Principles, Section 7.2.2.

Based on this analysis, and In order to address the concerns cited in the GAC Comments, I am recommending that the FOIWG clarify its *Interim Report* recommendation that IANA develop procedures for consideration of input from Stakeholders by noting that the IANA functions manager should not duplicate or second-guess processes and procedures established under applicable law and due process requirements, particularly where those processes and procedures take into account the “views of all local stakeholders.”

I would be grateful for your views as to whether this adequately responds to the GAC’s concerns.

Sincerely,

Keith Davidson, Chair