

Recommendation 6 Cross Community Work Group

Cartagena Board Resolution response drafting space

This space is currently DRAFT and acting as placeholder for text to be developed by the CWG by January 7th 2011 in response to Resolution (see for full resolution regarding outstanding issues with new gTLD's See 2. in Dec 10th Board Resolutions <http://icann.org/en/minutes/resolutions-10dec10-en.htm#2> which (in part) reads...

Whereas, the working group formed to address implementation of the GNSO-recommended policy concerning **morality and public order** objections made recommendations (the Recommendation 6 Community Working Group), several of which were incorporated into the guidebook, and the working group has clarified the remaining recommendations in a series of consultations with ICANN staff and Board members. Discussions will continue on (1) the roles of the Board, GAC, and ALAC in the objection process, (2) the incitement to discrimination criterion, and (3) fees for GAC and ALAC-instigated objections. ICANN will take into account public comment including the advice of the GAC, and looks forward to receiving further input from the working group in an attempt to close this issue*."

Whereas, the public comment period on the English version of the Proposed Final Applicant Guidebook concluded just prior to this Board Meeting on 10 December 2010, with the closure of other comments on translated versions to follow in the order posted, and ICANN will carefully consider all of the comments received.

Whereas, the Board participated in discussions and listened to comment from stakeholders during the meeting in Cartagena.

Whereas, the Governmental Advisory Committee communiqué from Cartagena indicates that the GAC will provide a list of issues that the GAC believes are still outstanding and require additional discussion between the Board and the GAC.

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.

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The Co-Chairs of the CWG asked staff for further clarification to assist in our understand of the Board resolution. This resulted (amongst other things) in the following reply from Kurt => "...after the second meeting there were three issues and the working group position in these three issues were roughly: (1) the Board role (that in cases of an objection being upheld by the review panel, (i.e., rejecting the TLD application), the Board must sustain the objection by a majority vote). (2) Amending the discrimination standard: changing "incitement to" or promotion of, to "incitement to and instigation of"; and adding a number of terms that qualified as discrimination; (3) that ALAC and GAC have standing to make Limited Public Interest Objections and should not have to pay the dispute resolution fee."

Therefore the Board is seeking by 7 January 2011 a proposal from the CWG for the Board's consideration, with regard to the three specific issues discussed in the Cartagena resolution. In preparing the proposal, it would be helpful if the CWG would suggest specific revisions to the Proposed Final Guidebook to address the CWG's concerns with regard to each of these issues, instead of making general statements that could be interpreted by Staff /Board differently than the CWG interprets them.

It would also be useful to note the level of support for each of the revisions, and also any background / rationale we have for each so that the Board may better understand our perspective(s)

With regard to the three specific issues described in the resolution, the Board intended that staff members not to contribute directly to this writing, however recognizing the extraordinary short time frame we have, staff as they clarified for us the intent /meaning/requests to us in the resolution, have categorized/organized the issues through a list of questions for our consideration in drafting a summary of the Working Group requests on each of the issues; these are listed below and some initial text has been inserted for us to edit and develop our response from.

With regard to the first issue (the roles of the Board, GAC, and ALAC in the objection process), we need to provide clarification regarding the circumstances under which the CWG suggests that the Board would vote regarding an application that is subject to a Rec6 Objection:-

- clarify the circumstances under which the Board would vote with regard to an Rec6 objection and/or with gTLD applications generally,

Based on the written responses to the pre-Cartagena questions from the ICANN staff, as well as the various discussions during the Cartagena meeting, the CWG has recommended that the Board would have to specifically approve any recommendations from third party experts to reject a TLD application based on a Recommendation 6 objection. The CWG has not suggested, however, that the Board be required to take a vote on specific Recommendation 6 objections where the third party experts reject such an objection. Nor did the CWG suggest that the Board be required to approve every new gTLD string. <Jon>

and

- if there is consensus on it, clarify the intended role of the expert panel (i.e., dispute resolution provider, mediator, advisor or other).

A consensus of the CWG recommended that the ICANN Board may "contract appropriate expert resources capable of providing objective advice." The CWG did not recommend that the Board should be a trier of fact or should hear in the first instance every Rec6 objection with a requirement that it make a determination on the merits in every case.

The CWG did not reach consensus over the actual form or weight of the expert advice (e.g. whether the expert panel should be a dispute resolution provider, mediator or advisor). Some members of the CWG take a broader definition of dispute resolution panel than others. Some members think that the experts should not hear from the objector and the applicant at all – whether in a trial setting or written argumentation – others disagree and support an adversarial process. There was Strong Support, but not consensus, that the experts should be able to look at the context of the application or applicant in evaluating a Recommendation 6 objection – others disagree and believe that the experts should conduct their analysis on the basis of only the string.

While the CWG did not reach consensus on these issues, it did explicitly remove all reference to "dispute resolution" in its recommendations, and made no requirement that the experts engage in an adversarial process between applicant and objector. Furthermore, the CWG did achieve Strong Support (though not full consensus) for not calling the evaluation process one of "dispute resolution," and requiring that the experts' skills be in legal interpretation of instruments of international law.<Jon>

With regard to the incitement to discrimination criterion, we need to confirm the specific language revisions the CWG requests with regard to the "incitement to or promotion of" portion of the criterion. After the discussion in Cartagena, does the CWG continue to request that the standard be "incitement and instigation" or is some other language preferable? In addition, the CWG could also state whether it still believes that the standard should be expanded to include the list of additional discrimination grounds that were referenced in the CWG Report:-

- CWG to confirm the specific language requested with regard to the "incitement to or promotion of" term in the original standard. After the discussion in Cartagena, does the CWG continue to request that the term be "incitement and instigation" or is some other language preferable?

In its report dated 21 September, 2010, the CWG recommended that "incitement and instigation" be used in the criteria for discrimination. In ICANN's explanatory memorandum on this issue dated 12 November 2010, it provided a rationale of why "incitement to or promotion of" is a more appropriate standard. Based on the ICANN response, the discussions in Cartagena during which several CWG members stated that they no longer agree with the recommendation, and some admitted confusion over the legal impact of the word choice, the CWG may no longer have a consensus on this issue [NOTE -- confirm -- do we want to do a straw poll? Do we want to try to recommend substitute language?](#). With that said, many members of the CWG still argue that a higher standard than "incitement to or promotion of" would be appropriate. <Jon>

- the CWG needs to reiterate consensus on the standard including an expanded list of additional discrimination grounds that were referenced in the CWG Report.

Two consensus recommendations of the CWG were to extend the list of potential discriminations also to include discrimination based on age, disability, actual or perceived sexual orientation or gender identity, or political or other opinion. The CWG also suggested by a full consensus that such discriminations must rise to the level of violating generally accepted legal norms recognized under "principles of international law." As such, any additional discriminations listed in the second prong still must be found to be in violation of principles of international law.

We do not believe that recognizing additional discriminations would significantly broaden the types of objections brought. The CWG does not believe that any additional research needs to be conducted on whether such additional classes are protected under international law today. It has been brought to the CWG's attention that these additional discriminations have some protection under international law. If they are recognized today, then the Board and the experts would rely on them. If they are not at that level yet, then they won't. Importantly, such additional discriminations might be recognized at some future date and the process should be fluid enough to take them into account at such time. The suggestion in Cartagena of a catch-all discrimination criteria – such as "any other discriminations that are generally recognized under international law" – seems to be acceptable to many of the CWG members (confirm). <Jon>

With regard to the fees for GAC and ALAC-instigated objections, we need to identify what (if any) fees should be charged and where the funds should come from, and any other restrictions or additional steps that the CWG suggests for dealing with GAC and ALAC-instigated objection:-

- what fees should be paid by ALAC and GAC (if filing and dispute resolution fees are waived, are the number of free objections limited)
- by what process is an ALAC and GAC objection formed and approved?

There was considerable discussion of this in the meeting, and at this stage subject to ratification as a formal process of the ALAC it is envisaged that ALAC would take recommendations of any of its At-Large organizations ALSeS (who may either hold a Community based objection view themselves or be passing such a concern on from the local Internet Community that they are engages with or are representative for) up through the RALOs and then for ALAC consideration an ALAC vote for formally raise such an objection would require a super-majority vote to pass; and that the GAC would develop a consensus based process.

<CLO added text> Also note here that in addition to the above use of the "Community Objection" process by the ALA and GAC; If the Independent Objector (IO) function is maintained in the processing of new gTLD Applications, then an alternate pathway for AC objections to be considered would be for the IO to take up such formally prepared objection notices from the ALAC and/or GAC and subject to the same standards of the AC and balance criteria assessment etc., as any other IO instigated objection process these as if self instigated.

From our clarification document:

A full consensus of the CWG recommended that fees be lowered or removed for objections from the GAC or ALAC. It is outside the CWG's scope to comment on the process for the GAC or ALAC to lodge objections. The CWG assumes that any Rec 6 objections put forth by the GAC or ALAC will be approved according its own internal processes. <Jon>

List here any other issues?
