

# Board-Facilitated Process for a GAC - GNSO Council Dialogue on Closed Generics: A Framing Paper

Date: 8 March 2022

Prepared by: ICANN Org

This paper provides additional context to the letter that the Board sent to the leadership of the GNSO Council and the GAC on Monday 7 March 2022 regarding the proposed Board-facilitated GAC-GNSO Council dialogue on Closed Generics. The paper lays out the issue, provides some relevant background information and suggests parameters and assumptions on how the Board-facilitated dialogue might proceed.

## What is the issue?

There is no explicit policy on closed generic gTLDs.<sup>1</sup> The GNSO Council [confirmed](#) in March 2013 that the outcomes of the GNSO's 2007 Policy Development Process on the Introduction of New gTLDs implicitly allowed for them. Consistent with the recommendations from the GNSO, the Applicant Guidebook included no specific provisions on closed generics.

In contrast to this, the [GAC advised](#) in April 2013 that for "strings representing generic terms, exclusive registry access should serve a public interest goal." To keep the Program moving forward, the Board adopted a stop-gap measure to allow for future policy development on the matter: In 2015, the [Board's New gTLD Program Committee \(NGPC\) resolved](#) that registry operators of a generic string are prohibited from imposing eligibility criteria for registering names in the TLD that would limit registrations exclusively to a single person or entity and/or that person's or entity's affiliates. In the same resolution the NGPC also requested "that the GNSO specifically include the issue of exclusive registry access for generic strings serving a

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<sup>1</sup> The GAC used the term "exclusive registry access" in identifying the type of application subject to its advice in the 2013 [Beijing communique](#). The Subsequent Procedures PDP discussed this type of application with the term "closed generics (also known as Exclusive Generics)." In neither case was a specific definition provided. As described in this paper, it will be advisable for those engaging on this topic to align on a definition of the application type referred to by these terms.

For reference, Specification 11.3(d) of the gTLD Registry Agreement provides that: Registry Operator of a "Generic String" TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates" (as defined in Section 2.9(c) of the Registry Agreement). "Generic String" means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those of others.

public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program.”

In its 2020 [response](#) to the SubPro PDP WG’s Draft Final Report Draft, the Board stated again that it believes that the issue of closed generics requires input from the GNSO through the bottom-up policy development process, encouraging the community to reach consensus (see [p. 5](#)). The Board continues to look for the community to develop consensus policy on the most appropriate approach for handling the issue of closed generics in future rounds of new gTLDs, in light of the fact there are no new recommendations from the GNSO, and taking into account existing GAC advice. The Board believes it is important for the community to determine the policy for closed generics and is seeking to avoid determining the approach for the community.

This paper summarizes the relevant background facts and the objectives and potential outcomes of such a dialogue between the GAC and the GNSO, as well as the Board’s facilitative role in the process.

## **Background**

The GNSO’s policy development processes that resulted in the 2007 [Final Report Introduction of New Generic Top-Level Domains](#) did not include any specific recommendations about limiting registration models for new gTLDs. The Applicant Guidebook (AGB) that detailed the rules and procedures applicable to the 2012 New gTLD Program round therefore did not prohibit closed generics or provide any other constraints on registration models for new gTLDs.

In 2013, the GAC [issued Advice](#), stating that for strings “representing generic terms, exclusive registry access should serve a public interest goal.”<sup>2</sup>

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<sup>2</sup> To implement the Advice, ICANN solicited responses from 186 applicants for the strings identified by the GAC regarding 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 ([view the 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, and 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. On 9 October 2013, ICANN [announced](#) that the applications that would not be operated as exclusive access TLDs (and have applications that are consistent with this) would be eligible to proceed in the New gTLD Program. This action was taken per the NGPC's [28 September 2013 Resolution](#) directing staff "to move forward with the contracting process for applicants for strings identified in the Category 2 Safeguard Advice that are prepared to enter into the Registry Agreement as approved." These applications were cleared to proceed to the next phases of the New gTLD Program. For the 12 applicants that stated their intent to operate exclusive access registries, applicants were asked to provide a response for how the proposed exclusive registry access serves a public interest goal. The responses received were provided to the NGPC and the GAC for further consideration. For the remaining 35 applications, in October 2013, ICANN asked the applicants to submit change requests to align their applications with their intended registration policies. Those applicants had

In 2015, the Board (via the New gTLD Program Committee) resolved that registry operators proposing to operate an “exclusive generic” gTLD:

*“For the remaining applicants in this round [...] [e]xclusive Generic Applicants for non-contended strings, or Exclusive Generic Applicants prevailing in contention resolution that they must elect within a reasonably limited time to either:*

- a. submit a change request to no longer be an exclusive generic TLD, and sign the current form of the New gTLD Registry Agreement;*
- b. maintain their plan to operate an exclusive generic TLD. As a result, their application will be deferred to the next round of the New gTLD Program, subject to rules developed for the next round, to allow time for the GNSO to develop policy advice concerning exclusive generic TLDs; or*
- c. withdraw their application for a refund consistent with the refund schedule in the Applicant Guidebook.”*

The NGPC also requested in that [resolution](#) “that the GNSO specifically include the issue of exclusive registry access for generic strings serving a public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program, and inform the Board on a regular basis with regards to the progress on the issue.”

In the Draft Final Report that it published for Public Comment in 2020, the New gTLD Subsequent Procedures PDP working group sought community input on three proposals for closed generics. While there was some support for each of the proposals, overall the Public Comments revealed a sharp [divergence](#) in the community’s views on this topic. There are strongly held views that all closed generics should be allowed and conversely, some that feel that closed generics should not be allowed in any circumstances. These views were reflected in the various PDP reports and public comment processes.

Ultimately, following its consideration of the community input it received, the PDP working group concluded that it was unable to reach consensus on any specific recommendations on closed generics. In its [Final Report](#), the working group noted its belief that future policy work on this topic should involve subject matter experts in the areas of competition law, public policy

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until 21 March 2014 to submit a change request. If such a change request was not submitted, the applicants had to provide explanations for how the proposed exclusive access TLDs would serve the public interest by 21 March 2014.

and economics, as well as be performed by community members who are not associated with any previous, current or anticipated future work relating to new gTLD applications or objections to them<sup>3</sup>.

Following the conclusion of the PDP, the community continued to discuss the matter, including at a [session on Closed Generics](#) organized by the ALAC just prior to ICANN72 in October 2021. The discussion included panelists from the ICANN Board, the ALAC, and the GNSO. The session demonstrated that the community continued to have divergent views, and that the various groups had not shifted their stance on the topic.<sup>4</sup>

### **What are the Board’s suggested parameters and assumptions applicable to the proposed GAC-GNSO Council dialogue?**

Assumption #1: The Board’s role would be to facilitate a dialogue between the GAC and the GNSO Council, with the aim of reaching mutual agreement on a high-level framework that could be considered through the applicable GNSO policy development processes.

Assumption #2: It is ultimately up to the GAC and GNSO Council to reach mutual agreement on the exact framing of the issue and scope of discussion; the Board’s facilitative role would include the provision of framing guidance for the GAC-GNSO Council dialogue and to provide suggestions for modalities that can help to facilitate consensus. The Board, GAC and GNSO Council may find the process that was used during the previous Board-facilitated GAC-GNSO Council dialogue on appropriate policy protections for specific Red Cross identifiers helpful.

Assumption #3: The Board’s role would include proposing a facilitator for the GAC’s and GNSO’s consideration. Agreement on who will perform the facilitator role is a key precondition to the dialogue.

### **Proposed Parameters for Dialogue:**

It is evident from the PDP deliberations and the community’s discussions and feedback that either of the two “edge outcomes” are unlikely to achieve consensus<sup>5</sup>; i.e.:

1. allowing closed generics without restrictions or limitations OR
2. prohibiting closed generics under any circumstance.

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<sup>3</sup> The New gTLD Subsequent Procedures PDP made this suggestion in their Final Report on page 102

<sup>4</sup> See [Zoom Recording](#): 1:15:14 - 1:20:42

<sup>5</sup> The New gTLD Subsequent Procedures PDP documented this outcome in their Final Report on page 102

As such, the goal could be to focus the dialogue on how to achieve a balanced outcome that does not represent either of these two scenarios. The space to be explored in this dialogue is identifying circumstances where closed generics could be allowed (e.g., when they serve the public interest, as noted by the GAC Advice). This will likely require discussions as to the types of possible safeguards that could apply to closed generics, identifiable public interest goals for that gTLD and how that goal is to be served, with potential consequences if this turns out not to be the case.

Accordingly, the parameters for the dialogue, according to the scope agreed by the GAC and the GNSO Council, could specify that the two edge outcomes mentioned above are generally considered “out of scope” for the dialogue, which could focus on a framework that allows closed generics only if they serve a specific, identifiable public interest goal.

To reach this outcome, the dialogue will likely need to include discussions about how to define a “closed generic gTLD”, including what is meant by “closed”, “exclusive” and/or “generic”.

In relation to the public interest, it may be necessary to acknowledge up front that this cannot be defined as a universal rule for all situations. As such, those participating in the dialogue may want to choose to focus on establishing criteria that could assist with the identification of one or more “public interest goals” for any given gTLD. In this regard, it may be helpful to refer to the work that has been done by the Board, the org and the community on the Global Public Interest Framework, especially as to whether any particular elements or tools may be helpful.

### **What are the baseline principles that the outcomes should adhere to?**

The GNSO, in its 2007 policy development process on the introduction of new gTLDs, agreed on certain principles for the process, which were also affirmed by the SubPro PDP Working Group, including:

Affirmation 1.2: The Working Group affirms Principle A from the 2007 policy and recommends that the New gTLD Program must continue to be administered “in an ongoing, orderly, timely and predictable way.”

Affirmation 1.3: The Working Group affirms that the primary purposes of new gTLDs are to foster diversity, encourage competition, and enhance the utility of the DNS.

The Working Group spent significant time to consider and propose mechanisms to support

predictability for all stakeholders, including a recommendation that ICANN must establish predictable, transparent, and fair processes and procedures for managing issues that arise in the New gTLD Program after the Applicant Guidebook is approved which may result in changes to the Program and its supporting processes.

The Final Report also included a recommended Predictability Framework (detailed in Annex E of the Report) as its guidance during implementation to achieve the goal of predictability in mitigating issues. The Predictability Framework is intended to address the concerns raised in the Charter and by the ICANN Board by creating an efficient, independent mechanism to analyze and manage issues that arise in the New gTLD Program after the Applicant Guidebook is approved, which may result in changes to the program and its supporting processes.

### **What is the expected process and actions following the conclusion of this dialogue?**

Should the dialogue result in an agreed framework between the GAC and the GNSO Council, the next step would be for the GNSO Council to move the framework through an appropriate policy development process, to result in approved recommendations that the Board could consider and, if appropriate, adopt in accordance with the Bylaws.

Should the dialogue not result in a mutually agreed framework, it may be presumed that the Board will need to decide on what the most appropriate action is, within the Bylaws-defined roles and respective remits of the Board, GAC and GNSO.

### **Timeline**

To support a timely and efficient process, the Board suggests an initial target timeline spanning the period between ICANN73 and ICANN74, as described below, for the group to convene and begin its work. Prior to the group commencing its work, the GAC and GNSO Council will have to agree on the facilitator proposed by the Board. The Board may request a project plan and regular updates from the GAC-GNSO Council group. If the group believes that it needs an extension of its timeline to reach consensus, it should flag this as soon as possible.

### **Procedural Overview**

The ICANN community, and in particular the GAC and GNSO Council, has had one previous experience with a Board-facilitated dialogue that resulted in mutual agreement on the need as well as the scope of work for further GNSO policy work on a topic that had been considered in a PDP but where the PDP recommendations were not yet approved by the Board. This was the Board-facilitated dialogue between the GAC and the GNSO in 2017 on the topic of protections for Red Cross National Society names. The Board proposes to the GAC and GNSO Council to use

the following steps as guidelines for how to proceed, as indicated this proposal is based on the Red Cross precedent where appropriate:

1. As noted above, the Board proposes a Board-facilitated dialogue to the GAC and the GNSO Council.
  - a. Note: For the Red Cross topic, the idea of a Board-facilitated dialogue emerged through informal discussions with the GAC and the GNSO Council at ICANN57 in Hyderabad (October 2016), was part of the GAC Consensus Advice from that meeting, and [accepted](#) by the Board on the understanding that any outcome of the dialogue was to be “conditioned on, and will be reviewed according to the GAC’s and the GNSO’s own internal processes”.
2. The Board proposes a facilitator for the GAC’s and GNSO Council’s consideration.
  - a. Note: For the Red Cross topic, the Board proposed, and the GAC and GNSO Council approved a facilitator, who was deemed to be a very effective resource by those involved in the process.
3. Building from this Framing Paper and any feedback that the GAC and GNSO Council provide, ICANN org works with the facilitator to draft a Problem Statement and Briefing Paper, to define the issue and clarify the scope and parameters for the dialogue.
4. Representatives of the Board, GAC and GNSO Council meet to agree on the process steps for the facilitated dialogue, including review of and agreement on the Problem Statement and Briefing Paper .
  - a. Note: This discussion could also include consideration of the appropriate number of participants for the dialogue; as well as the utility of having a Board liaison to the work.
5. The GAC and the GNSO Council appoint appropriate representatives to take part in the dialogue, including a member of the GAC and GNSO Council leadership team and those with expertise on the topic.
  - a. Note: These could, but do not have to, be Council and GAC members familiar with the issue, bearing in mind, however, that the PDP WG noted in the Final Report that should future work be conducted on closed generics then it “should be performed by those in the community that are not associated with any past, present, or expectations of future work in connection with new gTLD applications or objections to new gTLD applications.”

- b. For the Red Cross topic, the facilitated discussion group consisted of the GAC Chair and a few GAC members who had been following the issue; the GNSO Chair and Vice Chairs, the GNSO liaison to the GAC, and the PDP Working Group Chairs; and representatives from the Red Cross and IGOs.
6. The facilitated dialogue takes place at the first possible opportunity.
  - a. For the Red Cross topic, this took place at a dedicated session at ICANN58 in Copenhagen.
  - b. Note: In the current environment, it may be more feasible to aim for a Zoom conference call (or several) between ICANN73 and ICANN74.
  - c. Staff support for the Red Cross facilitated dialogue was provided primarily by the Policy Development Support Team, working with the Board-appointed facilitator.
  - d. All meetings are recorded and all recordings and transcripts published. Following the Red Cross precedent, all meetings should be open to observers to attend (though not participate or intervene).
7. Ideally, an agreed outcome should be mutual understanding of the specific policy issue to be worked on and clear rationale as well as scope for the work (e.g., any changed circumstances not known to the PDP working group or subsequent understanding of the issue due to further community discussions.)
8. If the agreed outcome is that additional, specifically-scoped policy work is required, the Board should formally request that the GNSO Council initiate the necessary process to do the work.
  - a. Note: For the Red Cross topic, since there were existing GNSO Council-approved PDP recommendations, the GNSO Council followed the process outlined in its PDP Manual for modifying policy recommendations prior to Board adoption. For closed generics, it may be that the appropriate process is an Expedited PDP (on the basis that the issue has already been extensively scoped) or a “regular” PDP.
9. The nature and timing of the Board’s final action on the topic depends on the outcome of, first, the facilitated dialogue and, secondly, the results of any additional GNSO policy work.