Difficult Durban Dialogue between GAC and NGPC

Durban is a lovely beach city on the Indian Ocean with idyllic winter weather, but you might as well be on Mars if you’re ensconced in the vast windowless meeting rooms of its International Conference Center. That’s where ICANN’s Governmental Advisory Committee (GAC) spent a good part of Saturday, July 13th, engaged in a dialogue with the non-conflicted members of the New gTLD Board Committee (NGPC) about how to have a constructive dialogue over the coming months geared toward understanding all, and implementing at least some parts, of the GAC’s safeguard advice for “sensitive” new gTLD strings encompassing regulated industries and professions.

The difficult dialogue was somewhat unexpected, as earlier indications had been that the NGPC was moving toward broad implementation of the safeguards. The NGPC’s July 2nd resolution on the matter[[1]](#footnote-1) stated:

After considering the community comments, the NGPC decided to begin a dialogue with the GAC during the ICANN Meeting in Durban to clarify the scope of the requirements provided in the Category 1 Safeguard Advice. The dialogue with the GAC on Category 1 will also include discussion of GAC's Category 2.1 Safeguard Advice regarding "Restricted Access" since that advice applies to the strings listed under Category 1. Pending the dialogue with the GAC, staff will defer moving forward with the contracting process for applicants who have applied for TLD strings listed in the GAC's Category 1 Safeguard Advice.

That decision put hundreds of new gTLD applications on hold – the exact number is unavailable because the GAC’s list of such sensitive strings was non-exhaustive, implying that many unlisted applications may fall within its scope.

In light of that action, many GAC members were visibly taken aback when the first NGPC slide displayed at the meeting stated that it was not (yet) rejecting the GAC advice – a negative spin that set the strained tone for the meeting. It also became apparent that, just two days prior to the get-together, the NGPC had sent GAC members a 6-page document entitled “Question and Concerns Regarding Portions of the GAC’s Safeguard Advice”. While that paper is not yet available on the ICANN website, it largely tracks the catalogue of questions appearing under the heading “What concerns or issues were raised by the community?” in that July 2nd resolution, including statements expressing concerns about:

* Inconsistency in the list of strings, with broad and undefined categories
* Strings encompassing a range of individuals, businesses and associations, some licensed and some not
* Difficulty in determining industry self-regulatory organizations
* Generic terms that are sensitive or regulated in some jurisdictions but not others
* Lack of a principled basis for distinguishing between certain categories and strings, some appearing on that non-exhaustive GAC list while others do not
* Proposed safeguards that appear related to website content, a subject beyond ICANN’s authority
* Questions about whether the registry operator is the appropriate entity to enforce certain safeguards
* Unresolved contract enforcement issues
* Differential treatment of commercial and non-commercial gTLDs
* Potential discrimination against users in developing nations where regulatory structures are thin or lacking – and against those in developed nations with very extensive regulatory structures
* Hazy identification of the risks that restricted registration policies aim to address

That long list just scratches the surface of the complex and interrelated issues to be resolved before ICANN can decide which parts of the safeguard advice it will ultimately embrace and implement – much less how that is to be accomplished.

With the issues thus framed, it was difficult at times to discern whether the dialogue was moving forward, sideways, or backwards. The European Community representative said the GAC’s role was to provide high level clarification, not precise implementation. The UK representative expressed disappointment and suggested it was the NGPC’s role, not the GAC’s, to compile a proposed list of all affected strings to be shared with the GAC and the overall ICANN Community. The US suggested that the GAC should revisit the advice with the aim of assisting the NGPC’s understanding and implementation. All parties agreed that the task ahead would be complex, pioneering, unprecedented, and challenging, and that the necessary dialogue would take many months (probably all the way up to the November ICANN meeting in Buenos Aries, if not beyond).

The meeting ended with both sides trying to put the best face on it, with the GAC Chair thanking the NGPC for its hard work since Beijing[[2]](#footnote-2) and stating that the discussion had been positive and that the GAC would consider how to best provide further guidance to the NGPC. And most probably the GAC will labor over the next few days to produce a Durban Communique that at least proposes a procedural way forward.

Yet the clear message coming out of the meeting is that new gTLD applications have been bifurcated into two broad categories – those that are clearly not related to sensitive strings and regulated sectors and which need only comply with the relatively easy to implement basic GAC safeguard advice, and thus can move forward through the evaluation and delegation process in coming months; and those that have appeared on the GAC’s non-exhaustive list of sensitive strings (or that may be added to it), which are on indefinite hold while all these unprecedented and interrelated questions are grappled with.

Of course, for those frozen applicants even delay and burdensome but uniform safeguard requirements may be preferable to the alternative likely to emerge if the continuing dialogue proves fruitless or breaks down – which is for the sensitive gTLDs and their registrants being subject to dozens of disparate regulatory schemes, and perhaps even enforcement actions, based on inconsistent national laws. For now, the best advice for all concerned may be the sage wisdom of American baseball legend and everyman philosopher Yogi Berra – “When you come to a fork in the road, take it.”

1. <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm> [↑](#footnote-ref-1)
2. See <http://www.icann.org/en/news/announcements/announcement-2-03jul13-en.htm> for a complete listing of the NGPC’s work product since Beijing [↑](#footnote-ref-2)