ICANN Board-GAC Consultation: Post delegation disputes with Governments

EXPLANATION OF ISSUE/HISTORY

Applications for geographic names, as defined in the Applicant Guidebook, require support, or non-objection, from the relevant government of public authority. In 2009, the GAC has noted that this approval or non-objection could be based on certain obligations for which the registry will be held accountable (which may include direct legally binding agreement under contract with the relevant public authority). In such cases there could also be procedures that allow the relevant government or public authority to withdraw its previously given approval of the TLD applicant as a geographical name TLD. For example, the GAC advised that "procedures should allow relevant governments or public authorities to initiate a re-delegation process in case of infringement of competition legislation, misuse or breach of contract, or breach of the terms of approval or non-objection".

The GAC offered the following specific suggestions:

1. Inclusion of language in the registry agreement that ICANN must comply with a legally binding decision in the relevant jurisdiction.

   In response, Version 4 of the Applicant Guidebook included the following paragraph in the Sample Letter of Government Support:

   > [Government / public authority] further understands that the Registry Agreement provides that ICANN *will comply* with a legally binding decision in the relevant jurisdiction where there has been a dispute between [government/public authority] and the applicant. (Emphasis added.)

   > [Optional] This application is being submitted as a community-based application, and as such it is understood that the Registry Agreement will reflect the community restrictions proposed in the application. In the event that we believe the registry is not complying with these restrictions, possible avenues of recourse include the Registry Restrictions Dispute Resolution Procedure.

   Additionally, the Proposed Final Version of the Applicant Guidebook included a clause in the Registry Agreement related to Government Support stating, inter alia, "... in the event of a dispute between such governmental entity and Registry Operator, ICANN *may implement* the order of any court sitting in such jurisdiction in favor of such governmental entity related to the TLD." (Emphasis added.)

   The Sample Letter of Government Support was later amended to be consistent with the language of the Registry Agreement, i.e., ICANN *may comply* with a legally binding decision in the relevant jurisdiction... (Emphasis added.)

2. GeoTLDs should be conducted under the legal framework of the country, the government administration of which provided the letter of support or non-objection, as this would remove any doubt or concern about legal conflict.

In correspondence to the GAC on 23 November 2010, the ICANN Board Chair suggested that the government approving the applicant can impose that requirement on the applicant as a condition of support.

While an agreement between the gTLD registry and the government or public authority, would not be enforceable by ICANN, ICANN would comply with a legally binding decision from a court of competent jurisdiction. Further, if the application is submitted as a "community-based" TLD, the processes and remedies of the Registry Restrictions Dispute Resolution Procedure are also available to governments or public authorities.

3. Where there is a change in the ownership structure of a geoTLD, ICANN should establish a new process for approval or non-objection for that geoTLD by the relevant government or public authority.

In response, an Explanatory Memorandum--gTLD Registry Transition Processes Model, http://www.icann.org/en/topics/new-gtlds/registry-transition-processes-28may10-en.pdf, outlines the process for transitioning a registry under certain circumstances, including if at the end of the registry agreement term, or by means of a court order by a legal authority with jurisdiction if the relevant Government or Public Authority withdraws its support for the registry of a gTLD representing a geographic name.

At the Nairobi meeting the Board resolved, that ICANN shall also consider whether the Registry Restrictions Dispute Resolution Procedure (or a similar post-delegation dispute resolution procedure) could be implemented for use by government-supported TLD operators where the government withdraws its support of the TLD.

In addition to these actions, an Explanatory Memorandum: Withdrawal of Government Support for Registry – Post delegation options http://www.icann.org/en/topics/new-gtlds/withdrawal-government-support-28may10-en.pdf was published that described possible post-delegation options to resolve disputes between the registry and the government or public authority.

REMAINING AREAS OF DIFFERENCE:

The GAC position is highlighted in bold, and discussion of the area of difference follows:

- **The GAC recommended the inclusion of a clause in the registry agreement requiring that in the case of a dispute between a relevant government and the registry operator, ICANN *must* comply with a legally binding decision in the relevant jurisdiction as a possible solution to post-delegation deviation from conditions for government approval of or non-objection. (Emphasis added.)**

  In response to oral comment, received during meetings with the GAC in Cartagena, ICANN committed to reinserting language consistent with the version 4

Guidebook language in the *Sample Letter of Government Support* in the next version of the Applicant Guidebook, namely:

[Government / public authority] further understands that ICANN *will comply* with a legally binding decision in the relevant jurisdiction where there has been a dispute between [government/public authority] and the applicant. (Emphasis added.)

In addition, the next version of the Guidebook will also contain information advising the applicant 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 the registry operator. (Emphasis added.)

However, ICANN's commitment to comply with court orders is to the government or public authority. Therefore, as the obligation is to the government/public authority, that obligation should be described some place other than the registry agreement as this a bilateral contract between ICANN and the registry operator – as it sets forth ICANN's obligations and rights with respect to the registry operator and vice-versa.

RELEVANT GUIDEBOOK SECTION OR OTHER PAPERS

Applicant Guidebook—Proposed Final Version

Excerpts from *Sample Letter of Government Support*

[Government / public authority] further understands that the Registry Agreement provides that, in the event of a dispute between [government/public authority] and the applicant, ICANN may implement the order of any court sitting in such jurisdiction in favor of such governmental entity related to the TLD.

[Optional] This application is being submitted as a community-based application, and as such it is understood that the Registry Agreement will reflect the community restrictions proposed in the application. In the event that we believe the registry is not complying with these restrictions, possible avenues of recourse include the Registry Restrictions Dispute Resolution Procedure.

Explanatory Memorandum: Withdrawal of Government Support for Registry – Post delegation options

Recommendations

As a guiding principle, it is considered important that a government or relevant public authoirty be able to show through a defined process that a registry operator has deviated from the conditions of original support or non-objection. Both the GAC's

recommendation for a contract clause addition, and the Registry Restrictions Dispute Resolution Procedure meet this principle and are recommended as solutions to resolving post-delegation disputes that may arise between the relevant government and public authority that suppored, or did not object to, the geographic name new gTLD application.

I.   The registry agreement will include the GAC recommended clause.

II.   The processes and remedies of the Registry Restrictions Dispute Resolution Procedure (RRDRP)[1] are available to governments as written in cases where the geographical name is applied for as a community-based TLD.

III.   Government approval will be required in cases of change of control, registry transition to a successor operatory, and upon agreement renewal.

IV.   Withdrawal of government or relevant public authority support for the registry will not result in an automatic redelegation or termination.

Explanatory Memorandum--gTLD Registry Transition Processes Model,
http://www.icann.org/en/topics/new-gtlds/registry-transition-processes-28may10-en.pdf

This memo outlines the process for transitioning a registry under certain circumstances, including if at the end of the registry agreement term, or by means of a court order by a legal authority with jurisdiction the relevant Government or Public Authority withdraws its support for the registry of a gTLD representing a geographic name. The Explanatory Memorandum outlines the process for three scenarios:

o   Registry Transition with proposed successor—to be used primarily when the current registry had identified a successor registry

o   Registry Transition Process with Request for Proposals (RFP)-to be used primarily when the curent registry is terminated and there is no successor registry identified.

o   Emergency Back-End Registry Operator Temporary Transition Process—to be used when one of the Critical Functions (DNS, DNSSEC, Whois, SRS/EPP, Data Escrow) is performing below a defined emergency threshold and requires temporary replacement.

Both the Registry Transition with proposed successor; and Registry Transition Process with Request for Proposals recognise that if the gTLDs is a geographic name, as defined in the New gTLD Applicant Guidebook, support, or non-objection, will be required from the relevant government or public authority for any subsequent registry operator of the gTLD. The Registry Transition process with RFP will also require ICANN to consult with the relevant Government or Public Authority for their input to the RFP.

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[1] The remedies that can be recommended to ICANN under this procedure include:
- Remedial measures for he registry to employ to ensure against allowing future registrations that do not comply with community-based restrictions;
- Suspension of accepting new domain name registrations in the gTLD until such time as violation(s) is cured; or, in extraordinary circumstances;
- Providing for the termination of a registry agreement.

REFERENCE DOCUMENTS: POST-DELEGATION DISPUTES WITH GOVERNMENTS

— **SUMMARY OF ACTIONS TAKEN RESPONDING TO GAC AND PUBLIC COMMENTS**

— **CHRONOLOGICAL LISTING OF GAC ADVICE AND COMMENTS ON NEW GTLDS AND RESPONSES PROVIDED BY ICANN AND KEY DOCUMENTS PUBLISHED ON THE TOPICS**

SUMMARY OF ACTIONS TAKEN RESPONDING TO GAC AND PUBLIC COMMENTS

Post-delegation disputes with governments

- To provide ongoing accountability, any change in the control of registry operator is subject to notice and approval by the government that supported or did not object to the original application.

- The Guidebook advises applicants that a government may determine its own conditions in providing support or non-objection for the application.

- The GAC suggested including a provision to require that ICANN would implement court orders (i.e., resulting from a dispute between a government and a registry operator) in the relevant jurisdiction. A form of this was included in the Registry Agreement. This is being updated in the Guidebook (including in the sample letter of government support) to advise applicants that ICANN has committed to governments that it will implement such court orders.

- Registry Restrictions Dispute Resolution Procedure is an avenue for governments to pursue a dispute against a registry concerning its implementation of community-based requirements in the case where the application was designated community-based.

- The capacity for an objection to be filed on community grounds, where there is substantial opposition to an application from a community that is targeted by the name also provides an avenue of protection for names of interest to a government which are not defined in the Applicant Guidebook.

THIS TABLE PROVIDES A CHRONOLOGICAL LISTING OF GAC ADVICE AND COMMENTS ON NEW GTLDS AND RESPONSES PROVIDED BY ICANN AND KEY DOCUMENTS PUBLISHED ON THE TOPIC

Post Delegation Disputes With Governments

GAC Advice and Comments	ICANN Responses and key documents
10 March 2009: Comments on V1 of Applicant Guidebook	**24 October 2008: Applicant Guidebook Version 1** http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf **18 February 2009, version 1 Public Comments Analysis Report** http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf
24 June 2009: Communiqué Sydney The GAC discussed the Draft Applicant Guidebook version 2 and feels that it does not yet respond to all the concerns that governments have. The GAC notes that considerable work is underway seeking to address several critical yet outstanding issues but the GAC remains concerned about a number of important issues: - The need to ensure respect for national and public policy interests, in particular the need for adequate protection of geographic names (on the top and the second levels) and delegation/re-delegation procedures;	
	18 February 2009: Applicant Guidebook Version 2 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf **31 May 2009, Summary and analysis of public comments on version 2** http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf
18 August 2009: Comments on V2 of Applicant Guidebook **gTLDs using strings with geographic names other than country names or territories (so called geoTLDs) should follow specific rules of procedure** The Draft Applicant Guidebook already provides for specific rules of procedure, such as the creation of a Geographic Names Panel or the requirement that an applicant for a geoTLD must document the government's or public authority's support for, or non-objection to, the applicant's application, and must demonstrate the government's or public authority's understanding of the string being requested and its intended use.	**22 September 2009: Reply from ICANN Chairman** http://www.icann.org/en/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf There is nothing to prevent a Government or public authority conditioning the granting of their approval of TLD requests to the TLD operator and so can influence policy making in a manner appropriate and acceptable to the government or public authority for that TLD. In addition, if the geographic name gTLD designates itself as a community TLD it will have restrictions in its agreement consistent with the restrictions associated with its community-based designation. If the TLD strays from those obligations to represent the community (through registration restrictions, for

However, the gTLD regime as proposed in DAG2 implies that the active involvement of public authorities would be limited to the application and evaluation phase of the new gTLD process. However, the GAC is of the view that the principles of subsidiarity should also apply after delegation. An approval or non-objection from the relevant government or public authority could for example be based on certain obligations on a gTLD registry for which the registry is held accountable (which may include direct legally binding agreement under contract with the relevant public authority). In such cases there could be a need for procedures that allow the relevant governments or public authorities to initiate a re-delegation process, perhaps because of infringement of competition legislation, misuse or breach of contract, or breach of the terms of approval/non-objection. Furthermore, in cases of a change in the ownership structure of a geoTLD, ICANN should establish a new process of approval or non-objection for that geoTLD by the relevant public authority. The GAC will provide input in this regard in the near future.	example), the government can lodge an objection and the decision maker can order the registry to comply with the restrictions in the agreement or face sanctions). To ensure this path is available, the government could condition its approval of the TLD application upon the TLD identifying itself as community TLD so that the government could lodge an objection if the registry operator does not live up to its obligations. The ICANN gTLD Registry Continuity Plan was developed to transition a TLD to a successor operator in the event that a registry or sponsor is unable to execute critical registry functions, and continue the operation of a TLD in the longer term. This plan will be amended in light of the new gTLD process and, in the case of geographical names as defined in the limited manner by this process, will require the approval of the relevant government or public authority.
	4 October 2009: Applicant Guidebook Version 3 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf **15 February 2010, Summary and analysis comments version 3** http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf
10 March 2010: Comments on V3 of Applicant Guidebook The GAC urges that mechanisms be established for the resolution of post-delegation deviation from conditions for government approval of or non-objection to the use of a geographical name. The GAC is of the view that this could be achieved with the inclusion of a clause in the registry agreement requiring that in the case of a dispute between a relevant Government and the registry operator, ICANN must comply with a legally binding decision in the relevant jurisdiction. However, in case of the need for approval or non-objection from multiple governments, proper mechanisms for resolving post delegation disputes must be detailed. ----- Taking into account that applicants and users of new TLDs of a high public interest	**5 August 2010: Reply from ICANN Chairman** http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-05aug10-en.pdf The GAC's suggestion of including a clause in the registry agreement requiring that in the case of a dispute between a relevant Government and the registry operator, ICANN must comply with a legally binding decision in the relevant jurisdiction has been adopted. The Registry Agreement has been amended accordingly. In addition, the processes and remedies of the Registry Restrictions Dispute Resolution Procedure are available to governments in cases where the geographic name is applied for as a community-based TLD. The remedies that can be recommended to ICANN under this procedure include: • remedial measures for the registry to employ to ensure against allowing future registrations that do not comply with community-based

for a specific community, such as city TLDs or country-region and other geographical TLDs[1], may expect the legal framework of the territory in which the community is located to be applicable to the TLD, ICANN should allow for ways to respect the specific legal framework under which the respective community is operating in the TLD regime. This will also help ICANN, the applicants and national or local public authorities to avoid the risk of large scale legal challenges.	restrictions; • suspension of accepting new domain name registrations in the gTLD until such time as violation(s) is cured; or, in extraordinary circumstances; • providing for the termination of a registry agreement. Other protections have been added to ensure ongoing government approval of the delegation. Further information is available in explanatory memoranda. The following "Withdrawal of Government Support – Post delegation procedures" (http://www.icann.org/en/topics/new-gtlds/withdrawal-government-support-28may10-en.pdf) and "Registry Transition Procedures" (http://www.icann.org/en/topics/new-gtlds/registry-transition-processes-28may10-en.pdf) were posted on 31 May 2010.
	28 May 2010: Applicant Guidebook Version 4 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf **28 May 2010: Explanatory Memo—Withdrawal of Government Support** http://www.icann.org/en/topics/new-gtlds/withdrawal-government-support-28may10-en.pdf **28 May 2010: Explanatory Memo—Registry Transition Processes** http://www.icann.org/en/topics/new-gtlds/registry-transition-processes-28may10-en.pdf **12 November 2010: Summary and analysis of comments version 4** http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf
23 September 2010: Comments on V4 of Applicant Guidebook The GAC welcomes the proposal for contractual clauses in the registry agreement to respect a legally binding decision in the relevant jurisdiction in the event of dispute between a Government which has provided a letter of support or non-objection and a gTLD registry. However, the GAC would appreciate a response from ICANN on an outstanding point concerning the GAC view that the operations of registry operators of "geo-TLDs" should be conducted under the legal framework of the country the government administration of which provided the letter of support letter or non-	**23 November 2010: Reply from ICANN Chairman** http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf Regarding the question of whether the operations of registry operators of "geo-TLDs" should conduct business under the legal framework of the country providing the letter of support or non-objection to ICANN: the government approving the applicant can impose that requirement on the applicant as a condition of support. While an agreement between the gTLD registry and the government or public authority, would not be enforceable by ICANN, ICANN would comply with a legally

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[1] Subject to the provisions of article 2.2 of the GAC principles regarding new gTLDs, March 2007

objection to ICANN. The GAC believes that this requirement would remove any doubt or concern about legal conflict.	binding decision from a court of competent jurisdiction. Further, if the application is submitted as a "community-based" TLD, the processes and remedies of the Registry Restrictions Dispute Resolution Procedure are also available to governments or public authorities. This detail is set out in the New gTD Program Explanatory Memorandum—Withdrawal of Government Support for Registry – Post delegation options http://www.icann.org/en/topics/new-gtlds/withdrawal-government-support-28may10-en.pdf
	12 November 2010: Proposed Final Applicant Guidebook http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf
9 December 2010: Communiqué Cartagena That the GAC will provide the Board at the earliest opportunity with a list or "scorecard" of the issues which the GAC feels are still outstanding and require additional discussion between the Board and the GAC. These include: • Post-delegation disputes with governments;	**10 December 2010, Board meeting** New gTLD Remaining Issues http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2 Resolved (2010.12.10.21), the Board: 1. Appreciates the GAC's acceptance of the Board's invitation for an inter-sessional meeting to address the GAC's outstanding concerns with the new gTLD process. The Board anticipates this meeting occurring in February 2011, and looks forward to planning for this meeting in consultation and cooperation with the GAC, and to hearing the GAC's specific views on each remaining issue. 2. Directs staff to make revisions to the guidebook as appropriate based on the comments received during the public comment period on the Proposed Final Applicant Guidebook and comments on the New gTLD Economic Study Phase II Report. 3. Invites the Recommendation 6 Community Working Group to provide final written proposals on the issues identified above by 7 January 2011, and directs staff to provide briefing materials to enable the Board to make a decision in relation to the working group's recommendations. 4. Notes the continuing work being done by the Joint Applicant Support Working Group, and reiterates the Board's 28 October 2010 resolutions of thanks and encouragement. 5. Directs staff to synthesize the results of these consultations and comments, and to prepare revisions to the guidebook to enable the Board to make a decision on the launch of the new gTLD program as soon as possible. 6. Commits to provide a thorough and reasoned explanation of ICANN

	decisions, the rationale thereof and the sources of data and information on which ICANN relied, including providing a rationale regarding the Board's decisions in relation to economic analysis.
	7. Thanks the ICANN community for the tremendous patience, dedication, and commitment to resolving these difficult and complex issues.