CC2 Discussion: Terms and Conditions

WT2 | 12 October 2017

Agenda

1 Welcome and Introduction

2 SOI Updates

3 Discussion Recap

4 CC2 Comments

1. Introduction

- ⊙ Goal: To move towards deliberations and proposals for steps forward for the initial report.

- ⊙ Schedule:
    - ⊙ 12 October 2017 meeting on Application Terms and Conditions.
    - ⊙ 19 October 2017 meeting on TBD (Likely to be continuation of Closed Generics).
    - ⊙ 28 October 2017 F2F meeting at ICANN60 on TBD.

2. Discussion Recap: Where are we at now?

We had one meeting on Application Terms and Conditions. While not all of the sections of the T&Cs were seen as necessary to be covered, Sections 3, 6, and 14 were discussed and we further sought feedback in CC2 Questions. These sections are summarized as below.

Section 3: Applicant agrees ICANN has the right to determine not to proceed with any and all applications for new gTLDs. The decision to review and delegate new gTLDs after approval is at ICANN's discretion

Section 6: Applicant releases ICANN from any claims by applicant related to ICANN's review, applicant's withdrawal, or ICANN's decision of application. Applicant agrees not to challenge ICANN in court in regards to any final decision made by ICANN in regards to the application.

Section 14: Applicant understands ICANN reserves right to make updates/changes to applicant guidebook and application process and that applicant will be subject to such changes. If such changes are made after application has been submitted and present material hardship to ICANN, ICANN will work to accommodate applicant.

2. Discussion Recap: Where are we at now?

Resulting from our discussion and the CC2 Comments received, we are currently leaning forward in the following areas.

Section 3: In CC2 comments, some respondents suggested clarifying language in this section and perhaps referencing other documents that should be read in conjunction with the Section, such as applicable provisions of the ICANN Bylaws and sections of the AGB on eligibility, evaluation process, and review process.

Section 6: One specific proposal for policy language was put forward, which would make the covenant not to sue contingent upon the implementation of a New gTLD appeals mechanism: "ICANN must build into the new gTLD Program appeals mechanisms to include the ability for applicants to challenge the decisions of the ICANN staff, the ICANN Board, and/or any entities delegated decision making authority over the assignment, contracting and delegation of new gTLDs. Such appeals mechanism must include the ability to review those decisions on the merits and not only with respect to whether ICANN violated the Bylaws. Only with such an appeals process performed by an independent entity could ICANN then include a covenant not to sue in the Applicant Terms and Conditions. However, the covenant not to sue shall not apply to cases alleging fraud, negligence or wilful misconduct." Some CC2 comments supported an appeals mechanism.

Section 14: Some CC2 comments emphasized the importance of predictability and having a framework for change management.

2.5.1 - The following language appears in Section 3 of the Applicant Terms and Conditions: "Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant." Do you believe that this paragraph gives ICANN an absolute right to reject any application for any reason including a reason that contradicts the Applicant Guidebook, or any law or policy? If yes, should such an unrestricted right appear in any modifications to the Guidebook? If no, please list the other documents that you believe should be read in conjunction with this paragraph, e.g. GNSO Policy on new gTLDs, ICANN Bylaws, other portions of the Guidebook, California implied covenant of good faith and fair dealing, etc.

3. CC2 Questions: 2.5.1 Comments

<u>RySG, BRG, Afilias, and INTA suggested adjusting language to clarify that ICANN cannot unilaterally reject an application without an appropriate reason.</u>

"In other areas of the **Applicant Guidebook, there are clear definitions of why an application may be declined. This paragraph in Module 6 would benefit from either a rewording to further specify why an application would be declined or from referencing related materials in other portions of the guidebook**, such as section 1.2.1 on eligibility and sections 2.1 and 2.2, which describe the evaluation and review process. Alternative language could be "ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law, policy, or eligibility and evaluation requirements outlined in sections 1.2, 2.1-2, and 3.2.1 in the Applicant Guidebook. ICANN's Bylaws prohibit it from discriminating against parties. Therefore, if ICANN rejects an application, it should only do so for good cause and not treat similarly situated parties differently." – RySG, BRG, Afilias

3. CC2 Questions: 2.5.1 Comments

"**It is not the role of the PDP WG to interpret existing contractual provisions**, including the existing Applicant Terms and Conditions – where there is a disagreement as to the effect of these Terms and Conditions that would be the role of the court or appropriate arbitral forum. However, **INTA does not consider that it would be appropriate for ICANN to claim the right to reject any future application without reason, or for a reason which conflicts with the AGB, law or policy**. To do so would be inconsistent with ICANN's Bylaws obligations, including section 1.2(a)(v) the commitment to apply policies consistently and neutrally; section 2.3, non-discriminatory treatment; and section 3.1, the obligations of openness and transparency. Since this matter is being debated within the PDP and some might interpret Section 3 of the Terms and Conditions as giving ICANN an absolute right to reject, **INTA would suggest that the provision warrants redrafting to make it absolutely clear that ICANN cannot unilaterally reject an application for reasons other than as specifically set out in the AGB**." – INTA

3. CC2 Questions: 2.5.1 Comments

Jannik Skou stated that ICANN should not have the right to stop processing an application unless the application is disqualified according to rules in the AGB.

"**ICANN should never have the right to stop processing an application, unless an application is disqualified according to rules set in the guidebook**, including contention set **resolution** mechanisms." – Jannik Skou

3. CC2 Questions: 2.5.1 Comments

<u>NORID, ALAC, and John Poole stated that ICANN should have this right.</u>

Sample excerpts:

"In our view this gives ICANN extensive rights. However, **ICANN offers a resource at their discretion and enters into a private contract with the applicant and they should be free to set conditions. However, ICANN should make the Applicant Terms and Conditions as predictable as possible**. The expression "applicable law or policy" could with advantage be extended to be more exhaustively presented. If ICANN finds it politically difficult to go forward with an application, for instance after immense resistance from the GAC, they should be able to choose not going into this kind of problems that could lead to delays and political difficulties. We should never forget that there is still forces wanting to destroy the multistakeholder model." – NORID

"Yes, **ICANN should have that right, and it should be clearly spelled out in the Applicant Guidebook and in an ICANN policy**." -- ALAC

3. CC2 Questions: 2.5.1 Comments

"While the process that developed the prohibition on closed generics was messy and open to improvement, the result is the appropriate one**. There is a ban on closed generics for the 2012 round and that should be extended to future rounds or allocation methods**." – Jim Prendergast

"Yes, permitting closed generics could impact both **consumer choice and consumer confusion**." – ALAC

". . . on balance we agree with the ban on closed generics for the foreseeable future." – Nominet (excerpted from response to 2.4.2)

2.5.2 - According to Section 6 of the Applicant Terms and Conditions, the "covenant not to sue ICANN", an applicant foregoes any right to sue ICANN once an application is submitted for any reason. Currently, an applicant can only appeal an ICANN decision through the accountability mechanisms, which have a limited ability to address the substance of the ICANN decision. If ICANN had an effective appeals process ((as asked about in Question 3.5.2 below) for an applicant to challenge the decisions of the ICANN staff , board and/or any entities delegated decision making authority over the assignment, contracting and delegation of new gTLDs, would a covenant not to sue be more acceptable? Please explain.

INTA, NORID, RySG, BRG, and Afilias supported establishing an appeals process prior to opening subsequent procedures.

Excerpts:

"INTA believes that an **appeals process would be beneficial**. In the previous round it was decided not to allow appeals from most decisions. However, in practice this has resulted in extensive use of time consuming and complex requests for reconsideration and independent reviews. In order to allow fair recourse for applicants, independent appeals processes should be identified prior to future releases of new gTLDs, with clear criteria for appeal identified." – INTA

"Yes, the **covenant not to sue would be more acceptable it there was an effective appeals process**. As it is now, the registrant is rather without legal protection if feeling that the decision taken by ICANN is really wrong and not based on what is listed in the Applicant Terms and Conditions. To establish this appeals process/mechanism could be a prerequisite for receiving new applications." – NORID

"Yes, ICANN should **introduce an appeals process for rejected applications** for long-term scalability, as is also suggested in section 3.1.4 of this document. . . To prevent unnecessary complications in the future, and to provide applicants with fair recourse, an appeals process **should be specified and defined before the next round of applications**. Similarly, for applicants who do appeal an ICANN decision and attempt to do so via legal means, having an appeals process in place means preventing any exceptional cases that would take time and resources from ICANN. With such a setup, it would be much more acceptable to include such a covenant not to sue." – RySG, BRG, Afilias

3. CC2 Questions: 2.5.2 Comments

<u>ALAC suggested that if appeals are allowed, they should only be allowed when decision is based on an error of fact that ICANN has available at the time.</u>

"The ALAC suggests that if appeals are allowed, they should only be allowed when decision is based on an error of fact that ICANN has available at the time.

<u>Nominet recommended adopting a "better mechanism" to require ICANN to review operational decisions related to applications.</u>

"In practical terms, it is totally understandable to ensure that ICANN does not get inundated with litigation. However a **better mechanism to require ICANN to review operational decisions in respect of new gTLD applications** which may be totally unreasonable or irrational would be useful." – Nominet

<u>John Poole stated that the interests of the global internet community should receive priority over the interests of registry operators.</u>

"More acceptable for whom? For contracted parties or the global internet community—SORRY, the global internet community, who ICANN is SUPPOSED to be representing, trumps the self-centered and selfish special interests of registry operators."

3. CC2 Questions: 2.5.3

2.5.3 - According to Section 14 of the Applicant Terms and Conditions, ICANN has the ability to make changes to the Applicant Guidebook. One task of this Working Group is to address the issue of predictability in future rounds, including with respect to the AGB. Do you think that ICANN should be limited in its ability to make changes to the Applicant Guidebook after an application procedure has been initiated? Please explain.

INTA, NORID, Nominet, and Valideus emphasized this importance of ensuring predictability, planning in advance, and learning from the 2012 round.

Excerpts:

"There is a **need for predictability** for all concerned. It should be an aim of this PDP WG to endeavor to **surface likely issues and address them** wherever possible, so as to minimize the prospect of late changes to the AGB. . ." – INTA

"First and foremost, we would **hope that fewer changes will be required** to be made in the AGB in subsequent rounds. We all know how many years it took to reach a compromise in the first round. It is of fundamental importance that there is a certainty in the process and that all parties know what they can plan for. However, we think that **ICANN should not receive applications until the AGB has been accepted by all stakeholder groups**. To change unilaterally after that will make the predictability very poor. . ." – NORID

3. CC2 Questions: 2.5.3 Comments

"We would **hope that many fewer changes will be required** to be made to the AGB in subsequent rounds. It's fundamentally important that there is certainty in the process." – Nominet

"Business applicants require **greater certainty and consistency**. Many of the new gTLD applicants who are not from the traditional ICANN community have found it inconceivable that ICANN should repeatedly change fundamental terms of the Applicant Guidebook after the process has commenced, seemingly without there being any ground for objection or sanction, when applicants have invested significant time and financial resources on their applications. Two such examples would be the issue of closed generics and the three terms identified as not to be delegated due to name collision. These issues should have been properly considered and addressed in advance, not half-way through the process. Whilst one might assume that Round 1 will now have flushed everything out, it is important that **where issues have been identified as contentious there is a firm decision made on how to address this**. This should serve to keep the risk of future mid-stream changes to a minimum." -- Valideus

BC and Jim Prendergast stated that ICANN's ability to change the AGB should be limited.

Excerpts:

"ICANN's **ability to change the AGB should be very limited**. The GNSO community should be asked to clarify its policy recommendations for any implementation decision regarding that policy." – BC

"Absolutely – ICANN **should be limited**. ICANN's insistence on a unilateral right to amend the contract is a prime example of ICANN imposing its will against the wishes of the community. . ." – Jim Prendergast

3. CC2 Questions: 2.5.3 Comments

<u>INTA, NORID, BRG, RySG, Afilias, Valideus, and Jim Prendergast suggested specific conditions and rules for changes in the AGB.</u>

Excerpts:

"To the extent that change is unavoidable, **applicants should be permitted to make corresponding changes to their application to address them without penalty**, and be granted the time to do so, even if this means extending the application window. Applicants should also be **permitted to withdraw their applications**, with full refund, if the changes are such that it is no longer attractive to them to proceed with their application, and this should be a decision for the applicant alone, i.e., not at ICANN's discretion." – INTA

". . . However, this depends on whether the result for next round will be "one window opened and then closed and nothing more" or "several windows one after another". In the last instance, there might be necessary to correct possible flaws between the "windows". In these instances, ICANN should **seek consensus from the stakeholder groups before opening up the next window**, and be very careful to **make announcements on the changes**." – NORID

3. CC2 Questions: 2.5.3 Comments

"The response to the 2012 round introduced complexities that had not been anticipated or issues had been left open. Whilst lessons learnt can be applied to future policies and processes, there is the likelihood that different issues will arise in the future. Therefore, **changes should be allowed but the processes should be sufficiently robust to capture, analyse and process the issues effectively. Any changes to the guidebook after applications have been received, should be limited, and also be subject to suitable reviews and objection processes**." -- BRG

"Yes. **Certain hanges should be allowed, but ICANN should offer a time period in which applicants may prepare for, or object to, any changes to the guidebook**. For example, ICANN shouldn't be permitted to change the application fee after it accepts applications. Any legitimate changes **must have good cause and ICANN should provide reasonable warning** to all new gTLD applicants before any changes in the guidebook take effect to allow applicants a level of predictability, while also giving ICANN the ability to modify and adapt as needed without making the process overly rigid. Applicants should also be given a **reasonable opportunity to amend a pending application** if the change is made after the application is submitted that is material to the application. Application amendments should be limited to addressing the AG change and the time frame in which amendments may be made should take into account time for applicant to first object to the AG changes." – RySG, Afilias

3. CC2 Questions: 2.5.3 Comments

". . . Since issues may always arise which were unanticipated, **it is pragmatic to allow for the possibility of change after the application procedure has been initiated, but this must be kept to a minimum.** Applicants affected by such changes must also be given **adequate time to consider the impact on them and, if they choose, to withdraw without penalty**. If necessary, an application window should be extended to allow for such review." – Valideus

". . . Going forward, **any post application procedure changes should be made in concert with the community**." – Jim Prendergast

3. CC2 Questions: 2.5.3 Comments

<u>ALAC stated the AGB should not be changed after the application procedure has been initiated.</u>

"The ALAC agrees that after the application procedure has been initiated, Guidebook should not be changed." – ALAC

<u>John Poole stated that ICANN should not be limited in its ability to change the AGB.</u>

"NO. TLDs are not private property." – John Poole

2.5.3 - According to Section 14 of the Applicant Terms and Conditions, ICANN has the ability to make changes to the Applicant Guidebook. One task of this Working Group is to address the issue of predictability in future rounds, including with respect to the AGB. Do you think that ICANN should be limited in its ability to make changes to the Applicant Guidebook after an application procedure has been initiated? Please explain.

3. CC2 Questions: 2.5.4 Comments

RySG, BRG, and Afilias suggested specific changes.

"Yes. A summary from the above:
Modify the language in section 6.3 to reference related eligibility and evaluation criteria (i.e. sections 1.2, 2.1-2, and 3.2.1 of the Applicant Guidebook) to further clarify when and why an application may be declined.
Maintain the covenant not to sue only if an appeals process is drafted and defined within the guidebook.
Specify a timeframe for proposed changes/updates to the Guidebook to provide applicants with adequate warning." – RySG, BRG, Afilias

Jannik Skou stated that ICANN should be allowed to make changes to the Terms and Conditions, but should seek to minimize the need for changes.

"Yes, **ICANN should be allowed to make changes – BUT applicants have to be informed about this risk VERY CLEARLY before applying**. The ICANN community may discover a need to update the requirements (new type of security threat or whatever) across all gTLDs. That said, ICANN (and the GAC) should please minimize such changes. . ." – Jannik Skou

GAC pointed to its comments in response to questions in section 1.3.

"The GAC **supports any reasonable measures that streamline application procedures** (thereby reducing compliance costs) but that also **enable due consideration of public policy issues raised by the GAC**. As noted in the GAC's response to the first round of community consultation questions from the PDP WG, with regard to predictability:

Many gTLD policy issues require resolution at the global rather than the national level. For many purposes, in practice this means resolution within ICANN processes to ensure consistency, as application of national laws country-by-country may not be sufficient. The GAC – and others – need a degree of flexibility to respond to emerging issues in this global space which is operated by ICANN and the community according to contractual arrangements and communitydeveloped policies and procedures. The need for such flexibility continues after the conclusion of a GNSO PDP." -- GAC