Review of the GAC Principles for the Delegation and Administration of ccTLDs (ccTLD Meeting, March 24, 2003, Rio de Janeiro)

Attorney-at-Law Stephan Welzel
Head of Legal Department, DENIC eG
GAC Principles

- issued February 2000
- nature
  - „suggest principles that will assist in the development of best practice for the delegation and administration of ccTLDs“ (Section 2.)
    - no description of actual situation
    - vision for future situation
      - „with respect to future delegations“ (Section 7.4.)
    - as if starting from scratch
Legal Impact of GAC Principles

- binding in general?
  - on governments
    - no, as no international treaty and not ratified by countries
  - on ccTLDs
    - no, as not transferred into law
  - on ICANN
    - no, as GAC itself cannot set rules for ICANN
    - no, as never adopted by ICANN formally

- ccTLDs with triangular contract
  - binding as far as implemented in contract
Political Impact of GAC Principles

- individual governments
  - some ignore them
  - some reject them
  - very few have implemented (parts of) them
- GAC
  - tries to adhere to them
- ICANN
  - tries to act on them
- ccTLDs
  - are aware of them
Basic Principle

- **triangular relation**
  - government
    - "designates" (i.e. appoints) ccTLD manager
  - ICANN
    - "delegates" ccTLD to (i.e. recognizes) designated manager
  - ccTLD manager
    - is "trustee" for ccTLD

- "communication"
  - between government and ICANN
  - between government and ccTLD manager
  - between ICANN and ccTLD manager
Role of Government

- government „ultimately represents the interest of the people of the country“, thus government to „ensure that the ccTLD is being administered in the public interest“ (Section 5.1.)

- governments „maintain ultimate policy authority over their respective ccTLDs“ (Section 5.2.)
Change of ccTLD Manager I

- mandatory
  - „when ICANN is notified by the relevant government“ that ccTLD manager has „contravened the terms of the communication“ (Section 7.1.)
    - government orders change
    - ICANN executes without any possibility to check or object

- possible
  - „when ICANN notifies the relevant government“ that ccTLD manager „threatens the stability of the DNS“ or „has breached and failed to remedy“ the contract with ICANN (Section 7.3.)
    - either: government and ICANN force ccTLD manager to remedy situation
    - or: government „effects“ change of ccTLD manager
Change of ccTLD Manager II

- where GAC principles not implemented
  - „upon the tendering of evidence“ by government that ccTLD manager „does not have the support of the relevant local community and of the relevant government“ (Section 7.2.)
    - since government represents local community, practically government orders change
    - ICANN executes without any possibility to check or object
  - „upon tendering of evidence“ by government that ccTLD manager „has breached and failed to remedy other material provisions of RFC 1591“ (Section 7.2.)
    - government determines whether ccTLD follows RFC 1591
    - if government thinks no, it orders change
    - ICANN executes without any possibility to check or object
Most Problematic Issues

- expansion of governmental power over ccTLD
  - without consent of ccTLD manager
  - without national legal procedure followed
- government can order a change of ccTLD manager
  - without following according national procedure
  - without being accountable or liable
  - without ICANN being able to object
- various conflicts with national law
  - containment of governmental competence
  - lawful procedures
  - material law, e.g. on data protection
Some Problems in Detail I

- uniform approach
  - no consideration of various models, traditions, and cultures
  - strength of ccTLDs is variety
    - also from governments‘ perspective

- assumption on representation of local community
  - government formally represents people in general
  - interests of Internet users represented (also) by others specifically

- view on ICANN and ccTLD manager
  - ICANN as executor of governmental will
  - ccTLD manager as object of governmental will
    - bypassing of protection enjoyed under national law
Some Problems in Detail II

- lack of realism
  - no reflection of actual situation with most ccTLDs
  - no path to implementation

- silence on important practical issues
  - scope of ICANN policies regarding ccTLDs
  - procedural questions
    - even within GAC principles framework

- conflicts with material law
  - constant availability of zone files and registration data to ICANN (Section 10.2.1.)
    - data protection
    - copyright protection of databases
    - fiduciary duties of ccTLD managers
Some Problems in Detail III

- application of gTLD rules?
  - ADR (Section 9.1.6.) and possible additional policies (Section 9.1.8.)
    - ccTLDs that allow registrations from non-residents
    - at the same time: ccTLDs in EU legally obliged to allow such registrations

- coverage of unrelated issues
  - protection of country names under new gTLDs (Section 8.3.)
Review of GAC Principles

- need for GAC principles at all?
  - why uniform approach?
  - why not deal with relation government-ccTLD locally?

- general relation
  - ICANN-governments-ccTLDs

- details
  - practicability
  - legality
- stephan@denic.de