



NEW gTLD DRAFT APPLICANT GUIDEBOOK VERSION 3 PUBLIC COMMENTS SUMMARY AND ANALYSIS

Sources

Public Comment Postings (7 October to 22 November 2009). The full text of the comments may be found at: <http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm>.

INTRODUCTION AND EXECUTIVE SUMMARY

Background

Since it was founded in 1998, one of ICANN's key mandates has been to create competition in the domain name market. This includes ensuring that competition, consumer interests, and Internet DNS stability and security issues are identified and considered in TLD management decisions, including the consideration and implementation of new TLDs.

The policy making process in the ICANN model is driven by people from around the world. Those discussions have involved representatives of governments, individuals, civil society, the technology community, business, and trademark lawyers. The consensus they came to, through discussions in the Generic Names Supporting Organization (GNSO), one of the many groups that coordinate global policy in ICANN, was that new gTLDs were needed and could be introduced.

The current work on implementation of new gTLDs has been in the study and planning stages for more than 3 years. See <http://gns0.icann.org/issues/new-gtlds/>. Its origin goes back even further – to the first two rounds of top-level domain applications held in 2000 and 2003. Those rounds were used to shape the current process.

In June 2008, the ICANN Board adopted the GNSO policy to introduce new gTLDs and directed staff to continue to further develop and complete a detailed implementation plan, continue communication with the community on the work, and provide the Board with a final version of the implementation proposals for the Board and community to approve before the new gTLD introduction process is launched.

In October 2008, a Draft Applicant Guidebook, with six explanatory memoranda was released and a consultation period of 76 days was held on the first draft. An analysis of over 300 comments to the Guidebook resulted in substantial changes, reflected in the second version of the Guidebook published in February 2009. Again, there was substantial commentary reiterating previous positions and staking out new ones for consideration. This process has been iterated through additional cycles of comment to produce the third version of the Guidebook, with incorporation of public feedback and publication of new material for discussion. As a result of this process, the third draft of the Applicant Guidebook

contains a number of areas which have matured in development to a point where they are essentially complete. Discussion continues on a limited number of remaining issues within the program, and these continue toward resolution.

Overview of the Analysis

For the comment period to the third version of the Guidebook, ICANN has followed the approach taken on comments to the previous versions and is providing here a detailed analysis of comments received. The comments were again divided into major categories and then subcategories.

An analysis was written to address issues raised in the categories and subcategories. The analysis identifies commenters and provides a summary of issues with which commenters are associated, and then provides an explanation of the proposed position regarding the issues raised. Therefore, each category is divided into the following sections:

- A summary of the key points made in that category
- A summary where a synopsis of comments and sources is listed
- Analysis, including a summary of the issues raised by that set of comments, a balancing of the issues raised by the comments, and a proposed position for moving forward.

The report analyzes comments by category and balances the different proposals made. The goals of the report are to:

- Analyze the comments in order to develop amendments to the Guidebook that are consonant with the meaningful input of the community, and
- Demonstrate that the comments are taken seriously and carefully considered.

Guidebook Analysis and Changes

ICANN continues to move forward in the implementation of the new gTLD Program while balancing and addressing community concerns on specific aspects of the program. The public comment period on the third version of the applicant guidebook recently closed and work continues to proceed on the resolution of overarching issues and other program details.

ICANN is publishing this analysis of comments to continue progress and the community discussion. Many of these comment areas will be the subject of consultation at the upcoming ICANN meeting in Nairobi. The next draft (version 4) of the Applicant Guidebook is expected in June 2010.

GENERAL CONCERNS/OTHER

I. Key Points

- Supporters have argued, in general, that New gTLDs promote investment, competition, innovation and can help new businesses grow. New gTLDs may also offer greater opportunity, accessibility and diversity for users.
- ICANN should proceed with the program. Applicants for New gTLDs want to see a timeline. If program suffers further delays, it will further harm ICANN's credibility; there should also be consequences for the organization.

- Critics have argued that the program does not serve the public interest, the risks outweigh the benefits and ICANN lacks sufficient public support. Some also oppose the introduction of an “unlimited” number of TLDs.
- Several comments support the delay in the timeline stating more time is needed to address open (overarching) issues and minimize adverse consequences, especially in today’s economy.
- Gap in timing of implementation between the IDN ccTLDs and IDN gTLD should be reduced.
- ICANN should consider the benefits of introducing further TLD categories. Some examples used were .brand, cultural, linguistic, municipal, geoTLDs, community TLDs.

II. Comment Summary

Support for New gTLD Program

In support of expanding the Internet to promote investment and e-commerce, among other things, ICANN should open the Internet to new top-level domains and stop the continuous DAG revisions. *M. Ferraro (13 Nov. 2009). A. McKinlay (17 Nov. 2009). I. Kalitka (19 Nov. 2009). B. Tippkemper (21 Nov. 2009). IH&RA (21 Nov. 2009). RRIH (21 Nov. 2009). Nokia (22 Nov. 2009). M. Neylon (22 Nov. 2009). C. von Veltheim (22 Nov. 2009).*

ICANN should be moving ahead with new gTLDs; we are close to the finishing line for resolving the overarching issues and maintaining the huge success of the Internet and its openness and constant adoption to users’ needs must not be risked. *dotZON (18 Nov. 2009). HOTEL (22 Nov. 2009). EuroDNS (23 Nov. 2009). dotECO (22 Nov. 2009). E. Pruis (23 Nov. 2009). Demand Media (22 Nov. 2009).* Competition in new gTLDs should be open and foster innovation. *P. Mevzek (22 Nov. 2009).*

Moving ahead to open new gTLDs without further delays will help small businesses grow and compete better. *P. Jacxsens (13 Nov. 2009). K. Nahigian (13 Nov. 2009). A. Bell (13 Nov. 2009). A. Toronto (13 Nov. 2009). J. Poelman (13 Nov. 2009). M. Lopez (13 Nov. 2009). R. Seidel (13 Nov. 2009). G. Hale (16 Nov. 2009). A. McNeill (17 Nov. 2009). B. Couture (17 Nov. 2009). M. Boese (17 Nov. 2009). F. Hagale (18 Nov. 2009). S. Storan (18 Nov. 2009). J. Masri-Nahigian (19 Nov. 2009). R. Gerstemeier (19 Nov. 2009). M. Crow (19 Nov. 2009). E. Letchworth (19 Nov. 2009). C. Livingston (19 Nov. 2009). H. Addington (19 Nov. 2009). AmericaSpeakOn.org (19 Nov. 2009). N. Carosella (19 Nov. 2009). G. Houston (20 Nov. 2009). M. Barnes (20 Nov. 2009). D. Motley (20 Nov. 2009). C. Perrone (20 Nov. 2009).*

New TLDs offer greater Internet organization, opportunities, accessibility, diversity and individuality for users at all levels. *C. Daly (17 Nov. 2009).* ICANN should solicit more diverse corporate participation to address the needs of corporations as registrants and TLD applicants. The lack of corporate participation might be the result of companies not being aware of the whole gTLD process. *Nokia (22 Nov. 2009).*

The extensive drafting, revisions and reviews producing the current DAG have resulted in an equitable and sensible process for selecting TLDs and registry operators. The DAG Modules are largely complete. *R. Tindal (23 Nov. 2009).*

Refunds for rejected applications (sec. 6.3.)

It seems that to be accepted an applicant must surrender all his rights. There is no refund policy in cases where the application is rejected based on non-applicant fault, and there is no right to complain or to sue ICANN. *A. Sozonov (Module 6, 23 Nov. 2009). S. Subbiah (Module 6, 23 Nov. 2009).*

Opposition to New gTLD Program

Program does not serve public interest, and risks outweigh benefits

The new gTLD program poses substantial risks to both consumers and businesses that outweigh any potential benefits. NCTA is concerned that the new gTLD program will be approved and implemented without full consideration of the potential risks that may result from the program. The case has not been made for a wholesale, widespread potential deluge of new gTLDs. Assuming there is a documented need for them, measured steps should be taken to expand the top-level domain name space market. *NCTA (22 Nov. 2009). DIFO (21 Nov. 2009).*

ICANN lacks sufficient public support for the new gTLD program. *G. Kirikos (22 Nov. 2009).*

Microsoft restates its opposition to introduction of an unlimited number of new ASCII gTLDs. *Microsoft (23 Nov. 2008).*

Timeline/ Models

Launch timing

It is a positive development that ICANN will no longer announce arbitrary expected launch dates for new gTLDs. Time needs to be taken for further consideration of unresolved issues and to minimize possible adverse consequences, especially given the current world economic situation. *NCTA (22 Nov. 2009). Time Warner (Module 5, 20 Nov. 2009).* ICANN has recognized the need to ensure that solutions to the four overarching issues are identified prior to announcing anticipated launch dates. *MarkMonitor (Module 1, 20 Nov. 2009). MarkMonitor et al. (20 Nov. 2009). ECTA/MARQUES (22 Nov. 2009). BITS (22 Nov. 2009). ABA (22 Nov. 2009). CADNA (22 Nov. 2009). Yahoo! (23 Nov. 2009). ICANN should assume, at a minimum, that at least another 18-24 months will be needed. SIIA (23 Nov. 2009).*

Hearst Communications (19 Nov. 2009). An incremental approach should be taken with financial gTLDs delayed until process and security issues are addressed. ICANN does not have an appreciation for the various state, national and international legal restrictions regarding use of the term “bank” and a vast number of like terms when delivering financial services via the Internet. *ABA (22 Nov. 2009). Consideration should be given to introducing only generic terms in the first round; this would allow ICANN to test the system. Coca-Cola (24 Nov. 2009).*

“Fast track” IDN ccTLDs

Time Warner applauds the ICANN Board moving ahead with fast track IDN ccTLDs. This lets the process focus first on those IDN TLDs needed to satisfy documented demand from users who employ non-ASCII scripts as their primary means of communication. It will also provide a critical testbed for identifying any technical problems before a larger number of IDN gTLDs can be rolled out. *Time Warner (Module 5, 20 Nov. 2009). Yahoo! (23 Nov. 2009).*

ccTLDs and gTLDs

Steps should be taken to reduce the gap in implementation between the IDN ccTLDs (moving faster) and the IDN gTLDs. *RySG (21 Nov. 2009).* IDN gTLDs and IDN ccTLDs should be implemented at the root level at the same time. *D. Cohen (23 Nov. 2009). There should be an IDN gTLD fast track process. CONAC (23 Nov. 2009).*

ICANN should proceed with new gTLDs; applicants need a timeline

dotBERLIN (15 Nov. 2009). dotbayern (16 Nov. 2009). D. Krischenowski (17 Nov. 2009). dotZON (18 Nov. 2009). dotEUS (18 Nov. 2009). M. Maller (18 Nov. 2009). M. Tofote (18 Nov. 2009). G. Werner (18 Nov. 2009). M. Erbach (18 Nov. 2009). S. Lubek (19 Nov. 2009). L. Treutler (20 Nov. 2009). A. Peters (20 Nov. 2009). dotKoeln GmbH (21 Nov. 2009). Asociacion PuntoGal (21 Nov. 2009). dothamburg (22 Nov. 2009). M. Neylon (22 Nov. 2009). HOTEL (22 Nov. 2009). INDOM (22 Nov. 2009). E. Pruis (23 Nov. 2009). NICMexico (23 Nov. 2009). EuroDNS (23 Nov. 2009). U. Stache (25 Nov. 2009). NIC.at (25 Nov. 2009).

Timeline and Priority Categories of Applications

If there is a concern about receiving too many applications, ICANN has the responsibility to divide them into appropriate categories of priority. Social purpose, public interest TLD applications supported by the relevant government authorities should have priority. The next DAG should be published in the first quarter of 2010 and the first round should start before the end of the third quarter. *City of Paris (22 Nov. 2009).*

ICANN should adopt an incremental approach to new gTLD applications, differentiating applications, and start accepting applications by the end of the third quarter in 2010. Further delays harm ICANN credibility. If the application timeline shifts again, then ICANN should be subject to a penalty system and be bound to lower its application fees. *AFNIC (22 Nov. 2009). M. Neylon (22 Nov. 2009).*

Priority application windows

No party is disadvantaged in a multi-window process compared to a single window process. If all TLDs are done at the same time, there will be resource bottlenecks and delays. ICANN should divide the application round into priority windows:

1st—community-based TLDs for which ICANN requires the approval or non-objection of the relevant government authorities.

2nd—other community-based TLDs, but requiring that the applicant demonstrate a clear and ongoing accountability framework to its community;

3rd—standard TLDs other than single-registrant projects. *W. Staub (22 Nov. 2009).*

Timelines and process review

More detail is needed on timelines and level of public data that will be available during the application process. Adding many new gTLDs will have many operational consequences. Post round, a full assessment of the whole procedure as well as adequacy of fees should be conducted. *P. Mevzek (22 Nov. 2009).*

Overarching issues—lack of justification

The four overarching issues were introduced into the new gTLD program without proper examination and they are substantially delaying the process. *Minds + Machines (22 Nov. 2009).*

TLD Categories

Application categories

ICANN should consider the benefits of introducing further categories of applications beyond standard and community-based so that applications can be compared. *ECTA/MARQUES (22 Nov. 2009). NPTA (22 Nov. 2009). EuroDNS (23 Nov. 2009).*

Single registrant TLDs

ICANN has not adequately considered all the issues related to single-registrant registries where the TLD holder is not going to operate as a traditional registry (e.g., different requirements in the utilization of ICANN-accredited registrars, registry/registrar structural separation, the impact on the DNS and the root zone of having numerous such “flat” registries not offering open registrations of second level names). *AT&T (22 Nov. 2009)*.

Decision should be deferred on single registrant TLDs and they should not be allowed in the coming round; they are the one trend that could cause a high rate of change of the root zone size. *W. Staub (22 Nov. 2009)*.

ICANN’s one size fits all approach is inappropriate

The evidence for a differentiated approach to numerous gTLD issues (e.g., types of applications (e.g. corporate TLDs), levels of security, etc.) that optimizes competition and consumer choice is becoming irrefutable but has been ignored in DAG v3. This need should be fully addressed in DAG v4. *COA (22 Nov. 2009)*.

Launch Date Timing

The launch date should be pushed back until unresolved issues such as trademark protection are thoroughly addressed. In the alternative the initial rollout should be limited to community-based and/or geographic gTLDs and should not include so-called “open” gTLDs.

Fast-track step-by-step proposal by cultural, linguistic and municipal interests

We remind ICANN that some cultural, linguistic and municipal interests have previously proposed for ICANN’s consideration a near-term step-by-step process for the application windows. *E. Brunner-Williams (22 Nov. 2009)*.

The flaw in the argument for the step-by-step proposal is contention. E.g., for generic “communities” such as linguistic communities, several applicant groups are known to exist. Which of these would get fast-track status? If non-profits are allowed to go first, it is certain that many of the existing applications will be re-formed as non-profit entities. This approach could be easily gamed. *Minds + Machines (23 Nov. 2009)*.

“dotBRAND” applications--clarify

ICANN should clarify in the DAG if applications for “dotBRAND” gTLDs will be accepted as community-based applications. An entity can always pursue a standard application and restrict registration requirements; however, this clarity is important in the case that multiple corporations apply for the same string, since the DAG currently says that “a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be.” *Thomsen Trampedach (Module 1, 20 Nov. 2009)*.

Lovells reiterates that creation of a third category of applications for brand owners would be beneficial. *Lovells (22 Nov. 2009)*.

“dotBRAND” applications—unjustified costs

In general the program needs to be more friendly to .brand TLDs. The current program is not set up at all to deal with the needs of an entity like IBM obtaining a TLD for a brand and results in significant unjustified costs. E.g., a brand owner would have to use an accredited registrar even if the brand owner has the technical ability to act as its own registrar. This is particularly unjustified where the proposed

.brand will be private or restrict registration to a closed community. In such cases, where the brand owner shows it has the technical ability, the brand owner should be allowed to effect its own registrations without using an external party. In addition, the proposed gTLD regime will impose a requirement for a DNS infrastructure that supports IPv6 and DNSSEC, which may also force brand owners to use third parties even for private or restricted gTLDs; this is not justified where the brand owner has a current sophisticated network infrastructure which can support its .brand TLD. *IBM (22 Nov. 2009).*

Demand for geoTLDs

There is a clear demand for geoTLDs. *dotBERLIN (15 Nov. 2009). dotbayern (16 Nov. 2009). D. Krischenowski (17 Nov. 2009). M. Maller (18 Nov. 2009). M. Tofote (18 Nov. 2009). G. Werner (18 Nov. 2009). D. Rau (18 Nov. 2009). A. Seugling (18 Nov. 2009). S. Lubek (19 Nov. 2009). L. Treutler (20 Nov. 2009). H. Krueger (20 Nov. 2009). dotKoeln GmbH (21 Nov. 2009). dothamburg (22 Nov. 2009). U. Stache (25 Nov. 2009).*

Reduce fees

The economic burden for small geoTLDs (in comparison with ccTLDs) is far too high. *dotbayern (16 Nov. 2009).*

III. Analysis and Proposed Position

Timing and open issues

It is understandable the frustration expressed by some regarding the delays for introducing new gTLDs. It is a challenge to balance on one hand the discussions and solutions for important open issues and, on the other hand, the continuing program development and operational readiness. Significant efforts continue to examine and, together with the community, find solutions to these open issues such as rights protection mechanisms; ways to address malicious conduct; a better understanding of how the coincident introduction of new gTLDs, IDNs, IPv6, and DNSSEC will affect the root zone, and vertical integration.

ICANN has been working toward a timely implementation of the consensus recommendations. The latest timing discussion is in light of the substantial community discussion and formal policy development work that have occurred, and the mission and core values of ICANN. Many of the issues raised that have delayed the introduction are at or near resolution. Specific implementation models to address the potential for malicious conduct and provide trademark protections have been introduced. Additional economic analysis, weighing costs and benefits of new gTLDs is underway. Root zone stability analysis is nearly complete.

ICANN continues to approach the implementation of the program with due diligence and plans to conduct a launch as soon as practicable along with the resolution of these issues.

Staff continues to make progress towards the program development and, at the same time, work with the global Internet community towards a level of consensus on the Program's outstanding issues. Besides the many public comment periods and live consultation events around the world, the Board has recently directed staff to propose an Expressions of Interest model. The model is a direct result of community recommendations during the ICANN Seoul Meeting (Oct 2009). An Expressions of Interest process could hasten the introduction of new gTLDs and provide ICANN and the Internet community important information that will contribute to a better understanding of, for example: the expected

volume of new gTLD applications; the number and kind of strings requested; certainty as to root-zone delegation rates; and inform the program's operational readiness plan. Ultimately, the EOI may assist with the timely resolution of some of the outstanding issues.

ccTLD IDN Fast track New gTLDs timing coordination

The ideal scenario would have been for IDN ccTLD fast track and the gTLD program to launch at the same time. Input received from the GNSO, ccNSO, and others reflected this goal, however, it has also been determined that one process should not be tolled due to timing of the other. The IDN ccTLD Fast Track launched late 2009. Many countries were ready to move ahead with their IDN ccTLDs. Delaying that process would unfairly have deprived registrants in those areas of participating in the DNS in their own language and also raised risks regarding root zone stability. It is important to launch the new gTLD process in a timely manner to maintain an even playing field among competitors in commercial markets.

Multi categories, multi-phased approach

ICANN is a strong proponent of innovative use of new TLDs. This is especially so in cases where TLDs can be delegated to address the needs of specific communities such as intergovernmental organizations, socio-cultural groups and registered brands. Rather than having ICANN limit this type of innovation and identification with certain TLD models, more creativity might be spawned by allowing different groups to self-identify the type of TLD they purport to be and promote that model among their community. If a self-declaration program is instituted and contractual accommodations are eliminated or minimized, fees can remain constant. Socio-economic groups, brand owners and other groups can be accommodated under the existing structure and self-identify as a particular type of TLD. Over time, the market and community interests will sort TLD types – a model preferable to having ICANN make that determination a priori.

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 forecloses those future developments.

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 standard or open TLDs)

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.

Beyond the accommodations sought, many or all of the suggested categories seem to be variations of community-based TLDs. The preference for community-based TLDs in the evaluation/contention process

is based on policy advice from the GNSO and is intended to ensure that community-based applicants receive the TLD string to which their community is strongly related. Perhaps the most important aspect of the suggested categories is that an applicant within these categories does, in fact, receive the string associated with its community, and that is what the existing process is designed to do.

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.

The structure of TLD categories, if granted different accommodations with differing contractual obligations, would result in significantly higher compliance costs and therefore, annual fees.

Several commenters who have concerns about the impact of opening up the namespace have submitted suggestions for a multi-phased approach. Such options were considered during the policy development process, and the earlier stages of implementation. A phased approach could happen in a number of ways, such as a limited first round or establishing a category of applications eligible for a ‘fast track’ process.

In the past, ICANN conducted two limited application rounds: the proof-of-concept round in 2000, limited to a small number of new TLDs that would provide an effective proof of concept, and the sTLD round in 2003-4, limited to sponsored-model applications. The experience from another such round might yield further incremental improvements, but the process would be less inclusive and the benefits less widespread than would be possible with an open launch.

Conducting another limited application process via limiting to a certain number or category, raises the problem of allocation. Random selection of applicants, even if allowed by law, could encourage gaming and favor those with the most money. Auctioning off application “slots” by various methods, including the Dutch auction suggestion, was also discussed earlier in the process and generated very little support for the same reasons. It is also expected that numerical limitations will cause a rush of application volume that could equal or surpass that of an ‘unlimited’ opening.

Other suggestions for a phased approach focused on a first round limited to certain types of applications, such as IDNs, cities, or applications that appear to be non-contentious.

Experience suggests that any criteria defined for participation in a limited early round will incent applicants with aggressive timelines to adjust their applications according to the set criteria. Rules for a limited round would need to be carefully drafted and reviewed by the community, which would retard progress for all potential applicants while benefitting only a select group. Opening the process to any one group to start before others raises issues of fairness, and is difficult to align with stated goals of the process such as diversity, openness, and innovation.

A less-defined set of criteria that involves picking out some ‘simple’ applications would require an objective method for determining in advance which applications are likely to be most and least complex.

It is also certainly possible that an application could become contentious in the middle of the process, resulting in disparate treatment among those ‘simple’ applications. This would be extremely difficult to construct in such a way as to result in a successful, timely introduction round.

ICANN has not ruled out the possibility of phased launches, but currently does not consider that an implementable approach has been developed or that consensus exists to date for any one manner of implementing this. An open launch is preferable as it meets program goals, and to date has continued to emerge as the solution that provides the most benefits.

APPLICATION PROCESS

I. Key Points

- ICANN has designated a limited number of application questions as confidential, for areas likely to contain sensitive information or prone to misuse. Otherwise, the full application will be posted in keeping with the principles of openness and transparency. Evaluation panels and dispute resolution providers will create appropriate procedures for posting of information throughout the application evaluation process.
- How applicants will differentiate themselves within a given market or industry is a decision left solely to the applicants. ICANN is not judging the effectiveness of an applicant’s business model. Rather, ICANN is focused on preventing user confusion, determining if an applicant is able and qualified to run a registry, ensuring DNS stability, and protecting registrant and users.
- The evaluation fee is the average of all costs to administer the process, considering all variations of applications including those that may require additional and extended analysis. Fees will be re-examined after the initial application round based on experience.
- Public comment will be considered in the evaluation and dispute resolution processes.
- All applications are required to provide documented proof of establishment and good standing, and make certain disclosures concerning the applicant’s background.
- Applications are required to be submitted in English to maximize cost and time efficiencies in the evaluation process. However, extensive support is planned in multiple languages to assist applicants for whom English is not the primary working language.

II. Comment Summary

Openness and transparency

There should be openness and transparency in the new gTLD application process. With the exception of confidential information (e.g. financial information and technical wherewithal) new gTLD applications should be publicly available. All objections to an application and responses thereto should be treated as public information and made publicly available. *IBM (22 Nov. 2009)*.

Implementation plan lacks market differentiation

The implementation plan for new gTLDs is contrary to the GNSO Final Report on the Introduction of new gTLDs which calls for their introduction in an “orderly way” as well as including “market differentiation”.

Recommendation 1: In this regard, the final AG should add two questions: (1) Which users/registrants/organization/group/community do you intend to serve? (2) How does your TLD differentiate itself from others in the DNS? With sharper criteria ICANN can approve those TLDs that valuably expand the name space and strengthen diversity on the Internet. Approving applicants irrespective of knowledge that they overlap or undercut other registries is antithetical to the new gTLDs policy development principle that they will benefit registrant choice and competition.

Recommendation 2: ICANN should start the process slowly with these safeguards for an orderly approach to market differentiation and if and when necessary make adjustments in future Applicant Guidebooks. BC (23 Nov. 2009).

The process must include market differentiation. *R. Dandruff (Module 2, 14 Nov. 2009)*.

Five principles to determine new gTLDs/future name space expansion

- (1) Differentiation—must be clearly differentiated from other gTLDs;
- (2) Certainty—must give the user confidence that it stands for what it purports to stand for;
- (3) Good faith—must avoid increasing opportunities for bad faith entities who wish to defraud users;
- (4) Must create added-value competition; and
- (5) Must serve commercial or non-commercial users.

BC (23 Nov. 2009).

Registry evaluation fee estimate (1.5.2)

The estimate of US \$50K for registry services evaluation seems excessive; it would be helpful to see a cost build-up of this estimate. *RySG (21 Nov. 2009)*.

Fees

Fees should be calibrated to the type of application/TLD. Smaller entities would have issues with the \$185K fee. *M. Neylon (22 Nov. 2009)*. The application fee is still too high and should be lower for certain entities (e.g., restricted .brand TLD, charitable organizations). *Lovells (22 Nov. 2009)*. *Visa (23 Nov. 2009)*.

Evaluation fee--refunds (sec. 1.5.1)

The costs of evaluation should reflect the actual cost of doing such evaluation and not be based on a hypothetical average of projected total evaluation costs across all applicants. Such fees should be credited in the case of multiple applications where a specific portion of the initial evaluation is identical, less any minor amount needed for evaluating such portion for multiple gTLDs. Since the IDN ccTLD fast track is ongoing and applied-for strings in the process are not disclosed until a later stage, special full refunds should be provided for applicants submitting an application for a gTLD string that may later be found to have been in conflict with an IDN ccTLD. *RySG (21 Nov. 2009)*.

Public comment

ICANN should provide further detail about the types of public comment that evaluators will consider and what impact public comment could conceivably have on an application. ICANN should restore the requirement that evaluators perform “due diligence” on public comments received to ensure that baseless comments or those filed in bad faith are not considered. *INTA (20 Nov. 2009)*.

Greater clarity on the role of public comment is needed and the deletion of the “due diligence” requirement needs explanation by ICANN. Public comments deemed to be regarding the “formal objection process” should automatically be forwarded to the Independent Objector if they deal with subjects on which he/she is empowered to file an objection. (Sec. 3.1.5 contemplates forwarding public comments to the IO but does not specify which public comments receive this treatment.) Also, the

disparity in how evaluators (must consider) and decision makers in the objection process (discretionary) consider public comments must be justified. *COA (22 Nov. 2009)*.

IDN applicants—languages (sec. 3.1.5 and 3.2.3)

Requiring English as the only means of communication is unfair to IDN applicants. Many applicants may have some objections from the IDN community and it would be more logical and it would be less costly to conduct the arguments in that IDN script and to hire a panelist in that language as well. The odds are always stacked against an IDN applicant and in favor of an English-speaking Western objector. *S. Subbiah (Module 3, 23 Nov. 2009)*.

It should be possible for objections/responses for IDNs to be in the appropriate language, which would make the procedure more accessible for local companies. The translation could be provided by ICANN. *A. Mykhaylov (Module 3, 23 Nov. 2009)*.

Lifecycle timelines (sec. 1.1.2.9)

Lifecycle timelines enable better understanding of the entire process. *MarkMonitor (Module 1, 20 Nov. 2009)*.

Verified domain name eligibility

Stricter enforcement of gTLD operators' contracts is needed, especially regarding the verification by gTLD operators of a domain name applicant's eligibility, with registry sanctions for failure to act. *Lovells (22 Nov. 2009)*.

Required Documents (sec. 1.2.2)

INTA suggests that ICANN include the following:

Certifications or attestations of a corporation (including individual partners and investors who might be doing business under other names) regarding pending litigation, especially infringement, domain name challenges or the lack thereof; and documentation such as certification of compliance with requirements for disclosure of any regulatory proceedings regarding fraud, omissions or non-compliance with disclosure requirements required by any law or regulation, and any pending proceedings related thereto (such as tax filings or securities offerings). Information submitted should be verified or attested to by specific individuals or third party regulatory authorities. *INTA (20 Nov. 2009)*. Stronger definitions of "good standing" and "the applicable body in the applicant's jurisdiction" are required. *BITS (22 Nov. 2009)*.

Any and all documents required should be clearly described by ICANN. "Proof of good standing" is not clear. *M. Neylon (22 Nov. 2009)*.

Notice of information changes (sec. 1.2.6)

ICANN should state explicitly the consequences where an applicant has to notify ICANN of untrue or inaccurate information in its application, and where ICANN discovers that an applicant has included untrue or inaccurate information. *BITS (22 Nov. 2009)*.

IDN applicants (sec. 1.3)

This section should refer to the need for applicants to comply with requirements for prevention of malicious conduct. ICANN should not allow variant TLDs as this is likely to lead to user confusion. *BITS (22 Nov. 2009)*.

Question and answer forum (sec. 1.6)

The question and answer forum during the submission period is an extremely positive addition and should help reduce the need for Extended Evaluations. *MarkMonitor (Module 1, 20 Nov. 2009)*.

Applications--languages

Why will applications only be accepted in English? *J. Guillon (4 Nov. 2009)*.

Refund of evaluation fee (sec. 1.5.1)

It is proposed that having completed Dispute Resolution, Extended Evaluation, or String Contention Resolution an unsuccessful applicant would be reimbursed 20% of the evaluation fee (\$37K). This seems unreasonable, at least regarding Dispute Resolution. While it may be reasonable to refund some of the fee if an applicant withdraws at the outset of objection proceedings, there will be less incentive to take such an approach if the applicant knows that they will recover this sum whatever the outcome of the dispute resolution. *BBC (19 Nov. 2009)*.

Cost considerations

INTA is pleased with ICANN's elimination of the TAS User Registration Fee. ICANN still has not, with respect to the Registry Services Review Fee, clarified when the 5-person panel would be required (as opposed to a 3-person panel), and has not identified the ceiling on the registrar services review fee (and the justification if that fee exceeded \$50K). Regarding section 1.5.2, ICANN should cap fees wherever possible rather than leave them open-ended. Also, some level of personalized service should be considered, instead of requiring all questions about application preparation to be submitted in writing. It is also of concern that section 1.5.2 suggests only one person could serve as the panel for a community-based objection's dispute resolution; one person is not adequate. *BITS (22 Nov. 2009)*.

Transition to Delegation (sec. 1.1.2.8)

This section should address the expected time to transition for gTLDs utilizing the Verification of High Security program. *BITS (22 Nov. 2009)*.

III. Analysis and Proposed Position

Comments on the application process addressed areas such as transparency and confidentiality, market differentiation criteria, fees, the role of public comment, language considerations, and other details.

Comments expressed support for openness and transparency in the application process. We agree with these points. As noted in draft version 3 of the Applicant Guidebook, the non-confidential portions of all applications are expected to be published. ICANN will continue working with evaluation panelist firms and dispute resolution service providers on an appropriate process for posting of information at subsequent stages of the process. This will require careful balancing of transparency and other factors such as conflicts and international arbitration norms, to preserve the integrity of the process. Some comments suggested that "market differentiation" should be reflected as a criterion in the evaluation process. This point can be interpreted in a number of ways. Implementing market-differentiating criteria could be construed as limiting competition for existing registries and potentially stifling innovation. As with any industry, two or more organizations focused on the same consumer provide that consumer with choice. It is this choice that drives competition which can lead to innovation, product/service differentiation, and price reduction.

The proposed question “Which users/registrants/organization/group/community do you intend to serve?” is already explicitly part of the application for those designating their applications as community-based. It is also implicitly part of the existing question required of all applicants to state their mission and purpose, although this could be articulated more fully. The second proposed question, “How does your TLD differentiate itself from others in the DNS?” might provide an interesting perspective, but it is unclear how responses to this question could be scored, used as a threshold item, or enforced without a significant expansion of the scope of ICANN’s responsibilities.

ICANN’s Core Values include “...depending on market mechanisms to promote and sustain a competitive environment.” How applicants will differentiate themselves within a given market or industry should be a decision left to the applicants and markets. ICANN should not judge the effectiveness of an applicant’s business model. Rather, ICANN is focused on DNS stability, preventing user confusion, determining if an applicant has demonstrated basic competencies to run a registry, and protecting registrants and users.

Regarding fees, comments advocated for changes or requested clarification. For example, a comment requested clarification on the methodology used for the estimated \$50,000 Registry Services Review Fee in section 1.5.2. This was estimated based on historical analysis. However, the historical model was not fully adopted; efficiencies were introduced so that the fee is less than 50% of the current cost per RSTEP evaluation. In the three years that the Registry Services Evaluation Policy has been in place, a small fraction of registry services proposed by existing gTLD registries have resulted in an RSTEP review. Each inquiry involving the RSTEP involves a 5-person panel and costs \$100,000-\$125,000. In the new gTLD process it is anticipated that most cases will be addressed using a 3-person panel. In addition, a lower rate has been negotiated due to the expected volume of reviews.

Comments concerning the gTLD Evaluation Fee (currently set at \$185,000) suggested that some applications might not cost a full \$185,000 to review, for instance, if the same applicant submitted multiple applications for various strings. The evaluation fee is an average and considers all variations of applications, including those that may require additional and extended analysis. Circumstances will be different for each application, and it is not anticipated that there should be a cursory or less rigorous review process for cases where an applicant has submitted multiple applications. It is true that there may be some economies of scale; however, that was part of the analysis in developing the \$185,000 fee and refund levels. Please see <http://icann.org/en/topics/new-gtlds/cost-considerations-04oct09-en.pdf> for additional discussion of the \$185,000 fee.

Some comments also stated that fee reductions should be available for particular cases, e.g., a charitable organization, a community group, or a trademark holder using a brand term. It is anticipated that subsequent application rounds will enable adjustments to the evaluation fee based on historical costs from previous rounds, the effectiveness and efficiency of the application evaluation process, and other data as it becomes available.

Regarding the refund structure in section 1.5.1, a comment noted that a full refund should be available in the case where an application does not pass Initial Evaluation due to contention with a string requested in the IDN ccTLD Fast Track. We agree. In such a case, the string would be a country or territory name and the gTLD applicant would need to acquire the support of the relevant governments, so it is unlikely that the applicant would not be aware of the other developments. However, the principle is accepted, and ICANN will review the current refund structure in light of this point.

Also regarding the refund structure, a comment questioned the relative incentives for applicants to participate in a dispute resolution proceeding or withdraw prior to the dispute resolution process; this will also be examined in review of the refund structure.

Some commenters submitted questions concerning how public comment will be used in the evaluation process. Several questioned the removal of the term “due diligence” from section 1.1.3. This section was edited from previous drafts to take out some repetitive elements. It continues to be the responsibility of all those charged with evaluation tasks in the process take into account public comment: this includes reading comments, weighing the considerations expressed, and checking the sources and authenticity of information provided through the comment process. This section of the guidebook will be reviewed to make this unambiguous. It should be noted, however, that public comment will be encouraged at the earliest possible stage, when most relevant to the evaluation stage that is occurring.

Regarding the forwarding of comments to the independent objector (IO), we agree, this will be clarified. As comments are publicly available, the comments do not need to be forwarded for the independent objector to have access to them. There is no vetting by ICANN staff of which comments deserve consideration by the IO. Indeed, it is part of the IO’s role to take all available information into account when determining whether an objection based on the public interest is justified. This does not mean, however, that all comments received will be relevant to the subject of an objection. The IO can only file objections on either Morality and Public Order or Community grounds. Thus, there may be comments that are not relevant to these areas and are not taken into account.

This is also the reason that the Applicant Guidebook states that dispute resolution service providers (DRSPs) have discretion to consider the comments. A DRSP will be making a determination in a particular subject area: they are not required to take into account comments on other areas. For example, a panel considering a Legal Rights objection would not need to consider comments relating to the applicant’s DNSSEC implementation. Note that public comments are one mechanism for making information available to be considered, and do not in themselves constitute a formal objection. Objectors are responsible for filing a formal objection, and the objection process and timing will be clearly highlighted for those submitting public comments.

Some commenters provided specific suggestions for amplifying or clarifying the documentation requirements for proof of establishment and good standing. Applicants are required to disclose any pending litigation related to financial or corporate governance activities or intellectual property infringement; this is part of question 11 in the application. Documentation of compliance with regulatory proceedings is covered as part of the proof of good standing; this is part of question 9 in the application. Some comments requested additional clarity on the proof of good standing requirements. We agree. This section will be examined so requirements can be amplified. Note that “good standing” applies to the corporate or other entity that is applying. In addition, records of individuals associated with the application are addressed through the background checks discussed elsewhere in this document.

Some comments questioned the requirement that applications and objections be in English. To provide the greatest cost and time efficiencies, the evaluation should be conducted in one language. English was selected as it is the most commonly used language for business transactions across the world. In addition, translation of contracts adds ambiguity that can be avoided. For some documents such as financial statements that are pre-existing to an application, these are expected to be submitted in the

original language, with any resulting translation needs being covered by ICANN. In addition, the Applicant Guidebook, application forms, and other information will continue to be made available in multiple languages, to assist those applicants for whom English is not the primary language. ICANN will encourage dispute resolution service providers to provide similar support for those participating in the objection process.

Additional comments concerned the consequences for an applicant of not reporting changes to information. We agree with these. This is covered in the Terms and Conditions in Module 6; in addition a note will be added in section 1.2.6 to provide additional clarity.

Comments regarding IDN applications indicated that section 1.3 of the guidebook should clarify that IDN applicants must comply with requirements regarding prevention of malicious conduct. These requirements are in the registry agreement and are binding on all new gTLD registry operators, whether the string is IDN or ASCII. Comments also expressed concern regarding IDN variants. The management of IDN variants continues to be a topic of discussion within the community. See the paper at <http://www.icann.org/en/topics/idn/fast-track/proposed-implementation-details-idn-tables-revision-1-clean-29may09-en.pdf> for a discussion of these issues, and the recent recommendations at <http://www.icann.org/en/announcements/announcement-2-03dec09-en.htm>.

Comments indicated that the lifecycle time estimates included in draft version 3 of the guidebook were seen as helpful. There was also a suggestion for an indication of time required to transition for applicants electing verification as high-security zones. This point will be considered as the High Security TLD program is further developed.

Community-Based Applications

I. Key points

- The community-based definitions and descriptions in Module 1 are intended to provide guidance to applicants in noting the factors considered should the need arise for objection resolution or community priority evaluation, without pre-judging the circumstances of particular applications.
- It is important to note that the community-based designation is made by the applicant rather than by ICANN. An examination of the various community aspects of the application occurs in the event of a community priority evaluation, in which case there is deeper inquiry into how the application meets the criteria and factors considered to demonstrate a community-based orientation.
- It is not expected that a “bulk” fee structure will be instituted for translated versions of community name strings. Applications for translated versions of the same string would undergo the complete evaluation process. It is anticipated that subsequent application rounds will enable adjustments to the fee structure based on historical costs from previous rounds, the effectiveness and efficiency of the application evaluation process, and other data as it becomes available.

II. Summary of Comments

Open or community gTLD

Requiring that the community for whose benefit a community-based application is intended be “clearly delineated” instead of a “restricted population” is a helpful change. INTA (20 Nov. 2009). More clarity is needed on the types of organizations that can submit a community-based application (e.g., a brand owner whose registry will only support employees and suppliers). ECTA/MARQUES (22 Nov. 2009). BITS supports requiring dedicated registration and registrant use policies in conjunction with community-based gTLDs. More than one institution must endorse an application as community-based in the financial services industry and potentially more broadly (secs. 1.2.3, 1.2.3.1). Also, BITS supports the sec. 1.2.3.2 provision that any application can be objected to on community grounds even if it is not designated as community-based. *BITS (22 Nov. 2009)*.

The term change from “open” to “standard” is a better reflection of what this type of application would allow. *Lovells (22 Nov. 2009)*.

Community-based—fundamental principles

In addition to honoring community commitments in the application, two specifications must be added for community-based TLDs: (1) the community TLD organization must demonstrate its ongoing accountability to the community; and (2) the community TLD organization must be granted its own policy-making authority (e.g. charter eligibility, technical performance standards that do not affect the general Internet). This means that the TLD server and Whois service performance are in the ICANN-governed realm, but the EPP server and performance and DNS update intervals are up to the community TLD organization. This is based on the central difference that a community-based TLD is one that has a credible and functioning governance process on the community level, while a standard TLD is one where the governance and policy oversight process is entrusted to ICANN. *W. Staub (22 Nov. 2009)*.

Community-based definition (sec. 1.2.3.1)

The definition of community-based in DAG v3 has some improved clarity but the criteria should ensure (1) a mere customer or subscriber base is not deemed to be a community and (2) to qualify as a community-based gTLD, an applicant must demonstrate that community members would likely self-identify themselves as a member of the community. The definition should preclude an applicant from claiming to be a community with an IDN version of an existing gTLD. The following should be added to the definition of a community-based gTLD: “The following shall not be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities; (iii) a country or other region that is represented by a ccTLD; or (iv) a language except in cases where the TLD is a recognized identifier for a UNESCO recognized language.” *RySG (21 Nov. 2009)*.

Community-based: concerns

Maybe the whole notion of community TLD should be scrapped. The brand TLDs or very small/closed community TLDs would seem not to provide any benefit to the Internet as a whole (i.e., TLDs created for the purpose of not being used or being “reserved” to lock others out); these should be limited as much as possible. *P. Mevzek (22 Nov. 2009)*.

Derivative names

If a community name has a derivative (e.g., Bayern/Bavaria), must the applicant apply for both names? There should be a fair reduction of the application fee in such cases if the applicant wants to apply for the community name in different languages. *C. von Veltheim (22 Nov. 2009)*.

Multilingual, community-based application—criteria and fees

The criteria for applying simultaneously for multiple translations of the same string could be (1) that the application meets all community-based criteria; and (2) that the proposed string translation can be found in any dictionary in any language. A single application fee coupled with an optional, additional fee per translation is a fair and equitable approach. A fee of \$185K per translation is unjustified and a barrier to achieving ICANN’s goal of a multilingual Internet. *R. Andruff (Module 1, 14 Nov. 2009)*.

The staff has not addressed the BC’s concerns regarding translations of strings. To best support the use of IDNs, new gTLD registry operators should have the ability to offer registrants their chosen domain names in the many different languages and/or scripts that Internet users wish to register. Fees for each translation should be lower, far less than \$185K. ICANN should encourage registry operators to run IDN gTLD strings as that is a primary purpose for expansion of the gTLD space. The final AG should facilitate the ability of community-based gTLDs to offer their respective communities the option of registering the same string name in any language or script that the registrant may choose. *BC (23 Nov. 2009)*.

Apply similar scrutiny to TLD translations

Similar scrutiny should be followed with the translation versions of the TLDs as with the original one. Wider language rights should be granted only if the supporting community is truly global and globally respected and active in the requested languages. *R. Siren (Module 1, 17 Nov. 2009)*

III. Analysis and Proposed Position

Regarding the definition set forth for a community-based application in section 1.2.3, various comments provided suggestions for elements that should be added to the definition of a community-based application listed in Module 1.

Some suggested that the definition for community-based application should explicitly preclude particular groups or scenarios. For example, there was comment that a customer base or business affiliate group should not be considered communities, and that countries or territories represented by ccTLDs should not be considered communities. In considering these suggestions, it was difficult to rule out every possible community-based construction that would fall into one of the above. It is possible that some of these could be useful as community-based gTLDs, and it is unclear what the basis would be to justify eliminating them from consideration. It is understood that these suggestions are made in the interest of clarity, but it was concluded after deliberation that the definition should not pre-judge applications without consideration of the circumstances.

It is important to note that the community-based designation is not made by ICANN, but by the applicant. This is noted along with the definition in section 1.2.3. ICANN does not evaluate whether the community named in the application is “valid,” i.e., falls into the stated definition. An examination of the various community aspects of the application occurs only in the event of a community priority evaluation or when resolving a community objection. In such cases there is deeper inquiry into how the application meets the criteria and factors considered to demonstrate a community-based orientation.

Thus, the definitions and descriptions in Module 1 are intended to provide guidance to applicants in noting the factors weighed in looking at any particular case. It would be possible to create more specific rules of inclusion and exclusion, but this would necessitate creating an extra step in the evaluation process for ICANN to determine which applications are acceptable as community-based. This would mean added cost, complexity and uncertainty in the process in spite of the additional rules. As the

process is constructed, there is little incentive to claim to be community-based without ability to substantiate the claim, since the application may be eliminated if it does not meet the scoring threshold in case of community priority evaluation, as well as in case of community objections, while, if succeeding, the applicant will be bound by additional community-specific obligations in the registry agreement.

Some suggested that the definition could be enhanced in particular ways. For example, there was a suggestion that the applicant demonstrate self-identification by community members, i.e., prove that the members it identified as part of its community would actually consider themselves part of the community as defined in the application. This is a reasonable expectation and, as is noted in the community priority criteria, there should be an awareness and recognition of a community among its members. This is an area that is examined in the community establishment criterion of the community priority evaluation.

Another suggestion was that the definition should carry some sense of ongoing accountability from the applicant to the community. This is also a helpful suggestion and in line with the intention of having the community-specific obligations in the registry agreement as well as the post-delegation dispute resolution mechanism. It is also partially addressed in the applicant's response to the application question about the community-based purpose. It may be beneficial to further articulate this in the guidebook, and this is being taken into account in revising the relevant sections.

There was concern expressed that a TLD could be awarded based on only one endorsement for an application, and a suggestion that more than one should be required. This was considered but also seemed too broad, as it is likely that there could be a community constituted where there was only one relevant endorsement, especially in case of a very structured community with a single organization representing it. The number and source of endorsements is examined in the community priority evaluation and, if relevant, in the dispute resolution process.

Finally, there was a comment that the community-based definition should tie more closely to the distinction made between existing "sponsored" registry agreements (where the sponsor has delegated policy-making authority) and "unsponsored" registry agreements (where policy development occurs in the ICANN process). The intention with the community-based designation is to implement the GNSO's policy advice on allocation methods, which does not contain the idea of varying delegated authority as with the previous "sponsored" model. Accordingly, a community-based gTLD will not be able to replace consensus policies with its own policies but can stipulate complementary own policies regarding, for example, registration requirements.

Other comments suggested a link between community-based considerations and fee considerations (i.e., multiple translations of a community name should be subject to lower fees), indicating that the process should facilitate the ability of community-based applicants to offer translations of a string in various languages or scripts at a lower cost. Another comment stressed that such instances called for an appropriate level of scrutiny, to include consideration of whether the community was active in the proposed language area and would be committed to providing meaningful support to local communities. As stated elsewhere, it is anticipated that subsequent application rounds will enable adjustments to the fee structure based on historical costs from previous rounds, the effectiveness and efficiency of the application evaluation process, and other data as it becomes available. It is not expected that a "bulk" fee structure will be instituted for the initial application round. Applications for translated versions of the same string would undergo the complete evaluation process.

One comment suggested eliminating the idea of community-based applications altogether. The concept of community-based applications comes from the GNSO's policy recommendations on which the implementation of the New gTLD Program is based. Although they may be small or tightly focused, it is expected that community-based TLDs will add value to the namespace in serving the needs of diverse user groups.

Evaluation

I. Key Points

- The selection process for independent evaluation firms is designed to retain the most qualified resources to perform these tasks. This includes diversity in language and cultural capabilities, to properly consider applications from all regions.
- ICANN will publish details on the code of conduct and conflict policies for evaluators, including procedure for complaint and actions to be taken in the event of breach of these policies by an evaluator.
- ICANN will provide support for applicants, including a customer service function, Question/Answer mechanism, and specified opportunities to exchange information with evaluation panels. This includes support for those applicants for whom English is not the primary language.

II. Comment Summary

Evaluators

ICANN did not include criteria for selection and qualification of evaluators in the DAG v.3. ICANN should include in the next version of the DAG either the criteria or a hyperlink to where they may be found on the ICANN website. *INTA (20 Nov. 2009)*.

Evaluation order and criteria

Are proposals going to be evaluated in a particular order? It is crucial that the evaluation criteria are the same for all applications and evaluation firms. Applicants and evaluators must have a common set of rules and criteria not biased by interpretations made by someone else. *NICMexico (23 Nov. 2009)*.

Two character gTLD IDN strings (sec. 2.1.1.3.2)

The three character requirement as applied to IDN gTLDs should allow for exceptions in Chinese, Japanese and Korean scripts. *RySG (21 Nov. 2009)*.

Confidentiality for answers to certain evaluation questions (attachment to Module 2)

If answering questions could disclose details about operational security at a registry, then the answers should be protected by confidentiality –e.g. aspects of questions 31, 35. *RySG (21 Nov. 2009)*.

Panelists--Conflict of interest (sec. 2.3.4)

There does not appear to be any delineated process in the DAG v3 for handling or managing of conflict of interest complaints (i.e., how should a complaint be filed; who internally handles complaints; how will it be managed by ICANN). *MarkMonitor (Module 2, 20 Nov. 2009)*.

The conflict of interest guidelines should be expanded for panelists to include not only those that meet the currently listed criteria for exclusion but also those that have met one or more criteria in the preceding twelve months. *AIPLA (22 Nov. 2009)*.

The guidelines should be revised to add to the list of prohibited conflicts the ownership or operation of any current contracted party. *Microsoft (23 Nov. 2009)*.

Panelists—languages (sec. 2.3.2)

For an IDN application, it must be required that at least one (and preferably two) panelists on each of the panels speaks that language and is from that community, preferably from the country that has the largest population of speakers. It is not a cost issue, it is the will to do so; in most IDN cases it would cost far less to hire a panelist from the poorer IDN country. *S. Subbiah (Module 2, 23 Nov. 2009)*.

Questions

Parties should have the opportunity to submit anonymous questions for the public record during the application process. *AIPLA (22 Nov. 2009)*.

Applicants should be able to ask questions to the evaluation panels during the preparation of the application, and all questions and answers should be published. Evaluation contractors and DRSPs also should engage in dialogue with ICANN constituent groups to outline draft procedures and obtain feedback. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

IDNs and 2- character strings (sec. 2.1.1.3.2)

There is no technical reasoning for the limit of IDN TLDs to 3 or more characters. Any potential collision with ISO 3166 strings can be solved by providing that 2 letter IDN strings that are visually similar with a string included in the ISO 3166 namespace will not be allowed, but any other strings will be allowed. Visual similarity should be resolved the same way other similarities are assessed as specified in sec. 2.1.1.1 by evaluating the IDN TLD's similarity with all the still available ISO 3166 strings. *Y. Keren (23 Nov. 2009)*.

Extended Evaluation—measures to ensure consistency should be considered

A single panel would ensure consistency. *ECTA/MARQUES (22 Nov. 2009)*. *IPC (22 Nov. 2009)*.

Extended Evaluation—not available for string similarity issues

The reasons for this exclusion are unclear. Extended evaluation should be available for string similarity for applicants that fail the string similarity review or whose applications are found at risk for string confusion. *IPC (22 Nov. 2009)*.

Extended Evaluation—new submissions (sec. 2.2.1)

The extended evaluation process does not allow the submission of new material to improve the application. This gives competitive advantages to ASCII applicants above IDN-using- and-need applicants. In light of the application fee of \$185K, it is fair to allow the submission of new material to improve the application. *A. Sozonov (Module 2, 23 Feb. 2009)*.

The policy against allowing a one-time possibility of upgrading a rejected evaluation to allow for misunderstanding of instructions is unfair in failing to consider that cultural differences may have led to such misunderstandings, especially for foreign IDN applicants. *S. Subbiah (Module 2, 23 Nov. 2009)*. *CONAC (23 Nov. 2009)*.

Continent or UN region gTLD (sec. 2.1.1.4.1 point 5)

The choice of 69% of countries agreeing and at most one country objecting seems completely arbitrary; what is the precedent or rationale for this? *S. Subbiah (Module 2, 23 Nov. 2009)*.

Scoring range discrepancy (question 50)

The redline version and “clean” version are inconsistent in the Scoring Range (redline 0-3, “clean” 0-2); this may be a typo. *J. Sowder (Module 2, 7 Oct. 2009)*.

Applicant reviews (sec. 2.1.2)

Performance of background checks on applicants, registries and registrants does not appear to be a part of the reviews that ICANN notes in this section. *BITS (22 Nov. 2009)*.

Evaluators—additional information requests (sec. 2.1.2.3)

Providing only one opportunity for clarification (and only upon the evaluator’s request) conflicts with the goal of allowing evaluators to obtain sufficient information to decide applications on their merits. *INTA (20 Nov. 2009)*. *RySG (21 Nov. 2009)*.

Evaluators—code of conduct (sec. 2.3.3)

Panelist impartiality and fairness are crucial, but it is also crucial that panelists be allowed to consider the public interest in avoiding confusion among TLDs. If the “ICANN-approved agenda” does not yet include this concern, INTA emphasizes that it must. *INTA (20 Nov. 2009)*.

Consequences of a reviewer’s breach of the code should be clarified—what effect does a breach have on applications, objections or disputes in which the reviewer was involved? *BITS (22 Nov. 2009)*.

A further check would be to disclose the identity of the evaluator to the applicant and allow a challenge process for cause shown on grounds of bias. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*. *Microsoft (23 Nov. 2009)*.

III. Analysis and Proposed Position

Comments concerning the evaluation process largely concerned the selection, tasks, and conduct of evaluation panels, and the opportunities for applicants to communicate with evaluators.

Comments requested the criteria for selection of independent panels; these were included in section 2.3.2. See also <http://www.icann.org/en/topics/new-gtlds/tenders-eoi-en.htm>, including the original announcement specifying detailed qualifications for each panel. Another comment suggested that panelists should communicate with applicants and constituency groups prior to application submission, for clarification and feedback. As the panelists work on the basis of the Applicant Guidebook, the open comment process on the guidebook is the best mechanism for such feedback and clarification requests.

Some comments expressed concerns about consistency in the evaluation process. We agree. This is an important and valuable point. The evaluators are required to use the same criteria for all applications reviewed, regardless of the order in which they are processed. Depending on the number of applications involved, it may not be feasible for all applications to go through the same panel. However, ICANN is taking care to ensure that the firms engaged to perform evaluation roles give special attention to ensuring consistency via their evaluation and review processes. For example, a candidate to provide evaluation services has recommended a double blind sampling plan to ensure consistency across panels.

In addition, the existing timeline for evaluations includes a “normalization” period where graded applications are compared to ensure consistency.

One comment sought confirmation that background checks are required for all applications. Here it is. Module 2 focuses on the evaluation of all applications through the various components that are part of Initial Evaluation. Besides the technical, operational, and financial information, the application form contains a number of other areas such as proof of establishment and good standing, applicant background, and confirmation of payment information, among others. These are gateway questions – if an applicant does not pass the background check, for example, the application will not proceed to the rest of the Initial Evaluation. These items are reviewed prior to the beginning of Initial Evaluation. The guidebook text will be reviewed to ensure that this is clear.

Some comments concerned the Code of Conduct and Conflict of Interest guidelines for panelists, included in section 2.3. Several inquired about the procedures for reporting, investigating, and handling breaches of the code by evaluators. This area is under review, to be amplified for the next draft of the guidebook. Candidate evaluation service providers were each asked, as part of their proposals, to address the areas of conflicts. The quality of presentation in this area was part of the grade they received. Some comments also had specific suggestions to the policy, such as inclusion of past activities in judging conflicts of interest, or adding ownership in a contracted party as one of the conflict elements. These will be considered for the next iteration of the policy.

A comment stated that panelists should be allowed to consider the public interest in avoiding confusion among TLDs. The String Similarity Panel will compare strings for potential user confusion – their goal (as with all evaluators and the entire process) is to serve the public interest, in this case guarding against user confusion and thereby working to ensure DNS stability.

A comment suggested confidential treatment for the applicant responses to security and abuse prevention questions. The principle is that as much information as possible should be posted, unless it contains sensitive details or would be prone to misuse. Confidentiality designations for each question will be revised in the next version of the Guidebook.

Some comments expressed concern that the process as designed would not allow applicants to give evaluators sufficient information to make a decision. This is a good issue to raise. The evaluation process is designed with the idea to afford several opportunities for clarification and amplification when needed. Applicants are expected to provide complete and accurate applications and supplemental data upon the first submission. A Customer Service function will be available to handle questions from applicants during the Application Submission Period. The Customer Service function will endeavor to provide and publish answers to all relevant questions from all applicants, to the extent practicable, in the applicant’s language of choice. The guidebook encourages applicants to take advantage of this Question/Answer mechanism to address any particular areas of uncertainty before the application is submitted, to reduce the need for additional clarification and review steps. Once the Initial Evaluation has commenced, the evaluation panels and applicants will conduct a coordinated exchange of information, if needed, which should address any remaining oversights or misunderstandings. Finally, applications not passing Initial Evaluation will have the option of requesting Extended Evaluation procedures in which they may provide further data supporting their applications (there is no extra cost to the applicant for electing this option). The availability of these opportunities before, during, and after application submission should allow the applicant to provide all necessary information to the evaluators.

Some comments stated that for an IDN application, each panel should have at least one native speaker of the relevant language. It is ICANN's intention to hire the most qualified resources possible to conduct the application analysis. A key requirement in the selection process is the ability for the firm to convene globally diverse panels that are able to address language and cultural concerns for any given application. ICANN has taken into account the possibility that cultural differences may lead to misunderstandings for certain applicants: this is the reason for posting application materials in multiple languages, for establishing a Customer Service function, and for allowing exchanges between the evaluators and applicant.

A comment suggested that there is no technical reason for the requirement that an IDN gTLD consist of three or more characters. This requirement has undergone review since version 3 of the guidebook was published; see the most recent recommendations at <http://www.icann.org/en/announcements/announcement-2-03dec09-en.htm>. ICANN has published a model for relaxing the three-character requirement under separate cover.

A comment expressed the view that Extended Evaluation should be available for the string similarity review, in the case where an applicant did not pass the review or was assigned to a contention set. This is a good issue – one that has been discussed extensively as both sides of the debate are considered. The goal is to implement a consistent, timely, predictable process that promotes DNS stability and competition. The String Similarity review considers similarities among strings and determines whether these rise to the level of creating a probability of user confusion. Unlike the other review areas where extended evaluation may occur, the determination is not based on information or evidence submitted by the applicant, but is focused on the strings themselves. Since there is no new evidence that can be introduced into this process in a second stage, an extended evaluation would largely consist of the panel looking at the same information. For this reason, no appeal procedure is provided for String Similarity outcomes, as explained in the guidebook and in previous public comment analyses. Based on the same logic, no Extended Evaluation option will be available for String Similarity outcomes.

A comment questioned whether there was a discrepancy in the scoring range on question 50 in the application. This is correct; this was a typo and will be fixed.

TRADEMARK PROTECTION

I. Key Points

- The public comments on trademark protection summarized below were received prior to the ICANN Board's request to the GNSO Council (<http://gnsso.icann.org/mailling-lists/archives/council/pdfHmFLGTtyhn.pdf>) for input on certain aspects of the Staff proposed models to address trademark protection in new gTLDs.
- In response to the Board's request, the GNSO Council proposed an alternative model as described in the GNSO'S Special Trademark Issues Recommendations Report (<http://gnsso.icann.org/issues/sti/sti-wt-recommendations-11dec09-en.pdf>), reflecting the consensus view of the Special Trademark Issues (STI) review team convened by the GNSO Council.
- The STI recommendations received the approval of the GNSO Council and were separately posted for public comment (<http://www.icann.org/en/public-comment/#sti>).

- The Staff models for an IP Clearinghouse and Uniform Rapid Suspension procedure, which were the subject of the comments described below, have been modified in accordance with proposals based on the GNSO STI recommendations.
- For further analysis of the proposed solutions to the issues related to trademark protection, please review the summary and analysis of the STI Recommendations located in a companion document to this one.

II. Comment Summary

IRT report misconstrued by ICANN

ICANN seems to have mistakenly viewed the IRT report as a trademark owner “wish list”; ICANN rejected some of the main IRT recommendations and cut others down to a hobbled version for GNSO review. *Time Warner (Module 5, 20 Nov. 2009)*.

More protections exist for trademarks in the new gTLD program

The combination of protections included in the current DAG and others that the ICANN is likely to adopt based on the IRT recommendations will far surpass the trademark protections available in current TLDs. Many new registries are building in additional protections, including proactive policing and takedown measures, adopted from successful ccTLD policies. Thus, trademark owners and others concerned about abuses should welcome new TLDs and the rules that come with them. *Demand Media (23 Nov. 2009)*.

Stronger trademark protection needed

The trademark protections in version 3 of the draft AG are inadequate. ICANN should adopt the more stringent protections of a GPML, a URS, and a trademark clearinghouse. *J. Lake (23 Nov. 2009)*.

Much work remains to be done to address the concerns of trademark owners. *Adobe Systems (20 Nov. 2009)*.

ICANN should incorporate further RPM policy changes in the next version of the DAG as recommended by the IRT. *BBC (19 Nov. 2009)*. *Coca-Cola (24 Nov. 2009)*. *Microsoft (23 Nov. 2009)*. *Visa (23 Nov. 2009)*. *Lovells (22 Nov. 2009)*. *INTA (20 Nov. 2009)*. *Yahoo! (23 Nov. 2009)*. *AIPLA (22 Nov. 2009)*. *CADNA (22 Nov. 2009)*.

The basis for ICANN’s rejecting the request for reconsideration process and revised string confusion analysis is not known. The analyses of public comment on the IRT recommendations make no reference to either, notwithstanding the generally supportive public comments received. These recommendations would have resulted in more new gTLD strings clearing the Initial Examination process, an outcome that would have otherwise seemed desirable from the perspective of the ICANN Board. *Microsoft (23 Nov. 2009)*.

Additional measures are needed to prevent frequent cases of cybersquatting that legitimate owners have to deal with. *F. Salamero (20 Nov. 2009)*. *CADNA (22 Nov. 2009)*. A sunrise or other pre-launch RPM, as well as the URS, should be mandatory for all TLDs offering domains to the public. The URS should have the same remedy as the UDRP. *NICMexico (23 Nov. 2009)*. *Coca-Cola (24 Nov. 2009)*.

The attempt to find a compromise solution through the GNSO may not be successful. We are dismayed that the GNSO will not be reporting on the crucial issues of the Trademark Clearinghouse or the URS until after the DAG v3 comment period has closed. Measures to protect the rights of others that are

“best practice” will not be effective. E.g., ICANN must ensure that the URS is mandatory and it should be considered for existing TLDs as well. *ECTA/MARQUES (22 Nov. 2009)*. *Coca-Cola (24 Nov. 2009)*. *Lovells (22 Nov. 2009)*.

Nokia supports IPR protections in the new gTLD program and for existing TLDs provided that they do not broaden existing trademark rights or create new legal rights. Nokia supports continued use of the UDRP as the primary means of addressing cybersquatting and recommends UDRP’s reform rather than an entirely new scheme should improvements be warranted. *Nokia (22 Nov. 2009)*. *Minds + Machines supports the proposed Trademark Clearinghouse. Minds + Machines (22 Nov. 2009)*. *C. von Veltheim (22 Nov. 2009)*.

Ascended TLDs proposed model.

If ICANN moves ahead with new gTLDs despite the lack of public support for the program, it should use an “Ascended TLDs” model using property rights systems like easements to introduce them and allow the marketplace to resolve conflicts using economic principles (e.g., recognize that each and every owner of abc.com, abc.net and abc.org should have a veto to disallow anyone to have .abc, and the only way for .abc to be allocated is for the prospective TLD owner to buy an easement from each of abc.com, abc.net and abc.org). This approach works with trademark holders and domain registrants alike, strengthening both their rights simultaneously. Abuse at the second level would still require work as well as combating other top-level issues such as morality, etc. *G. Kirikos (22 Nov. 2009)*.

Opposition to new gTLD program

IOC maintains its strong opposition. Enforcement costs posed by the threat of trademark abuse will be worse for nonprofit trademark owners like IOC and it is inappropriate to force them to divert their resources from their missions in order to prevent abuse of their trademarks in the gTLD system. IOC’s recommendations should not be taken as a waiver of its right to proceed against ICANN for damages resulting to the IOC or the Olympic Movement from the implementation of the new gTLD program. *IOC (20 Nov. 2009)*.

GNSO efforts and timing

ICA appreciates the Board’s recognition that the URS and other proposed RPMs are important policy issues requiring further GNSO input and adequate time for GNSO consideration so that balanced consensus policies can be developed. *ICA (23 Nov. 2009)*.

Substantial burden shift to trademark owners

Elimination of the GPML from the DAG v3 will shift the burden and expense of protecting and policing trademark owners’ marks onto trademark owners and increase that burden substantially. The proposed trademark clearinghouse watch service does not appear to have any enforcement mechanism to prevent the filing of potentially infringing gTLD applications. No safeguards are in place to prevent the same or very similar claims from having to be repeatedly litigated. Concerns raised in previous comments of Hearst and other companies have not been fully or satisfactorily addressed. *Hearst Communications (19 Nov. 2009)*. We are extremely disappointed that ICANN rejected the IRT’s proposal for a GPML. It would protect consumers and significantly reduce defensive registrations. ICANN should reconsider its position. *BBC (19 Nov. 2009)*. *MarkMonitor et al. (20 Nov. 2009)*. *INTA (20 Nov. 2009)*. *Adobe Systems (20 Nov. 2009)*. *Lovells (22 Nov. 2009)*. *Visa (23 Nov. 2009)*. *Microsoft (23 Nov. 2009)*. *Coca-Cola (24 Nov. 2009)*.

Standard procedures are needed for all new gTLDs regarding pre-launch sunrise periods, Whois requirements and post-delegation disputes, with adequate notice of these measures for brand owners. *Coca-Cola (24 Nov. 2009)*.

GPML as proposed should not be adopted

If ICANN adopted the GPML, it would become mired in litigation about it. *Minds + Machines (22 Nov. 2009)*.

Cost of defending brands.

The program will exacerbate consumer confusion and the costs of defending brands. *NCTA (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

Trademark clearinghouse fees should be allocated among trademark owners, registries and registrars so as not to impose an unreasonable burden on owners of substantial numbers of trademark registrations. *Hearst Communications (19 Nov. 2009)*.

Periodic re-evaluation of trademark data

Periodic re-evaluation of trademark data must take into account that the terms of trademark registrations may last for varying periods depending on the jurisdiction, up to ten years or more. *Hearst Communications (19 Nov. 2009)*.

Competing marks

Third party-owned marks, which may in fact be registered because the trademark owner permits them to be registered under strict limitations, should not be considered “competing” marks against the trademark owner’s marks in making determinations in connection with URS proceedings or reconsiderations of initial evaluation proceedings. *Hearst Communications (19 Nov. 2009)*.

URS—more operational details

More operational details are needed, including: how examiner panels will be constituted; the examiners’ qualifications; and the mechanism for enforcement by the registrars of panel decisions. The advance payment of fees to the DRSP needs to be clarified. In addition to the “evaluation fee”, ICANN should require an escrow from any registrant to make sure there are funds available to collect in the event of such a dispute. *Hearst Communications (19 Nov. 2009)*.

Uncertainty created by imposing dispute resolution fee

The new gTLD program could be harmed by uncertainty created from imposing the dispute resolution fee (i.e., IP owners may postpone their objection to a future date when they have funds to take legal action). Thus, even if an applicant wins the TLD initially it could lose it later on in a court of law. The complainant could argue that it could not raise money to pay the filing fee. *A. Rosenkrans Birkedal (Module 1, 17 Oct. 2009)*.

Capital City gTLDs

Names of key capital cities of the world raise clear trademark problems for entities with trademarks comprised partially of city names. E.g., the IOC’s “London 2012 Summer Olympic Games” or other marks like “New York Yankees” would be plagued with infringing second level domains in their respective city gTLDs. *IOC (20 Nov. 2009)*.

RPMs should be optional and voluntary

Anything other than voluntary and optional RPMs will constitute a negation of the GNSO Council policy making process. The record shows that there was no consensus for mandating RPMs by either the GNSO or the IP Constituency and to do so now runs counter to that lack of consensus. The guide “A Perfect Sunrise” worked on by the IP Constituency and others would be a good ancillary to the final Applicant Guidebook by providing assistance to potential gTLD applicants in identifying and assessing pre-launch RPMs. *A. Doria (9 Nov. 2009).*

Enforcement of existing legal rights--choice of law

The GNSO Recommendation 3 phrase “enforceable under generally accepted and internationally recognized principles of law” should be left to the applicable laws in each locality. *A. Doria (9 Nov. 2009).*

Protection of rights beyond commercial IP

Per the language of Recommendation 3 giving examples of “existing legal rights,” some effort should be made to ensure that the new procedures protect all rights (e.g., human, civil, political) at least as stringently as they protect commercial IP rights. *A. Doria (9 Nov. 2009).*

Consistent with ICANN’s Affirmation of Commitments responsibilities to the global public interest, the new gTLD processes for community and geographical names must be constructed with the rights of minority, vulnerable, stateless, powerless and economically impoverished communities in mind. ICANN should consult a panel of independent experts on international human rights law and incorporate their recommendations about community and geographical application requirements, string review, DRSPs or other dispute resolution panel and mechanisms, into the final version of the DAG. ICANN’s credibility would also be enhanced by establishment of a permanent panel of experts in international human rights law and the geopolitics of minority and displaced groups who would review all strings and flag potential concerns. *R. McKinnon (22 Nov. 2009).*

Dilution-type protection

The DAG v3 still does not clarify whether dilution-type protection will be afforded without requiring a showing that the applicant’s mark is famous. *AIPLA (22 Nov. 2009).*

III. Analysis and Proposed Position

Several comments raise concerns regarding the scope of protections afforded to trademark holders in AGBv3. Specifically, the failure to adopt all of the IRT’s proposals (such as the Globally Protected Marks List and a mandatory URS) is viewed as substantially weakening the protections for trademark holders in new gTLDs (BBC, Microsoft, Yahoo!).

Other comments supported scaling back the IRT proposals contained in the AGBv3 because ICANN would be providing trademark holders rights in excess of those available under trademark law, and because these proposals were not supported by a consensus among the ICANN community (Demand Media, Minds + Machines, Avri Doria).

The subsequent evaluation by the GNSO’s STI team attempted to balance these concerns and produce a compromise solution. The resulting model, referred to as the GNSO-STI Model, received the unanimous support of the GNSO Council, and resulted in certain improvements for trademark protection, while also providing enhanced protections for innocent registrants. These recommendations have largely been incorporated into the AGB Model for trademark protection.

The AGBv4 further protects trademark holders by incorporating other features into the New gTLD Program such as Thick WHOIS, a Post Dispute Delegation Resolution Procedure, and a High Security Zone Program. In combination, these additional features are designed to facilitate identification of infringing registrants, and protect against possible malfeasance among new gTLD registries.

WHOIS

I. Key Points

- The requirement for a thick Whois model for all new gTLD registries is seen as a positive step. Parties also would like to see expanded requirements containing accuracy of Whois data.

II. Comment Summary

Support

IBM supports the proposal that new gTLDs be required to have a thick Whois. While appreciating freedom of speech and privacy concerns providing legitimate bases for anonymity in some domain name registrations, this must be balanced with the need to stop cyber crime and identify who is behind such cyber criminal activity. A thick Whois offers the ability to register a domain anonymously while providing the additional information about the domain name registrant needed for identifying cyber criminals. *IBM (22 Nov. 2009). BBC (19 Nov. 2009). OTA (30 Nov. 2009). MarkMonitor et al. (20 Nov. 2009).*

NCTA supports thick Whois. ICANN should require existing registrars and registries and any new registries to enforce vigorously the requirement to maintain accurate, reliable and up-to-date information concerning domain name registrants. *NCTA (22 Nov. 2009). Internet Identity (Module 5, 23 Nov. 2009).*

The proposed thick Whois requirement is a step in the right direction. The scope of the Whois services to be provided by the applicant should be further specified and require that the applicant provide (and certify that it has provided) detailed and correct information about registrants and that such information be gathered consistent with the IRT recommendations of a universal Thick Whois model. *INTA (20 Nov. 2009).*

Proxy and privacy registrations

Measures should be taken prior to launch of the new gTLD program to deal with the increased use of proxy and privacy registrations. Their use by bad actors for unlawful purposes is increasing and hinders their identification and the prevention of IP abuse, phishing, and fraud. *Lovells (22 Nov. 2009).*

New processes and guidelines must be developed to ensure that privacy/proxy services comply with their contractual obligations. *IPC (Module 5, 22 Nov. 2009). SIIA (23 Nov. 2009).*

If a proxy service is shielding an abusive registrant, they should be held responsible. Proxy services should not be allowed, or in the alternative, should be permitted only if address details are provided in case of a dispute. *Hearst Communications (19 Nov. 2009).*

Privacy and data sharing

Data sharing with affiliates and third parties should be changed to an opt-in process with clear and concise policies provided to businesses and users at the point of customer interaction. The mounting

abuse to such practices is currently under review by both the EU and FTC. It is suggested that ICANN adopt the applicable OTA Online Trust Principles to proactively stem this practice <http://otalliance.org/resources/principles.html>. *OTA (30 Nov. 2009)*.

Accuracy of data

ICANN must enforce its Registrar Accreditation Agreements to ensure accurate Whois information. ICANN must also set, and enforce, universal proxy standards. Mere study of the issue while marching forward with an unbridled gTLD expansion displays a serious disregard for trademark owners' interests. *IOC (20 Nov. 2009)*.

All new registries should be required to cancel the registrations of any party supplying incomplete or false Whois details within a reasonable period (e.g. 30 days). This is the standard used by several ccTLDs. *ECTA/MARQUES (22 Nov. 2009)*.

As pointed out by the IPC, ICANN needs to require in the registry agreement that registries take proactive steps to ensure that registrars comply with obligations regarding complete and accurate Whois data which they collect in the new gTLDs. *COA (22 Nov. 2009)*.

Registries taking these steps and committing to these policies should receive extra points in the evaluation process. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

ICANN should require strict proxy or anonymous registration guidelines to prevent circumvention of the thick Whois requirement, including requiring the applicant to disclose the "true registrant" upon request by a brand holder protecting its trademark rights or to escrow such proxy/anonymous data to be available upon the occurrence of specified triggering events. *INTA (20 Nov. 2009)*. *ECTA/MARQUES (22 Nov. 2009)*. *IPC (22 Nov. 2009)*.

Privacy considerations

If thick Whois is mandated, each registry operator should have a public webpage on a designated address which would display the registry country and laws in effect related to customer data privacy and the way the registry uses the personal data, besides access through the IRIS server. *P. Mezvek (Module 5, 22 Nov. 2009)*.

Reference to thick Whois is insufficient, and no assurances regarding registrant privacy appear to have been forthcoming; this needs to be addressed. If ICANN can "get it right" for .tel, why can't it do the same for new gTLDs? *M. Neylon (22 Nov. 2009)*.

Mandate IRIS

The new gTLD should be the ideal occasion to mandate IRIS and completely forbid Whois over tcp port 43 both at the registry and registrar level. In the case of thick registry, ICANN should mandate all information to be available through the registry IRIS server, without any information to be available through the registrar IRIS server. *P. Mezvek (Module 5, 22 Nov. 2009)*.

III. Analysis and Proposed Position

Various comments expressed support for the thick Whois model. This requirement will remain in the Applicant Guidebook.

Several comments also urged that the guidebook institute requirements for new registries with regard to maintaining accuracy of Whois data. Such comments mentioned measures for enforcement of the Registrar Accreditation Agreement and proposed use of the registry agreement to mandate registry enforcement concerning registrar actions. ICANN has reviewed the scoring to consider where feasible and appropriate enhancements based on registry efforts to promote Whois accuracy can be instituted. Such an undertaking would require so change to Whois policy in order to amend the proposed registry agreement. Note that the High Security Zone TLD Verification program included a mechanism for registries to institute accuracy requirements among registrars – this elective is considered a sign of a high trust zone. Some comments also indicated that even where a thick Whois model is required, the registry should make available an information page concerning its privacy policies and applicable privacy laws. Telnic’s model for .TEL was cited as an example of a Whois model that addressed registrant privacy concerns.

Some comments suggested that the Applicant Guidebook should institute rules and guidelines for proxy and privacy services. This comment highlights an area of community discussion. Such services are generally instituted at the registrar level and below, and are less relevant to registry operations. This issue is best addressed through the policy process, where the GNSO is currently studying Whois issues and weighing the various stakeholder considerations.

A comment recommended adoption of the Online Trust Alliance principles regarding data sharing. ICANN appreciates the reference and will review these principles to see how they might be incorporated into the process.

Another comment suggested that the introduction of new gTLDs offered an opportunity to establish IRIS at the registry level as the primary protocol and phase out the current Port-43 Whois system. The GNSO is investigating IRIS in connection with internationalized registration data, and the current Whois provisions in the registry agreement could be updated via the amendment process if there is community support for making a transition from Whois protocols that are currently in use, to IRIS.

ECONOMIC ANALYSIS

I. Key Points

- ICANN has contracted to retain the services with recognized and independently recommended economists to provide additional economic analysis.
- The second phase of the study, due in June 2010, will be targeted to: (i) perform empirical analysis of the proposed gTLD market to estimate the cost of defensive registrations, (ii) develop a metric to assess whether overall expected benefits outweigh the costs for the new gTLD program, (iii) develop a process for assessing whether net economic consumer harm might result from individual applications.

II. Comment Summary

Rationale needed

ICANN should justify the necessity of the new gTLD program by providing the economic rationale requested by the Board several months ago to support ICANN's proposition that consumer benefits outweigh potential costs to the consumer. The costs of cybersquatting with respect to globally recognized brands would outweigh the benefits obtained under a much wider gTLD regime. *IBM (Nov. 22 2009). Adobe Systems (20 Nov. 2009). Yahoo! (23 Nov. 2009). ECTA/MARQUES (22 Nov. 2009). AIPLA (22 Nov. 2009). G. Kirikos (22 Nov. 2009).*

No one has shown any solid or substantial basis for concluding that the new gTLD program is truly needed. If the program does proceed, there is a need for a reserved list of Olympic trademarks. *IOC (20 Nov. 2009).*

Currently, there is not a strong business case for financial gTLDs and the benefits are unclear. *ABA (22 Nov. 2009).*

Importance of economic study

In many ways the economic study is the most important overarching issue and it is incumbent on ICANN to base its decision on the best possible empirical data. At the Seoul meeting ICANN staff made a number of potentially conflicting oral statements about the next steps to be taken. Time Warner looks forward to reviewing and commenting on a written plan from ICANN about how it plans to resolve this critical threshold issue. *Time Warner (Module 5, 20 Nov. 2009).*

The economic study that ICANN posted in March 2009 on competition and price did not evaluate the global demand for gTLDs or the economic impact on registrants, particularly in light of the global recession. A study to evaluate actual demand and a phased approach to new gTLD introduction would be prudent (especially given the results of the Root Scaling study). Further economic study of the cost of defensive registrations and the impact on consumers is also supported by the Government Advisory Committee. A study evaluating actual demand versus derived demand might suggest that ICANN launch a controlled TLD program targeted first to IDNs or geographic-based TLDs that are supported by significant community demand. *BBC (19 Nov. 2009). NICMexico (23 Nov. 2009). MarkMonitor et al. (20 Nov. 2009). AT&T (22 Nov. 2009). SIIA (23 Nov. 2009). Visa (23 Nov. 2009).*

INTA supports commissioning a new truly independent study based on the empirical realities of the domain name marketplace, the results of which should be assessed by the community and integrated into the new gTLD program. *INTA (20 Nov. 2009).*

Opposition to another economic study

Nothing suggests that doing another economic study will give anyone insight into what is going to happen with new gTLDs. This issue should be dropped. It is clear that there is sufficient demand to launch new gTLDs. *Minds + Machines (22 Nov. 2009). Demand Media (23 Nov. 2009).*

Launch Date

The threshold question of whether the new gTLD program will improve the public welfare has not been answered satisfactorily. ICANN needs to begin this work immediately and begin meeting its responsibilities under the Affirmation of Commitments. *INTA (20 Nov. 2009). Visa (23 Nov. 2009).*

III. Analysis and Proposed Position

Additional economic analysis is being undertaken. ICANN has contracted to retain the services with Greg Rosston of Stanford University and Michael Katz of Berkeley University (both in the US) to provide additional economic analysis. They have been retained to address specific questions.

In the first phase of the work, the economists will: survey published studies and resources that describe the potential impacts of new gTLD introduction; examine theoretical arguments about benefits and costs of increased gTLDs; consider and propose empirical studies to identify areas where additional work can serve to assess costs and benefits. The studies should be planned and structured to address open questions. A verbal report on results will be presented in the Nairobi meeting. The feedback received in those discussions will inform a report that is due on 15 February 2009.

The second phase will occur after review of that work by ICANN to define specific, additional selected areas of study. The economists will execute that additional study after review and approval by ICANN. The deliverable will include development of models describing how the selection criteria for new gTLD applicants and mechanisms to mitigate potential harm can promote consumer welfare.

As guided by the results of the first phase, that second phase of the study will be targeted to: (i) perform empirical analysis of the proposed gTLD market to estimate the cost of defensive registrations, (ii) develop a metric to assess whether overall expected benefits outweigh the costs for the new gTLD program, (iii) develop a process for assessing whether net economic consumer harm might result from individual applications.

The second phase study is targeted for completion by 10 June 2010, in time for publication for consideration at the ICANN meeting in Brussels. The results, to the extent necessary, will be incorporated in the next version of the Guidebook.

The final phase, to be undertaken if indicated by the work of the previous phases will seek to develop mechanisms to increase the net benefits from introduction of additional gTLDs. It is impossible at this point to determine what such mechanisms might be, but we expect them to result from the studies in phases 1 and 2.

After posting a public reports at each phase, this team will develop with ICANN, a plan for incorporating study results into the new gTLD implementation procedures.

MALICIOUS CONDUCT

I. Key Points

- Several measures to mitigate potential for malicious conduct have been implemented through the draft Guidebook.
- Working Groups are developing two other methods to deal with malicious conduct in relation to the new gTLD program: the High Security Top Level Domain (“HSTLD”) and the Centralized Zone File Access (“ZFA”) programs.
- ICANN is working with the GNSO to focus on malicious conduct activities possible through reseller activities in the new gTLD program.

II. Comment Summary

Further recommendations

The malicious conduct explanatory memorandum is a good first step but does not go far enough. ICANN should require registry operators to include provisions on protecting against malicious conduct in their agreements with registrars that sponsor registrations in the new gTLDs. ICANN also should:

- (1) reconsider its refusal to require registries to pass-through to registrars any obligations regarding Whois data accuracy or even simply to require new gTLD applicants to disclose their policies for ensuring the accuracy and currency of Whois data and steps they will use to enforce this with registrars and resellers of domain names in the new TLDs;
- (2) To strengthen due diligence, expand the disqualification of any applicant, officer, partner, director or manager who has been, in the preceding 10 years, convicted of a felony or misdemeanor related to financial or corporate governance misconduct. An application should be disqualified if any of these parties has a criminal conviction for copyright infringement, product counterfeiting, or other offense against intellectual property laws, whether or not the crime is labeled a felony;
- (3) Mandate the high security zone program, because it is not effective to make it voluntary. This is an especially troubling example of the shortcomings of ICANN's policy of steadfast refusal to draw any distinctions among applications or to classify them in any way. Even if it is challenging to define the category of new gTLDs in which the high security zone requirements must be applied ICANN is not free to shirk that challenge given its obligation to make decisions in the public interest, per the Affirmation of Commitments. *Time Warner (Module 5, 20 Nov. 2009)*.

High Security Zones Verification—not an appropriate role for ICANN

The HSZV proposal is not within ICANN's limited technical coordination mission related to Internet identifiers, would expand ICANN's authority to address malicious uses for domain names; put ICANN into direct competition with organizations that are already capable of performing this function; and the demand for such zones could be met more effectively by registries in cooperation with existing security organizations. Regarding the proposal, it is questionable whether registries will be able to ensure the registrars' compliance with its requirements. It has not been demonstrated if or how this program will deliver better security and reduced malicious activity. It is also a question why ICANN is getting involved in the market, and why the program should not be open to all registries, instead of just new gTLD registries. The associated controls and audit in the program will impose undefined financial and resource costs on new TLD registry operators. IP concerns should not be added to it, as alluded to in the explanatory memorandum. ICANN should not circumvent the policy making process by offering game-changing inducements; such opt-in programs can become de facto requirements in the registry space. *RySG (21 Nov. 2009)*.

ICANN must hold all applicants to and enforce the additional measures it has identified for combating malicious conduct and must make specific reference to these measures in the DAG—i.e., enhanced background checks, DNSSEC deployment, no wildcarding and removal of glue records, thick Whois, anti-abuse contact and documented policy, and the Expedited Registry Security Request Process. *BITS (22 Nov. 2009)*. *ABA (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*. *Microsoft (23 Nov. 2009)*.

The High Security Zones Verification (HSZV) Program must be mandatory

COA (Module 5, 22 Nov. 2009). *IPC (Module 5, 22 Nov. 2009)*. *BITS (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

In addition to being mandatory, there should be a right to file an objection against any applicant for a financial services domain that seeks to avoid high security verification. Such avoidance should be grounds for denial of the application. *ABA (22 Nov. 2009)*.

The HSZV must be mandatory and transparent with appropriate levels of public notice (e.g. regarding unresolved deficiencies of a registry or nonrenewal of verified status for failure to meet standards). *INTA (20 Nov. 2009)*. *Microsoft (23 Nov. 2009)*.

The High Security Zones Verification Program should be mandatory for certain types of zones and extended to industries like health care and insurance that have similar issues of privacy and security as does the financial industry. It would make sense to look at some of the proposed remedies in this area for inclusion in general gTLD security. *Internet Identity (Module 5, 23 Nov. 2009)*. *INDOM supports the High Security Zone concept as proposed. INDOM (22 Nov. 2009)*.

High Security Zones—questions

Regarding consideration of this issue at the Seoul meeting: (1) Where did this issue come from and why was it introduced now?

(2) Why is ICANN looking to compete with commercial entities in the security field and with registries and registrars?

(3) How can ICANN offer this without expanding the scope of its charter?

(4) How much will this cost, and where will ICANN get the budget to do this?

(5) How can ICANN do this and remain neutral on issues of security and stability, especially with respect to RSEP and Consensus Policies? *VeriSign (22 Oct. 2009)*.

How would ICANN work with existing commercial providers to ensure that anything ICANN would do in this arena would not be competitive in nature (assuming the private sector can and does provide the service), and how would the vetting of these items work in the RSEP as far as ICANN adhering to its coordination role as opposed to being a provider of services? *VeriSign (27 Oct. 2009)*.

Eligibility (sec. 1.2.1)

It is commendable that additional safeguards prohibit registry ownership of more than 15% by those convicted of a felony, a financially-related misdemeanor, subject to ICANN disqualification, or involved in cybersquatting or other domain name-related fraud. *MarkMonitor (Module 1, 20 Nov. 2009)*. *BBC (19 Nov. 2009)*. *Lovells (22 Nov. 2009)*.

Any new eligible applicant should declare that it will not engage in the same conduct in the future. Some of the disqualification factors should be clarified (e.g. question 11(f) should be rephrased to cover all allegations of IP infringement in connection with the registration or use of a domain name). *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

ECTA/MARQUES strongly support barring applicants with a history of cybersquatting. ICANN should create a formal reporting procedure for any person to inform the evaluators if they know that an applicant has been involved in the practice; perhaps it could be an additional role for the Independent Objector. *ECTA/MARQUES (22 Nov. 2009)*. *Visa (23 Nov. 2009)*.

This provision needs to be strengthened and to recognize situations in which a larger number of application participants exists such that no one party rises to the 15% threshold. There should be some background checking for key participants in such a scenario. A stronger and more explicit definition of

“good standing” is required. Who will perform background checks and the process are unclear—further definition is needed. *BITS (22 Nov. 2009)*.

Eligibility requirements should be clarified, and there should be a challenge mechanism for disqualifications. *M. Neylon (22 Nov. 2009)*.

Mechanism against bad actors running registries

The proposed mechanism is deficient. Because bad actors often set up “shell” companies, ICANN should have flexibility to deny a “bad actor” applicant which it discovers is an “alter ego”, “related entity” or “funder” of the applicant. It should also be able to disqualify not just on the basis of past record of an entity owning 15% or more of the applicant, but also on the record of that entity’s officers, directors, or controlling stockholders. *COA (Module 5, 22 Nov. 2009)*. *IPC (Module 5, 22 Nov. 2009)*.

Mandatory and expanded background checks

ICANN should make background checks mandatory and expand them to include the applicant, any officer, partner, director or managers of the applicant and any person or entity owning a controlling interest in the applicant and any funder of any of the foregoing. ICANN should consider having applicants and related persons submit fingerprint cards with the application. *INTA (20 Nov. 2009)*. *Microsoft (23 Nov. 2009)*.

Background checks should be performed beyond the application period, at a minimum at any point there is a registry ownership change and at contract renewal. Additional checks should be done at random intervals or in response to criminal complaints against a particular registry. Registries must be contractually bound to comply with such requests. Registries must perform background checks on all key employees. Results should be kept on file, be updated on a regular basis, and be auditable by ICANN compliance staff at any time. *OTA (30 Nov. 2009)*. *Internet Identity (Module 5, 23 Nov. 2009)*.

ICANN should add additional measures for vetted registry operators

Specifically, reduce to 5% the ownership threshold of persons or entities for whom/which “prior bad acts” is relevant; extend the class of persons to include persons who operate, fund, or invest in the Registry Operator; render denial of applications automatic; make any felony grounds for disqualification; eliminate temporal restrictions so that any disqualification at any time is relevant; include the language “is the subject of a pattern or practice of either liability for or findings of bad faith in connection with, trademark infringement or domain name registrations”; and add a new category that covers a material breach of an existing Registry Agreement or the RAA. *Microsoft (23 Nov. 2009)*.

Further study and work is needed

There is some overlap between trademark protection and malicious conduct. More study is needed and if new gTLDs are to be made available, it should be done on a limited basis (e.g., geographic/community names). *Hearst Communications (19 Nov. 2009)*.

Additional work is necessary to ensure that the risk areas regarding malicious conduct are identified and specific solutions are implemented. ICANN should form a working group combining members from the security industry and the ICANN community to help develop and assess solutions and specific implementations of proposed mitigation measures. *BBC (19 Nov. 2009)*. *MarkMonitor et al. (20 Nov. 2009)*. *Lovells (22 Nov. 2009)*. *AT&T (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

Proposals to date for preventing malicious conduct are inadequate

INTA encourages ICANN to develop mandatory processes to address high levels of DNS-related crimes and fraud perpetrated through phishing attacks, malware, and other forms of malicious conduct. ICANN

must specify how it will effectively ensure that all these new registries will comply with the new requirements. To date there is not a specified course of enforcement actions that ICANN may or will take or an explanation of how ICANN will enforce agreements and address malicious registry or registrar conduct after applicants are approved. Also, to address the overarching issue, the existing domain name registration process must be significantly reformed to ensure the ongoing integrity of domain names and registry data. *INTA (20 Nov. 2009)*.

Additional grounds for denying registries

The grounds proposed by ICANN are a good start but are ultimately inadequate. ICANN should expand the grounds as follows:

--If any funder or corporate affiliates of funders of an applicant or any officer, partner, director or manager or other affiliate or any person or entity owning 15% or more of an applicant are disqualified by any of the items (a) through (f) specified in Item 1.

--Section 1(a) should make clear that crimes related to financial or corporate governance misconduct will preclude an otherwise qualified applicant from becoming a registry operator (existing language is unclear as to whether it is all felonies or only felonies related to financial or corporate governance misconduct).

--Subsection (f) is vague and should be reworded--to include an applicant that is “associated with a pattern or practice of either liability for, or bad faith in connection with, trademark infringement or domain name registrations, including:”

--Subsection (f) (iii) should be restated: “registering domain names primarily for the purpose of disrupting the business of, or diverting Internet traffic from, a competitor; or”

--ICANN should add new subsections (g) and (h) which would add as grounds for disqualification findings that an applicant has previously violated registrar or registry agreements as follows: “g. is the subject of a material breach of an existing ICANN registrar or registry agreement(s); or h. intentionally submitted or provided fraudulent information in connection with its application, the review of that application or the defense of any objections to that application.” *INTA (20 Nov. 2009)*.

Financial gTLDs

Any domain name associated with financial services should be restricted to financial services companies with substantial restrictions, guidelines and proof of eligibility. ICANN has not sufficiently addressed the recommendations of the financial services sector. No panel to evaluate the special nature of financial services applications has been established nor have higher levels of security for such applications been mandated. The use of “.bank”, “.trust” and similar words should be restricted to avoid the potential for substantial user confusion and potential fraud. Much more work is needed with ICANN’s GAC and others to understand the legal and other implications of having financial domains both at the gTLD and ccTLD levels. *ABA (22 Nov. 2009)*.

Registry transfer risks

Any proposed change in control of more than 25% of the ownership of a registry over time should be submitted to ICANN for prior review and written approval. *INTA (20 Nov. 2009)*. There should be enhanced change of control requirements so that registries cannot be easily “flipped”. *ECTA/MARQUES (22 Nov. 2009)*.

Changes of registry control should be approved in writing by ICANN subject to requirements that prevent “flipping” and ensure that the new entity is qualified to be a gTLD Registry Operator (e.g., the substantive equivalent of the full range of evaluation criteria for new gTLD applicants). *Microsoft (23 Nov. 2009)*.

Risks after registries are approved

More is required for dealing with registries that become bad actors post-delegation. ICANN should adopt measures to prevent registries from passively allowing malicious conduct. The registry agreement requires strong mechanisms to hold registries responsible for conduct by registrars and their registrants. ICANN's registry contracts should require, rather than just suggest, that registries to negotiate stronger standards for business and security practices with accredited registrars. *INTA (20 Nov. 2009)*.

Protections required in registry-registrar contracts

ICANN should require registries to mandate specific measures in the registries' contracts with registrars to deliver adequate protection against malicious conduct. *COA (Module 5, 22 Nov. 2009)*.

Recommendations for a more unified and comprehensive approach

The proposed procedures to combat malicious conduct are inadequate. A more unified and comprehensive approach is warranted. ICANN should continue its efforts by forming a group of experts drawn from the GNSO and broader Internet community to develop further proposals to be subjected to independent community review and a separate public comment period. IPC offers the following recommendations:

- (1) All proposed mechanisms should be considered required elements of the new gTLD program, not voluntary options. Exceptions could be granted in rare cases to registry operators when justified by extraordinary circumstances.
- (2) A non-trademark related Rapid Domain Name Suspension process should be developed to address malicious conduct in new gTLDs.
- (3) Current procedures used to register gTLD domain names and to deal with DNS-related abuse issues must be improved in order to ensure the integrity of domain names and registry data. *IPC (Module 5, 22 Nov. 2009)*.

Documented registry level abuse contacts and procedures

The proposal for documented registry level abuse contacts and procedures should be adopted, and would likely have the greatest impact on how criminals access and use domains of any of those proposed in the malicious conduct memorandum. This provision should be extended to registrar operators as well. *Internet Identity (Module 5, 23 Nov. 2009)*.

Capabilities of new registries

Provisions should be included in the DAG to, among other things, require that all new registries meet basic operational and training standards in the areas that are exposed to malicious behavior (e.g., customer support, network security, legal and fraud detection). *Internet Identity (Module 5, 23 Nov. 2009)*.

Ongoing policing of registries and registrars

ICANN must also police registries that become bad actors, or that enter into business with bad actors, after they are approved. Meaningful enforcement mechanisms must be in place to address registries that engage in behavior such as that specified in subsection (a) through (f) of the proposed disqualification criteria on page 7 of the explanatory memorandum. While it claims to follow up on all RAA violations, ICANN lacks a well publicized process to allow third parties to submit complaints to ensure enforcement of registry agreements. There is also no transparent or set process and remedies or sanctions for violations of the RAA. ICANN needs to have the ability to audit registries. ICANN should consider conducting another similar vetting process on applicants delegated the right to operate a new gTLD on a periodic basis (e.g., every three years). *IPC (Module 5, 22 Nov. 2009)*.

Domain name resellers—work is required in this area

The malicious conduct memorandum did not cover the issue of domain resellers and their identification, responsibilities and liabilities. Without better transparency and accountability, the reseller area will have more exploitation as the gTLD market expands. This area needs more attention as part of the new gTLD process and a process not unlike that for obtaining EV SSL certificates should be considered. *Internet Identity (Module 5, 23 Nov. 2009). OTA (30 Nov. 2009).*

ICANN should insist on appropriate changes to the RAA to take action regarding resellers, which are a large source of registrar-related misconduct. *INTA (20 Nov. 2009).*

Enforcement of security

Enforcement mechanisms must back up standards for security of the DNS. ICANN's domain name registration process must be reformed to ensure the integrity of registration data. *IPC (Module 5, 22 Nov. 2009).*

Requiring DNSSEC, prohibiting wild carding and encouraging removal of Orphan Glue Records will only be effective if these standards are enforced in a timely manner to prevent malicious conduct and the resulting damages. *INTA (20 Nov. 2009).*

Wildcarding prohibition

This prohibition has good merit. *Internet Identity (Module 5, 23 Nov. 2009).*

Orphan glue records

This provision removing orphan glue records when a name server entry is removed from the zone is enthusiastically supported to prevent criminals from using loopholes in the DNS to help perpetuate their schemes. *Internet Identity (Module 5, 23 Nov. 2009).*

The issue of orphan record management requires more discussion—e.g. what criteria will evaluators use to evaluate it. *RySG (21 Nov. 2009).* ICANN should require registry operators to remove orphan glue records. *Microsoft (23 Nov. 2009).*

Accuracy of Whois information

ICANN should place emphasis on the accuracy of Whois information, and require new gTLD registries to spell out their policies to require registrars (who collect the Whois data) to ensure the accuracy of the data, to respond promptly to reports of false Whois data and cancel registrations based on false Whois data that is not promptly corrected. *IPC (Module 5, 22 Nov. 2009). SIIA (23 Nov. 2009). Microsoft (23 Nov. 2009).*

Combating identified abuse

This can be helped by requiring and enforcing thick Whois records, centralizing zone-file access, documenting registry and registrar level abuse contact and policies and making an Expedited Registry Security Request process available. *INTA (20 Nov. 2009).*

Expedited Registry Security Request process--support

This recommendation is a logical extension of work already done by ICANN and the existing registries. It should be supported and be non-objectionable since it is a methodology for a registry operator to obtain contractual relief for large-scale abuses that they help curtail. *Internet Identity (Module 5, 23 Nov. 2009). Microsoft (23 Nov. 2009).*

Centralization of zone-file access-support

Centralizing access to the daily zone files, which already must be provided, will likely be beneficial to both consumers of zone file data and registries through costs savings and stronger overall security and reliability. *Internet Identity (Module 5, 23 Nov. 2009).*

Rapid Domain Name Suspension process

INTA supports development of a rapid domain name suspension process to address abusive domain names that host or support malicious conduct. *INTA (20 Nov. 2009). SIIA (23 Nov. 2009).*

ICANN should require registry operators to adopt and implement rapid takedown or suspension systems. Microsoft is amenable to having one or more of its security and enforcement employees work on an ICANN-convened group to develop such systems. *Microsoft (23 Nov. 2009).*

Evidence for malicious conduct predictions as a result of new gTLDs

ICANN needs to ask those who predict an increase in malicious conduct from new TLDs to produce some evidence. While there are legitimate reasons to be concerned about new TLDs, the “malicious conduct” issue is a canard, and there is not a shred of evidence to support it. E.g., there is substantial evidence that scammers are not constrained in the least by the current domain name setup. In contrast, new TLDs will have significant new protections (e.g. rapid takedowns) which make it less likely that malicious conduct will be conducted under the flag of a new TLD. *Minds + Machines (Module 5, 22 Nov. 2009).*

III. Analysis and Proposed Position

Comments on malicious conduct in relation to the gTLD process focused on many aspects of malicious conduct including the need for more stringent focus on the overall issue of malicious conduct, support and questions for the High Security Zone TLD (“HSTLD”) program, eligibility, enforcement of measure to mitigate malicious conduct and suggestions for control activities that would reduce malicious conduct.

Comments requested additional study and work related to the reduction of malicious conduct activities as a component of the new gTLD program. ICANN agrees with this and is continuing work in this area. For instance, ICANN is developing a program called the “High Security Top Level Domain” (HSTLD) program and is in the process of gathering input from representatives in the community to define good control practices to reduce the possibility of malicious conduct within TLDs. Additional information about the HSTLD program can be obtained on the HSTLD wiki page located at: https://st.icann.org/hstld-advisory/index.cgi?hstld_advisory_group.

Comments suggested that the HSTLD program should be mandatory and not voluntary in nature. Related to these comments, comments also questioned if the HSTLD program was an appropriate role for ICANN to undertake. Although the HSTLD program is still under development (current published documents are concept or development only), it is currently anticipated that the resulting standards created by the HSTLD program will be voluntary in nature. This position may be subject to change, as the ICANN community will ultimately decide the overall course of the HSTLD program, including the voluntary or mandatory nature of the program. This position will be established through a multi-stakeholder process.

Comments raised specific questions regarding the origination of the HSTLD program, including:

- (1) Where did this issue come from and why was it introduced now? The HSTLD concept was initiated through the request of several community members. For an overview of some of the

requests that initiated the HSTLD concept, please refer to the minutes of the January 20th 2010 HSTLD advisory group. The minutes to this meeting can be reviewed as an mp3 recording and can be located at the following home page: <http://www.icann.org/en/topics/new-gtlds/hstld-program-en.htm>. During this meeting, one of the key topics covered by the advisory group was the initial community interest in a program designed to improve security and controls at various TLDs. This interest led to the formation of the HSTLD program.

- (2) Why is ICANN looking to compete with commercial entities in the security field and with registries and registrars? ICANN is not seeking to compete with commercial entities in the security field or with registries and registrars. Rather, the HSTLD program has now progressed to the formation of an advisory group that is focused on seeking community consensus on the definition, agreement and documentation of good and acceptable security controls for use in improving TLD security. The acceptance and application of these controls on individual TLDs is currently anticipated to be a voluntary decision, made by individual TLD operators.
- (3) How can ICANN offer this without expanding the scope of its charter? ICANN will not offer this program or any certification/verification related to the program directly. ICANN is acting as the overall facilitator for a program that will ultimately be offered by a separate administrator, should the program development reach a stage where this is necessary.
- (4) How much will this cost, and where will ICANN get the budget to do this? Overall HSTLD program costs and budget are still being determined, as the HSTLD program is in concept development state. An advisory group, formed with members of the community, is currently developing the program. Once the program has been accepted as actionable by the community, a cost analysis will be completed.
- (5) How can ICANN do this and remain neutral on issues of security and stability, especially with respect to RSEP and Consensus Policies? ICANN's role in the HSTLD program is to assist in the coordination of community development and consensus necessary to develop the HSTLD program. This is consistent with ICANN's overall mission.

Comments requested ICANN continue to maintain its role as a coordinator of activities designed to reduce malicious conduct in new gTLDs, and not become a provider of specific services. These requests are consistent with ICANN current approach. ICANN is focusing on malicious conduct as a component of its overall direction to support the community. ICANN will continue in this direction, until a multi-stakeholder process agrees to pursue an alternate direction, or a specific program.

Comments raised questions around the eligibility section 1.2.1 of the draft applicant guidebook version 3. Specifically, questions around safeguards prohibiting registry ownership by convicted felons, financially-related misdemeanors and/or other domain related fraud were raised. ICANN will review this section of the Guidebook, to determine which elements can be clarified or augmented.

On the specific point raised about establishing a formal reporting procedure, the proposed evaluation process allows for a period of public comments, which should support this type of procedure.

On the specific point of "good standing," good standing relates both to the standing of a company or entity that is applying for a new gTLD and to the method of background checking that supports the new gTLD application. ICANN is addressing eligibility in terms of both good standing issues. Currently, it is mandatory that an applicant submit to a background check as a component of their application. ICANN is continuing to focus on the issue of "good standing" and will take these comments into consideration.

Comments indicated that some in the community believe proposals to date for preventing malicious conduct are inadequate. Specifically, commenters raised the issue of ICANN developing mandatory processes to address high levels of DNS-related crimes and fraud, perpetrated through a variety of bad behaviors. As mentioned previously, ICANN will continue to work with the community on the HSTLD and other initiatives. The HSTLD program was strongly supported by international law enforcement during ICANN's most recent global meeting in Seoul Korea in the session on DNS abuse (<http://sel.icann.org/node/6961>).

On the subject of enforcement, ICANN will enforce the new gTLD agreements through provisions in the registry agreement, through various methods including regular audits and investigations of third-party complaints

Other matters outside of the new gTLD program are matters of policy development.

Comments suggested a variety of additional grounds for denying registry applications, including:

- Denial if any funder or corporate affiliates of funders of an applicant or any officer, partner, director or manager or other affiliate or any person or entity owning 15% or more of an applicant are disqualified by any of the items (a) through (f) specified in Item 1.
- Section 1(a) should make clear that crimes related to financial or corporate governance misconduct will preclude an otherwise qualified applicant from becoming a registry operator (existing language is unclear as to whether it is all felonies or only felonies related to financial or corporate governance misconduct).
- Subsection (f) is vague and should be reworded--to include an applicant that is "associated with a pattern or practice of either liability for, or bad faith in connection with, trademark infringement or domain name registrations, including:"
- Subsection (f) (iii) should be restated: "registering domain names primarily for the purpose of disrupting the business of, or diverting Internet traffic from, a competitor; or"
- ICANN should add new subsections (g) and (h) which would add as grounds for disqualification findings that an applicant has previously violated registrar or registry agreements as follows: "g. is the subject of a material breach of an existing ICANN registrar or registry agreement(s); or h. intentionally submitted or provided fraudulent information in connection with its application, the review of that application or the defense of any objections to that application"

Some of the additional grounds for denying applications mentioned above are addressed in the terms and conditions section of the Guidebook (module 6). Other suggestions are being considered, to determine if they are helpful additions.

Comments requested that domain names associated with financial services should be restricted to financial services companies. At this point, ICANN is not creating a specific financial services sub-category, as a component of the Guidebook. ICANN is focusing on the issues of user confusion and fraud through other programs like the HSTLD advisory group (see above).

Comments addressed a risk in the transfer of registry operations, which results in a change in control of ownership of a registry over time. A notice requirement for a change of control has been included in the registry agreement, to ensure ICANN has sufficient opportunity to ask questions regarding a proposed transaction in the event there are any concerns. In addition, Section 4.3 of the agreement provides protections for ICANN and the community in the event the registry operator fails to perform its material obligations following any change of control of the registry operator.

Comments requested additional work to define the mechanisms for dealing with registries that become “bad actors” post registry delegation. There are mechanisms currently in place to address registries that become “bad actors” post registry delegation. In addition to the mechanisms currently in place, ICANN is currently discussing additional post-delegation mechanisms (such as PDDRP and RRDRP) with the community.

Comments requested that ICANN police registries that become “bad actors” or that enter into business with bad actors, after they are approved. ICANN currently has the ability to audit registries for contractual compliance on a regular basis. In addition, existing mechanisms are in place to receive and investigate complaints related to registry agreements.

Comments requested a more unified and comprehensive approach to combat malicious conduct in the new gTLD space. As mentioned previously, ICANN is focusing on the issues of malicious conduct with programs like the HSTLD advisory group. ICANN is working on the comments related to this issue.

Comments requested that provisions be included in the Guidebook to require all new registries meet basic operational and training standards in the areas that are exposed to malicious behavior. ICANN believes these are good suggestions, and will look into training or operational procedures in the registry agreements, or in subsequent support mechanisms.

Comments suggested that the malicious conduct memorandum did not cover the issue of domain resellers and their identification, responsibilities or liabilities. Reseller activities happen primarily at the registrar level. Contractual requirements and restrictions are being discussed to determine if the registry agreement would be a suitable place for imposing such restrictions. At this point, it seems that additional terms in the registry agreement would not affect, in a way beneficial for registrants, the registrar-reseller relationship. Issues concerning resellers are being discussed in the GNSO group considering changes to the RAA. This is an independent process.

Comments requested that additional enforcement mechanisms be created in line with any new security standards established for the DNS. Specific focus of the comments related to requirements of DNSSEC, the prohibition of wild carding and the removal of Orphan Glue Records. Although currently considered a voluntary program, ICANN is currently working on establishing community standards for security of the DNS with efforts like the HSTLD program. In line with this comment, DNSSEC deployment is currently a requirement in the new gTLD program. Additionally, the new agreement now requires the removal of glue records of deleted names from registry zones and prohibits the deployment of wildcards. The community continues to exert effort related to the other issues, including wild carding/non-existent domains. A working group is being formed between members of the CCNSO. For additional information regarding wild carding, please refer to the following link: <http://www.icann.org/en/topics/new-gtlds/nxdomain-substitution-harms-24nov09-en.pdf>. Overall, ICANN continues to work with groups like the Anti-Phishing Working Group (APWG) and other active members of the community on the issues security and abuse as they relate to DNS.

Comments requested that ICANN place an emphasis on the accuracy of Whois information and suggested methods of enhancing Whois accuracy. In response to public comment, the proposed registry agreement now contains a requirement for the maintenance of a thick Whois database. ICANN will review new gTLD application scoring to consider, where feasible and appropriate, enhancements based on registry efforts to promote Whois accuracy. Thus far, these discussions have indicated such a change

requires some policy consideration before such changes can be made. In addition, efforts like the HSTLD program are focused on community definition and support for control structures that would help to increase the accuracy of Whois information.

Comments requested the development of a rapid domain name suspension process to address abusive domain names that host or support malicious conduct. Significant work has been done by the IRT and STI (see Trademark sections) to develop a Uniform Rapid Suspension system for the takedown of names that clearly and blatantly are abusing trademark rights. In addition, existing gTLDs and ICANN are working together to create a procedure to address blatant abuse. This report has been published under separate cover.

Comments requested centralization of access to daily zone files. Version 3 of the Guidebook (in the proposed registry agreement included a requirement to provide centralized access to zone data. ICANN has formed an advisory group called the “Zone File Access” (“ZFA”) cross-constituency advisory group to focus on this issue. This group will deliver a report for consideration and public discussion at the Nairobi meeting. The report will recommend one or more models seeking to satisfy this request.

Comments requested ICANN ask for evidence to support community discussions that suggest or predict an increase in malicious conduct as a result of the new gTLD program. ICANN will take this into account and will ask community members to support their positions where possible.

SECURITY AND STABILITY

I. Key Points

- DNSSEC is currently being deployed in advance of the new gTLD program, which should help reduce the potential stability risks associated with the introduction of DNSSEC in parallel with the delegation of new gTLD’s. It is important to note that the delegation of new gTLD’s will only happen once the entire application process for the new gTLD has been successfully completed.
- gTLD application volume does not directly tie to an instantaneous new gTLD delegation volume. A plan for new gTLD delegation will be created, once the total volume of new gTLD applicants is known. If the volume of new gTLD applications is high, a staged plan for new gTLD delegation will be created, to minimize the threat of stability of the DNS during new gTLD delegation.
- A new gTLD applicant’s DNSSEC implementation is a requirement of draft version 3 of the Applicant Guidebook.

II. Comment Summary

Risks of new gTLD program

The Scaling Report seems to suggest that there are significant risks attendant to increasing the size of the root without first deploying DNSSEC. It is prudent for ICANN to slow the process of increasing the size of the root with the introduction of new gTLDs until it has managed these risks properly (e.g., deployed DNSSEC). *BBC (19 Nov. 2009). MarkMonitor et al. (20 Nov. 2009). Time Warner (20 Nov.*

2009). *AT&T* (22 Nov. 2009). *Microsoft* (23 Nov. 2009). *NICMexico* (23 Nov. 2009). *ECTA/MARQUES* (22 Nov. 2009). *SIIA* (23 Nov. 2009). *ICA* (23 Nov. 2009).

Substantial work remains for ICANN to ensure that the stability of the DNS will not be harmed by the new gTLD program. INTA remains concerned that efforts in this area were not completed prior to the decision to attempt implementing an unlimited number of new gTLDs to the Internet. *INTA* (20 Nov. 2009).

One hundred new TLDs per year should not be a problem, even if DNSSEC is deployed in parallel. *HOTEL* (22 Nov. 2009).

Proposed DNSSEC implementation

ICANN should examine each applicant’s proposed DNSSEC implementation for stability or security issues as part of the core evaluation process, as would be the case for all required registry services. *RySG* (21 Nov. 2009).

Security and stability definitions (sec. 2.1.3.1)

The definitions require revision (they are also found in other places such as the draft registry agreement para. 8.3). The definitions also conflict with and exceed the draft gTLD agreement, and misunderstand IETF practices and definitions. The contract must be revised to adhere to proper terminology. The security definition should have this language: “Unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of registry information or resources on the Internet by registry systems operating in accordance with all applicable standards.” The language in the stability definition, “authoritative and published by a well-established, recognized and authoritative standards body,” is unacceptable. ICANN should not leave language open-ended and subject contracted parties to any and all standards bodies. ICANN needs to enumerate the standards and name the authoritative body, which is IETF. Application of additional standards should be considered via the consensus policy process. *RySG* (21 Nov. 2009).

Application processing limitation

It would be helpful for applicants to know if there is a “back-end processing limitation” (the number of changes in the root zone per year that the technical community thinks prudent at this time) on the earlier processing stages, up to the initial evaluation at 1-5, and the administrative completeness check at 1-4. *E. Brunner-Williams* (Module 1, 22 Nov. 2009).

Entry into Root

Comments offered to express a types-as-queues representation widely available, so that the controlling issue in terms of rate of service of applications, ignoring all causes for application failure, is visible. *E. Brunner-Williams* (Module 1, 22 Nov. 2009).

III. Analysis and Proposed Position

Comments in relation to the gTLD process focused on potential stability issues with the expansion of the existing root zone, the review of DNSSEC implementation plans as a component of the gTLD evaluation process, the current definition of “Security” and “Stability”, and entry of new gTLD’s into the root.

Comments expressed a concern regarding increasing the size of the current DNS root as a component of adding new gTLD’s to the root, in parallel with ICANN’s deployment of DNSSEC. DNSSEC deployment in the root zone is already underway. ICANN believes that the deployment of DNSSEC in the root zone is

the most important structural improvement to the DNS to happen in twenty years. The deployment of DNSSEC is proceeding with widespread involvement of the Internet's technical community, and is being carefully staged so that any unintended consequences of the deployment can be identified and mitigated promptly. The current plan is to have DNSSEC deployment in the root zone completed by July 1st, 2010. This should allow for the completion of DNSSEC deployment well before the new gTLD program is ready to delegate new gTLD's.

Comments raised a concern regarding the impact of the new gTLD program on the stability of DNS. Specifically, comments focused on the introduction of "unlimited" new gTLD's to the DNS. It is important to note that the current "unlimited" status for new gTLD applications does not necessarily tie with an immediate and unlimited delegation of those new gTLD applications that are approved and contracted. ICANN will develop an appropriate plan for delegation of new gTLD's into the root zone as a component of the overall gTLD program. The plan will be created once the total number of applications has been determined and will be developed with stability as a guiding principle.

Delegation rates have been modeled for several application rounds. Four demand scenarios for application volumes have been modeled: below expected, expected, above expected and significantly above expected. For each demand scenario, there's an assumption that only a fraction of the applications will lead to delegations, and that the processing time for the successful applications will be spread out. If there are more than, say, 500 applications, the processing will be batched further spreading out the delegation rates. These models will be published some time before the Nairobi meeting.

Some commenters requested that ICANN examine each applicant's proposed DNSSEC implementation for stability or security issues as part of the core evaluation process. We agree. As noted in draft version 3 of the Applicant Guidebook, a review of the applicant's DNSSEC implementation is included as question 43 of the application.

Some commenters requested a revision of the definitions of security and stability in section 2.1.3.1 of the Applicant Guidebook. Specifically, commenters recommended the security definition should use the following language: "Unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of registry information or resources on the Internet by registry systems operating in accordance with all applicable standards." In addition, the commenter recommended additional enumeration of the authorities body (IETF) into the definition of stability. These were excellent suggestions. The current definitions are found in existing registry agreements and can also be found in the Registry Services Evaluation Policy ("RSEP") (<http://www.icann.org/en/registries/rsep/rsep.html>, which was adopted as an ICANN consensus policy. The definitions are intentionally broad -- anything a registry might do that could harm other systems on the Internet would be considered a security/stability issue and could cause ICANN to not grant its permission to a registry to initiate a service. These definitions are critically important terms and part of a process that has a significant impact on the DNS. A change to what is already agreed and working should be subject to a broader stakeholder discussion.

Geographical Names

I. Key Points

- Applications for strings representing a country or territory name, as defined in the Applicant Guidebook, will be accepted in the new gTLD process and will require the support or non-objection of the relevant government or public authority..
- An application for a string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166-1 standard, will require the support or non-objection of the relevant government or public authority.
- An application for a string that is a city name will not require the support or non-objection from a government or public authority if the applicant does not intend to use the string to represent the city.

II. Comment Summary

Definition and list

The scope of the definition of geographical names is uncertain and potentially very broad-ranging. ICANN should try to achieve a higher level of certainty; an exhaustive list of such names should be established. The process done for the launch of .EU by EURid should be considered by ICANN. *Lovells (22 Nov. 2009)*.

Geographical Names Process (GNP)

INTA's recommendation that an applicant should have the opportunity to challenge a GNP decision was not reflected in the DAG v3. This appears necessary to address situations in which the GNP decision may be that the application for the new TLD is a geographical name. *INTA (20 Nov. 2009)*.

Country and territory names

The ccNSO does not agree that an untested and wholly theoretical demand by governments for .country TLDs justifies the introduction of meaningful representations of countries or territories on the ISO 3166-1 list into the generic TLD space. The GAC explicitly states that country and territory names should be excluded from the gTLD space. *ccNSO (21 Nov. 2009)*. *DIFO (21 Nov. 2009)*. *UNINETT Norid (21 Nov. 2009)*. *NPTA (22 Nov. 2009)*.

GoDaddy reiterates from its previous comments that it opposes inclusion of ISO 3166-1 alpha 3 codes in the definition of geographical names. *GoDaddy (22 Nov. 2009)*.

The requirement for government approval in the DAG v3 does not address or resolve the many legitimate concerns previously expressed. The fundamental distinction is that ccTLDs are country or territory designations, while gTLDs are not. The ccNSO strongly opposes changing this fundamental policy based on unsubstantiated demand particularly during the pendency of the ccTLD IDN policy development process which provides a mechanism to consider this issue (in respect to non-ASCII characters) comprehensively in the relatively near term. ICANN has proposed to make this change without addressing the significant legal and policy challenges that are certain to arise as a by-product of blurring the longstanding distinction between ccTLDs and gTLDs. The DAG v3 fails to acknowledge that its proposal does not in any way address the ccNSO's view that restrictions should not be limited to strings on the specifically delineated list set forth in the DAG but should apply to any meaningful representation including abbreviations of a country or territory on the ISO 3166-1 list. *ccNSO (21 Nov. 2009)*. The previous definition of "meaningful representation" of a country or territory name should be

reinstated and expanded according to the comments made from the ccNSO in April 2009. *UNINETT Norid (21 Nov. 2009)*.

The DAG v3 fails to consider the many complex post-delegation issues ICANN is likely to face if country/territory names are introduced in the gTLD space. For example, how will ICANN and/or IANA respond when a government that has endorsed a .country gTLD demands redelegation of the gTLD, citing its authority to do so under domestic law or even under a written agreement with the registry operator? Is ICANN prepared to ignore a change of heart by a government whose rights and interests it has previously explicitly acknowledged by conditioning the delegation of the gTLD on its consent? Since ICANN does not yet have a policy developed on how it would handle potentially competing interests of governments and country/territory TLD operators in the new gTLD process, it is profoundly unwise for ICANN to introduce gTLDs that constitute meaningful representations of countries and/or territories on the ISO 3166-1 list. *ccNSO (21 Nov. 2009)*. The DAG v3 should provide that ICANN must respect a legally binding decision from the relevant/local court regarding the compliance with a geo-TLD agreement between relevant governments and the registry, including carrying out a re-delegation if that is the court's decision. *NPTA (22 Nov. 2009)*. In addition, there will be conflicts with the interest of the local Internet community; the different regimes in place for a country code TLD and a country name gTLD will be confusing to users (different privacy policies, language requirements for registrars, dispute resolutions, etc.) *UNINETT Norid (21 Nov. 2009)*.

Permission or non-objection for geo GTLDs

AIPLA is concerned that efforts to obtain permission or non-objection from local governments or public authorities could be subject to demands for payment of financial remuneration or other benefits. If a gTLD applicant has IP rights in a string mark containing the proposed gTLD, ICANN should simply require gTLD applicants to identify and contact the respective authorities for the geographical areas and give them the opportunity to note their objections and state their reasons. Any objections to such a gTLD should not by themselves prevent the awarding of a gTLD to the applicant. *AIPLA (22 Nov. 2009)*.

City names (sec. 2.1.1.4)

This section is unacceptable. Cities and municipalities should have the right to have control over TLDs that can be linked to them. Further, the need for the cities to own the TLDs may arise later. Cities and municipalities must be consulted before using their names, even if the intended use is not associated with the city. The application must contact the administration of the city or municipality in question, not only governmental bodies. Consent by the city or municipality must be explicitly expressed and documented in writing before the registration can take place. Request for support or non-objection must be written in the official language of the city or municipality in question and include a standard explanation of the scope and implications of what is being requested. The gTLDs registered with consent must not be transferable to third parties without written consent of the city or municipality in question. *CEMR (Module 2, 30 Oct. 2009)*.

Geo-gTLDs objections (sec. 2.1.1.4.1 end)

If an application survives the geographical review, can a government later object on community grounds (section 3)? If so, this seems unfair and this should be prohibited. Can an indirect existing competitor object on community grounds to the geo gTLD (e.g., a capital city gTLD applicant sponsored by a government and an existing national ccTLD)? This should not be allowed if the purpose of the new gTLD program is more competition. There normally would be no case of confusing similarity. *S. Subbiah (Module 2, 23 Nov. 2009)*.

Define the response timeframe for government support/nonobjection (sec. 2.1.1.4.3)

The timeframe for a needed support/non-objection letter from government should be defined to eliminate risk for the applicant. Open-ended timeframes for go/no-go outcomes does not reflect maturity of the application process. *S. Subbiah (Module 2, 23 Nov. 2009).*

Capital names protection

Capital names need to be protected. *dotBERLIN (15 Nov. 2009). M. Maller (18 Nov. 2009). M. Tofote (18 Nov. 2009). K. Jager (18 Nov. 2009). G. Werner (18 Nov. 2009). D. Rau (18 Nov. 2009). F. Hagale (18 Nov. 2009). S. Lubek (19 Nov. 2009).*

The final guidebook must reflect the complex nature of communities and territories making their presence known on the Internet –e.g., issues have already been raised about the position of state capitals versus cities with the same name. This will require an adequate solution with a view to avoiding subsequent conflicts. *F. Salamero (20 Nov. 2009).*

The DAG v3 still seems unclear about how there will be special consideration for capital cities. It should be explicitly stated that capital cities will only require documentation of support or non-objection from the relevant government or public authority from that country. *City of Paris (22 Nov. 2009). AFNIC (22 Nov. 2009).*

GeoTLDs protection

GeoTLDs need to be protected against copycats. *dotbayern (16 Nov. 2009).*

Strings representing a continent or UN region (sec. 2.1.1.4.1, point 5)

It is not appropriate to assign any specific and largely arbitrary percentile to the requirements. They should be examined case-by-case in consultation with the GAC. *RySG (21 Nov. 2009).*

Geo TLDs—overriding presumption

If in looking at the string there is clearly no association with the geographic location, the new TLD application should be able to override the presumption in favor of the geographic entity. *RySG (21 Nov. 2009).*

COUNTRY AND TERRITORY NAMES

Should the definition of country and territory names include ‘meaningful representation’ given that the term has been adopted for the IDN ccTLD Fast Track process?

The ccNSO continues to raise concerns about the revised definition of country and territory names that appears in this latest version of the Applicant Guidebook, and finds it inexplicable that ICANN could accept the concept of ‘meaningful representation’ in the IDN ccTLD Fast Track process but not for the gTLD process. GoDaddy reiterates its earlier comments that it opposes the inclusion of ISO 3166-1 alpha-3 codes in the definition of geographical names; and Lovells considers the scope and definition of geographical names is uncertain and potentially very broad ranging.

Throughout the process of developing a framework for new gTLDs the Board has sought to ensure a combination of clarity for applicants and appropriate safeguards for the benefit of the broader community. A considerable amount of time has been invested in working through the treatment of country/territory names to ensure it reflects these twin objectives of clarity and safeguards. Following discussion at the Mexico City meeting the Board resolved that it was generally in agreement with the

proposed treatment of geographic names at the top level, and that the Guidebook should be revised to provide greater specificity on the scope of protection for country/territory names listed in ISO 3166-1, and greater specificity in the support requirements for continent names, with a revised position to be posted for public comment.

The resulting definition continues to be based on ISO 3166-1 and provides greater clarity about what is considered a country or territory name in the context of new gTLDs. It also removes the ambiguity created by use of criteria to apply the term ‘meaningful representation.’ While the revised criteria may have resulted in some changes to what names are afforded protection, there is no change to the original intent to protect all names listed in ISO 3166-1 or a short or long form of those names.

With regard to safeguards, the definition is based on a list developed and maintained, as objectively as possible, by a recognised international organisation. There are safeguards provided in the Guidebook based around the application and string assessment process, notably the requirement for support of or non-objection from the relevant government or public authority. In addition, the objection mechanisms provide an important secondary avenue of recourse for government (and others) to raise concerns about prospective names which fall outside ISO 3166-1.

It is accepted that the proposed combination of clarity and safeguards could be seen as minimal rather than optimal, but they represent the clear view of the Board taking into account the views in particular of the ccNSO, the GAC and the GNSO as well as a wide range of public comments on this issue with regard to version 2 of the Guidebook.

ICANN has accepted the concept of ‘meaningful representation’ of a country or territory in the context of the IDN ccTLD Fast Track. This reflects the objective of rapid initial deployment of IDNs and the associated need to remove as many potential obstacles as possible. As you are aware, there have always been particular sensitivities about geographic names where non-Latin scripts and a range of languages are involved. It does not follow that these considerations should automatically apply to the broader ccTLD and gTLD spaces.

What is the distinction between a ccTLD and a gTLD?

The ccNSO, and others, do not agree that an untested and wholly theoretical demand by governments for .country TLDs justifies the introduction of meaningful representations of countries or territories on the ISO 3166-1 list into the generic TLD space and notes that the GAC explicitly states that country and territory names should be excluded from the gTLD space. The ccNSO argues that the fundamental distinction is that ccTLDs are country or territory designations, while gTLDs are not and strongly opposes changing this fundamental policy based on unsubstantiated demand particularly during the pendency of the ccTLD IDN policy development process which provides a mechanism to consider this issue (in respect to non-ASCII characters) comprehensively in the relatively near term.

It was in the context of the GAC Principles regarding new gTLDs, that many of the requirements relating to the consideration of geographic names in the Guidebook were developed. The GAC communiqué of June 2008, expressed concerns that the GNSO proposals did not include provisions reflecting GAC principles 2.2 and 2.7. While the ccNSO notes that the GAC explicitly states that country and territory names should be excluded from the gTLD space, GAC principle 2.2 states “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”. The treatment of country and territory

names in the Guidebook was developed to specifically to adhere to GAC principle 2.2, and was interpreted as the GAC holding the view that governments should not be denied the opportunity to apply for, or support an application for, their respective country or territory name. While the GAC appears to have moved away from this, in favour of the ccNSO position, through language in recent communiqués, the GAC has not formally amended their principles document. ICANN, like the ccNSO, as outlined in a recent communication to the GAC regarding draft principles on IDN ccTLDs, considers that GAC principles “stand as a clear, definitive position from governments on key issues and have been afforded considerable policy priority and operational adherence”. In developing the Guidebook, this has certainly been the case.

The distinction between ccTLDs and gTLDs is an important and valid one that has been part of the DNS for many years. However, it should be recognised that the distinction is based on reasons of policy and administration rather than any contemporary technical requirements. In practice, developments in the market and user preferences are blurring the distinction, with some in the GNSO community citing the use of .TV, .NU and .ME (and possibly .CO in the near future) as examples of ccTLDs operating as gTLDs with the agreement of relevant national authorities.

At the time the DNS hierarchy was developed the number of characters was the distinguishing factor between a ccTLD (two characters) and a gTLD (more than two characters), a distinction reflected for some time in the ICANN website glossary. This remains a valid distinction for the Board – indeed, the only practical one, and the only one on which all parties are likely to agree - until the community indicates a desire for fundamental change.

The Board is aware of the possibility of entities seeking a .country name with appropriate government support, although this possibility is not the only consideration with regard to geographic names. If one of the practical characteristics of a ccTLD is to remain (for the time being) its two-character nature, then the only mechanism for delegating and deploying such strings is that of a new gTLD. As a basic principle, ICANN would not want to be in a position of opposing such delegation against the clear wishes of a national government, nor would it be appropriate to appear to be second-guessing problems post-delegation.

Should an entity (with appropriate government support) seek to have a .country name established within the gTLD space, there would of course be significant opportunities for contact with ICANN through the registrar accreditation framework and other mechanisms aimed at workable and accountable gTLD operations. Such opportunities for practical dialogue on operational matters would be no less than those available through the more “hands-off” way in which ccTLDs are administered, and may well be a useful platform for better communication and fewer misunderstandings should the gTLD space increase significantly.

POST DELEGATION CONSIDERATION

What avenues of recourse are available to deal with ‘redelegation’ type requests from governments who withdraw their support for an applicant, post delegation?

The ccNSO considers that Guidebook version 3 fails to consider the many complex post-delegation issues ICANN is likely to face if country/territory names are introduced in the gTLD space, such as redelegation requests.

It is acknowledged that post-delegation problems may arise with a .country name where a government may wish to see different arrangements apply because of changed circumstances. There is always the possibility (and, over time, the probability) of circumstances changing after delegation, whether for gTLDs or ccTLDs, and there are a range of options for working them through. A government or public authority has the option of applying conditions on a TLD operator as part of their initial support for a .country name, thereby putting itself in a position to influence the policies of the operator. In addition, if a geographic name TLD designates itself as a community TLD it will have specific restrictions in its agreement which, if breached (for example, through registration restrictions), enable the government to lodge an objection and the decision maker can order the registry to comply or face sanctions. It is possible that a Government may take some comfort from the existence of a contract between ICANN and the .country operator, particularly if the government does not have a mechanism to provide input or contribute to the operations and management of its ccTLD.

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.

OBJECTION PROCESS

Why is it not possible to appeal decisions made by the Geographic Names Panel (GNP)?

Some concerns have been raised about the inability to appeal decisions made by the Geographic Names Panel (GNP).

The role of the GNP, among other things, is to assess applications and determine if a string is a geographic name as defined in the Guidebook. In the event that an application is a geographic name, the GNP will ensure that the supporting document is provided and will also validate its authenticity. In circumstances where the applicant did not know that the string requested represents a geographic name as defined in the DAG, the applicant will be given 60 days to contact the relevant government or public authority to acquire the necessary support or non-objection to the use of the string.

The protection of geographic names in the Guidebook was developed in light of the GAC Principles regarding new gTLDs, with the intention of respecting the sovereign rights of governments in the process. For strings that are not obvious or obscure, but the GNP believes that it does represent a geographic name, it is anticipated that the GNP will liaise with the relevant government or public authority for confirmation.

There is a defacto appeal mechanism in that applied-for names can be objected to on community based grounds. A gTLD application for a geographical place name might be the subject of a successful objection. See below.

Can an application that survives the GNP process, be objected to on community grounds?

As stated above, the purpose of the GNP is to assess applications and determine if a string is a geographic name as defined in the Guidebook. If the applicant passes this step in the evaluation process,

it does not quarantine the application from an entity with standing objecting to the string on community grounds, or other grounds as specified in the Guidebook. A successful objection might be lodged on community grounds.

Each of these tests is described in further detail in the Applicant Guidebook.

CITY NAMES

Why don't all city names require support or non-objection of the relevant government or public authority?

What protections are afforded to capital city names?

As stated in the Explanatory Memorandum on Geographic Name Applications, city names offer challenges because a city name can be a generic term, and in many cases no city name is unique. Evidence of support or non-objection will be required for capital cities of the countries or territories on the ISO 3166-1 list, and for city names where an applicant declares that it intends to use the TLD for purposes associated with a city name. It is considered that the objection process provides an appropriate avenue of recourse, for local governments or municipalities.

The Draft Applicant Guidebook states that “an application for any string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166- standard” and “an application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city” require documentation of support or non-objection from the relevant government or public authority.

This requirement means that an application for .paris, regardless of whether the applicant intends to represent Paris, Texas; Paris, France; or the fragrance Paris, will require documentation of support or non-objection from the relevant government or public authority, which, in accordance with the capital city requirement, in this case would be France.

It is important to note that this rule applies only to capital city names of a country or territory on the ISO 3166-1 standard. Given the GAC Principles regarding New gTLDs and general principles of conservatism, the process identifies the limited number of capital city names as being important to government / sovereign interests. Other city names require government approval only if they claim to represent a city in the application, and only from the relevant government of the city they claim to represent. The relevant government in the case of city names depends on the location for example, an application purporting to represent Newcastle, England requires the approval of a different government than an application representing Newcastle, Australia. An application for “Newcastle Ale” or any other brand or unspecified purpose requires no government approval except in the cases of national capital cities described above.

GOVERNMENT SUPPORT

**What is the timeframe for providing government support or non-objection for an application?
Will support from the government or public authority come at a cost?**

The government support or non-objection must be available to the applicant at the time the application is submitted; therefore there is a finite timeframe. In the event that an applicant has unknowingly applied for a string that is a geographic name, the applicant will be contacted and given a limited time frame to provide the documentation.

The AIPLA has raised concerns that efforts to obtain permission or non-objection from the relevant governments or public authorities could be subject to demands for payment of financial remuneration or other benefits: “If a gTLD applicant has IP rights in a string mark containing the proposed gTLD, ICANN should simply require gTLD applicants to identify and contact the respective authorities for the geographical areas and give them the opportunity to note their objections and state their reasons. Any objections to such a gTLD should not by themselves prevent the awarding of a gTLD to the applicant.”

The protection of, and safeguards provided for, geographic names in the Guidebook was developed in light of the GAC Principles regarding new gTLDs, with the intention of respecting the sovereign rights of governments in the process. While understanding the concerns raised by AIPLA, the manner in which the relevant government or public authority provides support in these limited cases is a matter for them to determine, it cannot be a matter for ICANN.

How was the percentile determined for Strings representing a continent or UN region? Would it be more appropriate for the GAC to be consulted on such strings?

At the Mexico City meeting, the Board asked staff to provide greater specificity. The new definition provides applicants with more clarity about what qualifies as a regional or sub-regional name and the degree of approval required. The requirement for 60% approval means that a super-majority of governments in each area affirmatively approve the application and the applied for string. In this case, mere non-objection does not apply. The reasonableness 60% figure was checked by calculating at the number of countries / territories required for approval within each of the UN defined regions. The requirement that there be more than one written objection means that no single government has a veto power. The mechanism adopted is aligned with UN practices (which in most cases is by a simple majority in committees of the General Assembly: http://www.un.org/ga/60/ga_background.html). The GAC is not an operational arm of ICANN and as such there is no mechanism to enable the GAC to fulfill the suggested role.

The Applicant Guidebook Version 3, has a typing error—the next version of the Guidebook will revert to a 60% approval.

GAC member involvement in evaluations has been discussed in previous meetings. The GAC is not an operational arm of ICANN and as such there is no mechanism to enable the GAC to fulfill the suggested role.

STRING SIMILARITY

I. Key Points

- Comments continue to diverge on the scope of string similarity in Initial Evaluation, where some claim that aural, semantic and even concept similarity be covered. Others state that nothing beyond visual similarity should ever be regarded, especially for IDN gTLDs, The

proposed position, balancing comments and for reasons of practicability, is to maintain the current approach: to check all proposed strings for visual similarity during the Initial Evaluation, while String Similarity Objections can be assessed based on a wider range of similarities, in line with the adopted policy.

- A comment asserts that exceptions from the prohibition against confusingly similar strings should be granted for gTLD registries applying for an IDN version of its existing string. The issue of exceptions is a delicate matter where no clear policy guidance is at hand and it is the proposed position not to attempt development of exception rules until clear policy advice is available in that regard.
- The process for securing string examination panel services is underway and will be reported in an open way.
- A process for addressing collisions between the IDN fast track and the new gTLD processes has been published.

II. Comment Summary

IDNs (section 2.1.1.1.3)

Similarity should be limited to “visual” and “aural and meaning similarity” should be removed. The GNSO IDN working group concluded that only visual similarity will lead to actual user confusion. This was done to abstain from granting current registries an unjustifiable right to have equivalent TLDs in all languages. *Y. Keren (23 Nov. 2009).*

Meaning of similarity (sec. 3.1.2.1)

The guidebook is not clear on the meaning of similarity—is it just appearance as in the String Similarity Review of Module 2 (Evaluation Criteria)? There is also no basis for similarity on the grounds of aural or meaning across IDN scripts/languages as was established by the GNSO IDN working group. *S. Subbiah (Module 3, 23 Nov. 2009). A. Sozonov (Module 3, 23 Nov. 2009).*

Is visual similarity the only factor considered? *A. Mykhaylov (Module 3, 23 Nov. 2009).*

String similarity review—IDN version of gTLD name (sec. 2.1.1.1)

ICANN ignored RySG’s recommendation that it now makes again, that when performing the string confusion review against existing TLDs an appropriate exception should be allowed in cases where the applicant is applying for an IDN version of its existing gTLD name. *RySG (21 Nov. 2009).*

String similarity review –IDN ccTLD and IDN gTLD

To reduce the risk of unfairness and to promote transparency, ICANN should consider setting a deadline for IDN ccTLD applications at least one month before the deadline for gTLD applications. *IPC (22 Nov. 2009). SIIA (23 Nov. 2009).*

String similarity review and trademark reserved names list

INTA objects to ICANN’s continued exclusion of trademarks from the string similarity review; this could be pointed to as substantiating allegations of ICANN’s institutional bias in favor of its revenue collectors (e.g., existing gTLD registries) and against trademark owners. INTA reiterates its support for a trademark reserved names list and its application to the string similarity review. *INTA (20 Nov. 2009).*

String similarity standard

The DAG v3 contains inconsistent articulations of the standard of string confusion. A single standard should be adopted based on the rubric of “likelihood of confusion”, a concept widely used and understood in trademark and unfair competition jurisprudence worldwide. A probability of confusion or actual confusion is too narrow a standard. The standard should be motivated by the principle that any substantial number of consumers confused or defrauded is too much—that most consumers would be confused should not be necessary. *INTA (20 Nov. 2009)*.

String similarity assessment

INTA continues to recommend that the string similarity assessment should include similarity in sound and meaning, not simply similarity in appearance. Absent more detail on what weight the algorithm test results will carry, INTA is concerned that those results will carry disproportionate weight. *INTA (20 Nov. 2009)*.

Section 2.1.1.1.3 could be improved with a more detailed definition of the term “similarity of meaning” (e.g., do synonyms meet these criteria). *BITS (22 Nov. 2009)*.

The string confusion standard should include phonetic and conceptual similarity. *Microsoft (23 Nov. 2009)*.

String similarity panel

String similarity examiners should have experience in the field of trademark and unfair competition law or consumer behavior research so that they more adequately evaluate the issue of string similarity and user confusion. *INTA (20 Nov. 2009)*.

More details are needed about the panel and who will serve on it. *CADNA (22 Nov. 2009)*.

ICANN should publish the names, affiliations and qualifications of the String Similarity Examiners (SSEs) and require them to comply with a strict conflict of interest policy and allow applicants to submit to ICANN written objections to having a particular SSE assigned if the applicant has reason to believe the SSE has a conflict of interest. *Microsoft (23 Nov. 2009)*.

Translations and Database

DAG v3 does not include INTA’s recommendation that strings be translated and that a database be created and maintained for examiners to use in evaluating strings. This would be a useful addition and possibly necessary to ensure that potential string contention issues are dealt with appropriately. *INTA (20 Nov. 2009)*

Concept confusion

There should be a new requirement for the gTLD concept to be described in all applications—both standard and community-based. A gTLD could conflict with an existing sTLD (or community-based TLD) not through the string but through the concept it claimed to support. This would highlight confusingly similar concepts, of concern to both sponsored TLDs and community-based TLDs, and could be a justification for an objection. *Telnic—minority position in RySG (21 Nov. 2009)*.

III. Analysis and Proposed Position

Scope and rules

A couple of comments advocate an extended scope for the string similarity check in Initial Evaluation, including aural and semantic similarity. Given the number of potential string checks that can be performed and the complexity thereof, the current approach remains to check all proposed strings for visual similarity during the Initial Evaluation. String Similarity Objections (in Module 3), which can be assessed via a Dispute Resolution Service Provider, provides the ability for a wider range of similarity checks. This approach is in accordance with the adopted policy developed by the GNSO. Regarding a detailed comment suggesting a definition of "meaning" in 2.1.1.1.3 in the Guidebook, it should be noted that this section is not a proper place for definitions since it is merely exemplifying and clearly refers to Module 3.

Translations

A comment suggests developing a database of string translations for use by examiners, implicitly calling for a checking of "meaning" during the Initial Evaluation. Leaving aside the issues whether all strings can be translated, whether translations would constitute grounds for findings of confusing similarity can be examined on a case-by-case basis through the objections and dispute resolution procedures that are in place. This is the more practical approach: in view of the sheer number of languages in the world, it would be impracticable to check every combination of every application during Initial Evaluation. The cases when a party states there might be confusion due to translation are better left for dispute resolution.

IDN gTLDs

Two comments bring up string similarity specifically regarding IDN gTLDs, one supporting the GNSO IDN WG finding that only visual similarity should ever be considered, the other claiming that exceptions should be made to visual similarity exclusions for applicants applying for IDN versions of their existing ASCII gTLDs. As the string similarity check during Initial Evaluation is limited to visual similarity, no change is called for in that respect. Both comments relate principally to the handling of potential string similarity objections by the Dispute Resolution Service Provider. It should be noted that the issue of exceptions is a delicate matter where no clear policy guidance is at hand and it is the proposed position not to attempt development of exception rules until clear policy advice is available in that regard. The one area of "exception" might be in the case of variant TLDs. It is anticipated that rules will be developed where variant TLDs will be delegated under certain circumstances. Variants are discussed elsewhere in the new gTLD materials.

Trademarks

A comment proposes that strings be checked for similarity to trademarks in general. This would considerably widen the scope of the string similarity check in Initial Evaluation, without providing any clear benefits since resolution of conflicts with trademarks can occur thru the Legal Rights Objection Process (Module 3). Even if an applied-for TLD is identified in the string similarity check as matching or being similar to an existing mark, that does not create a right violation absent some other finding. That finding will occur in the rights objection process. Adding a trademark similarity check would add significant costs in process development and processing without the existence of a controversy over the use of the name. The proposed position is not to change the string similarity check in this way.

Examiners

A couple of comments regard the string similarity examiners, requiring disclosure, conflict of interest provisions and competence requirements. We agree. Those comments are all well taken and in line with the process currently underway for selection of the examiners and the evaluation process. Regarding a

comment expressing concern about the use of the algorithm – we also agree with its limited role. The approach remains that the algorithm has only an advisory function and that its usefulness is expected to grow for future rounds, based on experiences and refinements, as needed. ICANN intends to take a conservative approach in the first round and thoroughly evaluate this tool as experience is gathered. This may imply manually checking string combinations that score far below any "threshold", both to gain experience and to catch and rectify any potential errors in the algorithm scoring.

Standard

A comment requires more precision regarding the standard for string similarity, claiming that a finding of confusing similarity should only require that "a substantial number of consumers" would be confused, not "most consumers". This view is close to the intention of the Guidebook and staff will consider if it can be better captured in the drafting.

Inter-process contention

Two comments suggest a deadline for IDN ccTLD applications a month before opening the gTLD round, presumably with a view to avoid inter-process contention cases. The IDN ccTLD Fast Track process was launched in January 2010 and there is no deadline set – until the conclusion of the ongoing ccNSO Policy Development Process regarding IDN ccTLDs. Although it is unlikely that any inter-process contention case would occur, due to the requirements in both the Fast Track and New gTLD processes, there are clear procedures foreseen to handle such an eventuality. A deadline for the Fast Track for this reason would be inappropriate and counter the existing policy work.

STRING CONTENTION

I. Key Points

- Self-resolution of contention is stated as a preferred method in some comments, with requests to facilitate such resolution thru joint ventures. The proposed position is that, although joint ventures may result, such solutions would have to be arranged thru side agreements while keeping the identity of the formal remaining applicant unchanged, in order to avoid considerable delays.
- Multiple comments relate to the threshold for winning a Community Priority Evaluation, with some agreeing with the current threshold (14 of 16) while others argue for a lowering to 13 out of 16 points. The scoring will be assessed until the publication of the 4th version of the Guidebook.
- Ongoing compliance matters for community gTLDs are brought up in some comments. It is the proposed position that foreseen contractual obligations will adequately address such concerns, in combination with the post-delegation dispute resolution process that is available for communities.
- Among the comments regarding auctions, one identifies an inconsistency in the Guidebook that will be corrected and further clarity will also be given to other provisions, while comments calling for very long periods between auction rounds and alternatives to auctions to resolve "double winner" situations in CPE will not be retained as proposed positions.

II. Comment Summary

Existing legal rights (sec. 4.1.1)

Existing legal rights should also be taken into consideration when resolving string contention. It is unfair to legal rights owners to have to bid against third parties to the financial benefit of ICANN. Where there are legitimate competing rights, a more sophisticated mechanism should be adopted for allocating the relevant gTLD which reflects the nature, breadth and longevity of those rights. *BBC (19 Nov. 2009)*.

Contention between community-based applications

The current process design that two contending community-based applications will go to auction if both of them meet the community priority standard is bad policy. The process should be capable of giving priority to the community TLD that is more desirable from a public policy perspective. A panel must be able to use good judgment instead of blindly relying on a much too general scoring system. An auction should only take place between community-based applications if the applicants agree. If they do not agree and no preference can be determined on public policy principles, then the result should be the suspension of all applications that were determined to be community-based in that contention set. *W. Staub (22 Nov. 2009)*.

Community priority (comparative evaluation)

The only purpose of comparative evaluation criteria is to resolve string contention. Why has Nexus criteria (e.g. “uniqueness”) been implemented to only qualify applicants not facing string contention (thus not the need for comparative evaluation)? *RySG (21 Nov. 2009)*.

The system of allocating points may not be correctly calibrated yet; in addition to meeting a minimum threshold, all community-based applications in Community Evaluation should be re-evaluated. *ECTA/MARQUES (22 Nov. 2009)*.

There is no avenue for appeal of the community priority evaluation procedure for the applicant being evaluated or other applicants affected by it; there is no requirement for a written opinion by the panel giving a rationale for the scores awarded. ICANN should consider requiring the panel to document the basis for scoring and to provide an avenue for appeal. *AIPLA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

Legal rights (Module 3) and String Contention (Module 4) interplay is unclear

Where two applicants both have bona fide rights in the same or similar mark but coexist in the real world because of good/services distinctions, it is unclear how ICANN will assess likelihood of confusion. Could a commercial brand owner and a community-based applicant for the same or similar string advance past the legal objection stage into the string contention stage if both have legitimate rights in the same or similar mark desired for use as a gTLD? If so, the community-based applicant would automatically prevail in string contention as long as its community claim is approved. ICANN should address whether a commercial brand owner’s objection to a community-based application would be considered a “relevant” objection in the community endorsement portion of the community evaluation. *AIPLA (22 Nov. 2009)*.

During evaluation of “eligibility”, “name selection” and “content and use” categories, would a lack of policies and procedures to prevent domain name registrations and use that might create confusion with the commercial brand owner cause the community applicant to lose the available points in those categories? *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

Defaults and apparent inconsistency—sections 4.3.3. and 4.4

It is unclear when each section applies and on their face they seem inconsistent with one another. In addition, ICANN should clarify that a runner up who is offered the gTLD after the initial winner defaults will not be considered in default and subject to penalties if it refuses the offer. *AIPLA (22 Nov. 2009). IPC (22 Nov. 2009).*

Community Priority (Comparative Evaluation): Scoring

Community nexus scoring should be returned to 13 out of 16 points to allow one point (plus or minus) due to human error based on subjectivity by evaluators. The staff may be using the threat of “gaming” to ignore the larger ICANN community’s loud and clear call to allow for 13 of 16 points as a fair demonstration of nexus to community. This breeds mistrust. Also, the staff analysis statements that “additional testing has occurred,” which is hard if not impossible for the community to measure or verify, creates frustration. ICANN should publish these test methods and results for community review. ICANN needs to allow for more subjectivity in the scoring, and to lower the threshold for community-based applicants to give some priority benefit to those that should be favored in this process. Otherwise the narrow parameters will lead to a significant number of unnecessary auctions. In making it so difficult to prove a reasonable demonstration of nexus to community ICANN makes it exceedingly difficult for community-based applications to succeed. *BC (23 Nov. 2009). dotECO (22 Nov. 2009). C. von Veltheim (22 Nov. 2009).*

Contrary to ICANN’s public interest obligations, this change means that whenever there is a non-community competitor to one or more community-based applications for a particular string, the contention is extremely likely to be resolved not on the basis of community preference but rather on the basis of who has the deeper pockets. For all the detailed reasons set forth in COA’s comments, the DAG v3 changes reinforce the likelihood that the community priority evaluation procedure will turn out to be an intricately designed anteroom to an auction. *COA (22 Nov. 2009).*

The scoring gives no significant weight to an applicant that is bringing an innovative TLD to the DNS, notwithstanding that innovation is one of the primary reasons cited for expanding the DNS. *IPC (22 Nov. 2009).*

The bar is set too high for meeting the community status threshold. This needs to be fixed. *Minds + Machines (22 Nov. 2009).*

Returning the minimum score needed to demonstrate nexus to a margin of three, i.e., 13 of 16, maintains the rigor but removes the risk of false negatives. ICANN will never be able to remove all subjectivity so staff needs to factor it in to the scoring evaluation. In this way ICANN ensures that community-based applicants go through a rigorous but fair and equitable process. *R. Andruff (Module 4, 14 Nov. 2009).*

Big Room supports 14 out of 16 points needed to win a community evaluation. A high bar is appropriate since an applicant can write responses to the community establishment, string nexus, and registration policies criterion themselves without any community engagement. *Big Room (Module 4, 22 Nov. 2009).*

In sections 3.4.4, Community Objection and 4.2.3, Community Priority, ICANN has made appropriate adjustments to the community definitions and scoring so only true, discrete communities can use the designation and/or objection. *Demand Media (22 Nov. 2009).*

The estimated Comparative Evaluation fee is helpful, but it would be appropriate at this point in the DAG drafting to provide a fee range with an upper limit. *INTA (20 Nov. 2009)*.

Review of scoring system

The scoring system should be reviewed and evaluated after the first round of applications is processed and strings allocated to determine whether the system results in an accurate assessment of the legitimacy of community applications. *INTA (20 Nov. 2009)*.

Subjectivity

The amended notes and scoring system in relation to the Evaluation Criteria handle subjectivity in part by allowing the Community Priority Panel to use information sources outside the application itself to verify circumstances when assessing Criterion #1. This same option should be available to the Panel for assessment of each Criterion. The DAG v3 does address INTA's other concern about subjectivity that the assessment of the applicant's claim should require the applicant to demonstrate how they will comply with the Evaluation Criteria post-delegation. ICANN could address this concern by adding a criterion concerning post-delegation compliance and requiring the applicant to demonstrate how it plans to satisfy this criterion. *INTA (20 Nov. 2009)*.

Community establishment (criterion 1)

Big Room supports the explanatory notes in criterion 1, community establishment. What defines a community could use greater specificity particularly regarding scope, including geographic (i.e., global, country or city). Capture by a particular stakeholder or group is a risk. Applicants could be required to define their community, including geographic scope, and that delineation should also be expressed in the registration policies. Another risk is the inability to evaluate community endorsement due to differing delineation. To resolve this, a mechanism could be established to be employed by an independent evaluator in cases where two differently defined communities are applying for the same string. *Big Room (Module 4, 22 Nov. 2009)*.

Speculators favored over real communities in the current rules

Under the current rules for what constitutes a community and the proposed scoring, speculators are favored over real communities. ICANN needs to lower the threshold to achieve community status. *Minds + Machines (Module 4, 22 Nov. 2009)*.

Registration policies (criterion 3)

Big Room supports ICANN's criterion for name selection, content and use, and enforcement. There is some risk from the lack of a requirement for an ongoing governance process to be put in place for community TLD policies; this could allow a community minority or the TLD registry operator itself to create or change policies in the future without consulting the community. To address this, all community applicants could be required to outline how the community can engage in the ongoing governance of policies and practices of the community TLD. *Big Room (Module 4, 22 Nov. 2009)*.

Community priority criteria

An additional factor should be added—the relevance of the registry operator to the community and the community project it intends to serve. There should be a clear distinction between registry operators pursuing a non-for-profit model to help their community with funding projects, and commercial operations that wish to use the support they got from a community for their own profit. Objective criteria for the registry operator could be: legal status (for-profit, not-for-profit); commitment to allocate certain percentage of profits to fund community-based activities, the larger the better. This should be audited to see if the registry keeps its commitments. *DotSport (Module 4, 18 Nov. 2009)*.

The community priority criteria (sec. 4.2.3) is correct. *E. Brunner-Williams (Module 4, 23 Nov. 2009).*

Community endorsement—levels of support (criterion 4)

The lack of a mechanism to distinguish between levels of support for and non-opposition from a defined community for a particular community TLD application poses the risks of an inability to compare and stakeholder marginalization. To address these risks: (1) community establishment and string nexus should be evaluated prior to evaluating registration policies and community endorsement. Contention sets may be reduced simply on the basis of these two criteria; and (2) the reference to obtaining endorsements from alliances in the community (which could lead to disproportionate representation and inequitable evaluations) should be removed, and recognition for outreach to marginalized stakeholders should be encouraged. Applicants should have to show extra effort to communicate with disadvantaged stakeholders. Related to the risk of capture, endorsements and community support that are materially affected should be disclosed. Community TLD applicants should also be required to provide documentation on how they have engaged stakeholders in their community. Evidence of non-opposition and broad consultation should also be considered as endorsement indicators. Independent evaluators should have the expertise to determine in terms of breadth and depth the overall level of community support that the applicant has been able to generate and the level of effort taken to reach out to their entire community. *Big Room (Module 4, 22 Nov. 2009).*

Self-resolution joint venture (sec. 4.1.3)

Self-resolution of a string contention by recreating the application as a joint venture is not an accepted solution in the current draft. This should be reconsidered. *A. Sozonov (Module 4, Nov. 2009).*

ICANN's financial argument for throwing out the joint venture seems illogical and inconsistent. *S. Subbiah (Module 4, 23 Nov. 2009). RySG (21 Nov. 2009).*

Self-resolution—settlements (secs. 4.1.3, 4.3)

BBC objects to ICANN's proposals. It is highly unlikely that a brand owner would be prepared to share or relinquish control over its brand to a competing brand owner either in the same industry in a different country or a different industry in the same or a different country. It is not possible to reconcile the conflict between national trade mark rights and the global nature of the Internet. *BBC (19 Nov. 2009).*

Community evaluation—eligibility to object (sec. 4.2.3)

Given the scoring and objection process for community TLD applicants, it is appropriate that existing TLD operators should be excluded from opposing in any comparative evaluation. *A. Sozonov (Module 4, 23 Nov. 2009). S. Subbiah (Module 4, 23 Nov. 2009).*

ICANN's self-appointed evaluation role--competing community applications (sec. 4.2.3)

ICANN's self-appointed role of evaluating, as between competing community applications, the preferred applicant is highly problematic. Problems of competing communities are already arising in .eco, .gay, .food, and so on. An unsuccessful applicant, with an arguably equally legitimate right to a community TLD will be shut out from owning the relevant gTLD. These problems will inevitably increase as the rollout of new gTLDs moves forward. *BBC (19 Nov. 2009).*

Evaluator expertise regarding communities

Lack of knowledge and understanding about the community by evaluators could lead to ill-informed evaluation processes and misallocation of points. Mechanisms should be developed for evaluation panels to better understand the breadth and depth of the communities they are evaluating by providing access to a diverse pool of experts and leaders, who could serve as interviewees or informational

resources. Surveys could also be useful as mechanism for checking the assertions of evaluators. *Big Room (Module 4, 22 Nov. 2009)*.

Auction—Community Priority Evaluation

INTA's primary concern that 2 or more "clear winners" under the Community Priority Evaluation will need to compete for a disputed word string at auction has not been explicitly addressed in DAG v3. *INTA (20 Nov. 2009)*.

Auction rules

Auction rules should be published as soon as possible. *ECTA/MARQUES (22 Nov. 2009)*.

Auctions—problems and future changes

INTA is concerned that auctions will result in gTLD awards to those with the most money not necessarily the best applicant, and that a considerable number of contention sets will go to auction. *INTA (20 Nov. 2009)*. *AIPLA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

The system as proposed has practical problems. The payment period for the winning bidder is too long. Default penalties for failure to timely pay for a winning bid need to be refined—in some cases they could be excessive; an alternative may be to set a maximum threshold penalty. ICANN needs to specify that the default penalties apply to both the initial winner and subsequent winners if the initial winner defaults. In general, given the potential for significant changes in the auction rules from what is proposed in the DAG v3, it is difficult for any party to assess and consider the practical impact of the auction system if it is potentially subject to such change. *INTA (20 Nov. 2009)*. *IPC (22 Nov. 2009)*.

The current auction design can be described as brutally revenue-maximizing. The auction process should be redesigned to give opportunities for negotiation during the auction. There should be weeks, not hours, between auction rounds. The objective must not be to force applicants to pay as much money as possible but to resolve the contention as amicably as possible. *W. Staub (22 Nov. 2009)*.

Agreement to resolve string contention (sec. 1.1.2.7)

Sec. 1.1.2.7 does not mention agreement between contending parties as a way to resolve string contention; this should be clarified. *IPC (22 Nov. 2009)*.

String contention

The staff got it right when deciding that if two public authorities collide for a string, then block is appropriate. Where staff got it wrong is putting a public authority at the same level as a private applicant and this makes geo-squatting a reasonable economic activity, as public authorities have very limited non-planned liquidity with which to gamble on auctions. *E. Brunner-Williams (Module 2, 22 Nov. 2009)*.

III. Analysis and Proposed Position

Self-resolution

A couple of comments bring up the possibility of self-resolution of contention situation through agreements between the concerned applicants, suggesting more latitude for joint ventures to that effect, while one comment questions whether voluntary agreements are at all realistic in certain cases, notably between brand-owners. While agreeing that contention resolution through voluntary agreement(s) between the concerned applicants is a preferred solution from most perspectives, ICANN staff underlines that such arrangements require the withdrawal of one or more applications. It is indeed

expected that agreements may lead to the forming of joint ventures, but this must be established by side agreements without changing the formal applicant of the remaining application in order not to prompt a restart of the process with a renewed Initial Evaluation and other time-consuming steps which may also delay the conclusion of the whole round.

Comparative Evaluation Threshold

Multiple comments raise the issue of the scoring threshold for winning a Community Priority Evaluation, currently at 14 out of 16 points. Some find it correct and express support, while others find it too high and recommend a return to 13 out of 16, as in a previous Guidebook version. Those claiming that the threshold is too high invoke the need for an allowance to account for unavoidable subjectivity in the assessments, the desire to avoid false negatives, the risk for unfair opposition wrecking the score, the alleged implicit preference given to "speculators" and the undesirability to have many contention sets requiring resolution by auction, adding to the expenditures for applicants. While full consensus on where the perfect balance is in this respect may be unachievable, it is noted that these arguments may give reasons to further reflect on the threshold value. Guidebook preparation focused on criteria modifications and explanations with the intention to provide more clarity and to achieve reasonable outcomes without changing the overall threshold for winning. In further developing the practical steps of the evaluation process in ongoing discussions with potential providers, these comments will be kept in mind as well as potential options, where one option may be a non-integer threshold value combined with averaging scores from evaluators.

Comparative Evaluation Criteria

A comment suggests that all community applications be re-evaluated in the Community Priority Evaluation step. However, there is no need for evaluation of the "community" aspect of applications prior to this step – it only is necessary in cases of contention, so the notion of a re-evaluation at this step is misplaced. There will be community applications without any string contention situations and those would not require any Community Priority Evaluation to proceed to delegation, provided they have passed the preceding steps.

A comment suggests that criteria and scoring be evaluated after the first round. We agree. It can be noted that an evaluation of all aspects of the first round is already foreseen, as required by the adopted policy.

Criterion 1, Community Establishment

In response to a comment suggesting that Community Establishment and Nexus be assessed before other criteria, it can be noted that the evaluators will follow the criteria sequence as reflected in the Guidebook when performing their assessments.

A comment recommends to take due account of the community delineation. We agree. This is already considered a key factor in the assessment, of importance in relation to all criteria.

A commenter expresses concerns over nascent competing community strings and foresees difficulties in choosing between them. ICANN staff shares the concerns that undesired contention situation may emerge but wishes to highlight that community establishment, and most notably the pre-existence of a community, is a factor of considerable importance in the scoring that may simplify such choices in practice.

Criterion 2, Nexus

A comment expresses doubts about whether "uniqueness" is relevant, alleging that a "unique" string, by definition, would not end up in a contention situation. In the scoring, uniqueness gets a point but it is not required for success. It should be noted that "uniqueness" relates to the meaning of the string. It is quite possible that a string has the "uniqueness" property, although ending up in direct contention with a confusingly similar string.

Criterion 3, Registration Policies

A commenter asks whether lack of policies and procedures would lead to a lower score. The answer is Yes, if the application lacks policies and procedures that would be relevant in line with the scope and nature of the foreseen community TLD.

Criterion 4, Community Endorsement

A comment suggests scrutiny of proof of engagement of stakeholders and various notions of support, such as evidence of non-opposition and of broad community consultations. These suggestions are helpful for unclear cases, when evaluators would need to investigate the situation to arrive at a final score. As expressed in earlier comments analyses, needs for research and verifications by the evaluators may well arise in practice.

A comment proposes that opposition from existing TLD operators should not be permitted or considered. Such an overall exclusion seems inappropriate, since the evaluators have to consider opposition from the relevant community to assess the score and it may happen that a TLD operator is a member of that community. The evaluator is not required to change a score merely because opposition is lodged.

A commenter asks whether a brand-owner's opposition to a community application would be seen as relevant. The answer is Yes if the brand-owner is a member of that community.

Additional criteria

A comment suggests that legal status (profit/not-for-profit) of the foreseen registry operator should be taken into account, proposing a higher score for a not-for-profit registry. However, such a distinction would in practice limit the choice of registry operator for the community. Such a scoring distinction might also be the subject of abuses. The proposed position is not to incorporate this suggestion in the scoring.

Comparative Evaluation Evaluators, Fees

A comment suggests that the evaluators should be assisted by pools of experts and possibly surveys to best understand the communities they are evaluating. The primary objective is to select providers that can draw on extensive and varied expertise for their assessments, but additional means may be required in special cases. ICANN staff is currently performing the selection of providers and once the selection is finalized the Comparative Evaluation fees can be stated in greater detail, in response to a comment received. A commenter asks whether the evaluators will have to justify their findings. Each panel will be required to furnish a report of their findings, not just the decision.

Comparative Evaluation Appeal possibilities

With respect to a request made in the comments for the opportunity to appeal a scoring outcome, the proposed position is not to accept that suggestion. Adding an appeal opportunity to the scoring process would add complexities to the process and impose substantial delays for the process and for all applicants involved. The result of an appeal is not necessarily dispositive. Say an appeal results in a

different outcome – can't the original winner appeal that decision? After all, the score is now one to one. This reasoning is in line with the approach taken for most sub-processes, with a view to maximizing the overall efficiency of the New gTLD process.

Comparative Evaluation Legal rights concerns

A couple of comments relating to legal rights in conjunction with contention resolution deserve to be elaborated upon for clarification. Legal rights can be invoked as a basis for objections by right-holders, regardless of whether they are applicants themselves or not. This is a step that precedes the string contention resolution. If such an objection has not been upheld and the application in question proceeds to the string contention resolution phase, there would be no valid reason to bring up legal rights anew as a factor to consider in the latter phase.

Auctions

Multiple comments mention auctions as the least desirable contention resolution method, being onerous for the winner and not necessarily leading to selection of the "best" application. It should be highlighted that an auction is the contention resolution method of last resort and does have the advantage of always enabling resolution if other options fail. Negotiation and settlement are encouraged to avoid auctions. Comments also require added clarity in the auction rules, which will be forthcoming. One comment states that no auction should occur between multiple "winning" community applicants that are in direct contention and have scored above the threshold unless they all agree to it. Otherwise the panelist should elect a winner based on "public policy principles" and if that's not possible, suspend the applications. We agree with the desire to find an amicable solution but note that this approach may leave the whole contention set unresolved, while a final auction only involving the "winners" is a much clearer and preferred method for resolving the few such cases that can be expected. It would be a poor result if the desired TLD string were to remain unallocated.

A comment demands a clarification on whether a penalty as foreseen for an initial auction winner in default should also apply by inference to the number two, if defaulting, etc and highlights an inconsistency between sections 4.3.3 and 4.4. We agree and will redraft section 4.4 to be in line with 4.3.3. Regarding default penalties, they will only apply to defaulting "number twos" if they default after initially responding affirmatively when given the opportunity following a default of the original winner.

A comment suggests longer periods between auction rounds, "weeks not hours", and opportunities for negotiations in-between rounds. This would delay the whole process and the final resolution considerably, and consequently it is not retained as proposed position. There will be weeks to prepare for the auction so that parties can come in with well thought out plans.

Community gTLDs, Compliance matters

A couple of comments bring up how compliance can be assured, once a community gTLD is in operation. It should be noted that any community-based gTLD will be contractually held to its commitments to the community and the restrictions in its registry agreement. This will be the case regardless of whether the application has gone straight through the process unchallenged or passed a Community Priority Evaluation. Accountability to the community is further safeguarded thru the opportunity for the community to lodge a post-delegation objection if the gTLD deviates from its dedication to the community.

OBJECTION AND DISPUTE RESOLUTION

I. Key Points

- Consolidation of objections by dispute resolution providers will and has been strongly encouraged, but it is ultimately left to the discretion of the DRSP to evaluate and balance the efficiencies of consolidation and possible prejudice that might result from it. Each DRSP has published its rules that include statements on consolidation.
- There is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD – and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant.
- It is expected that DRSPs will select experts who are well qualified in the subject matter of the application and the objection, as well as the language of the parties.

II. General Process Comments

Purpose of dispute resolution process (sec. 3.1)

The word “limited” should be removed from the first sentence of section 3.1 so that it is not misconstrued by the ICANN community (e.g., replace it with “defined”). *INTA (20 Nov. 2009)*. What is meant by reference to “applicability of this gTLD dispute resolution process”? *Microsoft (23 Nov. 2009)*.

Challenges to existing gTLD operator (sec. 3.4.2 point 4)

The new gTLD process is not the place to object to TLD operators to date. The clause “or operates TLDs or” should be deleted. *S. Subbiah (Module 3, 23 Nov. 2009)*. *A. Mykhaylov (Module 3, 23 Nov. 2009)*.

Independent dispute resolution process

To connect this qualified language to the objection grounds, Section 3.1 should be modified to read: “The independent dispute resolution process is designed to protect the interests and rights covered by the scope of the objection grounds set out below.” *AIPLA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*. *Microsoft (23 Nov. 2009)*. The phrase “and competence of the designated experts to issue decisions in this process” should be added to Section 3.1 paragraph 2 and Section 3.3.4. *IPC (22 Nov. 2009)*.

DRSPs—objection process

It should be specified that each DRSP has exclusive competence to handle the Objections for which it has been designated, unless ICANN appoints additional DRSPs for the same categories of objection. ICANN should also specify what happens if an objector files with the wrong DRSP. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

III. Analysis and Proposed Position

Some general comments have been received with respect to the overall objection process. Those include specific suggestions for word changes, requests for clarity and making reference to competence of the dispute resolution providers.

All suggestions that can help clarify language are welcome. ICANN will consider the suggestions for specific language changes and will make revisions in the next published version of the applicant guidebook, if appropriate.

One comment requested clarification of the phrase “applicability of this gTLD dispute resolution process.” This statement refers to the New gTLD Dispute Resolution Procedure (the “Procedure”), the current draft of which was posted as an annex to the Draft Applicant Guidebook version 3. Applicants for new gTLDs and objectors to such applications must accept that their dispute arising from the objection will be resolved in accordance with the Procedure. See Article 1(d) of the Procedure, which states:

By applying for a new gTLD, an applicant accepts the applicability of this Procedure and the applicable DRSP’s Rules that are identified in Article 4(b); by filing an objection to a new gTLD, an objector accepts the applicability of this Procedure and the applicable DRSP’s Rules that are identified in Article 4(b). The parties cannot derogate from this Procedure without the express approval of ICANN and from the applicable DRSP Rules without the express approval the relevant DRSP

With respect to the dispute resolution provider’s competence, the Procedure tries to make the exclusive competence of the respective DRSPs clear: Article 3 of the Procedure identifies the single DRSP that has competence to handle each specific category of objection. Article 7(b) stipulates, in part, that “[t] he Objection must be filed with the appropriate DRSP...”, and Article 7(e) sets out the procedure to be followed in case an objector files an objection with the wrong DRSP. ICANN will look to see if this can be further clarified although at first glance, no further changes appear necessary.

Procedures

Objection filing timeframe (sec. 1.1.2.4)

The two week period for filing objections is too short; it should be extended to thirty days at a minimum. *MarkMonitor (Module 1, 20 Nov. 2009)*. *INTA (20 Nov. 2009)*. *Coca-Cola (24 Nov. 2009)*. *Microsoft (23 Nov. 2009)*. *BITS (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

The extended time to 30 days would allow trademark owners to wait and see if an application fails evaluation before preparing an objection. *ECTA/MARQUES (22 Nov. 2009)*.

The objection time period is too short; ICANN should allow a reasonable time (e.g., opposition period in the U.K. for new trademark application is now two months). Since the two week window will close before the outcome of an Extended Evaluation, there appears to be no opportunity to object to applications which fail the Initial Evaluation but are subsequently successful in the Extended Evaluation. *BBC (19 Nov. 2009)*.

Response timeframe (sec. 3.1.4)

Given the limited time to respond to objections especially in English for an IDN applicant and the resources and substantial investment that an applicant has put into the process, it seems unfair to immediately dismiss an application just because an objector pays a few thousand dollars and spends a few days to prepare an objection and the applicant takes more than a couple of weeks to respond. *S. Subbiah (Module 3, 23 Nov. 2009)*. Allowing more response time might be reasonable. *A. Mykhaylov (Module 3, 23 Nov. 2009)*.

Objections—languages

Why must objections be filed in English? This is unreasonable. *M. Neylon (22 Nov. 2009)*.

Response filing fee

Forcing an applicant to pay a fee to defend themselves is unreasonable. *M. Neylon (22 Nov. 2009)*.

Resubmission of corrected objection (sec.3.3.1)

If rejected on an administrative basis without bias will there be time to re-submit a corrected objection and will that require another fee? *S. Subbiah (Module 3, 23 Nov. 2009)*. In-person hearings can be cheaply conducted over the Internet. Objectors should be given a brief opportunity to rectify any errors where their objection does not comply with procedural rules. *BBC (19 Nov. 2009)*.

Consolidated objections (sec. 3.3.2)

Presumably consolidation of objection results in reduced cost for each objector? *S. Subbiah (Module 3, 23 Nov. 2009)*. *A. Mykhaylov (Module 3, 23 Nov. 2009)*. *A. Sozonov (Module 3, 23 Nov. 2009)*.

Brand holders should be able to consolidate complaints against the same party. *Visa (23 Nov. 2009)*. Both consolidated objections and responses should be possible. *Microsoft (23 Nov. 2009)*.

Each DRSP should publish the criteria it will use in making a decision to consolidate objections and should be encouraged to consolidate similar objections into one proceeding if requested by either the applicant or any objector. *RySG (21 Nov. 2009)*.

Separate objections may become burdensome if a number of community-based applications are filed. ICANN should consider the financial organization of the objector in setting and determining fees. *BITS (22 Nov. 2009)*.

Consolidated objections (sec. 3.2.1)

There should be a single objection in the cases of (1) a single objector objecting to two applications by a single applicant on the same grounds (e.g., the same trademark rights); and (2) in the event a single objector has two different grounds to object to an application (e.g., legal rights and community grounds). *BBC (19 Nov. 2009)*.

Consolidated objections (sec. 1.1.2.6)

DRSPs should be required to consolidate objections where feasible. *RySG (21 Nov. 2009)*. Applicants and objectors should be able to refuse consolidation of objections proposed by the DRSP. *Microsoft (23 Nov. 2009)*.

Expert panel—liability exclusion (3.3.4)

This provision should be clarified to allow the exclusion of the potential liability of a panel as a whole and not just the liability of experts individually. *IPC (22 Nov. 2009)*.

Publication of DRSP panel decisions

Every panel decision from a DRSP should be published on the DRSP website and made publicly available. This is discretionary in the DAG v3 and there are no guidelines set forth about it. *AIPLA (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*. *IPC (22 Nov. 2009)*.

Time extensions—negotiation/mediation (sec. 3.3.3)

The proposed limit on time extensions to allow for negotiation/mediation (30 days) will not encourage resolution in practice. Trademark proceedings could be a useful model to follow—in many jurisdictions the parties are encouraged to put the proceedings on hold to facilitate settlement. *BBC (19 Nov. 2009)*.

Why shouldn't automatic extensions be granted (30 days or less) if all impacted parties agree and request them? Also, all or part of the DRSP fees should be refunded when disputes are settled by negotiation without DRSP intervention. *RySG (21 Nov. 2009)*.

The new gTLD Dispute Resolution Procedure enabling the parties to suspend the proceeding or extend its deadlines pending negotiation is very helpful. The objector may require formal guarantees from the applicant prior to withdrawing the objection. The applicants should be able to document additional guarantees and commitments as an addendum to the TLD application, and the addendum should be published and enforceable under the PDDRP policy. *W. Staub (22 Nov. 2009)*.

DRSP decision—timeframe and effect

Timely action by DRSPs is an important part of the process. ICANN still has not answered why it deleted text about a 45 day decision timeframe target for DRSPs. *RySG (21 Nov. 2009)*. ICANN should clarify that the ICANN Board will take action in accordance with the expert determination in making a final disposition of the application. *Microsoft (23 Nov. 2009)*.

Objector prevails by default

If an objector prevails by default, a new application for the same objected-to string should not be permitted to be filed unless the application includes documentation of the objector's written consent. *Microsoft (23 Nov. 2009)*.

Three person panel (article 13)

Why was there no response to the suggestion made in the DAG v2 comments that there should be an option for a three person panel? *RySG (21 Nov. 2009)*. Each party should have an opportunity to request a three person panel with the additional costs to be borne by the requesting party. *Microsoft (23 Nov. 2009)*.

Expert determination (sec. 3.3.6)

For financial gTLDs, some expertise from the financial services industry should be included in the expert determination process. *BITS (22 Nov. 2009)*.

Panel—IDN applications (sec. 3.3.4)

For IDN applications, in each of the panel types, even if there is only one panelist on the panel at least one panelist must be from that IDN community—a native speaker of that IDN and from that country/countries where that language is predominantly spoken. *S. Subbiah (Module 3, 23 Nov. 2009)*. *Y. Kwok (Module 3, 23 Nov. 2009)*. *A. Mykhaylov (Module 3, 23 Nov. 2009)*. *A. Sozonov (Module 3, 23 Nov. 2009)*. *CONAC (23 Nov. 2009)*. *D. Allen (24 Nov. 2009)*.

Hearing (sec. 3.3.5)

A hearing should be part of the dispute resolution process, not only in extraordinary cases. It may be a very effective way to evaluate disputes. The case of a TLD dispute is not a regular domain dispute evaluated under a UDRP, but is a much more substantial and complex case. A hearing conducted on a conference call can be done with very low cost and be very productive for all parties. *Y. Keren (Module 3, 23 Nov. 2009)*. *S. Subbiah (Module 3, 23 Nov. 2009)*. *Y. Kwok (Module 3, 23 Nov. 2009)*. *A. Mykhaylov (Module 3, 23 Nov. 2009)*.

Full and fair adjudication (sec. 3.3.5)

Cost is an important factor, but rapidity of resolution should not take priority over ensuring that there is full and fair adjudication. The proposed time limits throughout the dispute resolution procedures are very short. *BBC (19 Nov. 2009)*.

Appeal rights

Objectors in a dispute resolution proceeding must not be forced to give up all legal rights beyond the ICANN proceeding, particularly the right to seek redress in court. *IBM (22 Nov. 2009)*.

DRSP rules

DAG v3 did not respond to this suggestion made regarding DAG v2: the rules and procedures used by the different DRSPs should be published and made available for comment. *RySG (21 Nov. 2009)*.

Analysis and Proposed Position

Comments on specific procedures encompass many particulars that have already been addressed and in response to which changes have already been made to the procedures.

One major topic of discussion is consolidated objections. Consolidation conditions are set forth in Guidebook § 3.3.2 and Article 12(c) of the Procedures. In the appropriate circumstances, the dispute resolution service provider may elect to consolidate certain objections. A specified example is multiple objections to the same application based upon the same grounds. Consolidation will and has been strongly encouraged but it is ultimately left to the discretion of the DRSP to evaluate and balance the efficiencies of consolidation and possible prejudice that might result from it. Indeed, it is anticipated that consolidation will reduce the costs for all parties involved in consolidated proceedings, at a minimum with respect to the panel fees. Further, the individual providers may also have specific rules relating to consolidation (which have been published). For example, see Draft WIPO Rules for New gTLD Dispute Resolution at <http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm>.

Many comments revolve around the panel, its expertise, holding of proceedings and the determination. It is required that DRSPs will select experts who are well qualified in the subject matter of the application and the objection, as well as the language of the parties. Further, the current version of Article 13(b) of the New gTLD Dispute Resolution Procedure provides for three-person panels for morality and public order objections and permits the option of a three-person panel if all parties agree in proceedings involving legal rights objections. The holding of a hearing can greatly increase the cost and duration of a dispute resolution procedure. However, in some cases, this increased cost and duration may be justified, especially if measures can be taken to minimize the costs and delay of a hearing (such as using videoconferences and limiting the duration of the hearing). Article 19 of the New gTLD Dispute Resolution Procedure seeks to balance these competing interests. In a further attempt to ensure efficiencies, and contrary to one comment, ICANN has not deleted the 45-day time limit for the Panel to render its determination. Article 21(a) of the New gTLD Dispute Resolution Procedure provides that the “DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel.”

Article 22 of the New gTLD Dispute Resolution Procedure stipulates an exclusion of liability that is quite broad. It is similar to the exclusions of liability incorporated in the rules of major international arbitration institutions. It is unnecessary to refer to the panel as a whole in such an exclusion of liability.

Finally, Article 22(g) of the New gTLD Dispute Resolution Procedure provides that, unless there are exceptional circumstances, the decisions should be published on the providers website.

In terms of time extensions for negotiation and mediation, because the objection and resolution process is taking place prior to delegation, it is not expected that there will be the same issues and evidence that might result post-delegation. It is not intended for the pre-delegation process to be lengthy, which is why the process will not be automatically suspended. If it is appropriate to do so, such considerations will be left to the discretion of the DRSP or the panel itself. The parties remain free to discuss settlement and to attempt mediation notwithstanding the fact that the proceedings are pending. In terms of refunds, the current draft guidebook provides that different types of disputes will have different types of costs and fees associated with them, and it permits the DRSP to determine and publish the costs and fees that are appropriate for the given dispute. The discretion to refund fees will be left solely with the DRSP. The DRSP may determine that, under the circumstances of a given case (e.g., if the dispute is settled immediately after the appointment of the expert(s) and the parties' payment of the advance on costs), a portion of the costs paid by the parties should be refunded to them.

Some comments ask for clarity about administrative review

Objectors shall indeed have an opportunity to rectify errors that are identified in the DRSP's administrative review of the objection. See Article 9 of the New gTLD Dispute Resolution Procedure, which includes the following provisions:

(c) If the DRSP finds that the Objection does not comply with Articles 5-8 of this Procedure and the applicable DRSP Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Objection be corrected within five (5) days. If the deficiencies in the Objection are cured within the specified period but after the lapse of the time limit for submitting an Objection stipulated by Article 7(a) of this Procedure, the Objection shall be deemed to be within this time limit.

(d) If the DRSP finds that the Objection does not comply with Articles 5-8 of this Procedure and the applicable DRSP Rules, and the deficiencies in the Objection are not corrected within the period specified in Article 9(c), the DRSP shall dismiss the Objection and close the proceedings, without prejudice to the Objector's submission of a new Objection that complies with this Procedure, provided that the Objection is filed within the deadline for filing such Objections. The DRSP's review of the Objection shall not interrupt the running of the time limit for submitting an Objection stipulated by Article 7(a) of this Procedure.

Morality and Public Order Objections

Morality section

The "morality" section should be removed in its entirety. Most of the issues could just as easily be covered under "illegal activities." *M. Neylon (22 Nov. 2009)*.

Morality and public order objection—amendment

The M&PO objection provision should be amended to make reference to legal instruments addressing freedom of expression and freedom of association (i.e., the U.S. Constitution's 1st Amendment, Articles 19 & 20 of the Universal Declaration of Human Rights) so that they are part of the criteria for assessing the validity of an objection. The name of a gTLD is an issue at the content layer of the Internet and not

simply a matter for the logical layer of the internet and thus needs to be addressed within the legal and constitutional frameworks that protect speech and association. This will enable ICANN to make reasonable judgments precisely to protect the rights of applicants, communities and ICANN itself. *APC (23 Nov. 2009)*.

Morality and public order objection—“quick look”

ICANN must clarify what is meant by the “quick look” evaluation of these objections so that stakeholders can ensure that their role as conscientious participants in a bottom up policy development process is retained. *CADNA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

Morality and Public Order objection – grounds for objection

Is “increased potential for financial fraud” a ground for a morality and public order objection? *BITS (22 Nov. 2009)*.

Analysis and Proposed Position

Some still do not like the Morality & Public Order section at all, others would have the standards amended to refer to legal instruments, and still others are not sure of the standards.

It is clear that there will be an objection process for those claiming that applied for strings might violate Morality & Public Order. The standards for such objections are set forth in DAGv3, § 3.4.3, and the factors to be considered are enumerated. Furthermore, the policy recommendation itself for objections on such grounds, which will be part of any expert’s review, include reference to various legal instruments and treaties. The experts will make determinations upon the facts and circumstances of each case keeping in mind the relevant standards.

Some comments ask for clarification of the “quick look” evaluation. Additional clarification will be provided in the next version of the applicant guidebook.

Independent Objector

Independent objector—qualifications, term

ICANN should specify the type and breadth of experience in Internet and legal communities required of successful IO candidates. The IO should also be subject to performance review before any renewal of his/her term, and ICANN should consider public comments on the IO during this review process. *INTA (20 Nov. 2009)*.

A panel of three independent panelists may be more appropriate. Any outside counsel retained by the IO must be independent of any new applicant, existing registry or registrar. *ECTA/MARQUES (22 Nov. 2009)*. *IPC (22 Nov. 2009)*.

More information is needed about the IO and its role. *CADNA (22 Nov. 2009)*.

The “highly objectionable” character of an application is in the sole discretion of the IO. *IPC (22 Nov. 2009)*.

Independent objector—fee coverage (sec. 3.1.5)

All filing and administrative fees arising from actions taken by the Independent Objector (IO) should be covered by the new gTLD application fee proceeds. The current proposal to have the IO cover these fees with a refund only in cases where it prevails means that the IO will likely file objections only when a favorable ruling is certain and may shy away from questionable but still important cases. The IO should be required to conform to the new gTLD Application Program Code of Conduct to prevent any real and apparent conflicts of interest. *MarkMonitor (Module 3, 20 Nov. 2009)*.

It is not clear who will provide the IO's budget and funding. *BITS (22 Nov. 2009)*.

Independent objector-neutrality

Why has the IO been introduced within potential group objections? How can ICANN guarantee neutrality when choosing an independent objector? If there is an "ICANN-approved" procedure, is there any chance for an outsider to see and discuss it? *CONAC (Module 3, 23 Nov. 2009)*.

ICANN should adopt sound policies to ensure IO impartiality, including transparency and accountability mechanisms. *INTA (20 Nov. 2009)*.

The IO should be unaffiliated with any gTLD applicant or existing gTLD operators. *IPC (22 Nov. 2009)*.

To ensure independence, ICANN should consider having an independent constituency appoint the IO instead of ICANN. *BITS (22 Nov. 2009)*.

Independent Objector—proper function

The role of the IO may have some value where its role is limited to providing a means for those who are not financially able to file an objection to be able to be heard, subject to following certain tightly defined requirements. *RySG (21 Nov. 2009)*.

Analysis and Proposed Position

Comments received relating to the Independent Objector (IO) include discussion of the IO's qualifications, terms of service, independence, impartiality, funding and role.

The current Draft Guidebook, §3.1.5, provides that the IO will be "an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant." The intent behind this description was to establish minimum standards for the IO without being too specific so that qualified candidates would not be foreclosed from serving. Given the breadth of areas in which the IO may serve, i.e. from morality to various communities, a point-by-point job description may be too limiting, but any further input as to IO qualifications is welcome.

The term of the IO is limited to the time necessary to carry out his/her duties during a single round of gTLD applications. Guidebook version 3, § 3.1.5. ICANN will naturally review the IO's performance, taking into account public comments, prior to renewing the IO's term.

With respect to the IO's neutrality and independence, the current draft Guidebook, §3.1.5, states that the "IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence." These standards are believed to encompass the standards in the code of

conduct. Further, while it is impossible to guarantee neutrality, it is believed that every step that can be taken to ensure neutrality will be followed. First, the IO would be selected through an open and transparent process. Moreover, recommendations from the community are welcomed. Additionally, the current proposal would require that the IO be independent from and unaffiliated with any of the gTLD applicants. In this regard, it is believed that the best practices to ensure neutrality have been followed and that ICANN's process will ensure independence by the IO, to the extent possible. As for any outside counsel engaged by the IO, ICANN agrees that such counsel must also be free of conflict before agreeing to perform services for the IO.

All filing and administrative fees arising from actions taken by the IO are intended to be covered by the new gTLD application fee (see DAGv3, §3.1.5). The rule providing that the loser pays the winner's costs is intended, in part, to discourage frivolous objections, but parties operating under this rule often initiate proceedings in cases where the outcome is questionable but the issues are important. ICANN will take proper steps to ensure that it engages an IO who will file objections whenever they are appropriate. To that end, ICANN anticipates that a sole IO can perform the duties incumbent upon him/her and does not think it is necessary or efficient to incur the cost and delay of having a three-person panel act as IO.

Legal Rights Objections

Legal Rights Objection—inappropriately limited scope (secs. 3.1.1, 3.1.2.2. and 3.4.2)

Section 3.1.1 and the glossary definition of legal rights objection do not appear to fully encompass GNSO Recommendation 3, which addresses infringement of “the existing legal rights of others under generally accepted and internationally recognized principles of law.” The DAG v3 inappropriately limits the scope of this objection to trademark infringement. In order to conform to the GNSO's Recommendation, section 3.1.1 and the glossary definition of a Legal Rights Objection should be described in a manner similar to the present Morality and Public Order Objection, incorporating the specific direction as to scope provided by the GNSO. GNSO Recommendation 3 also suggests a significantly broader scope to the phrase “existing legal rights” than that articulated by the term “rights” in present section 3.4.2. The scope for objection on grounds of ownership of other intellectual property rights or other non-intellectual property rights arising under “generally accepted and internationally recognized principles of law” (see examples in Recommendation 3) should be clarified. *H. Forrest (Module 3, 23 Nov. 2009)*.

Legal Rights Objection—clarifications needed

The LRO lacks detail, such as the threshold of legal rights one must surpass to be considered a rights holder. How many trademarks must be filed and in which geographic areas the marks must be valid and other pertinent information should be provided. Not specifying these details in the DAG will allow for potential confusion. *CADNA (22 Nov. 2009)*.

Greater certainty on how the listed factors would be applied would be helpful—e.g. how would WIPO resolve an objection where both the objector and applicant have legal rights in the same mark, but the geographic scope of the objector's rights far exceeds those of the applicant's or the objector's mark is more well-known than the applicant's. Also, ICANN should clarify if determinations made in legal rights objection and string confusion proceedings will have any preclusive effect and, if so, to what extent. *Microsoft (23 Nov. 2009)*.

Legal Rights Objection—standing

Both owners of collective and certification marks should have standing to file LROs. The reference to “rights holder” in section 3.1.2 should be clarified to include an exclusive licensee. The LRO sentence in section 3.1.1 should be modified to replace the term “objector” with an expanded “rights holder” term (suggested amendment: Legal Rights Objection – the applied-for gTLD string infringes the existing legal rights of the rights holder (including those of any exclusive worldwide licensee of such rights holder). *INTA (20 Nov. 2009)*).

Legal Rights Objection--three experts

Parties should have the option of selecting three experts in LRO proceedings but subject to approval of both parties, which the DAG v3 appears to be silent on. *AIPLA (22 Nov. 2009)*.

Legal Rights Objection—court appeal

Parties should have the right to challenge in court ICANN’s decision regarding an LRO. Module 3 does not address whether ICANN’s decision is appealable or otherwise subject to challenge. *AIPLA (22 Nov. 2009)*.

Legal Rights Objection—likelihood of confusion standard

AIPLA supports a likelihood of confusion standard and supports the revision protecting unregistered marks for LROs. AIPLA remains concerned that the language “whether the objector’s acquisition and use of rights in the mark has been bona fide” is unclear. A more practical statement would be: “Whether the objector’s acquisition of rights in the mark, and use of the mark, has been bona fide.” *AIPLA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*.

Legal rights objection (sec. 3.4.2 point 1)

The guidebook also needs to state explicitly that all existing TLD string operators can only object via the string confusion mechanism and not the legal rights objection since they already have a special mechanism to object. The legal rights objection should be reserved for those who have legal rights and not already an existing ICANN TLD registry operator. Absent this restriction for the existing TLD registry operators, they will unfairly have the opportunity to block an IDN for example on “similar meaning” and in effect own rights within ICANN to that meaning in every language, and the IDN domain process will be opened up to Western speculators at the expense of poor native speakers of the language. *S. Subbiah (Module 3, 23 Nov. 2009)*. *A. Mykhaylov (Module 3, 23 Nov. 2009)*. *CONAC (23 Nov. 2009)*.

ICANN has ignored the informed work of those who do know IDN, the GSNO IDN Expert Working Group. Is it any surprise that the result once again favors incumbent actors rather than those who need and use such TLDs? *D. Allen (24 Nov. 2009)*.

The “existing mark” across IDN scripts should be considered for the legal rights objection only in cases where this mark is registered in the country where this language/script is used and spoken as an official language. *A. Sozonov (Module 3, 23 Nov. 2009)*.

Analysis and Proposed Position

Comments on the Legal Rights Objection vary from concern over the limitation to trademark rights and those who might be in a position to object on such grounds, the lack of detail as to what rights might be required to prevail, the number of panelists in a proceeding, whether the panel will be asked to decide

whether one party's rights are "stronger" than another, and the preclusive effect or appealable nature of a determination

It is true that as implemented the Legal Rights Objection has been limited to trademark rights, including both registered and unregistered marks, and this includes existing TLD registry operators. That said, there is no minimum number of registrations or uses necessary for an applicant to show. Each case must be decided on its own merits. Care was taken to adopt factors that have been used in other types of proceedings so that there is some level of precedence to which panels can look, but each case turns on the particular facts and circumstances, so additional specificity for certain fact patterns cannot be provided.

In terms of Panels and determinations, Article 13(b)(ii) of the New gTLD Dispute Resolution Procedure provides that "[t]here shall be one Expert or, if all of the Parties so agree, three Experts with relevant experience in intellectual property rights disputes in proceedings involving an Existing Legal Rights Objection. Furthermore, the intent of the procedure has always been that the parties do not waive any rights they have to proceed in any appropriate jurisdiction against a party for infringing conduct.

Community-Based Objections

Institution launching community-based objection

The definition of an institution capable of launching a community-based objection is much narrower than was the case in the previous TLD round; there seems to be no justification for this change. *Telnic—minority position in RySG (21 Nov. 2009)*.

Community objections: Factors

The list of factors in Section 3.1.2.4 should not be considered exhaustive and it should be left open to provide for the possibility for objectors to submit additional factors for the consideration of the panel. *IPC (22 Nov. 2009)*.

Community objections: "complete defense" (sec. 3.4.4)

The "complete defense" clause is still unjustified and dangerous. Rather than minimizing the number of objections, it would only displace them so that they would have to be dealt with in front of the ICANN board. This clause also causes opposition to the entire gTLD process. *W. Staub (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

The "complete defense" clause should be removed; it will effectively nullify the entire community objection process. *Microsoft (23 Nov. 2009)*.

Community objection standards and procedures

COA's outlined concerns with the community objection standards and procedures in its v2 comments did not result in any changes in DAG v3, and it refers to those comments for full details. ICANN has set up a system which restricts the community objection process as much as possible to channel potential objectors into filing their own new gTLD applications. *COA (22 Nov. 2009)*.

Community objection (sec. 3.3.1, 3.1.2)

It is incongruous that it is proposed that a single institution can endorse an application to raise it to the community level, but it requires substantial opposition from a significant portion of the community to

object. If this level is required to object, then it should be required in the first place. The terms “substantial” and “significant” are too open-ended and further definition of them is warranted. The level of community involvement to object should be clarified. Section 3.1.2 seems to suggest that a single “established institution” may object, while section 3.1.2.4 seems to change the criteria again. These sections should be reconciled, as well as Section 3.4.4, which raises a similar incongruity. *BITS (22 Nov. 2009)*.

ICANN should clarify the inconsistency on pages 3-4 regarding the factors determining if the objector has an ongoing relationship with a clearly delineated community (“factors that may be considered” v. “balancing of the factors listed above”). *Microsoft (23 Nov. 2009)*.

Community objection--detriment (sec. 3.4.4)

Add to the phrase “The objector must prove that there is a detriment to the rights or legitimate interests of its associated community” the phrase “or its constituents.” Requiring the High Verification program would solidly indicate that the applicant intends to operate a secure gTLD. *BITS (22 Nov. 2009)*.

Flaws in community objection process—detriment

COA has never called for eliminating the detriment requirement, only for shifting the burden of persuasion on detriment, and has not urged that every challenger should benefit from this burden shift simply by filing an objection, but only a challenger who has shown that it meets the criteria of community delineation, substantial opposition, and targeting. Giving certain objectors with standing veto power over applications is precisely what all the objection procedures spelled out in the DAG are about. Apparently only in the field of community objections is a valid representative of the community targeted by a proposed string to be told that its objection fails for lack of sufficient proof of “detriment” and that its only remedy—now longer available to it—would have been to apply for the string itself. *COA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

It is unclear why an objector with standing must still prove detriment above and beyond allocation of the challenged string to the applicant. *Microsoft (23 Nov. 2009)*.

Analysis and Proposed Response

Comments received on the community-based objection process, largely track comments received and previously responded to. Others seek clarity. And still others seems to suggest that any party that would otherwise have standing to apply, should prevail in an objection against an otherwise valid community-based applicant.

Considerable thought has been given to the topics of complete defense and proof of detriment, and have been previously addressed in detail. Neither the complete defense provisions, nor the proof of detriment requirement on the objector, are intended to nullify the community objection process. As already stated, the New gTLD Program, with its dispute resolution and string contention procedures, is designed to safeguard a dispute panel from purporting to recognize the legitimacy of any specific organization as the representative of any group, religion, etc. There may well be multiple applicants that compete for the same string. The procedures are aimed at resolving the conflicts that arise from those applications. In short, the delegation of community-based gTLD to a particular community shall not constitute and should not be seen as recognition of any particular group or organization as the legitimate representative of that community.

If two institutions with proper standing apply for the same community-based gTLD, the string contention procedure (rather than the dispute resolution procedure) will determine which applicant might be delegated the gTLD. ICANN has agreed with suggestions from the community that the complete defense should only be available to those applicants who apply for a community-based TLD and has revised the standards to reflect that. An applicant for a TLD that does not first submit its application as Community-based should not be entitled to later claim a complete defense in the face of an objection by stating that the applicant meets the Community standing requirements.

There is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD – and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant. Therefore, in response to certain comments, it is not incongruous that “a single institution can endorse an application to raise it to the community level, but it requires substantial opposition from a significant portion of the community to object.” Further, the experts who decide community objections will consider what “substantial” and “significant” mean in light of the facts and circumstances of individual cases

Finally, in terms of the comments seeking clarity, section 3.1.2.4 does not change the standing criteria stated in Section 3.1.2. A single “established institution” may indeed have standing to file a community objection, provided that it satisfies the other criteria for standing (the factors for determine the existence of an “established institution” set for in section 3.1.2.4 are not exhaustive). And, there does not appear to be any “incongruity” in Section 3.4.4, which describes the standards to be applied on the merits of a community objection, not the criteria for standing.

String Confusion Objection

String Confusion Objection (sec. 3.1.2.1)

Part of the section should be clarified: suggested language: “...where string confusion between the two applicants has not already been found during the Initial Evaluation. That is, an applicant does not have standing to object to another party’s application for string confusion with which it is already in a contention set as a result of the Initial Evaluation.” *IPC (22 Nov. 2009). Microsoft (23 Nov. 2009).*

The vague generalities in this section about “confusion” in no way address the realities. Only the language communities can speak to the specifics in each of their particular situations. Why has ICANN not devolved responsibility accordingly? *D. Allen (24 Nov. 2009).*

Strings subject to successful string confusion objection

In cases where an application is rejected because an existing TLD operator successfully asserted string confusion with an applicant, the rejected string should be added to a “rejected TLDs” list. Any of the strings that are included in the “rejected TLDs” list should not be delegated to any party (including the existing TLD operator) in the future indefinitely. *Y. Keren (Module 3, 23 Nov. 2009). S. Subbiah (Module 3, 23 Nov. 2009). A. Sozonov (Module 3, 23 Nov. 2009).*

It is assumed that if based on the confusion criteria if the string is found confusingly similar with the existing string and the objection is satisfied, then it may not be registered by anyone else later. *A. Mykhaylov (Module 3, 23 Nov. 2009).*

III. Analysis and Proposed Response

Two main topics have been raised relating to string confusion. First revolves around under what circumstances someone may object to an application on the grounds of string confusion. The comment suggests that it be clarified that one does not have standing to object to another for string confusion if, in Initial Evaluation, they two strings are already placed in a contention set. The Guidebook was intended to be clear that Initial Evaluation is the only stage in which, outside of the objection process, two strings would be deemed in contention for similarity. That said, ICANN will review to determine if more clarity in the next version of the applicant guidebook would be helpful.

The second suggestion was that where an application is rejected because an existing TLD operator successfully asserted string confusion with an applicant, the rejected string should be added to a “rejected TLDs” list, and those on the list should not be delegated to any party. Section 3.1.2.1 in the current draft addresses this scenario. If the case where an existing gTLD operator successfully asserts string confusion, the application will be rejected. It will not, however, be permanently removed from circulation since different circumstances could arise in the future.

REGISTRY RESTRICTIONS DISPUTE RESOLUTION PROCEDURE (RRDRP)

I. Key Points

- The availability of the RRDRP will not replace ICANN’s contractual compliance oversight responsibilities. ICANN remains committed to enforcing contractual obligations and will do so from all new registry agreements
- The recommended remedies found in any Expert Determination shall be subject to review, approval and enforcement by ICANN.

II. Comment Summary

RRDRP - ICANN’s Contractual Compliance Enforcement Duties

INTA supports this proposed procedure to allow third parties with standing to seek enforcement of the term of a gTLD’s registry agreement. However, INTA believes that the RRDRP’s existence will not and should not limit or supplant ICANN’s contract compliance responsibilities. ICANN should be a party in RRDRP proceedings. *INTA (20 Nov. 2009)*.

If ICANN is not going to conduct contract compliance it should so state. *Microsoft (23 Nov. 2009)*.

RRDRP –Administrative Review of Complaint

A 5-day administrative review period (not 10 days) should be provided. There should be a 5-day period within which a complainant may cure any administrative deficiencies in the complaint. In its response, *INTA (20 Nov. 2009)*

RRDRP – Fees

The RRDRP fee should be less than \$1000 unless the complainant has previously filed a complaint and ICANN has concluded that the allegations are without merit. A minimum and maximum range should be

set regarding proceeding costs. If the provider appoints an expert, the provider must bear the cost of the expert's fees. A party requesting a hearing (videoconference or teleconference) should bear its cost, *INTA (20 Nov. 2009)*.

The Provider should bear parties' costs if the Expert wants to conduct discovery, take written statements or hold a hearing. *Microsoft (23 Nov. 2009)*.

RRDRP - Panels

The party paying the fee should have the sole choice of whether the panel consists of one member or three members. There should be a 15-day period for appointing the panel (not 30 days). ICANN should establish a deadline by which panel determinations must be rendered (e.g. 60 days after complaint is filed), *INTA (20 Nov. 2009)*.

There should be 14 days for appointing the panel. *Microsoft (23 Nov. 2009)*.

RRDRP - Standard

The standard should be "preponderance of the evidence" because "clear and convincing" is too burdensome. The evidentiary standard for finding a case "without merit" should be the same standard applied to the complainant. *INTA (20 Nov. 2009)*.

The burden of proof should be clear and convincing. *Microsoft (23 Nov. 2009)*.

RRDRP – Standing

ICANN should eliminate the standing requirement for RRDRP complaints or in the alternative allow the IO to initiate RRDRP proceedings. *INTA (20 Nov. 2009)*.

Standing requirements should be clarified so that individuals have standing, including the Independent Objector. *Microsoft (23 Nov. 2009)*.

RRDRP – Remedies

ICANN should outline maximum and minimums for penalties or sanctions; should clarify that monetary sanctions (with the possibility of attorneys fees) will be paid to the complainant; and should base them on the greater of the financial harm to the complainant or the financial benefit to the registry, with treble damages for egregious conduct. Violating registrations should be deleted and refunds, if any, to registrants of such violating registrations should be paid by the gTLD operator. First time offenders should be temporarily banned from registering new gTLDs, and repeat offenders should be permanently banned. Complainants should never be banned from filing complaints. The panel should have the express authority to order remedial measures and barring any justification to the contrary from ICANN remedies should take effect immediately. *INTA (20 Nov. 2009)*.

Remedies should include deletion of domain name registrations that were made in violation of the registry agreement restrictions. Notice of this potential remedy should be provided to registrants through the contracting process. *Microsoft (23 Nov. 2009)*.

RRDRP – Disclosures by Complainants

Complainants should be required to disclose if they participated in any way in the ICANN new gTLD program, either by providing comments, submitting an application, etc. They should also disclose their relation, if any, with any other registry operator currently operating or wishing to operate a new gTLD.

This would help to ensure that contentions at earlier stages are not forwarded later at a stage where the registry runs, and complaints come through the RRDRP. The complainant should also disclose its ties with the community for which it files a complaint and if it owns domain names in the registry for which the complaint is lodged, as well as if it tried to register domain names but was turned down and for which reasons. All complaints, at least after their resolution, should be published publicly somewhere, on the website of ICANN or the RRDRP, with all possible details. *P. Mevzek (Module 5, 22 Nov. 2009).*

RRDRP—Appeals (draft registry agreement cite in sec. 2.13)

Any process which could result in penalties or termination of the registry agreement must be appealable to the ICANN Board and subject to judicial review. To do otherwise would violate ICANN’s bylaws, the Board’s fiduciary duty and California law. *RySG (21 Nov. 2009).*

III. Analysis and Proposed Position

In general, comments have supported the concept of the RRDRP, but implementation questions or comments have arisen. In particular, comments revolve around ICANN’s contractual compliance role, standing, burden of proof, procedural timing and fee related issues, the binding nature of expert determinations, including remedies, and the publication of the expert determinations. Many of the comments made suggestions for revision while others simply sought clarity. ICANN appreciates the thoughtful comments and provides the following in response.

As stated at the outset, the availability of the RRDRP will not replace ICANN’s contractual compliance oversight responsibilities. ICANN remains committed to enforcing contractual obligations and will do so from all new registry agreements. If a registry were indeed engaging in the type of behavior that violates its registry agreement, ICANN will enforce that agreement and apply the remedies it deems appropriate.

There are competing comments on the burden of proof – one suggests preponderance of the evidence, as is contemplated by the initial proposal, and another suggesting clear and convincing evidence.

One comment suggests that standing requirements should be eliminated and others suggest that the Independent Objector should have standing to object. Given that imposition of community-based registration limitations is meant to ensure that registrations support the relevant community to which a gTLD is directed, it is appropriate to limit standing to members of the relevant community who claim to be harmed by certain registrations. The independent objector has a limited role in the new gTLD program and is meant only to protect the public interest in the pre-delegation stage, not post-delegation stage of the program.

In terms of timing, some suggest shortening the time limits for panel selection, administrative review, and deadlines for issuance of expert determinations. While balance is sought between providing an efficient and cost effective process and allowing the provider adequate time to review the evidence and make an educated determination as to the respective rights of the parties, many of the suggestions seem generally acceptable. The next revised version of the RRDRP, will reflect some revisions to procedural deadlines.

Various comments suggest specificity on fees structure of the proceedings. Although this procedure is still in development stages, it is important to note that the providers shall be responsible for setting fees for disputes. One way to reduce costs is to provide for only one expert, rather than allowing the complainant to choose if it would like three experts as one comment has suggested. As the presumption is that no hearings will take place, ICANN agrees that if the expert grants one party's request for a hearing over the other party's opposition, the expert should be encouraged to apportion those costs to the requesting party. This will be reflected in the revised version of the RRDRP. Finally, if an expert deems more information through discovery or independent experts it needed to make a full analysis and informed determination, it is appropriate for the non-prevailing party to pay those additional resulting costs, not the provider. Otherwise, if further information or expertise is needed to assist in the resolution of the case, the panel may not seek it if the dispute resolution provider must bear sole responsibility for costs, and the effect would be unfair to one or both of the parties.

Expert determination of remedies has also been the topic of some comments. Some have suggested that monetary sanctions be paid by complainant, yet that would not be appropriate if the complainant was not the prevailing party. As the proposal indicates, the prevailing party should not bear the costs of the proceedings. In terms of setting limitations on monetary sanctions, as has been suggested, the current proposal was created to allow the appointed expert latitude to make recommendations deemed appropriate under the specific facts and circumstances of each case. It would be impossible to envision each and every circumstance that might form the basis for a complaint and pre-set limitations. Thus, on balance, leaving the expert with latitude appears to be the preferred approach in light of the vast differences likely to appear in each of the cases. ICANN will clarify; however, that the recommended remedies found in any expert determination shall be subject to review, approval and enforcement by ICANN. Finally, as stated at the outset, the RRDRP is not intended as an exclusive procedure and does not preclude individuals from resorting to other mechanisms set forth in ICANN's Bylaws or courts of law.

One comment suggested certain disclosure requirements for complainants. While requiring a complainant to disclose the ties, if any, with the community against which it is filing the complaint may provide helpful information, the community against whom the complaint is filed is free to provide such information thus imposing a mandatory disclosure requirement would not seem necessary. Moreover, while some information might be gleaned from requiring a complainant to disclose participation in the gTLD program, such a requirement might chill additional public comment or discourage participation in the process, an effect ICANN hopes to avoid. As such, such mandatory disclosures of this nature would not be required.

With respect to publication, the initial staff proposal already stated that all Expert Determinations should be publicly available on the dispute resolution provider's website.

POST-DELEGATION DISPUTE RESOLUTION PROCEDURE (PPDRP)

I. Key Points

- ICANN remains committed to enforcing contractual obligations and will continue to do so with the new gTLD registry agreements. If a registry were engaging in the type of behavior addressed by the PDDRP and such conduct violated the registry agreement, then ICANN will enforce that agreement and apply the remedies it deems appropriate within the bounds of the agreement.

- In no way would the PDDRP expand the rights of trademark holders, nor would it limit those rights. Whether the PDDRP exists or it does not, the holder would be free to pursue conduct of the registries in the appropriate forum if that conduct was actionable.
- The remedies available and recommended by the expert panel must be approved and enforced by ICANN, thus contractual compliance still remains ICANN's responsibility.

II. Comment Summary

PDDRP Support

The concept of creating a Post-Delegation Dispute Resolution Process (PDDRP) to address improper activities of registries and registrars is long overdue. *NCTA (22 Nov. 2009)*.

The IOC gives qualified support to the PDDRP. *IOC (20 Nov. 2009)*.

Now that the foundation has been laid for a meaningful procedure to address possible trademark abuse by ICANN-approved TLD registries, balanced yet crucial adjustments are within reach. *WIPO (Module 5, 20 Nov. 2009)*.

PDDRP—effective design

An effective PDDRP would promote responsible registry conduct by incentivizing registries to adopt reasonable, meaningful RPMs and balanced policies and best practices. Such registries would benefit from safe harbors where they acted to address, at launch and later as required, known relevant abuses. The PDDRP must be predictable for all parties, including the identification of safe harbors. Neither trademark owners nor registries or registrants should have to guess about the consequences of the availability of a PDDRP. *WIPO (Module 5, 20 Nov. 2009)*.

PDDRP Opposition

The PDDRP is unnecessary. Any variation of the PDDRP would require a substantial overhaul with adequate safeguards to be put in place. *RySG (22 Nov. 2009)*.

Without explanation the staff PDDRP proposal radically departs from the IRT's proposal and strips out many of the core concepts that made the process fair and balanced. It is unacceptable. In addition, it is time for ICANN to accept responsibility for enforcing its agreements and not rely on others to perform its work and make the tough calls. Consistent with ICANN's Affirmation of Commitments, it is time to go back to square one with the PDDRP and produce a process that actually reflects the IRT recommendations and input from the community as a whole. *J. Neuman (Module 5, 7 Oct. 2009)*.

The PDDRP is deeply flawed. It should not apply to second level domains. *Minds + Machines (22 Nov. 2009)*.

PDDRP is unclear and seems unnecessary

This procedure is not at all clear. It seems to mix without enough details problems with the gTLD string possibly infringing some trademarks and problems with abusive registrations. For trademark issues, the trademark holder should have time before the registry starts operating to lodge complaints with ICANN through designated procedure (Module 3). Giving trademark holders a perpetual right to fight against some registry far after it started seems to be without merit and completely unbalanced. As for abusive registrations, it would be hard to identify such large scale bad behavior from the registry except if it is so blatant that it should have been caught at the application step well before the start of the registry. Such

cases should be “consequences” of UDRP –i.e. some further review of the registry operations should be attempted. Given these two points the PDDRP would not be needed. If it PDDRP does exist, the details suggested for the RRDRP should be adopted. Given the similarities between RRDRP and PDDRP, an attempt should be made to merge the two for cost and efficiency reasons. *P. Mevzek (Module 5, 22 Nov. 2009).*

PDDRP--Staff proposal departure from IRT report

The staff proposal is radically different in substance and effectiveness from the IRT report, raises much concern and dilutes the practical efficacy of the PDDRP. It puts trademark holders’ interests at risk; once delegation is made they would not have any recourse or rights to institute Post Delegation Disputes under this policy based on: breach of representations in the gTLD application; breach of Registry Agreements; or systemic breach of trademarks in the gTLD as a result of willful lacunas in registry operations leading to infringements. A registry operator who fails to perform the specific RPMs enumerated in its registry operator’s agreement should be subject to PDDRP claims as set forth in the final IRT report. *BC (23 Nov. 2009). Microsoft (23 Nov. 2009).*

PDDRP unduly limited as proposed

The PDDRP as proposed is unduly limited. The standards for infringement at the top and second level need clarification. Operators of truly generic TLDs will be immune from the PDDRP no matter how the TLD is being used in combination with second level domains. *INTA (20 Nov. 2009).*

ICANN contractual enforcement role

The PDDRP would not replace ICANN’s own contractual compliance oversight responsibilities. WIPO supports the IRT concept that a trademark owner would have the ability to initiate proceedings if the parties and ICANN could not timely and conclusively resolve the dispute under ICANN’s contractual framework. ICANN should align its own contractual compliance responsibilities with DNS realities. Declining the availability of a straightforward option to facilitate ICANN’s enforcement of its own contract terms in relation to trademark abuse appears inconsistent and may invite resource-consuming court litigation. *WIPO (Module 5, 20 Nov. 2009).*

ICANN role in PDDRP

The proposal deviates markedly from the IRT recommendations. ICANN should take a greater leadership role regarding the investigation and enforcement of complaints in connection with the trademark PDDRP. *BBC (19 Nov. 2009). MarkMonitor et al. (20 Nov. 2009). Lovells (22 Nov. 2009).*

ICANN role—investigating potential breaches of the registry agreement

The proposed removal of ICANN investigation as a pre-requisite to filing a PDDRP is unacceptable. Having ICANN not only involved but integral to the processes is vital because it provides a “check and balance” between (i) an IP owner that has been harmed by systemic bad faith actions of an irresponsible registry operator and (ii) the overzealous trademark owner that sought remedies against the registry operator, when the appropriate party to go after is actually the owner of the infringing domain name registrations. As stated by the IRT, if the registry were indeed engaging in the type of behavior addressed by the PDDRP and such conduct violated the registry agreement, then ICANN should enforce that agreement and apply the remedies it deemed appropriate within the bounds of the agreement. In addition, requiring an investigation by ICANN as a first step prior to initiation of a PDDRP serves as a deterrent against an overzealous trademark attorney seeking to go after the registry because it has deeper pockets or is easier to reach than the ultimate registrants causing the infringements. *RySG (22 Nov. 2009). Lovells (22 Nov. 2009).*

The PDDRP raises concern about taking contractual compliance outside the purview of ICANN and creating rights and remedies beyond those offered in law or as part of an ICANN-registry contract. *Demand Media (23 Nov. 2009). J. Neuman (Module 5, 7 Oct. 2009).*

ICANN needs to do a better job enforcing its contracts with registries and registrars. ICANN should take a larger role in the PDDRP rather than passing on the entire onus to trademark owners. *IOC (20 Nov. 2009).*

PDDRP--ICANN role in determining remedies

It is unacceptable to remove ICANN's involvement in determining the remedies in cases where a panel finds that a registry has breached its registry agreement by using its TLD to infringe rights of IP owners (at the top-level) or by engaging in a substantial pattern or practice of specific bad faith intent to profit from trademark infringing domain names. How would the immediate appeal to a court from a panel determination really be accomplished—who does the registry take to court, and what is the basis for either subject matter or personal jurisdiction? In contrast, if ICANN elected and enforced a remedy the registry could challenge ICANN on a breach of contract ground. *RySG (22 Nov. 2009). J. Neuman (Module 5, 7 Oct. 2009). NICMexico (23 Nov. 2009).*

As a matter of principle, any process which could result in penalties or termination of the registry agreement must be appealable to the ICANN Board and subject to judicial review. Adoption of the PDDRP would violate ICANN's bylaws (the Community Objection mechanism would also violate the bylaws), the Board's fiduciary duty and California law (Corporations code section 5210). *RySG (22 Nov. 2009).*

PDDRP--Escalating remedies

Escalating remedies to address abusive registrations should be available under the PDDRP, within limits. E.g., appropriate remedies should be available for second-level abuses where it is impractical for brand owners to file multitudes of UDRP or cyclical URS cases. On the other hand, monetary damages or direct third-party determinations that a registry operator contract must be terminated would not be appropriate in a PDDRP framework. *WIPO (Module 5, 20 Nov. 2009).*

Procedures should reflect the weight of the PDDRP mechanism

The proposed word limits and time periods do not reflect the intended weight of the procedure. Fees should be reasonable yet sufficient to prevent misuse (as with the Draft WIPO DRSP Fees for LRO procedures published as part of DAG v3). Consideration should be given to how to ensure that any possible follow-up legal action in other fora does not unreasonably restrict timely implementation of appropriately ordered PDDRP remedies. *WIPO (Module 5, 20 Nov. 2009).*

PPDRP Grounds for complaint

Regarding the grounds which a complainant could rely on to initiate and succeed in a PDDRP, those suggested by the IRT would tackle potential bad faith practices on the part of registries more efficiently. *Lovells (22 Nov. 2009).*

Without consultation, ICANN staff substituted its own judgment and revised the grounds for the dispute by eliminating any tie-in to the Registry Agreement with ICANN. This seems to be an attempt by ICANN to remove itself from the dispute process. *J. Neuman (Module 5, 7 Oct. 2009).*

PDDRP Content of complaint

The content bullet points seem duplicative. It is not clear whether the standing requirement is, or should be, separate from the requirement to identify the particular legal rights claim being asserted. Requiring a “detailed explanation of the validity of the Complaint” is duplicative of the preceding requirements. If intended to be an additional requirement, explanatory details should be provided. *INTA (20 Nov. 2009)*.

Administrative review of the PDDRP complaint

The administrative review period should be reduced to 5 days. *INTA (20 Nov. 2009)*.

Response to the PDDRP complaint

ICANN should raise the standard for set asides of defaults to “excusable neglect” or some higher standard to prevent gTLD registry operators from easily avoiding default judgments. The following statement is also not clearly worded: “If the registry operator believes the Complaint is without merit, it will affirmatively plead in its response the specific grounds for the claim.” *INTA (20 Nov. 2009)*.

PDDRP--Address top and second level conduct

The PDDRP standard of proscribing registry conduct causing or materially contributing to trademark abuse should apply to both the top and second levels. *WIPO (Module 5, 20 Nov. 2009)*.

PDDRP--Top level--“Affirmative conduct”

Regarding top-level disputes, there is no definition of what constitutes “affirmative conduct” by a registry or what it means to take unfair advantage of, unjustifiably impair or create an impermissible likelihood of confusion regarding the complainant’s mark. Absent clarification and exemption/safe harbor provisions the PDDRP could require registries to monitor and “sanitize” the names they register, requiring them to make determinations they are not competent or well-suited to make and requiring costly and time-consuming human analysis and intervention in what has been an automated process to date. *RySG (22 Nov. 2009)*.

The PDDRP is unnecessary at the top level—e.g., it is highly unlikely that a .APPLE fruit registry will lie to ICANN during the application process and risk all its investment by operating the registry in a manner that exploits the trademarks of Apple the electronics company. *Demand Media (23 Nov. 2009)*.

At the top level it should be sufficient that the registry knowingly permitted or recklessly disregarded that the use of the gTLD meets the conditions (a), (b) and (c) in the proposed standard so that scenarios in which a registry turns a blind eye to the abusive use of the gTLD would be covered. *INTA (20 Nov. 2009)*.

PDDRP--Second level disputes

At the second level there is no obligation for the registry to engage in affirmative conduct, but rather that there is a substantial ongoing pattern or practice of specific bad faith intent to profit from the sale of trademark infringing domain names. It is unclear what this means and the Registries Stakeholder Group reserves the right to make further comments about this unique standard. *RySG (22 Nov. 2009)*.

On the second level, if the goal is to stop “rogue” registries from harvesting names, engaging in serial cybersquatting, etc., then the language must be clear that the registry has to actively participate in such conduct and is not vicariously liable for the actions of independent third parties. *Demand Media (23 Nov. 2009)*.

PDDRP-standard

INTA agrees that the PDDRP should apply to the second level but disagrees with the proposed standard for second level infringement—it raises many questions and needs clarification. E.g.: the conditions set out in (i)-(iii) cover only certain infringement scenarios; they must cover other typical scenarios of cybersquatting. Another condition should be added under (b) to address domain names which have been registered and used in bad faith pursuant to the principles of the UDRP. The proposed standard also does not address the systematic “use” of domain names; it should be made clear that the standard addresses the systematic registration or use domain names which meet the requirements (b) (i)-(iii) or have been registered and used in bad faith. *INTA (20 Nov. 2009)*.

PDDRP—upset to balances in existing law

If the obligations set forth in the PDDRP are interpreted broadly by trademark owners, such obligations would give trademark owners rights above and beyond what they are given under the existing laws of a number of jurisdictions. Absent clarification and narrowing of its scope, the PDDRP could upset the balance struck in existing law. *RySG (22 Nov. 2009)*.

Abusive filings

ICANN must increase protections against abusive filings. ICANN has departed from the IRT approach and removed the fee barriers, which would serve as a deterrent to abusive filings by overzealous trademark owners. The changes ICANN made mean that fees will be relatively low and will enable any third party to file a complaint. *RySG (22 Nov. 2009)*.

The PDDRP must have appropriate mechanisms to counter and seek to prevent abusive filings by overzealous trademark owners. The IRT went to great lengths to ensure such mechanisms were in place. *Lovells (22 Nov. 2009)*.

Advance payment of fees

In a change from the IRT, ICANN has recommended that each party, not just the complainant, must pre-pay the full amount of the provider administrative fees and the panel fees at the outset of the proceedings. The threat that the registry must pre-pay these fees in order to defend itself will scare or coerce legitimate registry operators acting in good faith. This will also result in endless gaming by overzealous trademark owners to blackmail registries into settlement, whether or not a trademark owner’s claims are legitimate or in good faith, harming both registries and registrants. *RySG (22 Nov. 2009)*. *J. Neuman (Module 5, 7 Oct. 2009)*.

PDDRP--Registries--no review on default

Unlike the UDRP or URS, where a review of the facts of the complaint against a registrant is required, if the PDDRP complainant meets the procedural requirements in filing the complaint (mostly that it has paid its refundable fee to the provider) and the registry does not respond, there is no further review but rather automatic remedies. *RySG (22 Nov. 2009)*. *J. Neuman (Module 5, 7 Oct. 2009)*.

To avoid the risk of increased registry abuse in the new gTLD program, panel review should be denied when the respondent defaults and costs should be refunded to prevailing parties. *IOC (20 Nov. 2009)*.

PDDRP--Hearing option

A hearing should be the default not the exception. Before an order for the potential termination of an entire registry in which the operator has invested thousands if not millions of dollars, a registry should have the option of a hearing. *RySG (22 Nov. 2009)*.

PDDRP--Panel appointment and panel determinations

The period for appointing the panel should be reduced to 15 days. The period for the panel to provide a decision should be reduced to 30 days. *INTA (20 Nov. 2009)*.

PDDRP--Discovery--experts

If the Provider appoints an expert on its own initiative, the provider must bear the cost of the expert's fees. *INTA (20 Nov. 2009)*.

PDDRP--One-member panel is insufficient

At a minimum, the PDDRP should employ the same standard as the Independent Review Process under the ICANN Bylaws—i.e. either party may elect a three-member panel and in the absence of any such election the issue will be considered by a one-member panel. The panelist should be more akin to the type used under the current Independent Review Process—i.e., an international arbitration provider. Panelists used for UDRP decisions do not necessarily have the right skills, training and qualifications or expertise to serve as panelists in a PDDRP. *RySG (22 Nov. 2009)*. Three-member panels are obligatory given the importance of panel decisions and the potential impact on the business of the registry operator. *Lovells (22 Nov. 2009)*.

PDDRP--Burden of proof

The standard should be “preponderance of the evidence.” If there is concern that the process may be abused, safeguards can be included on the back-end (i.e. the appeals process). *INTA (20 Nov. 2009)*.

PDDRP--Remedies

The section addressing monetary sanctions should be clarified to specify that monetary sanctions (with the possibility of attorneys' fees, as are available to registry operators in cases filed “without merit”) will be paid to the complainant. The panel should have express authority to order remedial measures. The evidentiary standard for finding a case “without merit” should be the same standard applied to the complainant. *INTA (20 Nov. 2009)*.

PDDRP is deficient, unworkable and unacceptable (Specification 7)

There should be either: (a) a reversion to the PDDRP proposed by the IRT with changes proposed by many commentators on the IRT version; or (b) elimination of the PDDRP from the DAG. The current version of the PDDRP differs from what the IRT proposed and what commenters supported. Its deficiencies include that ICANN takes itself out of the process; it changes the grounds for dispute; and it eliminates all protections for abusive filings. *R. Tindal (23 Nov. 2009)*.

III. Analysis and Proposed Response

ICANN thanks the community for its thoughtful set of comments relating to a Post Delegation Dispute Resolution Process or PDDRP. In reviewing all of the comments, one thing is clear, there are many views about the PDDRP, many of which contradict each other. The general issue areas have been combined and are discussed below.

First is the PDDRP Concept in general

Some think that the concept of creating a PDDRP to address improper activities of registries is long overdue, yet others think it is unnecessary and could provide trademark holders a perpetual claim

against a registry and additional rights in their trademarks. Still others claims that the PDDRP could put trademark holders at risk because after delegation they would have no recourse against registries for violating its registry agreements. ICANN has tried to revise the PDDRP proposal while balancing the contradictory interests set out in the comments.

In no way would the PDDRP expand the rights of trademark holders, nor would it limit those rights. Whether the PDDRP exists or it does not, the holder would be free to pursue conduct of the registries in the appropriate forum if that conduct was actionable. The PDDRP does, however, consistent with the GNSO recommendation, provide a cost-effective RPM for trademark holders.

A second area of discussion in the comment forum has been the application of the PDDRP at both the top and the second level. Some have commented that the PDDRP standard of proscribing registry conduct causing or materially contributing to trademark abuse should apply to both the top and second levels. Others have suggested that the PDDRP is unnecessary at the top level while others have suggested that it should not be applied to the second level. It is clear that the current proposal, like the IRT proposal for such a process, is meant to apply at both the top and second level. The proposal made part of the DAGv3, contains language intended to strike a balance between avoiding the imposition of strict liability on the part of the registry for acts at the second level, while at the same time attempting to proscribe active involvement by a registry in trademark infringement.

A third area of discussion related to the application at the top and second level issue revolves around the standards set for each level. Some believe that a reckless disregard standard at the top level is sufficient, others indicate that affirmative conduct by the registry should be required at both the top and the second level and others simply seek more clarity. Some have commented that the second level standard does not reach all of the typical scenarios of cybersquatting and that another condition should be added to address domain names that have been registered and used in bad faith pursuant to the principles of the UDRP. Others have requested clarity and examples of affirmative conduct, and/or a recitation of safe harbors so registries do not feel compelled to sanitize the names they allow in the registry.

The one thing that must be remembered is that nothing in the PDDRP prohibits the use of the UDRP or other mechanisms to challenge actual cybersquatting or infringement claims. The PDDRP is meant to provide a non-judicial avenue to address systematic bad conduct by registries. In an attempt to balance all comments, the DAGv3 proposal is being revised to try to achieve further clarity and to make it clear that, under the PDDRP ignorance of infringing names within a registry is not sufficient to hold a registry responsible for that infringement. Recall, the UDRP (and other RPMs) are still available against the registrant of an infringing name.

A fourth and major topic of discussion is why, according to commenters, the PDDRP in the DAGv3 appears to limit ICANN's role in the process. At the outset, it is important to note that the PDDRP would not replace ICANN's contractual compliance oversight responsibilities. Rather, the PDDRP proposal allows a trademark owner to initiate proceedings if it believes that a registry is liable in some way for infringing its rights. ICANN remains committed to enforcing contractual obligations and will continue to do so with all new gTLD registry agreements. If a registry were engaging in the type of behavior addressed by the PDDRP and such conduct violated the registry agreement, then ICANN will enforce the agreement and apply the remedies it deems appropriate within the bounds of the agreement. However, requiring ICANN to be involved before a trademark holder can pursue a claim under the PDDRP would defeat the purpose of the RPM. Finally, as will be reflected in the revised PDDRP, the

remedies available and recommended by the panel must be approved and enforced by ICANN, thus contractual compliance still remains ICANN's responsibility.

Another area of discussion suggests that there should be increased protections against abusive filings. In response to a Complaint, a respondent may allege that the complaint is without merit, which, if proven, would entitle the respondent to relief. Still under consideration is the manner in which a panel would be able to determine if a complaint was filed without merit and the attendant burden of proof associated with such a claim. If the panel made that determination, it would have the discretion to recommend the appropriate sanctions. While it is believed that these sanctions would offer sufficient deterrence against abuse, if others should be considered, further comment is welcome.

The issue of sanctions leads to the broader discussion of remedies. Some suggest escalating remedies to address abusive registrations in the appropriate circumstances. Others suggest that appropriate remedies should be available for second-level abuses only where it is impractical for brand owners to use the UDRP or in cyclical URS cases. Moreover, some have suggested that monetary damages or direct third-party determinations that a registry operator contract must be terminated are not appropriate in a PDDRP framework. The current proposal allows the panel latitude to make recommendations that it deems appropriate under the specific facts and circumstances of each case with ICANN review of the recommended remedy. It would be impossible to envision each and every circumstance that might form the basis for a complaint. On balance, this appears to be the preferred approach in light of the vast differences likely to appear in each of the cases. It should be pointed out, however, that commenters were right when they noted that ICANN, and not the panel, should have to approve and enforce the recommended remedies, and that will be reflected in the revised PDDRP.

The registries also argue that requiring the registries to pay the full amount of each matter up front will scare legitimate registry operators. ICANN is considering how to revise that and balance the need for full payment up front with the understanding that the registries will be under contract with ICANN and be required to comply with the finally approved remedies. The revised PDDRP may reflect some change in this regard.

Several comments address specific procedural points of the PDDRP. For example, a few of the procedural deadlines have been questioned – some as too long and some as too short. ICANN will continue to adjust those in the proposal as deemed appropriate and some will be revised. However, a balance must be sought between providing an efficient and cost effective RPM and allowing the provider adequate time to review the evidence and make an educated determination as to the respective rights of the parties.

One commenter has suggested that a hearing should be the default as opposed to the exception. It is important to remember that one of the goals of the PDDRP as an RPM is to provide efficiency. In keeping with that aim, the PDDRP proposal is that there should not be a hearing unless one was requested. In this manner the cases that are appropriate for a hearing will still get one, and those that do not need one will not consume resources.

A couple of comments revolve around the expert panels. It has been suggested that if the panel request appointment of an expert, then the panel or provider should cover that expense. At first blush, such a recommendation has appeal. However, the reason to appoint the expert is to assist the panel in reaching a fair and informed determination. As such, it appears that the parties should bear the cost of any expert the panel reasonably retains. Also related to panels, some have suggested that either party

may elect a three-member panel and in the absence of any such election a one-member panel will preside. ICANN will review this and possibly suggest a revision to the PDDRP, but is also cognizant of the need for efficiency.

Finally, questions have arisen as to what review would be undertaken for default. The current proposal envisions circumstances in which default could be set aside for such things as excusable neglect, but the question remains, if default, does the complainant automatically prevail? While some suggest the answer is yes, others disagree. In many RPM scenarios that have recently been discussed, including the URS proposal, the panel is required to do an analysis on the merits of the complaint, even if no answer or response is filed. ICANN accepts this suggestion and the PDDRP will be revised.

Registry Operator Covenants

I. Key Points

- The covenants in the new gTLD agreement are designed to ensure that new registry operators will be bound by certain obligations necessary for the security and stability of the DNS and the Internet, while being flexible enough to allow for a diverse array of registry operators with differing business plans.
- ICANN will continue to explore ways to reconcile registry operator covenants with laws and regulations applicable to geographically diverse registry operators.
- Technical comments on the specifications to the new gTLD agreement are welcome and are being considered by ICANN technical personnel.

II. Comment Summary

Contract obligations—overreaching or inapplicable in some situations

The level of requirements should match the type of TLD and applicants. Some of the provisions of the agreement are overreaching (e.g., the continued operation instrument in 2.1 is U.S.-centric and would not have any practical value in some other parts of the world; section 2.2 is contrary to French law regarding protection of personal data; and section 2.3's requirements would only make sense for certain types of TLDs). For a community TLD, ICANN-defined performance requirements should be limited to the TLD name service and public Whois service. *City of Paris (22 Nov. 2009)*.

With regard to registrant's personal data publication per section 2.2, it is inapplicable to the French legal framework. ICANN should update the DAG to provide that provisions such as those approved for the .tel registry agreement may be acceptable. *AFNIC (22 Nov. 2009)*.

Approved services; additional services (sec. 2.1)

The phrase "at http: ...as such policy may be amended from time to time" should be deleted. Instead, there should be a reference to the RSEP that is self-contained within the registry agreement as an exhibit. The last sentence should also be deleted for contract certainty. The need for amendments is adequately addressed by the existing process. *RySG (21 Nov. 2009)*.

Data Escrow Requirements (Specification 2)

All terms must be properly defined; a number of specific, technical language suggestions and refinements are required (provided in RySG comments). *RySG (21 Nov. 2009)* Data collection

methodology (registrar data forms) should be streamlined and possibly centralized. *M. Neylon (22 Nov. 2009).*

Escrow Agent Requirements

ICANN should provide specifications before the new gTLD launch regarding the requirements for an escrow agent and consider differences between western country standards and non-western country standards (e.g., it could be illegal for an IDN gTLD applicant from a non-western country to escrow the data with a US/western agent. *Y. Keren (Module 5, 22 Nov. 2009).* *S. Subbiah (Module 5, 23 Nov. 2009).* *UNINET (22 Nov. 2009).*

Format and Content for Registry Operator Monthly Reporting (Specification 3)

Fields 36, 37, and 38 are provided at ICANN’s request per the Add Grace Period (AGP) Limits Policy implementation notes, not in accordance with the AGP Limits Policy. *RySG (21 Nov. 2009)*

Schedule of Reserved Names at the Second Level in gTLD Registries (Specification 5)

For country and territory names, it would be helpful for ICANN to maintain the authoritative list or provide authoritative links to the official documents. Specific clarifications also are requested by RySG regarding provisions. RySG recognizes that for certain TLDs the ability to use geographic names at the second level would be beneficial and non-objectionable. ICANN should establish a process pursuant to which a TLD could register geographic names at the second level. *RySG (21 Nov. 2009)*

Audits should be expanded

For the third time COA asks ICANN to revise the registry agreement to give ICANN authority to audit new gTLDs registries regarding material misrepresentations made in the application and contract negotiation process, as well as material statements that are no longer true. Section 2.11 is deficient because it only authorizes audits for compliance with covenants contained in Article 2, while the warranty of truthfulness of these statements is in Article 1. *COA (22 Nov. 2009).*

ICANN is also prevented from making any unannounced audits of registries; this is unjustified and should be removed. *IPC (22 Nov. 2009).* *SIIA (23 Nov. 2009).*

INTA reiterates that ICANN itself should conduct audits vis-à-vis technical check questions 3, 7, 8 and 9 in section 5.2.1 or in the alternative a third party should conduct the audit. All audit terms should be set forth before the application round opens. The pre-delegation testing procedure in DAG v.3 is an important and encouraging development, but ICANN should establish all testing criteria and procedures before the new gTLD application round opens. The persons/entities conducting the testing should be identified so that criteria, procedures and persons/entities can be fully vetted. *INTA (20 Nov. 2009).*

Audits should be limited

In the first sentence “quarter” should be deleted and replaced with “year.” One audit per quarter is excessive. There should not be more than one audit per year covering the same ground (i.e., should not do multiple operations audits in the same calendar year). Site visits should require more than 5 calendar days’ notice—10 business days is more reasonable. *RySG (21 Nov. 2009).*

Continued Operations Instrument not always appropriate

The continued operations instrument laid out in Specification 8 is not always appropriate or necessary (e.g. a gTLD operated by a public authority). This requirement should be replaced with a form of

commitment by a third party to ensure continued operations of the registry for three years, at its own expense, in case of failure of the registry operator. *AFNIC (22 Nov. 2009)*.

Ongoing registry eligibility and objection process (sec. 5.4.1)

The mission/purpose as described in standard applications should be used to determine ongoing registry eligibility. If the purpose is changed when implemented (e.g. a standard TLD described to be publicly available is actually kept for internal use) there is no recourse under the existing Terms and Conditions unless intellectual property rights are infringed. For meaningful objections to be raised to applications, objectors must understand how the TLD is to be used, and that the self-prescribed use will not change over time. *MarkMonitor (Module 5, 20 Nov. 2009)*.

III. Analysis and Proposed Position

The purpose of the new gTLD agreement is to provide a basic agreement among different types of registry operators (applying for varying types of gTLDs) and ICANN with respect to the operation of new gTLDs. Some modifications to the form may be appropriate (for example in the case of gTLDs that might be operated by governments or inter-governmental organizations), but the goal has been to create an agreement that is appropriately flexible for all types of potential new gTLDs. The relatively low annual fee will not provide the resources to enter into unique registry agreements with operators of possibly hundreds of potential new gTLDs. To the extent that a potential registry operator believes that the new gTLD agreement conflicts with specific laws, ICANN expects that such registry operator will provide a complete analysis with respect to such conflicts during the application process.

The RSEP process has been established as an ICANN consensus policy, and is subject to change based on evolving technologies and standards. It would be inappropriate to limit the reference to the RSEP to the current process for purposes of a long-term agreement.

ICANN is willing to work with the technical community to refine the language in the data escrow requirements set out in Specification 2 and the report fields set out in Specification 3.

The requirements set forth in Specification 2 will apply to all escrow agents but there is no requirement that registry operators engage an escrow agent from any particular region. The requirements are in place to ensure that there is no loss of registry data and are not meant to discriminate against potential escrow agents in non-western countries.

The Governmental Advisory Committee has indicated a strong preference that geographic names be restricted at the second-level as set forth in the draft agreement. Working with the GAC, ICANN published in version 3 of the Guidebook protections for country and territory names at the second level. The names protected appear on certain lists. No translations of the names are protected unless the translation appears on those lists (i.e., the lists themselves are complete and dispositive). The lists are maintained by independent agencies, the ISO and the UNEGEN. As requested by the Registry Constituency, links to those lists can be provided in the agreement.

All registry operators will be required to re-certify as to matters stated in their TLD application prior to entering into the new gTLD agreement. All registry operators will also provide a warranty that such statements are true. Audits are limited to operational matters and ICANN believes that the audit mechanics set out in Section 2.11 will provide ICANN with the rights it needs to ensure compliance with

registry agreement provisions while being minimally invasive to the business operations of registry operators.

The “Continued Operations Instrument” is intended to ensure the continuity of all new TLDs in order to protect registrants. ICANN believes such an instrument is appropriate for all registry operators. Public authorities are subject to bankruptcy and other failure and should not necessarily be exempt from this requirement in all cases. The mechanics of the Continued Operations Instrument are still under review and subject to community input. While such instruments will be required, some registries may be exempted from a requirement to transfer data and operations to a successor registry. An example might be a TLD such as .post if the registrants solely consist of member states. It will be difficult to write bright line rules for such an exemption.

While, ICANN expects that each applicant will initially maintain a new TLD for the purposes it states in its application, there is no requirement in the new gTLD agreement that the applicant always maintain the currently intended use of the TLD. (The one exception being the continuing obligation to enforce registration restrictions in the case of community-based gTLDs.) ICANN recognizes that business plans may change over time and registry operators should be given requisite flexibility in operating new TLDs after delegation.

Protection of Third Party Rights

I. Key Points

- The appropriate rights protection mechanism requirements are the subject of ongoing debate and study.
- New registry operators will be required to implement some baseline protections.

II. Comment Summary

Protection of legal rights of third parties (sec. 2.8)

It is unclear why ICANN would have an approval right for any changes or modifications, when it does not appear to have such a right initially when Registry Operator specifies the process and procedures it will use. The words “at a minimum” should be deleted because they suggest that registries must adopt additional protections above and beyond those stated in Specification 7. The provision should be replaced with the following: “Protection of Legal Rights of Third Parties. Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth at [see specification 7].” Also, RySG remains concerned that the v3 Registry Agreement must not create rights that are inconsistent with existing law. RySG strongly objects to the scheme requiring registries to protect the legal rights of third parties. If registries voluntarily choose to do so, they should be required to live up to their promises to do so. It is entirely unreasonable to require registries to implement and adhere to any RPMs that may be mandated from time to time by ICANN. This is akin to unilaterally amending the terms and conditions of the contract, would damage certainty and deter investment. The same is true regarding the proposed PDDRP, which may be revised from time to time. As the entire scheme is still under development, RySG reserves the right to comment further. *RySG (21 Nov. 2009)*.

III. Analysis and Proposed Position

Debate regarding appropriate requirements for rights protection mechanisms continues as one of the "overarching issues"; see <<https://st.icann.org/new-gtld-overarching-issues/>> for additional details. The GNSO has undertaken a review the findings and recommendations of the IRT and staff proposals and a consideration of additional appropriate requirements.

The requirements set forth in Specification 7 are meant to establish a baseline of rights protection mechanisms and each registry operator is not obligated to implement procedures or safeguards beyond that baseline, except as required by future policies or amendments to such baseline protections. Additional safeguards may be implemented by the registry operator as it sees fit for the operation of its business.

The general business community continues to express concern over rights protection matters and registry operators will be expected to implement reasonable third party rights protection mechanisms to address these concerns.

Term, Termination and Continuity

I. Key Points

- The new gTLD agreement's termination/renewal provisions attempt to strike a balance between registry operators that need certainty with respect to the continued viability of the TLD and those in the community concerned about the need for proper enforcement of registry operator obligations following delegation.
- Termination/non-renewal is reserved for the most serious breaches of the agreement, which breaches must occur on several occasions.
- In the case of termination/non-renewal of the agreement, ICANN will consider whether re-delegation is appropriate and will consult with the former registry operator prior to any re-delegation.

II. Comment Summary

Non-renewal by ICANN too easy

Three cured breaches over ten years should not necessarily result in non-renewal. It is unclear what purpose an automatic three strikes rule serves. RySG is concerned about the expanded number of offenses that could result in non-renewal, even offenses that seem mundane. Regarding sec. 4.3, Termination by ICANN, there should not be different terminology used for "breach" or "default." These commonly mean the same thing and care should be taken to ensure that there are no differing notice and cure provisions or other obligations owing to the different terminology used. Regarding sec. 4.3(b), there must be an objective standard for "testing and procedures necessary for delegation of the TLD into the root zone" and there should be a standard cure period allowed. Sec. 4.3(c) should require a "material" breach and be subject to the protections of sec. 4.3(a), including final determinations by a court or arbiter. *RySG (21 Nov. 2009)*.

Non-renewal by ICANN too hard

The DAG v3 changes have made the ability to disallow renewal of the registry agreement even weaker. While it is important to give registry operators the ability to cure defaults, ICANN should retain power

not to renew a registry operator's agreement based on breaches of any portion of the registry agreement. *INTA (20 Nov. 2009)*.

Renewal should be subject to re-bid

There should be no presumptive renewal for registries; registry operations should be regularly tendered through open competition like any other procurement contract. G. Kirikos (22 Nov. 2009). M. Berkens (23 Nov. 2009). S. Roberts (23 Nov. 2009)

Termination by registry operator

What does it mean to terminate a contract with ICANN for ICANN's breach? Would the relevant registry get to keep the ability to continue operating the registry for that particular TLD? Termination is not a sufficient remedy in the event of a breach by ICANN, as the Registry Operator would not be provided an ability to recover any losses. ICANN should have service level agreements with the registries to provide for an additional meaningful remedy to a breach by ICANN. Monetary penalties and sanctions not subject to the limitations of liability may be the only potential meaningful penalties, as opposed to termination by the Registry Operator. Section 4.4(b) will not be necessary once ICANN eliminates its unilateral right to amend the Registry Agreement. *RySG (21 Nov. 2009)*.

Branded TLD Continuity

Provision should be made for how the closure of a branded TLD will be handled. Where the branded TLD owner makes satisfactory provision for the transfer or closure of any second-level domains, it should be permitted to discontinue the TLD without it being re-allocated to an unconnected third party. ICANN must foreclose the possibility that a branded TLD might be re-allocated or managed by a follow-on registry if the brand owner becomes insolvent or chooses to discontinue operation of the registry—in such cases, authority to operate the registry must be perpetually associated with the trademark owner. *INTA (20 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*. *Microsoft (23 Nov. 2009)*.

Continuity plan (sec. 4.5)

In the first sentence, after "this Agreement" insert "as provided in Section 4.3". This edit is needed to ensure that the transition assistance is provided upon proper termination. In the second sentence before "consultation" insert "proper termination and" and delete "as the same may be provided from time to time." There should not be an ability to unilaterally amend the continuity plan (which is presently not yet finalized). RySG is unclear as to how the continuity plan applies in this context. It is primarily geared towards ICANN's responsibilities. *RySG (21 Nov. 2009)*.

Termination of registry agreement by ICANN

Can ICANN terminate the registry agreement once the delegation process has been successfully concluded including all set up tests? What safeguard and accountability mechanisms exist once a gTLD is up and running to ensure the domain management fulfill their obligations, and if not to revoke their registration license, transfer it or have their gTLD shut down altogether? M. McAdam (21 Oct. 2009).

Timeframes, including six month maximum timeframe for entering registry agreement contract with ICANN (sec. 5.1)

If, after evaluation and if necessary, after dispute resolution and string contention processes, the agreement is not signed by that point then the proposal should be rejected. If there was a contention or auction, the second winner should then have the possibility of signing the final contract if it still complies with all requirements. This would ensure that the community and/or end users would not be frustrated to see that some TLDs do not go forward. The same idea should apply to testing procedures (they

should not last more than “x” months). A specific page on the ICANN website should deal with the final life of all proposals listing each TLD/registry operator being in phase of “signing the contract,” “doing the final technical tests”, “IANA delegation”, etc. with dates when each event happened. *P. Mevzek (Module 5, 22 Nov. 2009)*.

III. Analysis and Proposed Position

As stated in response to comments on v.2 of the Draft Applicant Guidebook, after considering community input, ICANN determined to propose a longer initial contract term in the proposed new gTLD agreement as a measure to facilitate business planning by prospective new registry operators and encourage investment in new TLDs. Given the length of each agreement’s term, ICANN requires the ability to terminate or not renew the agreement if a registry operator fails to live up to its obligations under the agreement. ICANN believes the changes made to the termination and renewal sections of the new gTLD agreement strike the right balance between those in the community that feel that registry operators must have significant certainty with respect to the renewal/termination of the agreement and those that are concerned that ICANN will not have the ability to terminate agreements with bad actor registry operators.

In response to community comment, ICANN revised the new gTLD agreement to allow the registry operator to terminate the agreement under certain circumstances. If the registry operator terminated the agreement, the registry operator would not be allowed to continue operating the registry and the registry would either be transitioned to a new registry operator or wound down in accordance with the agreement.

In response to community concerns over the re-delegation of “branded TLDs”, ICANN revised the new gTLD agreement to require consultation with the registry operator prior to any transition. ICANN must retain the ultimate authority over transitioning TLDs of failed registry operators in order to fulfill its mandate to maintain the stability of the DNS.

The ICANN continuity plan is a work in progress and adherence to the final policy, as it may be amended in the future, is critical to the stability of the DNS.

The termination/delegation provisions in the new gTLD agreement allow ICANN to terminate/not renew the agreement if the registry operator fundamentally and materially breaches certain covenants in the agreement. These provisions are meant as safeguard and accountability mechanisms to be enforced after the new TLD is delegated and operating.

If, after evaluation and any string contention or dispute process is concluded, a prospective registry operator fails to enter into the registry agreement within 90 days, ICANN may offer the runner-up the option to proceed with its application. In keeping with ICANN’s mandate of transparency, the progress of gTLD applications will be tracked and publicly available.

Registry-Registrar Separation

I. Key Points

- Community interest in the registry-registrar separation model remains very high.

- ICANN intends to propose a new model in the next draft of the new gTLD agreement that will incorporate discussions, debates and studies conducted to date.

II. Comment Summary

Registry/registrar separation

ICANN became a supporter of removing separation of registry and registrar functions after it became clear that ICANN could become the monopoly holder of the root zone. Having that enforced separation would require ICANN to choose to become the registrar for the root zone or to own the root zone editorial process which it has claimed since its inception. ICANN apparently does not want to make that choice—it wants both. *B. Manning (8 Oct. 2009)*.

Registry/registrar separation—questions

Regarding consideration of this topic at the Seoul meeting: (1) How did ICANN choose only the four options for community discussion and consideration with respect to this issue that are set forth in the DAG v.3? (2) What (and where) is the economic data to support these options and not others? (3) If the community wishes to add options for consideration how should this be done before November 22, 2009 when DAG v. 3 comments are due? (4) What is the process for deciding on the final menu of options that will be considered? (5) What is the process and timeline that ICANN will use to make final decisions on the registry/registrar separation issue? (6) How will ICANN apply the construct that is finally decided upon to existing TLDs as opposed to new TLDs? *VeriSign (22 Oct. 2009)*.

Registry/registrar separation—policymaking process

What is the final process ICANN will use to make final decisions on the registry/registrar separation issue? When in the process will comprehensive economic data supporting the four options set forth in DAG v.3 be presented? Must the new gTLD program await resolution of this issue? *VeriSign (27 Oct. 2009)*. *GoDaddy (22 Nov. 2009)*.

The following should be added as an option for consideration and discussion regarding vertical integration: If the status quo is changed, ICANN should require either (1) complete restriction of registry/registrar cross-ownership or (2) complete lifting of any such restrictions. *VeriSign (27 Oct. 2009)*.

Any changes in the existing registry/registrar separation policies need to be developed using the policy development process. This should be a parallel track but not an overarching issue that needs to be solved before new gTLDs are introduced. *SIDN (23 Nov. 2009)*.

Registry/Registrar Separation—support for “vertical integration” (sec. 2.9)

The first option of “vertical integration” is the best approach (i.e., (a) No cross ownership restrictions except where there is market power and/or registry price caps (regulation needs, if any, left to regulating authorities)). It benefits consumers through better price, innovation and service; is supported by ICANN precedent in numerous TLDs; is the norm in almost every other industry; and safeguards will remain in place. Without it, many new registries will be hindered if registrars do not offer their TLDs. Registrars, the main beneficiaries of vertical separation rules in .com, support this option for new TLDs. *R. Tindal (23 Nov. 2009)*.

Registry/registrar separation—ICANN consideration of RySG views (sec. 2.9)

RySG is concerned that there is no apparent community support for the inclusion of the vertical integration options in v3 of the Registry Agreement. There was no inclusion of the RySG supermajority position or minority position as set forth in the v2 comments. ICANN must consider those RySG comments in addition to the ones it chose to consider in v3. *RySG (21 Nov. 2009)*.

Vertical integration is not harmful

Domain names should be registered only by ICANN-accredited registrars. ICANN should maintain the current structural separation requirements between registry and registrar functions, and the requirement that registries not discriminate amongst registrars. Vertical integration of registries and registrars would be beneficial; risks of malicious behavior would not be prevented by prohibiting such vertical integration. There is a history of registrars selling the TLDs of affiliated registries in gTLDs and ccTLDs with no allegations of wrongdoing. ICANN should not prohibit affiliates of ICANN-accredited registrars from applying to be a new TLD registry operator or from providing any types of services to registry operators. ICANN should not strictly prohibit registrars from selling registrations for TLDs of an affiliated registry operator. *RSG (22 Nov. 2009)*.

Allow cross ownership

Opposing arguments to prohibit cross ownership are driven by the desire of incumbent registries to maintain their protected market positions and not by consumer welfare and business efficiencies. We agree with ICANN's economists that absent extraordinary circumstances of market power there is not a good basis to prevent a registry from owning a registrar that is accredited in the registry's TLD. The following things should not change: legal (structural) separation of registries and registrars, guaranteed access to a registry by any registrar who wishes to offer its names; and non-discriminatory treatment of all such participating registrars. *Demand Media (22 Nov. 2009)*.

NeuStar believes that registrars should be permitted to become registry operators, but the longstanding, successful policy of structural separation should remain in place. *NeuStar (23 Nov. 2009)*.

Don't allow cross ownership

There should be complete separation of registry and registrar activities, and registries should not be permitted to register domains in their own TLD, with the possible narrow exception of single-owner, branded TLDs. Without such separation, the door will open to "insider trading", abusive domain registration practices and higher prices for some registrants. *INTA (20 Nov. 2009)*.

Relax cross ownership restrictions for single brand holder registries

ICANN should consider eliminating the registry/registrar separation requirements in cases of single brand holder registries. *MarkMonitor et al. (20 Nov. 2009)*.

III. Analysis and Proposed Position

ICANN recognizes that there are still significant community concerns and a variance of views regarding the appropriate registry-registrar separation model. ICANN is continuing to seek additional opinions on these issues and foster further discussion in order to refine the model and its parameters.

Additional detail regarding the current state of registry-registrar separation policy is set forth in the letter from ICANN Chairman Peter Dengate Thrush to GAC Chairman Janis Karklins dated 22 September 2009 located at <http://www.icann.org/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf>.

Based on debates on the subject held at the ICANN meetings in Seoul, discussion during the consultation with certain community representatives held on 7 January 2010 in Washington D.C., and ongoing study, ICANN will propose for community comment a new registry-registrar separation model for inclusion in the next draft of the gTLD agreement.

Pricing Controls

I. Key Points

- Price caps are not necessary or desirable. Registrars and Registrants will be protected against predatory pricing by certain other provisions (i.e. notice periods and non-discrimination requirements) and market forces.
- Existing pricing controls will remain in place.

II. Comment Summary

Additional pricing protections are needed

INTA welcomes the changes made to the draft registry agreement attempting to address concerns about the absence of price caps, but the potential for abusive pricing remains. Under DAG v3 a registry operator can, at its sole discretion, increase prices over time. The vast majority of domain name registrants do not register domain names for a long term, so proposed long term solutions are not adequate. Additional measures to prevent, discourage and control abusive pricing are needed. At a minimum, registry operators should be required to provide a rationale for requested price increases that are in excess of some incremental uniform increase indexed to a set standard, such as the cost of living index. *INTA (20 Nov. 2009)*.

This revised provision is still not enough; it still allows unrestricted prices because it has a loophole. Registries will simply have everyone agree that they can change the price at any time in their agreements that most people do not read. Alternatively they could provide hidden discounts for people while raising prices for all others. Hard caps are needed—i.e., no more than twice the .com price. Registrants should make a clear statement on the need to protect their registrant clients from predatory pricing by registries with the safety mechanism of hard price caps in sec. 2.10. *G. Kirikos (22 Nov. 2009)*. *M. Berkens (23 Nov. 2009)*. *S. Roberts (23 Nov. 2009)*.

ICA commends the new language in the Registry Agreement that makes progress on preventing differential pricing of domain renewals that could permit a registry to tax the success of domain developers. It should be clarified that the pricing rule that accompanies a particular domain at its inception should carry over to any subsequent acquirer regardless of how they obtained it. *ICA (23 Nov. 2009)*.

Pricing – impact of registrars

The new language about renewal pricing needs clarification. The current version does not differentiate between varying second level names and does not fully recognize registrars' role in domain pricing. Suggested modified language: "[Registry Operator shall offer a domain registration renewal at the same price as the initial registration price for that name, unless the registrant agrees to a higher price at the time of the initial registration of the domain name following clear and conspicuous disclosure of such

renewal price by Registry Operator and clear advice by the relevant registrar that renewal price may be higher than initial registration price.”] *R. Tindal (23 Nov. 2009)*.

Pricing impact—existing gTLDs

A clear statement is needed that existing TLD registries will not be allowed to deviate from the well-established general pricing structure that has defined the market in existing gTLDs .com, .net., etc. The absence of ICANN’s position on this point leaves global stakeholders feeling that ICANN is disconnected or unconcerned about potential abuses of registrant consumers who are the financial backbone of the Internet itself. *M. Menius (22 Nov. 2009)*. *E. Muller (23 Nov. 2009)*.

Clarification needed in pricing provision

Clarification is requested on what “net of refunds, rebates, discounts” means, as well as the bracketed sentence about offering of all renewals at the same price, what “same price” means, and whether that pertains only to a Registry Operator who is selling directly to a registrant. The proposed language seems to restrict a registry’s ability to offer a discount on renewals to registrants who commit to a longer renewal term, e.g. five years. Further, a registry could disclose renewal pricing--e.g., by posting a pricing policy on its website. However, the registry has no direct relationship with the registrant and should have no responsibility to disclose pricing to a registrant. Registry pricing and the fee a registrar charges are not the same. In the final sentence, what does “public query-based DNS lookup service” mean—that alternative models are not allowed, such as free registration with fees for resolution? RySG reserves the right to provide additional comments on this section, depending on the answers to these questions. *RySG (21 Nov. 2009)*.

Market forces should govern pricing

Section 2.10 of the proposed registry operator agreement should be removed with the understanding that the consumer protection it seeks to address will be addressed through market forces as it has been with all of the non-price regulated existing registries. *D. Schindler (Module 5, 24 Nov. 2009)*.

Other considerations beyond competition must be considered

Price competition does not necessarily mean lower prices for domains. It is also a question of the added value a new domain offers. *dotBERLIN (15 Nov. 2009)*. *dotbayern (16 Nov. 2009)*. *D. Krischenowski (17 Nov. 2009)*. *M. Maller (18 Nov. 2009)*. *M. Tofote (18 Nov. 2009)*. *G. Werner (18 Nov. 2009)*. *S. Lubek (19 Nov. 2009)*. *H. Krueger (20 Nov. 2009)*. *dotKoeln GmbH (21 Nov. 2009)*. *dothamburg (22 Nov. 2009)*. *HOTEL (22 Nov. 2009)*.

III. Analysis and Proposed Position

After significant community comment and an expanded and comprehensive review of pricing controls, imposition of pricing caps on new registry operators does not appear to be necessary or desirable. However, public comment has led to the inclusion of steps to discourage and provide notice for large price increases for renewal of registrations. The protections against predatory pricing in the current draft of the new gTLD agreement will provide registrars with enhanced notice periods prior to pricing increases and will require registry operators to not discriminate among registrars with regard to pricing.

Nothing in the proposed agreement for new gTLDs will directly modify the obligations of existing registry operators with regard to price caps; absent any amendments to existing registry agreements those provisions will continue in effect. Any requests from existing registry operators to modify their existing

agreements would be subject to community review and comment and ICANN approval. ICANN has promised in its agreement with existing operators that ICANN will "not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause."

The Registry constituency questions the meaning of "public query-based DNS lookup service.' We agree with the point made there. Section 2.10 will be clarified in the next version of the new gTLD agreement with respect to the language cited by the RySG. The proposed agreement would require that free public query-based DNS lookup service will be required to be implemented by the operators of all new gTLDs.

ICANN agrees with the comments that the value of new gTLDs is not limited to just competition for lower prices for domains but that other forms of service and value are important.

ICANN Fees

I. Key Points

- ICANN fees are meant as cost recovery mechanisms and, as such, must increase as the DNS expands and costs increase.
- The costs of the RSTEP process should be shared by the registry operator that stands to benefit from that process and the introduction of innovative services.
- The ability of ICANN to collect registrar fees directly from the registry operators in the event that it is unable to collect directly from registrars is crucial to the funding needs of ICANN and such fees can be recovered by registry operators via each registry-registrar agreement.

III. Comment Summary

Registry-level Fees (sec. 6.1)

RySG reiterates its v2 comments—the proposed mechanism seems to abandon cost-recovery obligations and amounts to a revenue share. *RySG (21 Nov. 2009)*.

The logic behind some of the fees is bizarre. E.g., registrar accreditation should be covered by the accreditation application fee. The amount for the registry operator fee (minimum \$25K) should be revised considering that one current registry operator pays less than \$1K per year. *M. Neylon (22 Nov. 2009)*.

RSTEP Cost Recovery (sec. 6.2)

RySG reiterates its v1 and v2 comments—this provision should be reconsidered given the negative impact it will have on innovation in the TLD space. *RySG (21 Nov. 2009)*.

Variable registry-level fee (sec. 6.3)

RySG does not see the cap on the per-registrar component that was supposedly added. RySG objects to registry operators being forced to act as guarantors for registrars. At this time, registries have no ability to select the registrars they do business with. If ICANN accredits registrars that cannot or will not pay, this should not become an obligation of registries. Language on this point suggested by RySG in v2 should be added. Finally, as more of the burden of payments to ICANN falls on registries, the registries believe they should have a similar approval right to the ICANN budget as currently enjoyed by the registrars. *RySG (21 Nov. 2009)*.

Adjustments to fees (sec. 6.4)

If such fees are subject to increase based on the CPI, they should also decrease if the CPI goes down. *RySG (21 Nov. 2009).*

ICANN revenue increase

ICANN's revenue is expected to substantially increase after new gTLDs launch. Does ICANN have an exact plan about how to handle this money and remain a non-profit corporation? *A. Sozonov (Module 5, 23 Nov. 2009).*

ICANN's main job appears to be monitoring the wired monies from a few hundred contracts and arranging 3 ICANN meetings a year. *S. Subbiah (Module 5, 23 Nov. 2009).*

ICANN should publish what it will do with all the money that it will collect from the new gTLD and ccTLD applications. *UNINET (22 Nov. 2009). D. Allen (23 Nov. 2009).*

III. Analysis and Proposed Position

ICANN considers the fees set forth in Section 6 of the new gTLD agreement to be fair and in keeping with the goal of cost recovery given what could be a rapidly expanding DNS.

The costs and fees for the RSTEP have been borne to date by ICANN. The costs and fees are expected to increase substantially in the future due to increased sophistication in new registry services and such increases are not part of the ICANN budget. If the number of registries increases significantly and ICANN is still required to cover these costs, the fees charged to all registries could be increased to cover the additional cost. Those new services that are subjected to the RSTEP process will need to be funded by the registry operator's seeking to profit from such services.

The variable registry-level fee (pass through of the registrar fee) is necessary in the event ICANN is unable to collect fees at the registrar level. This fee is intended to be recoverable by the registry operator pursuant to a provision included in the registry-registrar agreement. This pass-through is intended to be consistent with the one found in present registry agreements. The per-registrar fee will be capped at the amount determined by the ICANN board each fiscal year.

Because decreases in the CPI are extraordinarily rare on an annual basis, ICANN does not believe fees need to be subject to a board-approved reduction based on CPI decreases.

ICANN intends to utilize increased revenues from the new gTLD program to support the new gTLD program and continue to fulfill its mandate to maintain the security, stability and interoperability of the DNS and the Internet.

Technical Specifications and Requirements

I. Key Points

- Because of their importance to the security and stability of the DNS, DNNSEC and IPv6 will be required to be implemented by all new gTLD registry operators.
- ICANN will continue to consult with the technical community regarding the appropriate service level requirements for inclusion in Specification 6.

- ICANN will continue to review and supplement the ICANN gTLD Registry Continuity Plan based on community comment and policy discussions.

II. Comment Summary

DNSSEC

The guidebook needs to be clear on whether DNSSEC will be a requirement to run a new registry, and ICANN must appreciate that some applicants may be caught between an ICANN requirement for DNSSEC and a local government that objects to it. *Y. Keren (Module 5, 22 Nov. 2009)*. *A. Sozonov (Module 5, 23 Nov. 2009)*. *S. Subbiah (Module 5, 23 Nov. 2009)*.

DNSSEC is made mandatory for all applicants in Module 5. ICANN should explain why it has not given the applicant a choice as to whether to require DNSSEC. *CONAC (Module 5, 23 Nov. 2009)*. *CONAC (23 Nov. 2009)*.

DNSSEC should be an optional feature, not mandatory. *S. Legner (19 Nov. 2009)*. *UNINET (22 Nov. 2009)*.

Universal deployment of DNSSEC is a critical step to close a known security issue that leads to “pharming” attacks (DNS cache poisoning) and the requirement for it is applauded. With the root most likely to be signed prior to the launch of any new gTLDs, it makes no sense to allow new gTLDs to publish without signing themselves. *Internet Identity (Module 5, 23 Nov. 2009)*.

We assume that DNSSEC services will not trigger additional reviews or fees. *RySG (21 Nov. 2009)*.

IPv6

IPv6 implementation is still rare around the world and especially outside the U.S. It will be very hard in the near future to find an IPv6 ISP and co-location hosting center outside of the U.S. and will create an obstacle mainly for IDN applicants. This requirement should be removed to ensure the diversity of applicants and new gTLD registries. *Y. Keren (Module 5, 22 Nov. 2009)*. *A. Sozonov (Module 5, 23 Nov. 2009)*. *S. Subbiah (Module 5, 23 Nov. 2009)*. *D. Allen (23 Nov. 2009)*.

IPv6 should be optional. *A. Liu (23 Nov. 2009)*.

ICANN should only ask for the software ability to handle IPv6. *UNINET (22 Nov. 2009)*.

Technical feasibility of string (sec. 1.2)

This point should be rewritten to say: “...certain top-level domain strings may encounter difficulty in acceptance by various existing or future Internet services.” There is no need here to concentrate on webhosters or web applications. *P. Mevzek (Module 5, 22 Nov. 2009)*.

EPP (specification 6)

The registry operator should be mandated to follow all RFCs related to the EPP, and in the event it needs some extensions, it should be required to publicly release all documentation related to its EPP extensions. It should follow IETF guidelines in writing drafts and participate in IETF efforts related to EPP and other protocols associated with its operations (DNS, DNSSEC, IDNs, IRIS, etc.). *P. Mevzek (Module 5, 22 Nov. 2009)*.

CORE understands the need for a stable and robust infrastructure and encourages the chosen metrics for the DNS itself. But it is doubtful whether the same values should apply to the SRS (EPP). It does not harm registrants if the SRS is down for maintenance longer than 43 minutes per month and registrars could not interact with the SRS in this downtime. It is also questionable why the new values are higher compared to current registry operators contracts (e.g. COM/NET from VeriSign). *CORE (Module 5, 22 Nov. 2009)*.

Availability of RDPS and EPP service

The tightened requirements of 99.9% availability for RDPS and EPP services including all planned outages seem to go far beyond the practical requirements of some potential new gTLDs. The requirements should be reduced to the 99% value as stated in version 2 of the draft new gTLD agreement, which will leave responsibility with the TLD owner and foster competition amongst the TLDs and registry service providers. *S. Legner (19 Nov. 2009)*.

ICANN should reconsider the SLA levels for the EPP interface, giving well-established medium-sized registry operators at least a chance to compete with industry leaders, particularly for smaller, community-based new TLDs. *NIC.at (25 Nov. 2009)*.

SLA performance

For the sake of efficiency, ICANN should operate the probes specified in Specification 6, and the total number of probes should be lowered. Also the changes made to DAG v3 regarding SLAs put a large burden on small community-driven applicants. ICANN should revert to version 2 and focus on DNS availability (100%) and RPDS availability (99%). Also the proposed 99.9% availability for every single IP address listed for a TLD has drawbacks and carries risk of reducing the overall service availability in case of systematic architectural problems. ICANN should remove or reconsider these new SLA standards and consider alternatives (specific amendment suggestions provided in AFNIC comments). ICANN should also remove the 15 minute update time for the DNS SLA or at least to set the minimum frequency at several hours. *AFNIC (22 Nov. 2009)*. *NIC.at (25 Nov. 2009)*.

Performance Specifications

A uniform approach to performance specifications is not appropriate. CORE would like to see three categories and is willing to contribute concrete specifications to ICANN on request. The draft is unspecific about who determines the probes and testpoints. More specific language and a rationale should be provided regarding the changes to version 2 and how registrants benefit from the chosen approach. Also, it should be in the registry's discretion which model is chosen regarding DNS update times. It is now set to 15 minutes, but there are scenarios when longer times are wanted (e.g. to prevent name drop catching). *CORE (Module 5, 22 Nov. 2009)*.

Registry Interoperability, Continuity, and Performance

Regarding standards compliance, good operational security may require that some details of a registry's access and usage for its keys and registrants trust anchor material not be published. If is ICANN's goal to let registrants know that registries maintain good practices in this area, then that goal should be more explicit. RySG requests clarification on what is meant by designation of a registry services continuity provider. RySG would object if this meant that a registry has an obligation to select a second registry to take over in the event of a registry failure. The sentence including designation of continuity provider should be replaced with: "Registry Operator shall have a business continuity plan." Other specific technical language clarifications are requested and suggested in the RySG comments. Performance specification 6 eliminates many of the protections for registries as to allowances for things beyond their

control, allowances for planned outages and upgrades, and cure periods for failure. Further community discussion is needed on what is an appropriate standard for reliability and appropriate penalty for failure to perform, as well as the issue of whether every TLD should be subject to the same standards. *RySG (21 Nov. 2009)*

III. Analysis and Proposed Position

The implementation of DNSSEC is a requirement for all new gTLDs. Comments are not uniform on whether DNSSEC should be optional or mandatory, but due to the history and danger of attacks on DNS, and due to the coming signing of the root and implementation of DNSSEC in many existing gTLDs and ccTLDs, all new gTLDs will be required to implement DNSSEC. Additional support for requiring DNSSEC arises out of the consultation and study to address the overarching issue of malicious conduct; see <http://icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-04oct09-en.pdf>. There is work in progress in the IETF to address the concerns of some governments and others relating to the use of some particular cryptographic algorithms in DNSSEC; for more information please see <http://www.ietf.org/dyn/wg/charter/dnsex-charter.html>. As long as a proposed implementation of DNSSEC conforms to industry best practices it should not trigger any additional reviews or fees.

It was recently announced by the Number Resource Organization that less than 10% of IPv4 addresses remain unallocated <http://www.nro.net/media/less-than-10-percent-ipv4-addresses-remain-unallocated.html>. The NRO stated "IPv6 includes a modern numbering system that provides a much larger address pool than IPv4. With so few IPv4 addresses remaining, the NRO is urging all Internet stakeholders to take immediate action by planning for the necessary investments required to deploy IPv6 ... organizations and end users, should request that all services they receive from their ISPs and vendors are IPv6-ready, to build demand and ensure competitive availability of IPv6 services in coming years."

The wording in the new gTLD agreement regarding the technical feasibility of the string will be revised in the next draft of the gTLD agreement.

Specification 6 does require "provisioning and management of domain names using the Extensible Provisioning Protocol (EPP) in conformance with RFCs 3735, 3915, 5730, 5731, 5732, 5733 and 5734." Additional applicable RFCs will be added if appropriate.

Given that gTLDs face "requirements for coordination, interoperability, and broad distribution," (see RFC 3735 <http://www.ietf.org/rfc/rfc3735.txt>), the language of the specification will be amended to require that any EPP extensions used by new gTLD registries must be documented.

ICANN will review the proposed service level requirements, particularly the EPP uptime requirements, and will consult further with the technical community and the broader ICANN community concerning appropriate service level requirements for new gTLD registry operations.

The draft specification calls for registries to publish a "DNSSEC Policy Statement", which is in accordance with current work of the IETF DNSOP working group. Registries would not be required to publish any confidential information.

The concept of a registry services continuity provider comes from the work ICANN has done over the past several years in consultation with the community on the "gTLD Registry Continuity" project <<http://www.icann.org/en/registries/continuity/>>. ICANN will review the requirement in light of the comments and in line with the current version of the ICANN gTLD Registry Continuity Plan <<http://www.icann.org/en/registries/continuity/gTld-registry-continuity-plan-25apr09-en.pdf>>.

Amendment Process

I. Key Points

- The special amendment process continues to be highly controversial with certain segments of the community.
- ICANN will consider changes to the process that may give registry operators more comfort regarding the possibility of arbitrary and detrimental amendments being effected without registry operator consent.

II. Comment Summary

Unilateral contract amendment rights should be eliminated

Unilateral language in the contract by ICANN will only create unilateral counter action in the conduct, policy formation, cooperative response to adverse events and in undetectable operational practice. We should not build a new contractual culture of surprise and distrust as the “scaling solution” to having more than 21 contracts. *E. Brunner-Williams (Module 5, 23 Nov. 2009)*. The draft registry agreement must excise any provisions (e.g. secs. 7.1, 8.6, 8.8) that unilaterally allow for amendment of contract terms by ICANN and return instead to the paradigm of requiring mutual consent as is customary for amendments. Moreover, the proposed process for changes is unnecessary—and section 7.2 should be deleted. *RySG (21 Nov. 2009)*. *Minds + Machines (22 Nov. 2009)*. *RSG (22 Nov. 2009)*. *GoDaddy (22 Nov. 2009)*. *Demand Media (22 Nov. 2009)*.

Unilateral contract amendment rights should be expanded

IPC is concerned that ICANN has no authority even to propose amendments regarding the scope of registry services, compliance with consensus policies, or the definition of consensus policies (section 7.1). The definition of “security and stability” should be examined to make sure it is not unduly restrictive. *IPC (22 Nov. 2009)*.

Amendment (sec. 7.1) and process for changes (sec. 7.2)

The provision allowing registry fee amendment needs to have a much higher standard—e.g. a compelling financial need based on unforeseen circumstances beyond ICANN’s control. There also needs to be an annual limit on any fee increase (e.g. no more than 10% increase per year). As now written, the provision broadens ICANN’s powers by allowing it to make unilateral changes to registry fees for any reason ICANN deems necessary; it is not linked to Stability or Security, is loose and dangerous, and is in addition to sec. 6.4 which allows ICANN to make annual increases in registry fees based on inflation. *R. Tindal (23 Nov. 2009)*.

III. Analysis and Proposed Position

The proposed process for effecting amendments to the agreement during the life of the contract continues to be the focus of concern by certain sectors of the community. The new gTLD agreement has

introduced a number of additional safeguards for registries against arbitrary amendments, including ultimately allowing registry operators to terminate the agreement if they oppose an amendment that is adopted over their objection.

ICANN is considering reducing the lengthy terms of each registry agreement or expanding ICANN's rights not to renew agreements as an alternative to the proposed amendment process. ICANN is also considering whether the relevant provisions and mechanisms to modify or replace the registrar accreditation agreement should be utilized for the new gTLD agreement. Finally, certain changes to the current provision are under consideration that would limit ICANN's ability to amend the agreement through the special amendment process to a small subset of matters and only under specified conditions. This issue was discussed in detail during ICANN's public consultation on the proposed registry agreement held on 7 January 2010.

Whois Requirements

I. Key Points

- ICANN will consider suggestions for technical changes to the protocols contained in Specification 4.
- The concept of a centralized zone file access is under consideration by ICANN and subject to further community comment.

11. Comment Summary

Specification 4

The Whois Service language requires significant alteration. ICANN should not carve out a contractual right to impose unknown and possibly arbitrary technical requirements on registries. Movement to alternative formats and protocols is subject to consensus policy-making. GNSO efforts to examine Whois are already underway and should continue. The centralized zone file access concept raises legal, security and procedural concerns and it is not known if it is a good solution to a real problem. Further discussion is needed regarding what security and abuse risks may be involved. RySG has significant concerns about ICANN taking on this responsibility, which is currently carried out by registry operators. RySG outlines in its comments specific considerations that should be addressed regarding centralized zone file access.

III. Analysis and Proposed Position

ICANN considers the requirement to provide thick Whois to be widely supported and settled in the new gTLD agreement.

The Whois language contained in Specification 4 is standard thick Whois format and protocol. GNSO work on Whois will continue. Any changes to the Whois-related requirements for new gTLDs would be developed with broad public consultation whether as a result of new policy development or through amendments to the agreement. ICANN will consider changes submitted by the community to clarify the

language. The potential for ICANN to create centralized zone file access is under consideration and is subject to community input. Such centralized zone file access could result in decreased cost for registry operators and better access to zone files for legitimate users.

Other Provisions

I. Key Points

- Applicants for new gTLDs will be thoroughly vetted and reviewed prior to entry into the new gTLD agreement and delegation of new gTLDs.
- The limitation of liability, indemnification and change in control provisions contained in the new gTLD agreement contain safeguards and compromises based on comments to prior gTLD agreement drafts and ICANN will consider additional suggestions.

II. Comment Summary

Pre-contract review

ICANN should mandate a pre-contract review which should not be limited to whether an entity is merely a going concern in good legal standing. Applicants must reveal which individuals and corporations are affiliated with the entity and what their past legal standing was, etc. Material negative changes in an applicant’s status or financial qualifications should be sufficient to allow ICANN to refuse to enter into a Registry Agreement with that applicant. *INTA (20 Nov. 2009)*. INTA reiterates the importance of requiring applicants to re-certify and provide accurate and updated information. *INTA (20 Nov. 2009)*. ICANN still has not identified who would be responsible for conducting the pre-contract review and the pre-delegation technical check. *INTA (20 Nov. 2009)*.”

Final registry agreement available for review (sec. 5.1)

The reference in section 5.1 is to a “draft” registry agreement. The exact registry agreement needs to be published and guaranteed to be the one that will be signed in the event of delegation prior to the beginning of the application period or payment of application fees. The agreement should guarantee in writing and at the outset that if the applicant jumps all the hurdles and is eligible for delegation according to the pre-published rules, Board approval and Department of Commerce introduction of the TLD into the root is certain. *Y. Keren (Module 5, 22 Nov. 2009)*. *A. Sozonov (Module 5, 23 Nov. 2009)*. *S. Subbiah (Module 5, 23 Nov. 2009)*. *UNINET (22 Nov. 2009)*.

Definitions usage

Care should be taken to ensure that the terms “Security and Stability” and “Registry Services” are used in their precise, capitalized, defined meanings, rather than lower-case. *RySG (21 Nov. 2009)*.

Representations and warranties (sec. 1.3)

It is unclear what “and the other parties thereto” refers to. The provision should read – “Registry Operator has duly executed and delivered to ICANN...” *RySG (21 Nov. 2009)*.

Root zone information publication (sec. 3.4)

ICANN must make promises to gTLD registries that are the same as the commitment it made to the IDN ccTLDs. RySG (21 Nov. 2009).

Arbitration (sec. 5.2)

RySG objects to the continuing insistence on only a single arbitrator. The right to grant punitive damages should be reserved for truly important matters (e.g., not for things like failure to file monthly reports). The phrase “Article 2, Article 6 and Section 5.4” should be deleted, and replaced by “Section 2.1, 2.2, and 6.1” to reflect that punitive damages would be available with regard to temporary policies, consensus policies, registry services and fees. *RySG (21 Nov. 2009)*.

Limitation of liability (sec. 5.3)

RySG reiterates its v2 comments on this issue (cap on indemnification under the limitation of liability). RySG also believes it proposed previously a reasonable disclaimer of warranties, as these warranties may otherwise be implied by law, and they are routinely disclaimed. RySG’s specific language should be inserted into Section 5.3. *RySG (21 Nov. 2009)*.

Indemnification of ICANN (sec. 8.1)

A more reasonable approach is to make the indemnification provision mutual and to limit it to material breach of representations and warranties, and to gross negligence and willful misconduct. RySG suggests language changes to this effect. Also, per its comments to sec. 5.3, RySG offered language that would clarify that the indemnity obligation is under the Limitation of Liability. A cap is especially necessary given the breadth of the indemnity required in the v3 Registry Agreement. Also, the word “reasonable” should be inserted before “legal fees”. In section 8.1(b) the sentence beginning “For the purposes of reducing Registry Operator’s liability...” should be deleted; there is no way the Registry Operator would know that information or have access to it to make such a demonstration. *RySG (21 Nov. 2009)*.

Defined terms (sec. 8.3)

The effect on security language is too broad and should be changed to read: “Unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of registry information or resources on the Internet by registry systems operating in accordance with all applicable standards.”

Regarding effect on stability, the phrase “authoritative and published by a well-established, recognized, and authoritative standards body” is unacceptable. ICANN needs to more explicitly enumerate the standards and name the authoritative body, which is IETF. Application of additional standards should be considered via the consensus policy process. The contract language also must be revised to adhere to proper terminology regarding IETF practices and definitions. *RySG (21 Nov. 2009)*.

Change in control, assignment and subcontracting (sec. 8.5)

In the second sentence after “organized” insert “in the same legal jurisdiction in which ICANN is currently organized and”. This is in keeping with the plan that ICANN retain its headquarters in the U.S. to ensure certainty about ICANN’s registry agreements. RySG is concerned that ICANN’s unwillingness to

make the change it requested in its v2 Registry Agreement comments suggests a desire to evade cited commitments by a reorganization. RySG remains concerned about the impact of section 8.5 on securities laws as possibly requiring notification prior to public disclosure. RySG recommends saving language be added and suggests: “Under no circumstances shall Registry Operator be required to disclose any event to ICANN earlier than Registry Operator is required to publicly disclose such event under applicable securities laws.” *RySG (21 Nov. 2009)*.

ICANN should review Sec. 8.5 to ensure it will be an effective protection and if it adequately insulates ICANN itself for liability from injuries suffered by registrants and Internet users after a registry passes to the control of a “bad actor”. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

III. Analysis and Proposed Position

Each applicant will be required to provide significant financial and other information in its application for a new TLD. This information will be verified by ICANN and certified by the applicant prior to the entry into a new gTLD agreement. The process and parties responsible for reviewing applicant information will be identified prior to the acceptance of new gTLD applications.

The final new gTLD agreement will be published prior to opening the new gTLD round. The current draft new gTLD agreement sets out (and the final version will continue to set out) the requirements that each new registry operator will be obligated to fulfill prior to delegation.

ICANN will review the language of the new gTLD agreement to ensure that the proper capitalized terms are reflected.

It is anticipated that each Continued Operations Instrument will involve a third party financial institution or other guarantor. That is the purpose of the reference to “the other parties thereto” contained in Section 1.3.

The commitments made to registry operators under the new gTLD program are similar to the commitments made to the operators of IDN ccTLDs and ICANN’s commitment “to coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner” is part of its core mandate.

A single arbitrator appointed pursuant to the rules of the International Chamber of Commerce is capable of resolving disputes arising under the new gTLD agreement at considerably less cost and in a more efficient manner than a panel of three arbitrators. This reduced cost will benefit both ICANN and the registry operator. Punitive damages are only available for “fundamental and material” breaches, which presumably would not include minor breaches such as the occasional failure to file a monthly report.

It is not appropriate for indemnification to be capped by the general limitation of liability provisions. Damages arising from the acts of the registry operator should be covered in full by the offending registry operator, subject to the limitations that were introduced in the indemnification section. ICANN will review and consider adding back the warranty disclaimers contained in existing registry agreements.

If the registry operator wishes to reduce its indemnification obligation based on the bad acts of other registry operators, it is appropriate that the registry operator should have the burden to prove such other bad acts.

ICANN will review the “Security” and “Stability” language but notes that these definitions are derived from existing consensus policies.

Given the length of the term of each registry agreement, ICANN requires flexibility in the language regarding its potential reorganization. ICANN will consider the proposed changes with respect to the notice required to be given by registry operators that are publicly traded.

ICANN believes that it is sufficiently protected from liability in the event that a change in control of a registry operator results in the registry being controlled by a “bad actor”, and that the new gTLD agreement provides sufficient safeguards to remedy such a situation.

RESPONDENTS

Hugh Addington (H. Addington)
Adobe Systems Incorporated (Adobe Systems)
AFNIC
David Allen (D. Allen)
American Bankers Association (ABA)
American Intellectual Property Law Association (AIPLA)
AT&T
Matthew Barnes (M. Barnes)
BBC
Allyson Bell (A. Bell)
Michael Berkens (M. Berkens)
Anders Rosenkrans Birkedal (A. Rosenkrans Birkedal)
Ron Andruff (R. Andruff)
Asociacion PuntoGal
Association for Progressive Communications (APC)
Association UNINET (UNINET)
BITS
Big Room Inc. (Big Room)
Mary Boese (M. Boese)
Eric Brunner-Williams (E. Brunner-Williams)
Business and Commercial Users’ Constituency (BC)
Nicole Carosella (N. Carosella)
ccNSO
China Organizational Name Administration Center (CONAC)
City of Paris
Coalition Against Domain Name Abuse (CADNA)
Coalition for Online Accountability (COA)
David Cohen (D. Cohen)
CORE Internet Council of Registrars (CORE)
Council of European Municipalities and Regions (CEMR)
Matthew Crow (M. Crow)
Courtney Daly (C. Daly)
Bradley Couture (B. Couture)
Danish Internet Forum (DIFO)
Demand Media

Avri Doria (A. Doria)
dotbayern
dotBERLIN
dotECO LLC (dotECO)
dotEUS
dothamburg
dotKoeln GmbH
DotSport Registry (DotSport)
dotZON
Markus Erbach (M. Erbach)
EuroDNS
European Communities Trademark Association and MARQUES (ECTA/MARQUES)
Megan Ferraro (M. Ferraro)
Heather A. Forrest (H. Forrest)
Robert Gerstemeier (R. Gerstemeier)
Jean Guillon (J. Guillon)
Frank Hagale (F. Hagale)
Geoff Hale (G. Hale)
Hearst Communications, Inc. (Hearst Communications)
HOTEL Top Level Domain GmbH (HOTEL)
Greg Houston (G. Houston)
IBM Corporation (IBM)
INDOM
Intellectual Property Constituency (IPC)
International Hotel & Restaurant Association (IH&RA)
International Olympic Committee (IOC)
International Trademark Association (INTA)
Internet Commerce Association (ICA)
Internet Identity
Patrick Jacxsens (P. Jacxsens)
Kerstin Jager (K. Jager)
Ivan Kalitka (I. Kalitka)
Yoav Keren (Y. Keren)
George Kirikos (G. Kirikos)
Dirk Krischenowski (D. Krischenowski)
Helga Krueger (H. Krueger)
Yan Kwok (Y. Kwok)
Beauregard LaCoste (B. LaCoste)
James Lake (J. Lake)
Stefan Legner (S. Legner)
Elizabeth Letchworth (E. Letchworth)
Amanda Liu (A. Liu)
Carter Livingston (C. Livingston)
Martha Lopez (M. Lopez)
Lovells LLP (Lovells)
Sven Lubek (S. Lubek)
Bill Manning (B. Manning)
MarkMonitor

MarkMonitor et al.
Malcolm McAdam (M. McAdam)
Amy M. McKinlay (A. McKinlay)
Rebecca McKinnon (R. McKinnon)
Andrew McNeill (A. McNeill)
Max Menius (M. Menius)
Patrick Mevzek (P. Mevzek)
Microsoft Corporation (Microsoft)
Minds + Machines
Martina Maller (M. Maller)
Joceline Masri-Nahigian (J. Masri-Nahigian)
Doug Motley (D. Motley)
Ed Muller (E. Muller)
Alexey Mykhaylov (A. Mykhaylov)
Keith Nahigian (K. Nahigian)
National Cable & Telecommunications Association (NCTA)
Jeffrey J. Neuman (J. Neuman)
NeuStar Inc. (NeuStar)
Michele Neylon (M. Neylon)
NICMexico
Nokia
Norwegian Post and Telecommunications Authority (NPTA)
Online Trust Alliance (OTA)
Courtney Perrone (C. Perrone)
Andrea Peters (A. Peters)
John H. Poelman (J. Poelman)
Elaine Pruis (E. Pruis)
Dieter Rau (D. Rau)
Registrar Stakeholder Group (RSG)
Registries Stakeholder Group (RySG)
Scott Roberts (S. Roberts)
Royal Regency International Hotels (RRIH)
Francisco Salamero (F. Salamero)
Dan Schindler (D. Schindler)
Robert B. Seidel (R. Seidel)
Anja Seugling (A. Seugling)
SIDN
Ritva Siren (R. Siren)
Alexei Sozonov (A. Sozonov)
Werner Staub (W. Staub)
Uwe Stache (U. Stache)
Sean Storan (S. Storan)
S. Subbiah
The AmericaSpeakOn.org Team (AmericaSpeakOn.org)
The Coca-Cola Company (Coca-Cola)
Thomsen Trampedach GmbH (Thomsen Trampedach)
Time Warner Inc. (Time Warner)
Richard Tindal

Bastian Tippkemper (B. Tippkemper)
Markus Tofote (M. Tofote)
Adam Toronto (A. Toronto)
Lutz Treutler (L. Treutler)
UNINETT Norid AS (UNINETT Norid)
VeriSign
Caspar von Veltheim (C. von Veltheim)
Visa Inc. (Visa)
Gabriele Werner (G. Werner)
WIPO Arbitration and Mediation Center (WIPO)
Yahoo!