



New gTLD Program Explanatory Memorandum

Discussion Draft: Exemptions to Objection Fees for
Governments

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Background – New gTLD Program

This is one of a series of new Explanatory Memos related to recent consultations between ICANN's Board and Governmental Advisory Committee concerning ICANN's New gTLD Program.

These memos were developed to document the latest position on these topics by taking into account the current thinking, discussions and public comments received. Each memo not only reflects GAC advice but also contains the reasoning and rationale on each of the relevant issues regarding the Applicant Guidebook and the launch of the New gTLD Program.

For current information, timelines and activities related to the New gTLD Program, please go to <<http://www.icann.org/en/topics/new-gtld-program.htm>>.

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

Introduction

Current Environment

The independent dispute resolution process in the New gTLD Program is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. A formal objection will trigger a dispute resolution proceeding, allowing a party with standing to have its objection considered before a panel of qualified experts. Fees for dispute resolution are paid directly to dispute resolution service providers in advance of each proceeding. Following the proceeding, responsibility for the costs is on a “loser pays” basis.

A formal objection can be filed on four enumerated grounds:

- 1) String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications.
- 2) Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.
- 3) Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.
- 4) Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

Recent Developments

The Governmental Advisory Committee has provided advice that governments should not be charged a fee to participate in the objection process. Discussions with the GAC yielded an agreed principle that governments acting on behalf of communities to protect the interests of these communities should be eligible to object without cost.

ICANN has committed to investigate a mechanism under which governments could be exempted from paying fees to dispute resolution providers based on this principle. The ICANN Board indicated that fee relief available to governments might be subject to constraints imposed by budget and other considerations.

Recommendation

Several models (described below) were considered that balanced the government interests and the need for ICANN to maintain a reasonable extent of control over expenditures. It is recommended a pre-determined amount of funding be designated by ICANN for each individual government, for the purpose of funding objection fees where a government wished to file a formal objection. Each government would be allotted an equal amount, and could continue to draw on such funds up to the maximum at its discretion, with the guarantee that at least one objection be fully funded. By fixing the funding amount (instead of the number of objections), governments would tailor the objections to minimize dispute resolution costs.

This would provide ability for governments to object without cost and even collaborate on which governments will file objections, while putting a ceiling on the maximum costs.

The initial source of funds to provide these fee exemptions can be a fixed amount set aside from the ICANN reserve fund. The portion of the USD 185,000 evaluation fee that goes toward recouping historical development costs for the program (26,000 per application) will then also be used to recoup the initial expenditures that are not recovered via the dispute resolution process.

Rationale for recommendation

Based on the recent discussions between the Board and GAC, the ideal implementation model would:

- Give a government the ability to act on those applications that are of greatest concern.
- Maintain a limit on available funding that is fair and equitable to all parties.
- Give governments flexibility to decide how to use allotted funding.
- Maintain standards for responsible use of community funds.
- Require low administrative and tracking involvement by ICANN.

A number of models have been considered in light of these factors, as discussed below. The first is the recommended model. Each of the models is accompanied by rationale recommending for and against each. For

information, estimated cost detail for each objection type is included in annex below.

- 1) Fixed amount per government per application round. Under this model, a pre-determined amount of funding would be designated by ICANN for each individual government, for the purpose of funding objection fees where a government wished to file a formal objection. Each government would be allotted an equal amount, and could continue to draw on such funds up to the maximum at its discretion. ICANN would commit that at least one objection be fully funded for each individual government that wished it.

As noted above, this is the recommended approach because it provides governments flexibility as to which objections to pursue. Although this approach requires use of ICANN administrative resources to facilitate the allocation of funds, it allows costs to be budgeted in advance for use within a particular time frame.

The other options considered are discussed below.

- 2) Limited number per government per application round. Under this model, each government would be provided with a fixed number of objections for which ICANN would fund objection fees. ICANN would continue to fund the objection fees for an individual government up to the point where it had filed the maximum number of objections. The cutoff number would be the same regardless of the outcomes of any proceedings or the actual costs incurred. This mechanism presents significant challenges for ICANN in preparing for and controlling costs. Also, it does not provide the incentive, as the proposed model does, of incenting governments to maximize utility of available funding.
- 3) Number of wins/losses. Under this model, ICANN would continue to cover costs for any government objection up to the point where the government did not prevail in a proceeding. A government losing in a proceeding could reimburse ICANN for the cost and then be able to continue receiving funding for future objections. It should be noted that all objection fees are paid up front, during the same time period. Reimbursements, if any, would occur after the expert determination has been rendered, and this would occur for all objections in approximately the same time frame. Thus, a rolling credit/debit system does not appear feasible.

- 4) Case by case review. Under this model, ICANN would establish criteria for objections that it wished to fund. When a government wished to file an objection, it could petition ICANN for a fee exemption. This would not necessarily achieve the objective of protecting the government's interest, but would rather substitute judgment by ICANN up front of which objections were worthy. It would also require the design and establishment of a costly, time consuming, non-value added procedure in the process.
- 5) Apportionment by economic classification. Under this model, ICANN could use an existing classification model for various governments, apportioning a greater number of exemptions to those classified as least developed countries. This does not appear to address the GAC's concern, as the principle was not that governments could not afford the fees, but rather, that it would be inappropriate for them to pay fees to protect the interests of their populations.
- 6) Capped fund (first come, first served). Finally, a model is possible in which ICANN could set aside a budget line item of a fixed amount, and would fund objections from governments as requested up to the point at which the funds were exhausted. This would allow maximum budgeting and cost control. This might encourage a rush from governments to file objections at the earliest possible date rather than filing based on careful analysis and consideration of the applications.

Annex: Costs in the Objection Procedure

Under the existing model, the participants in each proceeding (applicant and objector) bear the cost of the proceeding. Each party pays a filing fee to cover the administrative review of the objection and response. Following appointment of the panel, each party makes an advance payment of costs in an estimated amount to cover the entire cost of the proceeding. The prevailing party in a dispute resolution proceeding has its advance payment refunded, while the non-prevailing party does not receive a refund and thus bears the cost of the proceeding.

The amount of the filing fee and advance payment of costs are payable to the relevant Dispute Resolution Service Provider (DRSP) by the parties, in accordance with that provider's schedule of costs.

The objection procedure does allow for consolidation of proceedings where appropriate. For example, multiple objections to the same application based on the same ground might be consolidated. DRSPs are encouraged to consolidate matters wherever practicable. In cases where disputes are consolidated and there are more than two parties involved, the advance payment of costs will occur according to the dispute resolution service provider's rules.

Two potential DRSPs have provided draft dispute resolution fees to ICANN; these are available at:

<http://icann.org/en/topics/new-gtlds/icdr-fees-clean-12nov10-en.pdf>

<http://icann.org/en/topics/new-gtlds/draft-wipo-fees-clean-12nov10-en.pdf>

The following table provides an estimated cost (in USD) for each of the four types of objections:

Objection ground	Panel	Cost type	Expected DRSP	Estimated filing fee	Estimated advance payment of costs	Estimated total
String confusion	1 panelist	Fixed	International Centre for Dispute Resolution	2750 (higher if hearing is held)	6000 (higher if hearing is held)	8750
Legal rights	1 panelist with option for 3 if agreed by the parties	Fixed	Arbitration and Mediation Center of World Intellectual Property Organization	2000 (3000 if 3 panelists)	8000 (20,000 for 3 panelists)	10,000 (23,000 for 3 panelists)
Limited public interest	3 panelists	Hourly	International Center of Expertise of International Chamber of Commerce	2000	122,000	124,000
Community	1 panelist	Hourly	International Center of Expertise of International Chamber of Commerce	2000	56,000	58,000

It is acknowledged that there may be additional costs to the parties, such as securing of assistance and time spent in research and preparation of filings. These cannot be eliminated in a cost model: this memo addresses only those costs resulting from fees payable to dispute resolution service providers.