

4.4.3 Objections

- 4.4.3.1 Explanation of the Subject

Guidance in the 2007 Final Report, intended to protect the rights of various parties can be found in the following recommendations.

Recommendation 2:

Strings must not be confusingly similar to an existing top-level domain or a Reserved Name.

Recommendation 3:

Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.

Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).

Recommendation 6:

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

Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

Recommendation 20:

An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.

Implementation Guidance P:

Opposition must be objection based. Determination will be made by a dispute resolution panel constituted for the purpose. The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).¹

Module 3 of the AGB, Objection Procedures, describes two types of mechanisms that may affect an application: 1) The procedure by which the GAC may provide GAC Advice on New gTLDs to the ICANN Board of Directors concerning a specific application; and 2) the dispute resolution procedure triggered by a formal objection to an application by a third party.²

GAC Advice: With respect to GAC advice the AGB states,

The GAC may provide advice on new gTLDs. The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors. The GAC can provide advice on any application. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period (see Module 1).

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The AGB describes the following forms of GAC Advice:

- I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved;*
- II. The GAC advises ICANN that there are concerns about a particular application “dot-example.” The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.*

¹ See further details concerning IG P Guidelines at: <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>

² See Module 3, Objection Procedures, at <https://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

³ Ibid

III. *The GAC advises ICANN that an application should not proceed unless remediated. This will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.*⁴

As stated in the AGB, when the Board receives GAC Advice concerning an application, ICANN will publish the advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.

According to the AGB:

*ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures. The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).*⁵

Public Objection and Dispute Resolution Process:

As noted in the AGB:

The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts. A formal objection can be filed only on four enumerated grounds, as described in this module. A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. Similarly, an objector accepts the applicability of this gTLD dispute resolution process by filing its objection.

According to the AGB, objections that trigger the dispute resolution procedure include: 1) “String Confusion Objection”: a string is confusingly similar to an existing top-level domain or another string applied for in the same round of applications; 2) “Existing Legal Rights Objection”: a string comprising the potential new gTLD infringes the existing legal rights of others; 3) “Limited Public Interest Objection”: the string comprising the potential new gTLD is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law; or 4) “Community Objection”: substantial opposition to the application from

⁴ Ibid

⁵ Ibid

a significant portion of the community to which the string may be explicitly or implicitly targeted.⁶

The AGB notes that objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, a panel of experts will review all objections designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. The AGB describes the standards for entities to have standing to object for each type of objection.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure.

As noted in the AGB, applicants whose applications are the subject of an objection have the following options:

1. The applicant can work to reach a settlement with the objector, resulting in withdrawal of the objection or the application;
2. The applicant can file a response to the objection and enter the dispute resolution process (refer to Section 3.2); or
3. The applicant can withdraw, in which case the objector will prevail by default and the application will not proceed further.

If for any reason the applicant does not file a response to an objection, the objector will prevail by default.

For a description of the process by which DRSPs administer dispute proceedings that have been initiated see the New gTLD Dispute Resolution Procedure.⁷

Dispute Resolution Costs:

As stated in the AGB:

Before acceptance of objections, each DRSP will publish a schedule of costs or statement of how costs will be calculated for the proceedings that it administers under this procedure. These costs cover the fees and expenses of the members of the panel and the DRSP's administrative costs.

ICANN expects that string confusion and legal rights objection proceedings will

⁶ See New gTLD Dispute Resolution Procedure at <https://newgtlds.icann.org/en/applicants/agb/evaluation-questions-criteria-04jun12-en.pdf>

⁷ See Module 3, New gTLD Dispute Resolution Procedure, at <https://newgtlds.icann.org/en/applicants/agb/dispute-resolution-procedure-04jun12-en.pdf>

involve a fixed amount charged by the panelists while Limited Public Interest and community objection proceedings will involve hourly rates charged by the panelists.⁸

Objection Consolidation:

The AGB describes the process for the consolidation of objections:

Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections. The DRSP shall endeavor to decide upon consolidation prior to issuing its notice to applicants that the response should be filed and, where appropriate, shall inform the parties of the consolidation in that notice.

An example of a circumstance in which consolidation might occur is multiple objections to the same application based on the same ground.

In assessing whether to consolidate objections, the DRSP will weigh the efficiencies in time, money, effort, and consistency that may be gained by consolidation against the prejudice or inconvenience consolidation may cause. The DRSPs will endeavor to have all objections resolved on a similar timeline. It is intended that no sequencing of objections will be established.

New gTLD applicants and objectors also will be permitted to propose consolidation of objections, but it will be at the DRSP's discretion whether to agree to the proposal.

ICANN continues to strongly encourage all of the DRSPs to consolidate matters whenever practicable.⁹

Independent Objector:

The AGB notes that a formal objection to a gTLD application may also be filed by the Independent Objector (IO) and provides the following details:

The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet. In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community.

⁸ Ibid

⁹ Ibid, Consolidation of Objections

The IO may file objections against “highly objectionable” gTLD applications to which no objection has been filed. The IO is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections (see subsection 3.1.2).

The IO may file a Limited Public Interest objection against an application even if a Community objection has been filed, and vice versa.

The IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed.

Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground.

- 4.4.3.2 Questions and Concerns Related to Subject

The DG on New gTLD Subsequent Rounds noted the following potential problems:

- Objections criteria: Were objections criteria sufficiently detailed for DSRPs and Panels?
- High fees: The prohibitively high fees to access (e.g., WIPO charged \$10,000 for Legal Rights Objections and ICC charged more than \$90,000 for Community Objections.
- Objection consolidation: Lack of detailed rules for consolidation.
- Independent Objections: The role, functions, and powers of Independent objection. In particular, ICANN should consider what process should be used to address an independent objector's conflict of interest, without having to pursue objection process to conclusion. Consider a penalization structure for objectors that make multiple frivolous objections.

There were challenges in implementing the dispute resolution standards perhaps because the objection standards were new and untested concepts in this round.

In relation to GAC Early Warnings, they were issued for 187 applications on 20 November 2012.¹⁰ Two of the 187 applications that received GAC Early Warning withdrew their applications within 21 days of receiving GAC Early Warning and received the 80% refund.

The AGB anticipated that GAC Advice would be on single applications as opposed to categories of strings, and thus this type of advice presented challenges in resolving. The unanticipated form of GAC Advice and the issues that were raised were the subject of multiple conversations

¹⁰ See <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>

between ICANN and the community. Ultimately, changes were made to the New gTLD Program and to the Registry Agreement, reducing the level of predictability available to applicants.

Public comment suggested that all objection mechanisms be examined, but in particular, the Legal Rights Objection be studied. A number of specific concerns were provided, such as a lack of definitions around terms like “legal rights,” the nature of expert determinations, and review/appeal mechanisms, which a possible PDP-WG should take into consideration when addressing this subject¹¹.

- 4.4.3.3 *Relevant Guidance*
 - Recommendation 2
 - Recommendation 3
 - Recommendation 6
 - Recommendation 20
 - Implementation Guideline P

- 4.4.3.4 *Rationale for Policy Development*

With respect to GAC Advice and Early Warnings, in relation to the New gTLD Program, these mechanisms may warrant community discussion. Discussion may be needed around what types of guidelines might satisfy the intention of the GAC Advice process while supporting greater predictability for applicants.

For the issues the DG raised the following suggestions may be considered by a potential PDP-WG:

- Objections criteria: Consider expanding the description of objections criteria for DSRPs and panels in the AGB.
- High fees: Consider reviewing the fee schedule in the AGB.
- Objection consolidation: Consider providing more detailed rules for consolidation.
- Appeals: Consider having an oversight body or mechanism to ensure consistency, and fairness in adjudication and mediation. Consider whether to develop an appeals mechanism and what factors would be important to consider for a meaningful and equitable appeals process.
- Independent Objections: Consider what process should be used to address an independent objector's conflict of interest, without having to pursue objection process to conclusion. Consider a penalization structure for objectors that make multiple frivolous objections.
- Consistency: Examine the objection proceedings and resulting outcomes to determine if there is a pattern of inconsistencies, and if so, suggest ways to mitigate.

¹¹ See full comment here: <http://forum.icann.org/lists/comments-new-gtld-subsequent-prelim-31aug15/msg00004.html>

- Access: How can parties, particularly governments and communities, access the objection mechanisms easier to protect their rights/express their concerns?

With a number of challenges identified, policy development may be warranted.