

## **ICANN Board-GAC Consultation: "Legal Recourse" for New gTLD Registry Applicants**

### **EXPLANATION OF ISSUE/HISTORY**

The following is background on the issue of "legal recourse" for new gTLD applicants, which is one of the issues identified by the GAC for the forthcoming Board-GAC consultation on new gTLDs.

The GAC's Comments on v4 of the Draft Applicant Guidebook (23 September 2010) noted, "The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application. The GAC believes therefore that the denial of any legal recourse as stated in Module 6 of the DAG under item 6 is inappropriate. The GAC cannot accept any exclusion of ICANN's legal liability for its decisions and asks that this statement in the DAG be removed accordingly." <<http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>>

This appears to be a new issue that has not been raised in previous GAC communiqués, even though the legal release language is essentially the same since the first draft applicant guidebook published in 2008 <<http://www.icann.org/en/topics/new-gtlds/terms-24oct08-en.pdf>>. Two years ago (in February 2009), seven words ("IN COURT OR ANY OTHER JUDICIAL FORA") were added to make it clear that the release only applied to challenges in court <<http://www.icann.org/en/topics/new-gtlds/draft-terms-redline-18feb09-en.pdf>>. In other words, applicants would agree not to sue ICANN, but would still have access to the avenues for review built in to the new gTLD application process, as well as ICANN's existing accountability mechanisms: ombudsman, reconsideration, and independent review. Additional mechanisms may result from the consideration and implementation of the recommendations of the Accountability and Transparency Review Team.

### **REMAINING AREAS OF DIFFERENCE**

The GAC requests that ICANN remove language for the Applicant Terms and Conditions that (paraphrasing) the Applicant agrees not to challenge in court final decisions made by ICANN with respect to the application and the Applicant waives the right to sue ICANN with respect to the application. ICANN has declined this request, stating (among other things) it would be an inappropriate risk for ICANN to undertake.

### **ICANN Response to GAC on "Legal Recourse" for New gTLD Registry Applicants**

In the letter from Peter Dengate Thrush to Heather Dryden (23 November 2010) "Response to GAC Comments on New gTLDs and DAGv4" <<http://icann.org/en/minutes/resolutions-25sep10-en.htm> - 2.10>, the ICANN Chairman noted that:

As stated earlier in this letter, one of the guiding principles in developing the Applicant Guidebook has been to address and mitigate risks and costs to ICANN and the global Internet community.

ICANN reaffirms its commitment to be accountable to the community for operating in a manner that is consistent with ICANN's Bylaws, including ICANN's Core Values such as "making decisions by applying documented policies neutrally and objectively, with integrity and fairness." The Board does not believe however that ICANN should expose itself to costly lawsuits any more than is appropriate.

The new gTLD process has been carefully designed over several years with multiple opportunities for public comment in order to develop a well-documented process that can be operated neutrally and objectively to the maximum extent feasible, and with integrity and fairness. Also, all of ICANN's standard accountability and review mechanisms will be available to all participants and affected parties in the new gTLD process, including ICANN's reconsideration process, independent review, and the ICANN Ombudsman.

Based on the above, in Trondheim, the Board resolved that, "The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions."

ICANN is a non-profit public benefit corporation and lacks the resources to defend against potentially numerous lawsuits in jurisdictions all over the world initiated by applicants that might want to challenge the results of the community-designed new gTLD application process. ICANN anticipates that, absent the broad waiver and limitation of liability in the application terms and conditions, rejected or unsuccessful applicants could initiate frivolous and costly legal actions in an attempt to challenge legitimate ICANN decisions, and possibly delay further the successful rollout of the new gTLD program. Accordingly, ICANN has carefully considered how to protect the new gTLD program from such challenges. The release from such potential claims was deemed appropriate in light of these considerations.

ICANN has surveyed multiple jurisdictions including outside the U.S., and is not aware of any law prohibiting the inclusion of such a waiver in a contract. Further, such a waiver is consistent with competition laws since it does not have the effect of excluding competition; the release simply limits the recourses available to one of the contracting parties. As noted above however, all internal ICANN accountability and review processes will remain available to applicants. ICANN will review whether further changes to the wording of the terms and conditions are necessary to clarify that internal review mechanisms will be available to applicants.

Under its Bylaws, ICANN's actions are subject to numerous transparency, accountability and review safeguards, and are guided by core values including "making decisions by applying documented policies neutrally and objectively, with integrity and fairness", but it would not be feasible for ICANN to subject itself to unlimited exposure to legal actions from potential unsuccessful applicants.

#### **RELEVANT GUIDEBOOK SECTIONS**

The following is the wording of the legal release provision in the most recent several drafts:

"Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD."

## **REFERENCE DOCUMENTS: LEGAL RECOURSE FOR APPLICANTS**

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

## LEGAL RECOURSE FOR APPLICANTS

GAC Advice and Comments	ICANN responses and key documents
<p><b>10 March 2009: Comments on V1 of Applicant Guidebook</b></p>	<p><b>24 October 2008: Applicant Guidebook Version 1</b>  <a href="http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf">http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf</a></p> <p><b>18 February 2009, version 1 Public Comments Analysis Report</b>  <a href="http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf">http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf</a></p>
	<p><b>18 February 2009: Applicant Guidebook Version 2</b>  <a href="http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf">http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf</a></p> <p><b>31 May 2009, Summary and analysis of public comments on version 2</b>  <a href="http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf">http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf</a></p>
	<p><b>28 May 2010: Applicant Guidebook Version 4</b>  <a href="http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf">http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf</a></p> <p><b>12 November 2010: Summary and analysis of comments version 4</b>  <a href="http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf">http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf</a></p>
<p><b>23 September 2010: Comments on V4 of Applicant Guidebook</b>  The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application. The GAC believes therefore that the denial of any legal recourse as stated in Module 6 of the DAG under item 6 is inappropriate. The GAC cannot accept any exclusion of ICANN's legal liability for its decisions and asks that this statement in the DAG be removed accordingly.</p>	<p><b>23 November 2010: Reply from ICANN Chairman</b>  <a href="http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf">http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf</a></p> <p>As stated earlier in this letter, one of the guiding principles in developing the Applicant Guidebook has been to address and mitigate risks and costs to ICANN and the global Internet community.</p> <p>ICANN reaffirms its commitment to be accountable to the community for operating in a manner that is consistent with ICANN's Bylaws, including ICANN's Core Values such as "making decisions by applying documented policies neutrally and objectively, with integrity and fairness." The Board does not believe however that ICANN should expose itself to costly lawsuits any more than is appropriate.</p>

	<p>The new gTLD process has been carefully designed over several years with multiple opportunities for public comment in order to develop a well-documented process that can be operated neutrally and objectively to the maximum extent feasible, and with integrity and fairness. Also, all of ICANN's standard accountability and review mechanisms will be available to all participants and affected parties in the new gTLD process, including ICANN's reconsideration process, independent review, and the ICANN Ombudsman.</p> <p>Based on the above, in Trondheim, the Board resolved that, "The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.</p>
	<p><b>25 September 2010: Board meeting in Trondheim</b> <a href="http://www.icann.org/en/minutes/resolutions-25sep10-en.htm">http://www.icann.org/en/minutes/resolutions-25sep10-en.htm</a></p> <p>Board Briefing Materials: <a href="#">One</a> [PDF, 3.23 MB] <a href="#">Two</a> [PDF, 2.03 MB] <a href="#">Three</a> [PDF, 816 KB] <a href="#">Four</a> [PDF, 240 KB] <a href="#">Five</a> [PDF, 546 KB]</p> <p>"... Whereas, on 23 September 2010, the Governmental Advisory Committee (GAC) provided comments on version 4 of the draft Applicant Guidebook. Resolved (2010.09.25.__), staff is directed to determine if the directions indicated by the Board below are consistent with GAC comments, and recommend any appropriate further action in light of the GAC's comments."</p> <p><b><i>Role of the Board</i></b> The Board intends to approve a standard process for staff to proceed to contract execution and delegation on applications for new gTLDs where certain parameters are met. Examples of such parameters might include: (1) the application criteria were met, (2) no material exceptions to the form agreement terms, and (3) an independent confirmation that the process was followed. The Board reserves the right under exceptional circumstances to individually</p>

	<p>consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community, for example, as a result of the use of an ICANN accountability mechanism. The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.</p>
	<p><b>12 November 2010: Proposed Final Applicant Guidebook</b>  <a href="http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf">http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf</a></p>
<p><b>9 December 2010: Communiqué Cartagena</b>          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:</p> <ul style="list-style-type: none"> <li>• Legal recourse for applicants;</li> </ul>	<p><b>10 December 2010, Board meeting</b></p> <p>New gTLD Remaining Issues  <a href="http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2">http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2</a></p> <p>Resolved (2010.12.10.21), the Board:</p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> <li>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.</li> <li>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.</li> <li>6. Commits to provide a thorough and reasoned explanation of ICANN</li> </ol>

	<p>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.</p> <p>7. Thanks the ICANN community for the tremendous patience, dedication, and commitment to resolving these difficult and complex issues.</p>
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