4.3.4 Contractual Compliance

- *4.3.4.1 Explanation of Subject*

Within the base agreement, and subsequently the Registry Agreements that applicants sign, are provisions spelling out the contractual requirements that the applicants, or registries at that stage, must meet, or be subject to specific enforcement measures. The contractual compliance mechanisms related to registries are in support of Principle E:

> *A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.*

And Recommendation 17:

> *A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.*

As noted in section 5.4.2 of the AGB:

> *ICANN's contractual compliance function will perform audits on a regular basis to ensure that gTLD registry operators remain in compliance with agreement obligations, as well as investigate any complaints from the community regarding the registry operator's adherence to its contractual obligations.*

- *4.3.4.2 Questions and Concerns Related to Subject*

The DG did not have specific concerns related to this subject, but wanted it captured as a potential topic for discussion and to ensure that contractual compliance, as it relates to new gTLDs, may be considered within scope in the event that there are concerns identified during the course of possible deliberations. However, it should be noted that the role of contractual compliance is to ensure that ICANN's contracted parties fulfill the requirements set forth in their agreement with ICANN[1]; changing this role is not within the remit of a GNSO PDP-WG.

Public comments identified a number of operational practices that the commenters found troubling, though they note that ICANN contractual compliance is only able to enforce contractual obligations or prohibitions against certain conduct that are accounted for in the Registry Agreement. Introducing new requirements on registries would need to be done in the context of an agreement (i.e., base agreement/Registry Agreement) for contractual compliance to be able to ensure the fulfillment of those requirements.

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[1] See https://www.icann.org/resources/pages/compliance-2012-02-25-en

Another comment noted that it is unclear how much reliance can be placed on the representations made by applicants in their submitted application. This poses a challenge as the representations are intended to be used for public comment, GAC Advice, objections, etc. However, the ability to rely on application statements may have been undermined by change requests to these representations, or by the possibility that they were not adequately integrated into the signed Registry Agreement in order to be enforceable, though Specification 11 in the RA was intended to address this concern, at least in part. These issues may be more appropriately discussed and possibly addressed by making changes to the application submission, evaluation, and contracting processes, rather than in the context of contractual compliance.

- *4.3.4.3 Relevant Guidance*

    - Principle E
    - Recommendation 17

- *4.3.4.4 Rationale for Policy Development*

As there were no specific concerns identified by the DG, the subject of Contractual Compliance is not seen to require any type of policy development. Public comments identified concerns around applicant representations in their applications, the reliance the community can place on those representations, and how those representations are ultimately integrated into the Registry Agreement. These concerns may be best addressed via recommendations related to the application submission and evaluation processes, as well as potentially translating those representations in contractual requirements, as changing the role of contractual compliance is considered outside the remit of a GNSO PDP-WG.