GNSO Working Session on the CWG Rec6 Report

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CARTAGENA

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Overview of CWG Task

Rec6 states that:

Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.

CWG did not revisit Rec6. Instead, it developed implementation guidelines to address GAC, GNSO and ALAC concerns

Highlights of CWG Report

- Consensus - the implementation model for Rec6 is flawed

- Report describes recommendations, with various levels of consensus, to improve the implementation of Rec6

Rec. No. and Level of Support	Issue	Recommendation
1	Definition of the 'Morality' & 'Public Order Objection' in AGv4	
1.1 **Full Consensus**	Change Name of Objection	ICANN should remove the references to Morality & Public Order in the Draft Applicant Guidebook as far as these are being used as an international standard and replace them with a new term.
1.2 **Full Consensus**	New Name	The name of the Rec6 objection should not be "Morality and Public Order." The Rec6 CWG identified the following alternative names for consideration, with varying levels of support.

Highlights of CWG Report

2	International Principles of Law	
2.1 **Full Consensus**	Other treaties	ICANN should seriously consider adding other treaties as examples in the Draft Applicant Guidebook.
2.2 **Full Consensus**	AGB Revision	The AGB should refer to "principles of international law" instead of "international principles of law."
2.3 **No Consensus – Strong Support**	Gov't Objection for National Law (alternative)	The Applicant Guidebook should allow individual governments to file a notification (not an objection) that a proposed TLD string is contrary to their national law.
2.4 **No Consensus-Strong Support**	Gov't Objection for National Law (alternative)	The Applicant Guidebook should **not** include as a valid ground for a Rec6 objection, an objection by an individual government based on national public interest concerns that are specified by the objection government as being contrary to national laws that are not based on international principles.
2.5 **Full Consensus**	Gov't Objection for National Law	If individual governments have objections based on contradiction with specific national laws, such objections may be submitted through the Community Objections procedure using the standards outlined in AGv4.

Highlights of CWG Report

3	Quick Look Procedure	
3.1 **No Consensus-Strong Support**	Explicit Guidelines	Further and more explicit guidelines needed, such as common examples from a substantial number of jurisdictions where the term "manifestly" has been defined through judicial decisions, and in particular where such analysis was in the context of disputes relating to Principles of Ordre Public, be added to the Quick Look Procedure.
3.2 **Consensus**	Standards for an Abusive Objection	Further guidance as to the standards to determine what constitutes an abusive objection is needed and consideration of possible sanctions or other safeguards for discouraging such abuses.
3.3 Consensus	National Law not a valid ground for an objection	In determining whether an objection passes the quick look test, there should be an evaluation of the grounds for the objection to see if they are valid. National law not based on international principles should not be a valid ground for an objection.

Highlights of CWG Report

4	Contracted Expert Consultation	
4.1 **Full Consensus**	Board Responsibility	Ultimate resolution of the admissibility of a TLD subject to a Rec6 objection rests with the Board alone and may not be delegated to a third party.
4.2 **Consensus**	Board Consultation with Experts	Under its authority to obtain independent expertise under the ICANN Bylaws, the Board shall contract appropriate expert resources capable of providing objective advice in regard to objections received through this process.
4.3 **No Consensus-Strong Support**	Scope of Expert Consultation	Such experts advising the ICANN Board are to be independent of any conflict in accordance with other provisions in the AGB. Their advice will be limited in scope to analysis of objections, based upon the criteria as expressed within these recommendations.
4.4 **No Consensus-Strong Support**	Selection of Experts	The number of experts to be consulted, the method of their selection and terms of their engagement, are to be determined by the Board subject to these recommendations.
4.5 **No Consensus-Strong Support**	Expertise	The contracted advisors will be expected to have specific expertise in interpreting instruments of international law and relating to human rights and/or civil liberties.
4.6 **No Consensus-Strong Support**	Name of Process	This process for Rec6 objections should not be referred to as a Dispute Resolution Process.

Highlights of CWG Report

5	Threshold for Board decisions to reject an application based on objections	
5.1 **No Consensus-Strong Support**	Higher Threshold	A higher threshold of the Board should be required to uphold an objection.
5.2 **Consensus**		The higher threshold should be at least 2/3.
5.3 **Consensus**		Approval of a string should only require a simple majority of the Board regardless of the input from the experts.
6. Incitement to discrimination criterion		
6.1	Revision to Criteria	This criteria should be retained, but rephrased as follows:
Consensus		"Incitement to and instigation of discrimination based upon race, age, color, disability, gender, actual or perceived sexual orientation or gender identity, political or other opinion, ethnicity, religion, or national origin."

Highlights of CWG Report

7. The use of 'incitement' as a term for the determination of morality and public order		
7.1 **Consensus**	Replace "incitement"	The new proposed language should read:
		• **Incitement and instigation** of violent lawless action;
		• **Incitement and instigation** of discrimination, based upon race, age, color, disability, gender, actual or perceived sexual orientation or gender identity, political or other opinion, ethnicity, religion, or national origin.
		• **Incitement and instigation** of child pornography or other sexual abuse of children.

Highlights of CWG Report

8. String only?		
8.1 **No Consensus-Strong Support**	Analysis based on string and context	The experts should conduct their analysis on the basis of the string itself. It could, if needed, use as additional context the intended purpose of the TLD as stated in the application.
8.2 **Divergence**	Analysis based on string only (Alternative)	The experts should conduct their analysis on the basis of the string only.
9. Universal Accessibility Objective with Limited Exceptions		
9.1 **Consensus**	Limiting Blocking of TLDS	The Rec6 CWB hopes that the mechanisms it proposes in this Report will help limit blocking of whole TLDs at the national level. Blocking of TLDS should remain exceptional and be established by due legal process.

Highlights of CWG Report

10. Independent Objector		
10.1 **Divergence**	Modifications to role of IO	The Rec6 CWG proposes modifications to the mandate and function of the Independent Objector as described in section 3.1.5 of the AGv4, without changing its scope. Unlike the current intention as expressed in the AGv4, it is suggested that the Independent Objector may not initiate an objection against a string if no community or government entity has expressed an interest in doing so. A valid Independent Objector objection must be tied to a specific party who claims it will be harmed if the gTLD is approved. The Independent Objector must not encourage communities or governments to file objections.
10.2 **Consensus**	Requests by GAC or ALAC	If requested in writing by the GAC or ALAC the Independent Objector will prepare and submit a relevant Objection. The Independent Objector will liaise with the GAC or ALAC in drafting such an Objection. Any Objection initiated from a GAC or ALAC request will go through the same process as an Objection from any other source and must meet the same standard for success as an Objection from any other source.

Highlights of CWG Report

12. Use of the Community Objections		
12.1 **Full Consensus**	Available to At-Large and GAC	The CWG notes that ICANN GAC and At-Large Advisory Committees or their individual governments in the case of the GAC have the possibility to use the 'Community Objection' procedure. A "Community Objection" can be filed if there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.
12.2 **Full Consensus**	Fees for ALAC and GAC	The CWG recommends that the fees for such objections by the GAC or the At-Large Advisory Committees be lowered or removed.
12.3 **Divergence**		ICANN should consider looking into a slight lowering of this threshold for Objections from the GAC or At-Large Advisory Committees. Staff should explore ways to reasonably lower the required standard for a successful At-Large or GAC Advisory Committee objection in the areas of standing (3.1.2.4), level of community opposition (3.4.4) or likelihood of detriment (3.4.4).

Highlights of CWG Report

13. Guidebook Criterion 4		
13.1 **Full Consensus**	Revision to Criterion 4	The current language from Criterion 4 of AGv4 should be revised to read: • "A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law."
14	**Next Steps for Rec6**	
14.1 **No Consensus-Strong Support**		The Rec6 CWG recommends that the ICANN New gTLD Implementation Team form a Recommendation 6 Community Implementation Support Team (Rec6 CIST) to provide input to ICANN Implementation Staff as they further refine implementation details for Recommendation 6.

Next Steps & Recent Developments

- Public Comment closed 22 October 2010:

  http://www.icann.org/en/public-comment/#cwg-report-rec6

- Each SO/AC to review and comment as appropriate

- Board Throndheim Resolution-

  "The Board agrees that ultimate responsibility for the new gTLD program rests with the Board. The Board, however, wishes to rely on the determinations of experts regarding these issues.

  "The Board will accept the Rec6 CWG recommendations that are not inconsistent with the existing process, as this can be achieved before the opening of the first gTLD application round, and will work to resolve any inconsistencies. Staff will consult with the Board for further guidance as required."

Proposed Final Applicant Guidebook

- Includes some, but not all, CWG Recommendations
- Some recommendations viewed as inconsistent with:
  - ❖ GNSO Council New gTLD Guideline H that states:
  - *"[e]xternal dispute resolution providers will give decisions on objections."*
  - ❖ Board Resolution- Role of the Board
  - ❖ Existing Processes
- Consultation underway with CWG to identify additional CWG Recommendations to adopt
  - **Attend Monday's Rec6 Session in Barahona 4 at 17:30-19:00**
- Issue : Do the CWG Recommendations have the support of the participating SO/ACs?

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Motion: Endorse CWG Rec6 Report

WHEREAS, on 8 September 2010 the GNSO Council endorsed GNSO participation in a joint working group with other interested Supporting Organizations (SO's) and Advisory Committee (AC's) to provide guidance to the ICANN new gTLD Implementation Team and the ICANN Board in relation to the implementation of the Council's Recommendation 6 regarding strings that contravene generally-accepted legal norms relating to morality and public order that are recognized under international principles of law;

 WHEREAS, the Recommendation 6 cross-community working group (CWG) was established in accordance with the Terms of Reference also approved by the GNSO Council on 8 September 2010;

 AND WHEREAS, the CWG has since delivered a set of recommendations regarding implementation of the GNSO Council's Recommendation 6 for new gTLDs to the ICANN Board and community;

Rec6 Motion (continued)

RESOLVED, the Council thanks the CWG and its participants, from the GNSO and other SOs and the ACs, for their hard work; and acknowledges that the CWG recommendations do not constitute Consensus Policy or GNSO policy development otherwise within the purview of the GNSO;

RESOLVED FURTHER, that the Council hereby endorses the CWG recommendations as representing. as far as possible, consensus among the various stakeholders in the ICANN community on effective mechanisms for the implementation of Recommendation 6.

Questions