The Internet Corporation for Assigned Names and Numbers

ICANN

22 September 2009

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via email: janis.karklins@icann.org

Dear Janis

Thank you for the GAC's letter of 18 August, containing the GAC's comments on version 2 of the Draft Applicant Guidebook. I appreciate the detailed consideration given by the GAC to the issue of new gTLDs. Outlined below is a detailed response to the GAC's comments, which I trust the GAC will find useful. I look forward to the Board continuing discussions with the GAC in Seoul, on version 3 of the Draft Applicant Guidebook which will be published by the end of September 2009.

I. ICANN'S PREPAREDNESS FOR NEW gTLD ROUND

1. Scalability of gTLD Expansion and Stability of the Internet

The GAC is aware that many root server operators have raised concerns about the effect that a major expansion of the gTLD space would have on the stability of the Internet. The GAC considers that a controlled and prudent expansion of the DNS space is of primary importance for safeguarding the stability, security and interoperability of the Internet on which the global economy and social welfare relies so much.

The GAC notes that the SSAC and RSSAC have been asked to prepare a report on the scalability of the root zone and the impact of the potential simultaneous introduction of new gTLDs, DNSSEC, IPv6 glue, and IDNs into the root zone, which will be published in August. The GAC will look to this report to provide reassurance that the scaling up of the root will not impair the stability of the Internet and that the technical safeguards are sufficient. The GAC is hopeful the report will stress the importance of developing an alert or warning system, as well as the need for a process for halting the adoption of new top level domains should the root zone begin to show signs of breach or weakness. It should be noted that although the GAC is encouraged this study is underway there is some concern as to why the proper analysis did not occur earlier.

RESPONSE

In February 2009, with Resolution 2009-02-03-04, the ICANN Board requested the Root Server System Advisory Committee (RSSAC), the Security and Stability Advisory Committee (SSAC),

and the ICANN staff, including the IANA team, to study the potential issues regarding the addition of IDNs, IPv6 addresses, DNSSEC and substantial numbers of new TLDs to the root zone. The Terms of Reference for this study are at: http://www.icann.org/en/committees/dns-root/root-scaling-study-tor-05may09-en.htm.

We note the GAC's concern that the analysis of the scalability of the root zone should have been undertaken earlier, at the time the new gTLD PDP was being undertaken, and confirm that it was the opinion of the technical community that the DNS could scale to accommodate an unlimited number of TLDs, including IDNs. (See: www.icann.org/en/topics/dns-stability-draft-paper-06feb08.pdf.)

The more recent advent of DNSSEC and IPv6 glue and their potential simultaneous impact on the scalability of the DNS, in addition to new TLDs, has resulted in the current study being undertaken to ascertain, if these combined effects will have an adverse effect on the DNS.

Interisle was selected to perform this study. In the course of their study, they recommended that a modeling effort be undertaken with the assistance of TNO. TNO produced a model and a companion report. The Interisle report was posted for public along with a covering note from the joint RSSAC/SSAC/ICANN staff steering group for this study on 18 September 2009, http://www.icann.org/en/announcements/announcement-2-18sep09-en.htm. The TNO model and simulation system is undergoing verification and will be released soon along with the companion report. The Interisle report addresses the interactions between potential changes that would impact the root zone and the inherently adaptable nature of the root system as the fundamental aspect of considering the implications of these changes. The report also does stress the need for an early warning system as a means for understanding emerging risks to enable effective planning in response. The SSAC and RSSAC along with the study steering group will be evaluating the report against the Terms of Reference and preparing recommendations for the Board and the public related to establishment of an early warning system and approaches to addressing concerns raised in the report.

In addition and as part ICANN's ongoing efforts to ensure the stability of the DNS, ICANN staff contracted with the DNS Operations, Analysis and Research Center (https://www.dns-oarc.net/) as independent and well-respected experts to provide an analysis of the impact of adding IPv6, DNSSEC, and additional top-level domains to the ICANN-operated L root server.

This study, while independent of the Root Server System Root Scaling Study and focused specifically on the impact to the ICANN-operated L root server, has been used as input in the more comprehensive study undertaken by the Root Scaling Study Group.

The final report of the DNS-OARC study has now been published at http://www.icann.org/en/topics/ssr/root-zone-augementation-analysis-17sep09-en.pdf.

Questions 2 and 3 are combined as responses overlap

2. Economic Studies

The GAC had registered its concern at the Mexico City meeting that the two preliminary reports on competition and price caps had not provided appropriate answers to the 2006 Board request for economic studies to be undertaken. Such analysis is needed to take full account of the entire domain name environment. The GAC remains concerned that the threshold question has not been answered whether the introduction of new gTLDs provides potential benefits to consumers that will not be outweighed by the potential harms.

The GAC notes that the economic reports commissioned by ICANN have failed to distinguish adequately between real demand and derived demand arising from widespread concern in the business community about the multiplication of the opportunity for cybersquatting, fraud and malicious conduct generally. The GAC notes that the recent IRT report addresses a number of related intellectual property protection and enforcement issues. However, the GAC believes there is an urgent need for separate empirical research to be undertaken regarding the costs of defensive registrations and the impact on consumers of the availability of new gTLDs. To the extent that the uses of new gTLDs are innovative and respond to registrant demand, the GAC expects there would be benefits to consumers.

The GAC also recommends that any analysis of the gTLD environment encompass fact gathering beyond empirical studies. A thorough analysis would include interviews with and perhaps surveys of a wide cross-section of market participants. As a first step in this process, the GAC recommends that ICANN more systematically conduct outreach and data gathering from the variety of resources represented by the participants in the malicious conduct and e-crimes sessions in Sydney.

3. Competition

The GAC has considered whether there is a risk that the gTLD process could create a multitude of monopolies rather than increasing competition. This rests in part on important, but unanswered questions relating to: (1) whether registrants view gTLDs as reasonable substitutes for one another; and (2) why some registrants purchase the same domain name in multiple TLDs.

Further concerns have arisen regarding the apparent desire to alter existing policy that requires a structural separation between registrars and registries. Change to this policy should be guided primarily by whether and how such a change would benefit consumers and registrants. Studies to date have not fully addressed this aspect of the marketplace, nor have they included an analysis of the potential harm to domain name registrants of permitting registrars to operate as new gTLD registries.

RESPONSES

New gTLD – Economic Study

I. Summary

The calls for economic studies cover several different issues, and even these questions/phrases mean different things to different people. The issues fall into the following three categories:
1) Fulfillment of 2006 Board resolution
2) Economic analysis of benefit vs. cost
3) Public benefit of introducing new gTLDs / demand for new gTLDs

ICANN proposes a plan for dealing with each of these issue areas separately. Once we have agreed on an overall plan internally, ICANN will structure our answers into appropriate categories externally as well, and avoid the inappropriate grouping under the heading "economic studies".
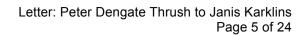
There has been substantial work to answer the economic questions associated with new gTLDs. A set of four related studies was released. Existing economic studies indicate significant consumer benefit flowing from the introduction of new gTLDs and identify risks that should be mitigated prior to introduction. Some of the elements that offer benefits to consumers include: lower cost, more choice, new languages (IDN), and innovation. Staff has taken action to mitigate identified risks through improved new gTLD implementation plans, primarily related to IP concerns and malware concerns.

There has been comment that additional study should be undertaken. That form of comment has cited different objectives. We anticipate that the analytical value of further studies will be small; and, it appears that an objective of the calls for additional study is to delay the implementation. It may well be that no action/outcome (other than delay) will quell that criticism. Still, there may be consensus-building value in heeding the call for additional study, and staff is proposing additional study.

II. Background

Contractual Issues
There has been a considerable amount of research and work undertaken on the impact that the introduction of new gTLDs will have on various stakeholders, including consumers, trademark owners, existing registries and registrars. In addition to the economic studies commissioned by ICANN, much of the work undertaken on the 'overarching issues' have addressed the issues of

cybersquatting, malicious conduct and trademark related issues, such as defensive registrations, which are nominated by the GAC as areas of concern.

While acknowledging the GAC's assertion that the economic studies did not answer the Board's call in 2006 for economic studies, it must be noted that the Board's request of 2006, was associated with considering the renewal and amendment of *existing* gTLD contracts, such as .biz and .info, and not new gTLDs. These issues are:
- Should there be price caps for registration services?
- Are registrations in different TLDs substitutable?
- What are the effects of the switching costs involved in moving from one TLD to another?
- What is the effect of the market structure and pricing on new TLD entrants?

During the comment period of the first Draft Applicant Guidebook a number of issues were raised that focused on the costs associated with the introduction of new gTLDs, and the risks associated with:
- Trademark infringements,
- Protection of trademarks at top-level,
- Costs for defensive second-level registrations,
- Potential growth in malicious conduct, and
- Potential for user confusion

In an attempt to answer questions related to registry contractual issues, market structure questions and possible new costs and risks as identified by the Board and comments received on the first Draft Applicant Guidebook, a series of related studies of the domain name marketplace were undertaken, and subsequently released, namely:
- Preliminary Report of Dennis Carlton Regarding the Impact of New gTLDs on Consumer Welfare (March 2009)
- Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries (March 2009)
- Report Of Dennis Carlton Regarding ICANN's Proposed Mechanism for Introducing New GTLDs (May 2009)
- Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing (May 2009)

The studies identified potential costs associated with gTLD expansion, for example:
- Potential for user confusion,
- Imposing significant costs on trademark holders by forcing them to establish "defensive" registrations,
- Increased opportunity for malicious conduct, and
- Taxing the capabilities of the root zone,

and recommended that the gTLD implementation undertake actions in mitigation of those concerns. These actions include:

- Existing objection and dispute resolution procedures for:
  - Similar TLD applications causing user confusion
  - Misuse of community labels
  - Infringement of rights
- Introduction of additional rights protection mechanisms
- Measures to mitigate and reduce malicious conduct
- Root zone scaling study

The study also anticipated benefits with gTLD expansion:
- Removing artificial restrictions on the marketplace
- Increasing output, lowering prices and increasing innovation
- Increased, enhanced participation
- Expanded community representation
- Expanded regional participation through IDNs
- Clearer, easier brand identification: i.e., a brand no longer has to be "brand.com"

Finally, there were conclusions regarding price controls:
- Price caps or ceilings on prices charged by operators of new gTLD registries are not necessary.
- Trademark holders should be protected through alternate rights protection mechanisms.
- New gTLD registries that attempt to act opportunistically by subsequently raising prices face significant risk of harming their reputation and the loss of customers.
- The imposition of price caps for new gTLDs may inhibit the development and marketplace acceptance of new gTLDs.

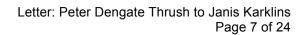### III. Action Plan

Fulfillment of 2006 Board resolution:
- Consider analysis that has been done with respect to the 2006 Board resolution, to determine if additional action can be fruitfully taken.
- Augment the existing studies to map the findings to the questions posed by the Board.
- Seek positive closure on this issue with the Board and community.

Economic analysis of benefit vs. cost:
- Retain economists to review and summarize work to date, ideally putting that work into the context of the questions some have said remain open.
- With that work done, state that the question is answered from an ICANN viewpoint.

Public benefit of introducing new gTLDs:
- Assuming positive results of a feasibility assessment (understanding expected outcome, cost, and time), staff will initiate a new study on public benefit of new gTLDs. .

- The public benefit analysis will be a verification of the policy work. This approach will enable implementation work proceed while this additional study is being done.
- This is intended to be responsive to the community call for a new study.

Registry-Registrar Separation

I. Status quo

ICANN has not had a policy prohibiting gTLD registrars from applying for or operating registries. Historically, ICANN has permitted registry-registrar cross-ownership with structural separation requirements. Recent agreements entered with registry operators since 2005 have included prohibitions on acquiring more than a 15% interest in registrars.

Currently, there is not a prohibition on registries acting as resellers or using registrars as back-end registry service providers. Registrars currently provide back-end services for TLD registries.

Current practices have worked well in the context of a relatively static set of competitors on the registry and registrar side. It is expected that the numbers of registries using back-end registry service providers may grow substantially in the new gTLD environment. This isn't anticipated in current practices, and requires a reevaluation of structural separation in the new gTLD environment.
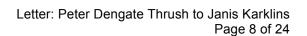
II. New gTLD implementation planning

Based on the requirement to reevaluate current structures, and at community request, ICANN commissioned an independent study that recommended a limited lifting of co-ownership restrictions. That and a set of face-to-face community meetings resulted in a model published in the initial Guidebook.

The registry constituency issued a report that opposed integration and sought to prohibit registrars from competing for back-end services. Two registrars published responses. As a result of the registry report, ICANN engaged another set of economists who recommend that, with caveats, all restrictions be removed.

The two economists were selected for their diversity of views – they are on opposite ends of the spectrum in antitrust thinking. It was thought that they would either: develop separate views for discussion; or, arrive at the same view, indicating a conclusion that would have broad "economist" support.

The anticipated changes in the market and the fact that no party is recommending an un-changed status quo requires ICANN to consider new options. There are four options to be considered:
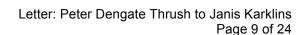
1) No cross-ownership restrictions except where there is market power and/or registry price caps (regulation needs, if any, left to regulating authorities)
2) No cross-ownership restrictions for new registries, existing restrictions for existing registries (probably most disagreeable outcome to registries)
3) Limited lifting with enhanced structural separation:
   a. The registrar cannot sell names in the co-owned registry, or
   b. The registrar can sell a very limited number of names in the co-owned registry
      While this approach may represent a reasonable transition strategy, economists indicate this removes the possible consumer advantages in efficiencies due to structural integration.
4) Complete restrictions:
   a. Registries cannot have ownership percentage in registrars, and vice versa
   b. Registrars prohibited from providing back-end services (this might be accompanied by reciprocal restrictions, i.e., that registries cannot provide back-end services for other registries and registries cannot own resellers).

The final position will take into consideration:

1. Registrar accreditation still required.

2. If an entity is abusing its market position to hinder competition, a relevant government competition authority should make that determination. ICANN has contractual authority, and governmental authority on competition issues is most appropriate.

3. Rules made should be enforceable, not easily circumvented. Rules to prevent "selling shelf space" or against owning resellers can be overcome through other forms of agreement or organization. Imposing co-ownership restrictions on registries with price caps would not necessarily prevent them from inserting themselves higher in the value chain and circumventing the effects of price caps.

4. While some risks are avoided through limited lifting of restrictions, the limitation also obviates most of the benefits.

5. ICANN might consider removing price controls on registries without market power in order to facilitate their entry to moving into the less regulated space.

With the current input:
   o The incumbent registries generally advocate imposing new and tighter restrictions on the ability of registry operators to own registrars. Additionally, existing registries want to define back-end registry operation to be the same as a commercial registry operator. This restriction and interpretation would effectively limit registrars' ability to compete against registries' TLD and back-end services offerings. Registries argue that since they have been prevented from owning registrars they would be at a disadvantage if the restrictions

are not tightened since they have not established retail relationships with registrants. One of the risks identified is that registrars can leverage "shelf space" to gain back-end service market share.

- o Registries argue that abuses can occur if a single entity holds the registry and customer (registrar) data.
- o Economists are still at work, but so far have indicated (in the CRA report and at the Sydney workshop) that there are potential benefits to consumers from allowing cross-ownership, including lower prices and more innovation.
- o Economists also indicate that separation does not fully meet registry concerns. Registrars can and will allocate shelf space through means other than agreement to provide back-end services: for cash payments or other forms of consideration. They also indicate that data abuses can be prevented through agreement.

Sources:

http://www.icann.org/en/registries/agreements.htm

http://www.icann.org/en/registrars/accredited-list.html

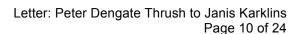http://www.icann.org/en/tlds/app-index.htm

4. Balancing Competing Business Models

Such is the global reach of the Internet that varied business models will arise amongst different commercial parties, especially where the parties operate in different jurisdictions, in different markets and in varying spheres of economic development.

While noting that applicants would be allowed to scale their applications, so that an applicant that intends to compete with large top level domains and have millions of registrations would require infrastructure on a greater scale, while a registry that intends to address a small local community would need infrastructure on a lesser scale, the GAC seeks reassurances that the evaluation of the applicant's business model would be conducted on merit and not rely solely on corporate size and financial criteria.

RESPONSE

The balancing of competing business models is a fundamental principle that ICANN has applied in its implementation of the evaluation process. ICANN has avoided setting highly prescriptive technical or financial requirements precisely to enable consideration of applications representing a variety of applicant types, jurisdictions, and purposes, both commercial and non-commercial.

In accordance with the GNSO's policy recommendations, the evaluation process does evaluate whether the applicant has the technical, operational, and financial capability to run a TLD registry that will be secure and stable. In addition, successful applicants will have to pass pre-delegation tests to ensure that they have put in place operations that meet certain technical aspects of the evaluation criteria. The evaluation process takes into account such elements as the level of preparation shown by the applicant, level of resiliency in proposed systems, and consistency of technical, operational, and financial elements within the application. The current evaluation criteria contain no advantage for corporate size or financial strength beyond that required to meet the plans specified in the application.
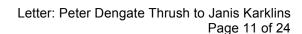
5. Risk of End User Confusion

It will prove likely that the average Internet user will place greater emphasis on retaining the ease of navigation around the existing DNS. The DAG2 does not specifically address the issue of how the new gTLDs will integrate with the existing gTLDs. The GAC believes therefore that there is a need for more studies to be commissioned which assess the impacts of a radically changed new gTLD regime on end users. Such studies should focus in particular on the extent to which the expected proliferation of domains may cause confusion or may exacerbate the harms from the malicious conduct and criminal activity that consumers experience in the current marketplace, or whether a more measured rollout would be more beneficial and cause less consumer confusion. The GAC wishes to emphasize the point that such fact finding studies as these should have been conducted prior to the decision to introduce new gTLDs.

RESPONSE

There are several areas of the Draft Applicant Guidebook that address issues of potential confusion. One GNSO policy recommendation states that new gTLD strings must not be confusingly similar to an existing top-level domain. This recommendation is implemented through the work of the string evaluation panel that will compare each applied for string against every other string, existing and applied for, to determine if a likelihood of user confusion if both strings are delegated in the root zone. Their work will be abetted a string similarity algorithm, developed specifically for the new gTLD evaluation process at considerable expense. The algorithm, while not dispositive, will provide evidence of the degree of similarity.

In addition to this evaluation, parties with 'standing' may object to an applied for string as being so similar to an existing, or an applied for string, that user confusion will likely result. The confusion may result from visual, oral or semantic similarity.

Another policy recommendation states that strings must not infringe the existing legal rights of others. ICANN has made a significant investment to develop rights protection mechanisms (including the formation of an advisory panel, the Implementation Recommendation Team) so

that user confusion does not result in the misappropriation of trademarks. These potential mechanisms include the establishment of a Trademark Clearinghouse, rapid takedown procedure, a requirement for thick Whois data maintenance, and a post-delegation dispute mechanism. Consideration of these proposed mechanisms is now ongoing.

In addition to these new rights protection mechanisms, the Guidebook has always provided for an objection process where rights holders can object to applied for strings considered to violate their rights. Any rights holder has standing to object and these procedures and standards are well defined in the Guidebook.

Considerable study has been undertaken (both before and after the publication of the first Guidebook) to determine and mitigate the potential for end user confusion. Input to this study was received from a number of stakeholders on possible costs and risks associated with the introduction of new gTLDs, notably Anti Phishing Working Group (APWG), Registry Internet Safety Group (RISG), the Security and Stability Advisory Committee (SSAC), Computer Emergency Response Teams (CERTs) and members of the banking, financial, and Internet security communities. Studies by the APWG and RISG were published. ICANN also consulted with firms that advise national trademark offices to best understand how to address confusion issues.

Certain trademark owner input comment indicates that new TLDs will enable brand owners to establish user awareness about their TLD labels and that new TLDs will increase the use of search engines, rather than typing trial addresses in address bars thereby reducing the number of typos and resulting in fewer successful cybersquatting instances and phishing attacks.

It is acknowledged that some significant level of user confusion with domain names clearly exists at present, for example, the use of lookalike and similar domains are currently a significant factor in both phishing and fraud. ICANN views the introduction of new gTLDs as an opportunity to reduce this confusion by allowing e-commerce entities, as well as others, to operate their sites from a unique domain space which matches its brand and which is under their control. If, for example, authentic paypal sites ended only in .paypal - potentially the current risk of fraud or phishing using labels such as pay.pal.com or paypa1.com or paypal.com.us would be reduced.

Steps taken to mitigate malicious conduct will continue. ICANN will explore the formation of a working group combining members within the security industry and ICANN community to help develop and assess solutions and specific implementations of proposed mitigation measures.

6. Administrative Resources

Consideration should also to be given to the increase in the required administrative resources available to ICANN for the management of the DNS arising from the expected significant increase in domains, and whether other activities, such as contract compliance, will be impacted by the possible diversion of resources to processing new gTLD applications.

The GAC also notes that potential new registries will come from many countries in the world with different languages and cultures. ICANN will need to address the need for it to adjust as an organization to a more diverse Internet community with the likely appearance of contractors outside the United States working within different legal environments and legal systems.

RESPONSE

ICANN is currently identifying operational impacts on the organization from the introduction of new TLDs. ICANN departments and internal processes that may be impacted by the introduction of new TLDs will be reviewed and prioritized, to ensure that sufficient resources are available. A separate department will be established to oversee the processing/evaluation of applications, assisted by a number of evaluation panels. ICANN does not foresee any diversion of resources from existing functions due to the processing of new gTLD applications.

ICANN has recently added contractual compliance and legal staffing resources in the Asia / Pacific region, and intends to hire additional compliance staff prior to the delegation of new TLDs in the root. This is a small part of the scaling of ICANN staffing to be operationally ready to address the requirements for providing services for new TLDs. An operational readiness plan is being prepared to provide IANA, registry liaison, contractual compliance, finance and other services.

ICANN anticipates new registries will be added that are representative of the global Internet community. These registries will come from many countries worldwide, supporting a wide range of languages, cultures and scripts. ICANN is already adjusting by employing a diverse international staff in offices located in its offices located in Australia, Belgium and the United States, as well as in regional locations such as Egypt, Niger, Poland, France, the Netherlands, Switzerland, the Caribbean and Italy.

II. IMPLEMENTATION ISSUES

1. Level of Awareness among Stakeholders and the Business Community

ICANN should address the very low level of awareness of the proposed gTLD round amongst the business community, in particular amongst small and medium sized businesses, outside the Internet industry and the existing registry and registrar communities. The GAC recommends that

ICANN more actively promote the opportunity for business in the period prior to the launch of the first and subsequent gTLD rounds.

RESPONSE

As you are aware, ICANN has recently undertaken a number of outreach activities in New York, London, Hong Kong and Abu Dhabi. While the primary focus of these events was to discuss the work of the rights protection mechanisms, it was also an opportunity to inform a broader audience about ICANN and the introduction of new gTLDs. Further events are being planned for Latin America for later in the year. ICANN's Global Partnerships team has provided information at various events they have attended in their respective regions.

A comprehensive communications strategy has been developed that will be published as part of the implementation plan for new gTLDs, and ICANN would welcome assistance from GAC members in identifying avenues and options for outreach in their respective countries. A significant amount has been expended on this effort to date and the go-forward budget, leading to the delegation of new gTLDs is approximately $2.7 million dollars.

2. gTLD Categories

The GAC proposes that ICANN should actively consider a more category-based approach to the introduction of new gTLDs. This could allow for different procedures for different types of TLDs, including non-commercial cultural, linguistic and regional gTLDs which would strengthen cultural diversity on the Internet, creation of local content, and freedom of expression. It would also potentially lessen consumer confusion and provide a structure for a more measured rollout of new gTLDs.

Furthermore the GAC believes that the structure of the gTLD application fee regime should reflect these different categories and the limited financial resources available to applicants for some of them. The GAC also feels that it would be logical and reasonable to apply existing policy principles and processes for ccTLDs (such as those policy provisions outlined in the GAC's ccTLD principles) to any top level domains intended to service a specific community within a specific national jurisdiction.

RESPONSE

Significant consideration has been given to the issue of the introducing category-based TLDs in the new gTLD process. The policy recommendations of the GNSO and the GAC principles have resulted in the creation of three gTLD categories or types:
•   Community-based TLDs
•   Geographic Name TLDs

- Everything else (called Open TLDs)

Similarly to the GAC, community comment suggests the creation of several TLD categories: for example, single-owner, country, intergovernmental organization, socio-cultural, community and open. Depending on the category, various accommodations are suggested; for example, no requirements for an ICANN contract, or to use accredited registrars, or to follow consensus policy, or policy provisions outlined in the GAC's ccTLD principles. Some might be restricted to not-for-profit status, be eligible for reduced fees, require registration restrictions, and have names reserved in anticipation of registration by certain parties.

The following table indicates some of the categories of TLDs and the accommodations proposed in some of the public comments:

TLD CATEGORIES PROPOSED

TYPE	Contract	Use of Registrars	Consensus Policy	May Be For-Profit	Fees	Restrictions	Name Blocked
Single-owner	Yes	No	Yes	Yes	Volume discounts	Restricted	Sometimes
Geographic	No	No	No	Yes	Voluntary	Open	Yes
I/O	Yes	Certain Cases	No	Yes	Normal	Open	Yes
Cultural	No	No	No	No	None	Restricted	No
Community	Yes	No	Yes	Yes	Normal	Restricted	No
Open	Yes	Yes	Yes	Yes	Normal	Open	No

The introduction of a number of new gTLD categories with a number of different accommodations will lead to a complex and difficult application, administration and evaluation process, in addition to a very complicated contractual compliance environment. Additionally, there will be considerable debate and discussion in the community as to whether certain accommodations should be made. Should certain gTLDs not be required to have an agreement with ICANN or not be required to follow consensus policy? Should certain TLDs be required to maintain not-for-process status? These discussions and debates will take considerable time and resources and may ultimately not result in consensus.

Parsing fees among TLD categories is problematic at this time due to the uncertain number of applications and thus the current lack of clarity about the extent to which economies of scale can be realized in supporting new gTLDs operationally. It will be difficult to create different fee structures (application or annual fees) in this uncertain environment. Reductions in some application fees will result in increases to others. This is also true in the area of annual registry fees. The annual fee reduction made between the first and second version of the Draft Applicant Guidebook lowered fees to the extent possible given the unknown number of TLDs that will be delegated into the root zone. ICANN has always stated that the idea of fee categories and lower fees will be investigated after the first round and following removal of many of the contingencies and uncertainties.

Finally, the structure of TLD categories, if granted different accommodations with differing contractual obligations, would result in significantly higher compliance costs and therefore, annual fees. If a self-declaration program is instituted and contractual accommodations are eliminated or minimized, fees can remain constant.

It may well be that as definitive categories of applicants emerge in practice, and as ICANN and the respective communities gain further experience of possible benefits of additional gTLD categorization over time, organizational structures might be developed with ICANN to reflect these categories. That will be a consequence of bottom-up policy developments by affected participants, according to the ICANN model. Nothing in the current implementation procedures foreclose those future developments.

3. Geographic Names at the Top Level

The GAC has commented on the use of geographic names as gTLDs on various occasions. The GAC principles of 28 March 2007 emphasize that "ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities" (Article 2.2). In a letter dated 24 April 2009, the ICANN Board received input from the GAC regarding the issue of geographic names as new gTLDs. In this letter the GAC pointed out that the rights of relevant governments or

public authorities, as representatives of the sovereign state or territory, cannot be limited as such by ICANN or by any procedures introduced by ICANN for new gTLDs.

The GAC is of the opinion that the DAG2 is a substantial improvement on its predecessor, but that it does not yet fully reflect the GAC position that governments and other public authorities, as representatives of citizens of a sovereign state, territory, province or city, have a legitimate interest in the use of geographical names as new TLDs.

The GAC therefore proposes the following amendments to be incorporated in version 3 of the Draft Applicant Guidebook (further in the text - DAG3):

i. Strings that are a meaningful representation or abbreviation of a country name or territory name should not be allowed in the gTLD space

These strings represent countries or territories and the principle of sovereignty must apply. TLDs in this category should therefore be treated in the same way as ccTLDs.

The use of exhaustive listings (e.g. ISO 3166-1) will not cover all the ccTLD-like applications envisaged by the GAC and ccNSO, in particular in the following categories:
'Commonly referred to as' type strings representing a country or territory but which are not official titles, e.g. .america, .ceylon, .holland;
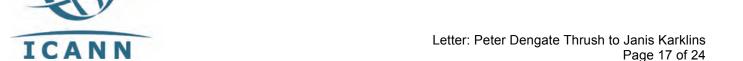*Common or general names that are often applied to more than one country, e.g: .guinea*

RESPONSE

While understanding the sentiment that a country name TLD should be treated as a ccTLD, ICANN policy constrains the way in which it is possible to provide country name TLDs to all countries and territories is under the new gTLD program at this time.[1] The treatment of country and territory names, in version 2 of the Draft Applicant Guidebook, was developed in the context of the points raised by the GAC, the ccNSO, and the GNSO policy recommendations and trying to find a balance among the somewhat contrary views. Applications for country and territory names will require evidence of support or non-objection from the relevant government or public authority which is consistent with GAC principle 2.2.[2], and that evidence must clearly indicate that the government or public authority understands the purpose of the TLD string and the process and obligations under which it is sought.

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[1] Meaningful representations of country or territory names in non-Latin scripts will be available under the IDN Fast Track process but country and territory names in Latin scripts are available in the gTLD program only, until the ccTLD policy development is complete.

[2] ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities

Safeguards have been developed to ensure that the relevant government or public authority's sovereign rights are respected, and that the process is understood. It is ultimately the government or public authority's discretion whether to support, or not support, an application for a country name TLD, and the circumstances under which they would be willing to do so.

The Board raised concerns that the criteria for country and territory names, as it appeared in version 2 of the Draft Applicant Guidebook was ambiguous and could cause uncertainty for applicants. Subsequently, on 6 March 2009, the ICANN Board directed staff to, among other things, "… revise the relevant portions of the draft Applicant Guidebook to provide greater specificity on the scope of protection at the top level for the names of countries and territories listed in the ISO 3166-1 standard".

The revised definition, provided in a [Geographical Names](#) excerpt of the guidebook posted on 30 May 2009, continues to be based on the ISO 3166-1 standard and fulfills the Board's requirement of providing greater clarity about what is considered a country or territory name in the context of new gTLDs. It also removes the ambiguity that resulted from the previous criteria that the term 'meaningful representation' created.

The Board's intent is, to the extent possible, to provide a bright line rule for applicants. While the revised criteria may have resulted in some changes to what names are afforded protection, it has not changed the original intent to protect all names listed on the ISO 3166-1 list, including the short or long form of the name. It is felt that the sovereign rights of governments continue to be adequately protected as the definition is based on a list developed and maintained by an international organisation.

In the context of the revised definition, the name America is afforded protection, while the names Ceylon and Holland are not. However, the objection process does provide a secondary avenue of recourse. An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted. With regard to the names .Guinea and .Guinea-Bissau; only the relevant government or public authority for the respective countries can agree to support, or not-object, to the use of their respective names.

ii. gTLDs using strings with geographic names other than country names or territories (so called geoTLDs) should follow specific rules of procedure

The Draft Applicant Guidebook already provides for specific rules of procedure, such as the creation of a Geographic Names Panel or the requirement that an applicant for a geoTLD must document the government's or public authority's support for, or non-objection to, the applicant's application, and must demonstrate the government's or public authority's understanding of the string being requested and its intended use.

However, the gTLD regime as proposed in DAG2 implies that the active involvement of public authorities would be limited to the application and evaluation phase of the new gTLD process. However, the GAC is of the view that the principles of subsidiarity should also apply after delegation. An approval or non-objection from the relevant government or public authority could for example be based on certain obligations on a gTLD registry for which the registry is held accountable (which may include direct legally binding agreement under contract with the relevant public authority). In such cases there could be a need for procedures that allow the relevant governments or public authorities to initiate a re-delegation process, perhaps because of infringement of competition legislation, misuse or breach of contract, or breach of the terms of approval/non-objection.

Furthermore, in cases of a change in the ownership structure of a geoTLD, ICANN should establish a new process of approval or non-objection for that geoTLD by the relevant public authority. *The GAC will provide input in this regard in the near future.*

RESPONSE

There is nothing to prevent a Government or public authority conditioning the granting of their approval of TLD requests to the TLD operator and so can influence policy making in a manner appropriate and acceptable to the government or public authority for that TLD. In addition, if the geographic name gTLD designates itself as a community TLD it will have restrictions in its agreement consistent with the restrictions associated with its community-based designation. If the TLD strays from those obligations to represent the community (through registration restrictions, for example), the government can lodge an objection and the decision maker can order the registry to comply with the restrictions in the agreement or face sanctions). To ensure this path is available, the government could condition its approval of the TLD application upon the TLD identifying itself as community TLD so that the government could lodge an objection if the registry operator does not live up to its obligations.

The ICANN gTLD Registry Continuity Plan was developed to transition a TLD to a successor operator in the event that a registry or sponsor is unable to execute critical registry functions, and continue the operation of a TLD in the longer term. This plan will be amended in light of the new gTLD process and, in the case of geographical names as defined in the limited manner by this process, will require the approval of the relevant government or public authority.

4. Objection Procedures and Costs

The GAC considers that the dispute resolution process appears to have the potential to be extremely complex and protracted. The GAC also believes that the cost of pursuing disputes may well prove to be a barrier to legitimate objections by interested parties.

The GAC notes the importance of sensitivities with regard to terms with national, cultural, geographic, and religious significance. The GAC has serious concerns about the practical modalities for addressing objections on these grounds, including ICANN's proposal to establish a panel of three judicial experts which may not fully take account of cultural and other national and differences in legal interpretation as to what is morally offensive or threatening to public order.

Specifically the GAC believes that there is a need for more work to be done regarding the costs and the ability to object, noting that public interest groups may wish to object but may be unable to do so due to the costs involved. The GAC will deliberate further on alternative solutions with respect to how best to deal with applications for new gTLDs that may be considered morally offensive or threatening to public order.

DAG2 appears to require governments to follow the same procedures and pay the same costs as other objectors. In situations where a government or public authority objects to a particular application on the grounds of public policy however, it would be inappropriate for ICANN to require the said public body to incur the costs or subject itself to the limitations associated with a formal objection process primarily designed for non-governmental stakeholders. Moreover, where the government or public authority is a member of the GAC, the ICANN By-laws already provide a more appropriate mechanism for the GAC to provide advice directly to the Board on issues of public policy.

The GAC notes that the public comment section associated with each application may well provide one avenue for governments wishing to make representations should they chose to use it. The proposed Independent Objector might also consider representations from governments at no cost to them. The GAC would therefore invite the ICANN Board to include these existing and potentially new provisions in the procedures foreseen for the DAG3.
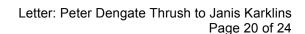
The GAC would also point out that in many cases governments might already have to bear the costs associated with industry stakeholder and cross-government consultation, and increase their monitoring of the application process more generally just to make sure they are aware of issues raised by applications for new gTLDs.

RESPONSE

With regard to the issues raised regarding procedure and cost, the New gTLD Dispute Resolution Procedure (the "Procedure") was designed to be a well, defined, smooth procedure. The procedures can be found at http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedure-18feb09-en.pdf and are summarized in Module 3 of the Guidebook. The Procedure includes provisions that are specifically aimed at reducing complexity and avoiding protracted proceedings, such as:
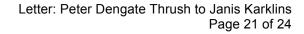
- Electronic filings (Article 6(a));

- Limits upon the length of written submissions (Articles 8(b) & 11(e));
- Short time limits for submissions and other steps in the procedure (Articles 7(a), 7(e), 9(a), 10(a), 11(b), 13(a), 17(b), & 21(a));
- Consolidation of objections (Article 12);
- Strict limits upon document production (Article 18); and
- Strict limits upon hearings (Article 19).

ICANN would welcome specific suggestions for improving the Procedure. However, the benefits that may be derived from further reducing the complexity and duration of the proceedings must be balanced against the panel's duty to ensure that the parties are treated with equality and that each party is given a reasonable opportunity to present its position (Procedure, Article 4(e)).

It is foreseen that morality and public order objections will be heard and decided by panels of experts who are eminent jurists of international reputation. The panels will comprise three experts, in order to ensure that diverse backgrounds and perspectives are present in the Panel. See Procedure, Article 13(b)(iii). Such proceedings will necessarily involve a certain level of costs, for example, to cover the time and costs associated with engaging the eminent jurists who serve on the panel.

It is difficult to predict with accuracy whether the costs of the objection procedure will prove to be a barrier to legitimate objections; however, it is felt that the existence of a fee to lodge an objection is necessary as a deterrent to frivolous objections. Interested parties may pool their resources to finance an objection that they consider to be legitimate and important. The rule that the prevailing party will be fully reimbursed for the filing fee and advance payment of costs that it paid (Article 14(e)) is intended to lessen the financial burden upon parties that file a well-founded objection. Finally, it should be recalled that the Independent Objector may also file an objection where, for various reasons (including cost), no other objection had been filed.

Considerable legal research was undertaken which examined the rules of public policy, as they apply to freedom of speech and encompassed the treatment of names of that may have national, cultural, geographic and religious sensitivities in a representative sample of countries, which included Brazil, Egypt, France, Hong Kong, Malaysia, South Africa, Switzerland and the United States of America. The possibility of objecting to an applied-for gTLD on the grounds of morality and public order is derived from the GNSO's Recommendation No. 6, which states, in part, that "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law." Various competing interests are potentially involved, for example the rights of freedom of expression versus sensitivities associated with terms of national, cultural, geographic and religious significance. While freedom of expression in gTLDs is not absolute, those claiming to be offended on national, cultural, geographic or religious grounds do not have an automatic veto over gTLDs. The standards summarized by Recommendation No. 6 indicate that a morality and public order

objection should be based upon norms that are widely accepted in the international community. It is felt that a rule that did not require wide acceptance would facilitate pressure to align the standards with those imposed by the most repressive regimes. In addition to the Draft Applicant Guidebook (Module 3), ICANN has published explanatory memoranda, dated 29 October 2008 http://www.icann.org/en/announcements/announcement-29oct08-en.htm and 30 May 2009 http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf ,that set out the specific standards that have been adopted for such objections and the legal research upon which those standards is based.
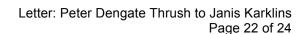
ICANN considers that a rule-based dispute resolution procedure, leading to a reasoned expert determination (that will normally be published) by three jurists of international renown, is an appropriate method of addressing and resolving disputes arising from objections based upon morality or public order. Indeed, no viable alternative has been suggested.

The Draft Applicant Guidebook does require governments to follow the same procedures and to pay the same costs as other objectors; however, it must be emphasised that the process has been developed to provide more than one avenue for governments, or anyone else, to raise concerns about an application. It has become quite common for governments and other public entities to participate in international dispute resolution proceedings with private parties (e.g., arbitration and other alternative dispute resolution procedures). For example, international arbitration is generally stipulated for the resolution of disputes between States and private investors under bilateral investment treaties (BITs). Such arbitrations may be conducted under rules such as those of the International Centre for the Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC). Recent years have seen a great increase in the conclusion of BITs. The United Nations Conference on Trade and Development (UNCTAD) has reported that the number of BITs increased dramatically in the 1990s, from 385 in 1989 to a total of 2,265 in 2003, involving 176 countries.[3] The total reached 2,676 by the end of 2008.[4]

Governments that are members of the GAC have a mechanism to provide advice to ICANN's Board, in accordance with ICANN's Bylaws; however, it is not clear that Bylaw was intended to provide an avenue for governments to provide advice on operational matters of this nature. The ICANN Board wishes to have a neutral, expert determination, based upon certain published standards, when deciding whether to accept an application for a new gTLD or if an objection should be upheld.

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[3]   Source: http://www.unctadxi.org/templates/Page____1007.aspx (last visited 25 August 2009).

[4]   *Recent Developments in International Investment Agreements (2008–June 2009)*, p. 2, IIA Monitor No. 3 (2009), (United Nations, New York and Geneva, 2009). Available at: http://www.unctad.org/Templates/Startpage.asp?intItemID=2310 (last visited 25 August 2009).

Finally, it should be recalled again in this context that the Independent Objector may file an objection against an applied-for gTLD in cases where governments (and others) choose not to do so. The Independent Objector will be entitled to take into account comments made by any person or entity (including, of course, governments) when deciding whether to file an objection.

5. Application Process

The GAC understands that ICANN intends to hold annual application rounds and those would be announced at the same time as the current round. However, the GAC is of the view that there is a need for clarity on how often the application process for gTLDs will be run, for how long it will remain open and whether there will be a limit on the number of gTLDs released in each round. There is also a question as to whether translation services will be provided as internationalized gTLDs are introduced. The GAC understands that ICANN will set up a separate organization overseen by a director to process applications.
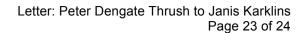
The GAC seeks clarification on how CANN will promote the new gTLD round so that affected parties are aware of their rights to object.

RESPONSE

As described in the Draft Applicant Guidebook, ICANN's goal is for subsequent application rounds to begin within one year of the close of the application submission period for the initial round. ICANN anticipates being able to announce future rounds soon after launching the program. ICANN anticipates potential changes to the process based on experiences gained, and is not prepared to announce exact timing at this stage. Regarding how long application processes will remain open, it is anticipated that an application submission period will be approximately 60-90 days. There is not currently expected to be a limit on the number of gTLDs approved in each application round.

Regarding translation services, draft Applicant Guidebook materials have been published in six languages, and ICANN expects to continue making program materials available in multiple languages. While the applications are required to be submitted in English, ICANN has allowed for supporting documents (for example, proof of legal establishment, financial statements) to be submitted in the original language, with any resulting translation needs being covered by ICANN. In addition, ICANN will continue its organization-wide initiative for translation and interpretation to support global engagement. It is certainly expected that the new gTLD program communications will be a key part of this effort.

ICANN has established a separate function within the organization to handle the processing of applications. It is not a separate organization.

6. Application Fee and Surpluses

A single fee structure creates limitations, notably by skewing the market in favor of applications from the developed world and those with significant financial resources. The GAC notes that ICANN had stated in its briefings that it was difficult to forecast costs accurately enough to offer different tiers of pricing, including discounts for community-based TLDs. However, the GAC believes that experience gained in the initial round would inform decisions on fee levels, and the scope for discounts and subsidies in subsequent application rounds.

The GAC is of the view that clarification is urgently needed to explain the level of the fee for a single application and the costs on which it was based, including historic and legal liability costs. The GAC notes that where governments are involved, as, for example, sponsors of community-based applications, legal liability costs might be less.

The GAC understands that ICANN will set up a separate organization to process applications which would not be heavily staffed and thus not expensive to run. If this is the case, it should allow ICANN to lower the costs or to provide for a more tiered pricing system.

The GAC expects that the gTLD round may well generate substantial surpluses and is of the view that ICANN should make clear how it would use such surpluses. As noted in previous GAC comments, community consensus should be sought on appropriate uses for any surplus revenues.

RESPONSE

As the GAC suggests and as ICANN has stated several times, the experience gained from the initial round of applications will inform decisions on fee levels, and the scope for discounts and subsidies in subsequent rounds. ICANN has always stated that the idea of fee categories and lower fees will be investigated after the first round and following removal of many of the contingencies and uncertainties.

The fees are revenue neutral.

With regard to the GAC view that clarification is urgently needed to explain the level of the fee for a single application and the costs on which it is based, a detailed explanation of the application fee derivation is provided in the Cost Considerations of the new gTLD Program paper http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf that was posted on 23 October 2008. The fee of $185,000 is based on a detailed cost estimation process which contains three elements: costs for developing the new gTLD process (based on historical costs of previous rounds), readily identifiable costs of evaluating and processing an application, and the more uncertain/difficult to estimate elements of the application and delegation process.

The evaluation fee was based on detailed analyses of specific tasks and steps needed to perform the evaluation. ICANN has taken a detailed and thorough approach to estimating program development costs, process and risk costs associated with this new program, and consistently used a set of principles in applying the estimation methodology. The results have been tested with sensitivity and other analysis, and appropriate expertise has been retained and applied.

The costs of the program have recently been re-evaluated and the results of the re-evaluation and the supporting data will be posted with the next version of the Applicant Guidebook.

Although the evaluation fee of $185,000 may be burdensome for certain organizations that are considering applying for a new gTLD, the evaluation fee was developed based upon a policy of revenue-cost neutrality, conservatism, and a detailed cost estimating exercise. The impact on a specific applicant or a class of applicant, by policy, is not a factor in the development of the evaluation fee. While it is acknowledged that some applications may have lower processing costs than others, and the costs associated with evaluating applications may vary, it is difficult, if not impossible, to determine which applications will require more or less resources. The application fee is based upon the estimated average cost of all applications based upon principles of fairness and conservatism.

In the event that there is a surplus from the new gTLD application round, the excess funds will not be used for ICANN's general operations. They will be disposed of in a manner consistent with the community's feedback and the policy recommendations. ICANN's multi-stakeholder model for decision making will be employed to ensure that all decisions regarding the underlying guiding principles, amounts, recipients, timing and manner of disposition of surplus funds, if any, will be handled in accordance with the communities' wishes.

To conclude, I hope you found this information useful and clear. Please contact my office with follow-up that the GAC might have and I will ensure that those questions are addressed. We look forward to comments of the GAC to the Guidebook excerpts and associated material published at http://www.icann.org/en/announcements/announcement-2-31may09-en.htm and to the third version of the Guidebook that will be published prior to the Seoul meeting.

Sincerely,

Peter Dengate Thrush
Chairman of the Board