Reference Material 34.

New gTLD Draft Applicant Guidebook: Analysis of Public Comment
18 February 2009

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New gTLD Draft Applicant Guidebook: Analysis of Public Comment

I.   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. In addition, the Joint Project Agreement that ICANN has with the U.S. Department of Commerce says: "ICANN shall maintain and build on processes to ensure 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 at 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 new gTLDs project has been in the study and planning stages for more than 3 years. See http://gnso.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. In addition to the comment period, there have been face to face consultations held at ICANN meetings and special consultations. Over 300 comments were received via the written public comment process and hundreds more via face to face discussion at ICANN meetings and other events.

Overview of the Analysis

ICANN conducts numerous public comment periods. They can be found here: http://www.icann.org/en/public-comment/.

In 2008 more than 50 comment periods were held. This process shapes policy direction and effects change to important technical, contract, and policy implementation documents. While ICANN relies heavily on this process, many have suggested that it is often difficult to understand how comments have shaped outcomes and if not, why not.

For the first comment period, ICANN has introduced a detailed analysis of comments received so far. The comments were divided into thirteen major categories and then subdivided into sub-categories. An analysis was written to address issues raised in the categories and sub-categories. 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 of the analysis where a synopsis of comments and sources is listed,
- A listing of the issues raised by that set of comments,
- An analysis balancing the issues raised by the comments,
- A proposed position that is reflected in the Applicant Guidebook for additional discussion.

Issues Requiring More Discussion to Address Concerns

The following overarching issues need more examination and discussion before they can be changed in a future draft Guidebook. They remain unchanged in this version of the Guidebook. This does NOT imply that the concerns expressed have not been understood or are being disregarded; it only indicates that these matters require more substantive discussion before changes to the Guidebook can be made.

Those issues are:

a. Security and Stability

Scaling

While there is always opportunity for more study, the concern regarding security abuses scaling with more TLDs is ultimately better dealt with through pragmatic implementation approaches than a set of predictions around which many would disagree.

Many clearly feel more work is needed on implementation of registrant protection and end user confusion, and these questions need to be raised again. Are there implementable and practical mechanisms to avoid the need for purely defensive registrations at the second level? Is there such a need in an expanded name space? Can registry or registrar mechanisms be put in place to make new gTLDs desirable from both a confusion avoidance and protection viewpoint? ICANN staff will be actively soliciting feedback on these topics over the next 60 days, and share with the community options for improvements in these areas in the next several months.

In addition, given that the near coincident changes planned for introduction into the root zone - IPv6 records, DNSSEC, IDNs, and new TLDs – have not been analyzed for their combined impact on root zone operations, the ICANN Board has requested the Security and Stability Advisory Committee and Root Server System Advisory Committee to jointly conduct a study analyzing the impact to security and stability within the DNS root server system of these proposed implementations. The study will address the capacity of the root server system to cope with a stressing range of technical challenges and operational demands that might emerge as part of the implementation of proposed changes.

b. Malicious Conduct

<u>Abuse</u>

Several commenters expressed concern that expanding the number of TLDs would also expand malicious behavior on the Internet.

One approach to addressing this would be to conduct a study (really a forecast) of expected behaviors with an expanded TLD name space.

Many clearly feel more work is needed on implementation of registrant protection and end user confusion, and these questions need to be raised again. Is there such a need in an expanded name space? Can registry or registrar mechanisms be put in place to make new gTLDs desirable from both a confusion avoidance and protection viewpoint? ICANN staff will be actively soliciting feedback on these topics over the next 60 days, and will share with the community options for improvements in these areas in the next several months.

c. Trademark Protection

Many comments noted that an issue of concern was trademark protection and particularly protection from what they saw as frivolous and expensive defensive registrations at the second level, both at the registry start-up time and on an ongoing basis. Are there implementable, practical mechanisms to avoid the need for purely defensive registrations at the second level?

ICANN intends to conduct a series of discussions with all relevant parties relating to proposed enhanced protections for trademark holders. ICANN is also in discussions with several Intellectual Property organizations around the world to coordinate setting up several conferences to propose some additional solutions to these issues.

If additional trademark protection mechanisms are agreed upon and included in the new gTLD implementation, the aim would be to reduce costs to trademark holders, and increase and build more confidence in protection measures.

d. Demand/Economic Analysis

Many comments indicated that ICANN should commission an economic analysis of the effect of increasing the number of gTLDs before proceeding. ICANN will release a study on the dynamics of the domain system in broad as well as a study specifically related to the impact of increase in gTLDs in the near future. ICANN will post that study for public comment and discussion prior to the next iteration of the Draft Applicant Guidebook.

Major Changes in the Draft Applicant Guidebook

This draft of the Guidebook has changed in many ways that clarify language and expand on concepts. These changes are outlined in the Analysis and reflected in the red-lined revised version of the Guidebook posted with the Analysis. In addition, the major areas of change are outlined below.

    a. Compliance

ICANN will revise the audit rights provision in the agreement included as part of the updated Applicant Guidebook to more closely align with the provisions in the current Registry Agreement, which cover compliance with the fee arrangements, monthly reporting specifications and technical and functional specifications. The scope of ICANN's audit rights will be clarified and limited to cover only the covenants of Registry Operator.

For Registry Operators who are repeatedly problematic, ICANN can bring action in front of an arbitrator and request the award of punitive damages. In addition, ICANN will clarify in the proposed Registry Agreement that ICANN may request that an arbitrator sanction the Registry Operator for noncompliance issues, including operational sanctions such as an order temporarily restricting a registry operator's right to sell new registrations if appropriate.

b. Registry/Registrar Separation

The revised Guidebook includes a limited lifting of restrictions on registry-registrar cross-ownership that could include the following:

- Maintain separation between the registry and registrar functions (with separate data escrow and customer interface);
- Registries continue to use only ICANN-accredited registrars;
- Registries should not discriminate among registrars;
- With a limited exception, a registrar should not sell domain services of an affiliated registry (this limit may be up to a threshold of 100,000 domain names, although the registrar may continue to manage its existing base once the threshold is met)
- Reasonable notice should be provided before any pricing changes are made on domain renewals.

This model would support small, targeted registries (including community-based applicants or single-entity TLDs), and recognizes that limited cross-ownership may provide economic benefit and competitive benefit in the domain name market.

c. Financial Considerations

Annual Registry Fee

It is proposed to reduce the gTLD annual registry fee base amount (not minimum) to $25,000 per year ($6,250 per quarter).   For registries with 50,000 or fewer second-level registrations, no further fee would be charged. For registries with more than 50,000 registrations, the registry would pay $0.25 per transaction-year. This approach better accommodates a diversity of registry models, registries in start-up phase, and smaller community registries, while ensuring reasonably expected future costs can be covered by the fees. Volume registries will pay total fees in line with current ICANN registry contracts. The proposed gTLD Evaluation Fee remains $185,000.   No additional cost estimates or policy decisions indicate that the fee should be altered.   However, the cost estimates will continue to be evaluated as the launch date approaches. If any significant cost estimates are altered due to more information becoming available, then the fee could be adjusted accordingly.

d. Geographical Names

The Draft Applicant Guidebook is amended to make it easier to identify the different elements of geographic names.

It has also been amended to reflect that a country or territory name in any language will require evidence of support, or non-objection from the relevant government or public authority.

The definition of meaningful representation is also amended to take out the reference to official languages.

The requirements of the letter of support will be augmented. In addition to demonstrating an understanding of the string being requested and what it will be used for, the letter should also reflect that the string is being sought through the gTLD process and the applicant is willing to accept the conditions under which the string will be available, i.e. sign a contract with ICANN, abide by consensus policies, pay fees etc.

ICANN intends to hold further consultations with the Governmental Advisory Committee, ccNSO and others to discuss these issues.

e. Last Resort Contention Resolutions: Auctions

Auctions are intended to be the mechanism of last resort for contention resolution.

Proceeds from auctions will be returned to the community via a foundation that has a clear mission and a transparent way to allocate funds for projects that are of interest to the greater Internet community. One use of funds would be to sustain registry operations for a temporary period in the case of registry failure. Other uses include outreach and education and DNS stability/security projects.

f. General Communications and Timeline

The proposed timeline that estimated the launch of the application round in September 2009 is under reconsideration. It will depend on the resolution of the overarching issues raised by the community in response to the initial draft Applicant Guidebook. There will be a third draft version of the Guidebook. It is unlikely that the application round will open before December 2009.

It is very important to take the time to resolve the overarching issues raised as a result of the publication of the first draft Guidebook. DNS stability, user protection and trademark rights must not be undermined by the introduction of new TLDs. It is equally important to continue to refine other community issues within the process and complete as much implementation work as possible so that when the overarching issues are resolved the new gTLD process will be robust and timely and effectively be able to commence. In that regard, the community will see several activities going forward while the overarching issues are addressed. For example, ICANN will continue to work on locating panels that will evaluate aspects of the applications.
A communications program that will focus on communicating existing proposals for the application process as well as informing the community about changes will commence immediately.

II. GENERAL COMMUNICATIONS AND TIMELINE

Summary of Key Points

- There was strong commentary from a variety of sources concerned that the timeline for the launch is too aggressive considering there are overarching questions remaining.
- A third draft version of the Applicant Guidebook will be necessary to provide sufficient time to address a set of overarching concerns raised in the public commentary.
- Other program elements are being pursued so that when the remaining questions are resolved, a robust, effective, timely process will be in place ready to launch.
- A comprehensive communication plan is being implemented presently.

Summary of Input

Program language

The new gTLD process should be addressed in other languages and the consultation period of 45 days is too short. *A. Al-Zoman, SaudiNIC (2 Dec. 2008); J.Shea, APTLD* (15 Dec. 2008).

Language Barrier: the whole process (including consultations, documentations, forms, communications, people involved) is done in English. Non English speaking communities would be put in behind because of this. *A. Al-Zoman, SaudiNIC* (2 Dec. 2008).

Timelines - four months communications period; launch; next round announcement

Demand Media supports the introduction of new gTLDs, the timely review of public comments, prompt issue of the final version, and swift progress to the bid submission stage. Recommends that the four month global communication phase begin with the publication of the revised Applicant Guidebook in February 2009. *Demand Media* (17 Dec. 2008).

The four-month awareness campaign for new gTLDs should be brought in earlier so application process can begin earlier. *Cairo Public Forum* (6 Nov 2008). Move Guidebook awareness campaign forward to January 2009. *Cairo Public Forum* (6 Nov 2008). The Global Awareness campaign should begin after the New Year in January 2009 to avoid needlessly holding up applicants that are prepared and ready to submit their applications on the given day in Q2 2009, as anticipated in the timeline. *R. Andruff* (20 Nov. 2008).

We urge the ICANN Board to not delay new gTLD application process in order to make changes to the Guidebook. *Cairo Public Forum* (6 Nov 2008).

The provision stating that ICANN will begin the next application round within one year of the close of the application submission period for this round is too vague and conditional in light of the GNSO Implementation Guideline recommendation. The intent was that at the beginning of the first round there would be a definite announcement of the start of the second round. *C. Gomes* (18 Nov. 2008).

Global awareness, further consultation and information availability

ICANN should organize regional and sub-regional workshops to raise the awareness of the gTLD launch. *F. Purcell, Ministry of Communications and Information Technology* (6 Nov. 2008)

Publication of a revised, more detailed schedule of events/milestones prior to application opening: with only seven or eight months to go before application opens, certainty over the pre-launch timetable would be to the advantage of many. A timeline that is regularly updated showing all the steps in the process such as when the second Draft Applicant Guidebook is due, when comment periods open and close, what events the ICANN team have planned, key events in the Communication Campaign, would be useful. *S. Metalitz (IPC, COA).*

ICANN should commit to use best efforts to raise awareness of and support solutions to the acceptance issues created by use of outdated length parameters or other erroneous formatting criteria. *RyC.*

There should be significant time between application rounds. *INTERNET COMMERCE COALITION* (15 Dec. 2008)

Issues

The community feedback in relation to the New gTLD Program communications and timeline can be categorized in 3 different levels: (1) Program language; (2) Timelines, including: four months communications period; launch; next round announcement; and (3) Global awareness, further consultation and information availability.

Program Language

Why is the New gTLD Program mainly in English? Why is ICANN not making the New gTLD program available in other languages giving an unfair advantage to English speaking applicants?

Why is the Public comment period only 45 days?

Timelines - Four Months Communications Period; Launch; Next Round Announcement

Why does ICANN not start the 4 months communications period now to prevent further delays in the timeline?

Can ICANN announce the exact date the next round of applications will start?

Global Awareness, Further Consultation and Information Availability

What will ICANN do to increase awareness from a global perspective?

Can ICANN provide a detailed timeline from now to launch, including all additional public comment periods?

Proposed Position (for this version of the Guidebook)

Program Language

ICANN has considered the development of a multilingual Program, nevertheless, it has reached a conclusion that the first application round should be in English due to the cost and time it would take to develop a truly multilingual Program. ICANN is making informational materials available in the 6 United Nations Languages (in alignment with Policy implementation guideline O). A multilingual Program is under consideration for future rounds.

Timelines - Four Months Communications Period; Launch; Next Round

The four months window between the publication of the final applicant guidebook and beginning of the application round is reflected in the GNSO in the implementation guideline E:

> "The application submission date will be at least four months after the issue of the Request for Proposal and ICANN will promote the opening of the application round."

The terminology "4 months communications campaign" has generated some misunderstandings and led to erroneous conclusions the 4 months are the only outreach activity ICANN plans on doing. ICANN communications campaign has been going on since the Policy approval with the intent to increase awareness about the New gTLD Program around the world.

The 4 months between final applicant guidebook and application round proposed by ICANN are specific activities being developed with the intent to explain in details the application process around the world. ICANN believes this step important considering the evolving process and changes of the applicant guidebook from now to final version.

The proposed timeline is under reconsideration and will depend on the resolution of the overarching issues raised by the community in response to the proposed draft applicant guidebook. ICANN staff is committed to a timely resolution of these overarching issues through further evaluation and consultations with the community and experts.

It is very important to take the time appropriate to resolve the overarching issues raised as a result of the publication of the first draft Guidebook. DNS stability, user protection and property rights cannot be deleterious way by the introduction of new TLDs. In order to do that, it is certain that ICANN will publish a third draft version of the Applicant Guidebook. That is because there will be substantial change between the second and third version of the Guidebook and that change should be made available for public comment. The requirement for a third version of the Guidebook means that the first applications cannot be taken until December 2009 at the earliest.

It is equally important to press other issues through to resolution and complete implementation work in these areas so that when the overarching issues are resolved, the new gTLD process will be robust, timely and effective. In that regard, the community will see several activities going forward while the overarching issues are addressed. For example, ICANN will continue to work to locate panels that will evaluate aspects of the applications. The time required to locate adequate resources for these tasks is uncertain.

ICANN intends to announce the timeline for the second New gTLD applicant round when the final applicant guidebook is published. At this point, ICANN cannot make a precise calculation when the second round can begin without first finalizing the retention of the panels, finalizing several of the processing steps and analyzing different potential issues regarding pending application.

Global Awareness, Further Consultation and Information Availability

ICANN is updating the calendar of global consultations and outreach activities for 2009. These activities include, for example, events specially developed for the ICANN Meetings, additional consultations with ICANN supporting organizations, participation in events with the Intellectual Property and business leaders, governments, technical community, registries and registrars, and consumer organizations.

ICANN also plans to improve the quality and availability of online information through the ICANN website.

<u>**Analysis**</u>

Program Language

ICANN received few comments regarding the fact that the new gTLD Program is mainly in English, although some informational materials have been available in 6 UN languages. The issue comes mainly from regions that are non-English speaking and the overall concern is that English speaking applicants have an unfair advantage.

The Public Comment period is only 45 days and this is not enough time for the global audiences to prepare a response.

Timelines - Four Months Communications Period; Launch; Next Round

ICANN has received comments urging the launch not to be delayed and suggesting shortening the 4 months communications campaign or starting it earlier in order to expedite the launch.

There was also strong commentary from a variety of sources voicing concern that the timeline for the launch is too aggressive considering there are many unanswered questions ICANN still needs to address and the global current economic crisis.

A few indicated that ICANN needs to announce a precise date for the second round when the information about the first round is available.

Global Awareness, Further Consultation and Information Availability

ICANN has been conducting and participating in a series of outreach and consultation activities with the community. Some of the activities to date include the Public Forum during the ICANN Cairo meeting, clarification and update meetings with the GNSO, ccNSO, GAC, RYC, and Registrars. ICANN will continue to consult with the Community to address the few overarching issues. A schedule of events will be made available to the community via ICANN website in March.

III. **APPLICATION PROCESS**

A. *APPLICATION PROCESS: GENERAL REQUIREMENTS*

Summary of Key Points

- The Guidebook will be updated to clearly indicate which parts of the application submissions will be held confidential. Essentially, answers to all financial questions and a portion of the security plan will not be published.
- The "stated purpose" of the TLD in the application will not be used directly in the evaluation but that information might be useful in resolving formal objections to applied-for strings.
- The documentation requirement for "good standing" will be made more flexible if possible to accommodate different cultures, regions, and business models.
- A limitation on communications between applicants and evaluators is intended to balance the need for the evaluators receiving complete information against the need for a finite, timely process.

Summary of Input

The proposed new gTLD process forces ICANN to be a regulatory body for the TLD allocations. Hacker suggests that proposed strings be meaningful with regards to purpose. Under Hacker's proposal, applicants would describe the purpose for the proposed gTLD and justify why the submitted TLD name is necessary in the first place. ICANN should require proposed TLDs to include a well-defined organizational definition. *Hacker* (14 Dec. 2008).

A financial sector gTLD should be implemented from a top down approach to ensure that no unsponsored gTLDs are issued, and that if issued, such gTLDs are managed within an industry and regulatory framework. *FDIC* (15 Dec. 2008).

Given the large amount of sensitive information collected in the application, this needs to be clearly defined. We recommend that ICANN only list the party placing the application and the gTLD that the party is applying for. *DHK* (15 Dec. 2008).

The full and complete application should be posted (subject to the confidentiality protections of Module 6). *Bank of America* (15 Dec. 2008); *FairWinds* (15 Dec. 2008).

What constitutes "proof of good standing," and how will start-up businesses satisfy this requirement? What happens if governments do not issue such certificates?" *C. Gomes* (18 Nov. 2008).

Why must evaluation requests be made solely through TAS? Why would only one exchange of information be permitted, and why would evaluators not be obliged to request further information or evidence if it is needed? *C. Gomes* (18 Nov. 2008).

Issues

Several comments had to do with providing justification for a TLD application. Should ICANN act as a "regulatory body for the TLD allocations" (taking the organizational structure and purpose into account in deciding which TLDs should be allocated)?

Question 1: Should ICANN take the purpose of the TLD into account when conducting the evaluation of an application?

There were a number of comments asking ICANN to disclose what sections of information would remain confidential and what would be publicly available.

Question 2: When should ICANN differentiate between confidential and public information in the AG?

Question 3: "What constitutes "proof of good standing," and how will start-up businesses satisfy this requirement? What happens if governments do not issue such certificates?" – C. Gomes

Question 4: Why is only one exchange of information allowed during each of Initial Evaluation and Extended Evaluation?

Proposed Position (for this version of the Guidebook)

Question 1: As indicated in the Analysis, ICANN has a technical mandate, not a mandate to act as a reviewer of business plans (i.e., a venture capitalist). As such, ICANN should continue to concentrate its evaluation process on the technical, operational, and financial capabilities of applicants. The stated purpose of the TLD may be taken into account as evidence in support of other areas. A TLD whose registrants are the sausage makers of Europe does not require the same infrastructure as a TLD whose registrants are the sausage eaters of Europe. Also, the purpose may become important if an applied-for string is a trademark that is also a generic word, because the purpose of the TLD may play a role in determining the outcome of an infringement of rights objection. The stated purpose will then also be used in later right ownership disputes, if they occur.

Question 2: The criteria questions in the Draft Applicant Guidebook will be clearly marked as public or confidential for the revised Draft Applicant Guidebook.

Question 3: Recognizing that practices in different regions vary and the requirement for a process that must accommodate governments, start-ups, and well-established entities, the current Guidebook attempts to be flexible regarding the requirements for good standing. ICANN is receiving seeking further guidance from KPMG, a big four accounting firm, on how to provide appropriate flexibility in defining "proof of good standing." Provided ICANN agrees with their analysis, these further details should be included.

Question 4: Based on the Analysis, the limit of one communication for Initial Evaluation and, if necessary, one communication in Extended Evaluation, should be maintained. ICANN has determined it is the proper balancing act in preventing a prolonged review process, while allowing for certain clarifications. It is believed that the questions and criteria are sufficiently straightforward so that a competent application will require no extra communications. The allowance for one communication during Initial Evaluation and one during Extended Evaluation

is meant to balance providing for complete communications and providing a certain end date to the evaluation. In addition, the communication will continue to be made through TAS only. This will provide a standard methodology that will help organize the tasks of evaluators, as well as ensure all communications and actions are captured in an historical record.

Analysis

Question 1 above asks that as ICANN acts as an evaluator of business and marketing plans, whether ICANN should place a value on the intended offerings of an applicant. ICANN has thus far refrained from focusing on these elements and instead has focused on ensuring that applicants are technically, operationally, and financially capable of running a registry. This focus is for the purpose of "preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet," which is an element of ICANN's Core Values. (http://www.icann.org/en/general/bylaws.htm#I). The stated purpose of the registry can become important for other reasons during the evaluation process. This might be the case in dispute resolution procedure where the proposed purpose of a TLD can be used to help determine if an applied-for name is a community label or might abuse a registered trademark.

ICANN primarily intends to focus on technical, operational, and financial capabilities. Additionally, the GNSO, in recommendations in its Final Report (http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm), emphasizes the technical and financial capabilities of the applicants, not the intended purpose of the string.

In regards to Question 2, the majority of the application information will be made public. The financial section and one question of the technical section will remain confidential. This will be clearly marked in the evaluation questions and criteria.

The final two questions pertain to both TAS and the evaluation period. For Question 3, the definition of "proof of good standing" should be expanded. How a newly formed entity would be able to provide this information can be discussed (i.e. proof of good standing for the individual entities that make up the new entity). The current definition was derived through discussion with outside consultants, Deloitte and Gilbert & Tobin, as part of a broader scope of work. Work will continue to determine if the current wording can be improved, taking into account the public comments. The test of good standing generally requires some form of official documentation but must make allowances for both start-up entities and well-established firms and take into account variance across different cultures and regions.

Regarding Question 4, the reasoning for only one communication is to meet the objective of establishing an efficient and predictable review process. The ideal situation is that the applicant criteria are absolutely predictable and every applicant is aware of their requirements. The reality is that because ICANN anticipates receiving applications with varying attributes, the criteria cannot be designed in absolute terms. As a result, ICANN chose to avoid creating an ongoing Q&A session where evaluators "coach" an applicant into completing an application correctly. The one communication is a compromise that reduces the bottlenecking issue that would likely exist if an ongoing dialogue was allowed to occur, but does allow for some level of rectification. The requirement to have all communications made strictly through TAS is to ensure that every action and communication is captured in an historical record.

B. *APPLICATION PROCESS: LIMITED APPLICATION PERIOD*

Summary of Key Points

- Limiting the application round is an effective way to reduce the risk of over-burdening the evaluation process but leads to issues of fairness and potential gaming.
- Therefore, it is not planned to limit applications in the first round.
- Application windows designed to reduce risk of over-burdening the evaluation process raise the same issues but evaluation windows could be used in the event that many times the anticipated number of applications are received.

Summary of Input

Some of the public comments suggested that ICANN follow a limited or phased implementation approach to the new gTLD program. For example, for the first round of the new gTLD process, one commenter suggested that ICANN impose a limit on both the number of applications it will accept and the number of new gTLDs that it will approve (e.g., no more than 100 applications evaluated on a first-come, first-served basis). *Go Daddy* (15 Dec. 2008). Another commenter suggested that ICANN start with processing 50 sponsored or community-based TLDs. *MARQUES* (15 Dec. 2008). Multiple application windows within each TLD round were also proposed as a way of providing a stable timeline and to avoid a "Big Bang effect" leading to resource bottlenecking and delays and uncertainties regarding future rounds. *W. Staub, CORE* (26 Nov. 2008).

Many other commenters suggested that ICANN phase the start of the program, including limiting the initial application period to certain types of applications (e.g., community-based, sponsored, IDN ccTLDs) and assessing some preliminary results before moving forward with a broad launch of the gTLD program.

See, e.g., Open community-based gTLDs first to speed process *PuntoGal* (13 Dec. 2008). Only community-based gTLDs with registrant verification mechanisms should be allowed before better rights protection mechanisms are developed for unrestricted gTLDs. *Rodenbaugh* (16 Dec. 2008). Prioritization system should be announced for orderly review of gTLD applications; it is more important that the application and approval process for new gTLDs be done right than be done fast. *ICA* (16 Dec. 2008) Consider scaling back to only those IDN or geographic-based gTLDs supported by a significant community demand. *U.S. COC* (15 Dec. 2008); *CSC* (15 Dec. 2008) Do a phased rollout of sponsored gTLDs and IDNs first; need to develop more safeguards before broader rollout. *ITT* (15 Dec. 2008) Reconsider and delay program pending more global demand studies, and/or scale back the launch to only "sponsored" community TLDs that have broad support from the affected community. *News Corporation* (16 Dec. 2008); Allowing a round of IDN ccTLDs first would remove bulk of current calls for expansion and allow new gTLD processes to be more thoughtfully developed. *MarkMonitor* (15 Dec. 2008); *P. Tattersfield* (15 Dec. 2008).

While studying economic justification and risks for broader gTLD program, ICANN may proceed with safe, orderly phased rollout of "fast track" country code IDNs and community/sponsored domain names provided that appropriate safeguards are in place. *AT&T* (15 Dec. 2008); *USTA* (15 Dec. 2008); *NAM* (15 Dec. 2008). Expansion of the domain name space should be limited to market differentiated, sponsored ("community-based") gTLDs. *INTA* (15 Dec. 2008). ICANN

should first focus on IDN TLDs with documented demand from users that employ non-ASCII scripts. If after the IDN TLD launch ICANN can show a strong need for more gTLDs only then should it consider them. *Time Warner* (15 Dec. 2008). Supports fast track ccTLD IDNs introduction but in general while IDNs are promising they need more study before their deployment. *INTERNET COMMERCE COALITION* (15 Dec. 2008)

Issues

The comments suggesting that ICANN first conduct a phased or limited application period for the gTLD program raise the following key questions:

1. Is there a way to fairly limit the application round and thus limit the number of new gTLDs added to the root?

2. Is there a way to divide the rounds into different windows to increase efficiency in evaluating the applications?

Proposed Position (for this version of the Guidebook)

The commenters' suggestions that ICANN conduct phased or limited application periods relates to both the issue of DNS stability – i.e., whether the DNS will scale to handle all of the new gTLDs, how many applications can be processed competently and quickly, and also the issue of fairness, in allowing a certain group to precede all others.

As stated in the DNS Stability section of this summary and analysis, the ICANN Board has requested that SSAC and RSSAC jointly conduct a study that takes into account the combined impact on the DNS of new TLDs (country code and generic), IDNs, IPv6 records, and DNSSEC. The final resolution of the key questions above regarding phased or limited application periods will be informed by the outcome of that study.

The other concern mentioned in comments related to ICANN's ability to process applications in a consistent and efficient manner. ICANN is undertaking preparations for operational readiness as the opening of the application round approaches. Best efforts will be made to ensure that sufficient resources are allocated to the program that anticipates processing several hundred applications but is modeled in a way to scale upwards quickly if necessary.

While limiting the number of applications was carefully considered as an effective way to "guarantee" program robustness, issues of fairness will inevitably arise if a first round is limited to a certain group; whatever group is given preference will enjoy a first-movers advantage. In addition, preference to a certain group may lead to "gaming" activity as applicants attempt to qualify under whatever limiting factors ICANN attempts to introduce.

In summary, there does not appear to be a way to fairly limit rounds and the efficiency gains from a smaller application pool are not a significant enough advantage to alter this position. Pending the outcome of the DNS study, at this time no change is being recommended that would establish a limited application period; the round will not be limited and any and all qualified applications would be accepted.

Analysis

Regarding question 1, ICANN concluded that there does not appear to be a way to fairly limit the number of applications in a round. A first-come, first-served process would encourage the development of automated computer scripts to apply as soon as the application period opens, rewarding those who enter the most applications or those that could write the best script. ICANN concluded that it was preferable to refrain from establishing limits that would encourage such behavior and instead consider any qualified application.

As some of the comments suggested, there are ways to limit an application round – e.g., by brand owners, IDNs, geographical names, non-controversial names, sponsored or community-based names, among others; however, limiting the round in any significant way inevitably raises issues of fairness. Whatever group is allowed to apply first will naturally have an advantage. In addition, limiting rounds to certain groups also creates potential "gaming" incentives and concerns – i.e., applicants taking all steps within their power to qualify under whatever methodology is established. A number of parties isolated IDNs as a candidate for an early application round. However, the same fairness issues exist, as well as the potential for ASCII squatting (registering an IDN TLD in an early round and then attempting to claim the ASCII equivalent in a later round).

Given the difficulty in introducing limited rounds because of fairness issues and the threat of "gaming," it makes it very difficult to justify limited rounds because of efficiency gains in evaluations.

Regarding question 2, setting up multiple application windows in a single round might create a first-movers advantage similar to what would exist in a limited application round. For the same reasons indicated for not limiting the round, application windows would not be suitable for considering different "types" of applications first or considering applications on a first come, first served basis. ICANN will take measures to allocate adequate resources to handle evaluations in a predictable and efficient manner. However, setting up "evaluation windows" might be a suitable way to address a situation where, say, ten times the number of applications anticipated are received. The evaluations might be broken into sets that are selected by lot. If there are contending applications, then all contenders would be grouped into the same set.

Background Resources: Two previous limited new gTLD rounds have been conducted (2000 - http://www.icann.org/en/tlds/app-index.htm and 2003 http://www.icann.org/en/tlds/stld-apps-19mar04/) which were used as a "proof of concept." These rounds lead to the successful addition of 13 new gTLDs into the root. Based on the success of the two "proof of concept" rounds, the GNSO developed the new gTLD Policy Development Plan (http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-28mar06.pdf) and eventually the GNSO Final Report on new gTLDs (Part A: http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm and Part B: http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-partb-01aug07.htm).

A cautious, limited expansion of the DNS was warranted to better understand the impact of additions to the root zone. Towards this purpose, an ICANN staff paper on root zone impact of new TLDs was published for public comment in February, 2008 (see http://icann.org/topics/dns-stability-draft-paper-06feb08.pdf). The paper came to the conclusion that "there is not currently any evidence to support establishing a limit to how many TLDs can be inserted in the root based on technical stability concerns." As noted above, ICANN has requested additional study of not only the impact on the DNS of new gTLDs, but also IPv6 records, DNSSEC, IDNs, and new ccTLDs. Further detail can be found in the DNS Stability – Security and Stability paper.

IV. **FINANCIAL CONSIDERATIONS**

Summary of Key Points

- Significant, thoughtful comment was received regarding the Applicant Guidebook and accompanying explanatory memorandum on Financial Considerations: including proposals of alternative models.
- Annual registry fees are reduced to a $25,000 base in the revised version of the Applicant Guidebook. The calculation of the variable fee component was simplified to 25 cents a registration.
- Recalculation of processing costs resulted in no change to the $185,000 processing fee. However, a refund mechanism is clearly defined for applicants that voluntarily exit the process.
- Handling surplus funds, if they occur, is discussed.

Summary of Input

Cost Recovery Basis-Application Evaluation Fee. Considering the fact that the new gTLD process is supposed to be implemented on a cost recovery basis, why is it that an applicant that applies for more than one string is required to pay the same evaluation fee for each application? Otherwise, this will result in applicants for multiple gTLDs subsidizing other applicants' fees. *C. Gomes* (18 Nov. 2008).

Application Evaluation Fee-Impact on Developing Nations. Paying $185,000 as an application evaluation fee may not be possible for a very large number of businesses and communities living in under-developed and developing countries. ICANN may divide the evaluation fee criteria on the basis of developed, under-developed and developing countries especially in context with a community-based gTLD. This would not only encourage more participation for new gTLDs but will also improve the end-user confidence in ICANN's regarding promoting internet resources. *N. ul Haq, Pakistan Telecommunication Authority* (14 Dec. 2008).

Brand Owner Costs-Defensive Registrations. USTA is concerned about the costs associated with the new gTLD process. They are concerned that brand owners will be forced to defensively register to protect their brands. *USTA* (15 Dec. 2008).

More Transparency Needed. Thank you for explaining the principles and high level estimation approaches that you have used to arrive at the proposed fees. It provided a good high level overview. However, in the name of transparency, I believe the internet community needs more explanation and greater visibility into the actual cost estimations and assumptions behind the application and recurring fees. This is especially important since cost recovery is the principle governing the fees. *A. Martin* (16 Dec. 2008).

Bundled Services Included in Fee Calculation. In determining the 5%, ICANN proposes to include all bundled products or services that may be offered by Registry Operator and include or are offered in conjunction with a domain name registration. This expansive definition goes well beyond any contractual terms with existing registries, and would create an unequal playing field among registry operators. *CentralNIC* (13 Dec. 2008)

<u>Refund Details</u>. Details on refunds are missing from the Applicant Guidebook, and if the community has to wait until the Final version of the Guidebook, it may be too late to comment. *K. Koubaa, Arab World Internet Institute* (8 Nov. 2008).

<u>Fee Level; Deterrence Factor</u>. The RFP presents a reasonably well-detailed case justifying the $185k Evaluation Fee. We agree that the process is unique and unprecedented, with considerable scope for unexpected costs. In our experience there will almost certainly be unanticipated complexities, therefore, we think it is prudent to have a fee that is high enough to cover these costs. On the balance we think $185k is an acceptable, one-time fee for serious applicants. We recommend that refunds only be provided in rare cases and that the amount of refund be determined on a case by case basis. *Demand Media* (17 Dec. 2008).

To deter frivolous applications, the gTLD evaluation fee should be higher for non-community-based applications (e.g., $500,000; do not allow payment by credit card); excess fees can be used to reduce the dispute resolution fee; need to clarify fees relating to dispute resolution and keep low the barriers for filing objections. *Bank of America* (15 Dec. 2008). *SIFMA* (12 Dec. 2008). *G. Kirikos* (24 Nov. 2008).

<u>Fee Structure Transparency.</u> ICANN must articulate a clear rationale for the proposed fee structure as well as a transparent mechanism, that includes community agreement, for the disposition of excess revenues, should there be any, given ICANN's status as a non-profit entity. *U.S. DOC-NTIA* (18 Dec. 2008); *CentralNIC* (13 Dec. 2008). *A. Martin* (16 Dec. 2008); *eCOM-LAC* (8 Dec. 2008); *C. Gomes* (18 Nov. 2008); *SIDN* (10 Dec. 2008) ("cost recovery" goal is not supported by high fees charged which create entry barriers and limit innovation). *J. Neuman* (26 Nov. 2008) (fee/cost recovery issues require explanation). *V. Bertola* (19 Nov. 2008). *D. Younger* (5 Dec. 2008) (cost recovery policy if used needs to be applied uniformly and subject to community consensus; ICANN overfocuses on commercial and its own revenue streams and has not addressed fee and cost concerns of needy and noncommercial applicants or needs of developing world). *Hacker* (14 Dec. 2008) (suggests changes to fee structure). *MARQUES* (15 Dec. 2008). *FairWinds* (15 Dec. 2008); *ANA* (15 Dec. 2008) (how do the fees affect existing gTLD fee structures).

Issues

There are many comments regarding financial considerations for the new gTLDs. Many comments expressed concerns about the size of the fees, while others expressed satisfaction with the underlying support and methodology for the calculation of the $185,000 evaluation fee. (Note: all $ amounts are expressed in US Dollars throughout this document.) Many comments expressed concern with the amount, the structure, and the lack of clear support for the annual registry fee. The comments can be grouped into the following issue areas:

1) <u>Fees may be too high.</u> Many comments suggested that both the $185k Evaluation Fee and the annual registry fee are too high for various reasons such as:
    - Applicants have financial hardships and can't afford the fees (e.g., some in developing nations),
    - Applicant's have a business model that is not aligned with paying such fees. (e.g., community based, not-for-profit, down-stream revenue)
    - Applicant's have applications which are believed to cost less to process than other applications (e.g., applicants who apply for more than one string).
    - Cost estimates are too high.

- Program development costs should not be included especially if already covered in budgets from prior years.
- Some comments expressed concern with the uncertainty of the amount or even the uncertainty of the possibility of further fees such as registry services review, dispute resolution, and comparative evaluation fees or thought the costs should be included in the $185k Evaluation Fee.

2) <u>Need more support for the fees.</u> Although many comments supported the $185k evaluation fee amount and the methodology used to determine the evaluation fee, some requested more information on the details of the evaluation fee development.   The annual registry fee development was frequently mentioned as not being well supported in the documents provided.

3) <u>Annual registry fee structure is problematic as described.</u>   Many comments focused on the challenges of a "% of revenue" structure for the annual registry fee and reiterated that the minimum registry fee level was problematic as well. Others commented that the structure as proposed would be a challenge to registries in the start-up phase, or community registries.

4) <u>Clarify refunds</u>. Many comments expressed the need to know the amounts and methodology of refunds available to applicants. This information was not covered in the initial cost considerations paper.

5) <u>Clarify how surplus funds will be handled</u>.   Several comments requested more clarity on how surplus funds, if any, will be handled.

<u>Analysis</u>

<u>1) Fees may be too high.</u>

As described in the cost consideration paper <u>http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf</u>, the determination of the new gTLD evaluation fee is based upon the following principles:

- The new gTLD implementation should be fully self-funding (costs should not exceed fees; existing ICANN activities regarding technical coordination of names, numbers and other identifiers should not cross-subsidize this new program).
- The new gTLD policy requires a detailed and thorough implementation process to achieve its goals; this process is inherently costly.
- Since this is a new program, it is difficult to predict costs or volumes with certainty. A detailed costing process has been employed, and costs are in line with historical precedent.
- If all cost-related estimates are accurate, there will be no net increase to ICANN's funds as a result of evaluating new gTLD applications; fees will just equal costs. After some time, there will be a careful assessment on whether the actual costs exceeded the estimates (shortfall) or whether the costs were less than estimated (surplus).   If there is a surplus, the excess funds will not be used for ICANN's general operations, but rather will be handled in accordance with community consultations.
- In addition to the one time evaluation fee, other fees will be paid directly to providers based upon the requirements of certain applications for technical issues or disputes.

- For those new gTLD applicants that are delegated a registry, annual fees will be assessed in accordance with contract terms and the overall ICANN budget process.

Although the evaluation fee, at $185k, may be burdensome for certain organizations that are considering applying for a new gTLD, the evaluation fee was developed based upon a policy of revenue-cost neutrality, conservatism, and a detailed cost estimating exercise. The impact on a specific applicant or a class of applicant, by policy, is not a factor in the development of the evaluation fee. When specifying the fee, it was also understood that new registries would require additional investment of, at a minimum, $500k in addition to the application fee to begin registry operations so that, by some measure, the fees are not an unreasonable fraction of the entire investment. It is also anticipated that with time, greater efficiency and greater certainty, evaluation fees would likely be reduced over time. It may make sense for entities to wait until subsequent TLD rounds to make an application.

Some applications may have lower processing costs than others; they may not require extended review; they may not require technical or other reviews, and they may not require much staff or consultant time to answer questions and process the evaluations. Some, such as organizations with multiple strings, may not need discrete applicant evaluations repetitively for each string. Despite all of the possible reasons a particular application may cost less than another application to evaluate, it is difficult, if not impossible, to determine which applications will require more or less resources. Applications fees are set based upon the estimated average cost of all applications based upon principles of fairness and conservatism. Singling out certain applications or types of applications as lower cost than others is contradictory to the principles of fairness and conservatism.

The GNSO policy recommendations allow for different pricing for different applications. Although the evaluation fee is proposed to be $185k in all cases, individual applicants may pay different amounts due to refunds and due to other fees. Applicants that choose to withdraw an application can pay significantly less. If an application requires dispute resolution or extra technical evaluation, the application may pay significantly more.

ICANN is a not for profit organization and is dedicated to deliver its services as efficiently as possible. ICANN is not established to grow revenue. The $185k evaluation fee is based upon the estimated costs associated with the new gTLD program. ICANN will continue to evaluate the cost estimates. If further research or adjustments to the evaluation process or cost estimating methodology changes the costs estimated to evaluate the applications, suggested changes to the pricing will be proposed.

If the actual costs for evaluating the applications end up being less than the $185k Evaluation fee, then the surplus funds will not be used as part of ICANN's general funds. Instead these funds will be distributed in accordance with consultation from the ICANN community.

2) Need more support for the fees.
As described in the cost consideration paper, the $185k evaluation fee was based on detailed analyses of specific tasks and steps needed to be performed during the evaluation. These costs will be described in additional detail in the next version of the cost considerations paper. Key questions that will be addressed include:

- What are the activities that need to be performed for each phase of the application evaluation?
- How are historical costs factored into the development costs?

- What is the impact of the assumptions used for the number of applications?

3) Annual registry fee structure is problematic as described.

The initial draft of the Applicant Guidebook posted on 24 October 2008 proposed that annual registry fees for new gTLDs would be the greater of $75k or a percentage (suggested 5%) of the registry transaction revenue. These initial fees were based upon the general terms and practices with the existing ICANN contracted gTLD registries. Although the annual registry fees are not to be based upon the direct costs to support the new gTLD program or the costs to support gTLD registries in general, the $75k fee roughly reflects the costs of a half to three quarters full time equivalent staff member or contractor.

The percentage of revenue structure suggested in the first draft of the guidebook was developed to reflect the impact of a registry on ICANN's operations. Thus a registry with large revenue streams could require more of ICANN's resources for support, and a registry with more revenue could more ably support ICANN's operations than a registry with less revenue. The five per cent number was selected based upon the range of fees paid by current gTLD registries.

Going back to ICANN's multi-year financial review in ICANN's Delhi meeting, it has been anticipated that ICANN's future fee structure will create a financial surplus when the new gTLDs are operational. Thus, it was forecasted that fees for existing registries/registrars and new registries/registrars could be reduced in future budget cycles to reduce or eliminate excess surplus. As documented in the Delhi meeting, future financial years were assumed to have fee reductions, but the specific source of that reduction was not determined (registrar, registry, other).

Many of the comments indicated that the size of the proposed new gTLD annual registry fees would, in effect, prevent diverse business models for new gTLDs, and effectively raise the question should some of the future fee reductions be recognized in the start-up phase of these new registries.

Many comments raised concerns with the percentage of revenue structure including:

- How does one determine revenue? Is it the revenue of the subsidiary running the gTLD? Is it the revenue of the entire organization? How does one adjust if unrelated business revenue is included? How does it adjust for premiums charged for other services?
- How does one verify the revenue numbers? How would audit features/rights be established?
- How does one capture revenue from auctions?

Other revenue structures were considered such as that considered in the chart below:

Fee Structure – Alternatives for Registry Fees

Structure	Description	Advantages	Disadvantages
Flat Fee	One set amount	Simple	High volume (high costs) not captureed
Tiered	Stepped fees for levels of transaction	Fairly simple	Unfair within a tier
Percentage	% of registry's revenue, net income, or other measure	Successful registries pay fair share	Revenue difficult to measure
Transactions	Fees charged for each domain contracted (transaction year)	Familiar. Similar to registrar and most registry contracts	Reporting complexity. Fluctuations not predictable.
Hybrid	Transacton fees with a minimum "floor" fee.	Could accommodate traditional and new model registries	
Age	Tiered pricing based upon years established	Allows startups to get established.	Contrary to ICANN's cost basis prcing. Is age fair measure of success
Type of gTLD	Tiered pricing based upon community or open TLD	Reflects historical trends and alliances	Fairness

Based on comments received, the criteria used to evaluate a proposed fee structure should better fit with start-up and community registry needs, encourage diversity of registries, be simpler to determine than a revenue-oriented approach, yet maintain consistency with ICANN's current agreements in terms of overall fee structures. Given that future fee reductions have been forecast by ICANN, one consideration now should be to reduce new gTLD registry fees, while assuring, in general, costs associated with them can be covered.

4) Clarify refunds, amounts and methodology.

The first draft of the new gTLD applicant guidebook, posted on 24 October 2008, mentioned that refunds of a portion of the $185k evaluation fee could be refunded in certain situations depending on the point in the process at which the withdrawal of an application is made. The draft also mentioned that details would be provided when the application process is launched.

Details of the refund amount and timing are to be posted as part of the next draft of the applicant guidebook. In general, the refunds are roughly based on the principle that all anticipated costs are on expended on an application that is withdrawn before final processing is completed. It is also designed to encourage unsuccessful or problematic applications to be withdrawn. The refunds allow an applicant to withdraw an application any time prior to completion of the evaluation. The amount of the refund will vary depending upon the stage at which the application has been evaluated.

5) Clarity on how surplus funds, if any, will be handled.

In order to comply with the principle of being fully self-funding and avoid cross-subsidy of the new gTLD program by existing ICANN registry or registrar fees, the fees for evaluation are to be segregated and to be used for the new gTLD program only. They are not for general purpose ICANN uses. This requires two important finance actions to ensure compliance with the

revenue-cost neutrality principles as well as adherence to ICANN's principles of accountability and transparency:

1) <u>Report on cost accounting.</u> There must be careful cost reporting performed that captures all relevant costs for the new gTLD program. As described in the cost evaluation paper, the $185k evaluation fee was developed based upon new gTLD development costs initially estimated at $12.8 million (and assumed to be amortized over the first several hundred applications) plus fixed and variable application evaluation costs, initially estimated at $100k per application. Each of these costs and the underlying details of the costs are to be captured and presented in an easily understood and reviewable manner.

   At some point in the future, currently thought to be in two to three years, the costs will be collected and the new gTLD application round will be deemed closed. The total costs expended will be subtracted from the total of all fees including application and evaluation fees collected by ICANN, less any refunds paid out. This net amount, if positive, will be the new gTLD application round surplus. If negative, the net amount will be the new gTLD application round deficit. If there is a deficit, future rounds will pay a portion of the fee.

2) <u>Dispose of surplus.</u> If the net amount from the new gTLD application round is a surplus, the funds will not be contributed to the general ICANN funds. Instead they will be disposed of in a manner consistent with the community's feedback and the policy recommendations. ICANN's multi-stakeholder model for decision making will be employed to ensure that all decisions regarding the underlying guiding principles, amounts, recipients, timing, and manner of disposition of surplus funds, if any, will be handled in accordance with the communities' wishes. Since the amount of any possible surplus is difficult to forecast (other than the current financial forecast of zero), it is hard to determine in advance how such a surplus should be used. Undoubtedly, this would depend in part on the magnitude of any surplus.

Proposed Position (for this version of the Guidebook)

<u>1) Fees may be too high.</u>

<u>Retain gTLD Evaluation Fee of $185k.</u>
The proposed gTLD Evaluation Fee remains $185k.   No additional cost estimates or policy decisions indicate that the fee should be altered.   However, the cost estimates will continue to be evaluated as the launch date approaches. If any significant cost estimates are altered due to more information becoming available, then the fee could be adjusted accordingly.

No discounts will be made available in this round of the new gTLDs as there is concern with gaming and possible added complexity in the first round. Discounts may be considered in future gTLD rounds.

<u>Reduce gTLD annual registry fee.</u>
Reduce gTLD annual registry fee to base amount (not minimum) to $25,000 per year ($6,250 per quarter).   For registries with 50,000 or fewer second-level registrations, no further fee would be charged. For registries with more than 50,000 registrations, the registry would pay $0.25 per transaction-year. This approach better accommodates a diversity of registry models, registries

in start-up phase, and smaller community registries, while ensuring reasonably expected future costs can be covered by the fees. Volume registries will pay total fees in line with current ICANN registry contracts.

No direct support for applicants.
As noted in the cost considerations paper (http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf) ICANN will not directly subsidize the application processing fee or other fees in the first round. ICANN will endeavor to help applicants with need to identify organizations that may be willing to sponsor or grant funds to such an applicant. A subsidy in the first round would add another layer of complexity along with other first round uncertainties. Additionally, there are potential abuses associated with subsidies that must be anticipated and protected against. These will be explored in preparation for the second round.

2) Need more support for the fees.

As described in the cost consideration paper (http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf), the $185k evaluation fee was based upon detailed analyses of specific tasks and steps needed to be performed during the evaluation. These costs will be described in more details in the next version of the cost considerations paper. Key questions that will be addressed include:

- What are the activities that need to be performed for each phase of the application evaluation?
- How are historical costs factored into the development costs?
- What is the impact of the assumptions used for the number of applications?

3) Annual registry fee structure is problematic as described.

The fee in the revised version of the Applicant guidebook is reduced and more direct. If the transactions are less than 50,000, the annual registry fee is proposed to be structured as
- a flat annual fee of $25,000 (billed at $6,250 per quarter),

If the transactions are more than 50,000, the annual registry fee is proposed to be structured as
- a flat annual fee of $25,000 (billed at $6,250 per quarter, plus
- $0.25 per transaction-year.

4) Clarify refunds, amounts and methodology.

Depending upon the stage of the application's evaluation processing, refunds for 20%, 35% or 70% of the evaluation fee will be available. Refunds will be made available to applicants whose applications do not proceed through the entire evaluation process. The amount of the refund will be generally based on an amount of the estimated evaluation costs not expected to be spent on the particular application. Any applicant can apply for a refund by submitting a request for a refund along with a request to stop processing the application. Any application that has not been successful is eligible for a 20% refund. The following table summarizes each of the refunds available.

#	Description of Refunds Available to Applicants	Percentage of Evaluation Fee	Amount of Refund	Considerations
1	After public posting of strings	70%	$130K	Applicants who perceive themselves to face considerable contention or dispute can withdraw at this point. Collect some fee from all applicants to avoid frivolous applications, and cover possible future risks of all applications.
2	After initial evaluation	35%	$65k	Applicant has failed initial evaluation or has the same considerations as above, and recognizing some significant amount of costs have already been expended.
3	After any later phase of evaluation	20%	$37k	Applicants who fail extended evaluation or lose may exit at this point without having spent the entire processing fee.

5) Clarity on how surplus funds, if any, will be handled.

1) Report on cost accounting: When the new gTLD round is deemed as closed, as well as periodically throughout the first-round process, all costs will be captured and reported on in a detailed and readily accessible manner. The total costs will be compared to the total fees collected, less any refunds and a report of the deficit or surplus will be posted. The report will be available for the community and will be reviewed by an independent accounting firm. (While most costs will be apparent at the "end" of the round, the full realization of risk costs may take up to three years. An estimated final cost will accompany each report.)

2) Use of surplus, if any: A process will be developed and implemented to engage the community in the disposition of the surplus, if any. This will include likely recipients of the funds as well as clarity on the principles (e.g., application of funds against future rounds), amounts, timing, and manner of disposition of the surplus funds, if any.

Appendix: Additional Comments on Financial Considerations

High Cost of Fees

Impact on non-profit groups, smaller entities, developing nations. They are also concerned that the proposed (US) $75,000 registry annual fee is too high for a not-for-profit community registry: "Our proposal would be that community TLDs pay a small percentage of their annual surplus/profit to ICANN – up to a maximum ceiling of (US) $10,000 per year. Should a community TLD be taken up in large volumes (on a par with strings such as BIZ) then there may be a case for a revision of the annual fee beyond the (US) $10,000. *dotSCO* (15 Dec. 2008); *dotCYM* (15 Dec. 2008) (fees too high for community bids and fail to address possible bilingual

requirements). *PuntoGal* (13 Dec. 2008). *J. Evans* (12 Dec. 2008). *NIC Mexico* (9 Dec. 2008)*.* *NCUC* (15 Dec. 2008) (fees too high)*. M. O'Connor* (14 Dec. 2008) *Lovells* (15 Dec. 2008).

ICANN should look at impact of high fees and other financial requirements on cities. *Connecting.nyc* (15 Dec. 2008). ICANN should consider charging lower fees for smaller registries. *Anonymous.*

Should the fee requirements apply to all types of entities (for-profit and non-profit)? *Y.E. Shazly* (2 Dec. 2008).

There should be reduced fees for non-profits and associations. An association or non-profit prevailing on an objection should be reimbursed its objection costs and attorneys' fees. *ASAE* (10 Dec. 2008) ICANN should clarify whether there is an application fee waiver for humanitarian corporations. *R. Romano* (7 Dec. 2008); *N. ul Haq* (14 Dec. 2008) (adjust fees downward for developing world).

Uses of Fee Money; Flexibility. The new gTLD fees are too high (e.g. annual and application), and ICANN must state how it intends to use the annual fees to protect the stability of the Internet. *RC* (15 Dec. 2008). *MarkMonitor* (15 Dec. 15 2008) (fees are high, should be adjusted for particular circumstances). *Smartcall* (4 Dec. 2008) (allow some flexibility in operation of the application fee to allow entities more opportunity to obtain gTLD). *Arab Team* (15 Dec. 2008). *Lovells* (15 Dec. 2008).

Cost Recovery Justification Needed. Considering the fact that the new gTLD process is supposed to be implemented on a cost recovery basis, why is it that an applicant that applies for more than one string is required to pay the same evaluation fee for each application? It is clear that evaluation of the string itself is going to result in some costs but presumably most of the rest of the application would be identical and require no additional costs at all. It certainly seems reasonable that all applicants pay a proportional share of general evaluation costs to the extent that their applications are mostly unique and it is understandable that it might be impractical to have a different application fee for every applicant, but it would be relatively easy to determine portions of the application fee that could be deducted in cases where no new evaluation activity would be required. Otherwise, this will result in applicants for multiple gTLDs subsidizing other applicants' fees. *C. Gomes* (18 Nov. 2008).

Microsoft (Guidebook comments,15 Dec. 2008) (ICANN should not seek to recover from applicant fees funds to cover new gTLD program developments costs (reported $12.8 MM); an escrow system should be used for $60K of the application fee and drawn against, with potential for some refunds; in general excess funds should be refunded to applicants).

Application Evaluation Fee-Annual Fee Impact. On Application fees, "the proposed ICANN fees serve as a significant deterrent to corporations considering whether to apply for a new TLD for their brand. Specifically, the recurring annual fee (the greater of $75,000, or 5% of the registry transaction revenue) is high, in the light of the probability that corporate owned TLDs may not have large numbers of second level registrations, thereby causing the per domain fee to be significantly higher than currently charged by ICANN." *MarkMonitor* (15 Dec. 2008).

Application Evaluation Fee-Economic Impact. Paying $185,000 as an application evaluation fee may not be possible for a very large number of businesses and communities living in under-developed and developing countries. ICANN may divide the evaluation fee criteria on the basis of developed, under-developed and developing countries especially in context with a

community-based gTLD. This would not only encourage more participation for new gTLDs but will also improve the end-user confidence in ICANN's regarding promoting internet resources. *N. ul Haq, Pakistan Telecommunication Authority* (14 Dec. 2008).

ICANN should announce in advance if any adult extensions will be permitted, without requiring applicant to pay $185,000 to find out. *WMI* (13 Dec. 2008). Why not define a fee based on an envelope of domain names which makes it possible for smaller gTLDs to stay in good shape and offer stable and functional services? *ISOC.*

A project to serve a mono-lingual demographic is inherently cheaper under ICANN's draft rules, than a project to serve a multi-lingual demographic. Registry applicants should be permitted to apply for transliterations in IDNs without additional costs. *E. Brunner-Williams. ANA* (15 Dec. 2008) (how do the fees affect existing gTLD fee structures). ICANN should clarify if there is only one $100 registration fee for each application. *INTA* (15 Dec. 2008). *Grainger* (15 Dec. 2008) (the workings of the $100 fee for accessing the application system must be clarified).

Fee Impact on Community-Based Applicants. There are concerns that $185,000 for the application fee is too high for community/city TLD applicants. Closer to (US) $50,000 would be welcome. *dotSCO* (15 Dec. 2008). See also *NIC Mexico* (9 Dec. 2008). *NCUC* (15 Dec. 2008). *dotCYM* (15 Dec. 2008). *Lovells* (15 Dec. 2008). *Anonymous.*

They are also concerned that the proposed (US) $75,000 registry annual fee is too high for a not-for-profit community registry.

Our proposal would be that community TLDs pay a small percentage of their annual surplus/profit to ICANN – up to a maximum ceiling of (US) $10,000 per year. Should a community TLD be taken up in large volumes (on a par with strings such as BIZ) then there may be a case for a revision of the annual fee beyond the (US) $10,000. *dotSCO* (15 Dec. 2008).

Comment: community-based cityTLDs should pay application fees not more that $ 50,000 and not more than $ 10,000 minimum annual fees. *dotberlin* (4 Dec. 2008).

We recognize that the application process to ICANN should be cost based, and that registrars should be contributing annually to ICANN's ongoing costs. However, the purpose of opening up the GTLD space should be to encourage a range of new TLDs that meet a range of community as well as corporate requirements. The initial application fee of $185,000 plus the annual fee of $75,000 may be far too high for legitimate, smaller communities (or communities of interest) who would otherwise benefit from their own TLD. ICANN should give consideration on how those community interests could be addressed, either through a discount of those fees or a special grants program for such communities. *ISOC-AU.*

Excessive Fee Impact-Proposed String: Fee Imposition Requiring Applicants to pay an $185,000 fee for multiple transliterations of a proposed string is unconscionable. Allowing a second entity to secure the rights to a transliteration of a string is contrary to the confusingly similar aspect of the Guidebook. Allowing applicants to have the ASCII string and IDN translations would permit applicants to offer users a full package of services, and promote the stability of the internet. *R. Andruff.*

The $185,000 application fee should permit application for more than one string (up to five in order of preference). In the alternative, if 1 string is limited per application, then unsuccessful

applicants should be given the option of participating in the second round without submitting a new application fee. *Smartcall* (4 Dec. 2008).

ICANN may consider allowing applicants to apply for up to x (x being a reasonable number like 5 for example) gTLD strings with one application with a mandate to reduce it to one after string contention check. ICANN may charge a "change fee". ICANN may charge "change fee" if such action leads to extra work for ICANN and to discourage frivolous changes. *I. Vachovsky* (16 Nov. 2008).

Multiple fees should not be charged for applications that are basically for one string (e.g. Milano and Milan; fee should not be more than $50K) *.koln* (15 Dec. 2008).

Brand Owner Costs-Defensive Registrations. USTA is concerned about the costs associated with the new gTLD process. They are concerned that brand owners will be forced to defensively register to protect their brands. *USTA* (15 Dec. 2008). Corporations are concerned about the high application fee of $185,000 and the $75,000 annual fee, when they are registered names purely for brand protection purposes-there is also a high cost for those wanting to apply for their brand in multiple languages or for multiple brands in the same industry sector (e.g. brands of cars). *Melbourne IT* (15 Dec. 2008). The $75,000 annual fee is too high for most brand owners to consider defensive registrations of TLDs, but possible for a large trade union and its membership. *E. Brunner-Williams.*

Closed gTLDs-Lower Fees/Economies of Scale. Reduce the annual fee for a "closed" gTLD for when a trademarked name has been approved, but not yet requested to be in the DNS - e.g. small holding fee $5000 per year - allow a lower application fee for a "closed" gTLD where the applicant has a trademark on the gTLD string, as costs for reviewing and risk is likely lower. Recommend $90,000 for "closed" gTLDs - offer a variable annual fee based on the number of approved applicants. E.g. $75,000 per year if less that 100 new gTLDs, $50,000 per year (100-200), $40,000 (200-500), $30,000 (greater than 500). This is because ICANN will obtain economies of scale with more gTLDs, and the costs of managing compliance for "closed" gTLDs will be lower (as there are no third party registrations at the second level). For "closed" gTLDs - for applicants that apply for multiple names that are trademarks for the same legal entity (e.g. product names), provide a 10% discount on application and annual fees for each additional name, up to a maximum of 50% of all fees. This can be justified as ICANN staff can have a single interface with the applicant for multiple names, and the cost of reviewing multiple applications will be lower as most of the content of each application will be the same except for the string being applied for. - allow a discount for multiple applications for names that have the same meaning in different languages (e.g. travel in Arabic or Chinese). *Melbourne IT* (15 Dec. 2008).

Single enterprise gTLDs. ICANN should adopt a tiered structure for the application, registry and annual fees, and discount fees equitably for single enterprise gTLDs ("seTLD"). Some of the fees have not been justified and seem excessive. Fees should be steeply discounted for multiple applications filed by the same seTLD application; the annual "tax" fee has not been justified and should be heavily discounted for seTLDs due to their narrow use of the registry compared with open, unrestricted gTLD registries (e.g., the .museum registries fee levels seem appropriate). *Client B* (15 Dec. 2008).

The $185,000 application fee outlined in the Applicant Guidebook is too high. Particularly with regard to transliteration i.e. paying the same fee over again for an approved TLD in a different language. (RA)

The $75,000 annual registry fee outlined in the Applicant Guidebook is too high (MF, DK, R1, SR, RA, AP, MB, JB, AM, IA, TH)

The $75,000 annual registry fee: It may have the effect of restricting applicants (MF, DK, R1, SR, AP, IA)

The $75,000 annual registry fee: the costs will be passed onto consumers (RA, AM, TH)

The $75,000 annual registry fee: does not account for smaller communities (SR, JB)

If a new registry makes under $1million it should be waived the annual fees (MF)

Allow non-profits to pay a percentage of the annual registry fee for the first two years of running a new gTLD (TH)
(*See Cairo Participation Key)*

Need Support for Evaluation Fee

Evaluation Fee Does Not Ensure Fair Consideration. Applicants are required to acknowledge that the initial fee of $185,000 is paid only "to obtain consideration" of an application. Applicants are not entitled to expect that the $185,000 fee will buy them even reasoned or fair consideration. *RyC* (6 Dec. 2008).

Transparency; Estimated First Round Applications. ICANN should provide more transparency in how it arrived at the cost estimates and fees in the new gTLD process, as well as its estimates for number of expected applications in the first round. He also recommends that ICANN be consistent in its terminology on "phases", "steps," and "tasks". *A. Martin* (16 Dec. 2008). Thank you for explaining the principles and high level estimation approaches that you have used to arrive at the proposed fees. It provided a good high level overview. However, in the name of transparency, I believe the internet community *needs more explanation and greater visibility into the actual cost estimations and assumptions* behind the *application and recurring fees*. This is especially important since cost recovery is the principle governing the fees and fairness and transparency seem to be higher priorities than cost-minimization. *A. Martin* (16 Dec. 2008)*.

Fees need to be reflective of ICANN's true costs. *NeuStar* (15 Dec. 2008).

Expected quantity of applications: Because your cost model depends significantly on this number, can you describe in detail your data points and sources for your 500 applications estimation, especially the "report   from a consulting economist" There is some inconsistency and I am slightly confused with your use of the terminology of "phases," "steps," and "tasks." (See Pg 8, "Expected value is determined by estimating the likelihood that each of the 75 steps will actually be executed for the pool of applications, then multiplying that likelihood times the cost.").This leads me to the question: at which of these levels (either phases, steps, or tasks) do you assume and assign probabilities that the application would pass through. For example, did you assume 80% of applications would pass through the Initial Evaluation step, or did you get more granular and assign probabilities at the task level where appropriate? Can you provide the internet community with the full list of tasks, as well as your assumptions with regard to what probabilities you assigned to each task, which you consider predictable? How are efficiencies factored into the accounting of individual tasks or steps? Presumably certain steps would not take the fully estimated time if repeated for all 500 applicants or done in batches? Please

explain. At what points in the application process (and which individual tasks) are you using consultants whose hourly rates are presumably more expensive than those of internal staff? *A. Martin* (16 Dec. 2008).

Cost Basis for Single Company gTLD Registry. This reasoning does not apply to company registries without registrar model, the Charles River Model I, as the TLD operator can define the cost of a registration to be zero, rendering percentages ineffective. However, it also seems inappropriate to have higher charges for large number of second level entries as they will not cause additional work for ICANN. To prevent applicants that wish to copy the .com model from applying for this category, restrictions must be defined. Category C domains have to be registered for free and services associated with C domains may not generate revenue for anyone except the operator. I would like to reiterate our offer of support in working on this important question by whatever means you consider helpful. We can think of no more important part of the guidebook to get correct than this, as without the .org revenue, or the NANPA revenue, the unrestricted "stars" of the 2000 new gTLD round would be economic failures, *M. Faure*, *CORE.*

Cost Basis-Evaluation Fee: The fees associated with the proposed TLD submission process seem to be the least coherent portion, yet this proposal section has the most justification. The initial submission fee of $185,000 is one example of the incoherency. The fee is intended to go toward ICANN's operational costs. However, the proposal does not identify which operational costs are currently covered. Are salaries, services, and base overhead currently not being funded? *Hacker* (14 Dec. 2008).

ICANN should provide more details on the costs and fees associated with each type of Extended Application described in 2.2. *NICMexico* (9 Dec. 2008).

ICANN needs to be more specific regarding its fee structure. *BITS.*

Need Support for Annual Registry Fee

Equitable Issues. Why should the new gTLDs pay $75,000 during their start up periods when the following existing TLDs all pay $10,000 or less -- .cat, .jobs, .coop. aero, .museum, and .travel? *CentralNIC* (13 Dec. 2008). What is the basis for the fee of the greater of 5% of transaction revenue or $75,000? Please provide more explanation and detail regarding the principle of having this fee be the same across all new TLDs. Is this to cover only variable costs? How many TLD are assumed to be designated (how many applications make it through the entire process? What type of services are you assuming you will provide? Do you assume you will provide the same level of service that will require same amount of staff labor or technical investment for each type of TLD? Won't some, for example corporate trademark TLDs used for internal purposes, require significantly less work on the part of ICANN? *A. Martin* (16 Dec. 2008). The annual fee is too high (should not be more than $25K). *.koln* (15 Dec. 2008).

Cost Recovery Analysis.   ICANN states that the application fees are calculated on cost recovery only. The 500 applications that ICANN itself estimates to be submitted in the first round, at $185k per application, will mean a $ 95M revenue for ICANN. This roughly equals 1000-1500 man years of work (or 300 to 500 man years when consultants are used). First of all, it seems unrealistic to assume that all preparatory work done so far, together with the manpower necessary to evaluate the five hundred applications will take 100 persons ten years, so the goal of "cost recovery only" does not seem to be supported by fees charged. *SIDN* (10

Dec. 2008). *Microsoft* (Guidebook comments, 15 Dec. 2008) (ICANN has not justified the annual $75K registry "tax" fee).

Fee Structure – Annual Registry Fee

Unequal Impact. In determining the 5%, ICANN proposes to include "all bundled products or services that may be offered by Registry Operator and include or are offered in conjunction with a domain name registration." This expansive definition goes well beyond any contractual terms with existing registries, and would create an unequal playing field among registry operators. *CentralNIC* (13 Dec. 2008).

ICANN should consider charging lower fees for smaller registries, and should consider a maximum fee in the event that the variable component results in an unexpected windfall to ICANN. In any event, the Guidebook should be revised to clarify that the 5% threshold does not apply to non-domain related registration services or revenue. *MarkMonitor* (15 Dec. 2008).

Clarifications Needed-Cost Recovery and Revenue. Section 6.1 states that the average price of registrations "include all bundled products or services that may be offered by Registry Operator and include or are offered in conjunction with a domain name registration". 1. Please explain exactly what was meant by ICANN in this statement. 2. Please explain how this relates to ICANN collecting fees from registries as a "cost recovery" mechanism which was cited as the purpose of collecting fees. 3. Please explain how this relates to ICANN as a non-profit organization as opposed to a for-profit revenue sharing arrangement. 4. Please explain why ICANN is not protected with a minimum as it relates to cost recovery. In other words, in most for-profit commercial arrangements, there is EITHER a minimum OR a rev share but not both. It appears that ICANN wants to have "it's cake and eat it too." 5. How does this comport with the GAO study on ICANN several years back which talked about ICANN's cost recovery mechanism as opposed to taxation on income? *eECOM-LAC.*

The GNSO policy on new gTLDs recommends that ICANN take a consistent approach to registry fees, but in no way mandates that ICANN impose a one-size-fits-all model. Registry operators strongly reject this model. The proposed mechanism seems to abandon any cost-recovery obligations and, in the end, amounts to a revenue share. *RyC* (6 Dec. 2008).

In addition, ICANN has also not shown why it deserves five percent of any fees generated by services that may be completely unrelated to the domain name registration other than perhaps that they are offered as part of a package. *Neustar* (15 Dec. 2008).

Registry Pricing. Pricing is not a stability or security issue and thus not within the bounds of the picket fence. It is a matter on which each registry is free to agree via contract, but it is not an appropriate matter for Consensus Policy. To the extent registry fees depend upon pricing by registries, there is no justification for calculating such prices on the basis of all bundled products or services. *RyC* (6 Dec. 2008).

Fees, as Proposed, are Reasonable

On the Application fee, Demand Media finds it to be an acceptable, one-time fee for serious applicants. They note that ICANN should spend surplus fees in a way that promotes and assists new gTLDs and reductions in fees for new gTLDs. The RFP presents a reasonably well-detailed case justifying the $185k Evaluation Fee. We agree that the process is unique and unprecedented, with considerable scope for unexpected costs. In our experience there will

almost certainly be unanticipated complexities, therefore, we think it is prudent to have a fee that is high enough to cover these costs. On the balance we think $185k is an acceptable, one-time fee for serious applicants. *Demand Media* (17 Dec. 2008).

Clarify Refunds—Amounts and Methodology

Refund Details Needed. Confirming and publishing a complete table of fees including details of refunds as soon as possible *IPC, COA.* Will a refund will be granted if ICANN determines that an applied for string is too similar to a Reserved TLD String [or an existing TLD]. In addition, she asks if it is possible to get a pre-application determination from ICANN on whether a proposed string would be too similar to a Reserved TLD string. *F. Hammersley* (24 Nov. 2008).

Details on refunds are missing from the Applicant Guidebook, and if the community has to wait until the Final version of the Guidebook, it may be too late to comment. *K. Koubaa, Arab World Internet Institute* (8 Nov. 2008).

The statement that refunds may be available to applicants who withdraw at certain stages of the process is too vague. A specific refund policy with guidelines that applicants can be aware of up front would be a very good idea. *C. Gomes* (18 Nov. 2008). ICANN should provide specifics of the refund policy in the next round of RFPs. C*entralNIC* (13 Nov. 2008).

Competing Applications; Withdrawals. If multiple applicants apply for the same gTLD .example, obviously only one applicant can be awarded with the gTLD. Will the other applicants receive a refund or a partial refund or be able to use the application fee to apply for an alternate or different gTLD? *B. Gilbert.*

It is desirable for all parties that an application facing opposition or contention can be withdrawn as gracefully as possible. To achieve this, applicants must be able to apply in a context where the possibility of withdrawal is a reasonable option. They must also be able to withdraw without losing face and without a substantial monetary loss. Negotiations between contenders should be encouraged, and their outcome should not be affected by the financial burden of a failed application. Finally, ICANN should facilitate withdrawal before any money has been spent on evaluation or objections. Full proposal made. *W. Staub, CORE.*

Refund Policy and Speculative Filings. We understand the motivation for those who want the RFP to provide an explicit promise of partial refund, or some form of graceful withdrawal period. In practice, however, any commitment by ICANN of this nature will cause ICANN to be inundated with a very large number of speculative proposals. We recommend that refunds only be provided in rare cases and that the amount of refund be determined on a case by case basis. *Demand Media* (15 Dec. 2008). The Guidebook states that, "ICANN reserves the right to reject any application that ICANN is prohibited from considering for a gTLD under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant." CADNA believes that the application fee itself, if nonrefundable, can deter attempts to register frivolous TLDs. *CADNA* (15 Dec. 2008).

Under 1.5.5, refunds should not be available. Applications for a new gTLD are a serious matter, and shouldn't be a game of trial and error, with refunds if unsuccessful. Section 3's refund policy is very unclear, and in particular seems to leave the door open for full refunds in all cases of refusal. It must be made clear that full refunds should not be the norm by tweaking the language. *G. Kirikos* (24 Nov. 2008).

Clarity on how surplus funds, if any, will be handled.
Articulate a clear rationale for the proposed fee structure as well as a transparent mechanism, that includes community agreement, for the disposition of excess revenues, should there be any, given ICANN's status as a non-profit entity. *US DOC-NTIA* (18 Dec. 2008). Is that already decided that ICANN is going to spend it or can it eventually be used to reduce registration fees for detailed deregistrants in general? *G. Kirikos* (24 Nov. 2008).

Evaluation Process – Financial considerations
Under 1.2.3 (5), Demand Media asks for clarification on funding of on-going operations in the event of registry failure. *Demand Media* (17 Dec. 2008).

Other Fees

Please specify if there are any additional costs after passing initial evaluation and clearing all objections (if any), prior to the TLD been added to the root zone. *NIC Mexico* (9 Dec. 2008).

RSTEP Review Fee. What is the basis for a $50,000 RSTEP review fee? What criteria will be applied to determine whether an applicant will be required to pay additional fees and when will these fees need to be paid? An excessive fee for new registry services will discourage innovation and competition in providing services for registrants, users and the community as a whole. *C. Gomes* (18 Nov. 2008).

The RSEP process supports ICANN's core functions, and should be treated as an integral part of ICANN's operations, and not as an adjunct, pay-as-you-go service. It imposes a fee on innovation, creates a free-rider problem, and to the extent that registries with limited resources (i.e., smaller, community based registries) are the source of innovation, it reduces the likelihood that the community will enjoy the benefit of such innovation. Why do the Registry Operators have to pay for the RSTEP process under the new agreement? *RyC* (6 Dec. 2008).

Will an extended review by the RSTEP entail an additional fee? Is it possible that the RSTEP might not be able to respond in a timely manner? If so, how would applications be prioritized and how would communications with affected applicants occur? *C. Gomes* (18 Nov. 2008).

Extended Evaluations. Why are requests for extended evaluations only allowed in four circumstances? What if ICANN gave applicants the option of extended evaluations in other areas at their expense? *C. Gomes* (18 Nov. 2008).

The objection filing fee. I find it morally wrong to even suggest an objection filing fee. I am of course talking about the rights of those that haven't got the money. Are ICANN telling them that they don't have any rights. Remember that they didn't ask for there rights to be violated. If anything. This fee should be funded by the evaluation fee. If you do not take this into account. Then I'm afraid that you are going see a lot of, later one, lawsuits. A. *Rosenkrans Birkedal* (10 Nov. 2008)*.* Per the draft, in situations where an objector files a protest, both the objector and the applicant must pay a fee to cover the costs of resolution (i.e. "Objection Filing Fees"). Once ICANN resolves the objection, ICANN will refund the fees of the successful party paid. We suggest ICANN clarify how it will handle the requirements for filing fees in situations wherein it consolidates two or more objections. It is not clear if each objector must pay a full fee or if ICANN will divide the Objection Filing Fee equally between the each "consolidated" objector. *BITS.* Requiring the applicant to pay a fee every time a response is filed seems excessive and also could be administratively challenging in terms of paying and collecting fees. Will dispute fees be reduced when objections are consolidated? *C. Gomes* (18 Nov. 2008).

The total sum of the fees should cover all forms of the conflict resolution. Individuals wishing to voice opposition to a TLD should not be required to submit any fees. What is the fee for extended review? (If it's not decided yet, why not, and when will that be decided)? *Anonymous***.** ICANN should consider small economies when the dispute fees are finalized. *F. Purcell* (6 Nov. 2008).

Processing of Fees

We do not believe a six figure Evaluation Fee should be payable by credit card. A serious applicant will have the funds on hand to make this payment. *Smartcall* (4 Dec 2008). It is ridiculous that ICANN would even consider payments by credit cards to be acceptable, given the ability of people to do chargebacks months after a transaction. Only irrevocable forms of payments should be allowed, namely wire transfers. *G. Kirikos* (24

V. DNS SECURITY AND STABILITY

Summary of Key Points

- Consideration of issues where the introduction of new TLDs might affect DNS stability and security should continue to be studied.
- This is especially true given the near coincident introduction of new gTLDs, IDNs, DNSSEC and IPv6.
- Strongly associated with these issues to be studied are security-oriented concerns that the introduction of new TLDs will lead to increased instances of malicious behavior.

Summary of Input

Public comments emphasized that ICANN must ensure that introducing a potentially large number of new gTLDs, including internationalized TLDs, will not jeopardize domain name system (DNS) stability and security. They urged that ICANN must assess threats to the DNS from the new gTLD rollout, and also must consider the potential in the future for events such as destabilizing registry failures. Some commenters suggested that ICANN conduct research on DNS stability issues before start of the first gTLD application round. A number of commenters urged ICANN not to move forward with the new gTLD program because of threats to DNS stability and security, and warned that the new program will create a new wave of malicious activity, including spam and phishing.

See *U.S. DOC-NTIA* (18 Dec. 2008) (ICANN must ensure that introducing a potentially large number of new gTLDs, including internationalized TLDs, will not jeopardize DNS stability and security). *ITT* (15 Dec. 2008). *G. Kirikos* (24 Nov. 2008). *Bank of America* (15 Dec. 2008). *P. Tattersfield* (15 Dec. 2008). *SIIA* (15 Dec. 2008). *FairWinds* (15 Dec. 2008). *AT&T* (15 Dec. 2008) (ICANN must assess threats to the DNS from new gTLD rollout and, at a later stage, how it will deal with registry failures). *SIDN* (10 Dec. 2008) (do research on stability issues before start of first application round). *R. Fernandez* (16 Dec. 2008) (ICANN should reject agreement; it removes all certainty and assurance for registrants). *WMI* (13 Dec. 2008). *NAM* (15 Dec. 2008). *SIFMA* (12 Dec. 2008). *Contessa* (11 Dec. 2008). *Microsoft* (Guidebook comments 15 Dec. 2008) (opposes new gTLD introduction, likely to threaten DNS security and stability). *Arab Team* (15 Dec. 2008) (not enough focus on stability and impact on other countries and communities).   *L. Parsons* (29 Oct. 2009) (opposes because will increase phishing and confusion); *R. Robertson* (4 Dec. 2008); *D. Buzzard* (31 Oct. 2008).

Issues

The comments addressing DNS stability break down into two main questions:

Scaling: What are the technical scaling issues associated with new TLDs?

- How can ICANN demonstrate confidence that the name system (root servers, resolvers) will scale to handle new TLDs?
- How large can the root zone be?

Security Impact: Will security-oriented abuses of the DNS systematically increase with an increased number of TLDs and a new set of registry participants?

- With evident problems in misuses of the existing DNS (squatting, pharming, phishing, malware), will increasing the number of TLDs significantly increase these misuses?
- Has adequate thought been given to the requirements and behavior for new TLD operators?

Proposed Position & Analysis (for this version of the Guidebook)

Scaling

Proposed Position: The ICANN Board has requested the SSAC and RSSAC to jointly conduct a study analyzing the combined impact to security and stability within the DNS root server system of the proposed implementation of new TLDs (both country code and generic), IDNs, IPv6 records in the root zone, and DNSSEC. The analysis is expected to address the implications of initial implementation of these changes occurring during a short time period. ICANN must ensure that potential changes in the technical management of the root zone and scope of activity at the TLD level within the DNS will not pose significant risks to the security and stability of the system. The study is also expected to address the capacity of the root server system to address a stressing range of technical challenges and operational demands that might emerge as part of the implementation of proposed changes.

Analysis: The public comments' concern about the impact of new gTLDs on the root zone and whether this issue has been studied adequately has been raised against the backdrop of other recent and planned changes to the DNS, all in roughly the same time frame, including: the recent addition (in December 2007) of IPv6 records for authoritative root servers to the root zone, and the planned addition of DNSSEC, IDNs, and new country code TLDs. While a new gTLD issues paper discussed scaling the root zone, to provide adequate confidence in the technical support for scalability, the simultaneous impact of all of these changes should be considered.

Background resources: In addition to the new gTLD issues paper, the following provides background on ICANN's efforts to understand the potential security and stability impacts of these changes individually:

The RSSAC and SSAC jointly issued an analysis of adding IPv6 records for the authoritative root servers in 2007 (see http://www.icann.org/committees/security/sac018.pdf and IANA's report at http://www.iana.org/reports/2008/root-aaaa-announcement.html). The addition of IDNs to the root has been the subject of significant advance planning, and an extended real-world testbed (see for example SSAC's report at http://www.icann.org/committees/security/sac020.pdf, and IANA's report at http://www.iana.org/reports/2007/testetal-report-01aug2007.html). DNSSEC has benefited from extensive root zone test bed experience and been extensively analyzed though not specifically for the all the events proposed to occur in the root zone (see for example http://www.net.informatik.tu-muenchen.de/~anja/feldmann/papers/dnssec05.pdf, and the RSTEP report on PIR's DNSSEC implementation at http://www.icann.org/registries/rsep/rstep-report-pir-dnssec-04jun08.pdf.). Finally, an ICANN staff paper on root zone impact of new TLDs was published for public comment in February, 2008 (see http://icann.org/topics/dns-stability-draft-paper-06feb08.pdf).

Security Impact

Proposed Position: Further comments on the issue of security impact are expected.
Many public commenters clearly feel more work is needed on security and particular issues
relating to it, including implementation of registrant protection and avoiding end user confusion.
These questions should be explored further. For example, are there implementable, practical
mechanisms to avoid the need for purely defensive registrations? Can registry or registrar
mechanisms be put in place to make new gTLDs desirable from both a confusion and protection
viewpoint? While there is always opportunity for more study, the concern regarding security
abuses scaling with more TLDs is ultimately better dealt with through pragmatic implementation
approaches than a set of predictions around which many would disagree in any event. ICANN
staff will be actively soliciting feedback on these topics over the next 60 days, and share with
the community options for improvements in these areas in the next several months.

ICANN staff believes that the concerns about security impact are being reasonably assessed in
the currently proposed study and are consistent with GNSO policy recommendations and
principles and also with ICANN's mission to ensure DNS stability and security. That study will
solicit the opinion of the broad DNS technical community. Wide consideration has been taken of
a broad range of issues, including: intentional and unintentional confusion at the TLD level;
balancing introduction of new business models with compliance mechanisms and assurances of
ongoing business stability of new registries; and the intent to create choice and competition. The
new gTLD policy development process is focusing on how policies could be implemented that
would minimize confusion to end-users, and costly defense to brand holders.

Analysis: The public comments have shown that there are a variety of security-oriented
concerns that could be associated with new TLDs. These include:

- Potential confusion of new TLDs with existing, or other new TLDs, either in Latin script or
  in IDNs. This has been a major focus of the policy development behind both new TLDs
  in general, and IDNs specifically. Many elements of the implementation plan are
  designed to specifically address this issue. For example, there are two "stops" in
  application evaluation process to test that applied for string might result in user
  confusion due to their similarity with existing or other applied-for strings. There is also a
  stop to test whether an applied for string might infringe on a trademarked label or
  inappropriately appropriate a community label. New TLDs for communities, brand
  holders, industry associations, online communities and unique applications will all be
  evaluated within an environment intended to be more structured, more predictable, and
  more protected than today's second-level registrations.

- Possible misbehavior of new registries– through inexperience or other causes. The
  guidebook criteria for new registry operators are intended to address some of this
  concern. New registries are asked to complete sections on business and technical
  capabilities, and there is a particular focus placed on the ongoing continuity of the
  registry (both in terms of ongoing operations, and in the worst case, continuing to run for
  a period when business models fail).

- Confusion at the second level. That is, expanding the number of TLDs will expand the
  number of locales at which abusers of the system could register second-level names
  intended to dupe end-users. For entities facing both direct cost and possible indirect cost
  in loss of confidence in a name or brand, this is a pressing matter. Some have studied
  the costs of brand protection at the second-level. While there is not complete agreement

on the data, the general point is unarguable. There is a substantial amount of resource spent by brand holders and others defending look-alike second level names. While there are no studies to show this would expand with an expanded namespace, it is an important concern.

There have been suggestions that new TLDs would actually aid brand identity, for example see this article proposing new thinking for global branding on the Internet. Many Internet users already pay close attention to the TLD, and look first to it – not the second level name – as the indicator of site validity. A user in France might well first look at .fr sites for those providing most local and linguistic relevance. In a world where there are many generic TLDs, the carefully-protected and rationally-considered TLD suffix could become more relevant than the second-level name for users, leading to less confusion, and ultimately less need for defensive second-level registration.

VI. <u>STRING REQUIREMENTS</u>

A. <u>*STRING REQUIREMENTS: IDN AND TECHNICAL*</u>

<u>Summary of Key Points</u>

- The three-character requirement will be the subject of additional community discussion and consultation to determine if a consistent exception can be made for ideographic or other script sets.
- The new IDN specification is not sufficiently mature to adopt the suggestion made by the Unicode Technical Committee (UTC) but progress on the protocol will be monitored with an eye toward updating string requirements in the near term
- The Guidebook asks that applicants take reasonable steps to identify string compatibility issues, not guarantee that all applications are compatible with the applied-for string.

<u>Summary of Input</u>

<u>String compliance with IDNA technical protocols.</u> The reference to the existing IDNA standard (RFC 3490) should be altered to refer to the new IDNA technical standard, on the presumption that the current standard will be superseded. Language should also be more emphatic that the list of restrictions in the guide is not complete. *UTC* (14 Nov. 2008). Add additional language regarding in-progress IDNA protocol revisions to make it clear that the protocol revision is expected to succeed, but the text is still subject to change. *UTC* (14 Nov. 2008)

<u>Directionality of characters in string.</u> "Must consist entirely of characters with the same directional property" is wrong and should be struck. Valid IDNs according to the in-development revised IDNA protocol would be limited by this restriction. *UTC* (14 Nov. 2008)

<u>Prohibiting mixing characters from different scripts.</u> The language that requires strings be limited to a single script is overly narrow, and does not address scripts deemed "Common" and "Inherited", which are given to characters that are used within multiple scripts, such as numerals. *UTC* (14 Nov. 2008)

<u>Documenting properties of the string.</u> The language on specifying the language used by the label should be altered to reference BCP 47 rather than ISO 639-1. *UTC* (14 Nov. 2008). The language on specifying the script used by the label should be altered to bring the section "in line with the use of script in 2.1.1.3.2 String Requirements". *UTC* (14 Nov. 2008). The language on specifying the discrete Unicode code points in the application should be more explicit on the notation used. It should be U+ notation, "for example, for the label "öbb", the list would be: "U+00F6 U+0062 U+0062". *UTC* (14 Nov. 2008) The reason for the requirement that the proposed TLD's pronunciation by supplied is unclear. Very few registrants will be able to supply the pronunciations correctly using the International Phonetic Alphabet, and there are likely to be multiple pronunciations depending on the part of the world. *UTC* (14 Nov. 2008) The requirement to provide an IDN table may mean provide a reference to a table, rather than provide the complete table. The format required of the table is not clear. *UTC* (14 Nov. 2008)

<u>Avoiding string compatibility issues.</u> With respect to making "reasonable efforts" to ensure there are no rendering and operational issues with the selected string, it is not clear what reasonable

efforts are, and it sounds like "this is asking the applicant to change all the program applications that use the domain name, which is clearly impossible." *UTC* (14 Nov. 2008)

Eligible string preclusions. The requirement for a minimum of three characters does not work for scripts where one character can represent an entity. *W.Tan* (8 Dec. 2008); IDN variant implementation needed for Chinese, Japanese and Korean TLDs. *J. Seng* (8 Dec. 2008). It is not clear why hexadecimal representations of numerals are prohibited. *A. Baumgart* (5 Dec. 2008) Inquiry relating to whether there is a prohibition on new TLDs that commence with the characters of a ccTLD (i.e. .FR blocking .FRANCHISE). *J.C. Vignes.*

Issues

The issues raised in these sections can be narrowed down to:

Regarding the technical requirements for TLD strings, there are questions on unclear language, or suggestions on improvements to the language, with a view to improving the clarity of the document.

Can changes to restrictions be made in order to better match equivalent standards documents?

Can changes be made to reflect the suitability of certain restrictions or obligations?

Proposed Position (for this version of the Guidebook)

String compliance with IDNA technical protocols: ICANN staff will continue to monitor the dynamics of the IDNAbis working group, and will continue to consult on the latest status and the viability of the proposed new standard, and identify the likelihood it will be resolved prior to the launch of the first round. If this is still a reasonable prospect then the proposed change of language is appropriate.

Directionality of characters in string. The current language should be retained; however, the comments provided will be re-evaluated should the IDNAbis standard be used as the reference standard.

Prohibiting mixing characters from different scripts. The current language is required as ICANN policy is to allow certain exemptions where scripts can be mixed.

Documenting properties of the string. Limit the technical details in the Guidebook on how script and language properties are formally provided, as they are operational details that are better in the scope of IANA Root Zone operational procedures, which are outside the scope of this document. Explain that these are informative properties, not evaluative, and make the phonetic description optional.

Avoiding string compatibility issues. Make the language clearer that "reasonable efforts" means that the applicant make a good faith effort to ensure that common applications do not have unexpected problems caused by the domain.

Eligible string preclusions. Number of characters in a string:

In the initial release of the Applicant gTLD Guidebook ICANN suggested that gTLD strings need to be minimum three (3) characters long.

In return comments have been received representing the fact that for example there are single and two character combinations in the ideographic writing systems that represents the name of cities, concepts and otherwise generic terms. This concern is understandable and additional information is being made available to inform community feedback on the topic. ICANN will also conduct additional consultations on this topic in order to reach a resolution before the launch of the new gTLD round.

In preparation of the initial suggestion of a minimum of 3-chars, ICANN took into consideration various analysis, including the work done by the Reserved Names Working Group:

- Single and two-character U-labels on the top level and second level of a domain name should not be restricted in general. At the top level, requested strings should be analyzed on a case by case basis in the new gTLD process depending on the script and language used in order to determine whether the string should be available for allocation in the DNS. This is notwithstanding the rule that the ISO-3166 list will continue to be reserved and as such all two character ASCII strings (i.e., LDH-labels) will remain reserved at the top level and second level of a domain name, although registries may propose release of two character strings at the second level provided that measures to avoid confusion with any corresponding country codes are implemented. Single and two character labels at the second level should be available for registration, provided they are consistent with the IDN Guidelines. (http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm)

At the same time, considerations need to be made to ensure that also confusion (and not just clashes) with the ISO-3166 list and associated IANA function for allocation of ccTLDs is not jeopardized. Confusability with existing ccTLDs and any future ccTLDs allocated through the IANA function by use of the ISO3166 list was viewed as increasing if strings with less than three character combinations are allowed. Further, avoiding such confusability is not planned for in the gTLD applicant Guidebook and needs to be if the 3-char suggestion is to be changed.

Additional considerations have to do with the concept of character and how to count characters on a global scale. Since the concept of a 'character' can remain hard to define, ICANN decided to go with the definition described at: http://www.icann.org/en/topics/idn/idn-glossary.htm#C. As is illustrated there, this creates some complications when moving to Internationalized TLDs due to the reason that in some writing systems, such as the ideograph system, a character can represent an entire concept or word. Specifically, it has not been possible to find a way of counting characters across all languages and scripts that creates an identical concept of numbers, this includes an incapability of counting the characters represented in the U-label, the Unicode code points, or other ways. The only way one can count characters in a unique way for IDNs is by counting the characters in an A-label and the shortest string available as an A-label is seven (7) characters long. It also does not appear that it is the length of the A-label that concerns the community members, although it is the length of the A-label that creates problems for the usability of domain names under such TLDs in various applications software. As such ICANN has determined to count the number of characters in strings that are applied for by counting their immediate code points as identified by Unicode.

While some specific examples of what appears to be reasonable (less than 3-char) strings can be made, for example in the ideographic writing system, it is not straightforward to

define (based on all received feedback so far) a globally implementable rule or set of rules that will identify when a string with less than 3 characters should be allowed. One could imagine that such strings could be allowed by a script by script basis, but a closer look at Unicode, which is the classification of scripts that ICANN is using, shows that there even is an inconsistency within a script as to when less than 3-chars appears to be reasonable. As such, at that time of writing ICANN did not find it possible to select for example some characters from the ideograph system over other writing systems with good reason. And simply going through all (approximately 100.000) characters in Unicode today also did not seem to be a scalable practice.

ICANN will conduct additional consultations as to what categorizes a good set of rules and requirements for when a string of less than 3-characters should be allowed, if such change should be made in the implementation of this program. Simply stating that it should be analyzed on a case by case basis does not provide ICANN with sufficient details of how or based on what such decision should be made. It further does not give enough indication to a potential applicant as to whether their string will pass such case-by-case analysis or not.

Analysis

String compliance with IDNA technical protocols. The comments from UTC suggest that the references to RFC 3490 (the current IDNA standard published in 2003) be replaced in favor of references to the in-progress IDNA standard. The emphasis should be shifted to the revised IDNA standard being at the final stages of standardization and being the more appropriate document to refer to. Whether this is appropriate really comes down to the probability of whether the IDNA standard will be revised by the time the next round opens. The prospect of this varies from month-to-month. The current standard was included in the document as it is a stable reference, and for most cases they will be equally compatible between the current standard, and the new standard.

Directionality of characters in string. The proposed new language improves the section to better match the intent of the restriction, but is predicated on the new IDNA standard revision being adopted. As per the previous section, RFC 3490 is being retained as the reference for the moment, however this may evolve in the future and the restrictions modified accordingly.

Prohibiting mixing characters from different scripts. The proposed new language would prohibit some classes of mixing characters for which exceptions have been made. These are description in Section 3 of the existing IDN guidelines available at http://www.icann.org/en/topics/idn/idn-guidelines-26apr07.pdf

Documenting properties of the string. Most of the comments provided by UTC in this section revolve around an enhanced description of the IANA Change Request Template that is employed today, which reads:

```
IDN Specific Information
10.  English translation of string..: test
11a. Language of Label (ISO 639-1)..: ru
11b. Language of Label (English)....: Russian
12a. Script of Label (ISO 15924)....: Cyrl
12b. Script of Label (English)......: Cyrillic
```

13. Unicode code points............: U+0438 U+0441 U+043F U+044B U+0442 U+0430 U+043D U+0438 U+0435

This section has several purposes:

<u>First</u>, in order to assist in day-to-day handling of delegated top-level domains by ICANN's IANA function, a methodology of generating an English-based reference was devised that can be used as an alternative to either the "A-label" and "U-label" notations for the purposes of dealing with IANA. For example, the IANA code for .испытание is "test:ru-Cyrl". This code indicates the domain means "test", written in "Russian", expressed used "Cyrillic". This code is broken into <meaning>:<bcp47tag>, whereby the meaning is the English meaning (or a similar reference) of the string; and the BCP 47 tag is a reference to an IANA registry of scripts and languages. The BCP 47 registry in turn is based upon two different standards, one for scripts (ISO 15294) and one for languages (ISO 639-1).
<u>Second</u>, in Part 13 the Unicode code points are requested as a simple cross-check. The elements could be automatically derived from the U-label or A-label itself, but because the meaning of the label may not be immediately evident, this provides a cross-check such that IANA can automatically detect transcription errors of the other labels.
<u>Finally</u>, there may be public interest reasons for IANA to classify the strings based upon their script and language properties, for example, an ability to review the root zone database for all of the strings that mean "test", or all the strings that are written in Russian.

Accordingly, the requirements are *informative* as opposed to *evaluative*. When stored in the IANA root zone database, they are considered meta-data that is additional to the central data for a top-level domain, but plays no direct role in processing or evaluation. An additional requirement was suggested by the applicant guidebook for the label, which is to provide a description on pronunciation. This would possibly aid IANA staff in understanding what a label was that a person while performing customer service tasks such as answering enquiries. It was not considered to be a property that is assessed as part of the qualification criteria.

With respect to providing IDN tables, it is the intent of ICANN to obtain the entire IDN table, not just a reference to it; because the goal is for it to be lodged in the IANA Repository of IDN Practices. It is a fair point that the formatting expectation be explained; however it is not clear whether this should be explicit in the document or merely by reference. IANA's website has submission guidelines already, although it is likely to change in the short-to-medium future to a more useful format (specifically, XML rather than HTML formatting). This timing of that is independent of the new TLD programs.

<u>Avoiding string compatibility issues</u>. ICANN staff did not have a strong vision of what specific actions would be considered "reasonable" when developing this requirement, as the provision is designed to detect any problems that can't be fully predicted or articulated in advance. The idea was to have language that could be pointed to in the event there are labels that were an egregious abuse (for example, the triggered properties that could be knowingly used for phishing attacks). It was not envisaged that applicants would need to undertake their domain would work in every browser, rather to make some effort in good faith to ensure there are no reasonably discoverable issues in popular software.

<u>Eligible string preclusions</u>. The restriction on 1- and 2- character top-level domains stems from the current split in ASCII top-level domains. There, two-letter top-level domains are restricted solely for ISO 3166-1 country codes (either current or future). Single letter domains, both in the

top-level and in the second-level within gTLDs, were reserved against possible registration in the early 1990s for possible future expansion purposes.

The guidebook states that for new gTLDs "applied-for strings must be composed of three or more visually distinct letters or characters in the script, as appropriate". Concern has arisen from communities that use ideographs to express their language that single characters can often denote whole words, and therefore concepts need to be expressed in less than three characters to be practical.

The hexadecimal restriction is designed because most Internet software does not distinguish between IP addresses and domain names. Instead, in most software a generic "Internet address" field is provided which can accept either, and the software must analyze and decide whether it is an IP address or domain name. Hexadecimal is a legitimate method of representing IP addresses, and a domain name that matches a possible IP address would cause confusion and unexpected results.

> **Example: Using hexadecimal in an application:**
> $ ping 0xd04dbc67
> PING 0xd04dbc67 (208.77.188.103) 56(84) bytes of data.
> 64 bytes from 208.77.188.103: icmp_seq=1 ttl=59 time=1.70 ms

B.   STRING REQUIREMENTS: RESERVED NAMES

Summary of Key Points

- For the next version of the Applicant Guidebook, no changes will be made to the Reserved Names list, but this position might change after additional consultation.
- Requests by certain rights holders that the reserved names list be augmented to include famous trademarks will also be discussed in additional consultations.

Summary of Input

Technical/Infrastructure Names. Create a mechanism that provides for the expansion of the gTLD reserved names list, as appropriate, technical or infrastructure-related names. *U.S. DOC* (18 Dec. 2008). Add the following names to the Reserved Names list: ARPA, IN-ADDR, IP6, and RIR. Develop a process for releasing reserved domains to the appropriate entity. Develop a process for adding or removing names from the Reserved Names list." IANA-related infrastructure names should be protected at all levels; the reserved names list has omitted significant Internet infrastructure names. *ARIN* (8 Dec. 2008). ICANN should specify criteria for the reserved names list, with transparent justification for each name on list; develop challenge and removal procedures; and clarify if they are reserved in ASCII but not IDN equivalents. *Rodenbaugh* (16 Dec. 2008) (these issues are of special concern to globally famous trademark owners to whom ICANN does not extend Reserved Names protection). ICANN should add other terms commonly found in Internet URLs (e.g. HTTP and HTTPS) to the Reserved Names list. *INTA* (15 Dec. 2008).

Government and NGO Names. On 2.1.1.2, ICANN should not reserve its own names without offering the same opportunity to governments and non-governmental organizations. *NYC* (13

Dec. 2008); *AT&T* (15 Dec. 2008) (consider the reserved names list concept for country and geographic names).

Trademarks. *See citations in Trademark Protection section, under "Top Level Reserved Names List".*

Reinstate Protection. "Reinstate the existing protection for Reserved Names." *ARIN (8 Dec. 2008).*

Issues

There was little direct feedback about the Reserved Names list itself, as presented in Draft Applicant Guidebook, with the exception of a comment from ARIN, which proposed the addition of ARPA, IN-ADDR, IP6, and RIR to the list. Feedback focused on the lack of any provisions for trademark owners. Comments from groups/companies such as Nike, ISOC, and the Internet Commerce Coalition requested the inclusion of trademark names on the Reserved Names list since ICANN was choosing to protect its own interests.

1) What type of categories should the Reserved Names list include?

2) Should the 2nd level Reserved Names schedule in the base agreement be reinstated to what is generally reflected in current agreements?

Analysis

The top-level Reserved Names list, which will prevent applicants from applying for certain names, was created for the new gTLD program based largely on the existing 2nd level Reserved Names schedule. This decision was reached as a result of the work conducted by the Reserved Names Working Group (final report available here: http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm), which recommended that existing names on the second or perhaps even third level Reserved Names schedules should be included on the top level list. However, they suggested that additional work should be performed to provide justification for the names or categories of names included on the list. In carrying over the 2nd and 3rd level Reserved Names schedule to the top level, ICANN has decided upon a conservative approach as it is far more difficult to recover a TLD than it is to block a TLD from being registered in the first place.

ICANN has identified three options:

Option 1: Reduce list to technical and structural terms and have ICANN and its supporting organizations use the standard objection procedures used by others to protect their names, in order to show that there is no preferential treatment.

Option 2: Include technical, structural, and ICANN related names, which would leave the list as it is presented in the Draft AG. Potential additions include the suggestions from ARIN.

Option 3: Include all elements of option 2, but also provide a provision for other entities, like trademark owners and geographical names holders.
Option 1 presents arguably the most defensible position to the general Internet community (i.e. limit the RN list to names that require technical or structural protection). ICANN would demonstrate that it is not placing its interests above other organizations. However, this position is subject to objection from the SOs, ACs, and other entities supporting ICANN. They will likely

contend that not reserving names like RIR, IETF, or GNSO could lead to security concerns via phishing and spoofing if one of these names was obtained by a malicious operator. In addition, if one of the ICANN related entities wished to protect their name against an applicant (for IETF or AFRINIC for instance), they would have to use the very same objection mechanisms that ICANN designed. This has the potential to open up questions of impartiality.

Option 2 presents the status quo (relative to the Draft AG), and thus the most conservative option, since there was only limited feedback on this topic. The external objections to this option will likely be similar to what was received in public comments for the Draft AG. The perceived message being conveyed is that ICANN is protecting its own interests without taking trademark owners and other entities into account. However, as mentioned above, it is far easier to prevent a name from being registered by placing it on a RN list than to recover that name from a registry operator.

Option 3 is dependent upon a solution being developed for rights holders, like trademark owners. ICANN is undertaking significant consultation on this subject to determine what methods of protection will be extended for the protection of rights holders. Please see the separate paper that discusses Brand Protection for further information on this topic.

Regarding the second issue posed above, the principal concern is that existing infrastructure and software is designed to accommodate the existing names on the 2nd level schedule. While exact details were slim on what types of technical complications may arise from having something like lacnic.newgtld registered, presumably this may affect registrar software and search/filter functions. However, these issues can likely be addressed by software modifications.

Proposed Position (for this version of the Guidebook)

Issue 1: The recommendation for the revised Applicant Guidebook is Option 2 (the status quo), as the consultative work with the community regarding trademark owners still needs to be undertaken. In addition, going forward, further work should be initiated to determine under what conditions ICANN-related entities should have continued inclusion on the list.

Issue 2: Unless a more compelling technical argument can be produced, the schedule currently included in the base agreement should be left unchanged.

VII. <u>GEOGRAPHICAL NAMES</u>

<u>Summary of Key Points</u>

- The implementation model seeks to achieve the objective of the GNSO to protect against abuse of community labels, and anticipate criticism of governments and possible objections to geographic names,
- The applicant guidebook is amended to:
  - o make it easier to identify the different elements of geographic names,
  - o reflect that a country or territory name in any language, will require evidence of support,
  - o augment the requirements of the letter of support.
- No additional protections for city and abbreviated names were added to the revised Guidebook as those terms are many in number and often have generic connotations.

<u>Summary of Input</u>

The ccNSO states that the Applicant Guidebook lumps together country names, territory names, and other geographical names like sub-national names and city names. *ccNSO* (14 Dec. 2008). The ccNSO suggests a definition for how to distinguish ccTLDs and gTLDs and notes "Until the introduction of IDNs, the number of characters in the TLD is how we have been able to visually separate the two categories. So how do we identify what is a ccTLD in the post- IDN world where we can no longer use that visual mechanism?" *ccNSO* (14 Dec. 2008). The ccNSO believes the current language preempts the ccTLD IDN PDP, by opening up for country names and abbreviations in Latin scripts and in non-Latin scripts that are not yet official languages of the country, to be entered as gTLDs while the ccTLD policies have yet to be developed. *ccNSO* (14 Dec. 2008).

The Applicant Guidebook does not establish a process to authenticate, or for a panel to consider challenges to, governmental statements of support or non-objection that may be presented by applicants. The ISO3166-2 standard is not comprehensive. *NYC* (13 Dec. 2008)

On 2.1.1.4.1, [of the applicant guidebook] the ISO 3166-2 standard is mostly inapplicable to new gTLDs. *NYC* (13 Dec. 2008) The reference to "city name" is too restrictive and should be expanded to include "city name or abbreviation". *NYC* (13 Dec. 2008). The capital city requirement from the Explanatory Memorandum of 22 October 2008 is not included in the draft Applicant Guidebook. *NYC* (13 Dec. 2008)

The four enumerated grounds for objection do not provide sufficient grounds to safeguard the interests of national, local, and municipal governments in the preservation of geographic terms that apply to them. Suggested costs for dispute resolution will be too onerous for governments. The contention process for geographic names should be specified. Any application for a geographic term should be considered community-based. The right of governments to object should be explicitly stated. *NYC* (13 Dec. 2008). The Geographic Names Panel decision should be posted and communicated to the relevant GAC representative and relevant sub-national government entity. IDN applicants should be required to indicate whether the proposed string corresponds to a geographic term. *NYC* (13 Dec. 2008)

The objection procedure for governments is not clearly defined. It is not clear whether a geographic objection would constitute a "morality and public order objection." Any fees associated with a government objection should be minimized. *NYC* (13 Dec. 2008)

This comment is on geographic names (particularly state names). Craig writes that he is considering applying for a string that is a State Name, has made inquiries with the relevant state government, and believes it almost impossible to get a letter of approval or non-objection. Craig says that the users and businesses in the state he has contacted have expressed support, and he wonders whether the benefit of the people who live in the state is considered (by ICANN). *D. Craig* (17 Nov. 2008)*.

Craig also argues that states have State.gov, and can restrict the registration policies in the .GOV space (he also writes that .GOV should be open to other governments to use). He wonders if he can make a case that a string corresponding to a state name, that case & the benefit to the local population should be considered in the evaluation. *D. Craig* (17 Nov. 2008)

The current language in 2.1.1.1 "co-mingles immediate and important issues like gTLD applications for strings that look like country codes, and non-immediate and possibly non-important issues potentially posed by gTLD applications for well-known terms referring to place names which pre-exist all present governments." *E. Brunner-Williams (*6 Dec. 2008)

The restriction on sub-national or continent names should be removed, section 2.1.1.4 [of the applicant guidebook] should be moved to a secondary materials reference, and ICANN should test for collision with a ccTLD Fast Track string. *E. Brunner-Williams* (6 Dec. 2008)

Demys is requesting clarification in the geographical names process on whether a string is a sub-national place name, on the basis that there appears to be ambiguity. This is important for common abbreviations of sub-national place names. *Demys* (14 Dec. 2008). An example presented is .lancs, a term not found in ISO 3166-2. This is a common abbreviation for Lancashire, and on a less rigid test might be held to "represent" Lancashire. Demys asks how this will be handled in practice. *Demys* (14 Dec. 2008)

Demys also notes that the test of "meaningful representation" applied to country and territory names is not applied to IS3166-2 sub-national place names. *Demys* (14 Dec. 2008). It says in the Draft Module 2 2.1.1.4.1 that in order to apply for city TLD, "documents of support or non-objection from the relevant government(s)" are required and they "should include a signed letter of support or non-objection from the Minister with the portfolio responsible for a domain name administration, ICT, foreign affairs or the Office of the Prime Minister or President of the relevant jurisdiction." *Interlink.*

If Interlink were to apply for dotTOKYO, do we need the documents from both Ministry of Internal Affairs and Communications and Tokyo Metropolitan Government? Or do we just need Ministry of Internal Affairs and Communications to support our application? *Interlink.*

ICANN should revise this Module to minimize disputes with governments on geographic and country names. *F. Purcell, Ministry of Communications, Information and Technology* (6 Nov. 2008)

This includes a representation of the country or territory name in any of the six official United Nations languages (French, Spanish, Chinese, Arabic, Russian and English) and any of the country or territory's local languages. *Unicode Technical Committee (UTC)* (13 Nov. 2008). It is

quite common for a country or territory to have more than one language, so that needs to be accounted for. *UTC* (13 Nov. 2008).

Applications for any string that represents a subnational place name, such as a county, province, or state. These could be, for example, as listed in the ISO 3166-2 standard. *UTC* (13 Nov. 2008). The ISO 3166-2 standard is not complete, and is not freely available. Including the comma may imply to the reader that it is required, that the sentence is to be read as: "Applications for any string that represents a subnational place name (such as a county, province, or state) listed in the ISO 3166-2 standard." *UTC* (13 Nov. 2008).

Applications for a city name, where the applicant clearly intends to use the gTLD to leverage from the city name. *UTC* (13 Nov. 2008). City names are very ambiguous - look at the number of "Paris" cities that exist. If Paris, Texas gets there first, what happens? Should there be some qualification necessary to disambiguate city names instead? *UTC* (13 Nov. 2008)

We strongly urge ICANN to adhere to GAC principles in general and in particular the following: (a) New gTLDs should respect the sensitivity regarding terms with national, cultural, geographic and religious significance. (b) 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. *APTLD* (15 Dec. 2008)

A 'geographical term' is terribly broad and thereby offers protection even beyond what I believe the GAC requested. *C. Gomes* (18 Nov. 2008). The GNSO recommended that a dispute process be used and that governments and GAC should have standing to file a dispute. The guidebook indicates that ICANN will ensure that appropriate consideration will be given to government interests. This is contrary to the GNSO recommendation. *C. Gomes* (18 Nov. 2008).

Applicants for a Geo -TLD need to represent on which legal framework their application is based and that the use of the proposed string is not in violation of the legal framework in the country in which the applicant is incorporated. The applicant also needs to represent if and how the relevant government/s and/or public authority/ies have to respond to requests of ICANN on support or non-objection. Additionally, the fees are too high for many cities and countries who may have very small user bases. *dotberlin* (4 Dec. 2008); *J. Evans* (12 Dec. 2008); *Plaid Cymru* (15 Dec. 2008); *PuntoGal* (13 Dec. 2008).

dotSCO raises issues with the geographic considerations in the Guidebook. They note that SCO is not a three-letter code in ISO 3166-2 nor does it clash with a country name on the ISO 3166-1 list. "The difficulty for us, and indeed all other applicants, is that the criteria of a string which could 'represent a sub-national place name' in ISO 3166-2 could potentially catch any string that anyone could think of." *dotSCO* (15 Dec. 2008).

Giving governments control over ccTLD space may stifle competition. *Cairo Public Forum* (6 Nov 08).

Government support concern: ICANN should reverse its adoption of the GAC position on prior approval for any geo-gTLD and revert to the GNSO position providing standard objection rights to governmental entities. Any suggestion that governments have any ability to object to second level geo-domains on any grounds outside the scope of the UDRP should be rejected outright. *ICA* (16 Dec. 2008). Some country names have well-used and general meanings in the English language. Requiring TLDs that are country names to have government support or non-objection

makes it unlikely that certain communities will be able to secure logical TLDs (e.g. china, turkey). Some territory names are geographic indicators for specific products (e.g. champagne), but the government support/non-objection requirement makes it unlikely that producers of such products can secure those corresponding TLDs. Having multiple applicants for the same city name TLD resolve the contention themselves is odd; there are numerous potential applicants for city name TLDs. *INTA* (15 Dec. 2008).

Issues

Process

Can the presentation of geographic names in the guidebook be improved to distinguish between the differing elements, i.e. Country or territory names, sub-national, city names?

- Will there be a process to deal with possible string collisions for strings sought under the IDN ccTLD Fast-Track and new gTLD processes?
- What is the objection procedure, i.e. would an objection regarding a geographic name be considered under 'morality and public order'?
- How does an applicant know what level of government support is required for a geographic name.
- Should the decisions of the Geographic Names Panel be posted and communicated to the relevant GAC and sub-national entity?

Country and territory names

- Will allowing country and territory names in the new gTLD process create confusion between what is a ccTLD and a gTLD?
- Should the number of languages representing a country or territory name be expanded to include all languages.

Sub-national names

- Can there be a clear comprehensive list, for defining sub-national names, such as the ISO 3166-2 list?
- Will the meaningful representation test be applied to sub-national names?
- How will common abbreviations for sub-national names be handled?
- How will abbreviations be considered in the context of geographic names?

City names

- Is the issue of city names ambiguous, where they are shared by multiple cities or may be a generic term?
- Should the city name definition be expanded to include abbreviations?

Government interests

- Is the consideration of government interests, as currently written in the guidebook, contrary to the GNSO recommendation?
- Are the interests of national, local and municipal governments adequately protected through the objection process?

Analysis

Process

Can the presentation of geographic names in the guidebook be improved to distinguish between the differing elements of country and territory names, sub-national names, and city names?

- Yes. The applicant guidebook will be amended to make it easier to identify the different elements of geographic names.

Will there be a process to deal with possible string collisions for strings sought under the IDN ccTLD Fast-Track and new gTLD processes?

- An application for a geographic place name, as described in the applicant guidebook, requires the evidence of support, or non-objection from the relevant government or public authority. There can only be collisions in circumstances where this documentation is provided for applications for a string in both the gTLD and ccTLD fast track process. Secondly, if the evaluation of an application for either an IDN ccTLD or gTLD string is complete before a contending application is lodged, the successfully evaluated TLD will not be removed from the root zone.

What is the objection procedure, i.e. would an objection regarding a geographic name be considered under 'morality and public order'?

- The GNSO policy recommendations intend that government interests in geographic names be protected under community based interests. These protections are described in the guidebook and in answers to other questions below.

How does an applicant know what level of government support is required for a geographic name.

- Discussions among GAC members revealed that there is no one standard that applies across the countries of the world about which level of government support will be required for country, territory, place or city names. It will be the applicant's responsibility to identify which level of government support is required.

Should the decisions of the Geographic Names Panel be posted and communicated to the relevant GAC and sub-national entity?

- The results of the evaluation will be publicly posted on ICANN's website at the conclusion of the Initial Evaluation and will also be available to applicants.

Country and territory names
Will allowing country and territory names in the new gTLD process create confusion between what is a ccTLD and a gTLD?

- The solution offered by the ccNSO to not allow country and territory names in the gTLD process until the outcome of the ccPDP, will mean that country or territory names in ASCII at the top level would not be available before August 2011. In considering the comments received on the issue of country and territory names in the gTLD space, the definition of meaningful representation will be expanded to include a representation of a country or territory name in any language to address the ccNSO's concern that "almost all non-Latin and Latin scripts can be entered as a gTLD without any restriction except that the country in question can object." This amendment, combined with the requirement that the relevant government or public authority provide support or non-objection for an application for a country or territory name, ensures that a government is aware of the application.

  Further, to overcome concerns that governments have varying degrees of understanding of ICANN and TLDs, the requirements of the letter of support will be augmented. In addition to demonstrating an understanding of the string being requested and what it will be used for, the letter should also reflect that the string is being sought through the gTLD

process and the applicant is willing to accept the conditions under which the string will be available, i.e. sign a contract with ICANN, abide by consensus policies, pay fees etc.

ICANN has received considerable exposure through the World Summit for the Information Society process, and the more recent annual Internet Governance Forum events. This, combined with the work of the GAC, has resulted in governments having a better understanding of ICANN and the domain name system. Through the communication plan for the implementation of new gTLDs, communication will be targeted at governments to ensure that they are informed about the various elements of the program, and its potential application to governments.

Should the number of languages representing a county or territory name be expanded?
*   During the meeting between the ccNSO and the GAC in Cairo, members of the ccNSO raised concerns that country names were not protected in all languages, and this has been reiterated in their comments as well as being raised by the UTC. <u>The Guidebook will be changed</u> to provide protection for country and territory names in all languages. Therefore the guidebook will now reflect that applications for any string that is a meaningful representation of a country or territory name listed in the ISO 3166-1 standard, including a representation of the country or territory name in any language, must be accompanied by documents of support or non-objection from the relevant government or public authority.

Sub-national names
Can there be a clear comprehensive list, for defining sub-national names, such as the "ISO 3166-2 Codes for the representation of names of countries and their subdivisions—Part 2: Country subdivision code" for defining sub-national names?
*   In the Explanatory Memorandum for Geographic Names, "place names are considered those that represent a sub-national identifier such as counties, states, regions or provinces". During discussions with the GAC on the issue of place names, the GAC suggested the ISO 3166-2 list as a possible reference list for identifying sub-national names. The City of New York, Law Department, recommended that the guidebook adopt an additional standard, the United Nations Code for Trade and Transport Locations http://www.unece.org/cefact/locode/service/location.htm This list is derived from the ISO 3166-1 and 3166-2 codes, however, as the purpose of the list is to identify trade and transport locations, it goes beyond the scope of geographic names as outlined in the draft applicant guidebook and may lead to confusion among applicants.

    It is difficult to develop a list that covers all sub-national names world wide; however, the 3166-2 list is considered the most applicable for the introduction of new gTLDs. The list is intended to be used in conjunction with the ISO 3166-1 list, which was selected by Jon Postel as the basis for ccTLDs, in the knowledge that ISO has a procedure for determining which entities should be and should not be on that list. The ISO 3166-2 list provides an independent and dynamic list of names which is consistent with previous ICANN processes. This list, combined with the applicant's responsibility to identify if a string represents a place name, and that any application may be subject to objections under GNSO Recommendation 20, under which applications may be rejected based on objections showing substantial opposition from the targeted community, is felt to provide reasonable protection for local and national governments.

Will the meaningful representation test be applied to sub-national names?

- It is not the intention to apply the meaningful representation test regarding sub-national names. Similar to city names, the volume of names will make with this difficult to police. It is considered that the objection process provides an appropriate avenue for recourse.

How will common abbreviations for sub-national names be handled?
- It is difficult to define what is meant by a common abbreviation, and therefore there will be no restrictions imposed on such names as part of the process. It is considered that the objection process provides an appropriate avenue for recourse.

How will abbreviations be considered in the context of geographic names?
- Currently, the definition of meaningful representation of a country or territory name includes a short-form designation of the name of the Territory. This could include three letter country codes such as .AUS for Australia and .AUT for Austria. With regard to sub-national names, and city names, the meaningful representation definition does not apply. However, as any string may be the subject of objection, it is the responsibility of the applicant to research possible meanings for a string, and acquire any support they believe necessary to successfully acquire the string, or at least minimize the likelihood of objection. This is consistent with the approach for community applications.

City names
Should the city name definition be expanded to include abbreviations? Is the issue of city names ambiguous?
- 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. Given the infinite number of city names world wide, and duplication, identifying and determining if a name is an abbreviation of a city name would be very difficult. 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 strings that may be considered an abbreviation of a city name.

Government interests
Is the consideration of government interests, as currently written in the guidebook, contrary to the GNSO recommendation? Are the interests of national, local and municipal governments adequately protected through the objection process?
- The GNSO recommendations were intended to provide for protection of government interests in geographical and other community labels through recommendation 20 of the Final Report on New gTLDs: "An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted." The implementation model of this recommendation has provided for protection of these interests through the objection and dispute resolution policy. The GAC raised concerns that this mechanism was inadequate, as many governments were not aware of the ICANN process and would therefore be unlikely to object in a timely manner, if at all. In order to achieve the objective of the GNSO to protect against abuse of community labels, and anticipate criticism of governments and possible objections to geographic names, the evaluation process was designed to require evidence of community support (i.e., government approval or non-objection) at the time of application. The amended process as outlined in the Draft Applicant Guidebook requires the application for certain

geographic labels to provide evidence of support or non-objection from the relevant government or public authority. This demonstration of community support, that may be required during the dispute resolution process is now simply required at the application stage.

Proposed Position (for this version of the Guidebook)

The applicant guidebook is reorganized to make it easier to identify the different elements of geographic names.

The draft applicant guidebook is to be amended to reflect that a country or territory name in any language will require evidence of support, or non-objection from the relevant government or public authority:

> "applications for any string that is a meaningful representation of a country or territory name listed in the ISO 3166-1 standard, including a representation of the country or territory name in any language."

The definition of meaningful representation is also amended to take out the reference to official languages:

> A string is meaningful if, in any language, it is a) the name of the Territory; or b) a part of the name of the Territory that denotes the Territory in any language; or c) a short-form designation of the name of the Territory.

The requirements of the letter of support will be augmented. In addition to demonstrating an understanding of the string being requested and what it will be used for, the letter should also reflect that the string is being sought through the gTLD process and the applicant is willing to accept the conditions under which the string will be available, i.e. sign a contract with ICANN, abide by consensus policies, pay fees etc.

It is intended to offer to hold consultations with the GAC, ccNSO and others to discuss these issues.

VIII. **APPLICANT EVALUATION**

Summary of Key Points

- Several specific questions are answered on various aspects of the evaluation.
- The role of public comment in the process is discussed and there is updated information in the revised Guidebook describing this.
- ICANN continues independent evaluations of the scoring methodology. There are updates in the revised Guidebook to improve objectivity and repeatability; there will be more changes.

Summary of Input

This section organizes the summary of responses about Applicant Evaluation into the following categories: *Applicant Information, Scoring, Miscellaneous, and Community-Based.*

Applicant Information

Submission of Updated Information. Applicants should be permitted to supplement incomplete sections. *MarkMonitor* (Module 1, 15 Dec. 2008). *Bank of America* (15 Dec. 2008) (there should be opportunities to amend substantially complete applications).

Subsidiaries/Affiliates. Under Applicant Review, existing entities should be permitted to set up newly formed subsidiaries or affiliates to serve as the registry. *MarkMonitor* (Module 1, 15 Dec. 2008).

Financial Statements Criteria. The requirement for "audited" financial statements in Section 1.2.3 should be reworded to allow applicants to submit the latest "available" audited financials, due to the delays typically associated with obtaining audited statements, and to submit unaudited financials for the latest period. *MarkMonitor* (Module 1, 15 Dec. 2008)*.* ICANN should clarify how newly-formed applicant entities may comply with the financial statement requirements. *INTA* (15 Dec. 2008); *Microsoft* at 9 (Guidebook comments, 15 Dec. 2008).

Good Standing. The required documents under 1.2.3 for "proof of good standing" are insufficient…Given ICANN's history in certifying registrars that later proved themselves to be shams, higher standards are demanded in order to protect the public. Financial statements of newly formed special-purpose companies will be insufficient to detect iffy applications. *G. Kirikos* (24 Nov. 2008).

There should be a clearer definition of the term "good standing" under 1.2.3. ICANN should explicitly describe how it would vet the government authority, notary public or legal practitioner attesting to the good standing to assure its legitimacy and to assure its veracity. ICANN should identify the types of documents it would accept to validate an applicant's good standing. *BITS* (15 Dec. 2008).

Public Comments. If an evaluator uses public comment as part of the evaluation under 1.1.3 then the evaluator must validate the accuracy of the submitted comment. *Demand Media* at 2 (Module 1, 17 Dec. 2008). ICANN should make available on its website all public comments submitted, provide Evaluators with all public comments, not just summaries generated by ICANN; and include in the next draft Guidebook examples of the type of matters for which the

public comment process is intended. *Microsoft* (Guidebook comments, 15 Dec. 2008). *INTA* (15 Dec. 2008). Clarifications needed regarding role of public comments. *BITS* at 4-5 (15 Dec. 2008). *MarkMonitor* (15 Dec. 2008). *Bank of America* at 5-6 (15 Dec. 2008) (oppositions should be considered only if made by a person with standing; should not subject applications to informal blogging, informal comments). *SIIA* (15 Dec. 2008). *CADNA* (15 Dec. 2008). *IPC* (15 Dec. 2008). *ANA* (15 Dec. 2008)

Scoring

"Rights" and Other Clarifications Needed. The questions and criteria on legal rights characterize "rights" broadly. There should be more clarification on the type of rights that must be protected at start-up to score "1". Question 50 in Evaluation refers to an "attached table of numbers" but the table is omitted. Also, there are discrepancies in scoring in the Attachment of Module 2. *Demand Media* (Module 2, 17 Dec. 2008). Were the criteria and scoring sections on Section 3, Scoring, page A-25, Questions 57 & 58 intentionally left blank? If not, what are the criteria and what are the scoring guidelines? *C. Gomes* (Module 2, 13 Dec. 2008).

Abusive Registrations. Increase the criteria for earning a minimum acceptable score on proposed policies to minimize abusive registrations. *NetChoice* (Module 2, 15 Dec. 2008).

Protection Mechanisms. The scoring system for question 31, page A-11 of Attachment to Module 2 should not turn on the detail provided, but on the characteristics of the mechanisms themselves. Applicants should be evaluated based on criteria such as the likely effectiveness of the mechanisms in preventing abusive registrations; the costs imposed on right holders who make use of such mechanisms, including the costs of assembling and documenting claims; and whether applicants are cooperating with other applicants in implementing common mechanisms, or at least common features, such as a single repository of claims information to which right holders can refer in lodging claims with multiple new gTLDs. *eBay.*

Expand Scale. Scoring ICANN should use a larger scale (e.g. a 10-point scale) for scoring evaluation criteria, as the current 0-1-2 scale does not provide enough latitude. *Microsoft* at 9 (Guidebook comments, 15 Dec. 2008). *INTA* (15 Dec. 2008) (use 0-5 or 0-10 at a minimum).

Communication Limitation. (1) The meaning of "one communication round per application" should be clarified. (2)The interface may increase the likelihood of questions, "so it will put a higher burden on the evaluation teams to precisely word their questions and provide as much guidance as possible with regard to the type information needed." *C. Gomes* (Module 2, 13 Dec. 2008). Evaluators should not be subject to a limit of one request for further information from an applicant. *INTA* (15 Dec. 2008).

Extended Evaluation Panel Choice. If an applicant fails the initial evaluation and applies for extended evaluation, it should have the choice of engaging the same panel that conducted the initial evaluation or a different panel. This affords the applicant a fair evaluation process, if the applicant thinks that the panel is prejudiced. *J. Seng* (8 Dec. 2008).

Proposed Rights Protection Mechanisms-Transparency. ICANN should provide for greater transparency and stakeholder inquiry of an applicant's proposed mechanism to minimize abusive registrations and other activities that affect the legal rights of others. Stakeholders should be invited to query the applicant about specifics and contingencies regarding their plan for rights protection. ICANN must require applicants to provide substantive responses to these

queries, and to publish questions and responses for public review. *NetChoice* (Module 2, 15 Dec. 2008).

Diverse Business Models; Small Community Participation. When considering an application for a new TLD, purely objective criteria such as a requirement for a certain amount of cash on hand will not provide for the flexibility to consider different business models. ICANN should make the proper adjustments to the RFP in order to actually allow diverse business models and small, but valuable and representative communities, to participate. The process should allow small communities to not only participate in the process with an application, but also have a well balanced and sustainable business without excessive or unjustified burdens. *NIC Mexico* (9 Dec. 2008).

Registry Failure: Continuity; Documentary Evidence. Under 1.2.3.5, the "documentary evidence of ability to fund ongoing basic registry operations for then-existing registrants for a period of three to five years in the event of registry failure" is obviously insufficient, as the number of "then-existing registrants" is ZERO! Reference needs to be made to the projected number of registrants within the applications, and furthermore funds need to be held in escrow by a recognized third party, or some other form of security bond should be in place. Under 1.2.3.5 the bond or escrow of funds to "fund ongoing basic registry operations" is far too small a bond given the negative externalities that can be created by a malevolent Registry Operator. The bond or level of insurance needs to be much higher, perhaps in the order of USD $10 million. The "documentation of outside funding commitments" also needs to be strengthened beyond simply "documentation" -- security bonds or insurance are stronger than simply words that can be altered. ICANN has no real means to assess the creditworthiness of these outside sources of funding, nor means of enforcing their financial commitments. Given ICANN's poor history in policing Registry Operators (e.g. VeriSign's SiteFinder) and registrars (too many to list!), it's clear that these extra safeguards from insurance companies are essential. *G. Kirikos* (24 Nov. 2008).

ICANN should clarify how an applicant can provide documentary evidence of its ability to fund ongoing registry operations "for then existing registrants" at a time when many applicants won't yet have any registrants. *Microsoft* (Guidebook Comments, 15 Dec. 2008). *Demand Media* (Module 1, 17 Dec. 2008) (1.2.3 (5) should be clarified regarding the funding of on-going operations in the event of registry failure). Registry failure provisions including a deposit to cover transition costs should be included. *INTA* at 4 (15 Dec. 2008). Requirement of having 3-5 years of registry's operational costs is onerous; should consider alternatives such as a pooled registry continuity plan or arrangements between registries to take over in the event of a registry's failure. *Van Couvering* (15 Dec. 2008).

Miscellaneous

RFCs 3730 and 3734 appear to have been updated by 4930-4934. *Demand Media* (Module 2, 17 Dec. 2008).

Confidentiality. ICANN should clarify which portions of the application are to be confidential, and should further specify its methods for maintaining the confidentiality of this information. *Rodenbaugh* at 4 (16 Dec. 2008). *R. Fassett* (5 Dec. 2008) (financial confidentiality concerns). *G. Kirikos* (24 Nov. 2008) (financial questions should not be kept confidential; criminal and background checks should be authorized). ICANN should clarify exactly what information will be placed in public posting; because a great deal of sensitive information will be collected in the application, ICANN should only list the party applying and the gTLD being applied for. Postings

should not be made public until the end of the application window. *DHK* (15 Dec. 2008). *C. Gomes* (18 Nov. 2008) (concern expressed about no assurances by ICANN on keeping data confidential).

DNSSEC. ICANN should require the use of DNSSEC for any proposed new gTLD that is devoted to high trust applications (including but not limited to financial services). This should be a mandatory feature to protect consumers in such environments. *eBay* (15 Dec. 2008). *BITS* at 5 (15 Dec. 2008). To improve security, DNSSEC should be considered. The contract should require the new domain to adopt best available security measures such as DNSSEC, a robust Whois and the current Add Grace Period Limits Policy. *Bank of America* (15 Dec. 2008).

ICANN needs to provide more information about how it will select and monitor outside service providers who will be serving as evaluators. *BITS* (15 Dec. 2008) *INTA* (15 Dec. 2008) (the Guidebook should be amended to provide information about the selection process and criteria for evaluators); *G. Kirikos* (24 Nov. 2008). *SIFMA* (12 Dec. 2008). *IPC* (15 Dec. 2008).

Conflicts Policy. Module 2 should include a conflicts of interest policy for evaluators/examiners. ICANN should publish the names of the examiners and give applicants an opportunity to object. The language should also be narrowed to allow certain contacts with ICANN which are unrelated to the application. *Microsoft* (Guidebook comments, 15 Dec. 2008). The conflicts policy should also ensure that no party involved with consideration of an application has a conflict regarding prior or current work with the applicant or a party that might be adverse to the application. *INTA* (15 Dec. 2008).

Financial Crimes, Fraud, Breach of Fiduciary Duty Questions. The application form should contain questions intended to ascertain it the applicant or any of its officers, directors or managers has been convicted of financial related crimes, fraud, breach of fiduciary duty, or has been disciplined by any government for such offenses. *Microsoft* (Guidebook comments, 15 Dec. 2008). *G. Kirikos* (24 Nov. 2008) (financial requirements must create big barriers to malevolent entities securing a gTLD).The background of applicants, their principals, and their senior officers should be subject to review, perhaps through the use of a form similar to the Sponsoring Organization's Fitness Disclosure. *BITS.*

Suggestions on Scoring and Evaluation Criteria. The Guidebook should specify (and rate) at least the following: General registration policies, and special ones, if any (types of registrations or registrants, if distinction is made); Specific mechanisms for the TLD launch (sunrise, special allocation mechanisms; land rush, etc); Compliance/enforcement procedures, if any, and dispute resolution procedures; Special services (not necessarily in the New Registry Services meaning) offered and/or planned. *A. Abril i Abril* (Module 2, 15 Dec. 2008).

Community-Based

Closed Branded gTLD. Based on the criteria for "community-based gTLD." A "branded" gTLD for which the brand owner is the applicant, that brand owner will operate for its own benefit, and for which the brand owner will restrict the population (which could range from merely the applicant itself to its divisions and personnel to its manufacturing and distribution channels) would be considered a "community-based gTLD." If ICANN does not intend to allow the "community-based gTLD" designation to apply to corporate, branded gTLDs, it should so state and provide a detailed explanation as to why not. In some instances, such as branded gTLD, it is conceivable that the applicant may be the only established institution representing the community and the requirements for written endorsement of the application should reflect that

possibility. *Microsoft* (Guidebook comments, 15 Dec. 2008). Operators of closed, branded gTLDs should have the flexibility to decide to stop operating the gTLD if they so choose. In such circumstance, it would be inappropriate for a third party with no rights in the brand to operate the gTLD. *Microsoft* (Guidebook comments, 15 Dec. 2008)

Financial Services gTLDs. The "written endorsement" requirement for community-based gTLDs is insufficient, because ICANN cannot consider one institution representative enough of a community. The threshold for a community-based gTLD should be significantly higher. A select group of industry associations (or regulatory agencies) should act as a consortium designated as the "community" to make decisions regarding the approval of any gTLDs whose names suggest they offer financial services or to endorse any applicants of such gTLDs. *BITS* (15 Dec. 2008). New gTLDs could create new rounds of financial fraud and increased costs to financial sector at a time of economic distress. There should be a separate and distinct application process for financial sector gTLDs: (1) top-down approach to ensure that no unsponsored gTLDs are issued and if issued that such gTLDs are managed within an industry and regulatory framework, with no "open" applications and explicit financial industry and regulatory endorsement; (2) subject financial sector gTLDs to community-established governance rules, including laws and regulations established by financial sector regulators. Applicants must show their ability to comply; (3) the objection process for financial sector gTLDs should allow objection on grounds of insufficient governance and include a process for financial regulatory objection; (4) allow financial gTLD ownership to be revocable or transferable at any time in future when the represented community or regulatory body determines and shows that the sponsored gTLD has not satisfied its governance requirements. *FDIC* (15 Dec. 2008). Financial sector does not yet have clear consensus on having a financial services sector gTLD. Fundamental concerns are raised regarding how to ensure only legitimate entities would be granted a financial sector gTLD. ICANN should have application controls and a "community" consortium approach for financial gTLDs. *ABA* (15 Dec. 2008). *Bank of America* (15 Dec. 2008) (further analysis and consensus needed before having financial sector gTLDs)

ISSUES, ANALYSIS AND PROPOSED POSITIONS

Applicant Information

Issues

Submission of Updated Information: Should applicant be permitted to supplement incomplete sections?

Subsidiaries/Affiliates. Should applicants be permitted to set up newly formed subsidiaries or affiliates to serve as the registry?

Analysis

Submission of Updated Information: ICANN recognizes that situations change and applicants may need to supplement sections of their application throughout the process, however, ICANN also needs to protect against the possibility of applicants changing their applications for competitive advantage. Material changes in the application information must be reported immediately. A material change after the evaluation would render that evaluation inaccurate.

Therefore, changes to applications are generally not permitted after the evaluation has started, i.e., at the close of the application period.

Subsidiaries/Affiliates: It is not an objective of ICANN to prohibit the formation of new subsidiaries or affiliates by an applicant to serve as the Registry Operator. However, the formation of new entities to resolve string contention, say by agreement between contending parties, is a material change to the application information that must be reported.

Proposed Position (for this version of the Guidebook)

Submission of Updated Information: Applicants will be able to revise and supplement their application until the time when the application period is closed and submissions must be final. After this time, the Guidebook includes a requirement that an applicant notify ICANN in the event of any material changes to the application submitted.

Subsidiaries/Affiliates: It is acceptable for existing entities to set up newly formed subsidiaries or affiliates to serve as the registry. If new entities are formed after the evaluation performed (in order to resolve contention) the evaluation will be performed again, possibly incurring additional fees and possibly in the next round.

Financial Criteria

Issues

Should 1.2.3 be reworded to allow the submission of the latest "available" audited financial statements?

Can ICANN clarify how newly formed applicants should comply with the financial statement requirement?

Analysis

ICANN's requirements are suitably met in allowing applicants to submit the latest available audited financial statements, provided they are within a date of 12 months of the application and accompanied by interim statements. ICANN intends to update the Applicant Guidebook in line with the comments received to permit applicants to submit the latest available audited financial statements.

Newly formed entities should be permitted to submit pro forma financial statements with supporting data.

Proposed Position (for this version of the Guidebook)

Section 1.2.3 will be revised to allow applicants to submit the latest "available" audited financials and to submit unaudited financials for the latest interim period.

For newly formed applicants, a pro forma balance sheet will be acceptable.

Evidence of Good Standing

Issues

Are the documentation requirements for proving "good standing" under 1.2.3 sufficient to detect sham applications?

Will ICANN clarify: the definition of "good standing," the validity requirements for governments providing assurances of good standing, and the types of documentation necessary to establish good standing?

Analysis & Proposed Position (for this version of the Guidebook)

The good standing requirement is to independently demonstrate existence and organization of the entity. ICANN must separately evaluate the completeness and accuracy of information submitted in the application in order to approve an application and the possible entry into a registry agreement for a TLD. ICANN is continuing to investigate common practices in the various regions in order to provide further guidance to applicants on this requirement.

The requirement should be flexible to accommodate different systems as well as newly formed and well-established companies. A good standing certificate or the equivalent under local law will be acceptable to reflect the existence of the entity. ICANN recognizes that jurisdictions will vary in custom and the application requirement is intended to be flexible. ICANN will accept submissions with supporting documents or information as to the relevance under local law.

Use of Public Comment

Issue

Should evaluators validate the accuracy of a public comment?

Analysis and Proposed Position (for this version of the Guidebook)

Evaluators will be provided with public comment for use and reference in their evaluation. As part of the procedures for evaluators, they will be asked to apply appropriate judgment and verify comments if necessary.

The Guidebook and other documentation to the evaluators will reflect the ability to perform due diligence in regard to the public comments as required by the circumstances of that particular evaluation.

Scoring

Issues

Can ICANN clarify the type of rights that must be protected at start-up to score "1"?

Can ICANN attach the table of numbers omitted from Question 50 in Evaluation?

Will ICANN resolve the discrepancies in scoring in the Attachment of Module 2?

What are the criteria and what are the scoring guidelines for Section 3, Scoring, page A-25, Questions 57 & 58?

Will ICANN increase the criteria for earning a minimum acceptable score on proposed policies?

Will the scoring system for question 31, page A-11 of Attachment to Module 2 should turn on the amount of detail provided, or on the characteristics of the mechanisms themselves?

Will ICANN use a larger scale (e.g. a 10-point scale) for scoring evaluation criteria?

Analysis and Proposed Position (for this version of the Guidebook)

As part of the updates to the Applicant Guidebook, ICANN is revising the Attachment to Module 2. All questions require a passing score of at least "1". A series of additional consultations and discussion is being undertaken in order to determine what specific rights protection mechanisms might be included as a requirement in the evaluation. The table of numbers omitted from Question 50 can be included. Questions 57 and 58 are not scored individually but the answers to those questions will be used in combination with answers to other questions in order to score the criteria. For example, the soundness of the financial plan will be evaluated based upon answers to questions about expected revenue, the uncertainty in the projections and how to address major risks in the projections. This methodology is described in the preamble to the evaluation. There will be changes in the formatting of the questions and criteria to make this clear.

ICANN does not intend to adopt a larger scale for scoring evaluation criteria, but is reviewing areas where scoring can be improved to remove subjectivity and provide greater granularity for the applicants. Revisions to the scoring criteria will be posted in the revised version of the Guidebook and ICANN is undertaking independent evaluations of the scoring methodology to verify the scoring model or change it.

ICANN is reviewing the Applicant Evaluation Criteria and Scoring with the suggestions made by Mark Monitor, Chuck Gomes, CADNA, Microsoft, among others, and will be testing modifications to the evaluation criteria and scoring.

Evaluators

Issues

Will ICANN clarify the meaning of "one communication round per application"?

Will the evaluation team word their questions precisely to provide as much guidance as possible with regard to the type information needed?

Will an applicant be allowed the choice of engaging the same panel that conducted the initial evaluation or a different panel after it fails the initial evaluation and applies for extended evaluation?

Will ICANN allow stakeholders to query the applicants about specifics and contingencies regarding their plan for rights protection?

Will ICANN provide flexible criteria when considering an application for a new TLD?

Analysis and Proposed Position (for this version of the Guidebook)

The revised Guidebook gives some more detail on the exchanges between applicants and evaluators. Essentially, evaluators will ask one series of questions in an evaluation round if the information provided is not sufficiently clear to pass the application. Through a standard channel, evaluators will ask applicants specific questions to obtain the necessary information.

Stakeholders can comment through the public comment process and those comments will be made available to the evaluators. To have stakeholders actively involved in the evaluation through questioning would tend to slow the process and increase costs and decrease objectivity in a way that is unpredictable to applicants.

Whether or not the same panel hears extended evaluation is not definitely determined. Final decisions will be based upon the proposals and rules received from evaluation panel providers. Additional public comment is welcome on this issue.

The criteria are intended to be flexible in order to accommodate different business models as is described in the preamble to the evaluation criteria and scoring section of the Guidebook.

Ongoing Registry Operations

Issues

Can 1.2.3 (5) be clarified as regards the funding of on-going operations in the event of registry failure?

Will 1.2.3.5, be edited to require further information, such as the projected number of registrants, and to require funds to be held in escrow by a recognized third party, or some other form of security bond?

Will the bond or level of insurance be increased, perhaps to as much as USD $10 million?

Will ICANN strengthen the "documentation of outside funding commitments" requirement?

Can ICANN clarify how an applicant provides documentary evidence of its ability to fund ongoing registry operations "for then existing registrants" at a time when many applicants won't yet have any registrants?

Analysis and Proposed Position (for this version of the Guidebook)

ICANN has made clarification to several areas of the questions and scoring criteria. Also, independent evaluations of the scoring criteria are being performed with an eye toward making additional changes that will improve objectivity.

As suggested by Demand Media, Microsoft, INTA and others, ICANN will continue to clarify the evaluation questions on registry failure and continuity, provide additional information on the bond or level of insurance, and on how an applicant provides documentary evidence of its ability to fund ongoing registry operations.

Miscellaneous

Issues

RFCs 3730 and 3734 appear to have been updated by 4930-4934.

Will ICANN reevaluate the "written endorsement" requirement for community-based gTLDs?

Will ICANN provide guidelines for determining which portions of the application are to be confidential, and what methods are used to maintain the confidentiality of this information?

Should DNSSEC be required for any proposed new gTLD that is devoted to high trust applications?

Will ICANN revise the application to require background checks and/or disclosures of past fraud by an applicant, its officers, directors and managers?

Will ICANN provide more information about how it will select and monitor outside service providers who will be serving as evaluators?

Should ICANN develop a conflicts of interest policy for evaluators and allow applicants to view the names of and object to evaluators based on such conflicts?

Will ICANN edit the guidebook to provide more clarity on the issues of general and special registration policies, specific mechanisms for the TLD launch, Compliance/enforcement procedures, dispute resolution procedures; and special services offered and/or planned?

Analysis

These are all good questions and comments that ICANN takes very seriously. ICANN will be confirming updates to RFCs and making the appropriate changes. ICANN will be offering some additional clarity with regard to confidentiality and the application process in general. ICANN believes in encouraging Registry Operators to use the most advanced technologies available to ensure the security of its information as it is fundamental to the security of the Internet. ICANN must also, however, balance these requirements with the constraints applicable to small Registry Operators who do not have and may not expect to have a large user base to justify the cost of certain measures. For these smaller Registry Operators, the requirement to implement these state of the art security measures, DNSSEC for example, could be too financially burdensome as a mandatory requirement. This requirement may change as DNSSEC becomes widely adopted.

Proposed Position (for this version of the Guidebook)

RFCs 3730 through 3734 have been replaced with the most current RFCs 4930-4934 in the next version of the Guidebook.

ICANN will clarify which sections are designated confidential.

ICANN will continue to encourage Registry Operators to implement DNSSEC but for the time being such implementation will remain optional.

Background checks for applicants are a good suggestion, and there are rules for how and when this might be done in each jurisdiction. The evaluators will be provided with a variety of tools to use to verify information in their evaluations.

ICANN will publish information on the selection of evaluators as well as a RFP for such evaluators. The process for selecting evaluators will be open and transparent.

ICANN intends to add granularity in the evaluation questions and scoring, in line with comments and inputs received.

Community-Based

Issues

Has ICANN decided not to allow the "community based" designation to apply to corporate brand owners? Please explain.

Will ICANN consider allowing a ["closed"] branded TLD to cease operations of its TLD without requiring it to turn the operations over to a third party?

Will ICANN consider increasing the number of representative institutions necessary to satisfy the "written endorsement" requirement?

Analysis

Summary of key points:

The concerns/questions regarding an applicant's freedom to select the type of application and the possibility of multiple representative institutions for a community are already covered in the current approach and no changes of the Applicant Guidebook are foreseen in these respects.

Community based/Brand Owners: It is wholly up to the applicant to select the type of application to file. ICANN will not verify nor change the type as such. Whether the application, if declared as community-based, will prevail in Comparative Evaluation for a contention situation is dependent on how well the application scores against the criteria, as detailed in the Applicant Guidebook. No change of the applicant's freedom to select the type of application to file is foreseen for the next version of the Applicant Guidebook.

Multiple representative institutions: If the community has a structure with multiple institutions that are representative of different parts of the community, it is wholly appropriate to take endorsement, or lack thereof, from all these institutions into account. Such endorsement is assessed only in a case when the application is in a contention situation that is resolved by Comparative Evaluation. As further detailed in Module 4 and the explanatory memorandum on string contention handling, the evaluation of the Endorsement criterion in such a case is already foreseen to take into account both endorsement and opposition from constituent parts of the

community and can thus address a situation where there are multiple representative institutions. No change of that aspect is foreseen for the next version of the Applicant Guidebook.

Proposed Position (for this version of the Guidebook)

<u>Community based/Brand Owners</u>: It is the applicant's choice to designate the application as community-based or open. There is no prohibition currently and none is envisaged for the next version of the Applicant Guidebook. The same criteria will be applied to all applicants in cases where there is a community-based objection and in cases of comparative evaluation.

<u>Multiple representative institutions</u>: The endorsement criterion applies to a case when a contention situation is resolved by Comparative Evaluation, where the endorsement will be taken into account as appropriate for the community addressed.

IX. <u>TRADEMARK PROTECTION</u>

<u>Summary of Key Points</u>

- Comments state that the introduction of new TLDs will increase burdens on rights holders by multiplying opportunities for malicious behavior at top and second levels of the DNS.
- ICANN will continue consultations over the next few months to promote a universal understanding of issues across the rights-holder community and derive potential solutions to possible deleterious effects of the introduction of new TLDs.

<u>Summary of Input</u>

A substantial number of public comments asserted that the new gTLD program will create an array of trademark law protection concerns which must be addressed through further trademark protection measures. This section organizes the summary of responses about Trademark Protection into the following categories: *In General, Process and Procedure/Defensive Registrations; Objections; and Rights Protection Mechanisms.*

In General

<u>Costs and Burdens on Trademark Rights Holders</u>. Numerous comments raised concerns that the new gTLD program would potentially impose new burdens and costs on rights holders in well-known brands and trademarks. For example, the International Olympic Committee (IOC) asserted that ICANN's guidelines should explicitly acknowledge the IOC's preeminent IP rights in the Olympic trademarks and raised concerns about: what preventative measures can ICANN take to block or screen out unauthorized applicants for Olympic trademarks; what steps can be taken to ensure that the IOC does not have to expend funds chasing down unauthorized uses of Olympic trademarks? *IOC* **(**5 Dec. 2008). Others said that allowing registries to sell domains of famous trademarks and keep the profits from the sale is a basic flaw in ICANN policies, which undermines ICANN credibility and the entire domain system. *WMI* (13 Dec. 2008).

<u>Monopoly Concerns</u>. Commenters also raised concerns about the potential for the new gTLD program to destroy the DNS's level playing field by leading to the creation of single entity super brands and monopolistic generic TLDs and urged that more consideration is needed about how to guard against the creation of monopoly positions. E.g., *P. Tattersfield* (15 Dec. 2008)(generic gTLDs risk creation of monopoly positions that would not be permitted under equivalent trademark law; while on the surface a competitive, market-driven approach for generic gTLDs may be well-supported, in practice there may be significant concern about the specific entities that actually run them—e.g., ".search" run by run by Afilias or VeriSign as opposed to ".search" run by Microsoft); *ANA* at 4 (15 Dec. 2008) (new generic TLD policies and standing must be carefully reviewed). *NCUC* at 4 (15 Dec. 2008) (the proposal perpetuates a presumption that trademarks and domain names are identical rights and raises significant anticompetitive issues regarding generic names). Commenters also warned that the new program is likely to confuse rather than benefit consumers. *E.g., U.S. COC* at 3 (15 Dec. 2008); *Arab Team* at 3 (15 Dec. 2008) (users will lose faith in a system with many variations of TLDs existing for a single label). Particular industry segments are concerned about the rights to certain generic TLDs and urged that no action be taken on them pending further work and consideration about issues raised. For example, the ABA requests that no ".bank" gTLD be granted until such time as the ABA has secured a sponsor or community base. *ABA* at 1-4 (15 Dec. 2008. *See also* BITS at 2-3, 5 (15 Dec. 2008); *Bank of America* at 8 (15 Dec. 2008).

<u>Single Enterprise/Corporate TLDs</u>. A number of commenters said that further work and consideration is required regarding the issue of single enterprise or corporate TLDs.

For example, eBay stated that the draft guidebook may need adjustment to accommodate the possibility to new TLDs operated by individual corporations for their own use, whether strictly internal or consumer-facing. It said ICANN should clarify whether such applications would be labeled as "open" or as "community," and urged that in appropriate circumstances a registry should be allowed to enter into an exclusive arrangement with a registrar to handle all registrations in a gTLD. *eBay* at 6 (15 Dec. 2008).

Microsoft asserted that if ICANN does not intend to allow the community based gTLD designation to apply to corporate, branded gTLDs, than ICANN should explain a rationale for not doing so. In some cases the applicant may be the only established institution representing the community and the written endorsement requirement should reflect that possibility. Operators of closed, branded gTLDs should have the flexibility to decide to shutter the gTLD; and set out that it would be inappropriate for a third party with no rights in the brand to operate the gTLD. *Microsoft* at 9-10 (Guidebook comments, 15 Dec. 2008). *See also INTA* at 7-8 (15 Dec.2008).

GT at 3-4 (15 Dec. 2008) (ICANN should amend the Guidebook to allow a "DNS wildcarding" exception for single enterprise TLD registries).

Potential negative impacts on the perception of DNS root due to single registrant TLDs were also raised. *W. Staub-CORE* (15 Dec. 2008) (single registrant TLDs will create a rush of brands to the top level; there should not be brand-based TLDs where the only conceivable use is reserved to the brand holder itself). Some commenters wanted further practical guidance about single enterprise/corporate TLDs. *E.g.*, is the application open to public or just to those who will be the registrar business? Can any company apply directly to ICANN for a new gTLD for its own business purposes and not resell second level domains? For example, can Nike apply for a .nike gTLD and operate it exclusively for themselves? And technically, will the Internet users be able to just type http://nike (without any second level domain name) to go their website? *J. Lam, Email Support.*

Process and Procedure; Defensive Registrations

Numerous comments asserted that ICANN must improve the process and procedures for trademark protection if the new gTLD program is launched. For example one commenter highlighted these concerns with the new gTLD program: (1) little to no protection for global trademark holders; (2) excessive administrative costs for applicants; (3) virtual total control by ICANN with no accountability; (4) exposure to increased fraud and legal liabilities for trademark owners; and (5) easy access and control for unscrupulous entities to core Internet infrastructure components and ultimately threatens Internet commerce around the globe. *R. Raines-Chevron Corporation* (4 Dec. 2008).

Many commenters emphasized that the new gTLD program will impose on them the necessity of expending resources to submit multiple defensive registrations to protect their trademarks, an especially negative cost impact given the global economic recession. *Internet Commerce Coalition* at 2 (15 Dec. 2008) (the new TLD program will greatly increase costs of protecting trademarks and brands). *Citrix* at 1 (15 Dec. 2008) (threatens brand integrity and is too costly). *INTA* at 2 (15 Dec. 2008) (costs imposed on trademark owners and businesses by the new GTLD program raise special concern in current global economic downturn). *E. Brunner-*

Williams (the $75,000 annual fee is too high for most trademark owners to consider defensive registrations of TLDs, but possible for a large trade union and its membership).

USTA asserted that there is no substantiated need for new gTLDs, and is also concerned with trademark abuse in new gTLDs, the obligation on brand owners to defend their trademarks in new gTLDs, and the costs associated with the new gTLD process. They are concerned that brand owners will be forced to defensively register to protect their brands. *USTA* (15 Dec. 2008). *USCIB* at 2 (16 Dec. 2008) (having low-cost ways to protect trademarks at the pre- and post-allocation stages is a key concern). *Hearst Corporation* (15 Dec. 2008) (no commercial value in expanding gTLDs, and will require costly defensive actions by trademark owners). <u>See also</u> *Time Warner* (15 Dec. 2008) (launch of a very large number of new gTLDs poses huge exploitation risks and costs to major trademark owners). *Lego* (4 Dec. 2008) (will impose major costs; outsourcing technical administration to an ISP would lessen burden for trademark owners). *GE van Staden* (12 Dec. 2008); *GE Bandon* (11 Dec. 2008). *Adobe* at 1 (12 Dec. 2008) *Bank of America* at 2 (15 Dec. 2008). *Melbourne IT* at 1 (15 Dec. 2008). *Cyveillance* (15 Dec. 2008).

Commenters cited the need for additional, cost-effective trademark protection measures. Illustrative examples include the following:

<u>Block Registration for Brand Holders</u>. Procedures should be implemented whereby (analogous to the community trademark or PCT patent in which several countries are designated with a single registration): (a) holders of existing domain names or trademarks could register any number of TLDs with a single registration, with a reduced cost to allow such a block registration to be financially feasible; (b) mechanisms to avoid abusive registrations and to verify actual use/right of alleged right holders; (c) an existing registration of all domain names/extensions would effectively block new domain names/extensions that are confusingly similar to existing domains by means of notification to the existing domain name holder allowing it a right of first refusal during a certain period (as opposed to a single sunrise period) - only if it does not act on this right would the domain name become freely available; (d) Joint action - in order to protect their rights, domain name and trademark holders could file a single action or single submission for dispute resolution involving any number of TLD extensions that infringe prior rights, instead of having to file separate actions in each case. *Busse* (13 Dec. 2008).

Many other commenters raised concerns about the increased need for defensive registrations, and some emphasized giving trademark owners the right to block or park TLDs containing their trademarks and to purchase such TLDs at a low cost with no obligation to implement infrastructure to support it. *See, e.g., Lego* (4 Dec. 2008); *Visa* (13 Dec. 2008) (brand owners should be able to register their trademark extension to protect it but should not have to actively use it or fulfill back-end requirements).

<u>Top Level Reserved Names List</u>. ICANN should create a list of top-level reserved names based on clearly defined, objective criteria and a clear process requiring all new string applicants to refer to and honor this list to minimize disputes between new registry applicants and global trademark holders. A dispute procedure should be provided with registry applicants to bear the cost. If the holder of the registered name prevails, the name should be removed to a "White List" of names that are unavailable for registration. ICANN should consider this list concept for country and geographic names. ICANN should revise dispute process at the second level to mandate a standard sunrise process and incorporate the global brand reserve list for second level domains also. *AT&T* at 4-5 (15 Dec. 2008). *See also G. Kirokos* (24 Nov. 2008); *NAM* (15 Dec. 2008) (supports "reserved list" to protect brand owners, just as ICANN created a list of

reserved ICANN-related names to protect its own interests); *NYC* at 6 (13 Dec. 2008) (governments or non-governmental organizations should have same rights as ICANN to reserve their own names). IANA-related infrastructure names should be protected at all levels; the reserved names list has omitted significant Internet infrastructure names. *ARIN* (8 Dec. 2008). ICANN should create a reserved list based on objective criteria for trademark owners at the registry level and applicant requests for a domain name on the reserved list should be resolved in an expedited administrative proceeding. *Internet Commerce Coalition* at 6 (15 Dec. 2008). *See also INTA* at 4-5 (15 Dec. 2008); *Pattishall* at 2 (15 Dec. 2008) (consider reserved names list and/or sunrise); *Nike* (2 Dec. 2008); *CADNA* at 4-5 (15 Dec. 2008) (reserved names list); *FairWinds* at 2-3 (15 Dec. 2008); *L. Cordell* (15 Dec. 2008); *USTA* at 7-8 (15 Dec. 2008); *Lovells* at 3-4 (15 Dec. 2008) (reserved names system); *ITT* at 4 (15 Dec. 2008); *Visa* (13 Dec. 2008); *News Corporation* (15 Dec. 2008) (the reserved names list should be broadened to include well known trademarks).

Some public comments cautioned against ICANN establishing protection mechanisms for trademark owners beyond existing law. *E.g., ICA* at 2, 10-12 (16 Dec. 2008) (protections for rights holders should be limited to enforcement under existing law, not based on creation of broader rights by ICANN fiat; a reserve list of trademark names should not be created because it would provide rights protections beyond the geographic and relevant marketplace limitations of trademark law; new rights or procedures should not supplant the UDRP; all second level registrations should be required to be subject to the UDRP). *See also, C. Christopher* (16 Dec. 2008) (lack of support by trademark owners for TLD expansion is self serving, especially by those who benefit from error traffic monetization and from not having a neutral network.; allowing trademark owners to remove themselves from .com and obtaining their own .brand may reduce trademark problems—consumers will no longer look to .com for individual trademarks).

WHOIS Commitment. New gTLDs will, like nearly all of the new gTLDs previously launched under the auspices of ICANN, operate as thick Registries. Accordingly, they should commit to making a full set of Whois data publicly available on each registration in the new gTLDs, so that copyright and trademark owners (as well as law enforcement, consumers, and members of the public) will have ready access to this information. *IPC* at 6 (15 Dec. 2008).

For the post-launch stage, new gTLDs should take on the same WHOIS publication obligations as those in previous rounds: nearly all new gTLDs have adopted a "thick" registry model in which extensive registrant contact information is collected and retained at the registry level. TLD applicants must specify how they will ensure that data collected by registrars and stored in the registry is accurate and up to date, and this information should be publicly evaluated. *eBay* at 5 (15 Dec. 2008).

ICANN should evaluate applicants' commitment to maintaining and enforcing WHOIS requirements, and should encourage applicants to maintain centralized or "thick" WHOIS databases and adopt additional WHOIS requirements. *CSC* at 4 (15 Dec. 2008). *Time Warner* at 6 -7 (15 Dec. 2008) (new gTLD registries should be required to maintain "thick" registries and make full registrant contact data publicly accessible; applicants must have policies to ensure accuracy of WHOIS data and how they will enforce this requirement with registrars and resellers, and there should be a tie-in to ICANN's WDRPS to shut down domains where WHOIS reports go unanswered and uncured for more than 15 business days). *AT&T* at 5 (15 Dec. 2008) (require applicants to maintain thick WHOIS data, inquire about proxy registrations and access to actual registrant data, standardize procedures in any new registry agreement; this is key to law enforcement and consumer safeguards). *U.S. COC* at 8 (15 Dec. 2008). *NAM* (15

Dec. 2008) (applicants must commit to open and accurate WHOIS system; proxy and private registrations should be discouraged if not prohibited). *Internet Commerce Coalition* at 7 (15 Dec. 2008) (require applicants to commit to open and transparent WHOIS database). *See also Visa* (13 Dec. 2008); *COA* at 2, 9-10 (15 Dec. 2008); *FairWinds* at 4 (15 Dec. 2008). *MarkMonitor* at 3 (15 Dec. 2008); *Lovells* at 4 (15 Dec. 2008); *IPC* at 6 (15 Dec. 2008); *Grainger* at 4 (15 Dec. 2008). *AIPLA* at 2 (15 Dec. 2008) (ensure enforcement of WHOIS data accuracy and establish policy regarding proxy or private registrations). *MARQUES* at 5 (15 Dec. 2008) (registry operators should be required to offer a privacy service but must provide for service to third parties and rights owners that need access to the registrant; registrars should not be allowed to offer Whois privacy protection services in the new gTLDs). *See also ITT* at 2-3 (15 Dec. 2008); *Bank of America* at 9 (15 Dec. 2008); *IACC* at 3 (10 Dec. 2008) (ICANN still needs to resolve outstanding Whois issues with existing gTLDs and should not exponentially magnify those problems by launching new gTLDs).

IP Registry/Other Mechanisms. ICANN must do more to provide scalable, cost-effective and efficient rights protection mechanisms to minimize the ICANN-imposed burden of having to secure defensive registrations and combat cybersquatting in as many as 500 new gTLDs. Possible steps include: (1) creating a "reserved list" to which rights owners could apply to have their marks excluded from second level; (2) developing 2-4 standardized Rights Protection Mechanisms (RPMs) that applicants could select from; (3) facilitate creation of a central repository for legal rights documentation on which rights holders may rely in pre-launch RPMs and requiring successful applicants to utilize the repository in their RPMs; (4) creating an online, cross-TLD interface through which rights holders can designate gTLDs they wish to participate in and gTLD operators may access the requisite data for participating rights holders. ICANN must discourage new gTLD registries from using RPMs as revenue-generating opportunities. *Microsoft* at 3 (Guidebook comments, 15 Dec. 2008). *See also ANA* at 3 (15 Dec. 2008); *Ameriprise* at 2 (15 Dec. 2008). *U.S. COC* at 7 (15 Dec. 2008) (ICANN should create a low cost or no-cost IP registry applicable to gTLD applicants and second level domains; it would be used to screen out infringing applications so that trademark owners do not have to defensively register marks in each new gTLD). *MarkMonitor* (15 Dec. 2008) (trademark owners in registry could get notice of infringing applications allowing them to apply for the gTLD). *K. Abbot (8 Dec. 2008) MARQUES* at 4 (15 Dec. 2008) (supports IP registry database concept). *See also Melbourne IT* at 3 (15 Dec. 2008); *Visa* (13 Dec. 2008); *SIFMA* at 4 (12 Dec. 2008).

Rights Holder Verification Process. ICANN should consider an alternative to a central IP registry database to facilitate sunrise registrations in new TLDs designed through a consensus process according to the following principles: real-time verification from authoritative sources; time stamp on all verified data; operation by a trusted third party on behalf of global Internet community; all communities to have a voice in developing technical and policy considerations; ICANN should not duplicate a sub-set of non-authoritative trademark data when other more authoritative sources exist. *M. Palage* (15 Dec. 2008).

Second-level concerns. ICANN should (1) require all new TLDs to implement a standard and effective pre-launch rights protection mechanism that would allow trademark owners to block their marks from being registered at second-level; (2) prevent use of "premium pricing" schemes for second-level domain names corresponding to or related to a well known trademark; and (3) require new TLDs to limit fees, if any, in any pre-launch rights protection mechanism to actual cost recovery. *News Corporation* at 3 (16 Dec. 2008). *SIIA* at 5 (15 Dec. 2008) (pre-launch framework to prevent abusive registrations lacking in Guidebook—this issue cannot be left to whims of TLD applicants). Applicants should be evaluated based on criteria such as the likely effectiveness of mechanisms for preventing abusive second-level registrations; costs imposed

on rights holders who make use of such mechanisms, including claims; whether applicants are cooperating with other applicants in implementing common mechanisms or features. Premium pricing of second-level domains should be prohibited. *eBay* at 4-5 (15 Dec. 2008). *IPC* at 5-6 (15 Dec. 2008) (ICANN must do much more to ensure effectiveness of pre-launch mechanisms). *MARQUES* at 4 (15 Dec. 2008) (detailed pre-launch rights protection mechanisms required). ICANN should incent TLD applicants to adopt ways beyond the UDRP compliance to deal promptly and effectively with abusive registration of second-level domains. *eBay* at 6 (15 Dec. 2008). For second-level registrations ICANN should mandate a notice/takedown procedure if the domain name is used in an infringing manner to a name on the IP Registry or require WHOIS verification and prohibit proxy or anonymous registrations for registrants intending to register a domain name conflicting with a name on the IP registry. *USTA* at 9 (15 Dec. 2008). *See also MARQUES* at 5 (15 Dec. 2008) (study notice/takedown experience to improve expedited suspension at registry level of domain names that facilitate sale of counterfeit goods and other infringement).

ICANN should: evaluate new gTLD applications not only on the level of detail used to describe their preventive mechanisms but also on how effective they are likely to be; require new gTLD operators to prevent registrations at the second level of any mark appearing on the gTLD reserved names list; require new gTLD operators to participate in a common repository for documentation of trademark claims that rights holders can invoke in any pre-launch mechanism for particular TLDs; provide a single portal through which rights holders can participate in any pre-launch mechanism provided by participating new gTLD registries and provide strong incentives in the evaluation process for new gTLD operators to participate in the common portal; provide strong incentives for new gTLD operators to limit fees in any pre-launch mechanism to actual cost recovery and to offload costs to ICANN-provided facilities such as the suggested common repository and single portal. *Time Warner* at 6 (15 Dec. 2008). ICANN should establish a baseline processes to ensure that IP rights holders can easily protect their trademarks and brands both prior and subsequent to launch of new gTLDs. *Internet Commerce Coalition* at 6-7 (15 Dec. 2008). *INTA* at 15-16 (15 Dec. 2008) (e.g., reserved trademark list, develop a few basic rights protection mechanisms that applicants could choose; database of cleared rights). *See also COA* at 2, 8-9 (15 Dec. 2008).

Objections

Burden on Rights Holders. The IACC strenuously objects to the proposed Applicant Guidebook insofar as (i) it imposes 100% of the financial burden of objecting to any application made for a new gTLD upon the existing rights owner (except, ironically, for ICANN itself); and (ii) it imposes no requirement beyond adoption of a UDRP based dispute resolution model with respect to second level domain names. *IACC* (10 Dec. 2008). A less costly and more efficient IP protection solution should be considered to shift the burden to bad faith infringers including due diligence by ICANN regarding serial domain name abusers. *Visa* (13 Dec. 2008).

The ICANN plan reliance on the Legal Rights Objection procedure to filter out applicants seeking to establish new gTLDs that are identical or confusingly similar to preexisting trademarks and service marks (1) unfairly shifts the entire burden and of cost and risk onto trademark owners to identify and challenge applications; (2) is too uncertain and too limited to serve as an adequate protection against abusive applications. *Time Warner* at 2 (15 Dec. 2008). *See also SIFMA* at 5 (12 Dec. 2008); *IACC* at 1-3 (10 Dec. 2008) (suggests additional IP protection measures, including bad faith fines). ICANN should filter out the strongest global marks at an earlier stage, either through expanding the "reserved names" list of character strings that are barred from recognition as new gTLDs or through an adaptation of the non-

objection procedure contemplated for geographic names.—*i.e.,* require that any application be accompanied by a statement of non-objection from the owner of the mark. Also, applications should be disclosed as they are received, not when the application window closes, so that mark owners have the option of filing their own competing application rather than only having the option of invoking the objection procedure. ICANN should also take into account the record of past abusive conduct by the applicant in the existing and new TLD space, and build the expanded reserved names list into the string confusion algorithm to be used to guide determinations on string contention. *Time Warner* at 3 -4 (15 Dec. 2008). A pattern of abusive DNS behavior should be grounds for ineligibility to apply, not just a factor in adjudicating an LRO. *Bank of America* at 11 (15 Dec. 2008). The application procedure should include diligence for past domain name abuse and certainly this should be a factor if raised in any objection. *Nike* (2 Dec. 2008); *Microsoft* (Guidebook comments, 15 Dec. 2008) (application form should have questions about financial crimes, fraud, etc.).

Precedential value of successful objections. Famous trademarks should be added to the reserved name list. However, failing this, successful objections should have precedential value so trademark owners don't have to keep objecting. *Nike* (2 Dec. 2008. *MARQUES* (15 Dec. 2008).

Rights Protection Mechanisms

Current Mechanisms Not Sufficient for New TLDs. The current trademark protection sunrise period system used for TLDs to date will not work economically or practically for new TLDs. The suggestion of an ICANN-supported database of trademarked items for purpose of pre-registering IP rights to protect them within proposed new gTLDs is encouraging. The UDRP is unlikely to be an effective remedy in the context of a very large number of new TLDs. *Net Names* at 1 (16 Dec. 2008). *See also Bank of America* at 2-3 (15 Dec. 2008); *Grainger* at 3 (15 Dec. 2008); *MarkMonitor* at 2 (15 Dec. 2008); *NCTA* at 2-3 (15 Dec. 2008); *USTA* at 8-9 (15 Dec. 2008); *CSC* at 3-4 (15 Dec. 2008); *U.S. COC* at 2-3 (15 Dec. 2008); *Ameriprise* at 2 (15 Dec. 2008). *News Corporation* at 3 (16 Dec. 2008) (with new gTLD program UDRP as tool for second level protection could be undermined completely). *Rodenbaugh* at 1-2 (16 Dec. 2008) (ICANN should study the costs of the new program for trademark owners and other rights holders; the new gTLD program will make abuses dramatically worse if stronger protection mechanisms are not developed to address abusive registrations). *eBay* at 1 (15 Dec. 2008) (existing defense mechanisms almost certainly not feasible once new gTLD process occurs). Most major corporations prefer that the new gTLD program launch be delayed until basic safeguards are adopted to protect against trademark abuse (74% of domain names containing a trademark were registered by 3rd parties and not the brand owner) *CSC* at 3 (15 Dec. 2008). *MarkMonitor* at 2 (15 Dec. 2008) (new tools against brand abuse needed that shift costs away from brand owners). *See also RILA* at 2 (15 Dec. 2008). ICANN should establish clear conflict avoidance procedures designed to avoid granting applications that infringe on global trademark holders; the new gTLD program does not afford comprehensive protections to globally recognized brands. *AT&T* at 1 (15 Dec. 2008); *NAM* at 3-4 (15 Dec. 2008) (UDRP will be impractical and too costly for new gTLD program).

Single mode of protection. ICANN should address why there is not a universal Rights Protection Mechanism ("RPM") that all new gTLDs must follow. *Anonymous Email* (26 Nov. 2008). Presently, it is not proposed that there should be one single model of protection for the assignment of domains within a new gTLD, i.e. whether there should be a sunrise period or some other procedure, and the precise terms of any such sunrise. Consequently, with the anticipated launch of numerous gTLDs a trademark owner seeking to protect its key trademarks

will have to familiarize themselves with the particular model chosen for each one, and ensure that they comply. This will inevitably be more time-consuming, and consequently costly, than having one prescribed model. *BBC* (15 Dec. 2008); *MARQUES* (15 Dec. 2008); *Rodenbaugh* (16 Dec. 2008) (supports one-time standardized sunrise validations process for interested rights holders, but more and stronger mechanisms needed to protect rights both before and after infringements).

Explicit Minimum Standards. The draft Guidebook must state for applicants the nature of IP rights that it must consider and minimum standards applicants must have in place for developing a mechanism to protect the rights of others—e.g., the consequences if an assertion of rights is sustained, the consequences if the assertion is rejected, and the minimum standards of authentication to be applied. By making minimum standards known in advance, vendors can self-identify as possessing a solution they believe will fulfill ICANN's minimum substantive requirements whether or not the procedural mechanism is a "sunrise" or a "stop" or some other form. Brand owners can determine the estimated cost of advanced registration and/or opposition and make strategic decisions regarding both. *GT* at 1-2 (15 Dec. 2008).

Best Practices. New gTLD applicants should be required to adopt strong best practices to protect IP rights; if the method chosen is sunrise period, trademark owners should be charged only a reasonable minimum fee to register their protected names at the second level on the new gTLD. *ICA* at 11 (16 Dec. 2008).

New Registry Agreement--Obligation to Protect. Section 2.7 of the proposed new registry agreement adopts a new, ongoing obligation to "protect the legal rights of third parties," which goes beyond the current commitment to take specified and agreed-upon steps to protect such rights. It creates potential liability for infringement that is neither practical nor consistent with established law. *RyC* (6 Dec. 2008).

Abusive Registrations/Transparency. There should be greater transparency and stakeholder inquiry of an applicant's proposed mechanism to minimize abusive registrations and other activities that affect the legal rights of others. The criteria should be increased for earning a minimum acceptable score on proposed policies to minimize abusive registrations. *NetChoice* (15 Dec. 2008).

Issues

In General

What preventative measures can be taken ICANN take to block or screen out unauthorized applicants for trademarks (e.g., Olympics)?

Why are Registries allowed to maintain registrations of famous trademarks and keep the profits?

How will ICANN handle industry-specific generic TLDs (e.g., ".bank" and request for delay until such time as banking industry has consensus and sponsorship is secured)?

How will ICANN handle single enterprise and "corporate" TLDs? E.g., could corporations have a formal relationship with an exclusive registrant?

Process and Procedure; Defensive Registrations

Will ICANN increase the protection for trademark rights holders?

Will ICANN consider allowing trademark holders to apply for multiple TLDs on one application?

Will ICANN consider a low-cost alternative for trademark rights holders to reserve certain TLDs?

Is the application process open to the public or only potential Registry Operators?

Can a company apply for a TLD for internal use only (i.e., not sell second-level domains)?

Will ICANN require new Registries to commit to making a full set of Whois data publicly available so that trademark rights holders (and others—consumers, law enforcement, etc.) can have access to them?

Is ICANN considering any ways to lower the cost of defensive registrations for trademark rights holders?

Will ICANN consider a policy where trademark owners are allowed to apply for TLDs with no obligation to support it?

Objections

Why is the financial burden of the objection process borne by existing rights holders?

Will successful objections have precedential value?

Does past abuse factor into the decision in the objection process?

Rights Protection Mechanisms

Why isn't there a universal rights protection mechanism that all new gTLDs must follow?

With the expansion of the obligations regarding protection of the rights of third parties, do the Registry Operators face greater infringement liability exposure?

Will ICANN consider adding mechanisms that allow for greater transparency of an applicant's rights protection mechanism to minimize abusive registrations?

Proposed Position (for this version of the Guidebook)

The guidebook should have a notation added indicating that information has been received regarding additional requests for trademark protection, and that this is an issue which ICANN has determined requires additional consultation. ICANN intends to conduct a series of discussions with all relevant parties relating to propose enhanced protections for trademark name holders. ICANN is in discussions with WIPO to coordinate setting up some conferences to propose some additional solutions to these issues.

If additional trademark protection mechanisms are agreed upon and included in the next guidebook, this would likely result in a cost savings to trademark holders, and additional consideration should be given to these concerns raised as part of any proposal.

It is possible that in consideration of additional mechanisms for trademark rights holders there may be solutions that require changes to this section in the next version of the Guidebook.

Analysis

As with all situations, ICANN must balance the needs of individuals and individual constituencies with the needs of the community at-large. As it pertains to trademark protection, ICANN recognizes the trademark rights holders' concerns with protecting their brands and controlling costs associated with defensive registrations. ICANN believes in protecting brand owners' trademarks and preventing abusive registrations. To that end, ICANN is continuing to evaluate and update its brand protection strategy and will be setting out a process to receive further inputs regarding appropriate mechanisms to enhance those protections.

Process and Procedure; Defensive Registrations

ICANN understands that trademark protection is of serious concern to the trademark rights holders and is requesting additional input on mechanisms to better protect those rights holders. On the other side of this issue is the need to protect competing trademark rights holders who believe they too have a right in the proposed TLD. ICANN has set forth an enhanced obligation on Registry Operators to protect the rights of third parties within the objection processes and rights protection mechanisms, which should help protect trademark rights holders.

ICANN Staff is evaluating a number of options for further enhancing the mechanisms available within the processes for trademark rights holders; however, it must also take into account the interests of non-trademark holder applicants. A system must be put into place that balances the needs of trademark holders to protect their interests while still promoting an open marketplace for the rest of the community.

The proliferation of defensive registrations is a concern that should be addressed because it is not beneficial to either the trademark rights holders or the Registry Operators.

Objections

These questions bring to light important issues that need to be clarified. In the past, the reserved name list was not as successful as had been hoped in protecting trademark rights holders, and was not uniformly available.

The objection process as drafted requires the objector to bear the costs of the process to prevent frivolous objections and the exposure of TLD applicants to excessive costs. There are many factors that contribute to the resolution of the objection process and the factors utilized should include past abuse.

Rights Protection Mechanisms

ICANN's position has been to develop and implement effective and efficient rights protection mechanisms. ICANN Staff sought and considered information from a variety of sources relating to the implementation plan, including setting out the paper promulgated by the IP Constituency (a copy of which can be found at: http://www.ipconstituency.org/PDFs/A%20Perfect%20Sunrise.PDF) which indicated that no single rights protection mechanism was superior to another and that any number of methods could be equally successful.

All Registry Operators are required to post their rights protection mechanisms to allow applicants a window into the decision making process. It may be necessary to adopt formal steps to address issues of particular concerns to the community.

X. <u>OBJECTION & DISPUTE RESOLUTION PROCESSES</u>

<u>Summary of Key Points</u>

- Several specific questions regarding dispute resolution procedures are answered; new detailed procedures are introduced in the Draft Applicant Guidebook, version 2.
- Specific questions regarding aspects of community-based, legal rights and morality and public order objections are answered. Standards to be employed by morality and public order dispute resolution panels are introduced in the Draft Applicant Guidebook, version 2. There are other Guidebook clarifications.
- Dispute resolution fees models are discussed; the "loser pays" model remains as the preferred model.
- Whether there should be appeals and other post-decision activities are balanced. The current model of no appeals remains but post-delegation objections can be raised in certain areas, with mechanisms under construction, and the model of an Independent Objector is introduced.

<u>Summary of Input</u>

This section organizes the summary of responses into the following categories: *Appeals and Post-Decision, Community-Based Objections, Existing Rights, Fees, Morality and Public Order,* and *Procedures. .*

Appeals and Post-Decision

<u>ICANN Authority</u>. Under what circumstances will ICANN allow an application to go forward notwithstanding a successful objection (e.g., decision by DRP in favor of objector)? *K. Rosette* (Module 3, 26 Nov. 2008). *Microsoft* at 5 (Guidebook comments, 15 Dec. 2008) (ICANN must clarify meaning and consideration of panel decisions—i.e., would an application proceed notwithstanding a DRSP in favor of an objector?). *See also IPC* at 4 (15 Dec. 2008); *NCUC* (15 Dec. 2008) (need to clarify ICANN discretion to approve or deny).

<u>Appeals to Dispute Resolution Mechanisms</u>: IP rights holders should have legal recourse and the right to appeal an adverse ruling on an objection. *Internet Commerce Coalition* at 4 (15 Dec. 2008). The Guidelines should allow for a procedure to appeal a clearly erroneous DRSP decision. *MarkMonitor* (Module 3, 15 Dec. 2008). Panel decisions should not be subject to further review by ICANN, but rather to an appeal process by a third party dispute resolution provider and/or a court. *Rodenbaugh* at 5 (16 Dec. 2008). *See also U.S. COC* at 9 (15 Dec. 2008); *ANA* at 4 (15 Dec. 2008); *AIPLA* at 2 (15 Dec. 2008). Several ccTLD operators including Nominet, the operators of .uk, have a reasonably priced appeals process with a three person Appeals Panel. There are well-documented inconsistencies in UDRP decisions which an appeals process would help to even out. MARQUES would like a credibly valid appeals process included in LRO. *MARQUES* at 3 (15 Dec. 2008). No appeal opportunity is in clear conflict with common legal practice for organizations serving the public such as ICANN. *SIDN* at 4 (10 Dec. 2008).

<u>Court Review</u>. Will applicants whose strings are in contention and subject to determination by a single panelist have an opportunity for legal review comparable to the UDRP provision: "The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for

independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded." (Section 4(k) of the UDRP) and if not, why not? *PIR* at 2-3 (15 Dec. 2008). There should not be a rule requiring a losing party in a formal legal rights objection to forfeit its rights to seek judicial redress—i.e., commenters object to the provision that in filing an application for a gTLD, an applicant agrees to accept the gTLD dispute resolution process, if that "acceptance" means that the applicant forfeits his right to protect his legal rights in the courts. *Bank of America* at 9 (15 Dec. 2008). *See also SIFMA* at 6 (12 Dec. 2008)*; NCUC* at 5-6 (15 Dec. 2008)*; Microsoft* at 4 (15 Dec. 2008). Page 3-1 in paragraph 3.1 says "an objector accepts the GTLD dispute resolution process by filing its objection." Does that mean that the objector will be required to, in some way, agree not to challenge the outcome of the dispute resolution process such as in court? *COA GNSO New gTLD Question and Answer Open Teleconference.* The Draft Implementation Guidelines eliminate the right of applicants to challenge any ICANN decision or related dispute proceedings in a national court (unlike under the UDRP). So applicants would have no protection at all for their free expression rights and national courts would have no means of protecting their citizens from an abuse in an ICANN proceeding about a domain name. This point was also not in the GNSO's recommendations and is something that staff pulled out of a hat (as part of its bottom-up process) presumably in an attempt to protect itself from being sued. *R. Gross, IP Justice* at 2 (26 Nov. 2008). *See also G. Kirikos* at 10 (24 Nov. 2008) (accountability to courts)*; IPC* at 3 (15 Dec. 2008); *Pattishall* at 3 (15 Dec. 2008) (review/appellate process necessary).

Effect of DRSP Decision. A decision from a DRSP should be final and binding on ICANN, rather than an "expert determination" to be considered by ICANN as a factor in the evaluation of a TLD application. *Visa* at 2 (13 Dec. 2008). *See also, U.S. COC* at 9 (15 Dec. 2008). Dispute resolution decisions should be binding and final on ICANN. *CSC* at 4-5 (15 Dec. 2008). Clarify impact of DRSP panel decision on ICANN and the LRO appeal standard. *Bank of America* at 5 (15 Dec. 2008). *See also Grainger* at 4 (15 Dec. 2008); *ITT* at 5 (15 Dec. 2008); *IPC* at 4 (15 Dec. 2008); *MARQUES* at 3 (15 Dec. 2008).

Post-delegation dispute resolution mechanisms: IP rights holders should be entitled to rely on representations in the application that are aimed at minimizing conflict between a new TLD and their IP rights and should have a means of redress available if those representations are violated. *Time Warner* at 5 (15 Dec. 2008); *INTA* at 16 (15 Dec. 2008) (supports development and publication of a post-delegation dispute resolution process as soon as possible); *IPC* at 6-7 (15 Dec. 2008); *MARQUES* at 4-5 (15 Dec. 2008).; *SIIA* at 6 (15 Dec. 2008) (post-launch protections needed). ICANN should have a process for reviewing TLD allocations periodically regarding their use and adoption; violations of any approved proposal should also be addressed. *Hacker* at 3 (14 Dec. 2008). ICANN should create specific language for new gTLD registry agreements and consult with a DSRP for developing processes for post-delegation dispute resolution addressing post-launch infringement by a gTLD registry. *Microsoft* at 5-6 (Guidebook comments, 15 Dec. 2008); *COA* at 8 (15 Dec.2008) (next draft Guidebook needs to address post-delegation obligations in detail).

Community-Based Objections

Community Definition and Standing. There is no working definition of "community", so it is possible that the community of "Internet users" and the community of "dog owners", the community of "blondes" and the community of "anything you can reasonably describe" would be a "defined community" according to ICANN, and as such will have standing if there is an "established institution" to lodge the objection. Also, NCUC believes that further details as to standing need to be disclosed as soon as possible, to enable a more fruitful public discussion to

take place. *NCUC* at 3, 5 (15 Dec. 2008). The concept of community is poorly defined; for example, it will be unfair for a community-based applicant to lose on the basis of substantial opposition by a member of the community if the applicant counters with a showing of substantial support. *Bank of America* at 11 (15 Dec.2008). *See also CADNA* at 6 (15 Dec. 2008)*; COA* at 3-4 (15 Dec. 2008)*; ASAE* (10 Dec. 2008).

Linkage to Community. The objector should be required to satisfactorily prove that the string it is objecting to has an association to the community it represents. This does not have to be a strong association, but that it passes the "absurdness" test. *J. Seng* (8 Dec. 2008).

Community Objection Criteria. Regarding point 3.1.2.4 Community Objection, It is an established institution. We feel that this is too limited. What if it is a community of people objecting that don't make up an institution or religious belief. *C. Schuddebeurs*; *Email Support.* The difference between existing legal rights objections and community-based objections should be described in more detail. *E. Brunner Williams*; *GNSO New gTLD Question and Answer Open Teleconference.* How will community objection criteria be weighed given subjectivity concerns? *USCIB* at 2 (16 Dec. 2008); *COA* at 5 (15 Dec. 2008). Concerns about the LRO also apply to the community objection procedure. *MARQUES* at 6 (15 Dec. 2008).

Defenses. "Defenses – Satisfaction of the standing requirements for filing a Community Objection (refer to paragraph 3.1.2.4) by the applicant is a complete defense to an objection filed on community grounds." Keeping this clause would imply that a community-based TLD could be squatted by a single member of the community. For instance, that one pharmaceutical company could apply for .pharma and enjoy "complete defense" against objections from any competitor, industry association or consumer group. Or that one bank could apply for .bank and that no other bank, nor associations of banks nor even a banking regulator could successfully object. Or that one tennis club could apply for .tennis and prevail against objection from any federation. It is dangerous to award complete defenses against objections on any ground; some communities have more than one generally accepted representative institution and these do not always agree. *W. Staub-CORE* (11 Dec. 2008). *A. Abril i Abril* (Module 3, 15 Dec. 2008) (automatic defense may yield perverse results).

Existing Rights

Clarifications Re: Mark and Rights Holders. We request that there be clarification as to the definition of a "mark" relied-on by an objecting brand owner. We assume that this would include an unregistered mark? *BBC* (15 Dec. 2008). The Guidebook should provide more clarity on what constitutes a 'Rights Holder.' For example, with respect to trademark rights, the Guidebook should specifically address what types of trademark rights are eligible for disputes, such as whether common law rights, trademark applications, or trademark registrations and trade names qualify. *MarkMonitor* (Module 3, 15 Dec. 2008).

Ensure rights protection mechanisms are effective. ICANN must do more to ensure that these [rights protection] mechanisms are effective, accessible, low-cost and efficient for right holders to use. *IPC* at 5 (15 Dec. 2008); *Microsoft* at 3 (Guidebook comments, 15 Dec. 2008). Regarding point 3.4.4, Selection and Number of Panelists: There will only be one panelist in intellectual property rights proceedings. Is this sufficient? *C. Schuddebeurs; Email Support.*

Objection Standards. The 'legal rights' ground for objection cannot be clear cut. The law on trademarks, and intellectual property is not universally consistent. What amounts to 'standing legal rights' in one jurisdiction may very possibly not be recognized in other jurisdictions. *ISOC-*

AU. Regarding Point 3.1.1 Legal Rights Objections: What happens if two or more parties have equal legal rights? If someone files a TLD that is confusingly similar to someone else's registered mark an objection can be based on the Legal Rights objection. What happens if two or more parties have equal legal rights? What if the applicant owns a trade mark right as well as the objector? Regarding point 3.5.2.4: Knowledge should not be required for infringement or should this read as knowing or should know. *C. Schuddebeurs; Email Support.* How would something like .bank, where under US law you must be a bank to call yourself a bank, be objected against? Is the legal rights objection restricted to the string itself? *Bank of America-GNSO New gTLD Question and Answer Open Teleconference.*

Fees

Fee details. These need to be more detailed. Brand owners are already spending hundreds of thousands to protect their trademarks online and there continues to be rampant online abuse. Having a cost of $70 - 122K to object to an application is unacceptable. *Nike* (2 Dec. 2008). *See also BITS* at 7 *(*15 Dec. 2008).

Economic and financial considerations. ICANN should consider small economies when the dispute fees are finalized. *F. Purcell* (Module 3, 6 Nov. 2008). Is it possible for there to be more than two parties in a given dispute? If so, will all parties be required to pay the full 'Dispute Resolution Adjudication Fee? *C. Gomes-Compiled Comments on the New gTLD Applicant Guidebook. MarkMonitor* (Module 3, 15 Dec. 2008) (fees are high and duplicative; one fee should be filed in the case of a rights holder's objection to multiple applications for the same TLD).

No separate objection fee should be levied. It is morally offensive to charge a fee for an objection and this should be covered by the evaluation fee. If ICANN does not take that into account, ICANN may receive law suits. *A. Rosenkrans Birkedal* (10 Nov. 2008).

Deterrence Factor of Fee. A fee for filing an objection helps to avoid false and bad-faith filings. An applicant whose proposal has passed initial evaluation and has all the required support from pertinent communities and/or governments shouldn't have to pay for filing a response to an objection, nor any other associated costs. The applicant should have the right to defend himself from allegations without being required to pay to a third party. *NIC Mexico* at 3 (9 Dec. 2008). In order to be taken seriously, an opposition must be considered only if made by a person with standing under section 3.1.2 who has gone to the expense of paying the necessary fees and who has raised a recognized ground for objection. Allowing any person to post a public objection makes a mockery of the standing requirements. If ICANN believes it has defined standing too narrowly, then ICANN should broaden its rule using explicit categories. If ICANN believes its own procedures for objection may forestall inquiry into relevant areas of concern, it should broaden the grounds of objection. If ICANN believes that persons with limited financial means will not be able to raise their legitimate concerns, ICANN should consider waiving or reducing the fee to file an objection upon an application showing good cause. *Bank of America* at 6 (15 Dec. 2008).

Fee levels. Why is the cost of opposing a proposed gTLD string so prohibitively expensive? Why is it so much more expensive than a UDRP, and when will an upper price point cap be announced? *Anonymous Email* (26 Nov. 2008). The proposed process for the "legal right" DRP appears to have a proposed cost two orders of magnitude less than the proposed cost for the proposed process for "community objections" DRP. The choice of proposed vendors may explain a difference in pricing, but if the underlying process is not two orders of magnitude

different in complexity, than the difference in cost has no justification other than the vendor choice. If the "legal right" DRP involves forming judgments on questions of "substantial" (opposition) and "likelihood" (detriment), how is two orders of magnitude of cost difference commercially reasonable for the cost of forming similar judgments for "community objections"? *E. Brunner-Williams* (25 Nov. 2008). Fees for LROs should be at the lower end of range stated in the Guidebook. DRSP rules must specify when and under what conditions fees may increase or be refunded. Parties should be allowed to set up accounts with the DRSPs for administrative ease of payment. *INTA* at 9 (15 Dec. 2008)

Prevailing Party Reimbursement. The prevailing party in a dispute resolution proceeding should be reimbursed for all costs and expenses. This will deter parties from maintaining otherwise questionable proceedings. *Visa* at 1 (13 Dec. 2008). Fees, including attorneys fees and litigation costs should be recovered by the prevailing party. *U.S. COC* at 9 (15 Dec. 2008). *See also Lego* at 1 (4 Dec. 2008); *MarkMonitor* at 3 (15 Dec. 2008); *Grainger* at 2 (15 Dec. 2008); *ITT* at 5 (15 Dec 2008).

Morality and Public Order

Legal Standards. [In relation to categories that are automatically banned] The ICANN paper [Oct 29, 2008] shockingly changes the AND to an OR in description of the US test: ICANN: "This limit should be construed as applying only to violent lawless action that is imminent or likely to result from the incitement." (p. 4 of 29 Oct. paper). So instead of this being a 2-part test as US law requires, ICANN will ban the speech if it meets either prong of the test - big difference and ICANN is not being honest about this legal standard (or is getting incompetent legal counsel). (Technically, it is a 3-part test in the US because the speaker must INTEND to produce the imminent lawless violence.) WHERE DID THE RESEARCH COME FROM THAT TOLD ICANN THE TEST INVOLVED AN "OR" RATHER THAN "AND" AS CLAIMED IN ICANN'S PAPER? *R. Gross, IP Justice* at 2 (26 Nov. 2008). *See also NCUC* (15 Dec. 2008); *ICA* at 2, 12-13 (16 Dec. 2008) (opposes law and public morality objections absent narrow and clearly articulated criteria).

Content Regulation. [In relation to categories that are automatically banned] It appears ICANN is attempting to regulate the content of websites, not URLs, since a domain name (2-6 letter string) cannot be child porn or sexual abuse of children. I'd like an answer from ICANN about how a URL can be child porn as a practical matter. *R. Gross, IP Justice* at 2 (26 Nov. 2008). *Y.E. Shazly* (Module 3, 2 Dec. 2008) (critique of ICANN moral and public order objection approach). *C. Preston* (Module 3, 12 Dec. 2008) (provides legal commentary supportive of ICANN morality and public order standards). ICANN should announce up-front if it will permit any "adult" extensions. *WMI* at 4 (14 Dec. 2008). The proposed standards open the door to unacceptable forms of content regulation by ICANN and provide the ability for a 'heckler's veto' over legitimate possible domains. ICANN needs to clarify the types of objective criteria and the nature of "independent judicial control" that will be used to determine the narrow exceptions that justify an interference with free expression. *NCUC* at 1-3 (15 Dec. 2008)

Standing. Who can bring a morality and public order objection? There is concern that attempts to make this anything other than a government (who has standing to object) will lead to arbitrary, subjective, and more widely conflicting standards. *R. Gross, IP Justice* at 3 (26 Nov. 2008). More details are needed regarding the Morality and Public Order Objection. *CADNA* at 5 (15 Dec. 2008). *See also Rodenbaugh* at 5 (16 Dec. 2008); *Pattishall* at 4 (15 Dec. 2008) (clarify standing); *NCUC* at 5 (15 Dec. 2008) (standing has yet to be determined). New TLDs should be restricted to protect the rights of those who would be offended or harmed by material

widely deemed offensive and not deserving of free speech protection, but the context must be balanced carefully. Any interested party should have the right to object on grounds of morality or public order. *INTA* at 11-12 (15 Dec. 2008)

Dispute Resolution. Module 3 of the Draft Applicant Guidebook states that objections based on morality and public order considerations will in principle be determined by the International Chamber of Commerce (ICC). As the ICC is an industry association for businesses, and as such represents and advocates on their behalf, we do not see the ICC as a particularly well-qualified arbiter of standards of morality and public order or as conducive to considering the interests of non-commercial parties in such a broad and values-based determination. *NCUC* at 3 (15 Dec. 2008). Uncertainty over whether the International Chamber of Commerce is the best place for dispute resolution on questions of morality and related issues. *A Muehlberg* (Cairo Meeting Public Forum, 6 Nov. 2008) *See also* Y. E. Shazly Cairo Meeting Public Forum*, 6 Nov. 2008).

Issue Appropriate for Governments. ICANN should focus on coordinating technical functions related to the management of the DNS and not on matters more appropriately addressed by governments, such as adjudication of morality and public order and community objections in accordance with international human rights law. The proposed mechanisms to address these topics are inappropriate. *U.S. DOC-NTIA* at 2 (18 Dec. 2008). *See also APTLD* at 2-3 (15 Dec. 2008); *Arab Team* at 2 (15 Dec. 2008); *Demand Media* (Module 3, 15 Dec. 2008); *U.S. COC* at 5 (15 Dec. 2008) (ICANN should not assume powers and duties on issues best left to governments as recognized in WSIS Principle 49).

Procedures

Abuse of Objections Process.   In order to avoid potential abuse by entities that use their financial prowess to thwart smaller deserving players, a limit should be placed on the number of disputes per application. *J. Seng* at 3 (8 Dec. 2008). ICANN should take the possible abuse of objections (submitting an objection at the latest possible moment and thus forcing maximum costs at a competitor) into account when determining the objection period. ICANN should set limits on the objection grounds and protect applicants against abuse of objections. A start-up applicant, having already invested significantly in preparing the application and paid fees risks being financially "brought to his knees" by numerous objections of which none might even prevail. *SIDN* at 2 (10 Dec. 2008). *See also DHK* at 2 (15 Dec. 2008).

Panel Qualifications. Panelists should have sufficient years of experience in dispute resolution. ICANN must make clear the scope of documents that can be required by the panel; discovery should be allowed. *INTA* at 10 (15 Dec. 2008). *MARQUES* at 3 (15 Dec. 2008) (fluency of at least one panelist in local language should be required and panel must have sufficient trademark qualifications). ICANN should state a conflicts of interest policy for all panelists. *Rodenbaugh* at 5 (16 Dec. 2008).

General Procedural Comments. What is the limit of the panelist's discretion, and can the list identified in the draft Applicant Guidebook be improved by panelists? The categories are general and could lead to wide interpretation by panelists. *Y.E. Shazly* (Module 3, 2 Dec. 2008). *See also AIPLA* at 1 (15 Dec. 2008) (experts on LRO cases should be subject to approval of both parties); *MARQUES* at 3 (15 Dec. 2008) (use a small number of experts to chair panels and appeals for a fixed term to promote consistent decision-making); *INTA* at 10 (15 Dec.2008) (hearings should be allowed in exceptional cases and must be public; the standard of proof should be explained). Fees need to be predictable; the panel's apparently unrestricted ability to

appoint experts is inconsistent with predictability. *Time Warner* at 5 (15 Dec. 2008). *See also COA* at 6 (15 Dec. 2008); *Pattishall* at 3 (15 Dec. 2008). For transparency, panel decisions should be published. *See IPC* at 4 (15 Dec. 2008); *AIPLA* at 1 (15 Dec. 2008); *MARQUES* at 3 (15 Dec. 2008); *Bank of America* at 10 (15 Dec. 2008). WIPO acting as the dispute resolution provider is problematic because it will inevitably favor and prioritize applications by trademark owners. *NCUC* at 5 (15 Dec. 2008). WIPO should be the sole provider of LRO services for at least 5 years with annual reviews. *MARQUES* at 3 (15 Dec. 2008). Consistency and transparency are needed in the online dispute resolution (ODR) process; a gateway provided by ICANN could help with this; these proceedings should be public. *InternetBar* (Module 3, 15 Dec. 2008). There should be a single organization with which all objections are filed and that organization should determine which DSRPs should resolve them. *Pattishall* at 3 (15 Dec. 2008); *IPC* at 4, 8-9 (15 Dec. 2008) (consider common portal for objections to promote efficiency; consider including a challenge of last resort). The new gTLD program might benefit from having a free period of mediation after submission of a complaint. *MARQUES* at 3 (15 Dec. 2008). Objections and responses should be made public. *ITT* at 5 (15 Dec. 2008). *See also G. Kirikos* at 10 (24 Nov. 2008); *INTA* at 9-10 (15 Dec. 2008) (lengthen the word limit for objections and responses; allow reasonable extensions of time to file responses; supports fee for filing a response; default judgment); *COA* at 6 (15 Dec. 2008) (word limit should be relaxed for a community objection; ICANN should reconsider policy that objections are not published as received). An objection category should be added regarding applicants who have a history of domain name abuse. *RILA* at 3 (15 Dec. 2008).

Three-Member Panels. ICANN should permit three member panels. *Internet Commerce Coalition* at 4 (15 Dec. 2008). Instead of only a single panelist in LRO cases, as in the existing UDRP, ICANN should consider constituting a three-person panel at the request of parties. *eBay* at 4 (15 Dec. 2008). *See also Microsoft* at 4 (Guidebook comments, 15 Dec. 2008); *MARQUES* at 3 (15 Dec.2008); *AIPLA* at 1 (15 Dec. 2008) (LRO procedure should allow a 3 member panel); *Lovells* at 5 (15 Dec. 2008); *Pattishall* at 3 (15 Dec. 2008). Why wouldn't objectors be allowed to request a 3-member panel if they are willing to pay the expense if they lose? *C. Gomes-Compiled Comments on the New gTLD Applicant Guidebook.*

Dispute Resolution Criteria. What are the specific criteria that will be used to decide who wins a dispute resolution matter? When will such criteria be published? *Anonymous Email* (26 Nov. 2008). The standard for string contention is confusing similarity in sight, sound or meaning. The "Defenses" section should be removed or clarified, and other objection procedures should be clarified (e.g., clarify how the community objection might be accommodated if in effect there are two or more valid community claims to same or similar strings). *Rodenbaugh* at 5 (16 Dec. 2008). Regarding Point 3.1.1 criteria for String Confusion Objection: In module 2 (2.1.1) it is explained that by string confusion in the Initial Evaluation phase performed by ICANN is meant: "String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion". Do the same criteria apply to the dispute resolution? *Schuddebeurs*; *Email Support.* Guidance needed for resolving disputes among associations and applicants (e.g., a local association and an international NGO competing for a gTLD). *See also ASAE* (Module 3, 10 Dec. 2008).

Details or Clarification of Objections Process. Objection process should be efficient and cost effective, and more details are needed; a cost of $70-$120K to object is unacceptable. *Nike* (2 Dec. 2008). Further clarification is needed regarding standing to object. *NCUC* at 5 (15 Dec.

2008); *NAM* at 7(15 Dec. 2008) (objections and responses should be made public). When can exact dispute resolution process rules be completed and published? *Rodenbaugh; GNSO New gTLD Question and Answer Open Teleconference.* The Guidebook should be clarified to indicate when potential objectors should file objections to an application. *ASAE* (Module 3, 10 Dec. 2008). Will there be a challenge of last resort? *MARQUES* at 6 (15 Dec. 2008). More detail is needed on panel procedures—e.g., documents, ensuring limits on panels appointing experts to be paid for by one or more parties. *Microsoft* at 4 (15 Dec. 2008). *See also Grainger* at 2 (15 Dec. 2008); *IPC* at 4, 8 (15 Dec. 2008); *INTA* at 9-10 (15 Dec. 2008) (various aspects of objection procedures require clarification—e.g., filing deadlines, single complaints with multiple objections, resolution of inconsistent outcomes by DSRPs; cooling off period).

Consolidated Objections. There should be an ability to consolidate complaints against the same party. *Nike* (2 Dec. 2008). Consolidated objections with a single filing fee should be allowed in appropriate circumstances. *Time Warner* at 5 (15 Dec. 2008). *See also Visa* at 2 (13 Dec. 2008); *SIFMA* at 6 (12 Dec. 2008); *DHK* at 2 (15 Dec. 2008); (consolidation should be required); *MARQUES* at 3 (15 Dec. 2008); *IPC* at 4 (15 Dec. 2008); *CADNA* at 2 (15 Dec. 2008). More information is needed on costs of filing objections and ways to reduce costs through consolidated objections. *USCIB* at 2 (16 Dec. 2008). *eBay* at 3-4 (15 Dec. 2008) (clarifications needed regarding consolidated objection scenarios; to promote consistency and predictability, more guidance and examples needed in Guidebook on LRO case resolution). There should be efficient procedures regarding combining multiple objections; opportunities to amend procedurally noncompliant objections, ability to refuse consolidated objection proposals by the DRSP. *Microsoft* at 4 (Guidebook comments, 15 Dec. 2008). *See also C. Gomes* at 6 (17 Nov. 2008); *BITS* at 7 (15 Dec. 2008) (clarify fees for consolidated objections); *Pattishall* at 3 (15 Dec. 2008) (more detail needed on resolving objections based on multiple grounds).

Online Submissions. Is it possible for each applicant to provide copies of all submissions to the DRSP associated with objection proceedings via the electronic system? *C. Gomes-Compiled Comments on the New gTLD Applicant Guidebook.*

Government Concern. The dispute resolution process is not a cost effective way for governments to participate and they should have an earlier opportunity to participate and object; the right of governments to objection and the mechanisms for it should be expressly indicated with costs minimized. Governments should be explicitly recognized as having standing to file an objection. *NYC* (13 Dec. 2008). ICANN should be doing more to minimize disputes with national governments and to increase their understanding of the new gTLD process, especially smaller, developing nation governments. *F. Purcell* (Module 3, 6 Nov. 2008).

Details Needed on LRO Procedure. The Legal Rights Objection (LRO) procedure will generally be the sole means that a trademark owner has at its disposal within the ICANN process to prevent the recognition of a new gTLD that infringes, dilutes, or otherwise harms or weakens its mark, and/or that will threaten to cause confusion detrimental to the mark owner's customers and the public at large. While the LRO procedure is sketched out in the draft applicant guidebook, much more detail will be needed before it can be determined whether this is a sufficiently robust safeguard for preventing these harms. *IPC* at 3 (15 Dec. 2008). *See also AIPLA* (15 Dec. 2008); *SIIA* at 5 (15 Dec. 2008); *Time Warner* at 4-5 (15 Dec. 2008)*; eBay* at 3-4 (15 Dec. 2008). Finalized procedures are needed for business certainty—e.g., ICANN has not yet completed agreements with Dispute Resolution Service Providers; it would help rights owners and applicants to know the likely application of factors in the LRO standard. *Microsoft* at 4-5 (Guidebook comments, 15 Dec. 2008).

ICANN Duties and Legal Reviews. ICANN must commit itself to follow the rules and procedures of the Guidebook once final; ICANN is acting in a quasi-governmental capacity and its Guidebook should be considered akin to an administrative rule. *Bank of America* at 12 (15 Dec. 2008). ICANN should state how ICANN will conduct legal reviews of applications, consider legal objections from third parties, and discharge its responsibility to ensure that the process of introducing new gTLDs respects all relevant national and international law, including property rights. *U.S. DOC-NTIA* at 2 (18 December 2008). The dispute resolution processes give ICANN too much authority. *Cyveillance* at 2 (15 Dec. 2008).

ISSUES, ANALYSIS AND PROPOSED POSITIONS

Appeals and Post-Decision

Issues

How might applications go forward notwithstanding a successful objection?

Will the panels' decisions be final and binding on ICANN?

The guidelines currently do not provide for appeals. Should there be such a provision and does a lack of one conflict with the public interest?

Does an acceptance of the gTLD dispute resolution process mean that the participating party has forfeited all right to judicial review?

Do applicants forfeit their rights to protect their legal rights in the court?

Analysis

The comments that have been summarized above reflect concerns about due process and the protection of substantive legal rights. ICANN takes these concerns very seriously and, with considerable participation from constituency groups, has sought to create an objection process that is fair and adequately protects the rights of all participants in the process.

One may distinguish three types of recourse or legal action in connection with new gTLD applications: (a) recourse against the expert determination that is rendered in the New gTLD Dispute Resolution Procedure (e.g., an "appeal" or some other action), (b) action in defense of one's legal rights before a court with jurisdiction, and (c) legal action against ICANN by an applicant.

> (a) As stated in Section 3.4.5 of the draft Guidebook, the dispute resolution panel's decision will be an expert determination. The New gTLD Dispute Resolution Procedure (the "Procedure") currently does not provide for an appeal or other recourse against the expert determination that is rendered by the Panel. While an expert determination will not be legally binding, as part of the dispute resolution process ICANN will follow the advice of the panel.

> (b) It is implicit in the Procedure that an objector does not waive its right to defend its legal rights (e.g., trademark) before a court of competent jurisdiction merely by filing an objection to an applied-for gTLD.

(c) The terms and conditions of the application for a new gTLD contain an express waiver by the applicant of recourse against ICANN relating to the application evaluation and approval process. This does not bar claims against ICANN that may not be related to the application process, nor does it bar claims by the applicant against any other party.

It does not seem that the absence of an appeals process within the process conflicts with ICANN's role in serving the public interest. There are various countervailing factors to consider in formulating the dispute resolution procedure. Adding a procedure for appeal would increase the cost and extend the duration of many – if not most – proceedings, thereby delaying the introduction of many new gTLDs. If on appeal, the determination is "reversed," there would be an argument for extending the process even further, resulting in great uncertainty in the process.

The dispute resolution process is intended to provide economic incentives for parties to participate in the process and to resolve disputes in a timely and efficient manner.

Proposed Position (for this version of the Guidebook)

At this juncture, ICANN does not plan to introduce an appeals mechanism into the dispute resolution process that has been developed. ICANN has heard many comments about making sure the new gTLD program progresses as swiftly and efficiently as possible. A dispute process that does not include a separate appeals mechanism is intended to help minimize the delay of introduction of new gTLDs into the root zone.

Given the nature of the expert determination to be rendered at the completion of a dispute proceeding, an unsuccessful applicant cannot obtain judicial review of the rejection of its application.

An applicant is not prohibited, however, from pursuing its legal rights related to the application process in court against any party other than ICANN.

Community-Based Objections

Issues

Will the definition of "community" and the role of an established institution be clarified?

Does an objector have to demonstrate an association with a community related to the string to which it objects?

Does an applicant who is able to fulfill the standing requirements to object have an absolute defense and could this complete defense to a community objection provided for in paragraph 3.1.2.4 lead to squatting?

In addition to describing "existing legal rights objections" and "community based objections," the Guidebook or supporting documentation could do a better job differentiating the role of each.

Analysis

The creation of community-based gTLDs offers great opportunities for diverse communities to learn about each other, meet, and communicate through the Internet. However, the rights, obligations and interests of many communities and their representative institutions may be at odds with the legal rights of trademark rights holders. The comments that ICANN has received thus reflect both the avid interest that communities have in obtaining gTLDs and concerns that some people and entities have about definitions and criteria.

The concept of community is not easy to define. That said, the "working definition" of community, and requirements for a community-based gTLD, and objections thereto, are summarized in the draft Applicant Guidebook, Section 1.2.2.1. The Guidebook also sets out the standing requirements for what group or entity may object to a community-based application. Those requirements make clear that the objector does have to demonstrate a relationship to a community to have standing. Further, the objector must be an established institution that has an ongoing relationship with the community. This requirement will help to insure that the objector has some legitimacy as a representative of the community. Such a standing requirement is intended to avoid a multitude of objections from individuals, many of whom represent only themselves and have no relationship to or real interest in the relevant community.

The complete defense to a community objection provided for in paragraph 3.5.4 should not, in itself, lead to squatting for one reason, among others, that a successful registry operator must also make the registry operational. Note the requirements for obtaining a community-based gTLD (summarized in the Draft Guidebook, Section 1.2.2.1) and the post-delegation obligations that the successful applicant will assume (*id.*, Section 1.2.2.2).

Regarding a comparison of legal rights and community objections, different criteria are at issue for each. While it is true that there might be a situation where a gTLD could provide an objector with both grounds, they are exclusive in that the legal rights criteria is focused on providing a forum in which trademark rights holders can object to a gTLD on the basis of an existing legal right to a trademark. The community objection, on the other hand, has no basis in trademark or other intellectual property law and, instead, focuses on rights of organized groups.

Proposed Position (for this version of the Guidebook)

An objector to a community-based gTLD must be an established institution with an ongoing relationship with a defined community that consists of a restricted population. *See* Draft Guidebook, Section 3.1.2.4. It will be made explicit in the revised Applicant Guidebook that the "defined community" is a community related to the string to which the objector objects.

Existing Rights

Issues

One common theme that has arisen in various public comments are the concerns voiced by trademark owners in terms of the efforts and costs that may need to be expended to protect their Intellectual Property. Another section of this paper specifically relates to trademark protection and will discuss these overarching concerns.

Do holders of all types of trademark rights – including common law trademarks, trademark applications, and trade names – qualify as "rights holders" and what if both the applicant and the objector are rights holders?

Are the current mechanisms of enforcement low-cost and efficient?

How/Who can object against a string, such as ".bank," where under U.S. law, it is suggested, an entity must be a bank to use such designation?

How will the "legal rights" grounds for objection be dealt with when the law on trademarks and other intellectual property is not universally consistent?

Regarding Section 3.5.2.4, why isn't there a knowledge standard required for infringement?

Is the legal rights objection restricted to the string itself?

Is only one panelist in intellectual property rights proceedings sufficient?

Analysis

ICANN appreciates the numerous comments it has received relating to trademark protection and is considering various options. As noted above, a separate section of this paper relates to trademark protection, which addresses the overarching concerns. The rest of this section will discuss the specific issues raised in the comments set forth in this paper.

The definition of mark was meant to allow objections on the basis of registered <u>and</u> unregistered marks. Further, the definition of "Rights Holder" was left broad to allow any person or entity that claims an existing legal right to object so as not to favor a registered mark over a mark that is not registered or to encourage sham filings to obtain registrations in jurisdictions which award them on a first to file basis.

ICANN has attempted to develop a process that is low-cost and efficient. Providing for an independent dispute resolution procedure is meant to achieve the goal of providing efficient and reasonably low cost ways in which rights holders can assert rights to an applied for string, and protect them on a global scale. ICANN is considering additional procedures, including some to apply post delegation; however, at this point allowing for global resolution in one forum in a relatively expeditious time frame goes a long way to providing effective, accessible, low cost and efficient ways for rights claims to be resolved. The UDRP proceedings will remain in effect, as well, for post delegation issues that arise in connection with second level domain disputes in the new gTLDs, and the specific laws of each jurisdiction still provide redress.

In terms of the issue raised regarding the potential gTLD .bank, it is not necessarily true that one must be a bank (i.e., a certain type of financial institution) in order to call oneself a "bank". (Consider blood bank, food bank, sperm bank, etc.) If more than one entity applies for the gTLD .bank, all applicants for the gTLD would enter into the string contention process. Further, a .bank application may qualify as a community-based application and, in such a circumstance, gain consideration in cases of contention. If the eventual owner of the gTLD .bank uses the name or domain in a way that violates U.S. law, legal action could be taken against that owner in accordance with the law.

It is correct that there is no universal application of intellectual property law. Indeed, this fact has made it quite difficult to identify standards that would be viable on a global stage. Thus, the standards to be applied and balanced are from a number of jurisdictions that enforce intellectual property rights as well as from UDRP proceedings, the closest form of IP precedent available on an international basis. As none of the factors are absolute, knowledge is not a "requirement". However, sections 4 and 5 contemplate a knew-or-should-have-known standard.

ICANN did consider providing for three-member panels, but thought a one-member panel would be more cost efficient. Alternatively, ICANN is considering providing for three-member panels, but only to the extent that all parties agree.

Proposed Position (for this Version of the Guidebook)

ICANN will provide more clarity in the revised Draft Applicant Guidebook in terms of the types of mark an objector or rights holder must have to file a valid objection. ICANN will also make clear in the revised Draft Applicant Guidebook and Procedures that parties may elect a three member panel, but only if all parties in the proceeding agree.

Fees

Issues

Can the dispute resolution fees be more detailed and can the costs be curtailed or limited?

Can small economies be considered with dispute resolution fees are finalized?

Can the filing fee be funded by the evaluation fee?

Can standing requirements for filing an objection be broadened and allowances for fee waivers be made in lieu of permitting the posting of public objections by any person?

Will the prevailing party be reimbursed for costs and expenses?

If more than two parties participate in a dispute, do all parties pay the Dispute Resolution Adjudication fee?

Why is the proposed cost for the "community objections" DRP proposed process higher than the proposed cost for the "legal rights" DRP proposed process?

Analysis

Some concerns have been expressed over the estimated dispute resolution fees, particularly for those that are not fixed rate proceedings. The rules of procedure for these proceedings have been designed, in part, to minimize costs. The general rule ICANN is promulgating, that the losing party in the dispute resolution proceedings pays the full cost (i.e., panelists' fees and filing fees), will provide some protection against parties acting in bad faith.

The costs of a dispute resolution proceeding must be paid by the parties in that proceeding (with the prevailing party having its advance payments reimbursed). An applicant's successful

passage through the initial evaluation would not be a basis for waiving dispute resolution fees, as the costs of resolving a dispute arising from an objection must be paid.

The filing fee in dispute resolution proceedings should not be funded by the evaluation fee, as the two fees relate to different steps in the application process, one of which may not occur in some applications. If the evaluation fee were to cover filing fees in dispute resolution proceedings, it would have to be increased (since the evaluation fee is currently set on a cost-recovery basis). This would produce an excessive fee for applications to which no objection is filed. Further, the dispute resolution fee will not be paid to ICANN. Note also that the number of filing fees that must be paid by an individual applicant may vary, depending upon the number of objections that are filed against that applicant's gTLD.

The consolidation of objections should result in certain cost savings (and is therefore strongly encouraged by ICANN). It is intended that the applicant would pay a single filing fee when submitting its response to all of the consolidated objections. Parties would pay in advance the costs of only one proceeding, rather than multiple proceedings, and a single Panel would render one expert determination that is applicable to all of the consolidated objections. Consolidation, of course, is conditioned on the type of objection and the facts of each dispute. For example, legal rights objections depend largely on the rights of the objecting party and therefore it is less likely that cases could or would be consolidated. Morality and Public Order objections are intended typically to be about the applied for string and therefore, a better candidate for consolidation. Consolidation will be the decision of the dispute resolution service provider.

The costs of dispute resolution proceedings in connection with "community objections" are likely to be higher than the costs of "legal rights objections". The latter are unlikely to be as complex, and their duration can be predicted with some confidence. In contrast, proceedings that arise from "community objections" are likely to be more diverse in their nature and to involve more varied factual submissions. For this reason, variable fees based upon the time spent by the expert panelists are more appropriate for the "community objections" than fixed fees. Similar factors indicate that the costs of "morality and public order objections" are also likely to be higher than those of "legal rights objections". In addition, dispute resolution proceedings that involve three-member panels at an hourly rate will have higher costs than those involving a single panelist. If the hourly rate based dispute processes do not take as much time or are less complex than estimated, the amount of time spent by the dispute resolution panel would be less, and therefore the fees should be less than estimated as well.

Per Section 3.4.7 of the draft Applicant Guidebook, the process has been developed so that dispute resolution fees paid in advance by the prevailing party will be refunded to that party.

Simply submitting a public comment in objection to an applied for string will not be considered a formal objection.

Proposed Position (for this version of the Guidebook)

Each dispute resolution provider will establish its fees. ICANN does not plan to include dispute resolution filing fees as part of the application fee, nor does ICANN intend in this round to announce a maximum level for dispute resolution fees.

Morality and Public Order

Issues

As related to the standards: (i) Does the test for incitement conflict with the test under US law; and (ii) what type of domain name would qualify as "child pornography" leading to an automatic ban?

Can anyone other than a governmental entity bring a morality and public order objection?

Is this dispute resolution process the right mechanism for adjudicating issues of morality and public order and community objections with international human rights law?

Can the types of objective criteria and the nature of "independent judicial control" used to determine when in interference with free expression is justified be clarified?

Analysis

Issues of morality and public order with respect to rights of expression are inherently controversial. The accepted standards of morality and public order may vary widely in different societies and over time. As explained in the first Draft Applicant Guidebook (Section 3.5.3), ICANN is guided by two general principles in this area: (a) everyone has the right to freedom of expression, and (b) such freedom of expression may be subject to certain narrowly interpreted exceptions that are necessary to protect other important rights.

ICANN has conducted extensive research and consultations to develop standards under which the Morality and Public Order Objections should be reviewed. In addition to extensive research in every geographic region, ICANN conducted individual consultations with experts in the human rights arena, present and former judges of internationally recognized tribunals dealing in human rights and morality issues, as well as legal practitioners who regularly appear in such tribunals. In such consultations, the starting premise was always that found in the GNSO Principle G:

> "The string evaluation process must not infringe the Applicant's freedom of expression rights <u>that are protected under internationally recognized principles of law</u>" (emphasis added).

Internationally recognized principles of law, however, do include narrow restrictions. *See*, *e.g.*, Articles 19(3) and 20 of the International Covenant on Civil and Political Rights, Article 10(2) of the European Convention on Human Rights and Article 13 of the American Convention on Human Rights. Thus, absolute freedom of expression is not protected under internationally recognized principles of law; there are permissible limits.

As the GNSO policy indicated, the standards that panels shall apply in dispute resolution proceedings should not necessarily be based upon U.S. law. The standards applied to morality and public order objections need to be as international in reach and applicability as possible, which ICANN has intended to identify now and in its Explanatory Memorandum on morality and public order objections, which can be found at: http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf.

The rule that would bar incitement to violent lawless action in new gTLD strings is not necessarily the same as the rule under U.S. constitutional law. Dispute resolution panels can consider whether under internationally recognized standards of law a string is likely to produce

violent lawless action and, if so, whether such action would be immediate (along with other factors), but it may not be appropriate to require "immediate" violence to sustain an objection. The DRSP panel is not bound to follow U.S. law in deciding morality and public order objections.

The standard that would bar incitement to or promotion of certain forms of discrimination has been criticized as a potential "heckler's veto" or the adoption of a "European Standard" for limiting free expression. Rules barring incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin exist in various forms in many countries around the world, not just in Europe. *See also* Article 20(2) of the International Covenant on Civil and Political Rights, which provides for analogous limits upon free expression.

It is important to stress that the requirement that new gTLD strings not be contrary to generally accepted legal norms relating to morality and public order concerns the <u>string</u> – *i.e.*, the letters to the right of the dot. This is <u>not</u> a regulation of the content of websites. It would be optimal if a mere gTLD string could not constitute incitement or promotion of child pornography or other sexual abuse of children. However, taking into account the fact that new gTLD strings may comprise up to 63 characters, one must anticipate that a string could well incite or promote child pornography.

Based on a few comments, there seems to be some confusion about the role of the dispute resolution service providers (DRSP). The DRSP itself does not decide the disputes; the DRSP administers the dispute resolution proceedings. That administration includes the selection and appointment of the panel (comprising one or three experts) that will issue an expert determination. The rules of procedure that ICANN plans to implement state that panelists deciding morality and public order objections should be eminent jurists of international reputation.

ICANN agrees that the standing and standards issues are worthy of further discussion. One comment asserts that the standards will be "arbitrary, subjective, and … conflicting" if parties other than governments have standing to file morality and public order objections. ICANN is still working to develop a mechanism relating to the standing requirements for filing objections relating to Morality and Public Order. Concerns have been expressed about leaving this open to any person or entity, but concerns have also been expressed about limiting this to just one defined group of people, such as governments. Allowing anyone to object is consistent with the scope of potential harm, but may be an insufficient bar to frivolous objections. On the other hand, while groups such as governments may be well-suited to protecting morality and public order within their own country, they may be unwilling to participate in the process. The current thought, on which ICANN invites public comment, is to develop a mechanism by which those objecting on these grounds must show a legitimate interest and harm or potential harm by the proposed string.

It has been suggested that the "proposed mechanisms" for this adjudication are "inappropriate", but no specific details or constructive criticism were provided. ICANN remains open to suggestions for improving its dispute resolution procedure for morality and public order objections and other objections.

Proposed Position (for this version of the Guidebook)

ICANN is recommending that the dispute resolution panel be provided the GNSO recommendation relating to Morality and Public Order (Recommendation No. 6), along with the categories of restriction described in ICANN's Explanatory Memorandum dated 29 October

2008, as well as what will be set out in the Draft Applicant Guidebook, version 2. The categories include certain criteria contrary to principles of international law: (i) incitement to violent lawless action; (ii) incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin; (iii) incitement to or promotion of child pornography or other sexual abuse of children; and (iv) any other category that the panel determines would render a proposed TLD contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under principles of international law. With respect to standing, as noted above, ICANN is still working on standing requirements for filing an objection on these grounds.

Procedures

Issues and Analysis

There are naturally many questions about the details of the dispute resolution procedure. Some of these points will be clarified with the publication of the New gTLD Dispute Resolution Procedure (a detailed set of procedures governing the objection process, based upon the more general description in Module 3 of the Draft Application Guidebook, version 2). Meanwhile, ICANN wishes to answer as many of the specific questions that have been raised as possible:

Can a limit be placed on the number of objections allowed per application?

> ICANN understands the concern. However, it seems appropriate not to place a limit in advance upon the number of objections allowed per application because there is no first come first serve requirement and placing a limit would prevent legitimate objectors from objecting.

Will ICANN take measures to protect applicants from objection abuse – like limiting the grounds for objection – in order to protect applicants from incurring potentially devastating costs in the process of responding to multiple objections?

> The process has been designed to take these concerns into account. Both standing to object is limited as are the grounds for objecting, and certain standards for such objections are defined. Multiple objections on the same grounds can be consolidated, thereby reducing costs. In addition, the rule that the losing party pays the costs of the dispute resolution process (i.e., panelists' fees) should discourage frivolous objections.

Can the costs of objecting to multiple applications of the same TLD be consolidated?

> This is not currently contemplated, but is something that will be considered in light of string contention and the dispute resolution provider rules.

What is the limit of the panelist's discretion, and can the list identified in the draft Applicant Guidebook be improved by panelists? The categories are general and could lead to wide interpretation by panelists.

> Specific standards have been defined, within which panelists will exercise their discretion as independent experts.

Can complaints against the same party be consolidated?

Yes, provided that the objections are based upon the same grounds. Thus, two or more legal rights objections against the same applied-for gTLD can be consolidated, whereas a legal rights objection against a given gTLD cannot be consolidated with a community objection against the same gTLD. Consolidation will be at the discretion of the DRSPs.

Will ICANN provide more guidance on the objection process, specifically on timing, deadlines, and procedure?

Yes. ICANN will publish its New gTLD Dispute Resolution Procedure along with the Draft Applicant Guidebook, version 2, which identifies specific Procedures.

Will ICANN allow community based objections to be submitted to the International Chamber of Commerce?

Community-based objections shall indeed be submitted by the objector to the International Chamber of Commerce's International Centre for Expertise (ICC), which will administer the dispute resolution proceedings. The panel appointed by the ICC (and not the ICC itself) will issue the expert determination.

Can applicants provide copies of all submissions to the dispute resolution service provider associated with objection proceedings via the electronic system?

Yes. In fact, that is required.

Will ICANN permit legal rights objections to be adjudicated by three member panels, particularly if objectors are willing to pay the expense if they lose?

Yes, provided <u>both</u> parties agree.

What specific criteria are used to decide who wins a dispute resolution matter and when will such criteria be published?

Certain criteria – i.e., standards – have already been published. See draft Guidebook, § 3.5. The standards for deciding morality and public order objections will be published in the Draft Applicant Guidebook, version 2.

Can ICANN provide more detail about the existing legal rights procedure so that it can be determined whether this procedure is a sufficiently robust safeguard?

The publication of the New gTLD Dispute Resolution Procedure with the Draft Applicant Guidebook, version 2 will provide more detail.

What discretion does the ICANN Board have to reject an application that threatens the process, the stability of ICANN, or the interests of the Internet community, but that has otherwise cleared all steps in the process because no third party objected?

ICANN does have discretion to reject such applications. Other mechanisms that could help ensure that applications that may "threaten [] the process, the stability of ICANN, or the interests of the Internet community," are also being carefully scrutinized and considered. Such a mechanism might include an independent third party or "Independent Objector" to ensure no obviously objectionable applications pass through

the process without objection. More information about ICANN's thinking about an 'Independent Objector" will be published with the Draft Applicant Guidebook, version 2.

Do the proposed standards for objection procedure open the door to unacceptable forms of content regulation or allow a 'heckler's veto' over legitimate possible domains?

No. Please see the "Morality and Public Order" Analysis.

Can ICANN provide more detail about who has standing to object?

The rules for standing for three of the four grounds for objections were provided in the draft Guidebook, Section 3.1.2. ICANN is still working on developing standing requirements for filing objections relating to Morality and Public Order. Concerns have been expressed about leaving this open to any person or entity, but concerns have also been expressed about limiting this to just one defined group, such as governments. The requirements will ensure that those objecting on the ground of morality and public order have and prove a legitimate interest and harm or potential harm resulting from the applied-for gTLD string.

How will ICANN conduct legal reviews of applications, consider legal objections from third parties, and discharge its responsibility to ensure that the process of introducing new gTLDs respects all relevant national and international law?

The dispute resolution process that is being developed by ICANN (Module 3) will perform exactly these tasks.

When can exact dispute resolution process rules be completed and published?

The current version of the Dispute Resolution Procedure will be published with the revised Draft Applicant Guidebook. These will be supplemented by the specific rules for the dispute resolution providers. The existing Rules of Expertise will apply for the disputes administered by the ICC. WIPO Rules for New gTLD Dispute Resolution Procedure will apply for disputes administered by the Arbitration and Mediation Center for the World Intellectual Property Organization. The ICDR Supplementary Procedures for ICANN's New gTLD Program will apply to the disputes administered by the International Centre for Dispute Resolution.

Does the same "confusion" principle set forth in Module 2 (regarding String Confusion Objection) apply to DRSP?

Yes; see Section 3.5.1 of the Applicant Guidebook.

Proposed Position (for this version of the Guidebook)

Many of the comments received about the procedures are well-taken and will be addressed in a more detailed procedures document that will be published with the Draft Applicant Guidebook, version 2.

XI. <u>STRING CONTENTION</u>

A. <u>*STRING CONTENTION: STRING SIMILARITY*</u>

<u>Summary of Key Points</u>

- The objection-based dispute resolution process tests for all types of string similarity that might result in user confusion, including visual, aural and meaning similarity. The revised version of the Applicant Guidebook will highlight this.
- The string similarity check in the Initial Evaluation will be done based on visual similarity in order to identify most cases of contention or user confusion early in the process.
- The role of the algorithm is primarily for filtering; it is intended to provide informational data to the panel of examiners and expedite their review.

<u>Summary of Input</u>

It should be made very clear to applicants up front that the definition of confusing similarity is not just visual. It could be easily concluded, because the algorithm only covers visual confusion, that that's all that matters, which is not the case with regard to GNSO recommendation 2. *C. Gomes; INTERNET COMMERCE COALITION* (15 Dec. 2008)

String confusion should apply to visual confusion only. Any broadening of the standard will limit competition. *Demand Media* (15 Dec. 2008); *Pattishall* (15 Dec. 2008)

In the standard for string confusion, how will the probability of confusion be determined? This should be clearly defined. *C. Gomes*(18 Nov. 2008)

The similarity review will be conducted by a panel of String Similarity Examiners. This examination will be informed by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs. The score will provide one objective measure for consideration by the panel. The algorithm uses proprietary software to perform a series of mathematical calculations to assess the visual similarity between strings based upon the following parameters. Issue--It is inappropriate for ICANN to use an algorithm which is not public, and not based on public data. *C. Gomes*(18 Nov. 2008)

The string similarity algorithm only accounts for visual similarity, and does not address aural or phonetic similarity. The phonetic sound or meaning should be incorporated in the string similarity algorithm. *INTERNET COMMERCE COALITION* (15 Dec. 2008).

Concerned that confusing similarity is only restricted to visual and not other forms of perception. *G. Kirikos-GNSO New gTLD Question and Answer Open Teleconference.*

The string review process is visually, but objections can be on other grounds - like meaning. *A. Kinderis-GNSO New gTLD Question and Answer Open Teleconference.*

The current approach taken where every string is seen as independent from any other may cause problems. It could create unnecessary fights and problems. It doesn't full account for the

realities of other scripts. *(RA, WT) - See Cairo Participation Key (Cairo public forum, 6 Nov. 2008).*

Issues

Scope of similarity: How are all types of user confusion tested? How is the similarity test defined by standards that will be furnished to evaluators?

Role of algorithm: What is the role of the algorithm? Should an algorithm based on proprietary software be used and, if so, in what function and what kind of similarities should be covered?

Analysis

Scope of similarity:
For the introduction of new gTLDs, the Generic Names Supporting Organization (GNSO) has recommended that: Strings must not be confusingly similar to an existing top-level domain or a Reserved Name. (Recommendation 2, http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_ftn26)

The string contention lifecycle was developed to address this concern. There are two main components of string contention. The first involves identifying gTLD strings that are likely to deceive or cause user confusion in relation to existing TLDs or Reserved Names. In addition, proposed gTLDs in a given round must not be likely to deceive or cause user confusion in relation to each other.

The applicant Guidebook provides the standard to be used in the Objection process by dispute resolution providers to determine whether an applied-for string should be excluded or placed into a contention set based upon potential confusion: "String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion."

More specific standards were considered during the development of the Guidebook. It seemed that very specific standards would lead to gaming or manipulation or would leave holes for the introduction of strings that would result in user confusion.

The revised Guidebook indicates in several places that this examination is not limited to visual checks only but also includes aural and meaning similarity, for example, any similarity that will result in user confusion.

In addition to the process that tests for all types of confusion, the Guidebook also includes a preliminary test. The Initial Evaluation includes a first check of similarity to find cases of identical strings among applications and string sets with a strong visual similarity. This is intended to capture many sets of string contention or instances of user confusion early in the process. It is not intended to replace the basic objection and dispute resolution model described above, just augment it.

The standard for this initial test is: "String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the

average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion."

This is a standard first step in the application handling process. Given that similarities can be of other natures, these will be caught when objections regarding confusing similarities can be lodged based on a full range of similarities.

Role of algorithm:
The algorithm selected is a tool used by many trademark offices to provide evidence of identical strings and similarity cases worthy of closer scrutiny. It is developed to focus on visual similarity and there are no algorithms on the market that we know of that effectively extend to wider concepts of similarity. Its wide acceptance makes it an attractive product. Generally, ICANN would plan to make the code public. In this instance, its wide acceptance and evident effectiveness caused ICANN to accept, for now the fact that the software cannot be published. No other products, where publication of the code was acceptable, were found to be as economical, effective, reliable and repeatable as the currently selected algorithm. Developing new software is attended by substantial risk and cost.

The similarity check in the Initial Evaluation is a first check for obvious cases of similarity, based on visual similarity where the algorithm primarily has a filtering role, reducing the work load on the panel to focus on the most likely cases of similarity, while giving an indication of visual similarity for pairs of strings to scrutinize. The decision whether a string pair is confusingly similar or not is entirely with the panel.

The algorithm will allow the panel of examiners to swiftly sort through the n(n-1) combinations of applications in order to identify candidates where confusion might arise. Every combination of string can be ranked ordered according to score, allowing the examiners to scan down and identify a family of combinations for closer examination.

Proposed Position (for this version of the Guidebook)

Scope of similarity:
The scope of the string confusion objection and dispute resolution process includes all types of confusion: visual, aural, meaning and so on. This check is implemented through the policy recommended objection and dispute resolution process. The revised Applicant Guidebook will include specific descriptions of these types of similarity.

The Initial Evaluation includes a first check that is based on visual similarity. The intention of this early check is to identify many instances of contention or user confusion as soon as possible in the process.

At this preliminary check, an algorithm will be employed to sort all combinations of strings and provide similarity scores to evaluators that can use the score along with other evidence of similarity.

In response to comments on the draft Applicant Guidebook, ICANN has clarified the standard for string similarity in Initial Evaluation as visual but that other forms of confusion are available in the Objection process, as recommended by the GNSO Council.

Role of algorithm:

The algorithm has primarily a filtering role, reducing the workload on the panel to focus on the most likely cases of similarity, while giving an indication of visual similarity for pairs of strings. The decision whether a string pair is confusingly similar or not is entirely with the panel.

B. STRING CONTENTION: COMMUNITY

Summary of Key Points

- Advance postings of proposed strings in order to identify possible string contention is a good idea but may lead to abuses.
- The distinction between open and community-based applications is intended to provide a preference for bona fide community-based applicants in cases of contention between identical (or very similar) TLD strings.
- Brand owners may apply as community-based applicants. Whether they are extended the preference depends on whether that application meets the comparative evaluation criteria.

Summary of Input

ICANN should post an open board for public comment on intended gTLD strings before the formal application process as a way of reducing string contention. *L. Ye* (28 Oct. 2008)

We encourage ICANN to remove the designation of open and community based from all gTLD applications. ICANN should allow all applicants to compete with each other on an equal basis through a comparative evaluation. *DHK (15 Dec. 2008).*

On open vs. community-based TLD types, ICANN is commended "for defining a workable process for this complex issue of 'community'." *Demand Media* (17 Dec. 2008)*.*

Is the applicant's identification of its application as open or community-based dispositive? If not, under what circumstances will ICANN substantively examine that self-identification and change it? *K. Rosette* (26 Nov 2008).

There is a need for clarifying the "Open" vs. "Community-based" question by publishing further examples of types of organizations that would fit in both categories – and then explaining the process of selection if there is string contention between Open and Community-based applicants. *IPC* (15 Dec. 2008); *COA* (15 Dec. 2008).

Does ICANN consider a '.brand' application an 'open' gTLD or a 'community based' gTLD? *F. Hammersley* (9 Dec. 2009)*.*

There are many issues around community provisions that all Constituencies need to understand further. One issue for the IPC is whether a business application (e.g., an application to run a gTLD for the exclusive use of a single company) could ever be categorized as a Community-based application, and if so, under what circumstances? *IPC* (15 Dec. 2008); *COA* (15 Dec. 2008).

Issues

Should ICANN post intended strings for public comment before the formal application period is launched or, alternatively, before it is closed?

Should the distinction between open and community-based applications be eliminated?

What is the (potential) relationship between a brand and a community-based TLD?

Analysis

The benefits of posting information about strings that are known beforehand to be contemplated for applications would be that the community be informed earlier with possibilities to discuss and provide feedback to the applicants at an earlier stage.

ICANN staff may have information about various gTLD projects and contemplated strings before the application period is launched, but it would be inappropriate for ICANN to announce such information for public comment. Early public information about strings could arguably facilitate voluntary agreements between contenders for the same string, but could equally well prompt others to apply for the same string, thereby exacerbating string contention rather than reducing it. This was discussed in depth during the policy development and the adopted policy clearly requires that proposed strings be kept confidential until the end of the application period. To announce proposed strings before the end of the application period would be at variance with the adopted policy.

To eliminate the distinction between open and community-based applications would certainly simplify the process. However, the distinction between open and community-based applications has been introduced to implement the approved policy and enable the required preference for community-based applications in contention situations, as the adopted policy requires. This is a core policy aspect that was discussed in depth during the policy development and clearly expressed in the finally adopted policy. The test of the application's worthiness of such preferential treatment is encapsulated in the Comparative Evaluation criteria and the threshold set for winning.

The distinction between open and community-based applications implements the approved policy, enabling the required preference for community-based applications in contention situations, as the adopted policy suggests. The test of the application's worthiness of such preferential treatment is encapsulated in the Comparative Evaluation criteria and the threshold set for winning. The policy reasons for creating a preference for community-based TLDs, as indicated in the record of the policy discussions, indicate that community-based TLDs enhance the name space and that true communities should be afforded some preferences and protections.

It is wholly up to the applicant potentially a brand owner, to select the type of application to file. ICANN will not verify nor change the type as such. Whether the application, if declared as community-based, will prevail in Comparative Evaluation for a contention situation is dependent on how well the application scores against the criteria, as detailed in the Applicant Guidebook.

Proposed position (for this version of the Guidebook)

Confidentiality about proposed strings will be kept until the end of the application period, after which all will be posted publicly.

To eliminate the distinction between open and community-based applications would be in conflict with the adopted policy and the distinction will remain for the next version of the Applicant Guidebook. The distinction provides a vehicle for extending a preference to a bona fide community-based TLD in cases of contention.

C. STRING CONTENTION: COMPARATIVE EVALUATION

Summary of Key Points

- The comparative evaluation criteria are altered to provide increased granularity in the scoring and an altered threshold for meeting the criteria in the revised version of the Applicant Guidebook.
- The only preference extended to community-based applicants is in cases of string contention. If the comparative evaluation criteria are not met, there is no other preference.

Summary of Input

Lower the required points to achieve community-based from 11 to 10 to bring the intent more in line with the purpose i.e. better balancing. *R. Fassett Employmedia.com* (5 Dec. 2008)*; J. Seng* (8 Dec. 2008); *SIDN (*10 Dec. 2008); *CADNA* (15 Dec. 2008)*; COA* (15 Dec. 2008).

Applying the most weight for nexus to trade names infers an assumption that the concern for implementation is the predictability of string contention for non-dictionary terms vs. dictionary terms. I think the reverse is true and that the intent of GNSO Implementation Guideline F (ii) - and the reason for its existence - is because the reverse is true. *R. Andruff* (20 Nov. 2008).

The Guidebook requires "an impossibly high threshold of proof - particularly when the review of an applicant's nexus to a particular community is wholly subjective, i.e., subject to human fallibility." A modification should be made to avoid auction, and factor in human error. *R. Andruff* (20 Nov. 2008).

Does the trade name of a community institution, as a gTLD string, offer the strongest connection 'between proposed string and community'? *R. Fassett, Employmedia.com* (5 Dec. 2008).

Why does the first 'Dedicated Registration' policy get a higher score than the second? *C. Gomes* (18 Nov 2008).

The comparative evaluation procedures must not be used to capture generic words for the benefit of one group. Also, community scoring should be high (11 or above). *Demand Media* (15 Dec. 2008).

To what extent will "the good of the internet community" be taken into account in such a clash? Is it ICANN's view that a Community-based application will always be better for the internet community? *S. Metalitz* (*IPC, COA).*

If a community-based application fails to emerge as a "clear winner" in a comparative evaluation, does any preference it would otherwise receive evaporate? *S. Metalitz (IPC, COA).*

What happens if a claim of support from the community is not substantiated? *C. Gomes* (18 Nov 2008)

Issues

How should the scoring and threshold for winning in a comparative evaluation be modified to ensure that proper preference is given to a bona fide community application?

To what extent will "the good of the internet community" be taken into account in cases of string contention? Does the community-based TLD always prevail?

What preferences are given to community-based applicants that do not meet the comparative evaluation criteria?

Must community support be substantiated?

Analysis

The threshold for winning is intentionally set with a view to prevent gaming attempts and identifying true Community applications. The risk for "false negatives" in the scoring can be moderated by a lowering of the threshold, but this has to be balanced against an increased risk for "false positives". In cases of generic words submitted as Community based strings, test runs by staff have also shown that the threshold is difficult to attain with the current scoring template and alternatives are being considered. There is merit in considering uniqueness in the nexus between string and community as a main factor for achieving a high score. To be an unambiguous identifier, the "ideal" string would have no other associations than to the community in question. This can arguably be achieved by using the community institution abbreviation as string, but there are other possibilities, for example by putting a prefix or suffix on a generic string to make it distinctly and uniquely associated with the relevant community (for example, prefixing "boy" to "scouts" for the community of boy scout organizations, or suffixing "growers" to "apple" for the associations of apple growers). Modification of the scoring template to reflect this approach is considered.

A higher granularity in the scoring template might provide for higher reliability in the scoring and reduce the impact of human judgment subjectivity. This is especially the case where the increase in granularity is attained by asking more detailed questions that are more objective. A higher granularity is considered, both by widening the scoring scale and de-aggregating some of the criteria (i.e., asking separate, more specific questions).

Registration policy is a criterion where a balance is needed between what is reasonably the most appropriate registration policy for a community and the risk for gaming of the process by an "open" application declaring itself as "community-based" to get an advantage in a contention situation. The approach taken is conservative in this respect, with the high score reserved for a registration policy only permitting members of the community to register. A widening has been considered, but it appears reasonable to maintain the chosen approach, while at the same time possibly de-aggregate this criterion in the scoring template in order to reduce the effect of missing out on one of the sub-criteria.

In accordance with the broad-based policy discussions, the category of community-based applications was introduced to implement a preference for community-based applications in contention situations. This preference is manifested in the process as an opportunity to win a

Comparative Evaluation for a contention situation. The test of the application's worthiness of such a preference is encapsulated in the Comparative Evaluation criteria and the threshold required for meeting the criteria, as detailed in the revised Applicant Guidebook. Both aspects are under review for the next version.

The only preference a community-based application will be given is the opportunity to win a Comparative Evaluation for a contention situation. If the application scores lower than the required threshold for winning, that opportunity is lost and there is no other preferential treatment to expect. In the eventuality that multiple community-based applications score above the required threshold in a Comparative Evaluation, they may all proceed to delegation if their strings are not identical or confusingly similar to each other. Otherwise, a further step is required to resolve the remaining contention among these applications.

Substantiated community support is a criterion that is scored for the application in a Comparative Evaluation. The absence of substantiated community support will lead to a lower score for the application in a Comparative Evaluation, reducing the application's likelihood of reaching an overall score above the required threshold for winning.

Proposed Position (for this version of the Guidebook)

The Comparative Evaluation scoring and threshold was reviewed and modified with increased granularity of the scoring template and an altered threshold for meeting the criteria in the revised version of the Applicant Guidebook.

D. *STRING CONTENTION: COMMUNITY RESOLUTION ASPECTS*

Summary of Key Points

- In cases where multiple community-based applications meet comparative evaluation criteria, the other, non-community based applications that are in direct contention with the former will no longer be considered.
- In cases where multiple community-based applications address the same community and meet comparative evaluation criteria, if one applications demonstrates considerably more community support, it will prevail.
- In cases where multiple community-based applications meet comparative evaluation criteria, but neither has demonstrated significantly more support than the other or they represent different communities, and they cannot settle the contention amongst them, an auction will be held between these applications.

Summary of Input

In the case of two community-based applicants of equal strength, rather than go to auction, neither should get the proposed TLD. Instead:

- Establish a parallel and similarly-limited period for negotiating the merging of proposals whenever there is more than one community-based application for the same community, also under the control of an ICANN-appointed mediator. If agreement is reached, the parties would have a further month to amend one of the applications, if needed, and

such reformed application would be put at the very end of the evaluation queue, not delaying the process for other applicants.

- In case more than one community-based TLD passes the Comparative Evaluation (scores 11 or 12), and both applications are deemed to represent or have the support of similar or even sizable parts of the intended community, ICANN should refrain from allocating such TLD in this round, and the parties (both community-based and eventual open applicants) should resubmit it at the next application window, if they wish so. *A. Abril i Abril* (15 Dec. 2008); *CORE Internet Council of Registrars; PIR.*

What is the reason for not allowing contending parties to combine to form a new application? *K. Rosette* (26 Nov. 2008)

ICANN should encourage joint ventures as a means of resolving string contention, as opposed to prohibiting them. *CentralNIC* (13 Dec. 2008); *Melbourne IT* (15 Dec. 2008). Why are joint ventures not allowed? *C. Gomes* (18 Nov. 2008). Joint ventures will help resolve string contention among competing applications. *Demand Media* (15 Dec. 2008).

In the 1st public draft GFA text, this set always goes to auction if two or more of community-based applications score 11 points or more in the comparative evaluation, and the relative evaluation fails to determine a "clear winner". Suppose that all three community-based applications each score 11 points in the comparative evaluation, and the evaluators are unable to arrive at a basis for awarding priority between them.
Therefore, Chrysler LLC, with a capitalization that may be negative today, but historically has had better access to capital than any Tribal Government ever, is allowed to bid as a brand manager (JEEP CHEROKEE) against three rather poor tribes and their respective community-based applicants. This is not the outcome we should be designing for. The process should always select a qualified community-based application, and unlike contention sets formed for generic strings, communities can not change their names to accommodate the uniqueness of labels requirement of the DNS, there is no 'commercially reasonable' private settlement possible for communities, unlike commercial plays for generic strings." *E. Brunner-Williams* (15 Nov 2008)

ICANN may consider allowing applicants to apply for up to x (x being a reasonable number like 5 for example) gTLD strings with one application with a mandate to reduce it to one after string contention check. ICANN may charge a "change fee". ICANN may charge "change fee" if such action leads to extra work for ICANN and to discourage frivolous changes. *I. Vachovsky* (15 Nov. 2008)

Should an applicant who invests in the process but loses a String Contention be afforded the opportunity of selecting (or proposing) another character string that is not part of a contention set? *S. Metalitz (IPC, COA).* Why can't an applicant choose an alternate string to avoid contention? The parties should be given an opportunity to select an alternative string if they fall into a contention set for auction. If the parties cannot agree to select different strings, then an auction would be able to proceed. *Smartcall* (4 Dec. 2008).

There will be a high degree of cooperation to resolve contention if the efficient allocation mechanism of last resort is auctions (as applicants will have incentives to not go to auction). If the mechanism is chance, less cooperation will occur and gaming may result. *Demand Media* (17 Dec. 2008). In the case of contention and where more than one applicant meets the criteria for community-based, "I believe ICANN has administered all that they can fairly and objectively

for the applicants with the final resolution to be left to an auction." *R. Fassett*, *Employmedia.com* (15 Dec. 2008)

The option to elect to comparative evaluation raises an additional cost for community-based applicants. *E. Brunner-Williams* (15 Nov. 2008).

Does the cooling off period count against any applicable time limits? Why wouldn't the time limits be automatically extended for the amount of time used in the cooling off period? *C. Gomes* (18 Nov. 2008).

Will the Evaluators take into consideration the purpose of an application? Is "Content Contention" of concern to ICANN? Would ICANN accept two applications with dissimilar character strings but identical purposes? *S. Metalitz* (*IPC, COA).*

It would be helpful for the Applicant Guidebook to clearly denote that the only instance when an applicant will be evaluated against another applicant is when two or more applicants each achieve the number of points required to be community-based. *R. Fassett, Employmedia.com* (10 Dec. 2008)

Issue

How can a residual contention situation between multiple community-based applicants who meet the criteria in a Comparative Evaluation best be resolved, or possibly prevented?

Analysis

The case at issue here is when there are multiple community applications, for identical or confusingly similar strings, that score above the threshold for criteria in a Comparative Evaluation.

There is some merit in refusing to resolve such a contention, notably to avoid polarization of the community, but this would have to be weighed against the negative consequences for all applicants involved in the contention set - their applications would all be considered void and they would have to reapply in the next round, implying both substantial extra costs and severe delays.

It should further be made clear that any final resolution necessary will be made ONLY between the community applications that score above the threshold, and NOT involve other applications in the contention set. This was ambiguous in the first version and will be clarified in the next version.

The opportunity to resolve the contention situation on a voluntary basis is present before a Comparative Evaluation takes place. To add an opportunity for such a resolution thereafter would carry a risk of delay with arguably meager chance of success, as the voluntary path has already been tried and failed. It is a preferred option to further facilitate the original opportunity for voluntary resolution by allowing more flexibility for agreements between the contending applicants, while safeguarding expedience in the process. Agreements between contending parties may result in deep modifications of an application that would have to be reviewed thru all steps from Initial Evaluation onwards. Applicants can investigate what agreements can be permitted in order to facilitate voluntary resolution of contention without resulting in substantive changes of any application. This should be considered in order to reduce the number of

contention cases to address by other means, thereby also avoiding additional costs for applicants.

An opportunity for applicants to present alternative strings, or to select a new string, would facilitate contention resolution and this was an option considered in the policy discussion but it was thought it would overly complicate the process. The agreed approach in the implementation advice accompanying the policy recommendations was, in short, that there be only one string per application to prevent gaming aspects.

For the final resolution in a case with multiple community applications, there are essentially two options to consider, either assessment of which one has majority support from the community or an auction among the winners. The first option is only applicable if the contenders do address the same community, while the second is applicable to any situation. From that perspective, an auction is preferred since that solution provides clarity of process and better predictability.

The role of the purported "purpose" of the TLD application: similarity of purpose between two applications is not a contention situation as defined by the process, which only is concerned with the ability of the TLD strings to coexist in the DNS. Provisions to prevent "content contention" are not part of the adopted policy, nor contemplated in the implementation. "Similarity of purpose" is, in fact, another way of saying "competition" and it is ICANN's recognized duty to promote competition.

Proposed Position (for this version of the Guidebook)

A comparative evaluation where multiple community applications feature identical or confusingly similar strings and score above the threshold for meeting the criteria will need to be resolved through an additional step. In cases where the applicants represent the same community, there will be a test to determine if one of the applicants represents a significantly greater portion of the community. In cases where this is not so, the applicants will be afforded an opportunity to settle the contention. During that time, the community invoked in the applications may choose to support one of the applicants over the other, with the result that one of the applicants would no longer meet the criteria and the other applicant would prevail. Absent a failure of all these methods, an auction will be held.

If more than one community-based application meet the criteria, none of the non-community-based (open) applications in direct contention with the former will prevail. This step should only address the particular contention situation among these community applications and not involve other applications in the contention set in question. This will be clarified in the revised version of the Applicant Guidebook.

E. *STRING CONTENTION: LAST RESORT CONTENTION RESOLUTION--AUCTIONS*

Summary of Key Points

- The revised Guidebook proposes that if comparative evaluation, agreement between parties or other methods do not resolve contention among applicants, that auctions will be used as a last resort contention resolution method.
- Several other methods of contention resolution were considered. Auction is an objective, legal, timely way to resolve contention, while other candidates proved not to be.

- Bona fide community-based applicants meeting the criteria will not face non-community based applicants in auction. In certain cases, if after other additional methods fail, community-based applicants might face each other in auction.
- Proceeds from auctions will be returned to the community via a foundation that has a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community. One use of funds would be to sustain registry operations for a temporary period in the case of registry failure.

<u>Summary of Input</u>

Support or Non-Objection to Auctions

Demand Media strongly supports the use of auction to resolve contention for open TLDs. They note that there will be a high degree of cooperation to resolve contention if the efficient allocation mechanism of last resort is auctions (as applicants will have incentives to not go to auction). If the mechanism is chance, less cooperation will occur and gaming may result. Related to cooperation is the issue of self-resolution of string contention. Demand Media notes that joint ventures could be permitted if the joint venture proceeds with the original bidder except for the new ownership structure of the entity. *Demand Media* (15 Dec. 2008).

"As a related comment, I would like to add that the draft AGB is still unsure what to do in the case more than one applicant meets the criteria for community-based. In this scenario, I believe ICANN has administered all that they can fairly and objectively for the applicants with the final resolution to be left to an auction." *R. Fasset (EmployMedia)* (15 Dec. 2008)

"Second, ICANN should encourage joint ventures as a means of resolving string contention, as opposed to prohibiting them. As long as the original applicant is part of the joint venture, the application shouldn't change in substance sufficiently to prohibit an important means to resolve string contention. If ICANN really wants to use auctions as a contention resolution method of last resort, it should adopt a high refund policy, announce it soon, and permit joint ventures to be formed by two or more parties that are contending for the same or similar string." *CentralNIC* (13 Dec. 2008). Several commenters also addressed the joint venture issue: E.g., noting that it is unclear why applicants may not resolve string contention situation through creating a joint venture to operate one string. *Rodenbaugh* (16 Dec. 2008). *Demand Media* (15 Dec. 2008). *K. Rosette* (26 Nov. 2008). *C. Gomes* (18 Nov. 2008). *Bank of America* (15 Dec. 2008).

4.3 Contention Resolution- "The Guidebook mentions an 'efficient mechanism for contention resolution' that has yet to be developed; the Guidebook only states a) that the first efficient means of resolution that will be employed is an attempt at a settlement between the two parties, and b) that auctions will be a last resort. ICANN should develop this mechanism that will come into play after attempts to settle a dispute between two competing applicants." CADNA notes that the Guidebook needs further clarification regarding how funds resulting from auctions will be allocated. "There should be further clarification as to what would be deemed an appropriate allocation of these proceeds, the time frame for this decision and how this allocation would be determined through 'community consultation.'" *CADNA* (15 Dec. 2008).

"The Guidebook mentions an 'efficient mechanism for contention resolution' that has yet to be developed; the Guidebook currently only states a) that the first efficient means of resolution that will be employed is an attempt at a settlement between the two parties, and b) that auctions will be a last resort. ICANN should develop this mechanism so that contention sets are not frequently pushed to auction." *RILA* (15 Dec. 2008).

General Concerns: Support for Comparative Evaluation Over Auction; Other

Supports mandatory, rather than optional, comparative evaluation on string contention. *AIPLA* (15 Dec. 2008) The DAG indicates that "auctions are one means of last resort" to resolve string contention. However, SIIA notes that no other means are discussed.   SIIA has serious reservations about auctions as a mechanism for awarding new gTLDs." *SIIA* (15 Dec. 2008)

Instead of auction, "not allocating the TLD would be more efficient to all parties involved (when multiple applicants for the same community-based TLD pass the evaluation and are all of them representative of such community)." *A. Abril i Abril* (15 Dec. 2008).

"If no community-based applications are presented other enterprises competing for a gTLD could be determined either between the competing parties or through an auction process (the one with the most money offered wins). There is no guarantee that the most appropriate trademark owner would retain a gTLD containing their brand name." *R. Raines* (4 Dec. 2008).

"The so-called "comparative evaluation" process should be completely re-thought, since in its present form it will be extremely difficult for even a strong community application to emerge as a "clear winner" and escape being funneled into an auction." "COA participants share the strongly stated concerns of the IPC regarding the inappropriateness of resorting to auctions to award gTLDs in most cases, see http://www.ipconstituency.org/PDFs/IPC%20comments%20on%20auctions%20paper%2020090708.PDF, and thus urge ICANN to re-think the "comparative evaluation" procedure. Especially when only one community-based application is involved, it should be designed mainly to weed out specious claims of community-based status, rather than to impose an unjustifiably high hurdle between an otherwise qualified community applicant (including those that have survived Community Objection procedures) and the goal of a gTLD delegation." *COA* (15 Dec. 2008)

The next Guidebook should clearly describe the nature of the "efficient mechanism for contention resolution"; it is doubtful that auction is appropriate for resolution of any string contention). *Bank of America* (15 Dec. 2008). *SIFMA* (12 Dec. 2008). *SIDN* (10 Dec. 2008) (revenues to ICANN aspect is problematic).

Opposed to Auctions

On Module 4, George Kirikos asserts that auctions alone are insufficient mechanisms for allocating gTLDs, as they do not address the negative externalities imposed upon others." "ICANN cannot be trusted to use the auction proceeds in a financially responsible manner, given what has been revealed in its IRS Form 990 disclosures, whereby ICANN's budget and staff compensation has been exploding to unreasonably high levels. Any proceeds should be used on a dollar-for-dollar basis to reduce ICANN fees for existing gTLD registrants, thereby refunding partially the externalities that ICANN is imposing upon society. Debacles like the ICANN Fellowship Project …should not create new precedents for even grander debacles that ICANN and its insiders hope to fund through auction proceeds. Financial prudence in these tough economic times means not funding white elephants, but instead rebating the fees back to domain registrants.""In the "Resolving String Contention", bidders during any auction must place a bidding deposit of large enough size to ensure that no fraudulent bids take place (in which case the auctions would be replayed, but the deposit forfeited to the other bidders). It's unclear that the current mechanism adequately addresses this, given the short time frames discussed

(bank letters of credit or other instruments might be required before the auctions). We've seen spectrum auctions, for example, where bidders defaulted, e.g. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2207A1.pdf.   *G. Kirikos* (24 Nov. 2008)

Section 4.3 of the DAG states that "auctions are one means of last resort" to resolve string contention, but no other means are discussed. IPC reiterates its strong concerns about auctions as a mechanism for awarding new gTLDs (see http://www.ipconstituency.org/PDFs/IPC%20comments%20on%20auctions%20paper%2009070 8.PDF and previous submissions cited there). [These comments were addressed in the Explanatory Memo on Auctions, except for detail on uses of funds and revised comparative evaluation criteria. *IPC* (15 Dec. 2008).

"Section 4.3 deals with an auction to resolve contention. Is this to maximize the revenue of ICANN? This seems to go against the foundational principles to promote competition in the domain-name marketplace while ensuring Internet security and stability. Surely the parties should firstly be given the option of accepting an alternative name? If this is not agreed then by all means, have an auction." *Smartcall* (4 Dec. 2008)

For brand protection in resolving string contention in the new gTLD process, auctions should be avoided and other mechanisms should be developed. If auctions are deemed necessary in some cases, escrow amounts should be required to deter fraud or defaulting bidders; analysis of auctions and resultant revenues to ICANN in relation to ICANN's status as a nonprofit should also be assessed. *NAM* (15 Dec. 2008).

Opposed to Auctions – Don't Use if Rights Holder has Objected

On Auctions, MarkMonitor recommends "Section 4.3- Auctions should not be adopted as a mechanism for string contention resolution if there has been an objection filed by a rights holder. This might occur if ICANN decides not to adopt the findings of the DRSP, and the rights holder has submitted an application for the string. To do so would enable ICANN to benefit from potentially infringing TLD applicants." *MarkMonitor* (15 Dec. 2008).

Opposed to Auctions – In Case of Community-Based Applicants

 "In the 1st public draft GFA text, this set always goes to auction if two or more of community-based applications score 11 points or more in the comparative evaluation, and the relative evaluation fails to determine a "clear winner". Suppose that all three community-based applications each score 11 points in the comparative evaluation, and the evaluators are unable to arrive at a basis for awarding priority between them.
Therefore, Chrysler LLC, with a capitalization that may be negative today, but historically has had better access to capital than any Tribal Government ever, is allowed to bid as a brand manager (JEEP CHEROKEE) against three rather poor (and corrupt for two out of the three) Tribes and their respective community-based applicants. This is not the outcome we should be designing for." "The process should always select a qualified community-based application, and unlike contention sets formed for generic strings, communities can not change their names to accommodate the uniqueness of labels requirement of the DNS, there is no "commercially reasonable" private settlement possible for communities, unlike commercial plays for generic strings.""It should be very clear that paying a fee to obtain access to an evaluated outcome rather than a auction outcome is an additional barrier to community-based applications who may be in a contention set, and failure to pay this fee will, in the simple case of a community-based

applicant and a "open" application, resolve the outcome as an auction in which the bidders are comprised of one auction-preferred bidder, and one auction-adverse bidder, with the obvious general outcome.""Again, this is not the outcome we should be designing for. The evaluation fee should be paid by the party forcing the evaluation, which is the "open" application which intentionally formed a contention set by applying for a community identifier, and has not withdrawn its application upon notice that a community-based application for that community identifier has been filed. Where there are no applicants within a contention set predisposed to an auction outcome, the evaluation fee should be paid by ICANN, which at its sole discretion selected the rather expensive International Chamber of Commerce rather than any other means to evaluate community-based applications, and which has, so far, rejected any contention outcomes other than "last man standing"." *E. Brunner-Williams* (15 Dec. 2008)

 "If there is no "clear winner" from the Comparative Evaluation, the resolution process is to process into a not-yet-finalized Efficient Mechanism for Contention Resolution, which will probably be auctions. Auctions do not appear to be a realistic mechanism for resolving contention among community-based applicants. Because it seems likely that many community-based applicants, such as non-profit organizations, may not have resources sufficient to compete with the open applicant in the auction setting, auctions are likely to favor those with open applications instead of those with community-based applications. In addition, an auction would work to the detriment of a community-based applicant unfortunate enough to compete with another community-based applicant and an open applicant. If the two community-based applicants both qualify through the Comparative Evaluation procedure and neither represents "a much larger share of the relevant community," they might both lose out to a better funded open applicant. This result seems contrary to the general preference for community-based applicants." *INTA* (15 Dec. 2008); *Arab Team* (15 Dec. 2008) (do not use auctions for community-based string contention).

Issues

1. Whether to specify or more clearly explain that joint ventures are permitted under the current language of the Applicant Guidebook, as part of self-resolution of contention among competing applicants.
2. Whether to specify that ICANN staff is proposing that auctions be the last resort mechanism to resolve string contention.
3. Whether to add detail on potential uses of funds derived from auction.
4. Whether community-based applicants continue to auction in cases where comparative evaluation does not produce a clear winner.
5. Whether auctions should be uses as a last resort contention mechanism in cases in which an objection has been filed against a proposed string.

Proposed Position (for this version of the Guidebook)

1. Whether to specify or more clearly explain that joint ventures are permitted under the current language of the Applicant Guidebook, as part of self-resolution of contention among competing applicants.

Joint ventures are expected as part of the application process and it is designed to accommodate applications by new entities. Agreements are expected as part of self-resolution of string contention but a new entity, resulting in a material change to the application information would require re-evaluation for satisfaction of the Operational/Technical/Financial criteria. This might require additional fees or potential

postponement of consideration to a subsequent round. Applicants are encouraged to resolve contention amongst them by arriving at accommodations that do not materially alter the application information of the surviving applicant in order to achieve a timely resolution and decision. ICANN will work with evaluation service providers as they are retained to determine if re-evaluation can occur in a timely way.

2. Whether to specify that ICANN staff is proposing that auctions be the last resort mechanism to resolve string contention.

Considerable analysis of this question is provided below. Module 4 has been revised to clearly describe auction as the last resort contention resolution mechanism, only after contending parties have had an opportunity to resolve the contention themselves, comparative evaluation does not resolve the contention, and all objection processes or comparative evaluation processes are complete. It is expected that resolution between the parties will present a more economical resolution method for applicants and that most contention will be resolved in this manner.

3. What are uses of funds derived from auction?

Proceeds from auctions will be returned to the community via a foundation that has a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community. One use of funds would be to sustain registry operations for a temporary period in the case of registry failure. Other uses include outreach and education, and DNS stability/security projects. The revised Guidebook includes this added detail on the use of funds regarding the establishment of a foundation.

It is important to note again that it is thought that most cases of contention will be resolved by an agreement among the parties since that is a more economical solution to contention than auction. Therefore, few auctions are expected.

4. Whether community-based applicants continue to auction in cases where comparative evaluation does not produce a clear winner.

This situation is described more fully in a companion paper. Briefly:

*   In cases where multiple community-based applications meet comparative evaluation criteria, the other, non-community based applications in direct contention with the former will no longer be considered.
*   In cases where multiple community-based applications address the same community and meet comparative evaluation criteria, if one application demonstrates considerably more community support, it will prevail.
*   In cases where multiple community-based applications meet comparative evaluation criteria, neither has demonstrated significantly more support than the other or they represent different communities, and they cannot settle the contention amongst them, an auction will be held between these applications.

Contending parties will be given an opportunity to resolve their differences, after which an auction will be conducted. An alternative was for both community-based applicants to come back at a later date (future round) after both have settled their differences but this seems to unnecessarily delay the delegation of a desired resource.

5. Whether auctions should be used as a last resort contention mechanism in cases in which an objection has been filed against a proposed string.

All objections will be resolved prior to resolution among contending applications. Presuming that the objection was not successful, and contention remains after the original objection was filed, then the contending applicants should proceed to resolution methods, including comparative evaluation, agreement among the parties, and auction.

<u>Analysis</u>

Background

Comparative evaluations were used in the 2001 proof-of-concept round and the 2003 sponsored TLD round. Comparative evaluation was also used in the .NET rebid process and transition of .ORG. It was widely noted in the community that ICANN did not have a good experience with comparative evaluation in the .NET rebid process.

The use of auctions in the new gTLD process has been discussed for many years. In 2004, ICANN received a paper on allocation of gTLDs via auction from the Organization for Economic Cooperation and Development (OECD) titled "Generic Top Level Domain Names: Market Development and Allocation Issues" (see http://www.oecd.org/dataoecd/56/34/32996948.pdf). This paper described allocation methods for gTLD strings, including auction and comparative evaluation. The OECD concluded: "On balance the economic arguments favour the use of auctions in some form, where scarcity exists, in relation to the goals set by ICANN for allocation procedures. They are particularly strong in relation to allocation decisions concerning to existing resources and where a 'tie-breaker' is needed during a comparative selection procedure for a new resource. In all cases, the best elements of comparative selection procedures could still be incorporated, at a prequalification stage for registries, using straightforward, transparent, and objective procedures that preserve the stability of the Internet" (pp. 51-52).[1]

The paper acknowledged that comparative evaluation may have the advantage of providing equity for new gTLD applicants, and permits the inclusion of broader objectives in the new gTLD selection process. However, it also noted that comparative evaluation lacks transparency and relies on subjective judgment in the determination of a winner for a proposed gTLD string.

Auction of new gTLDs was discussed during the development of the GNSO Recommendations during a meeting in Marina del Rey, California in 2007, and referenced in the final recommendations approved by the GNSO. Implementation details, including potential use of auctions, were discussed with the GNSO and others during the ICANN meetings in Los Angeles, Delhi, Paris and Cairo.

The GNSO Recommendations approved by the ICANN Board in June 2008 state that new gTLDs must be introduced in an orderly, timely and predictable way. There must be a clear and pre-published application process using objective and measurable criteria. All applications must initially be assessed in rounds until the scale of demand is clear.

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[1] Legal scholars familiar with ICANN and the DNS have also recommended auction as a means for distributing new gTLDs. See "An Economic Analysis of Domain Name Policy," Hastings Communication and Entertainment Law Journal (2003) (by Karl M. Manheim and Lawrence B. Solum) (http://law.bepress.com/sandiegolwps/le/art1).

The GNSO also recommended that if there is contention for strings, applicants may:

1. resolve contention between them within an established time-frame;

2. if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. **If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention** [emphasis added] and;

3. the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

In early 2008, ICANN retained PowerAuctions, LLC as an auction consultant, and published an Economic Case for Auctions in August 2008. The Economic Case paper became the basis for the auction model incorporated as Chapter 6 of the Resolving String Contention explanatory memorandum attached to the draft Applicant Guidebook.

Allocation Mechanisms Overview

The GNSO Recommendations anticipate that there will be cases where two or more identical or nearly identical strings will meet the qualifying criteria and successfully complete all evaluations. Applicants should first be provided an opportunity to resolve contention themselves. In cases where one or more contenders is community-based, comparative evaluation may be used. If comparative evaluation is not used or does not result in a clear winner, contention may be resolved by an "efficient mechanism." Staff has proposed that this mechanism be auctions. There are essentially four ways to resolve contention:

o Comparative evaluation – subjective criteria are applied to each contender in order to determine the better or best applicant. This method, supported by the GNSO Council for community-based applicants, is problematic because devising measurable criteria is difficult and the process will lead to controversial results.

o Auction – In a pre-determined methodology, contending applicants submit monetary bids for the TLD. Generally, the highest bid wins. This method is objective. It is supported by the OECD (Organization for Economic Cooperation and Development, www.OECD.org) and other stakeholders including aspiring gTLD registries..[2]

o Random selection – A coin-flip or (in the case of several contenders) random drawing determines the winner. The method is objective but is problematic as law in certain jurisdictions provides a direct barrier to using a lottery or other form of selection by chance to determine the winner of a contested gTLD.

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[2] The GNSO stated that in these cases "a process will be put in place to enable efficient resolution of contention." In that report, the council indicated that they had considered auctions as discussed in policy discussions and implementation meetings with ICANN staff an auctions merited additional study.

    o   Best terms - The party agreeing to best contract terms would be the winner. Determination of what are best terms is problematic and will lead to gaming. For example, the choice could be made on a registry reliability or response time measure that won't necessarily serve registrants better but would result in a number of overreaching application promises.

1. Selection by Chance

Selection by chance includes the use of lotteries, "short straw", "coin flip" or random selection as a mechanism for allocating applications for new gTLDs. ICANN has received advice from outside counsel that lotteries (or other selection by chance methods) might be viewed as illegal in some jurisdictions, and such laws may provide a direct barrier to using lotteries or other chance mechanisms in order to determine the winner of a contested gTLD.

2. Comparative Evaluation

ICANN previously used comparative evaluation for the transition of .ORG from VeriSign to PIR, the .NET rebid process, and the 2000 and 2003 new gTLD rounds. Subjective aspects of comparative evaluation in the .NET rebid made selection of a winner in a close contest difficult and vulnerable to litigation. ICANN anticipates that comparative evaluation will be used to resolve contention among applicants when at least one applicant purports to represent a community or is seeking a community-based gTLD.

The disadvantages of comparative evaluations can be summarized as follows:

-    It is difficult to establish clearly objective criteria that allow the evaluator to differentiate among competing applications that have already passed all evaluation criteria;
-    comparative evaluations take relatively longer time periods than objective measures and cost more;
-    Depending on how the comparative evaluation is structured, the process may favor well-connected applicants, and thus may not be any more protective of disadvantaged applicants than auctions;
-    Comparative evaluation is difficult in cases where community-based applicants are up against open applicants over the same string.

3. Auctions

ICANN has received a number of inputs from the community on the potential use of auctions to resolve contention among competing new gTLD applications.

Auctions are an objective and transparent means to resolve string contention. Given that bids are observable and verifiable by a court or any third party, the final allocation is less likely to be legally contested relative to a comparative selection procedure. The key benefits of a well-designed auction mechanism include the following:

- Transparent and objective means for determining a winner
- Efficient allocation – puts gTLD strings in the hands of those who value them
- Efficient process – fully dynamic auction, concludes in one day to one week
- Revenue maximization (although this is not one of ICANN's goals in the new gTLD process)

Parties competing for the same or similar strings would be able to collaborate with each other once contention sets have been identified. This would permit applicants for the same or similar strings to work out contention amongst themselves between the time in which all applications are posted and the initial evaluation process closes, and this would be in line with the GNSO

Recommendations. This would be a more cost effective solution for most contending parties and it is anticipated most contention would be resolved prior to the auction occurring. ICANN's task is to make a final determination among the applications received. As an example, how best should ICANN resolve contention for .shop if VeriSign, NeuStar, Afilias, Nominet and NIC.MX all meet the base criteria? An auction mechanism would provide for a clear and objective means for resolving contention among multiple applicants. In another example, how should ICANN resolve contention for .car, .cars, .care, and .cares (if it is determined that .car, .care and .cars are in contention and .cares and .care are in contention with each other)?

4. Selection by Best Terms
ICANN could also determine to resolve contention by selecting the applications that present the "best terms". This would require ICANN to identify in advance "best terms." Determination of what are best terms is problematic and will lead to gaming. For example, the choice could be made on a registry reliability or response time measure that won't necessarily serve registrants better but would result in a number of overreaching application promises.

Uses of Funds

ICANN's plan is that fees and costs of the new gTLD program will offset, so any funds coming from a last resort contention resolution mechanism such as auctions would result in new revenue to ICANN. Therefore, consideration of a last resort contention mechanism should include the possible uses of funds. Clearly, any funds must be used in a manner that supports directly ICANN's Mission and Core Values.

Given that possible new revenue from contention resolution mechanisms could range from zero to potentially significant sums, it is challenging to identify specific uses with certainty. Proceeds from auctions will be returned to the community via a foundation that has a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community. One use of funds would be to sustain registry operations for a temporary period in the case of registry failure. Other uses include outreach and education, and DNS stability/security projects. Other possible uses could include reduction in application fees or grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, or other specific projects for the benefit of the Internet community in accordance with ICANN's security and stability mission.

XII. REGISTRY AGREEMENT

Summary of Key Points

- ICANN received dozens of thoughtful and constructive comments on the draft proposed Registry Agreement.

- There have been significant revisions to the proposed Registry Agreement in response to public commentary and discussions:

  – ICANN has modified the proposed process and included limitations on implementing global amendments to the form of the Registry Agreement.

  – ICANN has included covenants requiring equitable treatment among registry operators and open and transparent actions by ICANN.

  – The recurring registry fees to ICANN have been reduced to US$25,000 per year, plus a flat $0.25 per transaction for registries with over 50,000 names.

Summary of Input

This section organizes the summary of responses about the Registry Agreement into the following categories: *General Comments*, *Covenants of ICANN, Consensus Policies*, *Compliance*, *TLD Delegation, Term and Termination, Payment Concerns, Pass-Through of Registrar Fees, Price Controls, Amendment Process, Dispute Resolution and Damages, Indemnification, Warranties and Liability*, and *Changes of Control.*

General Comments

General Concerns Regarding Proposed New Form of Registry Agreement. The introduction of an entirely new "base agreement" in the draft appears to be based only on a desire to simplify the form of agreement. With a few exceptions, it certainly does not stem from the recommendations in "Term of Reference Four – Contractual Conditions: http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc35657640." The resulting base agreement is so flawed in substantive provisions that consideration should be given to abandoning it in its entirety. At the very least, the Board should consider, as a possible starting point, the forms of registry management agreements in force for .ORG, .BIZ and .INFO. Among other sections that must be added: ICANN covenants, consensus policies, limits on ICANN authority to make changes; and certain fee provisions should be removed. *PIR* (15 Dec. 2008). ICANN must address other omissions and changes in the agreement - e.g., the TLD zone servers; the term of agreement; renewals; termination rights; dispute resolution; arbitration; liability; registry fees; RSTEP cost recovery; collection of registrar fees by registries; changes and modifications to the agreement; notice of changes; indemnification; and changes in control. *RyC* (6 Dec. 2008); *G. Kirikos* (24 Nov. 2008) (cites numerous deficiencies and need for revisions to the base agreement—e.g., renewal provisions, pricing, equal treatment trigger problem, fees, changes in registry control, rights protection mechanisms); *Demand Media* (Module 5, 15 Dec. 2008) (suggests numerous revisions – e.g., spell out rights protection mechanisms, indemnification, arbitration, community policies, audits); *A. Abril i Abril* (Module 5,

15 Dec. 2008) (certain omitted provisions should be added back into agreement — e.g., rights to data, traffic data, extent of delegated authority; clarification needed for public law corporations and community-based TLDs). Why does the currently proposed draft Registry Agreement deviate so much from existing Registry Agreements? It is very one-sided in favor of ICANN. Are there key areas in existing agreements that ICANN Staff think have been unsuccessful? If so, what are those and why are they thought to be unsuccessful? *C. Gomes* (18 Nov. 2008).

Need for a Balanced Agreement. Registries believe that we should focus now on crafting an agreement that is fair, gives ICANN the tools it needs to achieve its limited mission, and gives Registries the stability and predictability they need to operate businesses. Provisions under which changes to the fee provisions of each registry's agreement should be negotiated on an individual basis, as appropriate. *RyC* (6 Dec. 2008).

Impact on Existing TLDs. What will be the impact of the adoption of the new form of Registry Agreement on existing TLDs? *G. Kirikos* (24 Oct. 2008).

Compliance with Application; Changes. Do TLDs have to follow what was in the application? *J. Neuman, C. Greer; Notes from October 29 RyC Meeting.* ICANN should anticipate and accept that reasonable changes may occur during the course of what could be a lengthy review process. Registries also believe that the Registry Agreement should obligate operators to fulfill the commitments made in their applications, particularly with respect to community based applications, and note that this provision does not accomplish that goal. *RyC* (6 Dec. 2008). Can an applicant apply for a TLD and choose not to use it? Can applicants apply for a TLD to prevent others from using it? *F. Hammersley* (24 Nov. 2008; 6 Nov. 2008) (inquires about possible pre-application opinion on similarity to a reserved name; what is the position on gTLD "warehousing" to prevent others from using it).

Contract Execution. Section 4.4 – If an Applicant is in good faith negotiations with ICANN on the Registry Agreement, ICANN should not have the right to assign the contract to the runner-up applicant if the contract has not been signed within 90 days. *MarkMonitor* (Module 4, 15 Dec. 2008); *C. Gomes-GNSO New gTLD Question and Answer Open Teleconference.*

Covenants of ICANN

ICANN Accountability. More ICANN accountability is needed. The covenants section of the Registry Agreement needs clarification and adjustment to conform with established registry expectations, and the agreement also raises concern due to certain unilateral changes. ICANN needs to reconsider the significant changes it made to the "Covenants of ICANN" (article 3) provision. The proposed changes in this section eliminate ICANN's obligations to (a) operate in an open and transparent matter consistent with its expressed mission and core values, and (b) not apply its standards, policies, procedures or practices arbitrarily, unjustifiably or inequitably, and not single out particular Registries for disparate treatment unless justified by substantial and reasonable cause. As previously discussed, because Bylaws can be changed, Registry Operators feel very strongly that ICANN's accountability for compliance with the most basic obligations of fair dealing should be set out in the Registry Agreement. *RyC* (6 Dec. 2008). Why was the reference to the "equitable treatment" provisions in the old form of Registry Agreement (Sections 3.2(a) and (b)) removed from the list of issues which consensus policies could not modify? *M. Palage, J. Neuman; October 29, RyC Meeting.*

Zone Server and Nameserver Implementation Timeframe. Related to Section 3.1, the Registry Operators believe that ICANN should be willing to commit to a best efforts standard that targets implementation within 7 days for changes to the TLD zone server and nameserver. ICANN is obligated to ensure that the authoritative root points to the designated TLD zone servers to the extent ICANN has the authority to do so. This is a very limited obligation with respect to a matter of fundamental importance to Registries, and should remain in the Registry Agreement. *RyC* (6 Dec. 2008).

Consensus Policies

Limitations. Why was the definition of "Registry Services" removed from the Consensus Policy specification? *M. Palage, October 29, 2008, RyC Meeting*.

Scope of Consensus Policies. Registry operators cannot agree to expand the scope of Consensus Policies beyond the long-accepted picket fence, and believe that it is not in ICANN's long-term interests to do so. Because Bylaws can and do change, Registries feel that contractual protections for the picket fence are essential. *RyC* (6 Dec. 2008). Registry Agreement pricing is not a stability or security issue and thus not within the bounds of the picket fence. It is a matter on which each registry is free to agree via contract, but it is not an appropriate matter for Consensus Policy. *M. Palage, October 29, RyC Meeting.*

Compliance

Audit Rights**.** ICANN has the right to audit a registry's compliance with each and every aspect of the Registry Agreement. ICANN already has the right to audit compliance with the fee arrangements and with ICANN's technical and functional specifications. This provision could impose significant costs on Registry Operators (even if ICANN has to pay the actual auditor) that are not justified unless the audit is necessary to investigate a bona fide complaint about a material violation of the Registry Agreement. *RyC* (6 Dec. 2008).

Sanctions Program**.** ICANN should require re-evaluations in the event of blatant violations of the TLD's specified purpose that simplifies the deregistration process. *Hacker* (14 Dec. 2008). Is there a compliance and sanctions process for the companies who will run the new gTLDs? And if so, what is it? *Anonymous Email* (26 Nov. 2008). Where in the draft base agreement is implementation of GNSO recommendation 17 about a "clear compliance and sanctions process must be set out in the base contract that could lead to termination?" *C. Gomes* (18 Nov. 2008). ICANN should use graduated sanctions for registries and additional rights protection mechanisms should be encouraged beyond UDRP. *MarkMonitor* (Module 5, 15 Dec. 2008).

Community-Based TLDs**.** On contracts post-delegation, Demand Media would like to see ICANN include in community contracts a requirement that changes only be considered due to changes within the community itself. *Demand Media*; http://forum.icann.org/lists/gtld-transition/pdfm3Q_H889SJ.pdf. If a community application makes it through without contention, are they bound to the restrictions in application? *Demand Media-GNSO New gTLD Question and Answer Open Teleconference.*

Reporting Requirements**.** ICANN demands monthly reporting by the registry. It is unclear what the purpose of such reporting is and what the ground for such an obligation would be. ICANN

demands reporting on transfers. Again, it is unclear what the purpose of such reporting is and what the ground for such an obligation would be. *SIDN* (10 Dec. 2008).

Whois Obligations. Was it intended that all new TLDs have only the Whois obligations of thin registries? If so, why? *S. Metalitz* (25 Nov. 2008). It is essential to combating online fraud that full Whois information be available at the Registry Operator level (Base agreement Section 2.4, specification 4). *Microsoft* (Guidebook comments, 15 Dec. 2008).

General; ICANN Enforcement Capacity. "Standards Compliance: Registry Operator shall implement and comply with all existing RFCs." Does this include RFC 2549? *E. Brunner-Williams* (25 Nov. 2008). ICANN must demonstrate that ICANN has sufficient capacity to enforce contract compliance with an as-yet unknown number of new contracting parties, especially in light of outstanding questions regarding existing contracts (such as the proposed amendments to the Registrar Accreditation Agreements and problems with the Whois data accuracy reporting system). *U.S. DOC-NTIA* (18 Dec. 2008); *Lovells* (15 Dec. 2008); *News Corporation* (16 Dec. 2008) (ICANN also must dedicate resources to enforcement); *Grainger* (15 Dec. 2008) (policing new TLDs for compliance with intended use is ICANN's responsibility). ICANN must foster consistency and empower its contracting parties with the clear right to suspend resolution to any abusively registered domain; this right is absent in the proposed new Registry Agreement. ICANN should consider a notice and takedown system for abusive registrations. *Rodenbaugh* (16 Dec. 2008); *ICA* (16 Dec. 2008) (strongly oppose cost-free takedown procedures for domains alleged to be established in bad faith for new and existing gTLDs; bad faith is already one of the key elements of the UDRP and should be one or three elements in a balanced proceeding, not the single determinative element; ICANN and registries should increase resources for taking down domains used for criminal activity).

TLD Delegation

Applicant Implementation. The contract should allow the applicant to choose its own timetable for entering into the root zone. To prevent complete preclusion of a string by an applicant, an applicant should be required to proceed to delegation and to register at least one second level domain with legitimate content within three years after award of a gTLD. *Bank of America* (15 Dec. 2008); *Visa* (13 Dec. 2008) (brand owners should be able to register their trademark extension to protect it but should not have to actively use it or fulfill back-end requirements). We recommend that the contract require the new domain to adopt the best available security measures, such as DNSSEC, a robust Whois (see section 2.1.3) and the current Add Grace Period Limits Policy which currently does not have even "temporary policy" status. *Bank of America* (15 Dec. 2008). Is there any idea what the time period will be for ICANN to determine that a registry's initial start-up requirements are not satisfied such that the gTLD can be delegated into the root zone within the time frame specified in the Registry Agreement? Should this correspond to the time period by which the TLD has to become active? *C. Gomes-Compiled Comments on the new gTLD Applicant Guidebook.*

Term and Termination

Term of Agreement. Extending the term to ten years does not justify the many changes ICANN proposes to make in this agreement. In fact, the protections in place in the current agreements are far more important, and once in place, the term itself is less critical to Registry Operators. *RyC* (6 Dec. 2008).

Termination and Renewal. The current Registry Agreement places modest constraints on ICANN's rights to refuse to renew, which ICANN proposes to eliminate in the draft. The draft also eliminates existing provisions regarding the terms under which such renewals will take place. The current agreement assures ICANN that it can bring renewal agreements in line with contract changes that have been implemented during the term, but provide the degree of stability and predictability Registry Operators need to operate their businesses, both with respect to terms and pricing. Those protections should be maintained. *RyC* (6 Dec. 2008). The new draft extends ICANN's termination rights to any "fundamental and material breach" of the agreement, including any changed terms. *RyC* (6 Dec. 2008). Related to Section 4.4, the reference to "critical registry functions" should be defined in the same manner that this phrase is used in the proposed gTLD Registry Continuity Plan. *RyC* (6 Dec. 2008). Competitive bidding should be required for renewals of a gTLD Registry Agreement, rather than granting incumbents perpetual right to renew; this serves the interests of registrants and may lower domain prices and raise operating specifications. *U.S. DOC-NTIA* (18 Dec. 2008). If the Registry Operator operates a closed, branded gTLD or a gTLD with fewer than a set number of registrants, the Registry Operator should have the right to terminate the Agreement and cease operating the registry. *Microsoft* (Guidebook comments, 15 Dec. 2008). *Demand Media* (Module 5, 15 Dec. 2008) (registry should have right to terminate under certain conditions).

Payment Concerns, Pass-Through of Registrar Fees

Bilingual Fees. Regarding Section 6.1 of the New gTLD Draft Agreement, the fee structures do not make any provisions for bilingual Registry Operators, who may be required under equality legislation to make bilingual domain registrations available at no extra cost to the end user. We wish to suggest that Registry Operators who are legally required to operate bilingually should be dealt with on a different fee structure. *dotCYM* (15 Dec. 2008).

Registry Fee Collection. Registry operators have agreed in the past to collect fees, subject to a specific cap, from Registrars on behalf of ICANN. Registry operators cannot, however, agree to the changes proposed by ICANN, which remove all limitations on what ICANN may require Registries to collect. Also, regarding Section 6.4, this provision would appear to obligate Registries to pay registrar fees with no phase-in period to allow Registries to first collect the fees from Registrars. Registries should not have to compensate ICANN for fees due by Registrars unless they have had the opportunity first to collect those fees. *RyC* (6 Dec. 2008).

Price Controls

Maintain Price Controls. ICANN should clarify whether price controls that apply to domain names will be preserved; before any elimination of them ICANN must demonstrate the mechanisms to ensure that prices will be controlled by market forces. *News Corporation* (16 Dec. 2008); *K. Pilna* (16 Dec. 2008) (concern lack of price controls and preserving TLD neutrality); *eedlee* (Module 5, 12 Nov. 2008); *Swa Frantzen* (Module 5, 11 Nov. 2008); *A. Allemann* (Module 5, 12 Nov. 2008); *T. Smith* (Module 5, 8 Dec. 2008); *C. Christopher* (Module 5, 8 Dec. 2008); *P. Gusterson* (Module 5, 8 Dec. 2008); *D. Carter* (Module 5, 13 Nov. 2008) (why opening up old debate); *YouBeats* (Module 5, 12 Nov. 2008); *E. Rice* (Module 5, 13 Nov. 2008); *Searchen Networks* (Module 5, 14 Nov. 2008); *S. Morsa* (Module, 8 Dec. 2008); *B. Regan* (Module 5, 9 Dec. 2008); *G. Yandl* (Module 5, 15 Dec. 2008); *M. Menius* (16 Nov. 2008, 12 Dec. 2008, 15 Dec. 2008); *K. Pitts* (12 Nov. 2008); *C. Mendla* (13 Nov. 2008); *F. Schilling* (Module 5, 21 Nov. 2008); *K. Ohashi* (13 Nov. 2008); *K. Smith* (13 Nov. 2008); *Tom* (Module 5,

15 Nov. 2008, 13 Nov. 2008); *URL Names (*4 Dec. 2008); *C. Beach* (Module 5, 8 Dec. 2008); *J. Monasterio* (10 Dec. 2008); *M. Sumner* (Module 5, 13 Nov. 2008); *M. Castello* (13 Nov. 2008); *G. Boulter* (15 Nov. 2008); *R. Lafaye* (10 Dec. 2008); *A. Miller* (Module 5, 8 Dec. 2008); *J. Sprout* (11 Dec. 2008); *WMI* (14 Dec. 2008) (should not allow tiered pricing).

Impact on Innovation and Public Interest. Is it not in the ICANN charter to help support the growth and definition of the Internet for the public? The public does not need control but protection it seems from those that want to enslave it for profitable gain beyond what most can cope with. We need to help the newcomers as well as the founding members of the web to have as free and open a marketplace as can be made available. Allowing the introduction of open charging fees that could be anything the registrar deems appropriate is a recipe for disaster. As an example, .TV would have stood a much greater chance at succeeding if not for the incredibly high registration fees for their premium names. This was not good for the public, nor the domain owner. The public was denied a domain name that was stunted in its growth from the start. *M. Castello* (13 Nov. 2008).

Impact on Existing gTLDs. The new gTLD contracts must have hard caps in place to protect existing gTLD registrants. New gTLDs are NOT effective substitutes for existing gTLDs, and thus "competition" isn't going to keep VeriSign's pricing power in check. Even with a 10-year transition period, it would shock the conscience if VeriSign was permitted to arbitrarily and unilaterally raise the renewal price of .coms to millions or billions of dollars per year (say $1 billion/yr for Google.com, $10 million/yr for Hotels.com, $50 million/yr for Cars.com, $30 million/yr for Games.com, or whatever the market would bear), effectively re-auctioning the entire list of premium domain names to the highest bidder, removing the existing registrant and replacing things with .tv style pricing. Alternatively, all existing gTLD operators need to agree to language, before any new gTLDs are approved, that make explicit that the hard caps cannot be removed regardless of whatever happens in other gTLDs. *G. Kirikos* (24 Oct. 2008); *G. Kirikos* (4 Dec. 2008) (raises ICANN staff process concerns about changing price controls policy); *C. Christopher* (16 Dec. 2008) (equal cost registration and renewal for all registrants of retail TLDs to avoid extortion by registries, and ICANN must show its own financial accountability).

Lack of Price Controls. Maximum price caps or other terms benefiting consumers should be imposed in those cases where competitive bidding mechanisms will not adequately limit the ability of Registry Operators to exercise market power. *U.S. DOC-NTIA* (18 Dec. 2008); *ICA* (16 Dec. 2008) (draft contract for new registries lacks any pricing controls, and could lead to tiered pricing). Price caps should not be included in new gTLD agreements, but ICANN must be cautious about removing the caps in incumbent agreements given potential for tiered renewal pricing. *Go Daddy* (15 Dec. 2008); *D. Craig* (17 Nov. 2008) (new TLD purchaser should be able to set pricing, but there should be safeguards against monopolistic, unrestricted price increases); *I. Vachovsky* (15 Nov. 2008) (consider a model where gTLDs divided into two groups – (1) unregulated free market and competitive and (2) regulated monopolistic). To preclude abusive behavior, ICANN should have review mechanisms and then approve or disapprove any renewal price increases over a certain threshold. The potential exists for elimination of negotiated price caps in existing Registry Agreements, leading to differential pricing, as well as extortionate renewal pricing. *Rodenbaugh* (16 Dec. 2008). The base agreement represents a Trojan Horse that can be used by existing gTLD Registry Operators to engage in tiered pricing, due to the equal treatment clauses in existing contracts and the removal of price controls. It should take into account contingency that U.S. Dept. of Commerce will not renew the JPA. The base agreement tends to favor Registry Operators at the expense of registrants. There should not be bilateral, non-public agreement amendments by ICANN and

Registry Operators. *G. Kirikos* (24 Nov. 2008); *ICA* (16 Dec. 2008) (do not reopen tiered pricing through backdoor of new registry contracts).

Vertical Separation. Regarding vertical separation in registries under price caps, the Report is correct that relaxing the vertical separation requirement for registries operating under a price cap is undesirable, and will remain so for at least as long as those registries, particularly .com, account for such a disproportionate volume of current registrations. *Steve Metalitz (IPC)*. Open-access and price cap controls are essential complements to vertical ownership. *D. Maher* (forwarding J. Cave study). The new gTLD process must not be used to resurrect differential pricing by registries. ICANN should maintain vertical separation between registries and registrars and enforce equal access policies for registrars, with any exceptions to these policies strictly limited. ICANN should move slowly toward permitting integration of registry and registrar services, but should not use experimentation with single-organization and hybrid registries as a prelude to relaxing vertical separation and equal access requirements for a broader pool of gTLDs. *ICA* (16 Dec. 2008).

Objection to Registrar Price Disclosure; Notice of Increases. In a competitive market for registrar services, we do not understand ICANN's justification for requiring Registrars to disclose their price structure to registrants. The transparency of pricing for registry services provision is problematic; pricing policies are contracts between registries and registrars, not between registries and registrants. *RyC* (6 Dec. 2008). It is unclear why a registry has to publish prices on its website. *SIDN* (10 Dec. 2008). All Registries should be required to provide adequate notice before increasing renewal prices. *Network Solutions* (15 Dec. 2008).

Effect of Equitable Treatment Provision in Existing Registry Agreements. The following language—"ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause" - could lead to existing gTLD operators such as VeriSign petitioning to get the same treatment as new gTLDs in regards to not having a pricing cap. This could open up the door to variable pricing, whereby registrants of popular and/or high-earning domains would have to pay more for the same service, simply because they can afford it. *M. Sumner* (Module 5, 13 Nov. 2008). Before any new contract is approved with VeriSign in regard to .com and .net, unambiguous language must be specifically included in the contract that prohibits tiered-pricing on new registrations and renewals in the .com and .net namespace. Comment on the CRA Report is against existing gTLD registries being able to modify their agreements to remove price caps. *M. Menius* (16 Nov. 2008). Given the existing Registry Agreements state that ICANN cannot apply inequitable policies to registries, a logical conclusion must be that if the new gTLDs have no pricing controls, the existing registries will apply to have price controls removed also, and ICANN will be in no position to deny them. *C. Beach* (Module 5, 8 Dec. 2008). Will the issue of tiered pricing be revisited; what mechanisms are in place to prevent existing gTLDs from using the "equitable treatment" clause to have price controls removed? *G. Kirikos* (24 Nov. 2008). If price caps are not included for new gTLDs, then price caps must be removed from the .biz Registry Agreement. Any material changes for the newer, no-price capped TLDs regarding vertical separation and equal access in general must be applied to NeuStar – this is required under the .biz Registry Agreement and ICANN's Bylaws. Price caps are appropriate for larger TLDs that have a much higher percentage of the market and are not appropriate for gTLDs that do not have any real market power. *NeuStar* (15 Dec. 2008).

Amendment Process

Objection to unilateral amendment by ICANN; other changes. To remove the potential for unilateral amendments to the Registry Agreement by ICANN, ICANN should remove the Board's ability to override a GNSO's veto of agreement amendments. *NIC Mexico* (9 Dec. 2008)*; Demand Media* (Module 5, 15 Dec. 2008) (remove ICANN ability to change contract); ICANN should not have ability to change contract terms unilaterally; *CentralNIC* at 2 (13 Dec. 2008); *dotSCO* (15 Dec. 2008) (ICANN should not have unilateral ability to alter contract); *Van Couvering* (15 Dec. 2008) (instead allow ICANN to make changes all at once, but changes have to approved by 2/3 of registries). This is completely unnecessary, and an extraordinary act of over-reaching on ICANN's part. ICANN has described this provision as providing necessary flexibility, but has not identified any situation in which the absence of this right has hindered ICANN's ability to perform its mission. But the fact is that ICANN already possesses authority to impose new obligations on Registry Operators through the Consensus Policy provisions of the agreement, and has emergency authority to do so using the Temporary Policy provisions of the Registry Agreement. These provisions give ICANN the authority at all times to make changes necessary to preserve the stability and security of the Internet and the DNS. ICANN has not – because it cannot – point to any situation where it needed the kind of blank check it is requesting here. *RyC* (6 Dec. 2008). These annexes should not be subject to unilateral change absent a stability or security consideration that supports creation of a Consensus Policy. *RyC* (6 Dec. 2008). dotSCO has reservations on the proposed provisions for "Universal Contract change," and requests that ICANN respect the various legal systems that proposed Registries may be operating under. *dotSCO* (15 Dec. 2008).

Burden Shifting Concern. There is no justification for shifting the burdens in the way this provision does. Under the arrangement proposed by ICANN, however, ICANN can impose any changes it wants, and the burden is on Registries to block those that regulate activities outside the picket fence. Even if such burden shifting could be supported, the requirement of a vote of two-thirds of the number of Registries to overturn such changes is not an effective check in an environment involving hundreds, if not thousands, of TLDs employing many different business models. *RyC* (6 Dec. 2008).

GNSO Role. It is not clear what the ability of the GNSO Council to overturn a change by a two-thirds vote adds by way of protection for Registries. Rather, it problematically expands the mission of the GNSO Council, which currently consists of policy development only. *RyC* (6 Dec. 2008); *NeuStar* (15 Dec. 2008) (the GNSO Council should not be involved in any of the gTLD Registry Agreements except for the limited role already afforded to it as part of serving as managers of policy development per the Consensus Policy provisions of the agreements).

Clarifications and Modifications. What was the genesis of Article 7 of the new form of agreement, and how does ICANN expect to enforce these provisions? *J. Neuman; October 29, RyC Meeting.* What can ICANN change under Article 7 – Changes and Modifications? *Anonymous Email.* If Section 7 must stay in the Registry Agreement, then we request the following changes: (1) the term "Affected Registries" is unclear and should be defined; "Affected Registry Operator" should be defined as a "TLD operator that is materially impacted by such proposed change;" (2) ICANN should then provide notice to those TLD operators that ICANN has determined are the Affected Registry Operators who are entitled to vote; (3) ICANN should publish a list of those TLD operators that ICANN has determined are the Affected Registry Operators; (4) there should be a challenge process and dispute resolution process in the event that a party does not agree with ICANN's assessment of who constitutes an Affected Registry Operator; (5) the vote to disapprove the proposed changes to the Registry Agreement should be

51% of the Affected Registry Operators, not 2/3 vote; (6) in the event that the proposed change is disapproved by the Affected Registry Operators, the ICANN Board vote to override such disapproval shall be 2/3 vote of the ICANN Board. *Demand Media* (15 Dec. 2008). Section 2.7 of the proposed Registry Agreement should clarify that only changes that might decrease the effectiveness of Rights Protection Mechanisms are subject to prior ICANN approval. *Rodenbaugh* (16 Dec. 2008).

Uniform Standard Agreements. Uniform standard agreements that cannot be altered are essential. *WMI* (14 Dec. 2008); *SIFMA* (12 Dec. 2008). There should be one or at most two (one for open and another for community) standard contracts between ICANN and registry owners. The standard contract should not be subject to modification. The contract term must be finalized in the rule-making process and not left open for further negotiation or modification by the ICANN Board of Directors. *Bank of America* (15 Dec. 2008).

Dispute Resolution and Damages

Process Details. The existing Registry Agreement sets out a specific process whereby either party can invoke the other party's cooperative engagement obligation, and then sets out a series of steps for that process. While there are many ways this process could reasonably proceed, these changes remove all specificity – including most importantly, specificity about when the period starts. *RyC* (6 Dec. 2008).

Arbitration Requests. The Registry Operators object to mandating a single arbitrator. Moreover, we see no grounds for substituting a blanket right to seek extraordinary damages for the limited right set out in of the current Registry Agreement (Failure to Perform in Good Faith), which provides procedural and substantive safeguards to prevent abuse. *RyC* (6 Dec. 2008). Can ICANN seek punitive damages under the new agreement? *J. Neuman, October 29, RyC Meeting.*

Indemnification, Warranties and Liability

ICANN Liability**.** ICANN should be accountable and not have broad immunity. *RILA* (15 Dec. 2008); *G. Kirikos* (24 Nov. 2008); *SIFMA* (12 Dec. 2008); *CADNA* (15 Dec. 2008); *Bank of America* (15 Dec. 2008); *FairWinds* (15 Dec. 2008). Applicants must agree to release ICANN from liability for any acts or omissions in anyway connected with its consideration of the application, no matter how outrageous those acts or omissions may be. *RyC* (6 Dec. 2008).

Fee Liability Increase for Registries. The changes to Section 5.3 increase the liability for Registry Operators from "fees and sanctions owing" to fees paid during the preceding 12 months. ICANN's liability is not increased, however. *RyC* (6 Dec. 2008).

Indemnification. The indemnification provision (paragraph 5) is unfair – why should an applicant defend and indemnify ICANN if a disappointed objector or other applicant sues ICANN over the same string as that awarded to the applicant? ICANN is demanding sweeping indemnification rights without justification and without providing anything to Registries. There is no justification for such sweeping indemnification. *Bank of America* (15 Dec. 2008); *CentralNIC* (13 Dec. 2008); *RyC* (6 Dec. 2008). The covenant not to challenge and waiver in paragraph 6 are overly broad and unreasonable and should be revised in their entirety. *Microsoft* (Guidebook comments, 15 Dec. 2008).

Warranties. Registry operators do not agree with ICANN that the express waiver of warranties is unnecessary. *RyC* (6 Dec. 2008).

Changes of Control

Approval; Assignments. Does ICANN anticipate revising this provision to require a Registry Operator to obtain ICANN's prior written approval for a change of control? If not, why not? *K. Rosette* (26 Nov. 2008). Parties should have the ability to assign their rights in any application under commercially reasonable circumstances. ICANN should retain discretion to approve or reject any such assignment to prevent the development of a market for TLD applications and to ensure that any assignee meets all of the applicant criteria previously met by the assignor. *Rodenbaugh* (16 Dec. 2008).

Notice Requirement. To the extent notification of subcontracting arrangements is required, it should be limited to subcontracts that have a material impact on a registry's compliance with the Registry Agreement. Moreover, while there may be situations in which it is appropriate for ICANN to seek advance notice of changes in control that should be the exception rather than the rule. *RyC* (6 Dec. 2008).

ISSUES, ANALYSIS AND PROPOSED POSITIONS

General Comments

Issues

What were the main objectives in crafting the proposed new Registry Agreement?

Why did ICANN determine to change its form of gTLD Registry Agreement?

What will be the impact of the adoption of the new form of new Registry Agreement on existing TLDs?

Analysis

During the process of creating a new agreement framework for new TLDs, ICANN endeavored to craft a flexible yet robust agreement that provides sufficient protections and clarity for new TLDs. The proposed new form of agreement is intended to be simpler and streamlined where possible, focusing on technical requirements and security and stability issues. These changes were made after taking into consideration input from the GNSO in its recent policy development processes on new gTLDs and contractual conditions. Much of the prior details in the Registry Agreement and associated appendices have been replaced with relevant specifications and requirements, which will be maintained on ICANN's web site.

In drafting the proposed new form of Registry Agreement, ICANN started with a list of concepts the agreement must or should include. Where appropriate, language was drawn from existing Registry Agreements. As proposed, each of the new TLD agreements will have an initial ten-year term, with an expectation of renewal, in order to allow operators of the new registries some surety in the investments necessary to build a successful registry. ICANN has incorporated proposed mechanisms into the form of new Registry Agreement to allow ease of effecting

changes and modifications during the life of the Registry Agreement. These form changes were deemed appropriate and beneficial to both parties.

Proposed Position (for this version of the Guidebook)

The general comments on the new form of Registry Agreement raised a number of important issues that will be the subject of continuing community discussion. The revised version of the base Registry Agreement being posted with the second draft applicant guidebook incorporates a number of changes in response to further feedback, and discussion and thought on these comments will continue and changes will continue to be made in the proposed form of agreement.

Existing Registry Operators may approach ICANN to discuss adopting the new form of agreement, which would be the subject of bilateral discussions between the parties. ICANN will not require existing Registry Operators to implement the new form of agreement.

Application Process

Issues

To what extent will ICANN mandate applicants adhere to statements made in their applications?

Why is ICANN requiring an applicant to execute a Registry Agreement within 90 days following a contention resolution?

Analysis

With respect to "community-based" TLDs, ICANN recognized that it needed to protect the community identified in the application from fraudulent applicants (i.e., applicants who had stated one purpose in their application and then once the TLD was granted used the TLD for an entirely different purpose).

Following resolution of string contention proceedings, an applicant should be in a position to enter into a Registry Agreement with all due haste, and accordingly 90 days should be more than sufficient time for this to occur.

Proposed Position (for this version of the Guidebook)

Registry Operators will be required to comply with the terms of the Registry Agreement. Registry Operators will be required to warrant that all information provided and statements made in connection with the registry TLD application were true and correct. Also, community-based TLDs will be required to observe and implement measures set forth in their application relative to the defined community.

Per Section 4.3 of the proposed draft Registry Agreement, ICANN may terminate the Registry Agreement if the applicant does not complete all testing and procedures necessary for delegation of the TLD into the root zone within 12 months. Apart from requiring the Registry Operator to pass technical and operational checks sufficient to permit the TLD to be delegated in the rootzone, ICANN does not require a Registry Operator to utilize or operate a TLD in any specific manner.

Because the Registry Agreement will be signed by Registry Operators in a form that is substantially similar to the final proposed draft, 90 days should be enough time to resolve any minor points that may need to be negotiated by ICANN and the Registry Operator.

Covenants of ICANN

Issues

Will ICANN reconsider the removal of ICANN's covenants regarding operating in an open and transparent manner and equitable treatment among Registry Operators?

Why did ICANN remove the commitment to implement name server and TLD zone server changes within 7 days?

Why were ICANN's covenants removed from the list of provisions that could not be modified by Consensus Policies?

Analysis

ICANN understands that applicants and Registry Operators need to feel confident that ICANN will live up to its obligations, and such obligations should be confirmed in writing. ICANN's Bylaws already require ICANN to act transparently and non-discriminatorily, but as a result of community feedback these commitments will also continue to be restated in the Registry Agreements.

With regard to the commitment to implement nameserver and TLD zone server changes within 7 days: ICANN understands that timely implementation of changes is an important matter and is constantly looking for ways to improve its efficiency, however, ICANN also sees the need for some flexibility regarding this requirement because it does not always have control over the receipt of necessary information and cooperation from third parties. ICANN is presently engaged in discussions with existing and potential Registry Operators regarding a service level commitment by ICANN with respect to nameserver change requests. ICANN has stated its goal is to complete nameserver changes within 10 days.

Proposed Position (for this version of the Guidebook)

Consistent with ICANN's Bylaws, the covenants regarding operating in an open and transparent manner and equitable treatment will be reinstated.

For the reasons noted above, the commitment to *always* implement nameserver and TLD zone server changes within 7 calendar days of submission may not be sustainable as the gTLD name space rapidly expands. Apart from actions required by ICANN, ICANN must receive confirmation of certain changes from third parties, the timing of which may be outside of ICANN's control. Nevertheless, the revised draft Registry Agreement has been modified somewhat to continue to reference a goal of seven days for changes when possible.

With the reinstatement of the transparency and equitable treatment covenants, ICANN will include these covenants within the list of topics that may not be modified through the Consensus Policy process, consistent with other recent Registry Agreements.

Consensus Policies

Issues

Why was the definition of "Registry Services" removed from the list of items comprising the picket fence?

What will protect Registry Operators from expansion of the scope of Consensus Policies, particularly in relationship to the process set out in Article 7 of the proposed Registry Agreement by which the agreement and specifications can be modified, subject to certain requirements?

Analysis

In light of comments received, ICANN considers it is appropriate to incorporate a definition of "registry services" in the revised proposed Registry Agreement. This definition will be relative generally to compliance provisions in the agreement.

ICANN reviewed and considered the continuing relevance of each item included within the "picket fence," which contains the topics excluded from the adoption of Consensus Policies. The definition of "registry services" was included within the list of topics excluded from Consensus Policies contained in Registry Agreements negotiated during 2005-2006, but not during 2001-2002. The genesis for the inclusion within the 2005-2006 Registry Agreements was the concern of Registry Operators regarding the process for the approval of new or modified registry services and the attendant definition of registry services. Subsequently, a Consensus Policy regarding the process for the approval of new registry services (including a definition of registry services) was adopted, rendering the earlier concern regarding changes to the contractual definition a non-issue.

It has historically been the position within Registry Agreements that pricing matters should not be a subject of Consensus Policies, and that is why pricing of registry services is an excluded topic from the topics on which Consensus Policies may be adopted.

Proposed Position (for this version of the Guidebook)

ICANN will include a definition of Registry Services in the specification incorporated into the proposed new form of agreement.

The specification on Consensus Policies retains the concept of the picket fence and exclusions from Consensus Policy adoption, and the scope of the fence is appropriately revised to remove items that are no longer relevant, similar to the revisions in 2005 of the list of Consensus Policies exclusions included in the 2001 form of agreement.

See also discussion regarding changes to the amendment process specified in Article 7 as it relates to the consensus policies provisions of the agreement.

Compliance

Issues

Why is the proposed expansion of ICANN's audit rights appropriate?

Will ICANN include a sanctions program as part of the Registry Agreement?

Are community-based TLDs going to be held to their stated purpose and operation for a defined community?

Why does ICANN requiring monthly reporting on items such as monthly transfers?

Was it intended that all new TLDs have only the Whois obligations of thin registries? If so, why?

Will ICANN be able to enforce compliance with the increased number of TLDs?

Analysis

Audit and compliance provisions are important components of a contractual relationship whereby accurate reporting is essential. With that in mind, ICANN has carefully considered the scope of its audit provisions and the affect they could have on the Registry Operators. ICANN has reviewed and reconsidered the audit provisions in light of public comments and determined that the scope was perceived by the community as broader than intended. The scope of ICANN's audit rights will accordingly be clarified and limited to some extent in the next version of the proposed agreement to cover only the covenants of Registry Operator (which are enumerated in Article 2 of the agreement).

With regard to the institution of a monetary sanctions program, ICANN looked to past agreements and its past course of dealing to evaluate the costs and benefits associated with the implementation of such a program. After careful consideration, ICANN's assessment is that, in the past, when a sanctions-like program was in place, there was little opportunity or need to utilize it and a reluctance to do so given the punitive nature. In addition, an ability by ICANN to unilaterally impose sanctions on a Registry Operator without the requirement of proceeding through arbitration was considered to raise due process concerns. The first draft proposed base agreement included a provision permitting the imposition of punitive or exemplary damages by arbitrators in cases of repeated willful breaches of the agreement, and the new draft includes a proposal that arbitrators be permitted to order operational sanctions such as temporarily restricting Registry Operator's right to sell new registrations.

The Registry Agreement requires compliance with all terms and conditions. ICANN employs appropriate tools and procedures to monitor compliance. ICANN has the ability to terminate the Registry Agreement for repeated and willful material breach. It is not ICANN's objective to *sanction* Registry Operators through fines or some other punitive means in the case of minor infractions and noncompliance issues. In ICANN's experience, "good citizen" Registry Operators are willing to work with ICANN in the event there is a disagreement over contractual requirements.

As part of the creation of new gTLDs, ICANN will continue to implement and enhance its contractual compliance oversight program <http://www.icann.org/en/compliance/>. The audit provisions of the proposed Registry Agreement were included specifically for this purpose. ICANN has already initiated the planning that will be necessary to ensure operational readiness in the new environment to be created by the addition of new gTLDs.

Proposed Position (for this version of the Guidebook)

ICANN will revise the audit rights provision in the agreement included as part of the updated Applicant Guidebook to more closely align with the provisions in the current Registry Agreement, which cover compliance with the fee arrangements, monthly reporting specifications and technical and functional specifications. The scope of ICANN's audit rights will be clarified and limited to cover only the covenants of Registry Operator (which are enumerated in Article 2 of the agreement).

For Registry Operators who are repeatedly problematic, ICANN can bring action in front of an arbitrator and request the award of punitive damages. In addition, ICANN will clarify in the proposed Registry Agreement that ICANN may request that an arbitrator sanction the Registry Operator for noncompliance issues, including operational sanctions such as an order temporarily restricting a Registry Operator's right to sell new registrations if appropriate.

Community-based TLDs will not be able to make changes to community-specific terms without support from the community. Any necessary material changes to the community-based TLD operator's agreement would only be approved following appropriate public notice and comment.

ICANN requires monthly reporting by all Registries operators for tracking purposes including expected database demands, fees compliance and policy compliance.

ICANN is only requiring the publication of "thin" Whois data due to the multitude of applicable laws (including data protection and privacy laws) in different jurisdictions. Registry operators would be free to collect and publish additional data in accordance with their individual business plans and agreements. ICANN is exploring a possible requirement that Registry Operators would have to collect additional data, which would not be required to be publicized, as an additional safeguard against loss of information in the event of registry or registrar failure.

As discussed above, ICANN plans to enhance and strengthen its contractual compliance program <http://www.icann.org/en/compliance/>. The audit provisions of the proposed Registry Agreement were included specifically for this purpose. ICANN has already initiated the planning that will be necessary to ensure operational readiness in the new environment to be created by the addition of new gTLDs.

TLD Delegation

Issues

What security resources will be required of TLD operators in order to safeguard DNS stability and security?

Will there be specific timing obligations related to delegation into the root-zone?

Analysis

The stability and security of the DNS is a primary focus of ICANN's mission. ICANN believes in encouraging Registry Operators to use the most advanced technologies available to ensure registry security is fundamental and appropriate. ICANN must also, however, balance these requirements with the constraints applicable to small Registry Operators who do not have and may not expect to have a large user base to justify the cost of certain measures. For these smaller Registry Operators, the requirement to implement these state of the art security

measures, DNSSEC for example, could be too financially burdensome and is therefore optional. Please refer, for example, to the evaluation questions and criteria (#46) for details regarding the treatment of applicants' plans to implement DNSSEC.

ICANN is and will remain committed to encouraging the use of adequate security measures. For the time being, the requirement to implement DNSSEC will remain optional for Registry Operators due to the expense and burden it would place on smaller Registry Operators. Likewise, ICANN is only requiring the publication of "thin" Whois data due to the multitude of data protection and privacy laws in different jurisdictions. Registry operators would be free to collect and publish additional data in accordance with their individual business plans and agreements. ICANN is exploring a possible requirement that Registry Operators would have to collect additional data, which would not be required to be publicized, as an additional safeguard against loss of information in the event of registry or registrar failure.

ICANN is requiring applicants to commit to go through the required steps for a TLD to be delegated into the root zone to attempt to deter "blocking" applicants, who have no intention of actually running a TLD, but would attempt to take the opportunity to do so from other applicants. The new gTLD application process and the proposed base Registry Agreement are being designed to assure that ICANN retains the ability to respond flexibly and resiliently to changing circumstances and marketplace evolution that could occur with the growth of the Internet and the expansion of the name space.

Proposed Position (for this version of the Guidebook)

For additional details on security requirements and evaluation, please refer to the evaluation questions and criteria section titled "Demonstration of Technical & Operational Capability."

Registry operators are required to complete technical and operational checks to allow the TLD to be delegated into the root zone within 12 months of execution of the Registry Agreement. There are no other staged requirements for TLD start-up.

Term and Termination

Issues

What is the justification for the changes to the term and termination provisions in the proposed Registry Agreement?

What protections does the proposed Registry Agreement offer against arbitrary decisions by ICANN not to renew a Registry Agreement?

How will "fundamental and material breach" and "critical registry operations" be interpreted for purposes of the termination provisions of the proposed Registry Agreement?

Will ICANN consider a competitive bidding process for TLD renewals?

Analysis

ICANN balanced considerations relative to the security of a longer term against ICANN's need to be able to act to terminate the agreement, or determine not to renew, in the case of repeated

bad actor Registry Operators. Accordingly, there is less rigidity relative to the right to renewal of the proposed Registry Agreement.

Providing a 10-year potential term of the agreement is beneficial to the Registry Operator by providing assurance on the issue of business continuity and supporting the basis for investment by the Registry Operator. However, by proposing a ten-year term, ICANN must have the flexibility to implement modifications to the agreement during the term. On balance, providing a longer term for the agreement with the flexibility to modify seemed likely to be more desirable to the community as opposed to short 3 or 5 year term agreements which do not include a flexible process for making amendments such as the equivalent of Article 7 in the proposed agreement.

Proposed Section 4.2 (Renewal) has been modified somewhat in response to comments and allows for automatic renewal so long as the registry hasn't been deemed in fundamental and material breach of the agreement during the initial term. Essentially, this means that so long as the Registry Agreement hasn't been terminated due to breach, or subject to an uncured breach at the time of proposed renewal, it will be renewed.

As part of the evaluation of applications, ICANN will be carefully selecting among applicants those that are best suited and most qualified to operate a TLD. Registry Operators should expect to invest significant time, effort and expense in building a robust business model to support registry operations and service the registrants within the TLD. Mandating a rebid process for a TLD upon renewal would de-incentivize Registry Operators from making this investment, and directly counter the philosophy relative to the selection of each TLD Registry Operator.

Proposed Position (for this version of the Guidebook)

The termination rights provision will be revised for clarification and specificity. The definition of "critical registry functions" does not appear to be necessary as this section is generally describing the transition obligations of the outgoing Registry Operator. The registry functions that are considered to be critical in the context of the Registry Continuity Plan do not necessarily correspond directly to the responsibilities of an outgoing Registry Operator protect registrants and registrars by cooperating in a smooth transition to a new operator.

The inclusion of termination rights for ICANN relative to fundamental and material breaches of the Registry Agreement is consistent with existing Registry Agreements and will also relate to "fundamental and material breach" of the agreement as the same may be modified during its term.

The comments concerning the idea of requiring the rebid of TLDs upon expiration of the initial term of a Registry Agreement raise profound economic questions that will be addressed separately from this legal analysis, and will continue to be the subject of community discussions.

Payment Concerns, Pass-Through of Registrar Fees

Issues

What adjustments can be made to the fee structure to accommodate Registry Operators who are required to make bilingual registrations at no extra charge?

Why was the cap on the registrar fee that could be collected from the Registries eliminated?

How will the timing on collection and payment by Registries of the Registrars' fee if the obligation is triggered operate?

Analysis

ICANN received a number of thoughtful comments on the proposed model for the calculation of fees to be paid by Registry Operators to ICANN. Please refer to the separate paper on financial considerations for a detailed discussion of the proposed fee model. One of the GNSO's implementation guidelines was that "ICANN should take a consistent approach to the establishment of registry fees." The model being proposed (in the separate paper on financial considerations) attempts to find a balance between fairness and consistency, but it would be difficult to find a consistent fee model that is well-matched to every jurisdiction where registries will operate and to every varied business model that registries will implement.

The provision allowing the pass-through of the registrar fees has been a component of existing Registry Agreements and this is not a conceptual change. ICANN must retain the flexibility to require registries to collect this fee from the registrars, however the fee is fully recoupable by the registry from registrars. Any such fees would be approved through the ordinary ICANN budget approval process, but otherwise there is no special phase-in period for collection and payment of these fees by registrars or registries; they would be collectible from registries (and through them from registrars) directly upon invoice as they are under current Registry Agreements and registry-registrar agreements.

Proposed Position (for this version of the Guidebook)

The proposed agreement is sufficiently flexible to allow Registry Operators to adapt their own fee structures regarding domain name registrations as necessary to comply with local law.

ICANN must retain some flexibility to adjust the fees that registries pass through to registrars in response to changes in the evolving marketplace. These fees, however, will be justified in ICANN's annual budget and will therefore be subject to public scrutiny and comment. In response to comments ICANN will cap the transactional component of the Variable Registry-Level Fee. Registries will have the flexibility to include a provision in the registry-registrar agreement that gives them assurance on the ability to collect the registrar fees on a timely basis.

Price Controls

Issues

Will ICANN reconsider inclusion of price controls in the Registry Agreement?

How will ICANN deal with price caps under vertical ownership?

Will the issue of tiered pricing with respect to new registrations and renewal registrations be revisited?

Has ICANN considered the affect that the absence of price controls will have on new Registry Operators as well as existing Registry Operators?

Why is ICANN requiring Registries to disclose their pricing and fee structure?

Analysis

One of ICANN's main goals of the proposed Registry Agreement is to provide enough flexibility for Registry Operators to implement a variety of business models. ICANN has commissioned studies on whether there should be price controls in new gTLDs, and also a study on the effects of vertical registry-registrar separation. Please refer to those separate detailed analyses for treatment of the concerns raised in this set of comments.

Proposed Position (for this version of the Guidebook)

In General. ICANN has commissioned a study on the economics of and relative need for price controls in new gTLDs, which will be posted as soon as available.

Vertical Separation. ICANN commissioned a comprehensive study on the effects of vertical separation, which has been posted at http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf.

Transparency of Pricing for Registry Services. ICANN has modified the proposed requirement in response to comments. Six months' notice of a registry price increase has been incorporated consistent with other recent Registry Agreements. Further, the functional and performance specification and now also section 2.9 of the Registry Agreement obligate Registry Operators to offer up to ten-year registrations.

Equitable Treatment. As it relates to an ability for Registry Operators under existing Registry Agreements to invoke the "equitable treatment" clause to require ICANN to agree to the removal of price controls under existing agreements, "equitable treatment" does not mean that every TLD will have the same agreement. Specifically, existing Registry Agreements are not alike in all respects and include distinctions to address differing business and market concerns. ICANN's current Registry Agreements differ from each other markedly in some aspects, for example some registries (unsponsored) operate under price caps, while other current Registry Agreements (sponsored) have no price controls. Please refer to the separate economic studies for further discussion and analysis of this issue.

Amendment Process

Issues

Why did ICANN decide to include the process set forth in Article 7 allowing ICANN to implement modifications to the Registry Agreement and specifications during the term of the agreement?

What modifications and changes to the Registry Agreement (and incorporated specifications) can ICANN implement under Article 7?

Why did ICANN propose to allow veto of a proposed agreement modification by the GNSO Council?

Analysis

The proposed process for amending the Registry Agreement is a deviation from the current form Registry Agreement, and ICANN has carefully considered all comments on the proposed contract change mechanism. The problem the Internet community faces as the population of TLDs increases is how to deal with the inevitable changes and advancements, either in technology or circumstance, that affect all or substantially all TLDs. For example, concerns relating to changes due to market growth or dominance, or the need to impose new requirements due to Internet security or stability concerns. With anticipated significant growth in the TLD space, the burden to negotiate individual changes is too great to bear, and not achievable from a practical standpoint. With that in mind, Article 7, allowing contract changes and modifications to be implemented across all new TLDs, was conceived to create a mechanism where changes affecting all or substantially all TLDs could be made efficiently but still provide procedural safeguards for affected Registry Operators to act to contravene proposed changes.

The Registrar Accreditation Agreement (the "RAA") includes an analogous procedure to modify the form of agreement across all registrars, but it requires a lengthy and cumbersome development, approval, and implementation process that can more than 5 years to complete. ICANN's experience with attempting to negotiate and implement changes to the RAA have demonstrated the need for a flexible and efficient process for public discussion and approval of beneficial changes to the form of ICANN's agreements. In order to retain authority to address any adverse effects or consequences of the introduction of a large number of new gTLDs, ICANN needs a mechanism allowing modification to the agreement.

Proposed Position (for this version of the Guidebook)

ICANN's proposal included in the October 2008 draft agreement provides that ICANN would first consult with Registry Operators and the public for at least 30 days on any proposed changes to the agreement. Any material changes to the Registry Agreement would continue to be subject to ICANN Board approval. ICANN would give Registry Operators notice 90 days before any changes would take effect. This flexibility is also intended to benefit the registry community. Specifically, Registry Operators who believe change or modification to the Registry Agreement is necessary or appropriate will be able to suggest such a change or modification for consideration in a public forum.

ICANN has incorporated proposed mechanisms into the form of new Registry Agreement to allow ease of effecting changes and modifications during the life of the Registry Agreement. The process proposed by ICANN allows for public notice, discussion and opposition by the registry community, and, as noted above, any material changes to the Registry Agreement and specifications would require ICANN Board review and approval.

Existing gTLD operators (who would not be subject to the provisions of Article 7) are subject to the terms of their agreements, which cannot be amended without negotiation and bilateral agreement with ICANN. ICANN understands the concerns the Registry community has with proposed Article 7 and believes that a compromise is possible. The February 2009 v2 revised version of the proposed Registry Agreement reflects a modified Article 7 incorporating changes to address community comments, including: 1) a new preliminary 30-day consultation period prior to posting a notice of any proposed change, 2) a new requirement that any proposed changes could be vetoed by a majority of affected registry operators (instead of providing that a two-thirds' vote of either the registries or the GNSO Council could veto any change), and 3) a

prohibition on using the amendment process to modify ICANN's covenants in the agreement or provisions on Consensus Policies.. Community discussions on how to reach a compromise model for approval of global amendments to the form of the Registry Agreement (or whether such an amendment process is necessary at all) will continue, and further changes to this provision in the agreement can be expected.

Dispute Resolution and Damages

Issues

Why was the specificity regarding (i) the procedure for cooperative engagement between senior management of the Registry Operator and ICANN and (ii) the arbitration process removed?

Why did ICANN eschew a panel of three arbitrators in favor of only one with respect to the arbitration of disputes under the Registry Agreement?

Can ICANN seek punitive damages under the proposed Registry Agreement?

Analysis

ICANN determined to revise the dispute resolution provisions contained in the proposed Registry Agreement in an attempt to simplify and streamline the agreement. With respect to the provisions mandating a process for cooperative engagement by senior management of both parties, ICANN did not believe incorporating a rigid process into the proposed Registry Agreement was necessary. In making this decision, ICANN considered the current course of dealing in communications with Registry Operators, pursuant to which points of contention are raised and typically resolved in such cooperative discussions which proceed in a fashion suitable to both parties. As relationships with Registry Operators have evolved, ICANN has not experienced difficulty in arranging management level discussions (akin to cooperative engagement) to resolve issues and or points of disagreement regarding Registry Agreement provisions.

ICANN simplified the arbitration provision in the proposed Registry Agreement, allowing the parties to rely on the rules of the ICC. ICANN's decision to mandate a single arbitrator as opposed to a panel was driven by an interest in keeping the process both efficient time wise (selecting a single arbitrator is generally quicker than selecting a panel) and also in cost (a single arbitrator's fees versus the fees for a panel of arbitrators). From a legal perspective, ICANN does not perceive a notable benefit from having three arbitrators render a decision as opposed to a single arbitrator. Conversely, having to select and appoint three agreed-upon arbitrators can increase the time involved before a matter can be substantively decided and also raises costs that are ultimately passed on to registrants.

ICANN may ask an arbitrator for an award of punitive damages against a Registry Operator in circumstances where the Registry Operator has been in repeated and willful fundamental and material breach of the agreement. This right to punitive damages will be in addition to ICANN's right to ask for specific performance, or sanctions (monetary or operational) against the Registry Operator.

Proposed Position (for this version of the Guidebook)

ICANN has removed the very specific contractual provisions as unnecessary, with the expectation that ICANN and Registry Operators will keep open communications to resolve disputes before escalating to formal action. In response to comments, the revised version of the agreement has been modified to make it clearer that either party may initiate good-faith communications concerning any dispute.

As discussed above, ICANN does not perceive a notable benefit from having three arbitrators render a decision as opposed to a single arbitrator, and therefore the concept of a single arbitrator remains in the dispute resolution article of the proposed Registry Agreement.

Under the parameters specified in the proposed agreement (repeated willful fundamental and material breach) ICANN can request an arbitrators to award punitive damages, or specific performance. ICANN will clarify in the revised proposed Registry Agreement that ICANN may request the arbitrator order sanctions against the Registry Operator, which could include monetary and/or operational sanctions.

Indemnification, Warranties and Liability

Issues

How does the provision regarding the limitation of liability of the parties to fees paid during the prior 12 months operate differ from existing agreements?

Why were the indemnification provisions in the proposed Registry Agreement revised from those included in existing Registry Agreements and what is the effect?

Why was the express waiver of warranties relating to services, including implied warranties of merchantability, non-infringement or fitness for a particular purpose removed?

What is the justification for the requirement applicants release ICANN from liability from any acts or omissions associated with its consideration of the application?

Analysis

In the process of preparing the proposed Registry Agreement, ICANN specifically focused on provisions that could be simplified to the benefit of both parties. In the provision relating to the limitation of the liability of the parties, ICANN revised to allow ICANN to recover in an indemnification proceeding an amount equal to fees paid in the past 12 months, together with exemplary or punitive damages imposed by an arbitrator. This can be compared to existing Registry Agreements that allow ICANN to recover an amount equal to fees and monetary sanctions (imposed as a result of breaches of the agreement) due and owing in the last 12 months.

Regarding the topics on which the proposed Registry Agreement requires the Registry Operator to indemnify ICANN, as compared to existing gTLD agreements, the provision does not include the several other grounds for which ICANN could claim indemnification, such as (a) ICANN's reliance, in connection with its decision to delegate the TLD to Registry Operator or to enter into the Registry Agreement, on information provided by Registry Operator in its application for the

TLD; (b) Registry Operator's establishment of the registry for the TLD; (c) collection or handling of Personal Data by Registry Operator; and (d) any dispute concerning registration of a domain name within the domain of the TLD for the registry.

The express waiver of warranties relating to services, including implied warranties of merchantability, non-infringement or fitness for a particular purpose was deleted as not applicable to the commitments under the Registry Agreement. There are no express warranties made by the Registry Operator, and implied warranties typically seen in agreements relating to the sale of goods are not applicable.

Regarding the application indemnification provision, ICANN anticipates that rejected or unsuccessful applicants might try to take legal action in an attempt to challenge the decision, and possibly delay the advancement of the new gTLD program. Accordingly, ICANN has carefully considered how to protect the new gTLD program from such challenges. The release from such potential claims was deemed appropriate in light of these considerations.

Proposed Position (for this version of the Guidebook)

As discussed above, the limitation on liability provisions are appropriate for the proposed Registry Agreement as they are consistent with the revised provisions relating to dispute resolution.

The indemnification provisions included in the proposed new form of agreement (as compared to existing gTLD agreements) have been narrowed to require the Registry Operator to indemnify ICANN only for losses and damages caused by the Registry Operator's operation of the TLD or the provision of registry services. As part of the revisions to the form of Registry Agreement, ICANN viewed it as appropriate to reduce ICANN's rights in this regard.

It was determined to be unnecessary to include an express waiver of warranties, implied or otherwise, in the proposed Registry Agreement. As discussed above, the express waiver of warranties relating to services, including implied warranties of merchantability, non-infringement or fitness for a particular purpose was deleted as not applicable to the commitments under the Registry Agreement.

Changes of Control

Issues

Is a Registry Operator required to obtain ICANN's prior approval in the context of a change in control transaction, such as a sale of the entity?

Should there be a materiality threshold requiring notice to ICANN of arrangements to subcontract registry operations?

Analysis

ICANN's prior approval to a change in control of a Registry Operator, such as the sale of all assets of or equity in the relevant entity, is not required. ICANN simply requires notice no less than 10 days prior to the anticipated event. Requiring ICANN pre-approval of any change of control of a contracting party could be burdensome. Similarly, with subcontracting

arrangements, ICANN simply requires notice and not pre-approval. Notice requirements with respect to such events are, at a minimum, typical in a business agreement.

Proposed Position (for this version of the Guidebook)

ICANN will retain the provision as included in the draft Applicant Guidebook. A materiality requirement has been added to the notice of subcontracting requirement.

XIII. REGISTRY/REGISTRAR SEPARATION

Summary of Key Points

- An independent report was commissioned to study registry-registrar separation requirements after considerable community inquiry about the issue.
- The report (by Charles River Associates) weighed the benefits and risks to lifting the restrictions, taking into account the current and proposed gTLD environment.
- The report proposed a limited lifting of the restrictions in a way that reduced risk so that the effects could be studied.
- Based on the report and a set of public consultations, a model for lifting the current restrictions in a limited way, is introduced in the revised Applicant Guidebook for discussion.

Summary of Input

Below is a summary of input addressing registry and registrar separation and ownership comments submitted in (1) the first comment period regarding the new GTLD Draft Applicant Guidebook consultation; and (2) the consultation addressing the Charles River Associates (CRA) report – Revisiting Vertical Separation of Registries and Registrars - which was commissioned by ICANN. ICANN staff prepared an earlier summary and analysis of the CRA comments which is posted at http://forum.icann.org/lists/crai-report/msg00035.html. ICANN also conducted two face-to-face consultations regarding the CRA Report in December 2008.

(1) Comments in the new gTLD Consultation

Maintain Separation. There should be separation between registries and registrars; registries must continue to sell registrations through registrars and should not discriminate among registrars; with limited exception a registrar should not sell domain services of an affiliated registry (exception should allow sales of an affiliated registry up to a certain threshold of names—i.e., 100,000); this exception eliminates need for a special single organization TLD exception; registries must provide reasonable notification period before making domain renewal price changes; ICANN should maintain existing market protections for registries with market power. *Network Solutions* (15 Dec. 2008). ICANN should move slowly toward permitting integration of registry and registrar services, but should not use experimentation with single-organization and hybrid registries as a prelude to relaxing vertical separation and equal access requirements for a broader pool of gTLDs. *ICA* (16 Dec. 2008).

Maintain Accredited Registrar Model. The Accredited Registrar model should be required regardless of how the vertical integration and separation issues are resolved. *RC* (15 Dec. 2008).

Equitable Considerations. It is unfair to allow registrars to own new registries but to not allow existing registries to own registrars. *NeuStar* (15 Dec. 2008); *J. Neuman* (26 Nov. 2008) (clarify registry-registrar issues).

Risks of Ownership Changes. To avoid risk of a speculative marketplace developing through "flipped" registries, ICANN should clarify policy regarding changes of ownership or control of a registry; there is no restriction on ability of an applicant to flip registry to a buyer unvetted by ICANN, even immediately after delegation. *IPC* (15 Dec. 2008); *G. Kirikos* (24 Nov. 2008); *K.*

Rosette (26 Nov. 2008) (clarify ICANN approval policy regarding registry control change); *R. Raines* (4 Dec. 2008) (change allowing cross ownership could be exploited and increase cyber crime); *CentralNIC* (13 Dec. 2008).

<u>Allow Cross-Ownership</u>. *Melbourne IT* (15 Dec. 2008) (supports allowing single organization operating a "closed" gTLD to operate both the registry and registrar functions subject to safeguards). *J. Cady* (3 Nov. 2008) (clarify separation and consider novel uses allowing one company to do both). *Demand Media* (15 Dec. 2008) (change policy for new registries, allow cross ownership and do not impose price controls).

<u>(2) Comments in the CRA Report Consultation (meetings held in Washington, DC and Los Angeles on 11 & 19 Dec 2008, respectively)</u>

The views expressed in the comments to the publication of the CRA report on registry-registrar separation can be categorized as follows:

Cross ownership:

- support for limited cross-ownership where a registry could own an accredited registrar but not service names in its own TLD, and a registrar could own a registry as long as it did not service names in the TLD that it owns;
- support for limited cross-ownership with a self-management threshold of varied size (from 20,000 to 100,000 names);
- support for cross-ownership without a threshold; and
- support for continued registry-registrar separation.

Use of accredited registrars:

- wide support for continuing use of accredited registrars; and
- some opinion that "private label" registries, need not use accredited registrars.

These viewpoints and suggestions are summarized in specific models discussed below:

One Cross-Ownership Model with Limited Self-registration

During the Consultation on Registry-Registrar Separation in Washington, DC on 11 December 2008, Jon Nevett of Network Solutions presented the following model based on adherence to the following safeguards:

- if there is cross-ownership, there should be separation between the registry and registrar functions;
- registries must continue to sell domain registrations through registrars;
- registries should not discriminate among registrars;
- with a limited exception, a registrar should not sell domain services of an affiliated registry;
- registries must provide a reasonable notification period before making any pricing changes on domain renewals; and
- ICANN should maintain existing market protections with regard to registries with market power.

The model generally agrees with the CRA recommendation that a registry and registrar may be corporate affiliates, but the registrar may not sell the domain name services of an affiliated company, so long as market protection mechanisms are in place and enforced.

The model would permit:

- a registry to sell domain name services through an affiliated ICANN accredited registrar until the registry meets a certain threshold of names, such as 100,000 names;
- once the threshold is met, the registrar would no longer be able to accept new registrations, but would be permitted to manage its existing base;
- the registrar would not be required to divest these names; and
- other market safeguards would remain in place.

One aspect is that the model would help a new registry reach a sustainable level of registrations to remain competitive in the market. This would allow small, community-based TLDs to be supported by an affiliated registrar with an understanding of the needs of the TLD. Under this model, ICANN would not need to adopt the CRA recommendation for single organization TLDs.

Other comments suggested variations of the first model.

Vittorio Bertola recommended that registries could self-manage up to 20,000 names, but between 20,000-100,000 names, registries must accept willing accredited registrars. He recommended full vertical separation for registries charging a fee and managing over 100,000 names.

Michael Palage also supported the suggestion that registries could provide registration services direct to registrants up to a certain threshold, such as 50,000 names.

During the DC consultation session on 11 December 2008, Carolyn Hoover of DotCoop noted that they could support the model of a 100,000 name cap at start-up for self-management through an affiliated registrar as a reasonable long-term approach for starting a registry. Carolyn noted that many of the problems they experienced would not have occurred if they had been able to continue to support the names managed by the affiliated registrar, rather than divesting them after six months from launch.

Eric Brunner-Williams of CORE supported the idea of the Nevett Model but thought the 100,000 name cap was too large. He thought the proper number was somewhere below 100,000 names. This would help support proposed TLDs aimed at small linguistic or cultural communities, allowing them to directly serve their community when there may be little interest from other registrars. His comments were made from the experience of .MUSEUM (which CORE serves as the backend Registry Operator). .MUSEUM proposed to self-manage a number of registrations without using ICANN accredited registrars. In the renewal of the 2007 .MUSEUM sTLD Agreement, MuseDoma was permitted to self-manage up to 4,000 names.

Amadeu Abril i Abril also supported the idea of registry self-management of names through an affiliated registrar, up to a cap, such as 10,000 names. He did not support single-organization TLDs.
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The concept of the Network Solutions Model was supported by Liana Ye, who suggested that ICANN "allow registrar[s] to operate both as registry and registrar to a certain point before they

have to separate into two entities to encourage start-up operation without price cap." She also suggests that legal separation is important and there should be a requirement that at least 50% of the directors [for a registry or registrar] cannot be the same.

The threshold concept was supported by the gTLD Registry Constituency in its comments.

> "It would be possible to come up with a numerical threshold of registrations below which relaxation of these requirements could apply, and above which the restrictions would apply. The RyC believes that further study should be conducted on what those thresholds should be and how these registries would transition to new restrictions [upon surpassing the threshold]."

Melbourne IT recommends that where a registry offers registrations to third parties, the registry should be allowed to operate its own registrar (up to a cap of 50,000 names in total), as well as allowing other ICANN accredited registrars to offer names on the same commercial terms. Upon reaching the cap, the registry would not be able to sell additional registrations (or registrations for other gTLDs). This would assist a small registry to get started, but ensure that if the registry was dealing with large numbers of registrants, the registrants have the option to choose registrars in a competitive market.

Unlike Network Solutions' model, Melbourne IT supports a single-operator closed TLD operating both the registry and registrar functions. To avoid gaming, the operator would be limited to single organizations as the registrant for all second level domain names in the TLD and the registry prevented from licensing registrations to third parties.

A Second Model with Unlimited Self-registrations

Richard Tindal of Demand Media provided an alternate model for discussion, which supports the cross-ownership of gTLD registries and ICANN accredited-registrars. Demand Media supports the conclusion in the CRA Report that registries be able to sell directly to the public through an affiliated registrar. Demand Media supports legal but not ownership separation of registry and registrar functions. Unlike the Nevett model, the Demand Media model would not have a 100,000 name threshold.

Demand Media notes that registrars should be able to own a registry and sell through domain services of that registry but the registry should also be open to other willing registrars. "We believe the objective of enhanced competition in TLDs will be harmed if TLD operators are not allowed (under equal terms) to also promote their TLD at the retail level via an accredited registrar which is owned by the registry."

Demand Media supports relaxation of price caps. "*For registries <u>not operating under a binding price cap,</u> the arguments in favor of vertical separation and equal access requirements are less clear cut. We would recommend that ICANN take steps towards relaxing one or both of these requirements.* We agree."

Demand Media supports keeping market safeguards in place for registries with market power. This concept is supported by NeuStar.
Comments from GoDaddy echoed the cross-ownership with no threshold approach. GoDaddy advocates the elimination of existing restrictions on registry-registrar cross-ownership as a way for ICANN to stimulate competition. This comment was also supported by Antony Van Couvering.

In response to earlier models (such as the Networks Solutions 100,000 name threshold or Melbourne IT 50,000 name threshold), GoDaddy notes that the limit "provides a warm fuzzy" but if cross-ownership works for the first 50,000 names, there is no sound reason to limit it there. The caps also impose on registrants who want additional domain names in a new name space (or other TLD) to then manage names between two different entities, or incur additional expense in getting their existing names transferred.

GoDaddy cites to existing examples of registry-registrar cross-ownership (Hostway & .PRO, the consortium of registrars that formed .INFO, VeriSign's management of .TV, GoDaddy's joint venture for .ME). "There are no such integration restrictions within several major ccTLD name spaces, yet it isn't collapsing, there is robust competition, and the ccTLD space continues to grow."

Of the two CRA models, GoDaddy recommends that the issue of single owner TLDs be referred back to the GNSO Council for vetting with the community and examination of the policy implications.

Cross-Ownership/Equitable Treatment

Jeff Neuman of NeuStar recommends that registries be able to operate an accredited registrar, as long as the registrar did not sell registrations of the TLD that owns it.

Neuman suggests that a registry should be able to have an ownership interest in a registrar as registrars can already have in a registry under the existing rules.

"NeuStar's main point is that there needs to be a level competitive playing field and ICANN has not been able to achieve this to date. IF justification exists to allow registrars to directly or indirectly serve as registries, THEN steps needed to be taken to ensure that existing registries are not discriminated against. IF registrars are allowed to enter the registry market, then NeuStar agrees with the CRAI recommendation that a registry should not serve as a registrar in the TLD for which is serves as the registry. However, NeuStar is not certain that ICANN has established sufficient justification as to why a registrar should be allowed to enter the registry market. NeuStar also believes that ALL loopholes need to be closed to make sure that a registry does not resell the names as a reseller to circumvent the rules. IN other words, a registrar should not directly OR *indirectly* be allowed to sell names in a TLD for which it has a *direct or indirect* ownership in the registry."

Amadeu Abril i Abril (CORE) notes that some registrars serve as backend Registry Operators today (like CORE) and they should be permitted to do so and operate a registry as long as they do not sell registrations in the TLD they are managing.

NeuStar also notes that price cap flexibility must be offered to existing registries if offered to new gTLDs (except for registries with market power).

Comments against lifting of registry-registrar separation requirement

Steve Metalitz (on behalf of Intellectual Property Constituency, IPC) noted that ICANN has not made clear why the CRA Report was requested. The IPC urges ICANN to provide its reasoning and assumptions underlying the request to CRA to conduct the report. The IPC also note that the comprehensive economic study has not been done and would be valuable for a number of

ICANN initiatives. The IPC is asking for a status update on that study.

The IPC notes that some registrars are large domain name holders. "Because several registrars own vast domain portfolios, the equal access and vertical separation requirements also have the positive effect of preventing particular *registrants* from having privileged access to domains in particular registries. Relaxing the [registry-registrar separation] requirements could inhibit competition in the market for domain names."

The IPC agrees that relaxing of the vertical separation requirement for registries operating under price caps is undesirable and should remain in place for .com.

On single-owner TLDs, the IPC notes this is theoretically possible "but the devil is in the details." The IPC does not understand why a gTLD operated as a money-making venture should be excluded from the single-owner model. Owners of a collective mark may want to register a gTLD and sell second-level registrations to members. The same may be true of trade associations or franchisors. "The Report's description of the single-owner model should have made clear what gTLDs should not qualify for the single-owner model."

The IPC calls the hybrid model proposed in the report deeply flawed and should not be given serious consideration. If not for vertical separation, ICANN may have to take on more monitoring and enforcing compliance. See http://forum.icann.org/lists/crai-report/msg00013.html.

Patrick Mevzek notes that he sees no reason to relax the current registry-registrar separation under the current market conditions. He notes that makes sense to let registries own registrars or the opposite as long as the registrar does not register domain names in the registry it owns or that owns it, provided there are proper safeguards in place. He suggests data should be publicly available to be able to see who owns these entities. "It is not a big problem already for registries, due to their current low numbers, but it is already a huge problem currently for registrars, as some studies have shown even basic data such as true postal address and phone numbers are not really available for all current registrars."
He suggests performance criteria for new gTLDs should be established before any new gTLD is introduced. See http://forum.icann.org/lists/crai-report/msg00019.html.

David Maher submitted a comment on behalf of Public Interest Registry ("PIR") noting that the CRA Report had four major shortcomings:

1. "PIR believes that the public interest in supporting competition does not favor a breakdown of the current separation of registry and registrar ownership. Even more so, the (limited) separation in the current rules, as reflected in the contracts so far, should be made symmetric [registrars should not be permitted to own registries]."

2. "PIR believes that the conclusions of the CRAI Report do not give ICANN a basis for an implicit policy to remove all cross ownership restrictions on new gTLDs. PIR further believes that any policy ultimately adopted should be applicable equally to registries and registrars and to existing and new gTLDs."

3. The proposed experiments in the Report do take account of the risks of self-dealing by registrars that own registries.

4. The creation of the accredited registrar program has led to problems with monitoring compliance and ownership across 900+ registrars. "Blurring lines of registry/registrar

ownership would strengthen incentives for the economically strongest registrars to engage in the anti-competitive practices."

PIR believes ICANN should adopt a general policy limiting or prohibiting cross ownership between registries and registrars. See http://forum.icann.org/lists/crai-report/msg00020.html.

David Maher also provided a study by Jonathan A.K. Cave titled "A name by any other rows: an economic consideration of vertical cross-ownership between registries and registrars" by Jonathan A.K. Cave of the University of Warwick. The paper is an analysis of the proposal to relax, eliminate or substantially modify cross-ownership of registries and registrars from an economic perspective. The paper sets forth arguments for the continuing necessity of vertical restrictions, and makes recommendations based on the current market.

Cave notes that vertical control can distort competition between registries, encourage registries to become integrated, and may lead to "capture" by market power in a concentrated layer. This may give integrated registrars unfair advantages in bargaining with other registries, and it may give advantages to commercial registries over non-commercial registries that do not own registrars. Cave states that open-access and price cap controls are essential complements to vertical ownership.

Among the open issues are:

- "The extent of real competition in the registrar market or in the registry market;

- The extent of any anti-competitive behavior in relation to prices, entry, name access and quality of service and the degree to which this is predatory or collusive;

- Whether competition is actually producing useful efficiencies (lower costs, lower prices, better distribution of name access, incentives to invest in the DNS system or in the economic valorization of names); and

- Whether real (and useful) innovation is going on, as opposed to 'mere novelty.'"

Cave recommends that these issues can be addressed through 1) the development of a unified model considering the current registry-registrar market and the possibility of vertical control by ownership, 2) a panel econometric study of the competitive performance of DNS markets (including market facing ccTLDs) and of efficiency indicators, and 3) a forward-looking analysis based on models with the increase in TLDs. See http://forum.icann.org/lists/crai-report/msg00021.html.

Paul Tattersfield noted that it would be helpful if consultants such as CRA would do similar analysis on other areas of concern on the introduction of new gTLDs (such as large registries push boundaries of their positions). See http://forum.icann.org/lists/crai-report/msg00023.html. He asks a question on what happens to a .brand TLD when brand owners merge.

"One area the report doesn't touch upon are the implications from the creation of pure generic gTLDs and how to guard against the creation of monopoly positions. It is simple to make the statement for allowing open competition and let the market decide, and on the surface many people will support that notion. Of all the people who support the opening up of the DNS to allow generic new gTLDs like .search for example perhaps run

by Afilias or VeriSign etc. How many of those same people would show the same enthusiasm if .search was secured by Microsoft?"

George Kirikos asserted that the CRA Report provided only theoretical arguments, not empirical data, therefore the report should be discounted. He also states that competition should be promoted through a tender process. See http://forum.icann.org/lists/crai-report/msg00024.html.

Max Menius stated that he is against existing gTLD registries being able to modify their agreements to remove price caps. See http://forum.icann.org/lists/crai-report/msg00033.html.

Issues

1. Why was the CRA Report on Registry-Registrar separation requirements issued?

2. To what extent should the limitation on cross-ownership of registries and registrars be lifted as part of the new gTLD process, and why?

3. If it is determined to permit limited cross-ownership, which model should be considered for further community consultation?

Analysis

Previous Consultations. ICANN has received input from constituency groups, and stakeholders in the community over several years on the topic of registry-registrar separation. During the consultations on the development of the GNSO recommendations, the topic was discussed. The GNSO approved a recommendation (19) that "registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars."

During the ICANN meeting in November 2007 in Los Angeles, California, ICANN conducted an open session on the GNSO recommendations and a number of viewpoints were raised about registry-registrar separation and potential models. ICANN committed to undertaking a study of registry-registrar separation requirements and the effects of lifting such restrictions on the marketplace, most importantly, on registrants.

CRA Report. ICANN requested Charles River Associates International ("CRA") to perform economic research pursuant to two resolutions of the ICANN Board of Directors: 1) the 18 October 2006 resolution of ICANN's Board of Directors seeking more information relating to the registry and registrar marketplace; and, 2) the 26 June 2008 resolution of ICANN's Board, directing the development and completion of a detailed implementation plan for the new gTLD Policy.

ICANN's policies regarding the relationship between registries and registrars have evolved over time. Current gTLD Registry Agreements prohibit registries from acquiring directly or indirectly more than 15% of a registrar (since the 2001 agreements). ICANN's founding is connected to a core value of fostering competition in the registry and registrar functions. Adding competition at the retail level for domain names is one of ICANN's first major accomplishments.

CRA engaged in interviews with members of the community over the course of several months in the first half of 2008. The Report is based on economics expertise, research and interviews of various stakeholders between February and June 2008. The CRA Report on Revisiting

Registry-Registrar Separation was posted for public comment from 24 Oct to 23 Dec 2008. The CRA Report is available at http://www.icann.org/en/topics/new-gtld-crai-report-24oct08-en.pdf.

CRA's report makes certain recommendations regarding the relationship between registries and registrars. The report describes the risks and benefits associated with lifting the current restrictions. CRA notes that ownership separation reduces the risk of discrimination as required by the equal access provision. CRA also notes that some of the proposed new gTLD models would be incompatible with vertical separation (e.g., privately held or ".brand" type TLDs are mentioned). The report suggests that vertical integration could promote the growth of new gTLDs, facilitate registry innovation, and eliminating the 15% restriction may encourage registrars to acquire registries.

It also describes the role of price caps in determining whether restrictions should be lifted. CRA's report suggests that, for registries operating under price caps, the arguments in favor of vertical separation and equal access are less clear-cut. The report recommends lifting the restrictions in a limited way first. The limitations are put in place to guard against the risks identified. For example, completely lifting the restrictions may put at risk the equitable treatment requirement. So a model that limits how many names a registry could "self-register" ameliorates that risk. As the CRA report points out, such a restriction also obviates some of the benefits: innovative bundling of services by cross-owned entities will not occur if the limitation on self-registration is left in place.

In particular, the CRA report makes two proposals that might apply to the implementation of the new gTLD program. These models are meant to inform discussion.

First, CRA proposes that, for single organization TLDs, that organization be permitted to operate both the registry and the registrar that sells second-level domain name subscriptions.

Second, CRA proposes that a registry may own a registrar so long as the wholly-owned registrar does not sell second-level domain names subscriptions in the TLDs operated by the registrar.

After the publication of the CRA report, ICANN convened open consultation sessions to discuss the report and its effects on the proposed new gTLD implementation model.

Recent Consultations. ICANN conducted two open consultation sessions on the CRA report, one in Washington DC on 11 December 2008 and one in Marina del Rey, CA on 19 December 2008. The comments received were summarized (see above), and ICANN is developing a synthesis paper based on the models received in the comments and consultations. Based on the comments and input, ICANN staff is weighing a number of additional models suggested for re-evaluating registry-registrar separation and cross-ownership as part of the new gTLD process.

The comments received on the CRA Report and consultation period generally agree that there should be continued separation of registrar and registry functions, but that a limited form of cross-ownership or self-management may be permitted. There was also general agreement with the GNSO recommendation that registries must use the accredited registrar model. Registrars, registries, and individual commenters noted that registries should treat registrars equitably and provide sufficient notice of domain renewal pricing changes.

Proposed Position (for this version of the Guidebook)

Based on the comments and input, a number of additional models suggested for re-evaluating registry-registrar separation and cross-ownership as part of the new gTLD process are being weighed. To clarify the discussion, one model was selected (based on the findings in the CRA report and public discussion of it) for inclusion into the revised Applicant Guidebook. The limited lifting of the restriction also recognizes that entities will work around organizational restrictions in an environment where there are many top-level domains if the restrictions are maintained.

Possible model taking into account public comment, CRA Report, gTLD implementation and practicalities: The key elements of a proposed limited lifting of restrictions on registry-registrar cross-ownership include the following:

- Maintain separation between the registry and registrar functions (with separate data escrow and customer interface);
- Registries continue to use only ICANN-accredited registrars;
- Registries should not discriminate among registrars;
- With a limited exception, a registrar should not sell domain services of an affiliated registry (this limit may be up to a threshold of 100,000 domain names, although the registrar may continue to manage its existing base once the threshold is met); and
- Reasonable notice should be provided before any pricing changes are made on domain renewals.

This model follows the CRA recommendation for a conservative approach by limiting the number of names a registrar could sell in its co-owned registry. The model also supports small, targeted registries (including community-based applicants or single-entity TLDs), and recognizes that limited cross-ownership may provide economic benefit and competitive benefit in the domain name market.

This model has been incorporated into the Guidebook for discussion by updating the proposed Registry agreement clause regarding the treatment of registrars.

XIV.   LIST OF RESPONDENTS

Ken Abbott (K. Abbott)
Amadeu Abril i Abril (A. Abril i Abril)
Adobe Systems Incorporated (Adobe)
Andrew Allemann (A. Allemann)
Abdulaziz Al-Zoman (A. Al-Zoman)
American Bankers Association (ABA)
American Intellectual Property Law Association (AIPLA)
American Registry for Internet Numbers (ARIN)
American Society of Association Executives (ASAE)
Ameriprise Financial, Inc. (Ameriprise)
Ron Andruff (R. Andruff)
Anonymous
Arab Team for Domain Names and Internet Issues (Arab Team)
Asia Pacific Top Level Domain Organization (APTLD)
Asociacion PuntoGal (PuntoGal)
Association of National Advertisers (ANA)
AT&T Inc. (AT&T)
Bank of America Corporation (Bank of America)
British Broadcasting Corporation (BBC)
Andreas Baumgart (A. Baumgart)
Chris Beach (C. Beach)
.berlin
Vittorio Bertola (V. Bertola)
Anders Rosenkrans Birkedal (A. Rosenkrans Birkedal)
BITS/Financial Roundtable (BITS)
Gregory Boulter (G. Boulter)
Eric Brunner-Williams (E. Brunner-Williams)
Yolanda Busse, Oehen Mendes & Assoc. (Busse)
Dan Buzzard (D. Buzzard)
Joe Cady (J. Cady)
David Carter (D. Carter)
Michael Castello (M. Castello)
ccNSO Working Group on Geographic Names (ccNSO WGGN)
CentralNIC Ltd. (CentralNIC)
Charles Christopher (C. Christopher)
Chinese Domain Name Consortium (CDNC)
Chinese Organizational Name Administration Center (CONAC)
Citrix Systems, Inc. (Citrix)
City of New York (NYC)
Connecting.nyc, Inc. (Connecting.nyc)
Contessa
Coalition Against Domain Name Abuse (CADNA)
Coalition for Online Accountability (COA)
Computer Sciences Corporation et al. (CSC)
Lori Cordell (L. Cordell)
Dale Craig (D. Craig)
Cyveillance, Inc. (Cyveillance)
Demand Media Inc.

Demys Limited (Demys)
DHK Enterprises, Inc. (DHK)
DOMAINOO
dotCities
dotCYM
dotSCO campaign (dotSCO)
eBay Inc. (eBay)
eCOM-LAC
economiesuisse
eedlee
Jill Evans MEP (J. Evans)
FairWinds Partners (FairWinds)
Ray Fassett (R. Fassett)
Marcus Faure (M. Faure)
Federal Deposit Insurance Corporation (FDIC)
Robert Fernandez (R. Fernandez)
Stuart Fyfe (S. Fyfe)
GE Money van Staden (GE van Staden
GE Money Bandon (GE Bandon)
Go Daddy
Chuck Gomes (C. Gomes)
W.W. Grainger Inc. (Grainger)
Greenberg Traurig Undisclosed Client A (GT- Client A)
Greenberg Traurig Undisclosed Client B (GT- Client B)
Philip Gusterson (P. Gusterson)
Hacker Factor Solution (Hacker)
Faye Hammersley (F. Hammersley)
Hearst Corporation
HP.com
Intellectual Property Constituency (IPC)
International Anti-Counterfeiting Coalition (IACC)
International Olympic Committee (IOC)
International Trademark Association (INTA)
InternetBar.org (InternetBar)
Internet Commerce Association (ICA)
Internet Commerce Coalition
Internet Society-Australia (ISOC-AU)
IP Justice
ITT Corporation et al. (ITT)
George Kirikos (G. Kirikos)
.koln
Khaled Koubaa (K. Koubaa)
Joseph Lam (J. Lam)
Robert Lafaye (R. Lafaye)
Lego et al. (Lego)
Lovells LLP (Lovells)
MarkMonitor Inc. et al. (MarkMonitor)
MARQUES
Adam Martin (A. Martin)
Naomasa Maruyama-JPNIC (N. Maruyama-JPNIC)
Melbourne IT

Christopher Mendla (C. Mendla)
Max Menius (M. Menius)
Microsoft Corporation (Microsoft)
Andrew Miller (A. Miller)
Jorge Monasterio (J. Monasterio)
Steve Morsa (S. Morsa)
Annette Muehlberg (A.Muehlberg)
National Association of Manufacturers et al. (NAM)
National Cable & Telecommunications Association (NCTA)
National Internet Development of Korea (NIDA)
NCC Group (NCC)
NetChoice
Net Names
Network Solutions LLC (Network Solutions)
Jeff Neuman (J. Neuman)
NeuStar, Inc. (NeuStar)
News Corporation
NIC Mexico
Nike
Noncommercial Users Constituency (NCUC)
Mike O'Connor (M. O'Connor)
Kevin Ohashi (K. Ohashi)
.ORG The Public Interest Registry (PIR)
Michael Palage (M. Palage)
Lee Parsons (L. Parsons)
Pattishall McAuliffe (Pattishall)
Karl Peters (K. Peters)
Katherine Pilna (K. Pilna)
Kelly Pitts (K. Pitts)
Plaid Cymru
Cheryl Preston—BYU Law (C. Preston)
Fuatai Purcell (F. Purcell)
Robert Raines (R. Raines)
Brendan Regan (B. Regan)
Registrar Constituency (RC)
Registries Constituency (RyC)
Retail Industry Leaders Association (RILA)
Eric Rice (E. Rice)
Ray Robertson (R. Robertson)
Rodenbaugh Law (Rodenbaugh)
Ryan Romano (R. Romano)
Kristina Rosette (K. Rosette)
Josh Rowe (J. Rowe)
SaudiNIC
Frank Schilling (F. Schilling)
C. Schuddebeurs
Searchen Networks
Securities Industry and Financial Markets Association (SIFMA)
James Seng (J. Seng)
Yassin El Shazly (Y.E. Shazly)
SIDN-Netherlands (SIDN)

Smartcall
Katy Smith (K. Smith)
Tim Smith (T. Smith)
Software & Information Industry Association (SIIA)
Jeremy Sprout (J. Sprout)
Werner Staub--CORE (W. Staub-CORE)
Michael Sumner (M. Sumner)
Wil Tan (W. Tan)
Paul Tattersfield (P. Tattersfield)
Time Warner Inc. (Time Warner)
Tom
Naveed ul Haq (N. ul Haq)
Unicode Technical Committee (UTC)
U.S. Chamber of Commerce (U.S. COC)
U.S. Council for International Business (USCIB)
U.S. Department of Commerce, National Telecommunications and Information Administration (U.S. DOC-NTIA)
U.S. Department of Justice, Antitrust Division (U.S. DOJ)
United States Telecom Association (USTA)
Ivan Vachovsky (I. Vachovsky)
Antony Van Couvering (A. Van Couvering)
Patrick Vande Walle
Visa, Inc. (Visa)
Worldwide Media, Inc. (WMI)
George Yandl (G. Yandl)
Liana Ye (L. e)
YouBeats
Danny Younger (D. Younger)

Reference Material 35.

NEW gTLD DRAFT APPLICANT GUIDEBOOK VERSION 4 PUBLIC COMMENT SUMMARY AND ANALYSIS

Sources

Public Comment Postings (31 May to 21 July 2010). The full text of the comments may be found at: http://icann.org/en/topics/new-gtlds/comments-4-en.htm.

GENERAL COMMENTS

Key points

- There should be a level playing field for the introduction of new gTLDs, with no privileged treatment for potential applicants.
- By working with SO and AC working groups, ICANN has sought to ameliorate concerns that, in considering and responding to public comments, staff is making policy.
- By publishing these comment summaries and making significant amendments to the Guidebook, ICANN has sought to ameliorate concerns that it is not responsive to comment.
- ICANN has created staffing and resource plans to be in a position to adequately monitor contractual compliance.
- The New gTLD Program has introduced new rights protection mechanisms and malicious conduct mitigation measure to help provide for the safety of Internet users.
- Success of the New gTLD Program will be measured by the benefits to Internet users and not by the number of gTLD applicants.
- The ICANN community is striving to avoid delays in launching the new gTLD process that would undermine the credibility of ICANN's multi-stakeholder, bottom-up policy development process.

Summary of Comments

Public Interest TLDs. The sale of TLDs needs to be balanced with sound public policy. E.g., the potential use of a .health to signify health providers could make it increasingly difficult for consumers to differentiate between legitimate health providers and general commercial organizations. Also, TLDs such as .physio could be misused and potentially breach national laws (e.g. in Australia, use of physio.au by anyone other than a registered physiotherapist would breach registration laws). The fees for new TLDs are prohibitive for small not-for-profit groups that might appropriately manage public interest-oriented TLDs (e.g. a national physiotherapy association managing a .physio). ICANN should therefore reserve some TLDs where the public interest does or should outweigh commercial interests. *D. Mitsch (16 June 2010).*

No privileged treatment and a level playing field.
In response to many requests for privileged treatment by various potential applicants, ICANN has wisely resisted these pleas. We support a single application window, a single set of rules, and no special priority to any type of application beyond those already contemplated in the DAG. *Minds + Machines 21 July 2010).*

Proposals for advantaged applicants should not be adopted. There will be an official communications and marketing period to give everyone the possibility (not just "insiders") to get their community, geographical or standard TLD. Giving advantage to some applicants would compromise the ability of communities or governments to find the best TLD solution. *Bayern Connect (21 July 2010).*

Glossary.
Definitions are often circular (e.g., the community-based TLD definition uses the term "community" and does not explain what comprises a "community") and do not adequately describe the technical terms for those new to ICANN processes. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

CORE appreciates additions made to the DAG to address the specific needs of intergovernmental organizations or governmental entities. CORE requests a further clarification that "governmental entities" means any level of public authorities, according to their respective legal systems, be that national, federal, state, regional, local, municipal or other. In many languages there is a clear distinction between "governments" and "public authorities" where the former is sometimes reserved to the highest political body representing the sovereign state, and may go further down to federal or regional level, but rarely encompasses all levels of public authorities with a political and administrative mandate to manage a territory. *A. Abril i Abril (Module 5, 21 July 2010).*

New gTLD-related enforcement resources--not-for-profits. ICANN should consider including in the Applicant Guidebook mechanisms that allow not-for-profit organizations to conduct enforcement activities in a more efficient and cost effective manner. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Compliance. The new gTLD program raises concerns over abuse in the secondary market for new TLDs which ICANN is not in a position to adequately monitor from a contract compliance standpoint due to the unlimited nature of the proposed gTLDs, and also raises concerns over abuse of solicitations for defensive registrations. *A. Aikman-Scalese (21 July 2010).*

Compliance Officer. The entity awarded a new gTLD should be required to designate by name a Compliance Officer responsible for contract compliance and should be required to notify ICANN immediately of any changes in that designation. They should also be required to provide prominent public notice on their home page of the name and contact information for the designated Compliance Officer. *A. Aikman-Scalese (21 July 2010).*

Whois concerns. Concerns about inaccurate Whois information should be addressed prior to implementation of the new gTLD program. *A. Aikman-Scalese (21 July 2010).*

Costs. The effect of each new version of the guidebook is to raise operational costs for all kinds of TLD registries, when most of them don't need the highest possible standards. One size does not fit all. *A. Abril i Abril (21 July 2010).*

Overall approach.
ICANN must discard the mantra that more is better. Per the advice of the Economic Framework paper, it should analyze the likely costs and benefits of new gTLDs and move forward to authorize only those that can demonstrate a net public benefit. *MPAA (21 July 2010). BITS (22 July 2010).*

The Business and Commercial Users' Constituency (BC) wants to see new gTLDs rolled out in a systematic manner. All new names should meet five key principles—differentiation, certainty, good faith, competition and diversity. *BC (26 July 2010).*

The four overarching issues are not integrated into the DAGv4 and ICANN's development of the implementation plan for new gTLDs. ICANN should develop a holistic implementation plan that includes a comprehensive set of safeguards for addressing these issues. *AT&T (21 July 2010).*

ICANN's multistakeholder, bottom up process loses all credibility if delays continue. It is time to concede that the gTLD process has been overloaded. It must be redesigned in a way to constrain (a) the range of issues to be dealt with in the application documents; and (b) the range of gTLD applications accepted in the coming round. Both constraints can be applied by specifying a simple set of guiding principles rather than scoring systems or lists of names and codes. Examples of possible principles:
(1)ICANN must maintain an environment conducive to the beneficial development of the Internet
(2) ICANN may deny the delegation of gTLDs or kinds of gTLDs whose likely negative externalities (external costs) outweigh their benefits for the development of the Internet in the public interest. *W. Staub (21 July 2010).*

Flaws in policymaking process. Where public comments suggest a policy that does not yet have consensus through the bottom-up process, that proposed policy should not be introduced at the discretion of the ICANN staff. In such cases the proposed policy should go to the appropriate policy making body (e.g., the GNSO). The three issues of vertical integration/separation, single registrant single user (SRSU), and HSTLD do not have consensus and the ICANN staff exceeded its role by including them in some versions of the DAG in the implementation process despite that these issues are not explicitly discussed in the final report for new gTLDs. The staff's role is to make an implementation plan for what is figured out in policy discussions, not to introduce a new policy. Public comments of value to the staff are comments that: (1) suggest that a policy issue which became consensus is not implemented; (2) suggest that the implementation plan contradicts the policy consensus or ICANN bylaws, etc.; (3) suggest that there is a flaw in the plan so that there is difficulty in actual implementation; and (4) suggest an improvement for implementation of a policy issue which became consensus. *JPNIC (2 Sept. 2010).*

Criterion for measuring success of new gTLD program. Belief in meeting consumer demand and eagerness for new gTLD business are deeply connected. But beyond the issues of competition and consumer choice is the additional issue of stability. Threats to stability caused by eagerness for new gTLD business have not completely disappeared. A high number of applications received and processed is not the measure of success for ICANN. In reality only a few applicants will succeed; others will fail because they do not represent real consumer demand. After this stage we will be able to enter into a new era in which people can calmly predict consumer demand and the stability threat will be reduced. Reaching that point will be an achievement for ICANN. It is of concern that by recommending single registrant single user (SRSU) TLDs, ICANN staff may be intending to increase the number of applications. This should not be true. *JPNIC (2 Sept. 2010).*

Support for New gTLD Program

Complete the guidebook and do not delay the program. Further delay of the launch will erode the credibility of the new gTLD program. The Guidebook is in very good shape and reflects hard-won

compromises. *Minds + Machines (21 July 2010). Bayern Connect (21 July 2010). R. Tindal (21 July 2010). D. Schindler (22 July 2010). J. Frakes (22 July 2010).*

It is almost time to move to the gTLD implementation stage. Demand Media strongly believes that introducing new gTLDs will provide more choices for consumers, genuine uniqueness and specificity in TLDs and greater competition among registries. Many issues have been addressed by ICANN in the various version of the DAG with community's input. The Applicant Guidebook may need to be amended to deal with future issues and that is to be expected. The DAGv4 represents sound judgment and consensus in most respects. *Demand Media (22 July 2010). J. Frakes (22 July 2010).*

Opposition to New gTLD Program

Opposition.
The International Olympic Committee (IOC) opposes introduction of new gTLDs. IOC's recommendations should not be taken as a waiver of IOC's right to proceed against ICANN for damages resulting to the IOC or the Olympic movement from implementation of the proposed new gTLD system. *IOC (21 July 2010).*

Introduction of new gTLDs is premature and launch should not proceed without further review and revision. It is imperative that any plan put in place will guarantee the safety of Internet users and protect the rights of all parties. *CADNA (21 July 2010). Rosetta Stone (21 July 2010).AIPLA (21 July 2010).IACC (21 July 2010).*

ICANN has not adequately addressed the overarching issues. Unresolved malicious conduct concerns alone require that the gTLD program not go forward because it is far from ready. At minimum ICANN should assume at least another 18-24 months will be needed before it could launch new gTLDs given all the unresolved matters. As evidenced by the economic work produced by ICANN this summer, it is far from clear whether the public interest will be served; there has been no demonstration of demand for new gTLDs, or that a flood of new gTLDs will result in constructive, new competition. *SIIA (21 July 2010).*

The case has not been made for and no sensible advantages would be gained by introduction of new gTLDs. The new program will create more confusion and worsen cybersquatting and trademark infringement problems. Instead of introducing an unlimited number of additional TLDs, ICANN should concentrate on improving the current DNS by finding effective solutions to cybersquatting and trademark infringement problems. *H. Lundbeck (8 July 2010). VKR Holding (13 July 2010). LEO Pharma (14 July 2010). Vestas (16 July 2010).*

ICANN should cease its headlong rush to authorize an unlimited number of new gTLDs and instead follow a more considered approach based on an assessment of the need for new gTLDs and how they can be judiciously authorized so as to protect the interest of commercial users and the general public. *MPAA (21 July 2010).*

Microsoft continues to object to ICANN's planned simultaneous introduction of an unlimited number of new ASCII gTLDs. If ICANN nonetheless proceeds despite the widespread opposition to the program and the economic downturn, then it should take the time necessary to consider and address the issues and questions raised by the community about the intended implementation of the plan. It is essential that ICANN "get it right" and as written the DAGv4 effectively ensures that it will not. *Microsoft (21 July 2010).*

ICANN is not promoting competition. ICANN is not promoting competition with the new gTLD program but is acting in favor of registrars and registries and against the interests of the public. If competition is working, this will be seen through registration prices lower than .com. ICANN refuses to take steps to eliminate VeriSign's abusive .com monopoly by implementing a regular tender process so that each TLD is managed by a registry that will give consumers the lowest price for a set level of service. *G. Kirikos (1 June 2010).*

ICANN does not value public input. We will passively resist by not participating in a process that only leads to predetermined outcomes. We request that ICANN notify the community when it is ready and willing to demonstrate that it properly values public comments. *G. Kirikos (17 July 2010).*

Analysis of Comments

Policy development process and public comment

Since it was founded in 1998, one of ICANN's key mandates has been to create competition in the domain name market, "The new corporation ultimately should … oversee policy for determining the circumstances under which new TLDs are added to the root system." The secure introduction of new gTLDs, as specified in the White Paper, remains an essential element in fostering competition and choice for Internet users in the provision of domain registration services.

The introduction of new gTLDs continued to be identified as a core objective for ICANN in several key agreements, for example "Define and implement a predictable strategy for selecting new TLDs" in the 2003 Memorandum of Understanding. The study and planning stages, extending back several years, include two trial rounds of top-level domain applications held in 2000 and 2003. Experiences from those rounds have been used to shape the current process.

The New gTLD Program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the GNSO, formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholders, including governments, individuals, civil society, business and intellectual property constituencies, and the technology community were engaged in discussions for more than 18 months on such questions as demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The ICANN Board subsequently approved these recommendations in June 2008, and directed staff to develop an implementation plan.

The development of the Applicant Guidebook, and the resolution of the overarching issues identified during the process, has been a challenging task. Recommendations adopted from the trademark and malicious conduct working groups have been, where possible, incorporated into the Applicant Guidebook, while issues of root zone scaling and the overall demand for new gTLDs are being addressed in separate reports.

Since creation of the consensus policy to introduce new gTLDs, ICANN has commissioned several economic studies to describe the costs, benefits and conditions necessary to maximize net social benefit of the program. The studies have also explored anticipated benefits of gTLD expansion.

The program implementation contains several elements in mitigation of certain concerns, including:

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

The multi-stakeholder model means that ICANN is responsible to a diverse range of stakeholders, and the ICANN community has done an outstanding job of considering, in many cases, diverse views on issues and finding workable solutions. While there are claims that the failure to launch new gTLDs could be interpreted as a failing of the multi-stakeholder model, the process is, on the contrary, an example of its success. The implementation of this program has been a truly collaborative, community effort, involving a number of individuals who have worked very hard to resolve many contentious and important issues in large part through dedicated working groups such as:

- The Implementation Recommendations Team - proposed solutions on trademark protection;
- The Special Trademark Issues group - made recommendations for a Uniform Rapid Suspense System and a Trademark Clearinghouse;
- The Zone File Access group - recommended a standard zone file access model to aid those addressing potential DNS abuse;
- The Temporary Drafting Group - worked with ICANN to draft selected proposed elements of the registry agreement;
- The IDN Working Group – completed work on definitions and solutions for variant TLD management.

Some may question the value of the public comment process, if all comments are not going to be acted upon. However, the analysis of public comments received on the new gTLD process has set a new benchmark for ICANN. It is acknowledged that the content of the Applicant Guidebook will not please everyone, but there has been a genuine commitment to consider and respond thoughtfully to the public comments that people have taken the time to make, and in many cases these comments have been directly acted upon. This is evidenced by the considerable number of changes that have been made to the various iterations of the Guidebook and the consideration of the overarching issues that arose during the process.

While listening carefully to the public feedback, one of the challenges has been to be careful not to reopen for debate issues that had been discussed and resolved during the policy development process while also ensuring that the consideration of public comment did not lead to new policy discussions. The Applicant Guidebook was developed around the principles, recommendations and implementation guidelines provided by the GNSO policy development process. These guiding principles in developing the Applicant Guidebook have been to: preserve DNS stability and security; provide a clear, predictable and smooth-running process; and address and mitigate risks and costs to ICANN and the global Internet community.

Registry-registrar cross-ownership was discussed in the context of promoting choice and competition. The GNSO considered the issue and was not able to come to consensus, which ultimately led to the Board making a decision supporting cross-ownership, with some protections built in.

The High Security Top Level Domain discussion was part of the overall concern about potential for increased malicious conduct and the principle that the introduction of new gTLDs should not cause security or stability issues. The community undertook a great deal of work on malicious conduct, which included a working group on a possible HSTLD designation. As a result of discussion on strategies for mitigating malicious conduct in the namespace, nine measures were recommended to increase the benefits to overall security and stability for registrants and trust by all users of new gTLD zones.

A well-defined process was undertaken which recommended the introduction of new gTLDs and was supported by the ICANN Board. We believe that many of the reasons for not supporting the introduction of new gTLDs that have been identified through public comment and public workshops and fora have been heard and addressed during the development of the Applicant Guidebook.

Compliance

In addition to the development of the Applicant Guidebook and the operational readiness of the New gTLD Program itself, ICANN has allocated considerable time and effort to ensure the overall organization, including its Compliance group, will be able to manage the potentially increased volume from new Registries.

Glossary and definitions

In addition to the glossary provided at the back of the Applicant Guidebook, Module 1 provides more detailed explanations of the meaning of terms such as "community" in the context of the new gTLD process.

We acknowledge that there are varying levels of governments, and differing terminology and levels among governments. Additions have been made to the next version of the Applicant Guidebook to respond to comments for clearer definitions. The geographic names section has attempted to identify the expected level of government support, non-objection, required for the different categories.

Success of the new gTLD program

There are many ways to measure the success of the new gTLD program. From an operational standpoint, for example, we will look at the efficiency with which applications are processed, the performance of the TLD Application System (TAS), and the overall process flow and timelines.

There are other ways success could be measured. The Affirmation of Commitments calls for a review of Competition, Consumer Trust and Consumer Choice one year after new gTLDs go into operation. This analysis will likely answer critical questions that are asked today, for instance: has there been an increase in choice for consumers? Has the stability and interoperability of the DNS been impacted by the increased number of gTLDs in the root? Has the program allowed for more geographic diversity in the gTLD namespace?

TIMELINE / MODELS

Key Points

- The Board has directed staff to adopt as a working plan the Launch Scenario with launch date of Q2 2011.

Summary of Comments

Finalize the new gTLD process.
ICANN should finalize the gTLD process and start accepting new applications. Actions to facilitate this are highly welcome, such as the proposed "ICANN Summit" in September. *dotBERLIN (3 July 2010). dotBayern (20 July 2010). dotHamburg (21 July 2010). dotZON (21 July 2010).*

It is important for the credibility of ICANN and the vast number of already existing applicants to continue with the process so that a final guidebook can be published as soon as possible. *Bayern Connect (21 July 2010). Domain Dimensions (22 July 2010).*

A reliable timeframe for the next application round should be set. *dotZON (21 July 2010). eco (21 July 2010). HOTEL (21 July 2010). NIC Mexico (21 July 2010). EuroDNS (22 July 2010). dotKoeln (22 July 2010).*

Now is the time for the new gTLD program to move forward. The guidebook should be in final form no later than the end of 2010 and the application window and communication/outreach completed by summer 2011. A schedule for the next 18-24 months should be provided which clearly delineates what will happen and when as it relates to the new gTLD program. *J. Frakes (22 July 2010).*

ICANN should move forward with the program in a timely fashion. ICANN needs to recognize that it cannot focus the community's time and energy on the "unknown". It would be unreasonable to expect any group of people to draft policies today that would remain unaltered for eternity. It would be beneficial for all parties if these limitations were recognized. If and when issues arise let us all address them then. *Blacknight Solutions (21 July 2010).*

Changes in the latest version of the DAG allow for the launching of the application round in the near future. *AFNIC (23 Aug. 2010).*

With a few tweaks we believe the new gTLD program will be ready to launch later this year or early 2011. *Neustar (21 July 2010).*

Official timeline and benefits of an incremental approach.
ICANN now needs to focus on publishing an official timeline as much as it needs to work on the final adjustment of the new gTLD program. Accumulated delays are detrimental to new gTLD applicants with projects having "net social benefit" and undermine ICANN's credibility and legitimacy. The incremental approach previously suggested by AFNIC is still valid. If an incremental approach were not deemed appropriate for the application process (reserved windows for applications with defined characteristics), it could still be highly beneficial in the subsequent processing of applications, i.e., either for the actual processing of the application and/or later on upon negotiation of the Registry Agreements. Once ICANN

accepts applications, it would seem fairly reasonable that groups of like-featured applications could naturally appear (objectives, governance, policies and/or targeted audiences, etc.) Efficiency, simplicity and justice principles would then argue for specialization of the processing of such applications. Specialization could intelligently combine with the incremental approach. Batches of applications would form on the basis of rationality rather than mere chance. ICANN would gain time to deal with the most difficult problems posed by projects of uncertain "net social benefit" while it would realize and prove the value of its new gTLD program by unleashing initiatives that are of evident "net social benefit." *AFNIC (23 Aug. 2010).*

Indifference toward public comments.
ICANN has admitted that it is ultimately indifferent to comments submitted by stakeholders in this process. Time Warner is deeply concerned that ICANN appears poised to move forward with the launch of new gTLDs despite the fact that none of the "overarching issues" identified by ICANN in early 2009 have been adequately addressed in the DAGv4. If ICANN plans to launch a successful gTLD program, it has more work to do before claiming "mission accomplished" and accepting applications. *Time Warner (21 July 2010).*

ICANN should revisit issues with open mind.
ICANN should revisit issues with an open mind and propose needed changes before the Board meets in September to consider all of the outstanding issues relating to implementation of the new gTLD program. *COA (21 July 2010).*

Take more time before introducing new gTLDs because issues remain unresolved.
Three substantive issues remain unresolved in the DAGv4: (1) the economic study; (2) proposed rights protection mechanisms; and (3) root scaling. *MarkMonitor (19 July 2010). Carlson (21 July 2010). BBC (21 July 2010). HSBC (21 July 2010). DuPont (21 July 2010). Comerica (3 Aug. 2010). Sunkist (21 July 2010). LifeScan (22 July 2010). Solvay (22 July 2010). ETS (22 July 2010). Liberty Mutual (22 July 2010).*

As advised in the Economic Framework report, ICANN should move slowly in rolling out new gTLDs and study the implementation, demand, and potentially negative consequences arising from a new gTLD rollout. There has not been significant progress on the four overarching issues. *Verizon (20 July 2010). HSBC (21 July 2010). A. Aikman-Scalese (21 July 2010). Adobe Systems (21 July 2010). Rosetta Stone (21 July 2010).*

Clarity on next steps.
USCIB members would appreciate some clarity on how ongoing community discussions, the release of the Economic Framework study and expected second phase of that study, as well as the expected root scaling study, will affect the DAGv4 and possible launch of new gTLDs. For example, the Economic Framework study stated that it may be wise to continue ICANN's practice of introducing new gTLDs in discrete, limited rounds. *USCIB (21 July 2010).*

ICANN should prioritize IDNs and introduce new gTLDs in discrete, limited rounds, consistent with the Economic Framework paper's recommendations. *AT&T (21 July 2010). Coca-Cola (21 July 2010).*

Launch the less contentious cultural and linguistic TLDs.
Many of them will help developing countries and are less likely to be problematic with rights holders. *Blacknight Solutions (21 July 2010).*

Analysis of Comments

Finalizing the new gTLD process
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.

Timeline and benefits of an incremental approach.
A Special Meeting of the ICANN Board of Directors was held via teleconference on 28 October 2010 in which the Board discussed proposed timelines for publishing a final version of the Applicant Guidebook and the extent of public comment to be received on the Applicant Guidebook. After agreement on a proposed workplan to guide the remainder of staff's work, the Board directed staff to adopt as a working plan the scenario including a launch date in Q2 2011.

Staff continues to make progress towards the program development while, at the same time, working with the global Internet community towards a level of consensus on the Program's outstanding issues.

COMMUNICATIONS

Key Points

- The communications campaign is designed to address concerns about whether communications letting all parties know of the opportunity to operate a new gTLD are appropriately detailed, began soon enough, and contain enough detail to help entities that are new to ICANN's processes.

Summary of Comments

Start communications period. The communications period should start sooner rather than later; 'outsiders" should get enough time to become familiar with the new gTLD opportunities. dotZON (21 July 2010).

Evaluation procedures—technical requirements training, education outreach. ICANN should provide greater detail and instruction regarding how to prepare for the technical requirements associated with the new gTLD application and process, and should provide education and training outreach for organizations such as not-for-profits that are new to ICANN activities. This outreach should begin immediately but be increased once the final Applicant Guidebook is released so that parties will have access to the final policy information. It should cover the application process as well as areas of interest to third parties, such as the objection procedures and rights protection mechanisms. Outreach should be done in all five ICANN regions, and ICANN should provide live in-person seminars open to the public rather than only posting information on its website or hosting webinars. AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).

Analysis of Comments

The Applicant Guidebook, exceeding 300 pages in length, is already quite detailed about the application process. It covers topics that the commenters requested, such as objection procedures and rights

protection mechanisms. Regarding the request to provide greater technical instruction, the questions contained in the application are intended to inform and guide the applicant in aspects of registry start-up and operation. Inexperienced applicants should find them a natural part of planning. Supplemental documentation or more detailed guidance on particular areas of technical operations are referenced in the guidebook where available, and a number of resources are available elsewhere in the community.

Regarding the communications plan for new gTLDs, ICANN has already undertaken significant effort to achieve the objective of the four-month requirement recommended by the Generic Names Supporting Organization. ICANN's staff remains deeply committed to the primary goal of ensuring that all those who wish to participate in, and benefit from, the new gTLD Program have opportunity to do so.

A communications plan has already been posted, received public comment, and is being revised. The current plan includes live outreach presentations in all five ICANN regions, in addition to written and recorded educational materials. In order to give due consideration to all publicly expressed views, the plan will be finalized after ICANN's international meeting in Cartagena, December 5 – 10 2011.

APPLICATION PROCESS

Key Points

- An Applicant Support Working Group has been established to evaluate options to provide support for defined groups of applicants. This has resulted in various types of outreach and education that ICANN expects to offer to applicants. This group will continue to work to find sources of funds and criteria for awarding them.

- A reduction in the application fee for efficiencies gained from certain types of applicants (i.e. multi-string, single entity applicant) has already been considered in determining the $185,000 fee. ICANN staff will review processes after Round One to determine where additional efficiencies may be gained for subsequent rounds and additional efficiencies gained will be passed on to applicants in future rounds.

Summary of Comments

Fee standards—developing and undeveloped countries. Huge fees ($185K evaluation fee, US$70K-$122K and US$32K-$56K for the M&PO and community objections respectively) would stifle the initiative of developing and undeveloped countries and dampen globally balanced development of the Internet. ICANN should be able to set a fee standard based on the costs and adopt a favorable fee policy for the developing and undeveloped countries. ISC (21 July 2010).

Discounted fees--IDNs and Exact String Translations.
ICANN should significantly decrease application fees for exact translation equivalents of the same TLD to reflect the effort the evaluating team would require to process the applicant. If all TLDs fall under the same applicant, community, business plan, string, backend registry, etc., then ICANN does not need to spend additional time repeating the same evaluation step needlessly since economies of scale/scope are reasonably justified. .MUSIC (20 July 2010). dotKoeln (22 July 2010).

Each community-based applicant should be allowed to increase their utility within their specific community by having the option to apply for their respective IDN-equivalent TLDs for a nominal additional fee (per IDN or translated equivalent). It would not be justified to ask a community based applicant to pay an additional $185K for each translation to the approved string. BC (26 July 2010). R. Andruff (Module 1, 21 July 2010).

Different fee models for different types of TLDs. Given the high fees and costs associated with applying for and operating a new gTLD, ICANN should consider setting up different fee models for different types of TLD applications to alleviate the costs on applicants. A sensible fee model will greatly enhance the chance of success for the new gTLD process. CNNIC (21 July 2010).

Reduced fees for small cities, small cultural and linguistic community TLDs.
Special consideration, including reduction of the $185K application fee and $25K annual fee, should be given for small cities and small cultural and linguistic communities which do not intend to compete with general commercial TLDs such as .com or new brand TLDs and for whom the current level of fees is not affordable. It is understood that a lower but appropriate application fee is still needed in order to prevent excessive applications. JIDNC (21 July 2010).

Special consideration regarding technical requirements and fees for developing country applicants representing cultural, linguistic and geographical communities is appropriate and consistent with the advice of the GAC in its Brussels communication. A. Al-Zoman (21 July 2010). Arab Team (21 July 2010).

Reduced fee for bundled variants. ICANN should provide for a lower fee in the case where the TLD names are not chosen but are pre-existing (e.g. geographical names, many of which have more than one common name including IDN variants). Charging $185K for each variant seems punitive and unfair. Minds + Machines (21 July 2010). Bayern Connect (21 July 2010).

Not-for-profit organizations. ICANN should reveal and detail its actual costs for reviewing each new gTLD application and consider setting a lower cost pricing structure for not-for-profit organizations that will allow ICANN to recover its costs without imposing additional overhead on the not-for-profit applicants. This transparency and pricing consideration should also apply to extended evaluation fees, objection filing and proceeding fees (in objection proceedings fees should be capped, or at least the initial fees that must be paid as a "deposit" on the proceeding). ICANN should consider a two-tiered cost structure to separate commercial uses of the new gTLDs from the informational, educational and lifesaving functions served by not-for-profit organizations. AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).

Support for African new gTLD applications. The African ICANN Community urges that support be given for new gTLD applications from Africa and be prioritized. Civil society, NGOs and non for profit organizations in Africa are most in need of such support, and support is of utmost importance for geographic, cultural and linguistic and community based applications.

- Support should include but not be limited to: financial (reduced fees); linguistic (translation in the six UN languages); legal; and technical.
- Cost reduction is the key element in fulfilling the goals of Board Resolution 20, and the following should be entertained to achieve cost reduction: waiving the program development cost ($26K); waiving the risk/contingency cost ($60K); lowering the application cost ($100K); waiving the registry fixed fees ($25K per year); and charge only the registry-level transaction fee ($.25 per

domain name registration or renewal). The reduced cost should be paid incrementally to give African applicants more time to raise money and since investors will be more encouraged to fund an application that has passed initial evaluation.
African ICANN Community (28 June 2010).

Developing countries applicant support working group—support for initiative. We welcome the recent ICANN initiative regarding possible support for applications from developing countries. The results of the working group should be taken into consideration in the final Applicant Guidebook. *Arab Team (21 July 2010).*

Developing country non-profit applicant financial support efforts by ICANN, where the applied for TLDs are for the public good, are welcome, and should include reduced fees for application, evaluation and the annual contract. For proposed gTLDs financially sponsored by certain governments, ICANN should consider the government's financial support commitment in place of the irrevocable standby letter of credit or deposit into an irrevocable cash escrow account, since some governments are reliable enough to guarantee sustainable operation of the registry(s). DNSSEC cost burdens should also be reduced and the application process should be made more accessible to global stakeholders. ICANN should provide document translations and conference simultaneous interpretations in six UN languages which may also help reduce costs for non-English speaking applicants. As for technical support, DNSSEC support is a necessity. *CONAC (22 July 2010).*

The consensus in the At-Large Community is that whatever the finalized processes and procedures, ICANN must embrace the prospect of providing affirmative support for participation of hitherto marginalized communities, especially those entrusted to act on behalf of disadvantaged groups or those with agendas widely recognized as active in the general public interest in the new gTLD economy. The ALAC strongly endorses continuation of these efforts. *ALAC (September 2010)*

Reduced application fee--.brand and charitable organizations. The application fee is too high and could be discriminatory against certain types of applicants such as .brands restricted to employees of a company or charitable organizations. Such applicants should be eligible for a lower fee. Hogan Lovells (21 July 2010).

Application fee level is generally appropriate. The $185K fee is likely to be a realistic average estimate of ICANN's costs to manage the program. Substantial changes to the new TLD process as described in DAGv4 could result in an increase in the fee. I support practical ways to reduce costs for the discrete group of applicants in need, especially those from developing countries. R. Tindal (21 July 2010).

Terms of payment—exchange rate. The following is suggested as addition in DAGv4 after section 1.5.4: "Section 1.5.5—Terms of payment: Payment to ICANN may be effected in USD or in the legal currency of the applicant's country. If the applicant decides to use his local currency for processing payments, the exchange rate used shall be the one which applies on the day the applicant registers with TAS (refer to paragraph 1.5.1.)." This section is justified because the risk of exchange rates should not be borne by applicants alone, but shared with ICANN. It may be fair for ICANN to acquire financial products to hedge this currency risk, rather than each and every applicant having to provide this insurance on its own. E. Blocher (Module 1, 5 June 2010).

Refund of evaluation fee (1.5.1). The proposed 20% refund of the evaluation fee to unsuccessful applicants after having completed dispute resolution seems unreasonable. While it may be reasonable

to make such a refund if the applicant decides to withdraw 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 (21 July 2010)

Analysis of Comments

Fee Issues

Comments regarding fees have generally been consistent with previous versions of the Draft Applicant Guidebook. One comment is generally in support of the application fee to cover costs, while a number of comments have suggested a reduction in the application fee either based on where the applying organization is located (e.g., a developing country), its organization type (not-for profit, charities, small cities, a brand holder) or based on a presumed level of effort required to review an application (IDN variants, or multiple strings from the same organization).

Comments suggest a reduction of the $185,000 application fee based on the type of TLD being applied for (linguistic, small community), the organization applying (not-for-profit) or where there may be multiple TLD strings applied for (e.g., IDN variants, translations of a string) by a single applicant. The processing steps and associated costs to perform each application evaluation are based on an average number of steps to complete each application and do not change based on the TLD type or organization applying. In addition, applications for translated versions of the same string would undergo the complete evaluation process as each application is expected to stand alone. Consequently, the current application fee is not expected to change for the initial application round. However, as stated previously, 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.

Currently, a working group, comprised of representatives from various Internet constituencies, is evaluating options to provide support for a defined set of applicants. The working group's preliminary recommendations were presented to the Board in September and a resolution was agreed on regarding the support to be provided by ICANN (http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.2).

Progress is being made by the Applicant Support Working Group, tasked with, among other things, locating sources of funds to provide financial support for certain deserving applicants and determining criteria for releasing those funds in a way that avoids abuse and is fair.

There was a suggestion that payment of the application fee should be allowed in US dollars or in the legal currency of applicant's country to share exchange rate fluctuation risks. The payment of the application fee follows standard ICANN practices with respect to fees collected globally. For this process, ICANN receives funds in US currency only. It is the applicant's responsibility to arrange for funding in their own currency to equate to the evaluation fee at the time of the each wire transfer. ICANN does allow for normal fluctuations as the funds are applied to their respective application.

A comment questioned the relative incentives for applicants to participate in a dispute resolution proceeding or withdraw prior to the dispute resolution process. This was considered previously. The dispute resolution process is in place to allow a weighing of the objection in regard to the application. In

the event of an objection, an applicant may choose to withdraw at an earlier stage for a larger refund. The process is not designed to discourage applicants from completing a dispute resolution process just to afford some recovery to applicants who do not go through the entire evaluation.

APPLICATION CATEGORIES

Key Points

- Newly formed entities must be formally established prior to application submission. These entities will be evaluated similarly to established entities. Information required by newly formed entities is discussed in the Criteria section of the Application questionnaire.

- The standard for a successful community objection requires that the opposition be substantial so that the dispute resolution process is a consideration of the issues rather than a means for a single entity to eliminate an application.

- New TLD categories beyond what has already been described (community, geographic, and standard) will not be introduced, as ICANN believes that over time, the market and community interests are better suited to sorting TLD types. In addition, the introduction of categories may mean an unintended increase in compliance-related costs in areas without benefit to DNS security.

Summary of Comments

Proposal for two categories under community-based TLDs—commercial and noncommercial. ICANN's one-size-fits all approach does not accommodate all stakeholders. There should be two categories of community-based gTLDs--a commercial use and noncommercial use. Differentiated policies and evaluation procedures should be established for noncommercial TLDs—their evaluation should be simpler, as they may not be involved in trademark protection issues. ICANN should provide more support to noncommercial applicants--financially, technically and linguistically--and give some exceptions to them regarding vertical integration and Whois policies. This will simplify new gTLD management and accelerate the pace of evaluation to some extent. Moreover, GNSO has the commercial and noncommercial stakeholder groups, which perfectly matches the proposal. *CONAC (22 July 2010).*

Community-based application definition (1.2.3). The fourth factor ("Have its application endorsed in writing by one or more established institutions…") seems too narrow in specifying "one or more" and is imbalanced when compared with the Section 3.3.1 grounds for a community objection. If it takes substantial opposition from a significant portion of the community to object, how is it possible that only one institution can represent a community in the application process? BITS suggests also that during the Initial Review process, reviewers should be required to change the designation from a "standard" to a "community-based" application if it is clear that the applicant intends the gTLD string to be targeted explicitly or implicitly at a specific community. It is also not clear why ICANN in Section 1.2.3.2 makes the assumption that community-based applications are intended to be a "narrow category." *BITS (22 July 2010).*

Financial TLDs. Any domain name associated with financial services should be restricted to financial services companies, with substantial restrictions, guidelines and proof of eligibility. There should be a

formal Financial Services Panel for assessing financial service-oriented gTLD applications. Specific higher levels of security and stability should be mandated. The DAGv4 does not adequately address these recommendations. *ABA (22 July 2010).*

Applicant Evaluation: yet-to-be formed entity. Clarification by ICANN is requested as to whether it is possible under the current DAG to submit an application in name and on behalf of a yet-to-be-formed entity, where checks and evaluations are performed on the submitting entity(s) while the future registry has to be defined in all terms, but not yet prove legal existence. ICANN is asked to clarify the required documentation for the future designated registry on behalf of which the application is submitted. Examples of such a situation would be community-based, non-profit entities wishing to form a Foundation to manage a given TLD, or a city that might establish an agency to manage a city TLD. *A. Abril i Abril (Module 2, 21 July 2010).*

Brand category of applications. A third category of applications for brand owners would be beneficial. It is still unclear if brand owners could qualify to file a community-based application and whether a corporation could be considered to represent a community consisting of a restricted population such as its customers or employees. *Hogan Lovells (21 July 2010).*

Closed gTLDs—lack of provisions.
The DAGv4 lacks provisions for operation of closed gTLDs. Would this mean that trademark owners owning a gTLD would need to open the registration procedure to second-level domain names applied for to third unrelated parties? In this case, what is the incentive of actually registering and operating such a gTLD? *PMI (21 July 2010).*

Unique procedures are needed for single registrant TLDs. Such single registrant TLDs need different requirements in the utilization of ICANN authorized registrars. The DAGv4 does not address the unique procedures that are required for these unique registries, which are being used to increase online visibility of the TLD holder and not offering open registrations of second level names. *AT&T (21 July 2010).*

Single registrant, brand, corporate TLDs—beyond scope of new gTLD program. Based on the GNSO report to the Board (11 Sept. 2007), single registrant, brand and corporate TLDs are beyond the scope of the current new gTLD process. We strongly urge ICANN to state this fact explicitly in the forthcoming final version of the new gTLD RFP for the next round. ICANN should also clearly state that "community-based TLDs" will not open the door for proprietary TLDs. *JPNIC (21 July 2010).*

Opposition to single registrant, single user (SRSU) TLD category. ICANN staff should not propose single registrant single user (SRSU) TLDs because this proposal does not have consensus within the ICANN community. If the ICANN staff proposes it in its discretion, that would be a violation of process. In addition, such a proposal could increase the risk of lawsuits against ICANN by the SRSU applicants since many of the required elements of the new gTLD process do not properly fit for SRSU TLDs (e.g., mandatory use of ICANN registrars, data escrow and vertical integration). Therefore the third paragraph in the Background section addressing brand holders and organizations seeking to manage their own name should be deleted. The issue of SRSU TLDs is an important policy issue which should be discussed in the GNSO. It is not a consensus policy included in the 2007 GNSO final report for new gTLDs and it should be treated by a dedicated PDP. In case the dedicated PDP does not end in a timely manner, the next round of new gTLDs should exclude SRSU TLDs. This argument has the same logical structure as the

underlying logic of Board Resolutions 2010.03.12.17 and 2010.03.12.18 for Vertical Integration/Separation. *JPNIC (2 Sept. 2010).*

Analysis of Comments

A comment requests clarity on "yet-to-be formed entities" applying for a gTLD. Applications from or on behalf of yet to be formed legal entities, or applications presupposing the future formation of a legal entity (for example, a pending Joint Venture) will not be considered. All requirements of an existing entity continue to apply: proof of planned technical/operational and financial capabilities (see Criteria for Question 45 for financial information required by newly formed entities) will be required, background screening of the organizations forming the new entity as well as the new entity's key officers and shareholders will be conducted, all required documentation for geographic names and/or community based applications must be presented, and all other requirements, as outlined in the draft Applicant Guidebook must be met to submit a complete application.

A comment notes a potential imbalance between the requirement for at least one endorsement of a community-based application, and the requirement that there be substantial opposition in the event of a community objection. It is intended that the application should have substantial support as well; however, this is difficult to establish based on a certain number threshold. It may well be that an applicant supported by one institution or group means substantial support for that case (e.g., a highly structured community with only one relevant institution or endorsement from the pre-eminent institution in that area). Conversely, the standard for a successful community objection requires that the opposition be substantial so that the dispute resolution process is a consideration of the issues rather than a means for a single entity to eliminate an application. Opposition from a single entity might also be determined substantial in a given case.

Comments provided suggestions for possible approaches to application categorization. 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. 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-profit 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.

Significant consideration has been given to the issue of introducing category-based TLDs in the new gTLD process. ICANN remains a strong proponent of innovative uses 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 holders and other groups all 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.

Comments suggest that single registrant TLDs not be allowed as these may not have support from within the ICANN community nor is there policy to support such a category. Categorization of TLDs beyond what has been proposed (community, geographic, and standard) is not being introduced. In addition, an applicant is not required to have a minimum number of registrants to qualify for a TLD.

PROCEDURES

Key Points

- ICANN staff will conduct a Completeness Check of applications after the close of the 90-day Application Submission Period. Depending on the severity of missing information, incomplete applications may either be rejected or may be provided with an opportunity to provide missing information. Only after all applications have been designated as complete or have been rejected during the Completeness Check period will ICANN post the applied for strings and applicant data.

- The objection filing period begins with the posting of applied for strings and applicant data and ends 2 weeks after the close of Initial Evaluation. Applicant data necessary to file an objection will be made available via ICANN's website.

- It is important to note the distinction that reviews in Initial Evaluation offer no chance for appeal – the opportunity exists for clarifications only. Limited clarifications may be sought for String Similarity, DNS Stability and Background Screening as needed.

Summary of Comments

Timing for amendment of incomplete applications.
The provisions in paragraph 1.1.2.8 (string contention) can be expected to be used in competing applications (contention sets) to take speculative advantage of intentionally caused delays by incomplete applications. Therefore applications should be given a limited time of a maximum 4 weeks to mend incomplete application parts. *dotBERLIN (13 July 2010). dotBayern (20 July 2010). dotHamburg (21 July 2010). HOTEL (21 July 2010). dotKoeln (22 July 2010).*

Paragraph 1.1.2.8 should be amended so that applicants should be required to provide all information they can provide within a reasonable deadline set by ICANN. The string contention procedures will not

begin until all applicants in the contention set have completed all aspects of the evaluation. The deadline should help prevent applicants of speculative registrations from delaying the dispute resolution process. *eco (21 July 2010).*

Supplements to applications. ICANN should allow supplements to applications after submission. This would help not for profit organizations that may have a learning curve to understand the process. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Notice of changes (1.2.7). Part of the application should contractually or otherwise obligate applicants to notify ICANN of changes. *BITS (22 July 2010).*

Clarify objection filing timeframe (1.1.2.4). ICANN needs to clarify the objection filing timeframe. One part of this area suggests that the objection period is based on the Administrative Completeness Check, but another section suggests it is based on the Initial Evaluation Period with a two week window of time between posting of the Initial Evaluation results and the close of the objection filing window. *BITS (21 July 2010).*

Reconsideration. In every case, an applicant should have an opportunity within the ICANN process to request reconsideration of an erroneous or adverse decision. The current process has three places where an applicant or application can fail without opportunity for appeal or extended review: background check, string similarity, and DNS stability tests. *W. Seltzer (21 July 2010). R. Dammak (July 2010).*

Proof of good standing. ICANN should require proof of good standing in the application process. The DAGv4's elimination of this step at the early stage of the process raises concern about its impact on the entire process—it could potentially lead to a greater number of illicit applicants ending up in the applicant pool. Even if ill-intentioned applicants end up getting eliminated at a later point, it may still result in a waste of time of resources for ICANN and others which could have been prevented earlier in the process. *CADNA (21 July 2010).*

ICANN permission to use Applicant logos (Module 6, section 9). There is no basis to give ICANN unfettered permission to use an Applicant's logos as section 9 provides. It is basic trademark law that the value and distinctiveness of a trademark such as a logo can be destroyed through unregulated use by parties other than the trademark owner. If ICANN requires the right to use an Applicant's logo, it should enter into a proper trademark license with the trademark owner. *IBM (21 July 2010).*

Confidentiality (section 11.b). The confidentiality standard in this provision is insufficient. Rather than state that ICANN use "reasonable efforts" IBM proposes that the section should state that ICANN will have "sufficient agreements in place" to ensure confidentiality is maintained. *IBM (21 July 2010).*

TLD Application System Access. Sections 1.1.2.1, 1.4.1 and 1.4.1.1 speak to applicants, but it is not clear what process ICANN will use for other users who wish to review open applications for possible objection. It is also unclear how 1.1.2.2. and ICANN not posting certain information on the TAS (e.g. related to finances, architecture and security) will affect potential objectors' ability to assess an application and its applicants. *BITS (22 July 2010).*

Timing of subsequent application rounds (1.1.6). Given the timeframes of other sections, is it realistic for ICANN to assume the launch of a next round of applications "within one year of the close of the application submission period for this round"? *BITS (22 July 2010).*

Required financial documents (1.2.2). BITS recommends that ICANN ask for 3 years of audited financial statements instead of just one. Multiple years of statements would serve to validate the applicant's ongoing fiscal strength. *BITS (22 July 2010).*

Application form (1.4.1.2)—encryption of data. ICANN should encrypt the application data in transit across the Internet (i.e. use HTTPS) and while it is at rest in storage at ICANN—at least for selected information such as financials. *BITS (22 July 2010).*

Evaluation fee (1.5.1)—proof of concept round. Can ICANN provide a table of the 200 Proof-of-Concept round applications, and are these eligible for re-application? *BITS (22 July 2010).*

Analysis of Comments

Comments have requested clarity on the timing of providing complete applications to ensure string contention procedures begin appropriately. Although timelines are not yet final, it is expected that all Applicants will submit completed applications, including the receipt by ICANN of the full application fee, throughout and up to the final day of the Application Submission period. A 4-week completeness check period will ensue, allowing ICANN staff to validate that all applications question are complete and all necessary supplemental documents are attached. This review will not look at the adequacy of answers; rather it will focus on ensuring that each question has an answer. If an application is deemed incomplete, the applicant will have one opportunity to provide any missing data during this period. If the application remains incomplete at the end of this 4-week period, then it will be ineligible for further review and application fees (less any expenses incurred) will be refunded. Only after the completeness check is complete for all applications will ICANN post the applied for strings and other relevant information. The posting will also mark the beginning of Initial Evaluation. String Similarity analysis will begin immediately thereafter and string contention sets will be posted once this analysis is complete. Contention sets will be posted prior to the end of Initial Evaluation.

Another comment seeks clarity on the objection filing period as well the availability of applicant information necessary to file. The objection filing period will begin at the end of the completeness check period and will close two weeks after the Initial Evaluation results are posted. Based on current estimates, the objection filing period is expected to last approximately 5 1/2 months. In relation to the availability of applicant information, the objection process allows for interested parties to file objections against the organization applying for the string and/or the string on any of four grounds: [Limited Public Interest], Community, String Confusion, and Existing Legal Rights. This process does not allow for objections to be made on the applicant's ability to meet financial, technical or operational criteria. Accordingly, relevant and necessary applicant data to file an objection will be made available via ICANN's website.

A comment asked about the viability of committing to a subsequent application round "within one year of the close of the application submission period for this round." The GNSO's New gTLD Policy Development Final Report suggests that "Applications must initially be assessed in rounds until the scale of demand is clear" and that "...the first round will include scheduling information for the subsequent

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rounds to occur within one year." ICANN expects to meet this recommendation; however, the timing of the second round may be affected by necessary changes and improvements to the new gTLD program. Any potential delays in beginning the subsequent round will be communicated as soon as practical.

Comments have requested clarity, or made suggestions regarding several areas of the guidebook. One suggests that applicants should be contractually bound to inform ICANN if any material changes arise in regards to their submitted application. The current wording in the guidebook requires notice of changes to information, and makes it clear that if an applicant is found to have failed to notify ICANN of a material change, their application may be rendered invalid.

Another comment mentioned the three areas of Initial Evaluation (IE) that do not allow for appeal or extended evaluation; background check, string similarity, and DNS stability. It is important to note the distinction that no area of IE offers a chance for appeal – the opportunity exists for clarifications only. Limited clarifications may be sought for the three areas mentioned above in IE, as needed. For DNS Stability and String Similarity, as the submitted string cannot be modified, the need for clarifications is expected to be minimal.

A comment concerns the usage of the applicant's name and logo in section 9 of the Terms and Conditions (Module 6). While the language does constrain the areas of usage, it will be further narrowed in the next version of the guidebook to reflect only the use of the applicant name. The other comment on Application Terms and Conditions relates to maintaining the confidentiality of applicant information in seeking consultation to evaluate an application. The Terms and Conditions state that ICANN will use reasonable efforts to ensure that panelists maintain confidentiality of information in the application. This would include having agreements in place with panelists and other experts that may be consulted, as suggested in the comment.

One comment suggests that three years of audited financial data should be requested as opposed to the one required in the current version of the guidebook. Requiring only one year of audited financials is intended to provide sufficient data on the applicant's financial capability and broaden the range of applicants by avoiding overly burdensome requirements.

One comment reiterated that confidential data collected in TAS must be protected. We agree and ICANN is taking reasonable and necessary steps, including hiring an independent security consultant, to ensure that Applicant data is secured throughout the process.

One comment asked for a list of the year 2000 proof of concept participants. That information can be found here: http://www.icann.org/en/tlds/app-index.htm

EVALUATION

Key Points

- Applicants are expected to provide all necessary and relevant information at the time their application is submitted including disclosing any known concerns as described in Section 1.2.1 Eligibility (Questions 11d – f of the Application questionnaire).

- ICANN is moving forward with developing additional Eligibility (Section 1.2.1) guidelines that will be communicated to both potential applicants as well as Applicant evaluators prior to receiving applications.

- Protocols are being developed to ensure that all Applicants are aware of communications on a timely basis and are provided with same time period to respond to any clarifications requests.

- A clear process describing the Board's role in evaluation and delegation has been developed and communicated.

- Initial Evaluations cannot be completed until all relevant public comments have been considered and addressed. A summary of how public comments were addressed per application will be provided after the end of Initial Evaluation.

Summary of Comments

Question 18 and additional questions. The BC urges ICANN to add two more questions to sharpen the criteria for new gTLDs that add value and differentiation: (1) which users/registrants/organization/group/community do you intend to serve? (2) How does your TLD differentiate itself from others in the DNS? ICANN should initiate the new gTLD rollout with safeguards for an orderly approach to market differentiation and if or when necessary make adjustments in future applicant guidebooks. *BC (26 July 2010). R. Andruff (Module 1, 21 July 2010).*

Guidelines are needed regarding how Section 1.2.1 of the DAG will be applied. This section enables ICANN to deny a new gTLD application if any applicant, partner, officer, director or manager or any person owning more than 15% of the applicant "is the subject of a pattern of decisions indicating liability for, or repeated practice of bad faith in regard to domain name registrations." Applicant evaluators need to be provided with additional guidance on this eligibility factor. For example, a statute of limitations of 5 years should apply in regard to past infringing activities, given that trademark infringement can be unintentional and the UDRP process is unpredictable. Also, a few adverse UDRP findings over many years in the context of a large domain portfolio should not be presumed to indicate that an entity or individual is a "bad actor" who should be barred from any significant involvement in a new gTLD. *ICA (21 July 2010).*

Definitions—security (2.2.3.1). The "security" section of this area is very minimalist. BITS recommends either direct inclusion of other security related requirements or at least reference to other areas of the applicant guidebook containing those requirements (e.g. 5.4.1). *BITS (22 July 2010).*

Evaluation team—communications (attachment to Module 2, scoring, p. A-3). How will applicants be notified that there is a communication to them from the evaluation team available at the "online interface" (e.g. will there be email notification to check the interface)? *BITS (22 July 2010).*

"Average, reasonable Internet user". This term in Section 2.1.1.1.2 should be more clearly defined. *Red Cross (21 July 2010).*

Public interest prioritization. Rather than randomizing applications for batch processing, ICANN should consider prioritizing applications based on public interest need. *Red Cross (21 July 2010).*

World Health Organization (WHO) concerns not addressed. Concerns of the WHO regarding public health and safety issues involved with International Nonproprietary Names for pharmaceutical products (from WHO letter to ICANN dated 9 December 2009) have not been addressed. *A. Aikman-Scalese (21 July 2010).*

Financial evaluation—not-for-profits. Evaluation should take into account the different financial picture and sources of funding for not-for-profit organizations when reviewing whether an organization has adequate funding for three years of registry operations. *Red Cross (21 July 2010).*

Reserved names—regional ccTLD organizations (2.2.1.2). The four regional organizations of ccTLDs (AfTLD, APTLD, CENTR and LACTLD) should be added into paragraph 2.2.1.2 like reserved names. Like ARIN, LACNIC, AFRNIC, RIPE and APNIC, for IP numbers the regional organizations of ccTLDs are involved directly in the process of ccTLDs and ICANN. The four regional organizations have liaisons in the ccNSO Council and participate in different working groups and are recognized by the community. *E.I Ahon (Module 2, 17 June 2010).*

Section 2.2.2.3—Evaluation—clarifying questions. With respect to language changes made in this section, note that the evaluators are under no obligation to ask clarifying questions. RySG repeats its recommendation from its DAGv3 comments that evaluators should be obligated to ask clarifying questions where needed. *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

Section 2.2.3.1—Definitions—Security and Stability.
No changes were made to the definitions of security and stability. They need to be revised. They conflict with and exceed the draft gTLD agreement, and are based on a misunderstanding of IETF practices and definitions. The contract language must be revised to adhere to proper terminology (e.g., contracted parties should not be required to adhere to IETF best practices; by definition best practices are not mandatory.) *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

Some language in the "security" definition is too broad and opens it up to expansive interpretation. It potentially takes in a wide variety of small and large security incidents on the Internet. The mere fact that services are operating on a domain name does not imply or require registry involvement. The current language in the guidebook seems to come from the RSEP definition of an "effect on security" but it is missing the context of that definition. After the DAGv3 RySG suggested that the "security" language 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." *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

The "stability" definition's phrase "authoritative and published by a well-established, recognized, and authoritative standards body" is unacceptable. ICANN should not leave the language open-ended and make contracted parties subject to any and all standards bodies. ICANN needs to explicitly enumerate the standards and name the authoritative body, which we believe is the IETF. Application of additional standards should be considered via the consensus process. *RySG (10 Aug. 2010).*

Question 11(f)—allegations of intellectual property infringement. The question as written is ambiguous. The more relevant question is whether the applicant has been charged with activities that infringe intellectual property rights in which a domain name has been used. The question should be rephrased to

refer to "allegations of intellectual property infringement relating to registration or use of a domain name." The Notes column should make clear that ICANN can reject an application in which the applicant cannot provide a satisfactory explanation. *COA (21 July 2010).*

Whois data quality policy disclosure. ICANN should require applicants to disclose their policies for Whois data quality—i.e. spell out how they will require registrars who sponsor registrations in the new gTLD to ensure the accuracy and currency of Whois data that they collect. The best approach is to include Whois data quality requirements in registry agreements with new gTLD operators, but disclosure in the application is a worthwhile fallback. ICANN should be able to use contract compliance tools to pursue registries that misrepresent their plans on critical issues such as improving Whois data quality. *COA (21 July 2010).*

WHOIS requirements should be uniform. Whois enforcement must be stronger. The rules should be as specific as possible and ensure that accurate data is maintained. Applicants should be held to a uniform set of requirements in order to avoid any discrepancies. *CADNA (21 July 2010).*

High Security Zone TLD Program—application-based incentives.
A specific evaluation question should be included to provide application-based incentives for applicants to protect the public by adopting the more rigorous protections spelled out in the High Security Zone TLD Program. Applicants should be awarded one or more optional points for a positive response, or alternatively points could be deducted from the evaluation score of an applicant who declines to take these additional steps to protect the public. *COA (21 July 2010).*

We are concerned that an applicant's decision to not pursue High Security Zone verification does not reflect negatively on the applicant or affect its scores in the evaluation process. There should be a right to object against any financial services gTLD applicant that seeks to avoid high security verification and such avoidance should be grounds for denial of the application. *ABA (22 July 2010). BITS (22 July 2010).*

ICANN Board role in evaluation and delegation.
The Board's role in any part of the evaluation and delegation process is not sufficiently articulated or constrained. The Board's role needs to be extremely clearly defined so that all parties know when and under what conditions the Board may step in. The Board, like the evaluators, needs to be bound by probity requirements to ensure there is no background lobbying (e.g. from national governments or others). The Board's role in delegation must be clearly articulated (e.g., a Board bottleneck due to workload would be very unfair to an applicant who had successfully completed the application process). A full refund of costs of the evaluation would need to apply in cases of an applicant that passes evaluation but for which the Board denies delegation. *L. Williams (23 June 2010).*

ICANN should assure that the Board's role is to ensure that once submitted to ICANN that applications meet the criteria in the Final Applicant Guidebook as approved by the Board. ICANN should provide clarifying language in the Final Applicant Guidebook that if an application is deemed to have met the criteria, it is not the Board's role to make further deliberations about the application's validity or eligibility. *AusRegistry (20 July 2010).*

Technical evaluation of new backend registry operators. Given the established registry backend operators—i.e., VeriSign, Afilias, Neustar, AusRegistry and CORE, ICANN should evaluate them once and "pass" all applicants who have them as their backend registry providers. This would save ICANN money

and simplify the application process. The only backend registry technical evaluation that would make sense is if the backend registry is new and has no prior history in the business. *.MUSIC (20 July 2010).*

Delegation decision—certainty of process. The Final Applicant Guidebook should provide clarifying information about certainty of process so that each successful gTLD applicant has a clear indication of when their delegation will occur. It is not clear how ICANN decides the order of delegation and how and when successful applicants are informed. *AusRegistry (20 July 2010).*

Registry Failure—continuity of operations and financial instrument requirement.
The requirement for a financial instrument that will guarantee at least 3 years of operation of essential registry services in the event of business failure is an unnecessary drain on the resources of prospective registries already damaged by the long delay of the new gTLD program. The requirement is especially punitive for small registries and will tie up important resources. It will discourage deserving applications and contribute to the failure of others. The goal of protecting registrants can be met by different means. Instead, continuity can be assured through cooperative agreements between registries and/or registry service providers who agree to provide these services in the failed registry. This sort of arrangement, already contemplated by ICANN in its Registry Transition Process document, should be extended to the application evaluation portion of the DAG. ICANN should provide for alternative, non-financial means of guaranteeing registry service continuity, either wholly or in part. *Minds + Machines 21 July 2010). NIC Mexico (21 July 2010).*

Neustar supports the financial instrument requirement. ICANN has done a comprehensive job to deal with situations where a registry operator is also the back-end registry services provider. A financial instrument is appropriate in such a case since there is no third party to continue the registry operations and therefore ICANN could incur significant costs for transition. The current language does not adequately address the situation where the registry operator does not operate the registry services itself but outsources it to a back end registry services provider. In such cases failure of the registry may not result in loss of critical services if the back-end provider continues operations in the event of an applicant failure. This approach would not require a financial instrument. Neustar notes that ICANN has already addressed the issue of the back-end registry service provider failure by requiring contingency planning and submission of a transition plan. *Neustar (21 July 2010).*

Clarifications of language—public comments.
In 1.1.2.5, who will handle public comments and in which way (e.g. ICANN staff, independent evaluators) and how will they be reflected in the evaluation process? *DOTZON (21 July 2010).*

There should be guidelines for evaluators to use when assessing public comments. How will they be determined? How will comment periods be managed? Comments may be used in dispute resolution (1.1.2.7); DRPs should be given guidelines regarding how to assess comments. *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

RSEP fees. The cost estimate for fees for use of the RSEP process seems extremely high ($50K for a three person RSEP panel). What are the individual cost factors that make up this estimate? There are now actual RSEP cases that have been processed, so that the cost model should now be re-evaluated and made more cost effective. *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

Analysis of Comments

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. Additionally, evaluating (i.e., scoring) the beneficial effect of innovation in difficult or impossible and presents contract enforceability issues.

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 (question 18). This is an open-ended question to give the applicant the opportunity to describe the overall scope of its proposal, and to enable informed comment on the application. There is no expectation that this question should be used to eliminate any overlapping user groups, nor is there an assumption that the same group cannot be served by more than one TLD.

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 the relevant markets. ICANN should not judge the effectiveness of an applicant's business model. Rather, ICANN is focused on DNS stability, preventing user confusion, determining whether an applicant has demonstrated basic competencies to run a registry, and protecting registrants and users.

A comment suggests that additional guidelines are needed for the Eligibility requirements as covered in section 1.2.1 of the Draft Applicant Guidebook. ICANN agrees and is moving forward with developing additional guidelines that will be communicated to both potential applicants as well as Applicant evaluators prior to receiving applications. Applicants will still be required to disclose any known issues and can provide clarification of these issues upon submitting the application. Should other issues be found, not previously disclosed by the Applicant, ICANN will seek additional clarification from the Applicant. This clarification request will be conducted during Initial Evaluation.

A comment suggests rephrasing question 11(f), regarding relevant infringing activity in the applicant's background, for greater clarity, to refer to "allegations of intellectual property infringement relating to registration or use of a domain name." This is a useful suggestion and this change will be made in the revision.

Comments have been raised seeking clarity on communication with Evaluation Panelists. One comments asks how Applicants will be notified of communications from Evaluation Panelists while another seeks to ensure that Evaluation Panelists be obligated to seek clarifying questions where needed. Protocols are being developed and will be published to ensure that all Applicants are aware of communications on a timely basis and are provided with same time period to respond to any clarification requests.

In addition, Applicants are expected to provide all necessary and relevant information at the time their application is submitted. This includes complete and accurate information to support relevant criteria in the Applicant Guidebook. Evaluation Panelists are experts in their respective fields and are expected to conduct a thorough analysis based on the information provided by each applicant. If a thorough analysis cannot be completed, then clarification questions may be asked. However, as the Applicant can provide no new information - only clarifying information for the answer or information previously provided - a clarification request may not be needed. Accordingly, clarifications will be at the discretion of the Evaluation Panelist.

Note that the evaluation process is designed 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.

A comment suggests there should be some prioritization of batch processing applications versus random selection. Note that batching will only occur if the volume of applications is so high that the process as already built cannot accommodate it. In such a case, the same concerns highlighted in the discussion of application categorization also apply to establishing categories of applications and prioritization thereof for batch processing. Providing benefit to one set of applicants over another does not promote a fair and impartial process.

A comment suggests that the evaluation should account for differing funding sources when reviewing an application from a not-for-profit entity as opposed to a for-profit entity. It should be noted that the estimated level of funds required for three years of operation is determined by the applicant, not the evaluators. The financial review panel considers the information provided and assesses whether the proposed funding level will be adequate to maintain a secure and stable TLD. This is the case regardless of what type of entity the applicant is.

In relation to Whois requirements, comments suggest that additional steps should be undertaken in regard to Whois accuracy measures as part of the evaluation process. This was discussed and considered previously. Changes in Whois policy require a consensus based, bottom-up decision. ICANN is working on several fronts to improve Whois accuracy: policymaking support, technical, compliance, and performance reviews. In the meantime, there are improvements in the Guidebook including the requirement to maintain a thick Whois database and an option to implement searchable Whois.

In relation to increased security, one comment suggests providing an incentive to encourage applicants to implement more rigorous protections as highlighted in the proposed High Security Zone TLD Program

and another suggests that such rigorous protections be required of certain applicants. Continual improvement in security will always be part of the new gTLD program. Adoption of an HSTLD type certification will be urged for registries whose model connotes "security, such as a TLD providing financial services." There are a number of reasons for making this a requirement of a specific type of application.

Comments seek clarity of Board's role in the evaluation and delegation processes. We agree that further clarification is needed, and consultations with the Board have resulted in the detail provided in the new Guidebook.

A comment suggests that established back-end registry providers be evaluated once as opposed to on a per-application basis. It is agreed that certain efficiencies can be gained in the approach to reviewing applications with the same back-end registry provider, and this will be tested in the evaluation process. However, there is no assumption that all such applications will be identical or should be subject to a less thorough standard of review.

A comment seeks clarification about the order of delegation and how and when successful applicants are informed. This process has been clarified in the Guidebook. The order of delegation depends strictly on how quickly the applicant can complete each step in the process after Initial Evaluation. Note, all applications will complete Initial Evaluation at the same time. If an application passes Initial Evaluation and is not part of a string contention set or does not have any objections pending, then it moves straight to contract execution. Once the contract is signed, the applicant will move straight to pre-delegation check. As this check is passed then it will move directly to IANA for delegation. ICANN expects to have resources available to execute each step as the application progresses. Note, however, that this part of the process is dependent on many factors – including applicant level of readiness – and not solely controlled by ICANN.

In terms of communication, clear posting dates will be communicated to the public and the pool of applicants throughout the evaluation process. As the Applicant progresses through each step, updates will be communicated to the public and to the Applicant directly.

One comment suggests the addition of the names of regional ccTLD organizations to the list of names that are reserved at the top level. This was considered; however, the top-level reserved names list is intended to be as narrow as possible, and cover only those names which have an impact on the DNS infrastructure or are part of the organizational structure of ICANN. The bodies mentioned are certainly contributors to ICANN, but fall more into the category of constituencies, which are more loosely formed and self-governed, and it would expand the list considerably to include all of these as reserved names.

Several comments seek clarification of the public comment process. As discussed in the Applicant Guidebook, the public comment period will open with the public posting of applicant data at the end of the completeness check and prior to commencing Initial Evaluation. To ensure that Evaluation Panels and Dispute Resolution Providers are able to effectively and timely consider public comments, the public comment window will remain open for 45 days. A general comment forum will remain available, but if comments are to inform Initial Evaluation, they must be submitted within the 45-day period. All panelist and dispute resolution providers will have access to the comments. The availability and use of public comments will be discussed with the Evaluation Panels and Dispute Resolution Service Providers as part of their training. In the case of a dispute resolution proceeding, the panel must provide the reasoning

upon which the expert determination is based, which might include consideration of relevant public comments.

Comments regarding the financial instrument requirement suggest that ICANN should provide alternatives, or that the requirement would be irrelevant in the case where part or all of the registry operations are outsourced to a third-party service provider. The two options currently included in the guidebook ([a] letter of credit or [b] cash escrow deposit) are in place because they provide the most efficient and reliable means for transfer of funds in the event of a registry failure scenario. Other options (such as those contained in earlier drafts of the guidebook) have been considered in detail for implementation, but could not offer the same speed or reliability without being cost-prohibitive for applicants. Note that the funds are only released if a threshold is met for failure of one of the critical functions. It should be considered that even if the existing service provider continues to execute the critical functions in the short term, it is not clear that such a provider would be willing to continue such operations indefinitely, especially in the absence of financial provision for it by the registry operator. The financial instrument is considered a cornerstone of registrant protection and thus is a requirement across all new gTLDs for a particular time period.

With regard to the registry services portion of the evaluation process, a set of comments suggested changes to the definitions of 'security' and 'stability' that are employed. The current definitions are found in existing registry agreements and can also be found in the Registry Services Evaluation Policy ("RSEP") -- see 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 withhold approval of a particular service. These definitions are critically important terms and part of a process that has a significant impact on the DNS. A change to the currently accepted and workable process should be subject to a broader stakeholder discussion.

With regard to estimated RSEP fees, comments suggested that the model could be more cost-effective. The current expected fee of $50,000 was estimated based on a significant decrease from historical costs. 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.

TRADEMARK PROTECTION

Key Points

- Comments from every section of the ICANN community and broader Internet community have been thoroughly considered in the development of the current trademark protection mechanisms called for in the Applicant Guidebook.
- These trademark protections reflect carefully crafted compromises that received broad support within the GNSO and At-Large communities.
- Although some debate adequacy, the new trademark protections are unprecedented and aim to create a balance between all interested parties with a main focus of protecting rights holders and consumers, including both registrants and Internet users.

Summary of Comments

Registry option to exceed baseline rights protection. Most of the comments to date from the IP community are of a "baseline" nature, while registries themselves can choose to go over and above these requirements. Big Room invites feedback from IP and trademark experts as to what a "best in class" sunrise and ongoing rights protection mechanism(s) would entail. *Big Room (21 July 2010).*
What is expected of a registry operator section (5.4.1). This is an important section which includes key requirements such as DNSSEC deployment requirement, Whois service, maintenance of an abuse point of contact, and continuity. BITS suggests that ICANN require both the Trademark Rights Service and the Sunrise period at startup. *BITS (22 July 2010).*

Support for level of IP protection
The DAG is sufficient and is a significant concession to trademark owners even though the IRT's recommendations were not accepted in their entirety. Every interest group within the ICANN community has found that they need to live with something that is, from their point of view, less than perfect. The IP community should be no exception especially in light of the considerable concessions already made to them. *Minds + Machines 21 July 2010).*

We work in the interest of the global hotel industry and we support the proposed instruments for rights protection, which are the result of intense discussions within the ICANN community. *HOTEL (21 July 2010).*

Subject to minor drafting matters the trademark overarching issue should be considered complete. The protections developed through stakeholder discussion and compromise will provide trademark holders with significantly more protection than exists in current gTLDs. *R. Tindal (21 July 2010). Domain Dimensions (22 July 2010). Demand Media (22 July 2010). D. Schindler (22 July 2010).*

Trademark protection not adequate.
IOC appreciates ICANN's recognition of IOC's comments regarding special statutory trademark protection as a proposed standard for inclusion in the trademark clearinghouse. However, IOC finds troubling the statements from ICANN leadership confirming that trademark protection in new gTLDs is believed to be a settled issue. *IOC (21 July 2010).*

Current RPMs do not adequately address trademark concerns. *WIPO Center (16 June 2010). Arla Foods (6 July 2010). LEGO (6 July 2010). JONAS (11 July 2010). VKR Holding (13 July 2010). Nilfisk (13 July 2010). LEO Pharma (14 July 2010). Vestas (16 July 2010). Coloplast (19 July 2010). MarkMonitor (19 July 2010). BBC (21 July 2010) C. Speed (21 July 2010). Hogan Lovells (21 July 2010). IPC (21 July 2010). DuPont (21 July 2010).Comerica (3 Aug. 2010). Carlson (21 July 2010). Sunkist (21 July 2010).Solvay (22 July 2010). ETS (22 July 2010). LifeScan (22 July 2010). INTA Internet Committee (21 July 2010). Coca-Cola (21 July 2010).News Corporation (21 July 2010). Adobe Systems (21 July 2010). SIIA (21 July 2010). Microsoft (21 July 2010). ABA (22 July 2010). Liberty Mutual (22 July 2010). AIM (Module 5, 14 July 2010). Nestle (21 July 2010).*

Nilfisk is against introduction of new TLDs as long as the current system does not secure effective solutions to cybersquatting and trademark infringement. *Nilfisk (13 July 2010).*

ICANN has not adequately addressed the overarching issue of trademark protection in the new gTLDs. *INTA Internet Committee (21 July 2010). Adobe Systems (21 July 2010*

Introduction of new gTLDs will create vast opportunities for bad faith registrations and harm intellectual property owners and consumers. Consumers will lose trust in trademarks as guides in the global market. *JONAS (11 July 2010). INTA Internet Committee (21 July 2010).*

It is inevitable that conflicts will arise between competing brand owners in different jurisdictions. It is naïve to suggest (as ICANN does) that applicants identified as in contention can be encouraged to reach a settlement or agreement to resolve that contention, at least where trademark rights are concerned. 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. We do not consider it possible to reconcile the conflict between territorial trademark rights and the global nature of the Internet. It is for this reason among others that BBC has opposed and maintains its opposition to ICANN's proposals. ICANN needs to adopt a solution which genuinely lessens the need for defensive registrations and the administrative and financial burden on trademark owners. *BBC (21 July 2010).*

It is extremely disappointing that ICANN has failed to take the opportunity to require registry operators to adopt and implement rapid takedown or suspension systems to combat malicious conduct. Microsoft reiterates the proposal it made for this in its version 3 comments, including being amenable to having one or more Microsoft employees with relevant expertise to work on an ICANN-convened expert group to develop a required rapid takedown or suspension system. *Microsoft (21 July 2010).*Notwithstanding a succession of processes, there as been little truly substantive dialog on trademark considerations. Exchanges are subject to palpable registration-driven pressures, and have not lived up to a proper standard of open and informed dialog, which is key to a long-term, stable DNS framework. This is illustrated by the heavily compromised state of the envisaged protection mechanisms: the PDDRP ignoring willful blindness; the URS becoming overburdened; and the TMC not providing a level playing field. These circumstances support the Economic Framework paper's recommendations that ICANN proceed in a controlled manner, i.e., in discrete limited rounds. WIPO staff will continue to monitor developments and remains available to contribute to rights protection systems that work for durable DNS expansion. *WIPO Center (21 June 2010).*

The trademark protections in the current guidebook are weak and inadequate. If ICANN does not review the current guidebook and adapt it to respond positively to our concerns, our members will appeal to national governments and other bodies. *MARQUES/ECTA (21 July 2010).*

Significant issues of concern remain regarding intellectual property protection. The online community will benefit from a smartly designed TMC and URS and IHG looks forward to seeing them through. *IHG (20 July 2010).*

The cost of acquiring a gTLD is too high for most companies, as well as the cost of enforcement of their trademark rights. At the very least, ICANN should allow for a period of time for existing companies with established, registered trademarks to register those trademarks with ICANN (or ICANN should be required to do a trademark search) to avoid this problem. *Piper Aircraft (14 July 2010).*

AAFA requests that ICANN reevaluate and revise the current rights protection mechanisms proposed for both the application process and post-delegation to ensure that brand owners' (i.e., the apparel and footwear industry that is so dependent on the strength of their reputation and brand names) legitimate concerns and rights are properly protected and assured in the new gTLD space. Without requisite mechanisms in place to protect brand owners in the application process and post-delegation, AAFA is concerned that the new gTLD program could provide a vehicle for rampant abuses and exploitation of its apparel and footwear members' valuable marks and brands to increase exponentially. The apparel and footwear industry is concerned that the proposed high costs of registering a new gTLD will not deter the often well-funded and highly organized counterfeiting operations that are prevalent online. As cost alone is unlikely an impediment to these bad actors, stronger brand protection mechanisms are critical. The RPMs need to be stronger, less costly and more efficient than the RPMs currently proposed in the DAGv4 for protecting trademarks. The overwhelming burden still falls substantially on brand owners to stop infringement, and the proposed processes to do so remain overly cumbersome, expensive and time intensive for brand owners. *AAFA (21 July 2010).*

ICANN should address trademark owners' concerns about the current inadequate protection measures in DAGv4 by providing for rules that:
- Avoid discriminatory treatment of trademark registrations;
- Provide for equitable and efficient resolution of situations of split trademark ownership (e.g. geographic split or product category split);
- Include clear procedures for the trademark repository and recognition of trademark registrations;
- Include IP rights other than trademarks alone;
- Provide for an equitable and efficient dispute resolution system (a shifting burden of proof after demonstration of a prior IP right, including the "loser pays" principle);
- Streamlining the appellate procedure;
- Providing unambiguous provisions for transfer or cancellation of domain names; and
- Including clarification on closed gTLDs.

PMI (21 July 2010).

Dilution of IRT work.
ICANN has allowed the mechanisms proposed by the IRT to be worn away, as ICANN evidently hopes that stakeholders will be worn down until they can be ignored entirely. The relevant provisions in AGBv4 have changed little from the STI Review Team recommendations. There is not consensus on the RPMs in DAGv4 which, if taken together, fall well short of an effective response to the problem of trademark-related external costs in the new gTLD process. ICANN's refusal to strengthen these mechanisms, even so far as to bring them back to the level originally recommended by the IRT, is tantamount to concluding that trademark holders and the public at large should bear these costs, which is contrary to the public interest that ICANN has pledged to serve. *Time Warner (21 July 2010). Com Laude (21 July 2010). Hogan Lovells (21 July 2010). HSBC (21 July 2010). MPAA (21 July 2010). INTA Internet Committee (21 July 2010).*

ICANN should proceed generally with all of the mechanisms set forth in the IRT report. *USCIB (21 July 2010). Microsoft (21 July 2010).*

The overarching trademark issues have not been resolved. It would not be a backwards step to re-form the IRT; changes are needed and the IRT is well placed to advise in this area. *C. Speed (21 July 2010).*

ICANN should either turn to qualified IP experts to craft a package of effective protection measures or return to the original recommendations of the IRT report. WIPO could have a key role in this process and could use the IRT's original proposals as the starting point. ICANN should start out with strong measures that could be liberalized later if necessary. To satisfy the broader community, a review of such measures could be instigated after they are operational (e.g. after two years). *MARQUES/ECTA (21 July 2010).*

The AGBv4 is a step backwards—ICANN has inexplicably chosen to dilute the long-term solutions presented by the IRT. Without adequate remedies, the issue of trademark protection remains unresolved. The current proposals are too burdensome, expensive and unwieldy compared with existing remedies such as the UDRP or civil remedies available under the ACPA. We do not expect the business or trademark community to endorse or make wide use of the current trademark protection proposals in the future. At a minimum, all trademark protection remedies must be: (1) effective as a remedy; (2) reasonably expedited; (3) stringent enough to avoid gaming; (4) based on actual costs (which avoids further monetization and extraction of unnecessary fees from trademark holders); (5) provide for increased certainty; and (6) result in making the trademark holder whole. *Verizon (20 July 2010). IPC (21 July 2010). DuPont (21 July 2010). Rosetta Stone (21 July 2010).*

Process.
It is clear from comments of senior ICANN staff at the Brussels meeting that no further major changes to the AGBv4 on rights protection mechanisms will be seriously entertained. The cross-community efforts to date are not a triumph of the bottom-up policy development process. Rather, the almost complete lack of support for the final outcome (the insufficient mechanisms now included in AGBv4) among members of the community with the most at risk demonstrates that the process has been a failure. The real losers will be the consuming public on whose interests in avoiding marketplace confusion and fraud the entire trademark system is based. *COA (21 July 2010). BBC (21 July 2010). Adobe Systems (21 July 2010).*

It is ironic that ICANN prepares to announce "mission accomplished" on RPMs just when its Economic Framework paper calls for an objective study of the full costs to trademark owners of new TLDs (e.g., enforcement, monitoring, defensive registrations). This should have been step one in devising a sound and efficient system of RPMs, not an epilogue to a tale on which ICANN is about to close the book. *COA (21 July 2010). BBC (21 July 2010).*

Relationship to UDRP. The current new gTLD program's RPMs should meaningfully complement, not destabilize, the proven, globally recognized UDRP. *WIPO Center (16 June 2010).*

Expansion. There is a substantial gap in coverage among the currently proposed trademark protection proposals. Currently there is no DRP or other mechanism that allows a brand owner directly to confront registrar misconduct. *INTA Internet Committee (21 July 2010).*

Globally protected marks list (GPML).
The lack of a GPML in AGBv4 is very disappointing as it could have provided some relief for trademark owners of such marks. *Arla Foods (6 July 2010). LEGO (6 July 2010). Nilfisk (13 July 2010). Vestas (16 July 2010). MARQUES/ECTA (21 July 2010). HSBC (21 July 2010). IPC (21 July 2010). DuPont (21 July 2010). IPOA (21 July 2010). Coca-Cola (21 July 2010). News Corporation (21 July 2010). Adobe Systems (21 July 2010). SIIA (21 July 2010). Nestle (21 July 2010).*

Without the GPML there is no proactive trademark protection provided with the launch of new gTLDs. *AT&T (21 July 2010). AIPLA (21 July 2010). BC (26 July 2010). AIM (Module 5, 14 July 2010).*

Analysis of Comments

Many have commented on the general nature of trademark protections that have been put in place for the New gTLD Program. Some think they are sufficient, some think they are not sufficient and some have said that there has not been enough substantive discussion on the issues. Still others state that any protections put in place should extend to registrars.

It is important to reflect on the chronology of events that led to the development of the trademark protections now included in the New gTLD Program for new gTLDs. After the early versions of the Applicant Guidebook were posted, the trademark community spoke out loudly and clearly – more trademark protections were needed. Those comments were heard by ICANN. In response, the Board resolved to establish an Implementation Recommendation Team (IRT), to help identify and propose rights protection mechanisms (RPMs) for trademark holders within the New gTLD Program (*see* http://www.icann.org/en/minutes/resolutions-06mar09.htm#07). The IRT described itself as a group of 18 people experienced in trademark protection on the Internet.

Specifically, the Board asked the IRT to develop a set of solutions that addressed trademark protection and consumer protection in a way that was workable, and that was acceptable to other interests. Other parties were invited to respond to the IRT work, to propose solutions, and an extensive public outreach process was initiated, including several regional events held throughout the world.

In a series of face-to-face meeting, conference calls, and public consultations, the IRT engaged in intensive substantive discussion and developed specific recommendations (http://icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf), reflecting "the views of business and trademark interests in general." Those recommendations included proposals for an IP Clearinghouse ("Clearinghouse"), a Uniform Rapid Suspension System ("URS"), a Trademark Post-delegation dispute resolution procedure ("PDDRP"), and a globally protected marks list ("GPML"). Concerns from the broader ICANN Community immediately emerged with respect to several IRT recommendations. After significant public comment, through both the public comment forum and numerous face-to-face meetings, additional refinement of the IRT proposals were needed in order to balance the interests of the community as a whole, the trademark holders, and registrants with legitimate interests in registering domains that might also be the subject of a trademark. Compromises were also required in light of the implementation difficulties of some of the IRT proposals.

The next iteration of the Guidebook included nearly all of the trademark protection mechanisms suggested by the IRT, including the Clearinghouse, the URS and the PDDRP. The GPML was not included in light of the implementation difficulties with, and the significant opposition to, such a list.

After further comment, discussion and revision, the Board sent the Clearinghouse and the URS proposals back to the GNSO. The Board requested the GNSO Council's view on whether the Clearinghouse and URS recommended by the staff were consistent with the GNSO's proposed policy on the introduction of new gTLDs, and were appropriate and effective for achieving the GNSO's stated principles and objectives.

In response to the Board's request, the GNSO established the Special Trademark Issues Review Team ("STI"), consisting of members of each Stakeholder Group, At-Large, Nominating Committee Appointees, and the GAC. The STI issued a final report on 17 December 2009, including several recommended revisions to the Clearinghouse and the URS proposals (*see* http://www.icann.org/en/announcements/announcement-2-17dec09-en.htm), which were unanimously adopted by the GNSO.

In addition, ICANN invited community participation in an open consultation process to discuss and propose revisions to, among other things, the PDDRP. This group was formed as the temporary drafting group ("TDG").

Together, the IRT recommendations, the STI revisions, the TDG revisions, and comments from every section of the ICANN community and broader Internet community were taken into consideration in the development of the current trademark protection mechanisms called for in the Applicant Guidebook. These new trademark protections are unprecedented and are intended to create a balance between all interested parties with a main focus of protecting consumers, including both registrants and Internet users.

These trademark protections now part of the new gTLD Program include:

- The requirement for all new registries to offer either a Trademark Claims service or a sunrise period at launch.
- The establishment of a Trademark Clearinghouse as a central repository for rights information, creating efficiencies for trademark holders, registries, and registrars.
- Implementation of the URS that provides a streamlined, lower-cost mechanism to suspend infringing names.
- The requirement for all new gTLD operators to provide access to "thick" Whois data. This access to registration data aids those seeking responsible parties as part of rights enforcement activities.
- The availability of a post-delegation dispute resolution mechanism that allows rights holders to address infringing activity by the registry operator that may be taking place after delegation.

And of course, the existing Uniform Domain Name Dispute Resolution Policy (UDRP) continues to be available where a complainant seeks transfer of names. Compliance with UDRP decisions is required in all new, as well as existing, gTLDs.

Each of the recommendations above is intended to provide a path other than defensive registrations for trademark holders.

The application process itself, based on the policy advice, contains an objection-based procedure by which a rights holder may allege infringement by the TLD applicant. A successful legal rights objection prevents the new gTLD application from moving forward: a string is not delegated if an objector can demonstrate that it infringes their rights.

Contrary to the comment that there has been very little substantive discussion on this issue, the likely thousands of emails and hundreds of teleconferences had by the IRT, the STI, the TDG, the GNSO Council, the At-Large and numerous other stakeholder groups and constituencies relating to trademark

protection point to the significant effort and attention dedicated to the evaluation of these new trademark protections. These are in addition to the face-to-face meetings held at each of the ICANN Public Meetings as well as apart from those public meetings, such as those held by ICANN in Marina del Rey, New York and London.

Finally, in response to other trademark protections proposed but not included in the Applicant Guidebook, such as extending applicable trademark protections to registrar conduct, such ideas could be further explored through the initiation of policy development through the GNSO Council.

TRADEMARK CLEARINGHOUSE

General

Key Points

- In terms of entry into the Clearinghouse, all nationally or multi-nationally registered marks are eligible, as well as mark validated by a court, or protected by statute or treaty (subject to some date limitations).
- Steps have been taken to ensure consistency and to prevent similarly situated applicants from being treated differently.

Summary of Comments

Clearinghouse Proposals.
ICANN should share first drafts of the IP clearinghouse process as soon as possible. *dotZON (21 July 2010). HOTEL (21 July 2010).*

The Clearinghouse section should focus on "what we want" and avoid "how it gets done" as this section will be the nucleus for a later RFP and it is important to stimulate creative and competitive proposals from a wide range of service providers of the trademark industry. *EnCirca (Module 5, 21 July 2010).*

Evolution of Clearinghouse. There should be a mechanism for the Clearinghouse to evolve in its uses in the future. To enable this, following the sentence "The reason for such a provision would be to prevent the Clearinghouse from using the data in other ways" add the phrase "without undergoing the ICANN public participation process." *EnCirca (Module 5, 21 July 2010).*

Support for Clearinghouse as drafted in AGBv4. It was supported by both the IRT and STI, has broad acceptance from ICANN constituencies and received approval from the GNSO Council. *R. Tindal (21 July 2010). Domain Dimensions (22 July 2010). Demand Media (22 July 2010).*

Clearinghouse is not an RPM.
The Clearinghouse is not a protection mechanism—it is merely a database. *VKR Holding (13 July 2010). MarkMonitor (19 July 2010).Comerica (21 July 2010). Solvay (22 July 2010). ETS (22 July 2010).Carlson (21 July 2010).C. Speed (21 July 2010). CADNA (21 July 2010). Sunkist (21 July 2010).Adobe Systems (21 July 2010). LifeScan (22 July 2010).Liberty Mutual (22 July 2010). BC (26 July 2010). NCTA (Module 3, 21 July 2010). AIM (Module 5, 14 July 2010).*

The Clearinghouse is just a database, and it would promote the need for defensive registrations. *Arla Foods (6 July 2010). LEGO (6 July 2010). LEO Pharma (14 July 2010). Vestas (16 July 2010). Coloplast (19 July 2010). BBC (21 July 2010). Verizon (20 July 2010). PMI (21 July 2010). HSBC (21 July 2010). DuPont (21 July 2010). AIM (Module 5, 14 July 2010).*

The Clearinghouse provisions in AGBv4 do not fully encompass the IRT recommendations in focusing support of pre-launch service. *USCIB (21 July 2010).*

<u>Burden on trademark owners</u>.
The Clearinghouse potentially obliges the trademark owner to record all of their trademarks from all territories, significantly increasing costs and workload. Since the trademark owner receives no notice of the application for registration and no opportunity to communicate with the registrant prior to registration, one national registration per mark may not be sufficient for inclusion in the Clearinghouse.

The Clearinghouse requires an extra charge for brand holders, does not provide comprehensive coverage given that only identical marks can be registered and common law marks are left out. The Clearinghouse is given unprecedented discretion to validate and authenticate trademarks for registration in the Clearinghouse. *MarkMonitor (19 July 2010). Carlson (21 July 2010). Comerica (21 July 2010). Sunkist (21 July 2010). Solvay (22 July 2010). LifeScan (22 July 2010). ETS (22 July 2010). Liberty Mutual (22 July 2010).*

Analysis of Comments

There have been some comments about the timing and openness of the Clearinghouse proposal process. It should be noted that each version of the proposal (originating with the IRT proposal) has been published for public comment and continues to be revised and improved as a result of public comment. Importantly, as can be seen from the Clearinghouse proposal, not <u>all</u> aspects have been fully addressed as some are necessarily left to the potential providers to explore and develop.

Some commentators have suggested that the Clearinghouse is simply a database and others suggest it will promote the need for defensive registrations. It is unclear as to why that might be the case. The need for defensive registrations should be reduced if trademark holders register their marks in the Clearinghouse because it will better enable the trademark holder to avail itself of all rights protection mechanisms in the pre-delegation process.

The IRT recommendations with respect to the Clearinghouse have been the subject of substantial review and comment. The GNSO appointed the STI to evaluate the recommendations of the IRT and provide input. The STI then set forth its proposal at http://www.icann.org/en/announcements/announcement-2-17dec09-en.htm. That revision was posted in February 2010 and was the subject of public comment. Again the model was reviewed and published for additional comment in April 2010. In balancing the competing comments, not all suggestions could be incorporated as they often reflected opposite ideas, many of which had been considered by the STI. The resulting Clearinghouse is the product of this detailed review and analysis.

Much discussion surrounded which marks should be eligible for inclusion in the Clearinghouse. On the one hand, trademark holders wanted to be sure that they could register their marks but at the same time there were concerns that fraudulently obtained registrations could used to game the system. The

result of review and input from a variety of constituencies was to create a list of specific criteria for entry. In terms of entry into the Clearinghouse, all nationally or multi-nationally registered marks are eligible, as well as marks validated by a court, or protected by statute or treaty (subject to some date limitations). In creating objective criteria, steps have been taken to prevent the exercise of discretion and to prevent similarly situated applicants from being treated differently.

Procedural Aspects

Key Points

- Costs should be borne by the parties utilizing the services.

- In order to protect access to data, providers will be the only entities that have full access to Clearinghouse data.

Summary of Comments

Costs.
Registries and registrars (not most trademark owners) will be the main beneficiaries of the Clearinghouse and they should also contribute to its costs. ICANN should also bear some of this cost. ICANN stands to generate substantial revenues through the new gTLD process and it should bear some responsibility to ensure that the new program does not facilitate widespread infringement of brand owner rights and widespread confusion and deception of the public. *BBC (21 July 2010). CADNA (21 July 2010). NCTA (Module 3, 21 July 2010).*

The cost of funding the Clearinghouse should be apportioned between the entities that will profit economically from new gTLDs—ICANN, registry operators and registrars (see Clearinghouse, sec. 10). *IOC (21 July 2010).*

Trademark owners should pay only the transaction costs directly associated with the inclusion of their individual trademarks and they should not pay for elements of Clearinghouse overhead and its fixed operational costs. *IPOA (21 July 2010). AIPLA (21 July 2010).*

If the cost of the Clearinghouse is to be borne by those using the service, then there should be not additional charges by registries to trademark owners for sunrise/claims services other than the annual domain name registration fee and the fees should be the same as those charged for general landrush registrations. *Grainger (Module 5, 19 July 2010).*

IBM agrees that the cost of running the Clearinghouse should be borne by the parties utilizing the service and this cost should be nominal. The cost of establishing the Clearinghouse should be assumed by ICANN. Every study indicates that the new gTLD program will be a significant cost to brand owners for enforcement and cessation of brand misuse. The cost of the Clearinghouse should be shared with the new registries via a portion of the funds collected by ICANN for gTLD applications and maintenance. *IBM (21 July 2010).*

Setting Clearinghouse Fees.
Under subsection 4.2 fees for services should be set by ICANN. We also agree under subsection 4.2 that the detailed registrar accreditation agreement is an appropriate model. *IPOA (21 July 2010).*

Fees relating to the Clearinghouse should be determined as soon as possible so that not-for-profit organizations can budget in advance for the new gTLD process. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Fees under subsection 4.2 should be set by ICANN. *AIPLA (21 July 2010).*

Clearinghouse operator. ICANN must choose a third party contractor with extensive experience in trademark protection issues and do so via an open and transparent process. CADNA requests a preview of the proposed contractual arrangement in order to gain a fuller understanding of what this role will entail. *CADNA (21 July 2010)..*

Access to Clearinghouse. Who will have access to Clearinghouse data and services must be clarified. *CADNA (21 July 2010).*

Deposit of marks. Deposit of marks into the Clearinghouse should be clarified so that it is clear that a trademark owner does not need to register the corresponding domain name in the many new gTLDs. Trademark owners will not have a significant incentive to participate in the Clearinghouse if they have to deposit both their marks and also engage in multiple defensive registrations. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Analysis of Comments

Many comments revolve around who will pay for the Clearinghouse and the fess that will be charged. ICANN recognizes that this is an important issue, which has been often discussed, including by the IRT and the STI. As stated by the STI and adopted in the latest version of the Trademark Clearinghouse, "Costs should be completely borne by the parties utilizing the services. ICANN should not be expected to fund the costs of … operating the TC. The TC should not be expected to fund ICANN from its fees." The cost of establishing the Clearinghouse is to be borne by ICANN and the Clearinghouse provider(s). As for the fees that the Clearinghouse provider(s) will charge, ICANN will select provider on open bidding process and economical fees will be part of the consideration process.

One commenter notes that the Clearinghouse provider should be experienced in trademark issues and be chosen in open and transparent manner. As set forth in AGBv4, the service provider(s) will be selected on the basis of predetermined criteria which includes the ability to store, authenticate, validate and disseminate the data at the highest level of technical stability and security without interference with the integrity or timeliness of the registration process or registry operations. The process will continue to be transparent and subject to public comment. The details of the contractual relationship as it is currently envisioned is set forth in the AGBv4 at section 4.

In terms of access to data, the Providers will be the only entities that have full access to Clearinghouse data. As set forth in the current AGBv4, it is envisioned that one provider will house the repository and another provider will authenticate/validate the marks. There will be extensive provisions in the contract relating to maintenance of the data.

In terms of use of the Clearinghouse, it is not meant to be a bar to registrations of the trademark TLDs or an automatic registration in each TLD. It is a database that registry operators are required to utilize when offering either a pre-launch Sunrise service or Trademark claims process.

Authentication and Validation

Key Points

- ICANN intends to utilize a provider with regional presences so that appropriate expertise exists for complaints from any geographic area.
- Some form of penalty or graduated penalty system will be implemented for a rights holder's failure to keep information current in the Clearinghouse.

Summary of Comments

Regional Authentication. No basis for the regional authentication service appears in the IRT or GNSO-STI reports. IPOA opposes it unless there is some justification. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Updated information. A trademark owner's failure to respond to a legitimate request from the Clearinghouse Administrator to update could yield a series of warnings and ultimately suspension from the Clearinghouse pending a response. It would be impractical to try to collect monetary penalties from trademark owners who may be out of business or who may have failed to advise their successors in interest of their Clearinghouse entries. IPOA also supports mandated periodic renewals (e.g., perhaps every 5 or 10 years) to maintain the quality of information contained in the database. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Data and Authentication Guidelines.
What is the intent of the last paragraph of Section 7, Data Authentication and Validation Guidelines? Is that a backdoor mechanism for Clearinghouse entry for marks that could not otherwise qualify? *AIPLA (21 July 2010).*

A qualifier is missing in the last paragraph for validation of marks by the clearinghouse. For the sentence that reads "in connection with a bona fide offering for sale of goods or services" should be inserted the phrase "in the goods specified in the trademark registration." This will help prevent the inclusion of sham trademarks in the Clearinghouse (e.g. generic words applied for in obscure trademark classes that have never been used in commerce for the goods specified). *EnCirca (Module 5, 21 July 2010).*

The criterion that a trademark owner must submit a declaration is costly and burdensome. Why does it not suffice to use a certified copy of a valid trademark registration certificate or the official online database record of the relevant trademarks registry? *BBC (21 July 2010).*

We strongly object to the Clearinghouse being used as a validator for marks because this is beyond the intended purpose of the Clearinghouse. The term "Clearinghouse—validated marks" should be removed. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Evidence of use for mark validation.
ICANN's proposal for the Clearinghouse's validation of marks through the trademark owner's production of evidence of continuous use of the mark is burdensome and inconsistent with national legislation where there is a grace period between registration of mark and the obligation to use it. Such evidence of use, if produced to "validate" the mark, should

not be published in any way or to any person as it could be highly confidential and commercially sensitive. *BBC (21 July 2010)*

A trademark owner should be required to provide evidence of current bona fide use, but should not be required to prove that they had rights "continuously" since registration. *INTA Internet Committee (21 July 2010).*

Analysis of Comments

Regional authentication has been the subject of public comment. Because the Clearinghouse will be a central repository that will be tasked with authenticating/validating data from all over the world, it was suggested that a provider with regional presence be enlisted to assist and expedite the process. On balance, given the efficiencies that can be achieved the current proposal suggests utilizing a provider with regional presences to be called upon when appropriate. All will still be subject to the same rigorous standards.

Some have commented on the particular penalties to be implemented for a failure to keep information current in the Clearinghouse. Currently, it is envisioned that some form of penalty or graduated penalty system will be implemented for a failure to keep information current, the details of which will be finalized when the provider(s) are selected. It is understood that monetary penalties will not be practical and will not serve the intended purpose of encouraging prompt communication with the Clearinghouse and keeping information current.

Comments have been submitted surrounding the use and description of the terms "authentication" and "validation". One commenter requested clarification of the last paragraph of the Data and Authentication Guidelines and another suggested one addition. After careful review, this language will be revised. First, only authentication of registration of marks is required for entry into the Clearinghouse. The "validation" referenced in the final paragraph of this section of the Clearinghouse proposal refers to validation of "use", which will be needed to ensure protection in a sunrise services offering by a registry. Second, the addition recommended does make the statement more clear and will be included.

In terms of safeguarding data, it is anticipated that to the extent there is confidential or commercially sensitive submissions made to the Clearinghouse for validation purposes, the provider will have the appropriate means in which to safeguard the confidentiality/access to such information. Such means for maintaining confidentiality will be required in the provider(s) contract(s) with ICANN and the tender process will require demonstration of this capability.

One group has commented that a standard for the Sunrise process inclusion that "continuous" use of the mark should not be required. Such level of use was included to ensure that only valid registrations are capable of registration in a Sunrise period. If the rights were not continuous, the registration in some jurisdictions will no longer be valid. Continuous does not mean, however, that it is used everyday, but rather that the use continued over time.

Eligibility for Inclusion and Protection

Key Points

- Substantive review by Trademark Clearinghouse validation service provider shall require: (i) evaluation on absolute grounds; and (ii) evaluation of use.
- Both the IRT and the STI agreed that identical match is required for a mark to be protected in sunrise or provide notice under claims services.

Summary of Comments

Many critical, open issues remain with the Clearinghouse. It still limits the intellectual property that may be registered in the database to text marks that are (1) nationally registered; (2) court-validated; or (3) protected by statute or treaty. Much greater clarification is needed before the Clearinghouse can serve the objective for which it was intended by the IRT. *News Corporation (21 July 2010). IACC (21 July 2010).*

Substantive Review or Evaluation.
IOC is encouraged that "substantive review" of nationally registered trademarks is no longer a prerequisite for inclusion in the Clearinghouse (Clearinghouse secs. 5 & 9). But this will be futile if later rights protection mechanisms (e.g. Sunrise Registration Services and the URS) apply any "substantive review" standard. IOC reiterates that if domain name speculators are concerned about the ease by which generic words can be registered in certain countries, then the domain name speculators should bear the onus of initiating the challenge procedures previously recommended by ICANN. *IOC (21 July 2010).*

The "substantive review" or "substantive examination" language should be changed to "examination on absolute grounds". This should address the problem of gTLD applicants basing applications/objections on trademark registrations for purely descriptive words obtained in countries that conduct no examination on absolute grounds. *C. Speed (21 July 2010).*

Under sec. 4.1.1, the language provides that the entity would "validate" marks from jurisdictions that do not conduct substantive review. If the disparate treatment of such marks remains in the Clearinghouse implementation scheme then the criteria for this validation should be specified. *IPOA (21 July 2010). AIPLA (21 July 2010).*

The term "substantive examination" should be clarified to specify that "substantive review" refers to examination for "inherent registrability" or "on absolute grounds". *IPOA (21 July 2010). AIPLA (21 July 2010).*

"Substantive review" needs to be clarified to eliminate confusion as to what types of marks qualify for the Clearinghouse. *AT&T (21 July 2010). INTA Internet Committee (21 July 2010).*

ICANN should create a proper definition of "substantive review" or better still abandon the idea in favor, e.g., of "review on absolute grounds." It is unfair to expect the operators of the Clearinghouse to decide which marks from which jurisdictions can be included. Discriminating between official trademark registries is not a role for the Clearinghouse operator or an appropriate issue upon which ICANN itself

has any standing to influence. *MARQUES/ECTA (21 July 2010). Microsoft (21 July 2010). AIM (Module 5, 14 July 2010).*

Absence of a proper definition of "substantive review" means that mark owners in some parts of the world will be discriminated against (including the EU). Any Clearinghouse must be nondiscriminatory and the Clearinghouse operators must not be the arbiter of the validity of trademarks. *Com Laude (21 July 2010). PMI (21 July 2010). BBC (21 July 2010)*

ICANN should clarify what constitutes "substantive review" and what validation processes will be required, e.g., for marks registered in jurisdictions that do not require a "substantive" review. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010). Hogan Lovells (21 July 2010). IPC (21 July 2010). INTA Internet Committee (21 July 2010). SIIA (21 July 2010).*

"Substantive review" clarification is needed as it pertains to eligibility for Sunrise Services. I.e., whether "substantive review" includes: (1) absolute grounds; (2) relative grounds; or (3) absolute grounds plus an opposition period. Trademarks in many jurisdictions (e.g. from some European national trademark offices) could be excluded from eligibility for Sunrise Services if "substantive review" does not include examination based only upon "absolute grounds." The trend for trademark examination in several jurisdictions such as Europe is moving away from a relative ground review and towards solely an absolute ground review, leaving relative ground review to oppositions. It would be anomalous if such trademarks were only eligible for Sunrise Services if they have been successfully opposed. *IBM (21 July 2010).*

The current design appears to turn the Clearinghouse into an arbiter of the validity of trademarks legitimately obtained through systems applied in many jurisdictions. The Clearinghouse must be non-discriminatory to counter possible gaming. (The possibility could be explored of treating registered marks as prima facie valid, e.g., where subject to later challenge.) *WIPO Center (16 June 2010).*

The Clearinghouse falls short because registries are not required to incorporate their pre-launch RPMs protections for all trademark registrations of national or multinational effect. *COA (21 July 2010).*

The Clearinghouse should not be biased in a selective recognition of valid trademarks. If the Clearinghouse adopts exclusionary standards, many trademark holders will remain unjustly exposed to fraud and abuse. It is not the role of the Clearinghouse to judge the quality of international trademark regulations, but to enforce them. *IHG (20 July 2010). AIPLA (21 July 2010). Nestle (21 July 2010).*

Identical match limitation.
Limiting use of clearinghouse data to identical matches (and only at launch) would miss many abusive domain name registrations. *WIPO Center (16 June 2010). Verizon (20 July 2010). C. Speed (21 July 2010). PMI (21 July 2010). BBC (21 July 2010). Coca-Cola (21 July 2010). Adobe Systems (21 July 2010). Rosetta Stone (21 July 2010). USCIB (21 July 2010). ABA (22 July 2010). NCTA (Module 3, 21 July 2010).*

The identical match definition should at least be the same as IRT, should take into account the singular and plural of the Mark, and account for typographical variations (for typosquatting). *BC (26 July 2010).*

The "identical match" for the Clearinghouse should be expanded slightly to avoid numerous potential instances of typosquatting (e.g. plural forms of domain names containing the mark). *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Given how cybersquatters and phishers operate, it is imperative that the Clearinghouse be broadened to include domain names which are "confusingly similar" not just identical. *IHG (20 July 2010).*

The failure of Sunrise or Claims Services to recognize confusing similarity and foreign equivalents ignores rampant typosquatting in the domain name system (see Clearinghouse sec. 8). At a minimum, Claims Services should require registries to report domain names that are confusingly similar to, or a foreign equivalent of, trademarks in the Clearinghouse. If registries utilizing a Claims Service simply must provide notice and a mark holder does not obtain an advantage as it does if the registry offers a Sunrise Registration period, then no advantage is obtained in a Claims Service and "similarly situated applications are treated in the same way" regardless of whether the Claims Service protects against confusingly similar or foreign equivalent domain names. *IOC (21 July 2010).*

Trademark owners should be permitted to deposit into the Clearinghouse names consisting of exact registered trademarks plus generic terms incorporated into their goods or services. We support the solution set forth by the Commercial and Business Users Minority Position under Annex 4 of the STI Work Team Recommendations. Such procedures have been used successfully with prior gTLD launches such as for the ASIA registry. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Plural and singular forms of marks should be included in the Clearinghouse either through automatic operation or express request of a trademark owner. A substantial portion of abusive domain name registrations take advantage of either variant plural or singular forms, and the current rules do not address this issue. *AIPLA (21 July 2010).*

The scope of searches for matching should be determined with input from proposed Clearinghouse operators about what searches could reasonably be conducted. ICANN's rationale for limiting it to "identical matches" has not been supported. At a minimum, a match should include plurals of and domain names containing the exact trademark. *INTA Internet Committee (21 July 2010).*

Contrary to the language about punctuation or special character replacement in the definition of identical match in this section, "underscores" are not a valid character for a domain name. *EnCirca (Module 5, 21 July 2010).*

To maintain operational integrity and keep the processing volume manageable, it should not be expanded to include typographical variations of a mark. ICA questions whether any meaningful standard can be established to define the acceptable limits of such variations. Trademark owners should not be given the ability to assert potential control and have the Clearinghouse fire "warning shots" to potential registrants for the many thousands of possible variations of a single mark—especially as trademark infringement involving such names must arise from actual use and cannot be determined from the domain name alone. *ICA (21 July 2010).*

The identical match definition (2.3) should be widened to catch "obvious misspellings." *AIM (Module 5, 14 July 2010).*

The refusal to extend clearinghouse-based RPMs beyond exact matches, or to incorporate any form of a globally protected marks list, means that the impact on reducing the volume of defensive registrations will likely be negligible. *COA (21 July 2010).*

Design marks with a slight design element should be included in the "identical match" definition. *IBM (21 July 2010)*

Per comments with recommendations previously submitted by the BC: if the applied-for domain string anywhere contains text of a trademark listed in the Clearinghouse, then a TM notice is given to the applicant per the proposal in the Staff recommendation. If the domain is registered then the trademark owner is notified. Trademarks owners would also have the option of triggering notices in the event that the applied-for domain string includes the trademark string altered by typographical errors as determined by an algorithmic tool. The domain applicant must affirmatively respond to the trademark notice either on screen or email and the registrar must maintain written records of such responses for every domain name. The trademark owner must get notice of every registration that occurs. The trademark notice should allow registrant the option of stipulating their intended response. *BC (26 July 2010).*

Marks included in the Clearinghouse should generally include the text elements of marks consisting of stylized text, or designs plus text, rather than only word marks. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010). BBC (21 July 2010).*

ICANN should further define the term "text mark" to avoid misinterpretation. *IBM (21 July 2010).*

Text marks should be defined to include the text elements of design marks where the text in its entirety has not been disclaimed. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Best practice as used in recent RPMs should be explored with regard to the Clearinghouse. For example, the Clearinghouse scope should be widened to include device marks and plurals. *Com Laude (21 July 2010).*

ICANN must clarify the definition of a "text mark" included in the Clearinghouse—it should include protection for stylized letters and text with design components. *CADNA (21 July 2010). AT&T (21 July 2010). INTA Internet Committee (21 July 2010). News Corporation (21 July 2010). BC (26 July 2010).*

Marks protected by treaty.
ICANN should clarify to which marks "protected by treaty" it refers (page 2). *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Inclusion in the Clearinghouse of "Any text marks protected by a statute or treaty" should not be limited to those "in effect on or before 26 June 2008." That limitation discriminates against future Olympic Games in new host cities that will receive statutory protection. *IOC (21 July 2010).*

The punctuation used in section 2 for the two bullets labeled A and B is unclear. Does the phrase "and that was in effect on or before 26 June 2008" apply only to (iii), as it currently reads? That was not the intent. *EnCirca (Module 5, 21 July 2010)*

Reserved marks list for Olympic trademarks. If and when new gTLDs are introduced, the Olympic trademarks should be put on a list of reserved marks—just as ICANN currently reserves its own trademarks (see Module 2.2.1.2). ICANN is subject to and must act in a manner consistent with the U.S. Olympic and Amateur Sports Act and the Anti-Cybersquatting Consumer Protection Act in deciding whether or not to offer for sale any new gTLDs containing Olympic trademarks. *IOC (21 July 2010).*

Classes of trademarks. Missing from the Clearinghouse is a provision that allows trademarks to be put in classes mirroring the International Classes of Goods and Services. This is crucial as it will compensate for similar and identical trademarks that under traditional law co-exist harmoniously. This is especially important for small and medium sized businesses and for trademark owners in developing countries. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Dot-Trademark.
Exclusion of registrations that include top level domains as part of the trademark or service mark appears to be discriminating against valid trademark registrations and fails to take into account contemporary business trends. ICANN needs to provide the rationale why such trademarks cannot be included in the Clearinghouse. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010). BBC (21 July 2010).*

The AGB should specifically prohibit any advantage to holders of trademarks for a top-level domain (i.e., a trademark on "dot TLD"). While dot-TLD trademarks are not granted by the U.S. Patent and Trademark office, they are available in other jurisdictions to the detriment of all applicants. ICANN should provide assurances that not only will such TLD-specific trademarks be denied any priority in an application but that they will not be considered a valid ground for objection. *Minds + Machines (21 July 2010). NIC Mexico (21 July 2010). Domain Dimensions (22 July 2010).*

It is important that a "dot TLD" not put an applicant into any unjustified advantage and not be a ground for a later objection. In the case of a geographical application, this would compromise the position of a relevant government that wants to support the initiative that works in the best interest for the geographical area. *Bayern Connect (21 July 2010).*

ICANN offers no protection against the gaming of TLD applicants who have been publicly announced initiatives and have done all the leg work and communications outreach campaigns. Given this, TLD trademarks for publicly announced TLDs with years of exposure, lobbying, participation and business activities are warranted and in the public interest if used legitimately. While trademarks alone should not be the sole determinant of earning a TLD, it is the only means we have of protection since ICANN has not incorporated any mechanisms to prevent TLD applicant abuse, gaming and unfair piggybacking. *.MUSIC (21 July 2010).*

Use of Clearinghouse in URS and UDRP proceedings. The Clearinghouse has a potential to provide authentication of rights for both complainants and respondents in the case of any ICANN dispute proceeding. The Clearinghouse should incorporate a recognition of its use for this purpose in any ICANN dispute proceeding. *AIPLA (21 July 2010).*

Analysis of Comments

The Clearinghouse is intended to be a repository for trademarks. In keeping with that aim, specific criteria for entry and management had to be articulated. The aim was to create a list of criteria that could be verified in a cost effective, consistent and efficient manner while, at the same time, prevent gaming of the system since it is intended to form as a basis for rights protection mechanisms. When the provider(s) are selected further detail will be provided.

Criteria for entry, and later validation, has been the subject of widespread comment and review. Authentication will ensure that all marks submitted for inclusion in the Clearinghouse are in fact nationally or multi-nationally registered. Validation will be required if a trademark holder wants to be ensured protection in a sunrise service - that mark must be either: validated for use at registration or by a court, protected by statute or treaty (subject to some date resrictions), or (if none of these above), validated by the Clearinghouse provider.

To be an effective RPM, the Clearinghouse must operate efficiently. Out-of-date or inaccurate data in the Clearinghouse will harm applicants, trademark holders, and others. To that end, it was agreed that as an additional safeguard to ensure reliable and accurate data, mark holders will verify the accuracy of their information and agree to keep it current. The mere fact that a certified copy of a registration exists does not mean that the named registrant is the mark holder or that the information is current and accurate. A sworn declaration in many cases is less time consuming and much less costly than a certified copy of a registration.

Numerous comments, as seen above, seek understanding and clarification of "substantive evaluation" as it is set forth in the guidebook. In order to make clear what was required for substantive evaluation, the Board adopted the following resolution on 25 September 2010 (see http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6:

> Substantive Evaluation: The Applicant Guidebook will provide a clear description of "substantive evaluation" at registration, and retain the requirement for at least substantive review of marks to warrant protection under sunrise services and utilization of the URS, both of which provide a specific benefit to trademark holders. Specifically, evaluation, whether at registration or by a validation service provider, is required on absolute grounds AND use of the mark. Substantive evaluation upon trademark registration has essentially three requirements: (i) evaluation on absolute grounds - to ensure that the applied for mark can in fact serve as a trademark; (ii) evaluation on relative grounds - to determine if previously filed marks preclude the registration; and (iii) evaluation of use - to ensure that the applied for mark is in current use. Substantive review by Trademark Clearinghouse validation service provider shall require: (i) evaluation on absolute grounds; and (ii) evaluation of use.

The Applicant Guidebook language will be revised to reflect the above clarifications.

A variety of comments suggest that limiting protections to "identical match" under trademark claims or sunrise services is too restrictive. This suggestion has been the topic of much discussion. Both the IRT and the STI adopted this same limitation to identical match. Accordingly, this definition and scope will not be revised.

Clarifying questions have been raised with respect protection for names or marks that are protected by treaty or statute. To address each of the questions above:
- Inclusion into the Clearinghouse does not <u>require</u> protection under statute or treaty.
- The reference to effective date is the effective date of the statute or treaty, not the date of the mark registration (i.e., the punctuation in the AGB paper is correct).
- Only marks under <u>existing</u> treaties are protected. While some future protections might be excluded, the limitation was developed in order to prevent potential abuse.

Two commenters suggest that classification of goods and services must be addressed. The Clearinghouse allows for entry regardless of international classification ("IC") of goods and services. The description of the goods/services drives whether there is a possibility of confusion, not the class in which the good or service might be assigned. Moreover, not every jurisdiction follows the international classification system so to require it would result in unfair or inconsistent treatment for those registrations which issue from jurisdictions that do not use the IC system.

In response to comment for clarification about national effect, the language in Section 9 should be revised to be of national effect, not multinational effect. (The reference to the word "applications" refers to gTLD applications, not Clearinghouse applications.)

Whether a "dot-TLD" mark (e.g., "ICANN.ORG" or ".ICANN") should be included in the Clearinghouse has raised differing views. Some do not understand why they should be excluded, while others support the exclusion. The Clearinghouse is designed as a repository for trademarks. To fulfill the objectives of the IRT and the STI, it has been decided that those marks that actually function as trademarks, i.e., indicate source, are those that will be eligible for inclusion. Many safeguards have been established to prevent abuse and to ensure neutral application of validation standards, including objectively verifiable data that the mark does serve a legitimate trademark purpose. It has been successfully argued that TLDs standing alone do not serve the trademark function of source identification. Instead of telling consumers "what" a product is or who makes it, they tell consumers where to get it. Because the TLD does not indicate source, and because allowing marks in the Clearinghouse that include a TLD will increase the likelihood of abuse and gaming substantially, on balance they are excluded. This will obviate the need for registration of defensive trademarks.

In answer to a query about potential uses of the Clearinghouse: the Clearinghouse was designed to serve the Sunrise and IP Claims services specifically. It may or may not also support the URS depending upon the results of the tender of services for the URS.

Clearinghouse Provider Services

Key Points

- The Clearinghouse can provide ancillary services but cannot use its position to a competitive advantage.
- Optional services may include post-launch registry services such as IP Watch.
- The standard for "match" to identify Clearinghouse "hits" was developed by the IRT.

Summary of Comments

Pre-launch versus post-launch sunrise and claims services.
Both of these RPMs are pre-launch and they need to be post-launch to have any real value. Limiting the Claims Service to exact matches is clearly insufficient as most cybersquatting is not an exact match. There is no explanation for the different recognition accorded trademark rights for Sunrise Services and Trademark Claims Services (regarding substantive review/examination). *Arla Foods (6 July 2010). LEGO (6 July 2010). VKR Holding (13 July 2010). Nilfisk 913 July 2010). LEO Pharma (14 July 2010). Vestas (16 July 2010). Coloplast (19 July 2010). PMI (21 July 2010). BBC (21 July 2010). DuPont (21 July 2010).*

Additional protection for trademarks in the Clearinghouse should be extended by requiring mandatory post-launch notification procedures. A substantial portion of cybersquatting can be expected to occur well after a registry has launched. *AIPLA (21 July 2010). Grainger (Module 5, 19 July 2010).*

The Trademark Claims service should not be limited to pre-launch but should be required for post-launch registration applications, despite whether the registry uses Trademark Claims or Sunrise services at the pre-launch stage. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Making the clearinghouse-based mechanisms such as trademark claims services wholly voluntary for registries in the post-launch environment kicks the bulk of the abusive registration problem into a later time frame. In many cases the RPMs will be wholly inadequate without these post-launch protections. *COA (21 July 2010).*

In their present form neither the Claims nor Sunrise services reduces the number of domains being registered in bad faith. To be effective, the services should be mandatory both pre-launch and post-launch. *C. Speed (21 July 2010). BC (26 July 2010).*

Will not solve cybersquatting. No one should assume that the new gTLD registry operator's option in the current proposal to have the Sunrise or Trademark Claims Services, while a positive development, will in fact solve the abuse problems given the limitations of these services in deterring cybersquatting and other abuses. *Coca-Cola (21 July 2010).*

The requirement for registries for claims and sunrise should be standardized so that they are the same. *C. Speed (21 July 2010). BC (26 July 2010). AIM (Module 5, 14 July 2010).*

Exclusive use of Clearinghouse. It should be made clear that registries must use the Clearinghouse exclusively for the submission of Sunrise or IP Claims submissions. *EnCirca (Module 5, 21 July 2010).*

The Trademark Claims and Sunrise Services are not feasible for or applicable to all applicants. ICANN should not force a policy that is inapplicable to some entities. E.g. Chinese governmental organizations are prohibited from practicing commercial-related activities. CONAC, the registry for domain names of Chinese governmental organizations and public interest organizations, must pre-check all the domain names before registration. There is no way for a single brand name to be registered as a domain name in such categories, so that it is of no value to utilize Sunrise or Trademark Claims in these circumstances. It would force CONAC to bear the cost of using the Clearinghouse also. *CONAC (22 July 2010).*

Option for "Sunrise Period" or "Claims Service". A Sunrise is likely unnecessary for a .brand registry operator planning to use its gTLD as a private registry, so it should have the option to implement only a Claims Service rights protection mechanism. *IBM (21 July 2010).*

Notice to trademark owner.
We disagree with the advantage given to prospective registrants by delaying notice to the trademark owner under the Trademark Claims service until after the registration is effectuated. The objective should be to prevent registrations by would-be cybersquatters and innocent prospective registrants to the extent possible before after-the-fact enforcement efforts by trademark owners are required. *IPOA (21 July 2010). AIPLA (21 July 2010).*

The Trademark Claims service should require a waiting period before registration is effectuated following notice to both the prospective registrant and the trademark owner. The notice to the prospective registrant should include the following: "A copy of this Trademark Notice has been sent to the Trademark Owner. If the Trademark Owner deems that granting your requested domain name conflicts with existing trademark rights, it may initiate an ICANN dispute resolution proceeding and/or court action against you." *IPOA (21 July 2010). AIPLA (21 July 2010).*

The pre-launch proposals are unfairly balanced in favor of registrants. Trademark owners should be able to object prior to registration of a domain name. This could save time and money, instead of forcing parties into the post-grant URS. *BBC (21 July 2010)*

Sunrise fees.
Most registries will continue the established practice of offering pre-launch "sunrise processes" which only work to extract additional fees for defensive registrations most brand owners have no affirmative reason to want. There is no provision to limit sunrise fees; ICANN recommends that they operate "based on market needs" which means the highest fee the market can extract from the trademark holder. *Verizon (20 July 2010).*

CADNA noted the addition of a mandatory sunrise period, which could be beneficial to the trademark community as long as the domain names are not offered for inflated prices. Domains should not be held "hostage" by requiring trademark owners to pay more than anyone else would for their own trademarks. *CADNA (21 July 2010).*

Not-for-profits are concerned that most registries will pick the Sunrise service in order to create a revenue stream for registries. Not-for-profits with limited resources for registering numerous domains may not be able to take part in all or any of these Sunrise services. ICANN should consider suggesting or requiring alternative domain name pricing for not-for-profits. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

<u>Ancillary services.</u>
The proposal allowing the Clearinghouse operator to provide ancillary services is contrary to what the STI recommended. The STI made clear that any ancillary services should be directly related only to trademarks (common law marks, etc.). It was decided that all other intellectual property rights fall outside the scope of the Clearinghouse and therefore should not be included. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

INTA Internet Committee applauds ICANN's recognition that the Clearinghouse operator may offer certain ancillary services and maintain a separate database containing a "panoply" of rights, such as "unregistered trademarks, company names, trading names, designations of origin, family and personal names, etc." These services would be for the purpose of allowing trademark owners to better police their marks. Offering of such services should be mandatory in the evaluation and grant of certain TLDs (e.g. High Security Zone). *INTA Internet Committee (21 July 2010).*

ICANN must reconsider the provision allowing ancillary services to be provided by the Clearinghouse operator on a non-exclusive basis. These services could include release of lists of generic words or common typographical variations of various trademarks—exactly the type of information that facilitates and enables cybersquatting and typosquatting. This data should not be available on a non-exclusive basis; it should be guarded for exclusive use by relevant trademark owners. Third parties should not be able to profit from public confusion by warehousing variant spelling and combination domain names that derive value precisely because of the association with the trademark owner. *CADNA (21 July 2010). INTA Internet Committee (21 July 2010)*

Analysis of Comments

Comments question that:

- some pre-launch services, such as IP Claims, should also be required post-launch,
- identical match is not sufficient to protect marks, and
- there is no explanation for distinction between marks afforded protection in Sunrise versus those afforded protection in claims services.

With respect to suggestion that pre-launch claims services be extend to post-launch, the IRT stated the following: "The IRT considered whether the IP Claims Service should also extend to the post-launch period. The IRT concluded that it was unnecessary to extend the IP Claims Service post-launch because of the protections afforded by the URS that the IRT also recommends herein." (*See* http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf, footnote 6.) Such services will not be mandatorily extended to a post-launch environment. Although post-launch services are certainly something that the Clearinghouse service provider could offer as an ancillary service. Discussion about why exact matches are required for protection is set forth above. As to why there is a difference between marks afforded protection in sunrise versus claims, it has previously been made clear that in Sunrise there is an affirmative advantage, while a claims service is just notification. Other post-launch rights protection mechanisms are available including the URS procedure, the UDRP and the PDDRP as well as any remedy available in a court of competent jurisdiction.

Comments suggest that Sunrise or claims be required. This is the case. As set forth in the AGBv4, all new gTLD registries will be required to use the Clearinghouse to support its pre-launch rights protection mechanisms. These must, at a minimum, consist of either a Sunrise or Trademark Claims Service.

Some have suggested that notice to trademark holders should be provided before someone is allowed to register a name that is in the Clearinghouse, thereby allowing for a pre-registration dispute. As set out by the IRT, the goal of the service is not to be a blocking mechanism, as there are often numerous legitimate reasons for many different people to use the same word or phrase that may be trademarked. In addition, the potential registrant must indicate that it has a legitimate interest in the applied for name.

The Fee structure for Clearinghouse is that fees will be matched to transactions. Mark holders will pay for registrations of a name and registries will pay for administration of a Sunrise or IP Claims service. Matching the transaction to the fee will enable most efficient, economical operation.

Allowing the Trademark Clearinghouse Service Provider to offer ancillary services is something that the STI discussed at length. The Clearinghouse proposal has adopted the intent of the STI to ensure that the Trademark Clearinghouse Service Provider does not obtain any competitive advantage over competitors for ancillary services, such as post-launch claims services, or databases making other information available.

UNIFORM RAPID SUSPENSION SYSTEM (URS)

General

Key Points

- The URS is meant to supplement other rights protection mechanisms, such as the UDRP, and is purposefully drafted to target a very narrow class of clear-cut cases of abuse.
- Further, feedback on the effectiveness of the URS once it is implemented is encouraged so that it can be evaluated in the future.

Summary of Comments

Lack of Support for URS as drafted.
The URS is unlikely to achieve its full potential because it will in many cases be hardly faster than the UDRP and with weaker remedies, without adequate protections against abusive registrants, such as a loser-pays system for cases brought against high-volume registrants. *COA (21 July 2010). Arla Foods (6 July 2010). LEGO (6 July 2010). Nilfisk (13 July 2010). LEO Pharma (14 July 2010). Vestas (16 July 2010). Coloplast (19 July 2010). PMI (21 July 2010). DuPont (21 July 2010). AT&T (21 July 2010)*

The URS is overburdened for just a transfer and the burden consists of a combination of factors including: panel appointment even in default cases; panel examination of possible defenses in default cases; appeal possibility during two years from default; a higher burden of proof; uncertainty as to results (e.g., possible gaming and "revolving door" monitoring); use of the conjunctive bad faith registration and use; limiting marks forming the basis for a URS claim to either so-called substantive

review or clearinghouse validated marks (with cost and time implications); apparent translation requirements; a seeming option for re-filing; the possibility for de novo appeals; and significant timelines. *WIPO Center (16 June 2010).* We support WIPO's call for the URS to be re-engineered. *JONAS (11 July 2010. .*

The BC has urged ICANN to undertake a feasibility study before making any decision to address whether the URS will be implementable as a sustainable business model and if it would be more sustainable if transfer were allowed (i.e. how many more complainants would use it). *BC (26 July 2010).*

The URS is not "rapid" and given its required procedural elements it is not inexpensive. Since the ultimate remedy of the URS yields only suspension, it is likely that a majority of brand holders will be forced to buy a domain name in each gTLD corresponding to their trademarks or will be filing requisite UDRPs as opposed to relying on the equally time consuming and costly URS process. *MarkMonitor (19 July 2010). Comerica (21 July 2010); Carlson (21 July 2010). C. Speed (21 July 2010). Hogan Lovells (21 July 2010). BBC (21 July 2010). HSBC (21 July 2010). IPC (21 July 2010). AAMC (21 July 2010).Red Cross (21 July 2010). NPOC-FC (21 July 2010). Adobe Systems (21 July 2010). IACC (21 July 2010). Sunkist (21 July 2010). ABA (22 July 2010). Solvay (22 July.2010).*

Given the intent underlying the URS, it is imperative that the URS not be crippled by unnecessary, burdensome regulations, high expenses and limited remedies. *IHG (20 July 2010). CADNA (21 July 2010). M. Jaeger (22 July 2010)*

As currently structured the URS screams uncertainty for trademark owners and they will rationally choose the certainty and full remedies afforded by the UDRP. *Verizon (20 July 2010). IPOA (21 July 2010). Rosetta Stone (21 July 2010). AIPLA (21 July 2010). NCTA (Module 3, 21 July 2010).*

All the changes and alterations have turned the URS into a weaker version of the UDRP (cheaper but no speedier and a weak means of redress—i.e. no transfer of the domain to the complainant). *C. Speed (21 July 2010). AT&T (21 July 2010).*

The URS has been watered down from the IRT version and is not effective: it is not rapid, it has become complex, burdensome and unworkable. ICANN should return to the version proposed by the IRT and improve it by making it faster (21 days at most); simpler (pro forma complaint with copy of Whois and website copy, not a 5,000 word document); practical (only for case with no real contestable issue); efficient (experienced examiners); and reasonable (remove the "questionable fact" defense and dismissal if examiner thinks defense would have been possible). The concept of "loser pays" should be looked at again and the URS should be open to all trademark owners without discrimination provided their registration is current. *MARQUES/ECTA (21July 2010).*

The URS has been seriously diluted; ICANN should revert to the URS as proposed by the IRT. *Com Laude (21 July 2010). News Corporation (21 July 2010).*

<u>Support for URS as drafted</u>.
I support the URS as detailed in the DAGv4. Critics who say it will be longer than the UDRP do not make a valid comparison—they compare the longest possible URS action to the shortest possible UDRP action. Similarly it seems very likely that the average URS cost will be substantially less than the average UDRP cost. *R. Tindal (21 July 2010). Domain Dimensions (22 July 2010). Demand Media (22 July 2010).*

The changes have addressed many concerns of ICA members regarding due process, adequate notice and meaningful appeals. *ICA (21 July 2010).*

Fees.
Fees relating to the URS should be determined as soon as possible so that not-for-profit organizations can budget in advance for the new gTLD process. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

ICANN should firmly commit to the URS being much less expensive than the UDRP—i.e., commit to a "not to exceed" fee (e.g. a URS complaint shall not exceed $400) in final Guidebook. This would give trademark holders much more comfort. *Domain Dimensions (22 July 2010).*

Paragraph 2--Fees edit. The phrase "it is thought, more often than not, that no response to complaints will be submitted" should be deleted. This sentence makes it appear that the URS is instructing its examiners to view URS disputes under a presumption of guilt for respondents, which is unfair, and against due process. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

All URS providers should be put under contract. The STI-RT reached unanimous consensus on this point. This will promote uniformity. *ICA (21 July 2010).*

Qualifications of examiners. Examiners need only a legal background. How is this to be defined? *Hogan Lovells (21 July 2010).*

Rotation of examiners. There might be an issue with the rotation of examiners given the variety of jurisdictions and languages. *Hogan Lovells (21 July 2010).*

Analysis of Comments

Some comments suggest that the URS as currently drafted will be effective. Others suggest it will not be effective, that the burden of proof is too high, that its remedies are not sufficient, that it is not fast enough and that it will lead to uncertainty.

The URS was devised by the IRT, modified by the STI and influenced and revised to take into account significant public comment. This procedure is not intended to be a replacement for any other additional methods of redress that a trademark holder may have for infringement. Rather, the URS is meant to supplement those other methods, such as the UDRP, and is purposefully drafted to target a very narrow class of clear-cut cases of abuse.

Indeed the URS is not intended to provide uncertainty. Different procedures in different jurisdictions provide different types of relief. If immediate relief for clear-cut cases of abuse is the goal the URS may be the right alternative, if transfer of a domain is sought the UDRP might be the right alternative, if damages are sought a court might be the right alternative. The objective of the trademark holder will ultimately drive where an action is brought. The URS provides an additional remedy, not a replacement.

Further, feedback on the effectiveness of the URS once it is implemented is encouraged so that it can be evaluated in the future. As a part of its introduction, as set forth in Section 14 of the URS, a review of the procedure will be initiated one year after the first Determination is issued. It is expected that the

evaluation will cover usage and statistics and will be posted for public comment to gauge the overall effectiveness.

Each of the specific comments as to the deficiency of the URS is addressed in detail in the sections below.

The amount of the fee for a URS has been the subject of comments. The precise amount is still under consideration and will be set by the provider with the goal of being as cost effective as possible. A suggested revision to omit an editorial comment regarding why a loser pays provision has not been adopted for the URS will be adopted.

While one comments suggests that all URS providers should be put under contract, it should be clear that all providers will be required to comply with standards and procedures, regardless of the mechanism under which they are engaged to provide URS services.

There has been one comment on examiners legal background and another on the rotation of examiners. Legal background of examiners will be determined based upon legal training or training in dispute resolution processes. With respect to the rotation and examiners in light of jurisdiction and language variations, this is something that the URS providers will be required to consider in rotating examiners.

Complaints and Responses

Key Points

- The trademark holder will have the burden of proof since it is the person or entity that seeks relief.
- Given other safeguards that are in place, the time to respond to a complaint has been changed from 20 days back to 14 days, with an opportunity for an extension of seven additional days.

Summary of Comments

Trademark owner burdens.
The URS is flawed because the burden is on the trademark owner to prove that the registrant has no legitimate interest in the domain name. *Arla Foods (6 July 2010). LEGO (6 July 2010). VKR Holding (13 July 2010). Nilfisk (13 July 2010). LEO Pharma (14 July 2010). Vestas (16 July 2010). Coloplast (19 July 2010). PMI (21 July 2010). Adobe Systems (21 July 2010).*

The burden of proof should not fall on the trademark holder. The complainant's case should be considered legitimate by virtue of evidence of a valid trademark and in such instances the registrant should be responsible for proving its "good faith". *IHG (20 July*

Response filing fee.
The URS lacks a fee for filing a response to a complaint. *Arla Foods (6 July 2010). LEGO (6 July 2010). VKR Holding (13 July 2010). Nilfisk (13 July 2010). LEO Pharma (14 July 2010). Vestas (16 July 2010). Coloplast (19 July 2010).*

What is the reasoning behind allowing the respondent to be in default for up to 30 days following a determination before they would be charged any fee with their response? The respondent should be obliged to file a fee in all cases where it files a response to provide some balance between the parties. Even if this is not the case there should be a fee when a response is filed late. *BBC (21 July 2010). NCTA (Module 3, 21 July 2010).*

A fee should be charged for any response filed after a decision has been entered. No 30-day "grace" period should be allowed as currently proposed. *Grainger (Module 5, 19 July 2010).*

Notification to registrar (6.2 & 6.5): Is essential that a copy of the notification must also be sent to the domain's sponsoring Registrar by the URS Provider. The Registrar should always be informed of actions that change the domain's status, because the Registrar is the party with the service and contractual relationship with the Registrant. Registry Operators are not in a position to communicate with Registrants. *RySG (21 July 2010).*

Simple forms. ICANN should develop simple forms for the complaint, answer and decision, with a requirement that complaints that are too lengthy or complex to make use of such a form instead be required to be filed as UDRP complaints or that the complainant seek other remedies. This would reduce burdens and likely expedite the process. *AAMC (21 July 2010). CADNA (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

<u>Word Limitations</u>.
The 5,000-word limit for the complaint and response is too high for what should be a clear cut case and will increase preparation costs. *Hogan Lovells (21 July 2010). CADNA (21 July 2010).*

Any word limitation should be much smaller, such as 250 or 500 words. AT&T suggests a return to the initial form complaint and response approaches. *AT&T (21 July 2010).*

<u>Timeframes</u>.
The registrant should have 14 days to file an answer. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010). Microsoft (21 July 2010). NCTA (Module 3, 21 July 2010).*

The examiner should be required to render a decision within 7 business days, with a goal of providing it within 3 days as a best practice. *AAMC (21 July 2010). NPOC-FC (21 July 2010). Red Cross (21 July 2010).*

At a minimum, a decision should be rendered within 3 business days in cases of default. *INTA Internet Committee (21 July 2010).*

The response and decision-making timeframes are too long. The process needs to be streamlined. *CADNA (21 July 2010). AT&T (21 July 2010). AIPLA (21 July 2010).*

The URS fails to provide an expedited remedy; the URS timeline proposed by the IRT has been so extended in the current draft proposal that the timing for an initial decision may often be equal to or longer than under the UDRP. *INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). SIIA (21 July 2010). USCIB (21 July 2010). Microsoft (21 July 2010). EuroDNS (22 July 2010). BC (26 July 2010). AIM (Module 5, 14 July 2010). Nestle (21 July 2010).*

<u>URS needs to be refocused to immediately take down a website</u>. The role of the URS provider is to act as a rapid check on the bona fides of the complainant and to be a conduit between the complainant and the registry. The URS should operate with dramatically reduced timelines, which will stop the criminal act being conducted and cover probably 99% of URS cases:
- Complaint starts
- 24 hours—URS provider validates bona fides of complaint and notifies registry;
- 24 hours—Registry notifies Registrant that it will act to lock and then prevent resolution of the web site in 24 hours.

If the registrant reacts (defined as confirmation of registrant data and a statement that the complaint is or is not valid) within 24 hours the presumption of bad faith should be reversed and the web site should immediately be allowed to resolve again. If the registrant reacts as defined, the Registry notifies the URS provider who notifies the complainant within 24 hours and the URS finishes. At that point the complainant should then be invited to instead launch a de novo UDRP. *AIM (Module 5, 14 July 2010).*

<u>Revisions needed</u>.
Section 1.2(f) seems to need revision, as it is inconsistent with the examination standards in Section 8.1(a). *INTA Internet Committee (21 July 2010).*

Paragraph 1.2(f) should be rewritten to place the word "and" in front of (ii), deleting the word "and" after (ii) in the original, and so that ";and" appears before (iii), deleting "and;" before the (iii) in the original. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

This edit does not change the content, seems to make sense.

Split Paragraph 4.3. For purposes of clarity paragraph 4.3 should be split into two sections:
- 4.3—"All Notices to the Registrant shall be sent through email, fax (where available) and postal mail. The complaint and accompanying exhibits, if any, shall be served electronically."
- 4.4—"The URS provider shall also notify the registrar of record for the domain name at issue via the addresses the registrar has on file with ICANN."

K. Komaitis (21 July 2010). R. Dammak (22 July 2010

Analysis of Comments

Who has the burden of proof and what the standard of proof should be have been the subject of comments. The trademark holder will have the burden of proof since it is the person that seeks relief. To hold any other way would afford the trademark holder a presumption it is not entitled to hold. All use of a trademark is not unlawful or infringing use, as such, the mere ownership of a mark by "A" and use of a similar mark by "B" does not mean that A should prevail.

Whether a respondent should have to pay a fee and at what point in time has been the subject of comments. A loser pays system was rejected by the IRT and STI but is still being discussed. Currently, the respondent needn't pay a filing fee for the action to commence. This is because in most cases the registrant abandons the registered name and does not reply or pay. In other cases, the respondent may respond but not pay. Therefore, waiting for a reply and fee before proceeding would delay righting the wrong while not garnering any extra fees.

Therefore, it was decided there would be no filing fee unless the registrant decides to respond after being in default for a prolonged period of time. The ability to respond after default provides legitimate registrants the right to regain the use of a legitimate domain name. Thus, default responses will continue to be allowed under the URS Proposal.

Some commenters suggest use of "form complaints" and answers, and others suggest a limitation on the submission. While forms can facilitate filings in certain situations, given the fact-intensive nature of the bad faith standard, a form complaint would not be appropriate. In a similar vein, the 5000-word limit was arrived at by balancing the need for the RPM to be rapid against the need of the complainant to be able to plead and prove its case with a clear and convincing standard of review. There is no requirement that a complainant use all 5,000 words.

Many think that the time frame to respond is too long. ICANN agrees. The Board has stated as follows: "URS timing: In response to public comment, change the time to respond to a complaint from 20 days to 14 days, with one opportunity for an extension of seven days if there is a good faith basis for such an extension." (*See* http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6.) The URS Proposal will be revised to reflect this change.

There are other protections available for registrants in the event they cannot respond within 14 days. First, a seven-day extension can be requested. Second, there are opportunities for filing after default and for appeal. It is thought that there will be very few legitimate cases where the registrant will not be able to respond within the prescribed period. For those instances, there are the safeguards of default

filing and appeal. On the other hand, increasing the period to reply from 14 to 20 days means that every harmful registration can be misused for an additional period.

While some have suggested that a URS complainant should be referred to UDRP under certain scenarios, the UDRP and the URS are separate procedures, tying rights to initiate one to the result of another is therefore inappropriate.

Comments relating to language revisions are appreciated, will be considered and made where appropriate.

Eligibility and Standards

Key Points

- The URS is meant to provide a quick process in the most clear-cut cases of abuse, thus a clear and convincing burden of proof is appropriate.
- Standing is not limited to certain jurisdictions; standing is afforded to those holding trademarks registered in jurisdictions that conduct substantive review or that are otherwise validated in certain ways.

Summary of Comments

Eligibility requirements.
By requiring that complainants' trademarks be registered in jurisdictions requiring "substantive review", ICANN is making the eligibility requirements for the URS unreasonably high. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

There is no reason why the URS should be available only for certain marks that were registered in countries with substantive review. A procedure for rapid take down of a clearly abusive site is needed regardless of where the mark at issue was registered. Remedies can be put in place (and indeed are in place) against abusive use of the URS proceeding. *Coca-Cola (21 July 2010).*

The URS, now much weaker than what the IRT report proposed, is apparently only available to owners of trademarks registered in countries conducting a so-called substantive review (para. 1.2(f)), so that all CTMs and most national European trademarks are excluded. *Arla Foods (6 July 2010). LEGO (6 July 2010). VKR Holding (13 July 2010). Nilfisk (13 July 2010). LEO Pharma (14 July 2010). Vestas (16 July 2010). Coloplast (19 July 2010). PMI (21 July 2010). BBC (21 July 2010). Red Cross (21 July 2010).*

Clear and convincing standard.
It will be difficult for many trademark owners to meet and will be easily gamed by defendants to thwart a URS finding. This standard is not only higher than the UDRP but higher than that required in most civil actions. *Verizon (20 July 2010). Hogan Lovells (21 July 2010). News Corporation (21 July 2010). Rosetta Stone (21 July 2010). BC (26 July 2010).*

A clear and convincing standard is appropriate. *Domain Dimensions (22 July 2010). ICA (21 July 2010).*

The URS clear and convincing standard is higher than the UDRP; mark owners will continue to use the UDRP as they have in the past with success. The statement that a URS complaint will only be granted in favor of complainant if there is no genuine issue of material fact seems appropriate. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Dismissal threshold for complaints is far too low. ICANN permits a URS complaint to be dismissed by an examiner based on a vague and exceedingly low threshold—i.e. if "evidence was presented" to indicate a domain name is non-infringing or a "defense would have been possible" to show it is non-infringing. *Verizon (20 July 2010). Hogan Lovells (21 July 2010). IPOA (21 July 2010). INTA Internet Committee (21 July 2010). Microsoft (21 July 2010).*

<u>Bad faith criteria</u>.
To be truly rapid, the URS should use a conjunctive "OR" standard of bad faith. *IOC (21 July 2010).*

Criteria (iii) in paragraph 1.2 (g) should refer to the registrant having registered the name primarily for the purpose of disrupting the business of <u>another</u>, rather than of a <u>competitor</u>. There may be many reasons why someone might register a domain name in order to disrupt the business of a third party that is not a commercial competitor. *BBC (21 July 2010)*

The sale of traffic (5b) should be presumed to be bad faith, not merely a factor for consideration. The Registrant should bear the burden to prove that the sale of traffic is not bad faith, once it has been pled in the Complaint. *IPOA (21 July 2010). AIPLA (21 July 2010).*

"<u>Pattern</u>". If the registrant exhibits a pattern of abusive registrations, it should not be a point in its favor that this particular registration does not seem to share the same abusive characteristics as those in the pattern (5.8(d)). *AIPLA (21 July 2010).*

Analysis of Comments

Comments suggest that eligibility requirements for utilizing the URS are too high and limited to certain jurisdictions. The IRT developed the URS in order to provide a quick avenue for the most clear-cut cases of abuse. In order to provide such a process, some limitations on standing to file a complaint pursuant to the URS are necessary. Nevertheless, standing is not limited to those holding trademarks registered in jurisdictions that conduct substantive review. There will be a provider to validate use of marks if such validation was not conducted in the jurisdiction of the trademark registration, or the mark is not otherwise protected by statute or treaty. Such limitations are placed on the marks eligible for URS consideration in order to limit gaming of the system by those who simply register marks for no reason other than to obtain a domain name.

Some think a clear and convincing standard is appropriate while others do not. Further, some have pointed out that this is higher than the UDRP standards, and thus complainants will simply bypass the URS for the UDRP. Others suggest that the dismissal threshold for URS complaints is too low. It is true that a clear and convincing standard is higher than the UDRP; that is the intent. In addition, the threshold for dismissal of complaints is intended to be low. As noted above, the URS is meant to provide a quick process in the most clear-cut cases of abuse. Thus, a higher standard is appropriate. Further, as the IRT stated: "If there is a contestable issue, the matter is not appropriate for decision under the URS and the Complainant should pursue a decision in a different forum." (See page 34 of IRT Final Report at: http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pd).

Therefore, neither the clear and convincing standard, nor the threshold for dismissal of a URS complaint will be revised.

The evidence needed to show bad faith has been the subject of commentary. Some comments have suggested that a disjunctive requirement should comprise the standard of review in a URS case, i.e., that the domain name was registered **or** is being used in bad faith. Further, it has been suggested that the requirement of bad faith reach would reach "disrupting the business of another", instead of a "competitor."

While two different types of possibly infringing conduct are captured by the disjunctive standard, the goal of the URS is to reach only the most clear cut cases of abuse. Because of this heightened standard, the decision was made to require a complainant to plead and prove both that the domain was registered and is being used in bad faith. Thus, the conjunctive will remain as the standard for a URS case. This is not the standard in every type of RPM. Further, because of the type of harm the URS is intended to address, the "competitor" standard will be retained.

One question above is, what is meant by 5.8(d). In addition, some think that the sale of traffic data, as referred to in 5.9, should be presumed bad faith. The language as proposed in section 5.8(d) is not meant to provide a way to avoid liability for deviating from previously abusive practices. The standard in this section is meant to capture the good faith registrant that does not register a series of typographical spellings of a registered trademark - it is not meant to provide a safe haven for serial cybersquatters. Further, given that the Complainant must show clear and convincing evidence to prove its case, a presumption against the respondent for a URS case is not appropriate. However, a factor that an examiner can consider as evidence of bad faith is the sale of traffic in the appropriate cases. Thus, the standards set forth in Section 5.9, allowing consideration without creating a presumption in favor of the complainant, will remain as written.

Defenses

Key Points

- The purpose of this more restrictive entry standard (as compared to UDRP) is to avoid time-consuming analysis over the question of rights, which would undermine the intended purpose and ability of the URS process to provide a fast inexpensive remedy for cases of clear abuse.
- Evidence of fair use of the disputed name must be analyzed by the Examiner to determine its validity

Summary of Comments

Common law rights.
It is ironic that a complainant can only launch a URS complaint based on trademark rights but a registrant can defend such action on the basis of common law rights. We do not see why the procedure cannot accommodate a consideration of the complainant's common law rights also. *BBC (21 July 2010).*

Wider pattern—defense. We do not agree that the fact that the domain name is not part of a wider pattern or series of abusive registrations should in itself be a freestanding defense. *BBC (21 July 2010).*

Language change from "safe harbors" to "defenses". ICANN should provide to the community the independent analysis that led to the change of wording from "safe harbors" to "defenses". Instead of "defenses" the term should be changed to "absolute or complete defenses", which is closer to the original term "safe harbors". *K. Komaitis (21 July 2010). R. Dammak (22 July 2010)..*

Paragraph 5, section 5.4—addition. Another paragraph (e) "Absolute/Complete Defenses" should be added. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Fair use defense Paragraph 5, section 5.8(b). The current language implies that the Examiner has discretion to determine whether a fair use defense will be acceptable. This is against due process and would give Examiners too much power. The phrase "that is found by the Examiner" should be removed. Fair use is an affirmative defense and as long as the registrant can provide evidence of such use the Examiner should accept it unwittingly. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Paragraph 5.9 edit. The word "not" is missing and this appears to be a typographical error. It should read: "Other considerations that are not examples…" *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

To many defenses.
The current version of the URS adds more factors to support a defense that the registrant has not acted in bad faith, without adding any additional presumptions in favor of trademark owners, which seems to reflect a bias against trademark owners. *NCTA (Module 3, 21 July 2010).*

To be truly rapid, the URS should reduce the number of defenses for panelists to consider. *IOC (21 July 2010).*

Analysis of Comments

One commenter challenges why a complaint cannot be based on common law rights. The intent for the URS is to be applicable only in cases of clear-cut abuse. The UDRP, which is still available to any URS complainant, allows for determination based upon common law rights. As stated in footnote 38 of the IRT Final report (see http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf), the "IRT recognizes that entry standard for utilizing the URS is more limiting than the standard provided in the UDRP, which permits claims to proceed based on any registration of trademark rights or on common law rights. Parties that do not meet the higher entry standard proposed for utilization of the URS may, of course, still proceed with claims under the UDRP or in courts, as appropriate. Exclusion from the URS is not intended in any way to prejudice a party from proceeding under other available avenues. The purpose of this more restrictive standard is to avoid time consuming analysis over the question of rights, which would undermine the intended purpose and ability of the URS process to provide a fast inexpensive remedy for cases of clear abuse." Thus, the URS will not entertain complaints from those with only common law rights.

Two commenters have asked for an explanation for changing "safe harbor" to "defense." As explained in the comment summary and analysis posted on 28 May 2010, "[t]he language modification strikes a balance between the trademark holder bringing the claim and the rights of the registrant who remains free to allege a defense of good faith. However just as there is no absolute right for the trademark holder to prevail, similarly there is no absolute right to prevail in the basis of alleged good faith, otherwise all would allege it and no successful claim could ever be brought." *See* http://www.icann.net/en/topics/new-gtlds/urs-comment-summary-and-analysis-28may10-en.pdf. Therefore, it is thought the term "defenses" is more accurate. These same commenters suggest that a new paragraph for absolute defense should be added. Absolute defenses, if any, are contained within the term defense.

Two comments suggest that that the Examiner must unconditionally accept evidence of fair use for trademarks from jurisdictions without substantive review. This is not correct. The Examiner will be required to determine whether evidence of fair use exists. Evidence of fair use must be analyzed by the Examiner to determine its validity, which is why the phrase "that is found by the Examiner" is included. Accordingly, a change of language in response to these comments is not required.

Two commenters suggest revision to some of the language of 5.9. While the word "not" was never intended to be part of this section, there may be some lack of clarity in the language. Thus, the language will be changed from "Other considerations that are examples of bad faith for the Examiner" to "Other factors for the Examiner to consider."

One comment suggests that the defenses create bias for trademark holders and another says there are too many defenses for URS respondents. There is no intent to create a bias for trademark holders. The URS was developed by the IRT, subsequently modified by the STI and others, solely for the protection of trademark holders. The result is an attempt to balance the rights of a trademark holder, against a registrant of a domain name that may have the same words as a trademark, but is being used in a non-infringing manner.

Default

Key Points

- Full examination, even in cases of default, is intended to ensure all parties, whether or not they respond, are provided an opportunity to a fair analysis of the facts.

Summary of Comments

No panel in cases of default.
Where a registrant fails to present a defense (default), an immediate judgment should be rendered in favor of the complainant. A panel should not be appointed to debate hypothetical points of defense. IHG (20 July 2010). IPOA (21 July 2010). Coca-Cola (21 July 2010). NCTA (Module 3, 21 July 2010).

Respondent default should result in suspension of the domain name. There is no need for panel appointment and substantive review in the event of a default. IPOA (21 July 2010). AIPLA (21 July 2010).

To be truly rapid, the URS should deny panel review in cases of respondent default. IOC (21 July 2010).

Returning name servers upon default response. In case of a default response, name servers should not immediately be returned to the state prior to "hold" status until an initial examination of a default response is completed to prevent frivolous filings and delays in implementing decisions. Allowing the return to initial status would be contrary to the "rapid" intent of the URS and provide a loophole for cybersquatters to extend the process. Grainger (Module 5, 19 July 2010).

No default responses should be allowed. No default responses should be allowed unless, upon initial examination, there is strong and compelling evidence that the decision was in error. As with a UDRP the registrant still has the option of filing suit in court to reclaim the disputed name. Grainger (Module 5, 19 July 2010).

Analysis of Comments

Some commenters are against evaluation upon default and think an immediate ruling in favor of the complainant should be issued. Others think that defaults responses should be allowed. One commenter has suggested that until an initial examination of a default response is completed, the name server should not revert to allow the registrant to utilize the domain name.

Examination in case of default is something that was identified by the IRT, and accepted by the Special Trademark Issues Review Team ("STI"). The intent was to ensure that someone other than the Complainant had a chance to at least analyze the claim for merit. Thus, there is full review even when there is no response. Further, given the quick nature of the URS proceedings, the intent is to provide a balance to legitimate registrants that may not have been available to respond in a timely fashion. The ability to respond after default and revert to the same position as if the response had been timely filed, provides legitimate registrants the right to regain the use of a legitimate domain name, at least pending Determination. Thus, default responses will continue to be allowed under the URS.

Key Points

- If there is an appeal, independent review (rather than review by the same panel that decided the complaint) seems to be in the best interest of all parties given the type of proceeding, and the bad faith standard a complainant must meet.
- The filing of an appeal will not change the domain name's registration until the appeal decision is issued.

Summary of Comments

De novo appeals—statute of limitations. A proposed 2-year statute of limitations for filing a de novo appeal from a panel decision would address any concern about registrants missing the notice and having a review on the merits of every case. *IOC (21 July 2010).*

Appeals must be efficient.
In case of any judgment (default or otherwise) the appeals process must be efficient and succinct. Allowing a defendant to appeal up to two years later is counter-intuitive and counter-productive. *IHG (20 July 2010). Verizon (20 July 2010). Hogan Lovells (21 July 2010). IPOA (21 July 2010). Rosetta Stone (21 July 2010). AIPLA (21 July 2010). NCTA (Module 3, 21 July 2010).*

Two years for a defaulting registrant to reopen the proceeding is much too long. The window should be reduced to 30 days from issuance of the Notice of Default, and subject to a showing of good cause why the default should be lifted. *INTA Internet Committee (21 July 2010).*

Two years for a defaulting registrant to reopen the proceeding is much too long. The window should be reduced to 90 days from issuance of the Notice of Default. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010). BC (26 July 2010).*

De Novo review.
The de novo appeal standard is inappropriate; it allows an unsuccessful appellant to simply hope for a different decision by a new reviewer. De novo appeals will take longer to resolve. *NCTA (Module 3, 21 July 2010).*

De novo reviews by filing an answer during the life of the registration period should not be allowed. If the abuse is clear cut and obvious enough to warrant a decision in favor of the complainant, there should be nothing compelling enough in a response filed after default, and certainly not months or a year or more later, to warrant automatic reinstatement of the site. *Grainger (Module 5, 19 July 2010).*

We strongly object to the proposal that a registrant who fails to file a response shall have the right to a de novo review at any time up to two years after the determination. Two years is much too long. We also object to the domain name resolving back to the original IP address where the registrant files a request for de novo review. The domain name should resolve back to the original IP address only where the response has been filed within a limited grace period, i.e. a few months. *BBC (21 July 2010)*

Time for filing appeal.

The window to file an appeal after issuance of a URS decision should be reduced to 14 days. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

There should be a de novo appeal by either party; the filing deadline should be shortened. *AIPLA (21 July 2010).*

Notice of appeal should be filed within 10 days and a date for a decision on appeal must be set. *INTA Internet Committee (21 July 2010).*

Limits on new evidence. Any new evidence submitted as part of the appeal should be limited to evidence that (1) was not available at the time of the initial proceeding; or (2) relates to an issue that was not raised by the parties but formed part of the basis for the decision. *NCTA (Module 3, 21 July 2010).*

Fee for Evidence on Appeal. Making the introduction of new evidence contingent upon an additional fee is unfair and we fail to see the rationale for it. If an appellant pays the required fees for an appeal, there is no justification for another fee for introducing new evidence. ICANN should waive this requirement. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Appeal procedures (paragraph 12) are inadequate. 12.5 merely says that "The Provider's rules and procedures for appeals shall apply." There must be explicit provision that notices will be sent via e-mail to the Registrant, the Complainant, the Registrar, and the Registry Operator. The current lack of specificity also exposes Registry Operators to needless liability and unpredictable procedures. If an appeal is successful, URS requires the Registry Operator to unlock the domain and possibly restore back to the previous name servers. Registry Operators should perform domain actions only under explicit and formal notification from the URS Provider, under fully documented procedures. *RySG (21 July 2010).*

Analysis of Comments

Questions have arisen with respect to why two years for an appeal is permitted. Some have suggested that this time period is too long. The only way in which an appeal can be taken two years later is if the respondent is seeking relief from Default. Otherwise, the appeal must be filed in 14 days pursuant to Section 12.4. To balance any perceived harm and to deter any gaming of the default mechanism, the filing of an appeal does not change the domain name's resolution. So if there is a determination in favor of the Complainant, the domain will continue to point to the informational page of the URS provider. Given that the status quo is preserved, it is unlikely that the default/appeal procedure will be gamed for the two-year period. Also, the intent of the URS is to address clear-cut abuses. In these clear-cut cases, the appeal will be lightly used and have little effect on process administration.

Other comments have been submitted regarding the de novo review. Some commentators support it while others believe that it will lengthen the appeal process. Given the limited evidentiary submission before the URS examiner, it is unlikely that the de novo review will substantially increase the time in which review and appeal resolution are complete. Moreover, given the type of proceeding at issue, and the bad faith standard a complainant must meet, on balance, independent review of the materials submitted seems to be in the best interest of all parties. As such, the de novo standard should remain.

Additional comments question the right to introduce new evidence on appeal and suggest that it be limited only to evidence unavailable at the time of the initial proceeding or relates to an issue that was not raised by the parties but formed part of the basis for the decision. As the appeal standard is currently drafted, it reflects the intent to prevent handicapping an opponent on appeal with the requirement that the evidence be limited to that which predates the filing of the Complaint. The availability or unavailability of the evidence is a factor that could be considered by the appeal panel.

One commentator has suggested that since the registrant is filing an appeal, it should not have to pay to submit additional evidence. While costs are a concern, merely instituting an appeal does not carry with it the right to introduce new evidence. Also, the additional costs of the hearing associated with the introduction of new evidence must be recovered. As such, a separate payment will still be required.

One group has requested additional rules and procedures on appeal. In response, some additional notice requirements have been included in the current version of the URS posted in November 2010 at the same time as this analysis is posted. Further, the comment about time for filing an appeal seem reasonable and the time for doing so has been reduced from 20 to 14 days. Additional procedures will be developed once URS Providers have been selected.

Abusive Filings

Key Points

- The URS attempts to balance benefits and harms by permanently barring those who have submitted two material falsehoods, and barring those submitting two abusive complaints for just a year after the second complaint is deemed abusive.
- If persons have been found to be abusive in the complaint process an appeal of the finding must be only on very limited grounds.

Summary of Comments

Abusive complaints and Deliberate Material Falsehoods.
The definition of "abusive" complaints is not clear; legitimate trademark owners could be labeled as having an abusive behavior and thus barred from using URS. *PMI (21 July 2010).*

The standard for imposing a penalty on complainants has been unjustifiably lowered, and the process is silent on the burden of proof placed on the examiner making a finding of an abusive complaint. The bar should be set extremely high given the severe consequences of such a finding. *NCTA (Module 3, 21 July 2010).*

IBM welcomes the clarifications provided for identifying an "abusive" complaint and for identifying a "deliberate material falsehood" (11.4). Clarification is required on what is considered "material". *IBM (21 July 2010).*

The abusive complaints section should be removed or reworked; the current section is troubling because it is highly likely that every registrant will plead the abusive nature of the complaint, thereby increasing costs and time to respond. *IPOA (21 July 2010). AIPLA (21 July 2010).*

The safeguards for abusive complaints go too far. The requirement in Section 11.4 that the false statement would have an "impact" on the outcome is too low for it to be held to be a deliberate "material" falsehood. *INTA Internet Committee (21 July 2010). BC (26 July 2010).*

No time period is set with regard to the two findings of "deliberate material falsehoods" that can permanently bar a party from using the URS. *INTA Internet Committee (21 July 2010).*

The threshold for the sanction is too low. Perhaps two abusive complaints or deliberate material falsehoods within a five-year period should warrant the sanction (barred from URS for one year). *AIPLA (21 July 2010).*

The "two strike policy" is unprecedented in international law (see URS sec. 11). Jurisdictions do not bar trademark owners from filing complaints—under any circumstances—and neither should ICANN. *IOC (21 July 2010).*

IBM agrees that two findings of "deliberate material falsehood" by a party should permanently bar the party from utilizing the URS. *IBM (21 July 2010).*

The abusive complaint provisions should not be diluted. Those who make deliberate misstatements of material facts to prevail in a URS should face sanctions stronger than being barred from using the process; such sanctions should include monetary fines for egregious cases. *ICA (21 July 2010).*

The appeal standard of review for findings of abuse should be de novo—as is proposed for a default appeal or appeal of a determination. *INTA Internet Committee (21 July 2010).*

Analysis of Comments

There have been several comments about the terms and application of the abusive complaint standards. Some commenters think being barred from utilizing the URS requires a much higher standard or should not ever be allowed, some think that the stated standard is too lenient, and others think simply barring a complainant from the URS is not enough. What was provided for in the URS Proposal attempts to balance all of these positions, by only permanently barring those who have submitted two material falsehoods, and barring those submitting two abusive complaints for just a year after the second complaint is deemed abusive.

It is true that if trademark holders are found to have submitted abusive complaints, as they are defined in the AGBv4, they will be barred from using the URS. This will not bar them, however, from using other enforcement mechanisms, including the UDRP.

One commenter asked for a clarification of the term material and another has stated that a false statement simply having an impact should be insufficient to be deemed a deliberate material falsehood. We used section 11.4 of the URS, where deliberate material falsehood is one that "contained an assertion of fact, which at the time it was made, was made with the knowledge that it was false and which, if true, would have an impact on the outcome on the URS proceeding." Something is material if it would have an impact on the outcome of the URS proceeding. Whether or not something would have an impact on the outcome, however, only goes materiality. This does not discount the fact that it must also be a "deliberate material falsehood," and not merely a "false statement."

One commenter has suggested that the appeal standard of review for findings of abuse should be de novo. But, the purpose of the URS is to address only the most clear-cut cases of abuse. Thus, if persons have been found to be abusive in the complaint process an appeal of the finding must be only on very limited grounds. This helps ensures that only legitimate trademark holders with legitimate reasons for filing a URS complaint are permitted to use the process in an unfettered manner.

Key Points

- Both the IRT and the STI called for suspension, not transfer of a domain name in the event a URS complainant prevails.
- In addition to requiring the URS Provider to post the Determination on its web site, the requirement to provide electronic notice to relevant parties has been added.

Summary of Comments

Notice of Determination. Section 9.2 says that "[i[f the Complainant satisfies the burden of proof, the Examiner will issue a Determination in favor of the Complainant. The Determination will be published on the URS Provider's website. "There is a vital omission here: the procedures do not require any active notice to the various parties involved. The procedure MUST be amended so that the URS Provider sends a copy of the Determination via e-mail to the Registrant, the Complainant, the Registrar, and the Registry Operator. These formal notices MUST be sent. If the Determination is in favor of the Complainant, the Registry Operator is then required to suspend the domain as per 10.1. Registry Operators should act only under explicit notification from the URS Provider, and this notification should be documented in the URS requirements.   And in general, it is only logical that the various parties should receive an e-mail notice of the Determination, as is done with UDRP decisions. *RySG (21 July 2010).*

Remedies not sufficient.
The URS should provide trademark owners with the ability not only to temporarily suspend a domain name but also to have the option to transfer valuable domain names back into their portfolios. At best the URS as now proposed allows only a temporary suspension for the remainder of the registration period with the option to suspend for an additional year. During this time the trademark owner cannot make use of a valuable domain name itself. This forces trademark owners into perpetual monitoring and enforcement obligations as the frozen domain name eventually lapses, falls into the pool and is likely picked up by another cybersquatter. *Verizon (20 July 2010). PMI (21 July 2010). DuPont (21 July 2010). IPOA (21 July 2010). CADNA (21 July 2010). Coca-Cola (21 July 2010). News Corporation (21 July 2010). Rosetta Stone (21 July 2010). AIPLA (21 July 2010). BC (26 July 2010). NCTA (Module 3, 21 July 2010).*

URS should offer a meaningful remedy—e.g., transfer, placement on a registry-maintained black list, or imposition of a presumption of bad faith for all domains that have already been suspended once (see URS sec. 10). *IOC (21 July 2010).*

Suspension as the only remedy would not lower costs for the trademark owner because of the risk that the same squatter will or another squatter could register the name upon expiration. If a complainant opts for the 1-year extension of the suspended domain name, will the Whois information continue to reflect that of the respondent after the initial expiration date? Who will monitor suspended domain names to ensure that no changes are made to the Whois or the site during the suspension period? *Grainger (Module 5, 19 July 2010).*

The URS decision should be binding for life, not a few months. *AIM (Module 5, 14 July 2010).*

Regarding the remedy (10.2), a successful complainant should have the right to cancel the domain to avoid causing damage to the goodwill associated with its trademark through having the contest url containing its mark resolve to a website not under its
control for a lengthy period of time. *IBM (21 July 2010).*

If the point of the URS is to address blatant abuse, then the domain should not resolve past the point at which initial administrative review is passed in an initiated URS proceeding and internet access should be promptly disabled. *Coca-Cola (21 July 2010).*

Transfer should not be available under the URS. The UDRP and URS remedies should remain distinct. *ICA (21 July 2010). Domain Dimensions (22 July 2010). M. Jaeger (22 July 2010).*

No re-registration after an adverse URS decision. To not exacerbate the "revolving door" problem and the need for costly defensive registrations, registrants should not be able to re-register a domain name after an adverse URS decision. *IHG (20 July 2010).*

Right of first refusal. At the very least the successful complainant should be given the right of first refusal to register the domain name when it next comes up for renewal. *BBC (21 July 2010)*

Paragraph 4 Domain lock.
Asking registry operators instead of registrars to perform the domain lock is highly problematic. This paragraph bypasses one layer of the registration hierarchy (registrars) and in this respect conflicts with the way the UDRP operates. Registrars should be the point of contact for the URS panel. Registrars have existing procedures in place to perform similar functions, have a direct relationship with registrants and already have customer services that seek to assist registrants. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

The lock process could cause substantial ongoing damage to a trademark owner whose rights are being infringed or to the public by virtue of how it operates (name still resolving for a period of time with website visible). There should be some provision for an interim remedy at least in cases of significant potential harm (akin to an interim injunction in court actions). *BBC (21 July 2010)*

Extension of registration period. Section 10.2 says: "There shall be an option for a successful complainant to pay Complainant to extend the registration period for one additional year at commercial rates." The mechanism for this is unspecified. The RySG notes that Registry Operators are generally precluded from offering registration services directly to registrants, and the RySG assumes this option will be offered without Registry Operator involvement. *RySG (21 July 2010).*

Analysis of Comments

The method and manner in which notice should be provided to the parties has been the subject of comments. In addition to requiring the URS Provider to post the Determination on its web site, the requirement to provide electronic notice to relevant parties has been added.

Many comments submitted involve the nature of the remedy available to a URS complainant. Some have suggested that the remedy should be a transfer; others have suggested that the decision should be binding for longer periods of time. Both the IRT and the STI called for suspension, not transfer of a

domain name in the event a URS complainant prevails. As noted above, the URS is intended to be a way in which trademark holders can obtain prompt relief from the most clear cut cases of abuse. The remedy reflects the evil it is designed to prevent. If cancellation is sought, that option can be obtained through a different rights protection mechanism, such as the UDRP.

The manner in which registrants losing URS proceedings can continue to register domain names has been the subject of comments. It has been suggested that an adverse ruling should prevent the registrant from re-registering a domain name. Each case would be determined on its own basis. Accordingly, the URS procedure will not include a ban on future participation in the domain name registration process.

Some have suggested that a successful URS complainant should be given a right of first refusal for the domain name when it comes up for renewal. On balance, this remedy was rejected since the purpose is to stop blatant abuse and the remedy of suspension achieves that end. Another has suggested that an interim remedy, similar to that found in injunction proceedings, be imposed. The URS is designed to remedy a very specific harm and the remedy reflects that precise harm—clear-cut cases of abuse, and to do that quickly. Such a rapid process will obviate the need for any interim remedy. Further, the URS is not the only manner in which an aggrieved trademark holder can obtain relief, it is simply one of many different rights protection mechanisms available to it. If injunctive relief is sought, the trademark holder can proceed in the appropriate jurisdiction to obtain it.

With respect to the comment relating to the ability of a successful URS complainant to register a domain name for an additional year, we agree that this mechanism requires implementation details that will need to be resolved in consultation with the registries and the providers.

ECONOMIC ANALYSIS

Key Points
- Independent economists retained by ICANN will answer substantive comments.
- Regarding the timing of the analysis, this study is not a new effort but rather part of the ongoing question of whether to undertake the new gTLD program that was first answered in ICANN's founding documents and later in ICANN's policy development process.
- ICANN took the results of earlier studies seriously, implementing trademark protections and malicious conduct mitigation measures.

Summary of Comments

The economic analysis work is incomplete.
ICANN has not yet performed analysis of the economic effect of the program on trademark holders (e.g., cost of defensive registrations, costs/benefits) nor has it analyzed consumer demand. ICANN has not yet shown that the new gTLD program will achieve its stated goal of creating innovation and competition. MarkMonitor agrees with Economic Framework report's conclusion that new unrestricted gTLDs with traditional business models for domain name registration will not provide any significant competition to .com. Community-based gTLDs and IDN gTLDs should be expedited. It is hard to predict a successful launch of the new gTLD program without further study and analysis. The initial conclusions in the Economic Framework document contradict the original reasoning by ICANN for introducing new gTLDs

(i.e., .com is the dominant gTLD and introducing additional gTLDs may not untether its dominance). *MarkMonitor (19 July 2010). Red Bull (21 July 2010). BBC (21 July 2010). DuPont (21 July 2010). Comerica (21 July 2010). Carlson (21 July 2010). Sunkist (21 July 2010). Solvay (22 July 2010). LifeScan (22 July 2010). ETS (22 July 2010). Liberty Mutual (22 July 2010).*

Report does not add value. The economic report, while professional in appearance, says very little and its main message regarding the issues is "it depends." The report predicts various possible risks and benefits without quantifying any of them and lacks empirical evidence. *Minds + Machines (21 July 2010).*

ICANN released the Economic Framework report just days before the last ICANN meeting, with little time for review by the community. Before rolling out new gTLDs, ICANN must perform an economic analysis including the cost to trademark holders and users and the actual consumer demand for various types of new gTLDs. It appears that IDNs have the most demand and other gTLDs have little if any. *Verizon (20 July 2010).*

Launch of new gTLDs must be preceded by a more thorough economic analysis that takes into account actual consumer demand and costs to trademark owners. ICANN needs to decelerate its new gTLD launch plans and take time to ensure that the costs do not end up outweighing the benefits of registrants and users. *CADNA (21 July 2010). INTA Internet Committee (21 July 2010).*

The Economic Framework paper cautioned that an open entry process may not lead to the societally optimal number of new gTLDs. Yet ICANN has persisted on following an open-entry process that will certainly lead to an avalanche of new gTLDs that will bury users of the Internet in confusion, abuse and higher costs. *MPAA (21 July 2010).*

The economic analysis findings suggest that far from responding to an economic demand for new gTLDs, the approach ICANN has taken could have devastating consequences for the stability of the DNS. The economic analysis recognizes the tremendous costs imposed by the new gTLD program on brand owners, consumers and ultimately civil society. Further work needs to be done—especially in the area of identifying the risks and impacts on existing markets for gTLDs. *SIIA (21 July 2010).*

It is alarming to see the introduction of an economic analysis at such a late stage of planning. We expect ICANN to fully consider the recommendations now put forward under the Economic Framework and to undertake the relevant pre-launch studies. These results should be factored into the DAG and the overall approach to launching new gTLDs. *HSBC (21 July 2010).*

The Economic Framework study suggested that positive competitive effects from new gTLDs may not be large, while it also suggested some potentially important and beneficial innovations from new gTLDs such as the opportunity for differentiation. ICANN should seek mechanism and applicant structures to maximize competition and encourage innovation in the DNS. DAGv4's rules on community-based gTLDs both in the evaluation and objection portions represent a good example of the way in which gTLDs can offer innovation in the DNS. ICANN should also be deliberate in its ongoing analysis, rollout and evaluation processes once new gTLDs are launched. USCIB supports the Economic Framework study's suggestion for ICANN to gather information from any new gTLD program in order to more clearly identify the general benefits and costs of implementing new gTLDs, including those related to consumers. *USCIB (21 July 2010).*

More comprehensive data and study required.

To facilitate a proper economic analysis of the costs and benefits of new gTLDs, AT&T fully supports the Economic Framework Paper's recommendations that ICANN gather much more comprehensive data about new and existing gTLDs, and conduct several types of studies, *before* new gTLDs are introduced. This information will also help in understanding the costs created by malicious conduct and inform the decision making on security, stability and resiliency issues. *AT&T (21 July 2010). ABA (22 July 2010).*

Microsoft supports the Economic Framework study recommendations to ICANN in paragraph 117 (introduce new gTLDs in discrete, limited rounds) and paragraph 118 (require registries, registrars and registrants to provide information, including about trademark disputes, sufficient to allow the estimation of costs and benefits of new gTLDs). *Microsoft (21 July 2010).*

ICANN should not issue a final Applicant Guidebook before the case studies and further analyses called for in the Economic Framework paper are complete and before the community has a chance to comment on their incorporation in another Draft Applicant Guidebook. *News Corporation (21 July 2010). AIPLA (21 July 2010). BITS (22 July 2010).*

Introduce new gTLDs in discrete, limited rounds.
AT&T supports the Economic Framework Paper's recommendations that ICANN introduce new gTLDs in discrete, limited rounds with prioritization of IDNs. In this way, ICANN will be able to mitigate consumer confusion and make any necessary adjustments to the implementation plan based on learning from initial rounds. As the economic paper acknowledges, there is no way for ICANN to fully assess and understand all of the potential costs and implications of introducing new gTLDs. By prioritizing introduction of IDNs, ICANN will be facilitating new gTLDs that are likely to deliver new benefits to global Internet users. *AT&T (21 July 2010).*

Until we have achieved a rollout of a substantial number of domains there will be no evidence to study regarding competition in the name space. Therefore the BC recommends that ICANN continue its practice of introducing new gTLDs in discrete, limited rounds. BC (26 July 2010).

Certainty not realistic. There will never be certainty about future extensions of the domain name space. *dotZON (21 July 2010).*

Do not delay the new TLDs launch and proceed with the implementation plan.
Nothing in the economic study should cause further delay in introduction of new TLDs or change the implementation plan. ICANN is, in fact, recommending in DAGv4 that it introduce new TLDs in discrete, limited rounds: there will be a discrete window which will open and close; all applicants must pass a background check, meet qualifications, establish their technical ability and meet all financial criteria and will have to have about $1 million to file a new TLD application. This round will thus be limited in duration to a discrete group of entities that can meet very limiting qualifications. Due to the nature of the evaluation, objection and approval processes, all of the names applied for in this round will, in practice, enter the root in batches or phases. ICANN could use the experience of this round and make any necessary adjustments prior to future rounds, as recommended in the economic study. *Domain Dimensions (22 July 2010).*

Analysis and Proposed Position

These comments have been forwarded to ICANN retained independent economists for response. However, some response can be made now regarding the timing of the reports and the comments that this analysis should have occurred earlier in the process. The current study is the last in a series of many investigations as to whether new markets should be opened and gTLDs should be delegated in an open way.

This is not the first opening of markets by ICANN. ICANN has opened up competition and opportunity on the marketing/distribution end of the spectrum (registrars), with spectacularly good results for consumers and entrepreneurs. It has, in contrast, been very measured in opening the market on the manufacturing side (registries), because of technical and other concerns that have been addressed.

It has always been ICANN's mission, as defined in its founding documents, to open up competition in the DNS – that has been one of the principal reasons for ICANN's existence from even before its beginning. After two initial rounds and learning lessons on benefits and costs there, ICANN undertook an intensive policy development process where all the stakeholders groups in ICANN's GNSO endorsed the opening of this market – after extensive discussions regarding costs and benefits.

After the ICANN Board approved the policy, ICANN undertook several independent economic studies regarding: price controls, vertical integration and the possible benefits of the program.

The previous studies and community discussion indicated potential social costs in the program. As a result, ICANN has tried very hard to take into account input form trademark interests, resulting in a thorough program of trademark protections and malicious conduct mitigation measures built into the Guidebook.

After all of these, there was a call for additional analysis and this study was launched. The timing of the report is not due to a late realization but rather it is an additional undertaking of an ongoing effort.

MALICIOUS CONDUCT

Key Points

- Working Groups have developed two added 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. See updated HSTLD Snapshot published under separate cover.

- Liability for invalid or inaccurate Whois information may receive future consideration for inclusion within amendments to the RAA.

Summary of Comments

Integrated approach to trademark protection and malicious conduct. ICANN should integrate its consideration of malicious conduct and trademark protections as they are directly related. Additional proactive measures are needed to keep deceptive gTLDs out of the system in the first place, and they

should be an essential component of ICANN's comprehensive plan for avoiding end user confusion and the associated harms resulting from malicious conduct. *AT&T (21 July 2010).*

Mandatory baseline for registries. The main problem is the voluntary nature of many of the key safeguards that ICANN has proposed to deal with malicious conduct. At a minimum, ICANN should require registry operators of new gTLDs to implement basic procedures to help prevent, or to expedite response to, malicious conduct involving registrations that they sponsor. *Time Warner (21 July 2010).*

Proxy and privacy registrations. Measures should be taken prior to the launch of new gTLDs to deal with the increased use of proxy and privacy registrations by bad actors for unlawful purposes. If this issue is not dealt with prior to the new gTLDs launch, the scale of use for unlawful purposes could spiral out of control. *Hogan Lovells (21 July 2010).*

Liability for invalid or inaccurate Whois data. If a registrant is untraceable due to invalid or inaccurate Whois data, liability should be passed on to the Registrar or Privacy Whois providers. This could reduce the harm to Internet uses and be leveraged to improve the accuracy of Whois data. *HSBC (21 July 2010).*

Built-in mechanisms and compliance efforts to combat malicious conduct. The rollout of new gTLDs and accompanying structures in DAGv4 should, where possible, build-in mechanisms to limit further criminal activity, including spam, malware, WHOIS abuse and other illegal activities. Ensuring strong contract compliance and increasing funding for ICANN compliance efforts will help in this regard. *USCIB (21 July 2010).*

Additional measures for vetting registry operators. The background check is a positive addition to the process for vetting registry operators. Additional measures would decrease the likelihood of malicious conduct, including: (i) rendering denial of an application automatic as opposed to discretionary as suggested by the wording of the notes to question 11; (ii) extending the class of persons to include persons who operate, fund or invest in the registry operator; (iii) eliminating the temporal restrictions in (d) regarding disqualification by ICANN such that any disqualification at any time is relevant; (vii) revise (e) to read "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, including." (viii) add a new category (f) that covers "has materially breached an existing registry agreement or the Registrar Accreditation Agreement." Microsoft (21 July 2010).

Rapid takedown or suspension systems. It is extremely disappointing that ICANN has failed to take the opportunity to require registry operators to adopt and implement rapid takedown or suspension systems to combat malicious conduct. Microsoft reiterates the proposal it made for this in its version 3 comments, including being amenable to having one or more Microsoft employees with relevant expertise to work on an ICANN-convened expert group to develop a required rapid takedown or suspension system. *Microsoft (21 July 2010).*

Support for malicious conduct efforts in DAGv4. I support and commend ICANN for its work on malicious conduct concerns in the DAGv4 and that this issue should be considered resolved. Domain Dimensions *(22 July 2010).*

High Security Zone TLD Program—application-based incentives.
A specific evaluation question should be included to provide application-based incentives for applicants to protect the public by adopting the more rigorous protections spelled out in the High Security Zone

TLD Program. Applicants should be awarded one or more optional points for a positive response, or alternatively points could be deducted from the evaluation score of an applicant who declines to take these additional steps to protect the public. *COA (21 July 2010).*

Analysis of Comments

As stated in various comments, the issues of trademark protection and malicious conduct have some overlap, and while the progress on those issues has been discussed separately, the solutions generated work in tandem. Controls and processes for both are included in the current Applicant Guidebook. The issue of malicious conduct is addressed with nine separate measures designed to mitigate the potential increase in phishing, spam, malware, botnets, and other abusive activities. It is thought that all these measures will work for the protection of rights holders and all registrants.

Mitigation of malicious conduct issues, as they relate to the new gTLD space, was worked through the active participation of multiple expert sources, including the Registry Internet Safety Group (RISG), the Security and Stability Advisory Committee (SSAC), Computer Emergency Response Teams (CERTs), Intellectual Property Constituency (IPC), and members of the banking/financial, and Internet security communities.

As a result of this work, nine measures were recommended and included in the Applicant Guidebook for the benefit of registrants and users to increase trust in new gTLD zones:

- Vetted registry operators (background checks)
- Demonstrated plan for DNSSEC deployment
- Prohibition of DNS redirection of "wildcarding"
- Removal of orphan glue records to eliminate a tool of spammers and others
- Requirement to maintain thick WHOIS records
- Centralized method of zone-file access
- Documented registry abuse contacts and procedures
- Participation in an expedited registry security request process

Comments requested that ICANN place an emphasis on the accuracy of Whois information and suggested methods of enhancing Whois accuracy. In response to earlier public comment, the proposed registry agreement now contains a requirement for the maintenance of a thick Whois database. ICANN is actively reviewing the new gTLD program and its compliance regimes overall to consider where enhancements can be made to promote Whois accuracy or ease access to Whois information.

Liability for invalid or inaccurate Whois information may receive future consideration for inclusion within amendments to the RAA and is an issue for ICANN's policymakers. Requirements for removal of malicious domains may address this issue in a more efficient fashion.

Several comments on malicious conduct described: the need for more stringent focus on the overall issue, support and questions for the High Security Zone TLD ("HSTLD") program, contract enforcement, and suggestions for control activities. See the recently-posted explanatory memorandum on Malicious Conduct and HSTLD Snapshot Summary and Analysis for an additional report on all aspects of the Malicious Conduct Mitigation effort and results. Several changes were made to the Guidebook in relation to and in anticipation of the HSTLD program or one like it. High security designations are

encouraged for TLDs that raise an expectation of security, such as providers of financial services. As the launch of new gTLDs becomes imminent, ICANN is augmenting staffing in compliance, registry liaison, IANA, and other functions to provide a full suite of enforcement and other services to new gTLD registries and for the benefit of DNS users.

Implementation of some built-in mechanisms is underway, such as monitoring the availability of Whois services.

The processes for vetting of registry applicants have been further reviewed. Specific, significant changes have been made in background screening to make that tool more effective in preventing future potential abuse and to provide applicants and others with certain requirements.

Comments requested the development of a rapid domain name suspension process to address abusive domain names that host or support malicious conduct. Currently, the guidebook requires all applicants to establish and maintain a dedicated abuse point of contact responsible for addressing matters requiring expedited attention, and for providing a timely response. Although the specific policies and procedures might vary according to the needs of particular TLDs, all applicants are expected to have a well-developed plan for abuse prevention and mitigation in the TLD to pass the evaluation. Community work on standardizing or coordinating takedown or other mechanisms could take place in the policy space, or informally among TLD operators. In addition, 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 are blatantly abusing trademark rights, where this type of behavior can be addressed.

Background check

Key Points

- The basis of the background screening was borne from public concern about potential for malicious conduct with the introduction of new gTLDs.
- The term "terrorism" has been removed from the background check criteria.
- The focus of background screening is now limited to general business diligence, criminal history, and improper domain-name-specific behavior.

Summary of Comments

Background checks.
It is welcomed that the DAGv4 has added a background check for applicants, where a number of circumstances could disqualify a person or entity from running a new gTLD. *COA (21 July 2010). Hogan Lovells (21 July 2010). R. Tindal (21 July 2010). ABA (22 July 2010). BITS (22 July 2010).*

Instead of a case by case approach, we would prefer a more systematic approach to the background checks given the importance of mitigating the risk of participation in the new gTLD process by criminal actors. *BITS (22 July 2010).*

Section 2.1 details a reasonable background check process regarding individuals and entities applying for any new gTLD. The approach of a "case by case basis depending on the individual's position of influence on the applying entity and registry operations" should alleviate fears that ICANN will look for any

connection to nefarious conduct, no matter how remote, to bring down a gTLD applicant. The background check language is also appropriate provided that ICANN will not be looking to exclude an applicant for anything but serial intellectual property violations that have been adjudicated in a court of law. We believe that ICANN will be reasonable in this aspect of the applicant review process. *Demand Media (22 July 2010).*

CADNA welcomes the background check requirement but seeks more information about how high a priority background checks on past intellectual property violations will be. *CADNA (21 July 2010).*

No basis was provided for the introduction of this additional step in the application process. The least intrusive check is one on the applicant itself in relation to its financial, technical and operational capabilities. If it is necessary to check the applicant's management, this should be limited to active officers, directors and possibly majority shareholders of the applicant.
The word"partners" in this context is confusing as the legal meaning is different from the broader, more general meaning in ordinary use. In addition, some of the grounds upon which a background check is to be based appear overly vague or disproportionate to the objectives. While the scale of serious matters such as terrorism and war crimes cannot be denied, how would these affect the deployment of new gTLDs and the operation of the DNS? *M. Wong (21 July 2010). R. Dammak (July 2010).*

There is no provision for informing the applicant that it has triggered alarm bells in the course of its background check or even that it has failed because of a negative background check. There is no provision for appeal or review of a decision to disallow the application because of a failed background check. *M. Wong (21 July 2010). R. Dammak (July 2010).*

ICANN should remove the background check requirement unless community feedback indicates strong, substantiated and principled support for it. If the community supports a background check, it should be strictly limited to, at most, cases of proven financial irregularity or fraud, and possibly clear-cut proven cases of cybersquatting. *M. Wong (21 July 2010). R. Dammak (July 2010).*

The background check is inappropriate, prejudicial, and should be deleted. This was not something the GNSO recommended but is something that ICANN staff created. Preventing "terrorism" is widely outside of ICANN's scope and mission and there is no internationally agreed definition of terrorism. This policy will prejudice non-westerners. In addition, including "intellectual property violations" in the same category of harm as "terrorism" seems to be a gift to the intellectual property community that is not grounded in reality, proportionality or community support. *R. Gross (21 July 2010). R. Dammak (22 July 2010).*

Third party firm conducting background checks.
We are concerned about the standard and approach for selecting the third party firm that will conduct background checks according to the DAGv4. ICANN must select a neutral, authoritative organization as a third party through wide community consultations. An organization under the frame of the UN should be selected to undertake this job. *ISC (21 July 2010).*

CADNA requests more information about the process of selection of the third party to perform the background check. *CADNA (21 July 2010).*

Inclusion of the word "terrorism" without standards or definition.

Regarding the DAGv4's Section 1.2.1 "Eligibility" and 2.1 "Background Check" the insertion of the word "terrorism" so arbitrarily as part of the background check on applicants, and without providing any definition or criteria that would be measured against approving or denying an applicant for a new gTLD or IDN gTLD, causes deep personal concern. Background checks in this area of terrorism, as it is presented in the DAGv4 without any definition, are unacceptable to many people, language communities, and faith communities around the world. It is a surprise to see ICANN involving itself in the area of terrorism while its mandate is only being a technical coordinator. Clear and internationally recognized definitions and measures should be included in this section or it should be removed. *A. Al-Zoman (19 July 2010). A. Al-Zoman (21 July 2010).*

ICANN has arbitrarily added Terrorism verification checks to be conducted on all applicants for new gTLDs (including IDN gTLDs) in the DAGv4 with no definitions or standards whatsoever upon which these checks will be done, a clear indication that little thought was given to this matter, if any, or to its grave international implications. This requirement is offensive to many in the international community and some will boycott the ICANN process. If implemented it would clearly indicate that ICANN has gone well beyond its mandate. It suggests that ICANN is still operating in the shadow of the U.S. government, casting damage on the Affirmation of Commitment.

ICANN should urgently address this issue by either:
> Option 1—retract "terrorism" as an area of verification checks in the guidebook; or
> Option 2—if "terrorism" remains as an area of checks, ICANN must
> (A) indicate how it intends to carry out such an evaluation and provide clear definitions of what type of terrorism (e.g., cyber, Islamic, state, etc.);
> (B) adoption definitions congruent with international, local community and local jurisdiction accepted laws and standards on terrorism upon which fair and unbiased measurements of applicants can be conducted;
> (C) if ICANN staff or "experts" cannot come up with appropriate definitions or protocols that meet the above criteria, ICANN would be better served to post a 30 or 45 day period Request for Comment for community feedback for definitions and advice on protocols, as it does for other issues.
> (D) ICANN should provide an explanation as to how and why "terrorism" was added to the DAGv4 in the first place—i.e. on whose request? ICANN should indicate in which policymaking forum this request was made, when and by whom, for "bottom-up", transparency purposes.

If this offense of arbitrarily adding "terrorism" was unintentional, an apology by ICANN with a commitment to correcting it would go a long way to show how magnanimous ICANN can be when realizing it made a mistake. *Multilingual Internet Group (19 July 2010).*

Background check—clear terms needed. The background check section contains ambiguous terms prone to subjective interpretation. This could provide third parties seeking to interfere with, delay or block specific applications with attack vectors. Clear and internationally recognized definitions and measures should be included in this section. *Arab Team (21 July 2010).*

Analysis of Comments

The term "terrorism" has been removed from the Applicant Guidebook. The term was not meant to single out or identify a group of potential applicants; rather, it was meant to provide some guidance on what could be checked and to indicate that ICANN must comply with certain laws.

Several comments welcome the addition of a background screening process, while others question the basis and necessity of such a review given the extensive analysis to be performed by the Evaluation Panels. Other comments are concerned with the definition of terms and the potential that the process could be prejudicial depending on how those terms are interpreted by who is providing the background screening service. These comments have merit and have been carefully considered in redrafting this section of the Applicant Guidebook.

The basis of the background screening was borne from public concern about potential for malicious conduct with the introduction of new gTLDs. There have been specific comments that allowing "bad actors" to own and/or manage TLDs would perpetuate malicious conduct on the Internet. As is explained in the next version of the Applicant Guidebook, the background screening process is part of an overall approach to mitigate such behavior. All Applicants have been and continue to be required to disclose any potential concerns about their background. However, the focus of background screening is now limited to general business diligence, criminal history, and improper domain-name-specific behavior. Specific criteria are provided in the guidebook.

The third-party organization conducting the background screening will check publicly available data to determine if the Applicant has made all disclosures. Gaps between Applicant disclosures versus the third party check may require clarification from the applicant.

ROOT SCALING

Key Points

- ICANN published two studies to inform the root scaling discussion.
  > The *Delegation Rate Scenarios for New gTLDs* http://www.icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf
  > The *Summary of the Impact of Root Zone Scaling* http://www.icann.org/en/topics/new-gtlds/summary-of-impact-root-zone-scaling-06oct10-en.pdf

- The Delegation Rate study describes a process-imposed limit that the delegation rate of new TLDs will not exceed 1000 new gTLDs per year, regardless of the number of applications.
- The planned delegation rate and other factors contribute to a conclusion that the new gTLD program will not pose root zone stability issues.

Summary of Comments

Limit initial pool to community-based gTLDs and IDN gTLDs. MarkMonitor agrees with the root scaling study that a slow limited release of new gTLDs might be prudent until DNSSEC implementation is completed since there is no indication as to how many gTLDs will be introduced and ICANN has yet to

formally limit the size of the initial pool. The convergence of DNSSEC, IDNs, IPv6 and the new gTLDs could potentially destabilize the root. Given that potential negative effect to security and stability, ICANN should limit the pool of gTLDs (to allow ICANN to evaluate the potential pressure on the root) and significantly limit the initial round to community-based gTLDs (designed for and supported by clearly delineated, organized and pre-existing communities) and IDN gTLDs only. *Mark Monitor (19 July 2010). Red Bull (21 July 2010). BBC (21 July 2010). HSBC (21 July 2010). DuPont (21 July 2010). Carlson (21 July 2010). Comerica (21 July 2010). Sunkist (21 July 2010). Solvay (22 July 2010). LifeScan (22 July 2010). ETS (22 July 2010). ETS (22 July 2010). Liberty Mutual (22 July 2010).*
The root scaling study concluded that more work was needed to fully understand the implications of the introduction of new gTLDs and develop effective responses to these concerns. The Root Scaling Team recommended a staged approach to new gTLD introduction as a way to help manage the risks to the root zone servers. *AT&T (21 July 2010).*

USCIB is eager for ICANN to finish and release the expected root scaling study that will provide insight into important security and stability considerations with respect to introducing a range of both ASCII and non-ASCII domain names and the impact on a single authoritative root. A focus on differentiation could help limit some of the potential negative consequences for a rapid introduction of new gTLDs into the root. *USCIB (21 July 2010).*
We suggest deferring the implementation of new gTLDs until the final root scaling study report is available and any issues it identifies are adequately addressed. *BITS (22 July 2010).*

Analysis of Comments

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 gTLDs 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 has devised an appropriate plan for delegation rates of new gTLDs into the root zone as a component of the overall gTLD program. The plan was created with both the expected and maximum number of applications in mind.
In releasing the two reports related to Root Zone Scaling, ICANN states the proposition that the many of the issues raised have been addressed by:

- metered delegation rates;

- the fact that DNSSEC, IDNs and IPv6 are already deployed; and

- analysis of L-root behavior.

The analysis of the "Delegation Rate Scenarios for New gTLDs" seeks to address the concern that with many new TLDs being delegated, the stability of the root server and distribution system could be in question. It is calculated that the expected rate of new TLDs entering the root in the first round would be in the order of 200 to 300 annually - and not exceeding 1,000 delegations/year even if there were thousands of applications. As a result, no meaningful technical stability issues were identified and advice from the root zone operators indicated that delegation rates of up to 1000 could be accommodated. Based on this analysis, and taking into consideration the results of the studies into the effects of scaling the root summarized in "Summary of the Impact of Root Zone Scaling," we have no evidence (reason to believe) that the root system will not remain stable. The report also recommends that monitoring of

root management systems as well as communications between the various stakeholders involved in root management should be improved to ensure that changes relating to scaling of the root management systems don't go unnoticed prior to those changes becoming an issue. This is not technically difficult given the relatively low delegation rates, and is currently under consideration.

SECURITY AND STABILITY

Key Points

- Contractual compliance will be staffed to effectively deal with audit and enforcement issues arising from the introduction of new gTLDs.
- Introduction of new gTLDs will be conducted in a manner consistent with ICANN's commitments to preserve the security, stability and resiliency of the DNS.
- Divergent views have been received on whether the High Security Zone Verification Program should be mandatory or voluntary. The program will continue to be pursued by ICANN; standards and program administration will be adopted by an independent agency.

Summary of Comments

Compliance issues. ICANN already has substantial existing critical compliance challenges and per a recent report (KnujOn) ICANN is not devoting enough resources to them. Compliance issues are a serious red flag and specter over any planned expansion of the DNS. Serious questions remain about whether ICANN can effectively deal with security, stability or malicious conduct when it increase the number of registries, registrars and gTLDs operating on a global scale. The DAGv4 provides no assurance that the rollout of new gTLDs will not spawn further criminal and illegal activity or how ICANN will prevent and address these issues. *Verizon (20 July 2010).*

Trust and reliability of the Internet. The success of the Internet is based on its openness and constant adoption to users' needs. Consumers can rely on its availability and have trust in registrars and registries and the constant developments to accommodate users' needs. This achievement should not be put at risk. *dotZON (21 July 2010).*

High Security Zones Verification Program.
This program appears unlikely to materialize and, if it does, to be effective. The HSZ TLD program must be mandatory for all new gTLDs or, at a minimum, ICANN should subtract points form any applicant that does not state its intention to seek HSZ TLD certification. *Microsoft (21 July 2010).*

High security verification should be mandatory for financial services domains. *ABA (22 July 2010). BITS (22 July 2010).*

The HSZ program should remain voluntary so that consumers can make their own assessment of its worth. If there is real consumer value then market forces will drive its broader adoption. *R. Tindal (21 July 2010).*

Analysis of Comments

<u>Compliance issues</u>

With regard to compliance issues, ICANN will continue to aggressively enforce ICANN's registrar and registry contracts in the interest of protecting registrants and encouraging public confidence in the DNS. Additional resources are planned and will be secured to effectively serve the new gTLD registries.

<u>Trust and reliability of the Internet</u>

ICANN acknowledges these comments, and recognizes that the introduction of new gTLDs should be conducted in a manner consistent with ICANN's commitments to preserve the security, stability and resiliency of the DNS. The application process and evaluation of new gTLD proposals is intended to follow a process to ensure that trust and reliability of the Internet's unique identifier system is not put at risk.

<u>High Security Zones Verification Program</u>

ICANN received divergent views on whether the High Security Zone Verification program should be mandatory or voluntary.

In general, and in other sections of the Applicant Guidebook, comments suggested that the HSTLD program should be voluntary and that if there is perceived value in it, the marketplace will evolve to accommodate the demand. The HSTLD program is currently being explored and its viability is under review and consideration. On 22 September 2010, ICANN in coordination with its HSTLD AG issued a Request for Information (RFI) on the HSTLD Program. The purpose of the RFI is to assist the ICANN community in understanding potential frameworks and approaches for evaluating TLD registries against the HSTLD criteria, determine where improvements to draft criteria and the overall program may be necessary to ensure its success, and to assess the viability of the proposed HSTLD Program.

Next Steps:

ICANN and the HSTLD AG agreed there is value in conducting a RFI on the program, and as noted above it was published on 22 September 2010. After the RFI period closes on 23 November 2010 and ICANN and the HSTLD AG have had adequate time to respond to questions and to summarize and analyze the responses, a determination about next steps will be made.

ICANN remains committed to mitigating malicious conduct in new gTLDs and supports the development of the HSTLD concept as a voluntary, independently operated program. Some in the community have taken ICANN Board Resolution 2.8 Mitigating Malicious Conduct[1] as a lack of support for the concept. While the Board said it will not be signing on to be the operator of such a product, it does support its concept just as it has other measures (e.g., URS, prohibition of wildcarding, centralized zone file access, etc.) to mitigate malicious conduct in new gTLDs.

VARIANT MANAGEMENT

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[1] Board Resolution is viewable at http://icann.org/en/minutes/resolutions-25sep10-en.htm#2.8.

Key Points

- It is understood that script cases and practices vary around the world, and that delegation of variant TLDs is critical to good user experience for a number of Internet users.
- ICANN continues to support study and development activities toward a variant management solution for the top level, including testing of DNAME, creation of policy, and other mechanisms, so that users around the world will be able to take advantage of increased opportunities in a secure and reliable DNS.

Summary of Comments

Chinese characters. Variants must be treated fairly in the new gTLD process. The current policy where variants have to be blocked or reserved until there is a proper solution may advantage some variants over others and cause user confusion. In Chinese script strings of simplified and traditional form share the same meaning and are used equally among Chinese Internet users. Block or reservation of either form will deprive certain groups of Chinese users of the right to access the Internet in Chinese scripts. CNNIC appeals to ICANN to consider a proper solution to Chinese characters before launching new gTLDs. It may be that if applicants abide by similar requirements on ".China" that ICANN will approve the applications of the two string requests in a bundle. *CNNIC (21 July 2010).*

Delegation of Variants. Variant TLDs should be supported and delegated to the same TLD holder. Blocking or reserving them will deprive certain user groups of the right to access the Internet in their language using the available input device (e.g., keyboard). *A. Al-Zoman (21 July 2010).*

Analysis of Comments

ICANN agrees that treatment of variant strings should occur according to a fair procedure. The current approach is designed to be uniform and avoid advantaging or disadvantaging any user group as compared to another. It is understood that script cases and practices vary around the world, and that variants are critical to good user experience for a number of Internet users.

It is expected in the long term that variant TLDs will be supported and delegated to the same TLD operator. The task is to define a clear and globally supported understanding of the definition of variant TLDs, and what policies and user expectations can attach to these.

It is noted that IDN ccTLDs involving the simplified and traditional Chinese scripts have been delegated, and it is expected that the experience gained through the IDN ccTLD Fast Track will inform these community discussions going forward and help enable a workable approach for the gTLD namespace.

In authorizing the delegation of these IDN ccTLDs, the Board resolution noted that the methodology to be taken by the IDN ccTLD manager to handle these particular instances of parallel IDN ccTLDs is, in the short-term, the only option available, but there are serious limits to where such an approach is viable in practice, so that it cannot be viewed as a general solution. Consequently, long-term development work should be pursued. The Board directed that "significant analysis and possibly development work should continue on both policy-based and technical elements of a solution for the introduction on a more general basis of strings containing variants as TLDs." (See
http://www.icann.org/en/minutes/resolutions-22apr10-en.htm).

ICANN continues to support study and development activities toward a variant management solution for the top level, including testing of DNAME and other mechanisms, so that users around the world will be able to take advantage of increased opportunities in a secure and reliable DNS.

STRING SIMILARITY

Key Points

- Whether exceptions should be made to rue excluding delegation of "confusingly similar" TLD strings is a complex issue requiring additional policy discussion.
- The policy work should examine whether there should be exceptions for "non-detrimental" similarity (e.g., cases of common ownership or in view of context).
- The diversity in the make-up of evaluation Panels will match the anticipated diversity of the new gTLD applications.

Summary of Comments

Section 2.2.1.1. No changes were made to this section. Strings that may be judged similar but in a non-detrimental way should not be eliminated in the initial evaluation. In case that does happen, the opportunity for correcting the possible error could be provided. The focus should be on a good user experience; it is very possible that two strings could be similar but not create confusion and instead provide for a better user experience. *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

Foreign language equivalents (1.1.2.8, 2.2.1). String contention should include foreign language equivalents of applied for names (e.g. "bank" and "banco" should be considered equivalent). *BITS (22 July 2010).*

Review methodology (2.2.1.1.2). I agree that a higher visual similarity score could be indicative of greater difficulty in passing the string similarity review. I support the DAG's conclusion that "final determination of similarity is entirely up to the Panel's judgment." *R. Tindal (21 July 2010).*

String similarity—panelists. Panelists reviewing for string similarity should include both trademark practitioners and personnel experienced in the workings of not-for-profit organizations. *Red Cross (21 July 2010).*

String similarity review should include aural (sound) and commercial impression (meaning) as well as visual similarity. *Red Cross (21 July 2010).*

An extended review should also be available following the String Similarity Review process, at the Applicant's request. *Red Cross (21 July 2010). V. Petev (Module 2, 21 July 2010).*

"Average, reasonable Internet user". This term in Section 2.1.1.1.2 should be more clearly defined. *Red Cross (21 July 2010).*

<u>Evaluation criteria for confusingly similar strings--IDNs</u>. A major point ICANN is missing in their current evaluation criteria for confusingly similar strings is that they do not review the TLDs, especially IDNs, in the context they will be used in (e.g., Cyrillic). When reviewing an IDN in context, the evaluation of the string (and its alphabetical differentiation) becomes much easier. *V. Petev (Module 2, 21 July 2010),*

Analysis of Comments

The proposal to allow for exceptions for "non-detrimental" similarity is certainly worth consideration. Comments have requested that exceptions be granted from findings of confusing similarity. The reason for granting an exception would be that a string pair that has been found to be confusingly similar constitutes a case of "non-detrimental confusion", for example if the applicant/operator is the same for both strings or if there is an agreement between the involved applicants/operators that provides for improved user experience.

One result of the GNSO idea may be the delegation of variant TLDs – given that variant TLDs are very similar.

Similar strings should not be delegated absent an in depth policy examination of the issues. The suggested modifications raise a complex set of policy issues (similar to those discussed regarding variants). The proposal should not be considered as plain implementation matters.

This is a conservative approach. If appropriate, the outcome of the work listed above can be considered for implementation when completed. Policy work in this area should be encouraged.

The GNSO policy states that strings resulting in user confusion should not be delegated: avoidance of user confusion is a fundamental objective to protect end-user interests and promote a good user experience.

The criteria and requirements for operation of similar TLDs in a "non-detrimental" manner is not obvious or straightforward. The exact criteria and requirements for such a situation to be unequivocally fulfilled have to be defined and need to be agreed by the wider community.

The String Similarity review and the String Confusion objection provisions already protect delegated TLDs against applications featuring confusingly similar strings. To confer a right to delegated TLDs to use such strings themselves is a change in principle and of importance. Such rights can be used to introduce chains of successively similar TLD strings, potentially reaching far away from any direct similarity with the original TLD string. The appropriateness of such consequences, and any limitation to impose, need to be discussed and agreed by the wider community.

The actual operation of "non-detrimentally" confusingly similar strings raises issues regarding user experience and user expectations already identified in discussions about "equivalent" and "variant" strings. Operational requirements to safeguard such aspects need to be developed, introduced and enforced. For example, should they resolve to the same address or not?

If exceptions for "non-detrimentally" confusingly similar strings are granted, there must also be safeguards to guarantee that the necessary conditions remain permanently fulfilled, calling for particular

contractual conditions as well as for compliance measures. These need to be developed and agreed by the wider community. The requirements in this regard would be even more pronounced for any exception granted for strings to be operated by different operators under any particular agreement aimed at improved user experience.

The changes proposed by the GNSO deserve proper consideration and may ultimately prove to be beneficial. However, this is not a foregone conclusion and requires positive outcomes of all the investigations mentioned above. While the necessary investigations are taking place, such strings will not be delegated. In the meantime, the available protection against applications with confusingly similar strings will safeguard both user and operator interests, so there are no obvious justifications for haste in modifying the existing approach.

The requirement for diversity in panel expertise is well taken, especially in view of the ultimate decision power of the panel, and is already a foreseen criterion for the selection of service provider to populate the panel.

As to the requirement for a more precise definition of "average, reasonable Internet user", it deserves to be mentioned that diversity in the panel would include linguistic diversity to ensure familiarity with the scripts involved. This in order to avoid undue findings of confusing similarity, as for example two strings in Chinese may look visually confusingly similar to a Westerner but not be visually confusable at all for a Chinese. The "reasonable person" standard is commonly used and it is thought that adding detail might serve to denigrate the intent.

The requirements to increase the scope of string similarity assessment beyond visual similarity have already been addressed in earlier comment rounds and no new aspects have been put forward to consider. The Guidebook assessment in Initial Evaluation is limited to visual similarity only as a pre-screen for the objection process that covers all types of potential confusion (as detailed in earlier comment analyses and public statements.

STRING CONTENTION

Key Points

- Multiple comments refer to the scoring threshold for community priority evaluation, some arguing in favor of keeping it at 14 out of 16, some favor lowering it to 13.
- Multiple comments propose various changes in the scoring, notably: using a finer scale, extending scoring for community delineation, modifying scoring for nexus and uniqueness, adding points for policy-making/governance structure and adding points for early establishment.
- Some comments address the situation with two or more winning community applications in final contention, proposing alternatives to auction: a) highest scorer wins, b) await voluntary resolution, c) supplementary scoring system.
- One comment proposes a process change in view of a potential outcome of the discussions regarding Vertical Integration.
- One comment claims that legal rights should play a role in contention resolution
- One comment proposes separate treatment for not-for-profit organizations

Summary of Comments

Existing legal rights. Existing legal rights should also be considered when resolving string contention. Where there are legitimate competing rights, a more sophisticated mechanism (than, e.g., an auction) should be adopted for allocating the relevant gTLD which reflects the nature, breadth and longevity of those rights. *BBC (21 July 2010)*

Community priority evaluation—revisit standards.
ICANN staff should revisit the community priority evaluation standard. Previous public comments overwhelmingly sided with the 13-point threshold. ICANN staff has not satisfactorily explained the basis for its insistence on a 14-point threshold, which will be almost impossible for most community applications to achieve. *COA (21 July 2010).*

In addition, to reduce the likelihood that the community priority evaluation process will be nothing more than anteroom to an auction hall, the criteria for a top score on the following evaluation criteria, as set out in DAGv4 Section 4.2.3, should be modified to read as follows (adding the underlined text)"

- Nexus: The string matches the name of the community, is a well known short-form abbreviation of the community name, or is otherwise strongly associated with the community.
- Uniqueness: String has no other significant meaning beyond identifying the community described in the application. (This criterion to be applied in the language associated with the described community, if applicable.) A meaning unrelated to any community would not be considered significant.

COA (21 July 2010).

Community priority evaluation--clarity of revisions. Notable clarity has been provided in DAGv4. *Big Room (21 July 2010). R. Tindal (21 July 2010).*

Community priority evaluation--support for 14 point threshold. I strongly support maintaining that an applicant must score at least 14 points to prevail in a community priority evaluation. Lowering the score can harm registrants. If the scoring threshold is lowered it will be easier for applicants to obtain community status on strings that should be available at the second level to a wide variety of registrants. The scoring only happens when there are two or more applicants for the string; in this situation a high scoring threshold is the best way to protect real communities because it will be more likely that the string is awarded to the applicant who most closely represents the community in question. A low score will allow successful objections to legitimate communities—it will be easier for groups who may not be closely associated with the community to object successfully and block the applicant—i.e. the standards for successful objection are based on the standards required to achieve the 14 point score. *R. Tindal (21 July 2010). Domain Dimensions (22 July 2010). D. Schindler (22 July 2010).*

The community priority evaluation scoring should be set at 13 of 16 points to allow one point for evaluator (subjective/human error). This would be a more fair and equitable approach. The narrow approach currently proposed will undoubtedly lead to a significant number of unfair and unnecessary auctions. *BC (26 July 2010). R. Andruff (Module 4, 21 July 2010).*

Community evaluation priority—clarifications requested. ICANN should more clearly delineate the notion of "clearly delineated community" and the scoring process. An applicant should not be penalized in the process for accidental similarity. If ICANN wants to keep the current scoring system, then eligibility rules should have an extended range allowing for more granularity and/or all registration policies should be examined together. There should be a wider range under community delineation bringing the total to 17 or 18. Under this system that somehow imposes double penalties (delineation and eligibility for non-membership communities, e.g.) and provides for accidental "fails" outside the control of the applicant (lack of "uniqueness" due to some coincidence or similarity in any other language), having the ability to miss a third point is critical even for most reasonable, responsible proposals. *A. Abril i Abril (Module 4, 21 July 2010).*

Community priority evaluation—change the scoring scale to tenths of a point. The evaluation procedure for community priority ratings should not use a gross integer measure that will miss nuances in these difficult and crucial criteria. The scale should be changed to allow for discrimination in terms of tenths of a point instead of whole points. Making this change will make the procedure more sensitive while still providing a bright line between those applications that merit community priority and those that do not. *A. Doria (Module 4, 22 July 2010).*

Community evaluation—Scoring based on accountability and transparency. If a scoring system is used, the largest number of points awarded should be based on the credibility of the TLD governance model with respect to accountability and transparency for community stakeholders. In addition, ICANN cannot handle all the policymaking. Community-based TLDs are precisely the kind where policymaking, policy oversight and policy enforcement must be delegated to the TLD's own governance model. ICANN must evaluate the viability of delegating authority as the key criterion for recognizing a community-based TLD. *W. Staub (Module 4, 21 July 2010).*

Community evaluation—comparison of contending applications and limits of absolute scoring. If the use of a scoring system cannot be avoided, it is best to add a supplemental scoring mechanism to deal with contending community-based applications which should eliminate contenders that do not deserve to be treated at par (such as cases of blatant gaming). Criteria for comparing the contending community-based applicants between each other would include: relative relevance of: the supporting community institutions and the community (in cases of contention between communities; the relative ability for Internet users outside the community to understand the purpose of the TLD; the degree to which the TLD's governance model ensures accountability and transparency to the underlying community. *W. Staub (Module 4, 21 July 2010).*

Community-based contending applications—avoiding auctions. Where both contending applications are found to be community-based, instead of an auction making the determination, non-delegation for as long as contention formally persists is a better solution. Applications subject to unresolved contention should remain open until the subsequent gTLD round unless agreement is reached. At that point, each applicant should be allowed to lodge an updated application at no charge. These updated applications would not be evaluated unless a modest re-evaluation fee is paid (e.g. $5,000 per application). One party can be allowed to pay the re-evaluation fees for the other party as well. The result of re-evaluation may still be no delegation for the time being. *W. Staub (Module 4, 21 July 2010).*

Community evaluation and potential vertical integration exception. If a higher standard or threshold results from a Community-based exception to a general policy on Registry-Registrar Separation for delegated Registry Operators, the application of this standard should be limited to the exception

application, not the string contention outcome resolution. If the vertical integration working group process results in a second use of a Community priority evaluation, then community-based applicants that did not elect it at the time of application should be allowed to elect it at the time of application for exception so that it is not mandatory in fact at application time. *E. Brunner-Williams (Module 4, 21 July 2010).*

GeoTLDs and Community Priority Evaluation Criteria (4.2.3). One extra point should be given in the Community Priority Evaluation if the organization of a GeoTLD applicant is based on a sound multi-stakeholder community of the GeoName concerned. *dotBERLIN (13 July 2010). dotBayern (20 July 2010). dotHamburg (21 July 2010.)*

Multistakeholder governance structure. One extra point should be awarded in the Community Priority Evaluation if the applicant/organization adopts a sound neutral multistakeholder governance structure to ensure fairness and representation of both commercial and non-commercial constituents. Multistakeholder governance is in the best interest of all stakeholders by providing a public service to both the community

Applicants established prior to 26 June 2008 or prior to March 2009. Given the long delays in launching the new gTLD program, and that recently emerged new gTLD applicants may take advantage of it by copying existing concepts and projects, one extra point in the Community Priority Evaluation should be given if organization of an applicant was already established before the approval of the new gTLDs program by the ICANN Board on 26 June 2008 or before the first communicated application window in March 2009. *dotBERLIN (13 July 2010). dotBayern (20 July 2010).*

Applicants established prior to March 2009. Two maximum points should be allocated in the Community Priority Evaluation section if the applicant/organization was established before the first communicated application window of March 2009 and has conducted a significant communication outreach public campaign that is considered beyond reasonable for the best interests of both the public and awareness of the ICANN gTLD program. Public proof must be provided in these cases to substantiate these claims. This would be a sound method of minimizing gaming and be fair regarding the public interest, transparency, accountability and business ethics. *.MUSIC (20 July 2010). .MUSIC (21 July 2010).*

Unfair participation in auction for highest scoring application. The highest scoring application in a contention set on the basis of the scoring system set out in the Attachment to Module 2 (or at least an application that scores significantly more than the other application it finds itself in contention with) should prevail. Currently it would seem that in the case of an application scoring very high that is in a contention set with another application scoring just above average that both applicants would ultimately have to participate in an auction. *Hogan Lovells (21 July 2010).*

Auctions—disadvantage for not-for-profit organizations. The auction procedure will likely put not-for-profit organizations with limited budgets at a distinct disadvantage in acquiring new gTLDs that are desired by two or more parties. One solution is for ICANN to offer a third application category for not-for-profit organizations in addition to standard and community priority applications with consideration given to the not-for-profit's mission when the string is in contention. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Self-resolution (4.1.3). I support the new language that gives greater flexibility to applicants who may be in string contention. *R. Tindal (21 July 2010).*

Analysis of Comments

Regarding the comments expressing preference for 13 and 14, respectively (three each), as winning threshold on a 16 point scale, it is obvious that interests and opinions diverge. No new arguments for either solution have been raised in this comment round. Some previous concerns, regarding for example the risk of failing due to unfounded obstructionist objections, have been addressed in the explanatory comments in version 4. This discussion has resulted in considerable and intensive discussions with the community. The Guidebook will keep the scoring threshold at 14 out of 16 points.

The comments suggesting modifications in the scoring are addressed below

- To use a finer scale, with decimals instead of integer numbers as proposed in one comment, may appear to facilitate the assessment but goes against the grain of experience, where more granular criteria with fewer scoring steps for each criterion have proven to be more reliable in the sense of being reproducible when used by different panelists. Experienced assessment consultants have advised that we adjust the scoring granularity in the opposite direction, to use a pure binary scale for scoring each criterion. Based on experiences, this is something that may be considered for future rounds. The proposed position for the first round is to keep the scoring unchanged in this respect

- To modify the scoring for nexus (highest score also for "string is otherwise strongly associated with the community") and uniqueness ("meaning unrelated to any community would not be considered significant") as proposed by one comment would be equivalent to a considerable lowering of the winning threshold. These arguments are counterbalanced by other comments that these modifications increase the likelihood that community applications will capture generic words. While these issues are fairly close and either side can be argued, the current Guidebook scoring mechanism seems to strike the right balance between the goals to favor communities during string contention while assuring those communities are well established, identified and supportive of the application.

- To add points for a multi-stakeholder governance structure in general, or regarding policy development in particular, certainly has some merit but would add considerable complexity to the assessment and require additional compliance measures post-delegation. The proposed position for the first round is not to modify the scoring in this way. One consideration to keep in mind is the sTLD approach, which featured such considerations, and was not retained in the New gTLD policy development outcome.

- To add points for "early" (although post-New-gTLD-PDP-conclusion) establishment of applicants seems inappropriate from two perspectives. First, the crucial criterion regarding "pre-existence" is already included. Second, the "pre-existence" criterion relates to the community, not to the applicant per se. The community is the central concept of interest here, while the entity/ies representing the community may change over time for various reasons, without dates for such changes reasonably justifying any differences in scoring. The proposed position is not to modify the scoring in this regard.

The comments regarding alternatives to a forced auction in a case where multiple community applications in a contention set score above the threshold are well taken. In particular, the proposal to allow an extended time for voluntary resolution, as is currently contemplated in the Guidebook, could well serve the winning applicants in such situations, although other applications in the contention set would be on hold awaiting the outcome. The latter would be a drawback in the case where the strings of

the winning applications are not identical (but confusingly similar) and another application is only in direct contention with a winning string that's not the one of the finally and voluntarily selected application. That other application would become eligible for delegation, but have to wait before being able to proceed. The benefit of a voluntary outcome seems to outweigh that risk.

The other alternative proposals put forward, to select the highest scoring application among the winners or to add supplementary criteria in such cases, seem inappropriate since all community applications scoring above the threshold have reached a pre-determined level as validated for preferential treatment and should be considered equal in that respect for any subsequent process step. The proposed position is not to take score differences among the winners into account nor to introduce supplementary criteria.

The comment regarding potential consequences of the outcome of the Vertical Integration discussions is appreciated and will be taken into consideration in the light of the actual outcome of those discussions.

The comment requiring consideration of legal rights has been addressed in conjunction with earlier public comment periods. String contention resolution takes place after all legal rights objections for all applications in a given contention set have been addressed and resolved. It would be illogical to reopen any such claims during the string contention resolution phase. The proposed position is not to introduce any additional consideration of legal rights in string contention resolution.

The comment proposing separate treatment of non-profit organizations as applicants requests a similar preferential handling of such applicants in string contention resolution as provided for community applications. However, there is no policy ground for granting any preferential treatment in string contention situations based on the applicants' legal or organizational structures, might be subject to abuse, and the proposed position is not to modify the process in this regard.

GEOGRAPHICAL NAMES

Key Points

- Much of the treatment of geographic names in the Applicant Guidebook was developed in response to the GAC Principles regarding new gTLDs.
- Geographic terms not defined in the Applicant Guidebook can be protected through the community objection process.
- The definition of country and territory names appearing in the Applicant Guidebook has sought to ensure both clarity for applicants, and appropriate safeguards for governments and the broad community.
- Country and territory names are protected at the second level.

Summary of Comments

Definition.
Geographical names should be defined in a broader sense, and all gTLD strings containing the geographical names listed in the ISO 3166-1 standard should also be considered geographical names. There are special cases in China where provinces, municipalities directly under the Central Government

and autonomous regions all have full name and abbreviation name. The abbreviation name should be handled as the full name consistently. *ISC (21 July 2010).*

In Section 2.2.1.4.2, it should be added that not only an "exact match" but also a "representation" of a sub-national place is considered a geographical name. E.g., this will solve the issue for NRW (German state that stands for NordrheinWestfalne). *Bayern Connect (21 July 2010).*

ICA remains concerned that Section 2.1.4 of the DAG concedes unwarranted authority to nations that already control their own ccTLDs by imposing an absolute bar on use of country or territory names at the top level and that applications for capital and other city names as well as sub-national place names (counties, states, provinces, etc.) will require endorsement or non-objection of government entities. ICA is gratified that ICANN has resisted past calls from the GAC to impose similar restrictions on geo names at the second level of new gTLDs and ICA urges continued adherence to that policy. *ICA (21 July 2010).*

Country or territory names (2.2.1.4.1). I support the new protections for country or territory names and the rationale for their inclusion. *R. Tindal (21 July 2010).*

City TLDs. Cases of string contention between two different cities of the same name, where both cities have the appropriate letter of non-objection and did not apply as a community applicant, should be clarified in the final guidebook: does it go to negotiations and auction, or would it remain with the parties to work out and if they did not, the name would not be assigned? The same would be true for a city name in contention with a non-city name. If such contention is not resolved through negotiations and auction, small cities with generic names could be used to "game" the system. *Domain Dimensions (22 July 2010).*

English "short name"—Macedonia and Hellas (Module 2, Annex, p. 36). "Macedonia" must be removed as the record with the class B1 indication of the respective cell under the "separable name" column of the table. There is an ongoing dispute between the Hellenic Republic (Greece) and FYROM, the Former Yugoslav Republic, over the official name of FYROM, which has been discussed for many years in the U.N. without resulting in any conclusion so far. There is no official "short name" for this country and since we believe that the DNS should be kept outside of such sensitive issues, the word "Macedonia" must be removed. "Hellas" should be added next to Greece with the class B1 indication because this is a commonly used "short name" of our country, Hellenic Republic (Greece), which we believe should be equally protected. *P. Papaspiliopoulos (Module 2, 20 July 2010).*

Analysis of Comments

Should there be a broader definition of geographic names in the Applicant Guidebook?

The exact match of sub-national place names such as states, provinces or territories, listed on the ISO 3166-2 list are afforded the protection of requiring support. There are almost 5000 names (many of which are shared or generic words) on the ISO 3166-2 list, and providing protection for a 'representation' or 'abbreviation' of the names on the list would multiply the number of names and the complexity of the process many-fold. Abbreviations or representations of names are protected through the community objection process rather than as geographical labels appearing on an authoritative list.

Throughout the process of developing a framework for new gTLDs the Board has sought to ensure a combination of: clarity for applicants; appropriate safeguards for the benefit of the broader community; a clear, predictable and smooth running process. A considerable amount of time has been invested in working through the treatment of geographic names to ensure these objectives are met, and also addresses, to the extent possible, the expectations of the GAC and the community. It is felt that the current definition of geographic names contained in the Applicant Guidebook, combined with the community objection process, provides adequate safeguards for a range of geographic names.

Geographic names were discussed during the GNSO Policy Development Process, and the GNSO Reserved Names Working Group considered that the objection process was adequate to protect geographic names. The Working Group did not find reason to protect geographic names. The GAC expressed concerns that the GNSO proposals did not include provisions reflecting important elements of the GAC principles and did not agree that the objection and dispute resolution procedures were adequate to address their concerns.

Much of the treatment of geographic names in the Applicant Guidebook was developed around many conversations and correspondence with the GAC on this issue that started following the Board's acceptance of the GNSO recommendations on the introduction of new gTLDs in June 2008.

On 2 October 2008, (http://www.icann.org/correspondence/twomey-to-karklins-02oct08.pdf) following a teleconference with the GAC on 8 September 2008, the then CEO & President, Paul Twomey, wrote to the GAC explaining proposed principles to guide a procedure for implementing elements of paragraph 2.2. Place names were split into two categories, as follows: 1) sub-national geographical identifiers such as countries, states, provinces; and, 2) city names.

During the teleconference of 8 September 2008, GAC members identified the ISO 3166-2 List, as an option for defining sub-national names. Accordingly, the Guidebook provides protection for all the thousands of names on that list. Also during this call the idea of the GAC creating a list of geographic and geopolitical names was discussed, however, it is understood that the GAC moved away from this suggestion because it would be a resource intensive effort for all governments to undertake.

Implementing protections for regional language or people descriptions was considered difficult because it would be difficult to determine the relevant government or public authority for a string which represents a language or people description as there are generally no recognised established rights for such descriptions.

As described in the 2008 letter, city names were considered challenging because a city name can also be a generic term, or a brand name, and in many cases no city name is unique. Therefore, where it is clear that an applicant intends to use the gTLD for purposes associated with the city name evidence of support, or non-objection is necessary. However, provision is made in the Guidebook to protect sovereign rights by requiring government approval for capital city names in any language, of any country or territory listed in the ISO 3166-1 standard.

Why are there protections for country and territory names at the second level?

The existing protections for country and territory names at the second level were developed as a compromise between the positions of ICANN's policy making bodies. The compromise is that

protections are limited to a definite list of names and not the GAC request for all names with national or geographic significance.

In the new gTLD process, there is limited protection for country and territory names at the second level, that was developed as a result of consultation with the GAC regarding the implementation of paragraph 2.7 of the GAC principles regarding new gTLDs, states:

Applicant registries for new gTLDs should pledge to:

a) adopt, before the new gTLD is introduced, appropriate procedures for blocking, at no cost and upon demand of governments, public authorities or IGOs, names with national or geographic significance at the second level of any new gTLD;
b) ensure procedures to allow governments, public authorities or IGOs to challenge abuses of names with national or geographic significance at the second level of any new gTLDs.

At the Board's request, Paul Twomey (who was ICANN's CEO and President), wrote to the GAC on 17 March 2009 (http://www.icann.org/correspondence/twomey-to-karklins-17mar09-en.pdf), requesting the GAC's input on possible options to resolve the outstanding implementation issues regarding the protection of geographic names at the second level. The end result of this request was a letter from the GAC to Paul Twomey, dated 26 May 2009 (http://www.icann.org/correspondence/karklins-to-twomey-29may09-en.pdf), which proposed a solution, that was accepted by the Board and ultimately reflected in the draft Registry Agreement developed for new gTLDs.

Are the common names of countries protected in the new gTLD process?

The definition of country and territory names, in the context of the Applicant Guidebook is consistent with the ISO 3166-1 standard and provides protection for the short and long form of a name appearing on the list including translations. Country and territory names will not be approved in the first round of the new gTLD process.

The treatment of country and territory names in version 4 of the Applicant Guidebook was developed specifically to adhere to paragraph 2.2 of the GAC principles on new gTLDs, i.e., the GAC view that governments should not be denied the opportunity to apply for, or support an application for, their respective country or territory name. However, the GAC's clarification of their interpretation of GAC principle 2.2[2] has resulted in a reconsideration of the treatment of country and territory names in the new gTLD process. This has resulted in a change of approach as reflected in the recently published draft version 4 of the Applicant Guidebook: namely, that country and territory names will not be available for delegation in the first round of the new gTLD application process.

With regard to the definition of country names, the Board has sought to ensure both clarity for applicants, and appropriate safeguards for governments and the broad community. A considerable amount of time has been invested in working through the treatment of country and territory names to ensure it meets these two objectives. Following discussion at the Mexico City meeting, the Board recommended that the Applicant Guidebook be revised in two areas regarding this subject: (1) provide

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[2] "The GAC interprets para 2.2 of the GAC gTLD principles that the strings that are meaningful representation or abbreviation of a country or territory name should be handled through the forthcoming ccTLD PDP, and other geographical strings could be allowed in the gTLD space if in agreement with the relevant government or public authority."

greater specificity as to what should be regarded as a representation of a country or territory name in the generic space, and (2) provide greater specificity in defining the qualifying support requirements for continent names, with a revised position to be posted for public comment.

The resulting definition for country and territory names is based on ISO 3166-1 and other published lists to provide clarity for potential applicants and the community. It removes the ambiguity created by use of the term 'meaningful representation.' Therefore, the definition of country and territory names has not been amended in the recent Guidebook draft and remains consistent with the Board goals and resolution on this issue.

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 (and, importantly, translations of them). In addition, the Separable Country Names List was developed to protect common names of countries derived from the ISO 3166-1 list, but not identified as the short name, for example, one such short name is "The Bolivarian Republic of Venezuela" for a country in common usage referred to as "Venezuela". This level of increased clarity is important to provide process certainty for potential TLD applicants, governments and ccTLD operators – so that it is known which names are provided protections.

We acknowledge the comments from the GAC representative from Greece requesting the removal of Macedonia from the Separable Country Names List due to unresolved issues regarding the use of the name. An amendment has been made to the Separable Country Names List which continues to provide protection for the name "Macedonia" but recognizes that due to the ongoing dispute between the Hellenic Republic (Greece) and the Former Yugoslav Republic of Macedonia over the name, no country will be afforded attribution or rights to the name "Macedonia" until the dispute over the name has been resolved.

While Hellas will not specifically be called out as the commonly used "short name" for the Hellenic Republic (Greece) in the list of separable names, we believe it is provided protection through the 'translation in any language' as Greece translates to Hellas in Norwegian.

What process is applied for string contention of 'city' names not designated as a community application?

An auction will not take place to resolve contention in the case where there are contending applications for a geographic name as defined in the Applicant Guidebook. In the event that two applications are received for the same geographic string, and the applications are considered complete (ie. they have the requisite government approvals) the applications will be suspended pending resolution by the applicants.

If an application for a string representing a geographic name is in a contention set with applications for similar strings that have not been identified as geographic names, the string contention will be settled using the string contention procedures described in Module 4 of the Applicant Guidebook.

Capital city names
Since the approval of the national government is required for capital city names, as defined in the Applicant Guidebook, contention is not expected. In the unlikely event that the national government of France supports two applications for .paris the applicants will be asked to resolve the issue.

Other city names
In other cases where applications for the same city name, but representing two different cities (and most likely in different countries), which both have the documentation of support of non-objection from the respective relevant government or public authority, and the applications are considered complete, the applications would be suspended pending resolution by the applicants.

City versus Generic
Applications for the same name, but one is being used to leverage a city name and has support of the relevant government or public authority; and the other is for generic purposes, they would undergo the "String Contention Procedure" contained in Module 4 of the Applicant Guidebook.

There is no priority given to an application for a city name with documentation of support or non-objection over an application for a generic or brand name with the same name, if both are submitted as standard applications. However, the 'community' designation for applications was developed to view such applications more favorably if the applicant can prove, through the community priority evaluation procedure, that it represents a defined community. Applicants intending to use the TLD primarily for purposes associated with the city name are encouraged to apply as a 'community' application, understanding that additional criteria applies.

MORALITY AND PUBLIC ORDER (M & PO)

Key Points

- ICANN will accept the Recommendation 6 Cross-Community Working Group recommendations that are not inconsistent with important objectives of the program,
- One suggestion for a new title for the objection ("Limited Public Interest Objection") has been included in the current version of the Applicant Guidebook.
- ICANN has included several Working Group recommendations and plans additional consultations with the Working Group before and during the Cartagena meeting to achieve agreement in additional areas.

Summary of Comments

M& PO Objections—procedure needs improvement. The procedure proposed by ICANN leaves much to be desired and would likely be inordinately costly. It requires a response and payment of a response filing fee before any "quick look" would occur, and postpone a "look" until any full complement of adjudicators had been empanelled. COA understands that the entire morality and public order objection process is likely to be revisited in light of strong objection from the GAC. This review should include developing a more expeditious and lightweight means of disposing of frivolous objections. *COA (21 July 2010).*

Current M&PO process is highly problematic. ICANN fails to understand the dangers that this provision will create and its impact on fundamental rights and liberties. Historically these issues have been associated with the right of sovereignty. ICANN seeks to assign an independent panel. The ICC is not the right entity for this process. M&PO issues cannot be determined according to business practices or

rationales—they are domains of national states. The criteria ICANN has proposed is also problematic. E.g. how can a domain name registration "incite" anyone to do anything? The only way to determine if a domain name registration incites people to commit an unlawful act would be to also check content. ICANN needs to produce for the wider community examples of names that incite users to commit unlawful acts. A review panel should provide recommendations that the applicant may use before the European Court of Human Rights or the International Criminal Court. Panels will have to be composed according to geography, cultural divergence and will not be associated with any business interests but will represent the interests of states/regions. The ICC is not the appropriate forum but international courts are—they are the bodies we can turn to for such delicate and controversial issues. *K. Komaitis (21 July 2010). Blacknight Solutions (21 July 2010). R. Dammak (22 July 2010).*

Remove M&PO objection absent solution from GAC. ICANN should remove the morality and public order objection from AGBv4 absent a proposed solution being presented to the Board from the ICANN GAC. This would be consistent with ICANN's bottom-up, community-driven approach and is in line with the Board's approach to other challenging issues, such as registry-registrar separation. *Big Room (21 July 2010).*

M&PO is out of scope. The ALAC echoes the At-Large Community in our disappointment with the retention in the Draft Application Guidebook V4 of the so-called Morality and Public Order (MAPO) language as part of the preparatory scope for new gTLDs. We reiterate our principled position: Even as we accept that there is no single definition of what is moral, determination of a moral string and a public order encroachment are not within ICANN's competence and its remit in the Internet governance space. The ALAC's disappointment is moderated with the knowledge that other support organizations are equally bothered and have proposed a cross- Community group to address and grapple further with this matter. *ALAC (September 2010)*

Delete the M&PO objection. The sooner that ICANN realizes that the only practical course is to throw out the M&PO objection, the sooner it can get on with introducing new gTLDs. The M&PO objection is illegitimate, outside of ICANN's scope and chilling to free expression. It is strongly opposed by the NCUC. It is likely to expose ICANN to constant litigation. Issues of morality and public order are matters of national law to be decided in national legislatures and national courts. Creating an additional level of M&PO objections only invites arbitrariness, subjectivity and global censorship. ICANN has an obligation to respect the free expression rights of Internet users which are nearly universally guaranteed through various national constitutions and international treaties (e.g. Article 19 of the Universal Declaration of Human Rights). *R. Gross (21 July 2010). R. Dammak (22 July 2010).*

Need for GAC involvement. The M&PO issue threatens to be the major stumbling block to a successful and timely initiation of the new gTLD program. The GAC, with encouragement from the ICANN Board, should participate in a multistakeholder group to find a solution. *Minds + Machines (21 July 2010).*

Need for an M&PO objection. It is unclear that an M&PO objection is needed. A joint AC/SO group has been formed to discuss M&PO issues; any further work should be taken only with reference to the work to be done by that group. *M. Wong (21 July 2010). R. Dammak (July 2010).*

Keep current options. ICANN should stay with the current options in the AGBv4 and not extend the M&PO discussion any further. A M&PO black list won't solve problems. *dotZON (21 July 2010).*

Legal standards. Compliance with the M&PO should be determined according to both the principles of international law and the laws of each sovereign state. If judged only by principles of international law, it is likely to approve some gTLDs which conflict with laws of some countries, which is unfair to those countries and even damages their national interests. *ISC (21 July 2010).*

ICC adjudication of M&PO objections—limitations. The grounds for an M&PO objection are in areas that contravene the concern, scope and expertise of the International Chamber of Commerce. Would the neutrality and global representativeness of the ICC be recognized by each country? The same problem exists with ICC adjudicating the community objection. Adjudications on M&PO and community objections involve a broad range of subjects and are of great significance. It would be unfair for a certain international organization in some business areas to perform adjudications. More representative and neutral organizations should be selected or at least added to complete this job. *ISC (21 July 2010).*

M&PO Objection fee—developing and undeveloped countries. The fee for an M&PO objection is set too high and would stifle the initiative of developing and undeveloped countries. *ISC (21 July 2010).*

"Denial of service" via duplicative M&PO objections. The lack of standing restriction for M&PO objection opens applicants to the equivalent of a distributed denial of service attack whereby a well-funded opponent or astroturf group could generate multiple complaints, delaying the application and taxing the resources of the decision forum. Along with quick dismissal of "frivolous or abusive" objections, the process should consider a means of speedy dismissal of duplicative objections. *W. Seltzer (21 July 2010). R. Dammak (July 2010).*

Board role. Since there is no objective standard for what is to be applied, the Board, after appropriate community input, must make what is essentially a political decision about the most suitable M&PO mechanism—e.g., current AGB provisions, some variation of that, or a scaling down/removal of the objection process. I support any reasonable approach by the Board. *R. Tindal (21 July 2010).*

Rapid resolution.
If the current M&PO objection process is problematic to the GAC and others, we need to work together as a community to reach a new resolution very quickly. *Domain Dimensions (22 July 2010).*

The M&PO issue needs to be firewalled from creating further delays in the gTLD program. *J. Frakes (22 July 2010).*

Incitement clause. The incitement clause of the MP&O objection, if it remains in the Guidebook, should be rewritten to include, at least, disability and actual or perceived sexual orientation or gender identity, and political or other opinion, and modified to read: "Incitement to or promotion of discrimination based on race, color, gender, disability, actual or perceived sexual orientation or gender identity, political or other opinion, ethnicity, religion, or national origin." *A. Doria (Module 3, 22 July 2010). S. Seitz (22 July 2010).*

Analysis of Comments

Since the closure of the public comment forum, recent events have dealt with several issues related to the treatment of the Morality and Public Order recommendation, and thereby addressing many comments above. In August 2010, a cross-community working group was formed with members of the

GNSO, At-Large and GAC communities to provide recommendations on how to improve the implementation of Recommendation 6. Many of the concerns raised in the public comment forum were evaluated and, where appropriate, addressed through this cross-community effort. A Report on Implementation of GNSO New gTLD Recommendation No. 6 (Rec6 Report) was published for public comment on 22 September 2010, and included several recommendations supported by a consensus of the members of the working group. This Report was endorsed by ALAC on 1 November 2010.

 At its retreat in Trondheim the Board passed the following resolution with regard to the M&PO issue:

> The Board acknowledges receipt of the Working Group report. This is a difficult issue, and the work of the community in developing these recommendations is appreciated. The Board has discussed this important issue for the past three years.

> The Board agrees that ultimate responsibility for the new gTLD program rests with the Board. The Board, however, wishes to rely on the determinations of experts regarding these issues.

> The Board will accept the Working Group recommendations that are not inconsistent with the existing process, as this can be achieved before the opening of the first gTLD application round, and will work to resolve any inconsistencies. Staff will consult with the Board for further guidance as required.

The "existing process" as described in the Board resolution is interpreted as an objection process (such as described in versions 2, 3 and 4 of the Applicant Guidebook) that satisfies the following goals: (1) providing a predictable path for applicants; and (2) mitigating risks by having: (i) an independent dispute resolution process; (ii) dispute resolution panels with the appropriate expertise; and (iii) the clearest and most uniform set of standards possible.

The Applicant Guidebook published with this analysis in November 2010 incorporates several recommendations from the Rec6 Report, including:

- A suggested revision of the title of the objection
- Change of references to "principles of international law"
- A note encouraging applicants to pre-identify possible sensitivities related to M&PO
- A procedure for governments to send notifications with regard to national laws to applicants or through the public comment forum
- Inclusion of additional treaties as suggested by the Rec6 Report
- Additional elaboration on terms in the Quick Look Procedure, including the term "manifestly unfounded"

In addition, ICANN has encouraged further discussion and has scheduled a meeting with the cross-community working group to discuss how other recommendations found in the Rec6 Report can be incorporated into the Applicant Guidebook to the extent they are consistent with the existing process. Additional consultations are contemplated in Cartagena with the intent of coming to resolution on the material aspects of the dispute resolution process for this objection at the end of the Cartagena meeting,

Some principles reflected in the Rec6 Report are not included in the Applicant Guidebook as they are contrary to the goals described above. These largely relate to the Board's desire to rely on the determinations by independent expert panels, and the role of the Independent Objector.

With respect to the use of independent expert panels, it has been suggested that the grounds for a morality and public order objection "contravene the concern, scope and expertise of the International Chamber of Commerce" and that it would be "unfair for a certain international organization in some business areas to perform adjudications". However, it should be recalled in this context that the ICC International Centre for Expertise, as DRSP, would <u>administer</u> the dispute resolution procedure; it would not "perform adjudications" itself. It is the expert panel (appointed by the DRSP) that hears the dispute and issues an expert determination. ICANN considers that the ICC and its International Centre for Expertise, with their extensive experience in administering various types of international dispute resolution proceedings, are well qualified to act as a DRSP. The rules of the International Centre for Expertise are available at: http://www.iccwbo.org/court/expertise/id4379/index.html.

OBJECTION AND DISPUTE RESOLUTION PROCEDURES

Procedural Aspects

Key Points

- Multiple objections may be consolidated at the discretion of the dispute resolution provider.
- The deadline for filing an objection must be balanced with ensuring there are no unnecessary delays and providing some level of certainty of process for applicants.

Summary of Comments

<u>DRSP access to public comments (1.1.2.7)</u>. It would seem appropriate to provide the public comments to DRSPs directly, particularly for applications already subject to active objections. *BITS (22 July 2010).*

<u>Time for filing objections too short (1.1.2.4)</u>.
ICANN set a reasonable period for filing objections by adopting a model similar to what is used for objecting to a new trademark application (e.g., two months). A two week window is too short for filing objections. With such a short timeframe objectors will have to do all the work in advance in preparing an objection, only to find that an application may fail at the initial evaluation stage. There also needs to be a provision for objection after an extended evaluation; currently the two week window for filing an objection will close before the outcome of an extended evaluation is known and there appears to be no opportunity to object to applications which fail initial evaluation but are subsequently successful in the extended evaluation process. *BBC (21 July 2010)*

An additional two weeks to file objections after the Initial Evaluation results are posted would help to address the shortage of adequate time for objecting in the current proposed process, so that a potential objector has a full month following the posting of the complete Initial Evaluation results to review those results and consider whether an objection is needed under all the circumstances. This additional two weeks will not unduly delay the application process. *Coca-Cola (21 July 2010).*

<u>Consolidation</u>.
If there are two or more applications by a single applicant to which a single objector is objecting on the same grounds, these should be the subject of a single objection. If a single objector has two different grounds to object to an application (e.g., legal rights and community grounds) this should also be a

single objection, not two separate objections administered by different bodies and subject to two objection fees. *BBC (21 July 2010)*

If objections are consolidated before responses are filed, then the Applicant should pay one response filing fee. If objections are consolidated after responses are filed, the Applicant should be entitled to a refund of some of the response fees paid. In the latter case, the refund may not necessarily be all fees in excess of a single response fee if further administrative steps have occurred. *IBM (21 July 2010).*

The many to one relationship between possible objectors and a single applicant is an inherent scaling problem in the application process that needs to be addressed with time limits and batch costing. The procedures could act as a Denial of Service or Distributed Denial of Service attack against an applicant (e.g. an applicant challenged by many similar objections, with no extension of time while they may be consolidated, or a very large number of similar but non-consolidated objections where it may be impossible for the applicant to respond to all of them, each one requiring a separate response and a separate fee). *A. Doria (Module 3, 22 July 2010).*

Dispute resolution costs (3.3.7). Clarification is needed as to what costs paid by a prevailing party will be refunded, including whether the costs for the panel are refunded and whether fees for objections and responses (described as nonrefundable in 3.2.2 and 3.2.4) are in fact refundable as appropriate to a prevailing party. *IBM (21 July 2010).*

Corrections to objection filings (3.2.1). Objectors should be given a brief opportunity to rectify any errors where their objection does not comply with procedural rules, especially if the window for filing is so unreasonably short. *BBC (21 July 2010).*

Extensions of time (3.3.3). While negotiation and mediation is encouraged, parties should be limited to 30-day extension requests. Trademark proceedings could be used as a model also, where parties are encouraged to put the proceedings on hold in order to facilitate settlement. *BBC (21 July 2010).*

Full and fair adjudication (3.3.5). Rapidity of resolution should not take priority over full and fair adjudication. The time limits throughout the dispute resolution procedures are very short. *BBC (21 July 2010).*

Number of Panelists.
Three member panels should be available for all disputes if requested; additional costs could be covered by the party requesting three panelists. The number for both String Confusion and Community disputes is still restricted to one panelist. There is an option for 3 panelists for Legal Rights disputers and a requirement of 3 panelists for a M&PO objection. *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

By definition we find it hard to understand how a "panel" can consist of only one person. Each panel should consist of at least two individuals. *BITS (22 July 2010).*

Filing procedures (3.2). The "Rules for Expertise of the International Chamber of Commerce" to be used for the Community Objections appear to be missing from the Attachment to Module 3. *BITS (22 July 2010).*

Analysis and Proposed Position

It has been suggested that certain deadlines for objection be extended, in order to give potential objectors more time prepare their objections. They argue that the time for objection extends beyond initial evaluation by only 14 days. This is true. However, there are several months to object from the time the application is posted. This is much greater than the suggested time in the comment of two months. While that may require some preparation before one determines if the TLD application has passed evaluation, it must be balanced with need to not delay the process once initial evaluation is complete. Providing for objections beyond extended evaluation would be detrimental to the overall time line of the process.

The entire objection procedure is intended to be fair and has safeguards. Accordingly, the DRSP and/or the Panel have the discretion to extend certain deadlines. See Procedure, Art. 16(d) (possibility of extension of a deadline or suspension of the proceedings upon request of the parties); Art. 17(b) (possibility to grant a time limit for written submissions that is greater than 30 days); Art. 21(a) (possibility to extend the 45-day deadline for the expert determination). Note also that objectors do have an opportunity to correct errors that are found in the DRSP's administrative review of the objection and are given an additional five days to file the corrected objection, pursuant to Article 9(c) of the Procedure.

Several comments addressed issues arising from multiple objections or multiple applications and possible consolidation. As set out in Article 12 of the New gTLD Dispute Resolution Procedure (the "Procedure"), multiple objections may be consolidated at an early stage of the dispute procedure. In the event that a large number of similar objections were filed against a single application (a situation that has been compared to a "denial of service" attack), the objections could be consolidated, pursuant to Article 12. Moreover, multiple objections aimed merely at harassing or overwhelming an applicant might constitute an abuse of the right to object and thereby be subject to dismissal in the "quick look" procedure.

If an objector wishes to object to a single application on more than one of the four available grounds, separate objections must be filed, because there are different procedures for different objections (e.g., legal rights objections will be administered by the WIPO, while community objections will be administered by the ICC International Centre for Expertise). In addition, the qualifications and experience of the experts will relate to the nature of the objection. In addition to the consolidation of multiple objections against the same gTLD, it would be possible to consolidate multiple objections against similar gTLDs. This latter possibility is implicit in Article 12(a) of the Procedure and is explicitly stated in Article 7(d)(i) of the draft WIPO supplementary rules for gTLD Dispute Resolution.

Consolidation of multiple objections would normally occur before the Applicant has paid its filing fee(s). The DRSP will have discretion to refund a portion of the amounts paid as filing fees in the case of consolidation occurring later. See, e.g., Article 7(c) of the draft WIPO supplementary rules for gTLD Dispute Resolution.

Some have commented on the dispute resolution panels. The question whether to provide for three-member panels of experts for all dispute procedures has been discussed in the comments relating to previous drafts of the Applicant Guidebook. ICANN continues to favor a rule that would require all parties to agree to three experts for Legal Rights Objections, as provided by Article 13(b)(ii) of the New gTLD Dispute Resolution Procedure (the "Procedure"). For convenience of reference in the Procedure and elsewhere, the term "Panel" refers to one or three members, as appropriate. Further, as panel are

meant to have the appropriate expertise, to the extent any particular organizational structure is relevant to the objection, the dispute resolution provider should take that into consideration, as should the parties, when selecting panel members.

It would not be appropriate to provide public comments to a DRSP directly but the panel will have access to public comments through the TLD Application System and have the discretion to rely on them.

Providing free dispute resolution for governments, as suggested, is not contemplated at this time. The process is based on cost recovery. Relieving the requirement to pay fees by one would result in higher fees to others. How to do that accurately is problematic and the result is discriminatory.

COMMUNITY OB JECTIONS

Key Points

- After extensive review and consideration of public comments, the complete defense has been eliminated.
- However, in order to prevail against a defense that an applicant would have had standing to object, objector must prove an elevated level of likely detriment.
- The Independent Objector may choose (although would not be required) to file an objection upon the request of governments or entities that are unable to afford the costs of the dispute resolution proceedings.

Summary of Comments

Legal rights objection—defenses. As is the case with the community objection, the fact that an objector has not chosen to apply for the same or any other string does not constitute any element of a defense to a legal rights objection. *BBC (21 July 2010)*

Community objections—standing.
The following should be added to Section 3.1.2.4: "Where more than one entity joins together to file a community objection, or where more than one community objection is consolidated pursuant to 3.3.2, the qualifications of the objectors shall be cumulated for purposes of determining standing. Business and trade associations, and membership/affiliate organizations, are eligible to demonstrate standing to file a community objection under the above criteria." *COA (21 July 2010).*

The requirement to support and/or endorse a particular community application may create the possibility of conflict of interest, whereby a supporter of one community-priority application could file a community objection against a competing community-priority application to assist the one they support, rather than for legitimate reasons. Therefore, any community institution/member organization that supports a particular community-priority application should not be given standing to file a community-priority objection against any other community-priority application for the same TLD. *Big Room (21 July 2010).*

Community objection –definition (3.1.2.4). BITS believes that the text defining a community is well written. *BITS (22 July 2010).*

Community objections—"detriment" standard.
In lieu of the first paragraph under "Detriment", insert the following in Section 3.4.4: "An objector that satisfies the preceding tests shall be presumed to have an established a likelihood of detriment to the rights or legitimate interests of its associated community. However, this presumption may be rebutted by the applicant. Ultimately, for an objector to prevail, the panel must determine that such detriment is likely if the objected-to application were approved. Factors that could be used by a panel in making this determination include, but are not limited to:" *COA (21 July 2010).*

Community objections—complete defense.
In the same section (3.4.4) provision should also be made for defining the circumstances under which "satisfaction of the standing requirements for filing a Community Objection…by a community-based

applicant is a complete defense to an objection filed on community grounds." An applicant asserting this defense should be required to affirmatively prove that the community it claims to represent is substantially identical to the community expressing opposition. While it should not be possible for a community-based applicant to assert the complete defense by claiming to represent a community that is not substantially identical to the one expressing the objection, proof of satisfaction of the standing requirements may also provide an element of a defense to the objection even if the complete defense is not available. *COA (21 July 2010)*

ICANN should qualify the complete defense with a "relative representativeness" requirement by which if the complainants are clearly more representative of the intended community than the applicants, the complete defense should not apply and the complaint should be examined on its merits. *A. Abril i Abril (Module 3, 21 July 2010).*

ICC adjudication—limitations. The grounds for a community objection are in areas that contravene the concern, scope and expertise of the International Chamber of Commerce. Would the neutrality and global representativeness of the ICC be recognized by each country? Adjudications on M&PO and community objections involve a broad range of subjects and are of great significance. It would be unfair for a certain international organization in some business areas to perform adjudications. More representative and neutral organizations should be selected or at least added to complete this job. *ISC (21 July 2010).*

Objection fee—developing and undeveloped countries. The fee for a community objection is set too high and would stifle the initiative of developing and undeveloped countries. *ISC (21 July 2010).*

No fee for government objections. ICANN should not impose any fees to individual governments including local governments that intend to submit objections to individual applications. Such objections are based on the public interest and therefore should be exempted from general commercial practices. *JIDNC (21 July 2010). A. Al-Zoman (21 July 2010).*

Not-for-profit organizations concerns. Participation in dispute resolution procedures during the new gTLD application process would be burdensome on resources of not-for-profit organizations, increasing the likelihood that they will be subject to DNS abuses by bad actors. Factors considered by panels deciding legal rights objections should be clarified (e.g., "relevant sector of the public," recognition of the "sign", "intent") and should not provide a "how to" guide for formulating arguments against accusations of infringement. "Experts" appointed to dispute resolution panels should include individuals well versed in the operations and specific needs of not-for-profit organizations. Fees for filing and adjudication of objections should be determined as soon as possible so that not-for-profit organizations will be able to budget adequately in advance for the new gTLD process. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Analysis of Comments

As stated in one of the comments, business and trade associations and other organizations are indeed eligible to demonstrate standing to file a community objection. The Objector is "one or more persons or entities who have filed an objection against a new gTLD for which an application has been submitted". New gTLD Dispute Resolution Procedure (the "Procedure"), Art. 2(b). Entities that join together to file a single objection could cumulate their qualifications as a single "Objector". However, it would not be

feasible to cumulate the qualifications for standing of multiple Objectors whose objections may be consolidated. Even when consolidated, multiple objections are considered on their individual merits.

Contrary to one commenter's suggestions, there does not appear to be any conflict of interest in a situation where the supporter of one community application files an objection against a competing community application. Indeed, it would be inappropriate to add a rule that an objector to a gTLD application must not have any interest in any other gTLD application. A person or entity with an interest in one application who objects to another application would still be required to satisfy all of the applicable rules for standing, and meet the standards for an objection.

The question whether the objector who files a community objection must prove that there is a likelihood of detriment to the rights or legitimate interests of its associated community has been raised and addressed in connection with previous drafts of the Applicant Guidebook. ICANN does not consider that the satisfaction of other elements of the community objection (community, substantial opposition and targeting, as set out in § 3.4.4) should create a presumption of detriment. The likelihood of detriment is an independent element of the objection that must be proven by the objector. If the objector cannot prove the likelihood of detriment, there does not appear to be any reason why the objector should be entitled to block the applicant's application. Simply not wanting another party to be the applicant or obtain the name is not sufficient to be deemed a detriment.

The complete defense to a community objection (§ 3.4.4 *in fine*) has also been raised and addressed in connection with previous drafts of the Applicant Guidebook. After extensive review and consideration, the complete defense has been eliminated. However, in order to prevail against a defense that an applicant would have had standing to object, objector must prove an elevated level of likely detriment.

The costs that the parties must pay in the dispute resolution proceedings continue to attract comments. It has been suggested that the costs are too high for developing countries and that governments should be excused from paying any costs, since their objections would be based upon the public interest. In considering this issue, it must be recalled that the costs paid by the parties cover the administrative expenses of the DRSPs and the fees and expenses of the experts. These costs must be paid by someone. If certain categories of objectors pay reduced or no fees, some other person or entity would have to pay in their place. In general, it is not unusual for governments to pay their respective shares of the costs of dispute resolution proceedings. In the specific instance of governments or other entities (including non-profit organizations) that may be unable to afford the costs of the dispute resolution proceedings, the Independent Objector may choose (although would not be required) to file an objection upon their request; that function is part of the IO's mandate. Of course, in that circumstance, the IO would remain independent and would be acting generally in the public interest and not on behalf of any particular entity or government. Finally, it should be recalled that the prevailing party will be reimbursed the full amount of the advance payments of costs that it paid during the proceedings, pursuant to Article 14(e) of the New gTLD Dispute Resolution Procedure.

It has been suggested that the grounds for a community objections "contravene the concern, scope and expertise of the International Chamber of Commerce" and that it would be "unfair for a certain international organization in some business areas to perform adjudications". However, it should be recalled in this context that the ICC International Centre for Expertise, as DRSP, would administer the dispute resolution procedure; it would not "perform adjudications" itself. It is the expert panel (appointed by the DRSP) that hears the dispute and issues an expert determination. ICANN considers that the ICC and its International Centre for Expertise, with their extensive experience in administering

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various types of international dispute resolution proceedings, are well qualified to act as a DRSP. The rules of the International Centre for Expertise are available at: http://www.iccwbo.org/court/expertise/id4379/index.html.

INDEPENDENT OBJECTOR (IO)

Key Points

- An objection filed by the IO is subject to the same scrutiny by the experts as any other objection.
- The IO's status and rights will be no greater than those of any other objector.

Summary of Comments

IO Accountability. There is a troubling lack of specificity in DAGv4 regarding the accountability of the Independent Objector. E.g. the potentially limitless renewable terms of the IO cause concern. There is no process by any person aggrieved or harmed by the IO's decisions and actions or inactions as the case may be to object or appeal. These concerns are magnified given the IO's mandate to file M&PO objections. At a minimum, specific provisions relating to an appeal and review process for the IO as well as either non-renewable tenure or a maximum number of terms ought to be included in the final applicant guidebook. *M. Wong (21 July 2010). R. Dammak (July 2010).*

Experience. In choosing the one IO, ICANN should consider the candidates' experience with not-for-profit organizations and the way they use the Internet. *Red Cross (21 July 2010).*

Malicious Behavior Vulnerability Objection needed. Some objection mechanism needs to be created to fill a significant, critical safeguard gap in the objection process—dealing with the situation where an application, while meeting baseline standards for successfully passing through evaluation, nonetheless would leave members of the public excessively vulnerable to risks of malicious activities (e.g., a .kids gTLD, where the applicant does not include a registrant vetting process before registration in order to have heightened security procedures for .kids). Because a concern could arise outside of the community context in some cases, it should be possible to raise a concern without having to meet the standards for standing to file a community-based objection. One approach could be to assign this duty to the Independent Objector who would be in a position to evaluate public comments that raise a concern, consult with relevant experts and then launch an objection if needed. Other approaches should also be considered. *COA (21 July 2010).*

Analysis and Proposed Position

Two people comment on IO accountability. There is no question that accountability is extremely important. Thus, it should be remember that objections filed by the IO are heard by an expert panel the same as any other objection. For example, if the IO submits a Community-based objection that is manifestly unfounded or an abuse of the right to object, the objection will be dismissed. An objection filed by the IO is still subject to the same scrutiny by the experts as any other objection. In the dispute resolution proceedings, the IO's status and rights would be no greater than those of any other objector. The IO would not have a privileged position, or wield unchecked power.

ICANN agrees with the suggestion that experience with non-profit organizations could be a useful qualification for the position of IO. This will be a consideration in the tender.

The comment regarding the problem of malicious behaviour refers to actions and misuse of a gTLD that occur post-delegation. To the extent that such misuse of the gTLD could be discerned in the application for the gTLD, it could potentially support an infringement of rights objection. Otherwise, there are other remedies (including, post delegation dispute resolution and criminal prosecution) that are available post-delegation.

POST DELEGATION DISPUTE RESOLUTION PROCEDURE (PDDRP)

General Process Comments

Key Points

- The Trademark PDDRP should be enforced to hold registries liable for their own (or their affiliate's) bad acts; it should not hold registries liable for acts of unaffiliated registrants.
- One implication of non-use is that the trademark holders have one more effective deterrent in place to protect their marks.
- Marks protected through the PDDRP, will meet the same test as those protected in URS and Sunrise protection.

Summary of Comments

PDDRP fails to make registry operators accountable.
Registry operators have an inherent responsibility to ethically manage their domains; as its stands, the PDDRP relieves them of that responsibility. If registry operators fail to monitor their registration process, whether due to financial interests or simple negligence, they should be held accountable. *IHG (20 July 2010).*

The PDDRP needs to be revised to make registry operators accountable. The standards section now effectively relieves registry operators of an enormous amount of liability and gives them no incentive to monitor domain names being registered or those already within their registries for infringement. *CADNA (21 July 2010). Microsoft (21 July 2010). NCTA (Module 3, 21 July 2010).*

It is up to ICANN to take responsibility to police bad actor registries. ICANN should not shift this responsibility to users. *Nestle (21 July 2010).*

PDDRP as currently drafted will discourage any actual, widespread use by potential complainants. *Verizon (20 July 2010). CADNA (21 July 2010). INTA Internet Committee (21 July 2010). Rosetta Stone (21 July 2010). BC (26 July 2010).*

PDDRP and RRDRP should be combined. *Verizon (20 July 2010). CADNA (21 July 2010). AT&T (21 July 2010). INTA Internet Committee (21 July 2010). Rosetta Stone (21 July 2010).*

The PDDRP must apply to all gTLDs. *W. Staub (22 July 2010).*

Registrars not addressed. The PDDRP is not a full remedy because it does not address the bad faith, specific or otherwise, of registrars who inevitably will be involved in illicit activities working in collusion

with registries. This loophole will encourage black hat registries to set up arms-length relationships with registrars and other third parties to engage in bad faith conduct. *Verizon (20 July 2010). INTA Internet Committee (21 July 2010). Rosetta Stone (21 July 2010).*

The PDDRP is not adequate as currently drafted. ICANN should appoint a third party agency to conduct an annual audit of each registry operator including on-site visits. The accreditation agreements should specifically ban "warehousing" and other bad practices. A registry operator that breaches its obligations should face a heavy fine or a first offense and suspension for a second offense. *MARQUES/ECTA (21 July 2010).*

Burdensome for not-for-profit organizations. AAMC values the PDDRP as a potentially more affordable and expedient means to resolve conflicts, but it requires improvement. As currently proposed, participation in the PDDRP is likely to be burdensome for not-for-profit organizations, increasing the likelihood that they will be subject to DNS abuses by bad actors. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

The PDDRP is premature and should not be adopted. It lacks the same level of multistakeholder process and it lacks mechanisms to ensure that the rights of legitimate registrants will be secured. It could potentially upset the whole registration culture. It raises issues of intermediary liability and directs the registration of domain names towards a more controlled system of content. Free speech and expression could be jeopardized. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Support for PDDRP as drafted in AGBv4. I support the PDDRP as detailed in ABGv4 and strongly endorse the principle that it should only be used against registries that are actively involved in cybersquatting. *R. Tindal (21 July 2010). Domain Dimensions (22 July 2010).*

Registered and unregistered marks. The PDDRP should operate like the Clearinghouse and make a distinction between registered and unregistered marks. The inclusiveness of the PDDRP as currently proposed poses danger because almost every word is or can be a common law trademark and that would give the trademark community the opportunity to turn against registries for every single word that is part of our vocabularies. *K. Komaitis (21 July 2010). R. Dammak (July 2010).*

Trademarks should not be required to have undergone "substantive review" to be eligible to be the subject of a PDDRP complaint. Under global trademark law there is no single standard for what constitutes "substantive examination". For purposes of the PDDRP, a registration that is valid in the eyes of the sovereign nation that granted it should be a valid registration. The PDDRP should be amended to accept trademark registrations from any valid sovereign nation as a basis for a PDDRP complaint. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Analysis of Comments

Once again, thanks to all of those who have commented on the Trademark PDDRP. As can be seen from the differences between the most recent version and prior versions of the PDDRP, the public participation process has been extremely productive. This round of comments is no exception. While the changes to the PDDRP are much less voluminous in the newest version to be posted, they are no less important.

Although not all suggested revisions have or could have been included in the PDDRP, in that some were either or not implementable or were directly at odds with each other thereby requiring some middle ground to be proposed, they have all been carefully considered.

General comments about the PDDRP are highly varied. Some suggest that the PDDRP fails to make registries accountable, that it is premature, that it is burdensome and therefore will not be used. Still another states that the PDDRP strikes a proper balance and is an appropriate level of enforcement against registries because it only holds them accountable to the extent registries are involved themselves in cybersquatting. Some suggest that the PDDR should make a distinction between registered and unregistered marks, and others assert that there should be no substantive review requirement for marks to be addressed by the PDDRP. Finally, one commenter states that the PDDRP must apply to all gTLDs and another states that it should apply to all registrars.

The Trademark PDDRP should be enforced to hold registries liable for their own (or their affiliates') bad acts; it should not hold registries liable for acts of unaffiliated registrants. If a trademark holder's rights are being infringed, there are other mechanisms already in place, such as the UDRP or judicial proceedings, in which they can seek redress from the direct source of infringement. Further, with the new gTLD Program, the avenues to take against a registrant have expanded to include the Uniform Rapid Suspension System (URS). Thus, the PDDRP is not an exclusive avenue to challenge trademark infringement.

In terms of the marks that can be addressed, the PDDRP does distinguish between registered and unregistered marks. Please see Section 9.2.1 in the latest version of the PDDRP, posted with the Applicant Guidebook in November 2010. Further, as the Board has clarified, in the new gTLD protection mechanisms (*see* http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6), review for use of a mark in many circumstances is important to help diminish gaming. It makes sense that marks capable of being addressed through the PDDRP, will be equivalent to URS and Sunrise protection.

We again see a comment that, as written, the PDDRP will not be used very much and its effectiveness will be judged by its non-use. As noted in the last round of comment analysis, if this is the result, it may be an indicator of need for evaluation or of success. One implication of non-use is that the trademark holders have one more effective deterrent in place to protect their marks.

Finally, while expansion to existing gTLDs, as well as registrars, may be something to consider in the future, such expansion is not at issue here and will not be considered at this time.

Standards

Key Points

- Willful blindness is not enough to hold a registry liable under the Trademark PDDRP. There must be affirmative conduct on the part of the registry. To hold otherwise will lead to some incorrect results and irrevocable harms.
- The PDDRP was developed to prevent systematic abuse by the registry itself, and the standards are purposely written to do just that.

Summary of Comments

"Willful blindness" standard.
Trademark owners should not be relegated to second-level enforcement tools in a digital age where registration authorities may choose to act as de facto registrants or turn a blind eye while facilitating and profiting from cybersquatting. The PDDRP encourages new gTLD registries to take root in countries with weak legal protection for IP (e.g., nations that lack theories of secondary liability or remedies for cybersquatting). The PDDRP should utilize a "willful blindness" standard and extend to registrars as well (see PDDRP, secs. 6 & 1). *IOC (21 July 2010).*

The scope of the current PDDRP as limited to affirmative conduct undermines the intended effect of encouraging responsible TLD management and DNS credibility. Stakeholders have called for consideration factors to address the real possibility of willful blindness occurring in the course of management of new domains. *WIPO Center (16 June 2010).*

The PDDRP, without explanation, fails to reflect a widely held position in the submitted comments regarding willful blindness, a position expressed not only by WIPO and the IPC, but also INTA and MARQUES/ECTA, which collectively represent a significant global share of trademarks. *WIPO Center (21 July 2010). Hogan Lovells (21 July 2010).* We support WIPO's call for the PDDRP to be re-engineered. *JONAS (11 July 2010). Com Laude (21 July 2010).*

The "affirmative conduct" limitation discourages best practices by registries
(including those who intentionally design their operations to engage in bad faith activities through passive mechanisms). The "affirmative conduct" definition should be broad enough to include both knowing and intentional bad faith conduct on the part of registries and registrars whether "affirmative" or otherwise. *Verizon (20 July 2010). Rosetta Stone (21 July 2010).*

The following clarifying definition should be added: "Affirmative conduct" may consist of affirmative steps taken by a registry operator to deliberately shield itself from full or exact knowledge of the nature and extent of infringing activity, after it knows or strongly suspects that infringing activity of the type contemplated by this PDDRP is occurring or is likely to occur. *INTA Internet Committee (21 July 2010)*

"Affirmative conduct" engaged in by the registry operator must be clarified; if the threshold is set too high then the risk is that the PDDRP's effectiveness will be put in doubt. *C. Speed (21 July 2010).*

As proposed by WIPO there should be "safe harbor" defenses to protect registry owners who are exposed by registrants. However, the PDDRP must address "willful blindness" if ICANN is serious about protecting consumers and IP owners. *MARQUES/ECTA (21 July 2010).*

WIPO's proposed amendments to the PDDRP relating to willful blindness should not be adopted. They are contrary to established laws of jurisdictions that have addressed this issue and are an expansion of international law. ICANN should not be creating dispute processes or even contractual requirements based on how intellectual property owners would like to see the law in the future. It is not for ICANN to pre-empt the state of existing law by incorporating this notion of willful blindness in to the PDDRP. *Neustar (21 July 2010).*

The PDDRP as proposed does not offer realistic examples of what behavior, if any, may qualify as affirmative conduct by the registry operator. NCTA supports a somewhat less stringent standard than "willful blindness" which would require that the registry have first been put on express notice of abusive registrations. NCTA had previously provided examples that should suffice to make the required showing that a gTLD operator has been acting in bad faith—i.e. a failure to act after being put on express notice of abusive registrations of domain names; and a failure to require complete and accurate Whois information, either on a frequent or a regular basis. Reasonable persons would be hard-pressed to justify excluding, at a minimum, these situations, from those for which registries should take responsibility. *NCTA (Module 3, 21 July 2010).*

Material harm. The definition of material harm may prove challenging. ICANN should provide information as to the interpretation of material harm. By using this term the PDDRP is recognizing abuse that does not require actual or threats of trademark infringement. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

"Clear and convincing" and bad faith.
The clear and convincing standard higher than that in most civil actions. It is unlikely that complainants, without access to the discovery available in full-blown litigation, will be able to meet this evidentiary standard. The bad faith standard is unreasonably stringent. It is unclear how a complainant could establish "specific" bad faith. This implies that a registry operating with general bad faith intent to profit is free to carry on its illicit activities. Moreover, a complainant must establish a "substantial" pattern of "specific" bad faith. *Verizon (20 July 2010). AAMC (21 July 2010). DuPont (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010). IBM (21 July 2010). Rosetta Stone (21 July 2010). BC (26 July 2010).*

Pattern and Practices and Joinder.
The language that requires the complainant to prove that a pattern of registering domain names that specifically infringe one of the complainant's marks should be deleted, revised to lower the threshold for harm to the complaining trademark owner, and/or that the proposal be revised to allow some form of joinder of class action status for aggrieved trademark owners. Under the current provision, despite the degree of abusive conduct, there would be no basis for a PDDRP complaint against a gTLD operator where no one trademark owner has one mark that is specifically affected by abusive registrations. *NCTA (Module 3, 21 July 2010).*

Given the "substantial pattern" requirement, among other things, ICANN should consider whether the PDDRP would allow for joinder or class action status between aggrieved parties. This would allow parties

to share the cost of the PDDRP and to combine efforts to more efficiently gather and present evidence to the Expert Panel. *IPOA (21 July 2010).*

Affiliated Entities. To take into account the issues of vertical integration and PDDRP liability, conduct of a registry operator should be defined to include: "Conduct by entities directly or indirectly controlling, controlled by or under common control with a registry operator, whether by ownership or control of voting securities, by contract or otherwise where 'control' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether by ownership or control of voting securities, by contract or otherwise." *INTA Internet Committee (21 July 2010)*

There is an imbalance between the stringent standard for complainants and the leniency toward registries that is troubling and difficult to justify. *DuPont (21 July 2010).*

Reference to "infringement.
The described standards should not necessarily involve trademark infringement as is the case for UDRP complaints. Also, since the parties may not be in the same jurisdiction, reference to the concept may raise conflicts of law issues. Instead, reference should be made to the breach of standards or a similar neutral term. *IPOA (21 July 2010).*

The phrase "in fact infringes the trademark of the complainant" should be added to the sec. 6 second level complaint standard; this ensures that complainant proves actual infringement, as is required for cases of secondary liability in court. This is important because there may be no discovery and there is some uncertainty about the panel/arbitrator. *RySG (21 July 2010).*

Analysis of Comments

In terms of the standards, there has been much discussion and comment on whether registries should be found liable under the PDDRP for willful blindness to malicious conduct, i.e., the fact that there are infringing names in its registry. As set out in the last in the current version of the Trademark PDDRP proposal, and set forth in the last version of the PDDRP Comment Summary and Analysis:

> willful blindness is not and properly should not be included as part of the standard under which the registries will be reviewed. The portion of the PDDRP that can hold a registry liable for infringement at the second level is a large step in providing trademark protections. It must be done carefully. Registries do not have a direct interface to customers, that happens at the registrar level. Registries maintain the database. In any large registry there will be a relatively large number of "infringers," the registry may be aware of some of them but will also be unaware of others. To hold registries accountable for all instances of infringement would have unknown effects on the ability of the registry to conduct business. A standard to hold them liable for that cannot be implemented understanding all of the effects, including the interplay and renegotiation of agreements between and among, registries, registrars, and ICANN. In the meantime, it is reasonable to hold registries accountable for affirmative conduct with regard to second-level names. That is what this standard does; it hasn't been done up to now; it is a substantial step.

http://www.icann.org/en/topics/new-gtlds/pddrp-comment-summary-and-analysis-28may10-en.pdf

One commenter request further explanation of "material harm." Material generally relates to having consequence, but it is difficult to provide more explanation in the abstract. It will up to the Expert Panel to determine if something is material to the Complainant.

Some believe that the clear and convincing standard is too high because it is higher than most civil actions. Some also think the bad faith requirement calling for the pattern of registration of infringing domain names within a registry is too limiting because a complainant could not go after the registry for infringement of a single or a few trademarks or just their own marks. While both the requirements for clear and convincing evidence and a bad faith requirements are high, that is how they are intentionally crafted. The PDDRP was developed to prevent systematic abuse and thus the standards are purposely written to do just that. If there is just one or a few infringing names in a registry (or even many), the complaint can use other mechanisms available to it, the UDRP and the URS, as well as the judicial system. The suggestion of allowing joinder is certainly something that can be considered and will be included in discussions with the PDDRP provider(s); however, that will not eliminate the need for proof of a pattern and practice along with systematic registrations of one trademark holder's names.

One commenter suggested that not only registries, but their affiliated and commonly controlled entities must be required to refrain from conduct that would lead to infringement of trademarks. We agree. This point is well taken and this has been incorporated into the version of the Applicant Guidebook posted in November 2010 with this analysis.

Procedures

Key Points

- ICANN shall refrain from determining whether to implement a remedy until conclusion of the appeal
- No member of the evaluation panel shall serve as an appeal panel member

Summary of Comments

Fees and Costs.
The explanation of costs is vague and fails to mention any limit on the cost of PDDRP proceedings. ICANN's passing statement that costs will be reasonable does not mean that they will be. ICANN needs either to implement a maximum cost or provide the parties with more say in how the costs will stack up. Otherwise complainants will have no incentive to use the PDDRP and will look for alternative methods to solve their disputes. *CADNA (21 July 2010).*

The rules should be altered to provide a cap on estimated costs, and the nature of such costs must be more fully defined. The requirement for a full complainant outlay in the initial stage should be replaced by policies requiring that no payment (beyond the filing fee) be required until after the Threshold Review is completed. *INTA Internet Committee (21 July 2010).*

IBM agrees that if the complainant is the prevailing party, the registry operator is required to reimburse complainant for all fees incurred, but if the registry operator is the prevailing party, then the registry operator may recover its filing fees. *IBM (21 July 2010).*

The PDDRP mechanism and its costs unfortunately seemed to have been passed to brand owners. *Hogan Lovells (21 July 2010).*

Registry Operators should not have to pay to respond; the Registry Operator should only pay if/when it loses an entire PDDRP complaint. *RySG (21 July 2010).*
Prior notice to registry operator of a potential complaint. We question the need for the proposed 30 day period of prior notice to registry operators by would-be complainants. The length of the notice period makes it likely that the bad faith actions will continue, and mark owners will look more seriously at litigation as the more expedient and effective enforcement route. The 30-day period should either be stricken or, at a minimum, shortened to a term sufficient to provide only notice, as opposed to an advantage, to registry operators. *INTA Internet Committee (21 July 2010).*

Complaint.
Expected elements of a PDDRP complaint and evidence required to support it should be described in greater detail. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

The complaint should include a statement regarding the actual economic and other harms the registrations have caused to the trademark owner. *RySG (21 July 2010).*

Appeals.

Section 21 reference to URS should be removed. In its place should be PDDRP or alternatively reference to either the URS or PDDRP should be removed altogether. In addition the nature of the appeal is not clear. Presumably, members of the Appeal Panel should not have been involved in the initial proceeding or perhaps other similar proceedings at first instance. There is also no indication of the timing of the appeal, discovery and Appeal Panel decision except for the deadline for the initial appeal. Basic dates should be incorporated into the PDDRP itself. *IPOA (21 July 2010).*

The registry operator has multiple and possibly redundant avenues of appeal. The registry operator may either appeal the Expert Determination through the provider's process; initiate a separate dispute resolution procedure under the provisions of the Registry Agreement; or both. Neither of these two additional avenues of appeal is necessary. *INTA Internet Committee (21 July 2010).*

RySG would modify the appeal provision in sec. 21 to provide: Either party shall have a right to seek a de novo appeal of the Expert Determination of liability or recommended remedy based on the existing record within the PDDRP proceeding for a reasonable fee to cover the costs of the appeal. If an appeal is sought, ICANN shall refrain from determining whether to implement a remedy until conclusion of the appeal. *RySG (21 July 2010).*

New evidence should be allowed to be introduced at appeal stage. Later facts may be highly relevant to any remedy recommended by the Panel. Also because the appeal is de novo, there is no reason to restrict the timing of the evidence. *RySG (21 July 2010).*

Threshold Review.
INTA Internet Committee supports the threshold review concept but the current proposal is unacceptable in several ways. If the Threshold Review panel determines that the complainant has not met the threshold review criteria, then the provider should state the grounds of the determination. The complainant should be allowed to amend the complaint at the threshold review stage without the need to file an additional filing fee. By contrast, the current process would require forfeiting the filing fee and a second process of procedures which is punitive and a waste of resources. The parties should have the capacity to suspend the Threshold Review process by joint stipulation (e.g., for settlement discussions). *INTA Internet Committee (21 July 2010).*

Generally, the RySG believes that (1) the Administrative Review and the Threshold Review can be conducted by the same or related parties; and (2) The Threshold Review and the Expert Panel should be separate parties. The rationale for (2) is to avoid the appearance of impropriety and to remove the financial incentive of the Threshold Review automatically approving complaints. *RySG (21 July 2010).*

The Threshold Review should include considering the factor of whether the Complainant has asserted that there is no current or previous PDDRP for the same asserted facts. RySG would like to avoid multiple review of the same facts and proposes to have joinder of similar complaints. *RySG (21 July 2010).*

Default.
RySG recommends change of the language of Default (which under the UDRP in practice leads to a finding in favor of the complainant) to Failure to Respond. Failure to Respond will still allow the case to proceed to an Expert Determination on the merits, but without the stigma of a Default. *RySG (21 July 2010)*

Default cases should not be decided on the merits as this will stretch out the process unnecessarily. Registries are sophisticated businesses that can avoid this result simply by filing a response. *NCTA (Module 3, 21 July 2010).*

Expert panel.
To make consistent with the URS, add that PDDRP panelists within a Provider shall be rotated so as to avoid selection of Providers that are thought to be likely to rule in a certain way. *RySG (21 July 2010).*

Three member expert panels should be the default rule given the importance and seriousness of PDDRP disputes. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Joinder of complaints against the same registry.
A mechanism should be added that will provide for complainants who file similar complaints against the same registry to request that the matters be joined into a single proceeding. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Reply opportunities for the trademark holders (paragraph 11). ICANN needs to explain why the PDDRP gives the trademark holder two opportunities for a reply. This seems not to follow the paradigms of the URS and UDRP. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Discovery (paragraph 16). Discovery should not be discretionary but should be an option that operates irrespective of panels. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Suspension of Proceeding. Parties should be able to jointly stipulate that the PDDRP proceeding be suspended at any point. *INTA Internet Committee (21 July 2010).*

Analysis of Comments

Several comments have been received relating to procedural aspects of the Trademark PDDRP. Fine-tuning of a newly developed procedure is always appreciated and some are already included in the current version of the PDDRP posted in November 2010 simultaneously with this analysis.

Many have commented on the uncertainty of costs and the payment or refundable nature of fees. While costs at present are somewhat uncertain, that is unavoidable given that this dispute resolution procedure will be based on administrative costs of providers and hourly rates of selected panelists. The fees should be within current standard practices of dispute resolution providers deciding cases with the same amount of complexity. As there is flexibility as to whether one or three panelists will be chosen and given the broad range of possible evidence that could be presented, in any given matter, estimating would be difficult at best. One can look to the broad range of fees and costs estimated for community based or other objections for guidance found in Module 1 of the Applicant Guidebook. With respect to fees, it has now been clarified that registry operators need not pay unless and until the trademark holder is deemed the prevailing party, and all fees will be refunded to the prevailing party.

Some suggest that the elements of a complaint are not sufficiently stated and one group thinks a statement of harms should be required. With respect to the elements of a complaint, there is no suggestion as to what is not sufficient and the elements have been reviewed for sufficiency by experts in

dispute resolution. In agreement with one suggestion, there will be an inclusion to state that the complainant has been harmed, although it will not require the precise level of harm.

In terms of appeals, some suggest:
- more clarity in terms of timing and panelists who may preside over an appeal,
- when ICANN will implement a remedy,
- whether evidence can be presented.
- there are too many avenues of appeal or that they are redundant with the dispute resolution term in the registry agreement.

Revisions will be made to the appeal section of the PPDRP to clarify issues about timing and scope of an appeal, the timing of the imposition of a remedy, as well as which panelists may preside over an appeal. The nature of appeals, however, are not redundant as one commenter suggests. An appeal of the Expert Determination is about the panel statements, while the invocation of dispute resolution via the Registry Agreement is about ICANN actions with respect to imposition of remedies.

With respect to the Threshold review, one group suggests that if Administrative review finds a complaint deficient, that the Complainant should have an opportunity to amend without forfeiting a filing fee. Another group suggests that the Threshold Review Panel and the Expert Panel should not have the same panelists. We agree with both these suggestions.

Allowing for a short time to amend a Complaint for procedural deficiencies seems reasonable and has been included. So too has the indication that no member of the Threshold panel shall serve as an Expert Panel member.

One group suggests changing the term Default to Failure to Respond, to avoid the stigma of the word Default. Another suggests that no determination on the merits should be made if a party defaults. No changes will be made to the default section with respect to these comments. While a failure to respond should be considered a default, the party that failed to respond should still be given the opportunity to prevail on the merits.

One group's suggestion that panelist should be selected on a rotating basis will be incorporated. Two have suggested that a three-member panels should be the default position, but since a three member panels can be requested by either party, the current position seems sufficient and more economical unless one of the parties makes an affirmative request.

Other comments discuss joinder, reply opportunities, discovery, and suspension of the proceedings. Joinder, when appropriate, is always encouraged, but will be left to the Providers to make that determination. If the facts and circumstances are sufficiently similar, it is anticipated that the Provider will have rules in place to address such circumstances. In those cases, those rules should apply, although Providers will be encouraged to consolidate matters to the extent consolidation is appropriate. As for reply opportunities, the trademark holders should have the right to ensure each of their points is heard. In terms of discovery, because the parties are incented to provide as much information as they cans, it should be left to the panel to determine more information is required, but this dispute resolution mechanism should not be an opportunity for parties to conduct discovery for any particular purpose. As for suspension in connection with settlement discussion, there is no reason that, in a post-delegation mechanism, that the panel should not consider a stay pending such discussion. That, however, will be left up to the relevant panels.

Remedies

Key Points

- Panels' Determinations will be given great deference, however, ICANN is in the best position to understand the effectiveness and effect of recommended remedies and will make the final determination.
- While a remedy shall not be inconsistent with those available under the Registry Agreement, there must be flexibility that it can be one not referenced in the Registry Agreement.

Summary of Comments

Advisory nature of panel conclusions.
Widespread of use of the PDDRP is seriously undermined given that ICANN can treat panel conclusions as merely advisory with no obligation on ICANN's part to take any action against a registry. If a finding of specific bad intent, including even that established by a *substantial* pattern of misconduct, does not result in serious consequences for the registry operator, what else is required to trigger ICANN taking action? At a minimum, such a finding should trigger immediate action by ICANN against the registry, to provide certainty to all ICANN stakeholders and justify the legitimacy of the PDDRP/RRDRP process. *Verizon (20 July 2010). IPOA (21 July 2010). CADNA (21 July 2010). Rosetta Stone (21 July 2010). BC (26 July 2010). NCTA (Module 3, 21 July 2010).*

Why is ICANN afforded such discretion especially given that ICANN is not a party of the dispute? This raises issues of privity of contract that we have raised with ICANN but to which we have not received any response. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Decisions by a PDDRP expert panel should be considered final in most cases. ICANN's discretion to make its own determination on what remedies to impose should be limited to cases where the panel decision contradicts or falls outside the scope of the substantive terms of its Registry Agreements. Otherwise, the Registry Agreement should include a provision that parties must abide by the decision of an expert panel in the case of a PDDRP. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Deletion of domains names. The expert panel adjudicating a PDDRP complaint should have discretion to delete domain name registrations in certain cases (e.g. where the registrant is the registry, or where a relationship can be shown between the registrant and the registry at issue) and thereby prevent the domains in these cases from remaining with the registrar. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010). Microsoft (21 July 2010).*

Panel authority. A panel should not be able to influence the adoption of a remedy that a court cannot order or that ICANN cannot implement under the terms of an applicable Registry Agreement. *RySG (21 July 2010).*

Determining Malice. "Malice" is a term which ranges in meaning across UK and US jurisprudence and may not have meaning at all to those in countries without the common law. Further, its definition ranges from actual intent to disregard. RySG strongly recommends defining the term clearly so that its meaning is clear and unequivocal. Also, we advise that in the extraordinary remedy of terminating the

Registry Agreement, the value of the gTLD to the community and the existing registrants be considered and weighed (e.g. revised language: "the clear and unequivocal intent to cause great economic harm to the trademark owner and provided no value to the Internet community or the domain name registrants independent of this intended harm" and that in making its recommendation of the appropriate remedy, the Expert Panel will consider the ongoing harm to the Complainant, as well as the harm the remedies will create for the registry operator and other, unrelated, good faith domain name registrants operating within the gTLD). RySG (21 July 2010).

Challenge to remedy.
Under Sec. 22 the registry operator may challenge ICANN's imposition of a remedy. This means that the initial determination may be subject to both an appeal and a challenge relating to the remedy, both of indeterminate length. This seems unpalatable from the complainant's point of view. *IPOA (21 July 2010).*

RySG would move the language about ICANN waiting to impose a remedy to the "challenge to remedy" section (sec.22) and requests clarification on how the 10 day period in this section interacts with the 20 day appeal timeframe in sec. 21. *RySG (21 July 2010).*

RySG suggests the following language added to sec. 22 to create consistency with the provision that the Expert Determination shall be reviewed de novo and so that the registry operator should receive the same protections for alleged violations and claims of termination under the PDDRP that it has for alleged violations of the Registry Agreement: "Any arbitration shall be de novo and determined in accordance with the parties' respective rights and duties under the Registry Agreement. Neither the Expert Determination nor decision of ICANN to implement a remedy shall serve to prejudice the registry operator in any way in the determination of the arbitration dispute. Any remedy involving a termination of the Registry Agreement must be according to the terms and conditions of the termination provision of the Registry Agreement, including any and all provisions providing for notice and an opportunity to cure breaches of the Registry Agreement." *RySG (21 July 2010).*

Availability of Court or Other Proceedings (sec. 23). For consistency with the UDRP, RySG proposes that Sec. 23 be amended to read:

"Trademark PDDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability. Neither an Expert Determination or other proceedings under the PDDRP shall operate in any way to prejudice or otherwise affect the position of any party to a court proceeding, which shall be conducted independent of the PDDRP and according to the standards of trademark law.

In those cases where a Party provides the Provider with documented proof that a Court action was instituted prior to the filing date of the Complaint in the post-delegation dispute proceeding, the Provider shall suspend or terminate the post-delegation dispute resolution proceeding. In all other cases in which a Court action is instituted before the conclusion of the PDDRP proceedings, the Provider shall determine whether a stay is consistent with the interests of justice, including considering whether there is a possibility of inconsistent findings or results if a stay is not granted, the presence of any third parties in the Court proceeding and the scope of the claims and relief sought in the Court proceeding." *RySG (21 July 2010)*

Analysis of Comments

The imposition of remedies following an expert determination in a Trademark PDDRP has been the subject of many comments. Indeed, there is a great appreciation for the difficult nature of potential remedies and a concern that legitimate registrants not be harmed in the process. Such concerns are the most important and are taken extremely seriously in the development of the PDDRP available remedies.

Some question why ICANN should have so much discretion to impose remedies recommended in the Expert Determinations. Protection of registrants is precisely the reason for such discretion. The Expert Panel is in place because of its expertise in dispute resolution and fact finding. The Panels' Determinations will be given great deference during the imposition of remedies against the registries. However, ICANN is in the best position to understand whether those recommended remedies might harm legitimate registrants in some fashion. Thus, for the protection of those legitimate registrants, it is important to maintain discretion.

The protection of registrants' rights, is also the reason why deletion of names is not a remedy, although some suggest it should be. Registrants are not a party to the Trademark PDDRP. The trademark holder can always use the URS or UDRP to prevail in having a domain name suspended or transferred.

The current PDDRP model requires a finding of malice in order to recommend a remedy of termination. Inclusion of malice was an earlier recommendation of the RySG. Another member of that stakeholder group now recommends alternative language ("intent to harm the trademark holder and failure to benefit the Internet Community") now. We elect to retain the original recommendation of the RySG.

Finally, comments have been made suggesting revisions to the language regarding the ability and timing to challenge remedies and availability of court proceedings. Some of the additional language will be adopted and some will not as it is felt it provides too much protection to the registry operator or improperly imposes requirements on courts or arbitration panels. The suggestions involving timing of when ICANN will implement remedies will be incorporated, as will the fact that a remedy is not intended to prejudice the registry appointed arbitrator in an arbitration. Others will not be incorporated. In particular, the fact that a decision on imposition of a remedy will be heard de novo if an arbitration is filed. ICANN is not qualified nor is it appropriate to have ICANN re-argue the Complainant's case in the PDDRP proceeding. Further, while a remedy shall not be inconsistent with those available under the Registry Agreement, there must be flexibility that it can be one not specifically referenced in the Registry Agreement.

REGISTRY RESTRICTIONS DISPUTE RESOLUTION PROCEDURE (RRDRP)

Key Points

- Instituting a RRDRP is not intended to replace ICANN's contractual compliance responsibilities.
- While an Expert Determination will be given great deference, ICANN must have discretion to impose remedies because ICANN is in the best position to understand whether recommended remedies might harm legitimate registrants in some fashion.

Summary of Comments

Standing.
The RRDRP should be available to any interested party to enforce the requirements agreed to in a community gTLD in its registry agreement. The standards of "defined communities" in Section 5 and "strong association" in Section 6 may preclude legitimate claimants from having standing who are outside these definitions. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

ICANN should delete the standing requirement or adopt the same threshold used for oppositions under the Lanham Act, namely "any person who believes that he would be damaged by" the ultra vires actions of the registry. Section 7 should also be amended to add a requirement that the complaint include a statement of standing. *INTA Internet Committee (21 July 2010).*

Registry protections. The PDDRP processes and procedures have evolved more than those of the RRDRP. Each of the protections for registries in the PDDRP should also be applied to registries under the RRDRP, including those related to review and appeal of RRDRP decisions. *RySG (21 July 2010).*

PDDRP and RRDRP should be combined. *Verizon (20 July 2010). CADNA (21 July 2010). AT&T (21 July 2010). INTA Internet Committee (21 July 2010) Rosetta Stone (21 July 2010).*

Evidentiary standard lower than PDDRP. It is unclear why the RRDRP has the lower "preponderance of the evidence" standard—i.e., why is one stakeholder group allowed a reasonable standard of proof for one set of bad faith registry abuses over another stakeholder group with an equally valid set of claims. *Verizon (20 July 2010). AAMC (21 July 2010). Rosetta Stone (21 July 2010). BC (26 July 2010).*

Use of Experts.
The discretion to add experts to RRDRP proceedings, in addition to the already-appointed expert panel, should be eliminated or greatly curtailed to extraordinary cases pursuant to strict limitations. It is unfair to add testimony from an expert or experts that neither party has solicited nor which neither party will have a chance to cross-examine, and for which the parties must shoulder the unknown expense. The strict limitations under which a panel would have discretion to select an expert would be: a predetermined scale of fees for experts so that parties can assess costs in advance; the panel's intention to appoint an expert should be communicated to the parties at the earliest possible stage so that parties can lodge objections; and any appointed expert should prepare a report summarizing their conclusions which is provided to the parties in sufficient time to allow them to present contrary arguments and evidence, possibly including a rebuttal from another expert. All of these materials should be part of the

record presented to the panel for its consideration. Further, Section 13 should be revised to provide that disputes under the RRDRP will usually be resolved on written submissions and without appointing experts and that if the panel believes that appointing an expert is appropriate, the panel will not appoint more than one expert without the stipulation of the parties to the proceeding. *INTA Internet Committee (21 July 2010).*

Remedies.
Decisions by an expert panel should be considered final in most cases, without ICANN setting aside the decision in favor of a different determination. ICANN's discretion to make its own determination on what remedies to impose should be limited to cases where the panel decision contradicts or falls outside the scope of the substantive terms of its Registry Agreements. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

The expert panel adjudicating the RRDRP should have discretion to delete, transfer or suspend domain name registrations in certain cases (e.g., an affiliated registry and registrant). *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Suspension of accepting new domains as provided in Section 16 should be permitted to include registry operators that acted in bad faith, with gross negligence, with malice, or that are repeat offenders of the agreement restrictions. *INTA Internet Committee (21 July 2010).*

Fees. The potential expenses and outcomes of the RRDRP are highly unpredictable. Expert panels can appoint experts at their complete discretion and over the parties' objection. There are no caps on expert fees and the potential expenses of the proceeding are highly uncertain. These factors are likely to drive potential complainants away from using the RRDRP and toward litigation. *INTA Internet Committee (21 July 2010).*

Analysis of Comments

The RRDRP has attracted comments with respect to standing. Some suggest that anyone who can claim harm should have standing, and not just those who are associated with the community. Standing is limited because the nature of the claim is limited to when a registry fails to comply with its own restrictions and there is harm to the community or community member. If, for example, trademark holders believe a domain is infringing its rights, there are several avenues for redress, including the URS, the UDRP and the Trademark PDDRP.

Furthermore, it should be remembered that instituting a RRDRP is not intended to replace ICANN's contractual compliance responsibilities. ICANN will continue to pursue its contractual compliance activities and enforcement for all of its contracted parties. A robust RRDRP will, however, be an additional avenue for protecting the interests of legitimate and eligible registrants within community-based restricted TLDs who otherwise could see their interests in their registrations tarnished by registrations made in violation of the promised restrictions associated with the TLD.

Some think that the RRDRP should be combined with PDDRP, and that the provisions under both should be the same, including the evidentiary standard. While the current versions of each posted in November 2010 with this analysis are now quite similar, there are some distinctions given the nature of the claims and therefore are set out separately. Indeed, because the RRDRP addresses limitations

specifically placed on the registry operator, it makes sense to have a lower evidentiary standard. In practice, it is possible that the same providers will administer both dispute resolution processes.

One group suggested placing some limitations on the ability of a Panel to appoint independent experts. Some of those suggestions are appropriate and will be incorporated into the RRDRP.

The imposition of remedies following an expert determination in a RRDRP has been the subject of comments. Some question why ICANN should have so much discretion to impose remedies recommended in the Expert Determinations. Protection of registrants is precisely the reason for such discretion. The Expert Panel is in place because of its expertise in dispute resolution and fact finding. The Panels' Determinations will be given great deference during the imposition of remedies against the registries. However, ICANN is in the best position to understand whether those recommended remedies might harm legitimate registrants in some fashion. Thus, for the protection of those legitimate registrants, it is important to maintain discretion.

The protection of registrants' rights is also the reason why deletion of names is not a potential recommended remedy in most circumstances, although some suggest it should be. Registrants are not a party to the RRDRP. That said, the suggestion that such a remedy be permitted if the registrants are affiliated with the registry operator is appropriate and will be incorporated.

REGISTRY AGREEMENT

Vertical Integration

Key Points

- The community continues to be significantly divided on the proper approach to vertical integration of registrars and registries;
- The Vertical Integration PDP Working Group has submitted a Revised Initial Report on Vertical Integration Between Registrars and Registries (available at http://gnso.icann.org/issues/vertical-integration/revised-vi-initial-report-18aug10-en.pdf), which sets out several potential approaches to this issue;
- No consensus at the GNSO has been developed on this issue;
- The ICANN board of directors has directed the ICANN staff to remove restrictions on registry-registrar cross ownership, subject to certain safeguards.

Summary of Comments

The 2% figure in the DAGv4 is unreasonable. CORE proposes the following: a general rule limiting cross ownership (and control) between registries and registrars with a 15% limit makes sense. We also propose a presumptive acceptance of greater than 15% cross-ownership (up to 100%) provided that the entity/group does not act as both a registry and registrar/reseller under the condition that they have relatively low market relevance (well below market power standards). There might be a need for an exception to the principle, allowing a registry to act as a registrar for its own TLD and we would propose a mechanism and guidelines for such exceptions (in some cases not just for the vertical separation rule but also for the need to use ICANN-accredited registrars). A. *Abril i Abril (Module 1, 21 July 2010).*

It is worth noting that the DAGv4 language does not prevent ICANN registrars from owning an entity that applies for a TLD as long as not more than 2% of their shares in the applying entity are not "beneficially owned." If there is no consensus on the cross ownership issue, ICANN has an obligation to approve a position that ranges between the Nairobi resolution (strict separation up to 2%) and the status quo for the majority of existing contracts (strict separation up to 15%). Choosing a position outside that range would represent policy making by the Board without community support. *R. Tindal (21 July 2010).*

ICANN should consider exemptions from the restrictions on registrar cross-ownership as currently discussed in the Vertical Integration Working Group, such as SRSU scenarios, small community TLDs, and orphan registry operators. The proposed 2% threshold for cross-ownership appears unduly low. *eco (21 July 2010).*

Exceptions to the vertical integration policy are needed. It is not fair to mandate no vertical integration especially for non-commercial, registrar-based TLDs. We propose an open market with full competition. Vertical integration protects small registries who serve specific customer groups (like government organizations and public interest organizations). They may focus on perfecting the pre-check rules and procedures for registrants' equity and authority, rather than fight for their market share. *CONAC (22 July 2010).*

Barring ICANN-accredited registrars from assisting new gTLD applicants or from applying for their own TLD is discriminatory and bad policy. The heavily restrictive language of Article 1.2.1 of Module 1 and Articles 2.9a-c of the proposed new gTLD agreement arbitrarily discriminates against ICANN-accredited registrars in preventing them from providing assistance of any kind to prospective new gTLD applicants. This restriction seems to contradict the goals of the new gTLD program to foster diversity, encourage competition and enhance DNS utility. The language in Article 1.2.1 of Module 1 and in the proposed new gTLD agreement should be amended to delete this prohibition. INDOM (7 July 2010). Key-Systems (21 July 2010). eco (21 July 2010). EuroDNS (22 July 2010).TLDDOT (22 July 2010). A. Abril i Abril (Module 1, 21 July 2010).

Single user or corporate TLD—exception.
There is little need to relax the strict prohibition on common ownership of new gTLD registries and registrars that the ICANN Board adopted in Nairobi. The main significance of the debate on vertical integration concerns single user or corporate TLDs (sometimes referred to as ".brand") for which different treatment is appropriate. There is no evident reason why TLD registries in this category should be barred from controlling their own accredited registrar; from entering into exclusive arrangements with an independent accredited registrar; or from dispensing with accredited registrars altogether and allocating second level domains as they see fit. Defining the contours of this category is challenging and whether ICANN meets it successfully could have a major impact on the viability of the new gTLD launch. *COA (21 July 2010).*

Concerns over common ownership of registries and registrars in the open domain market do not apply to private registries (such as a .brand for private use). IBM is pleased that this concern has been noted and ICANN has not foreclosed the issue as to whether one entity may act as both a registry and registrar in all circumstances. *IBM (21 July 2010).*

At a minimum, the vertical integration issue should be clarified so that individuals who control an accredited registrar for purposes of managing their own domain and who do not offer registrar services to the general public are in no way barred from playing a major role in a new gTLD applicant entity. *ICA (21 July 2010).*

Not-for-profit organizations—exception. ICANN should offer an exception to the limitations on vertical integration/cross ownership that provide a single registrant TLD or single registrant/single user TLD to meet the needs of not-for–profit organizations that might register a new gTLD strictly to execute a public service mission and not for commercial purposes. Not-for-profits also should not be prohibited from acquiring the services of an ICANN registrar to fulfill registry services, as this will unduly limit the pool of qualified registry service providers for consideration. *Red Cross (21 July 2010).*

Community-based organizations—exception.
Vertical integration exceptions should be granted to community-based organizations with a structure that ensures that registry data cannot be abused and used to raise prices and make valuable, premium domains unavailable to the public (e.g. organizations that do not require the assistance or the marketing distribution channels of current registrars). Newcomer/new entrants with no prior business in the registrar/registry business and with innovative business models and technology should be allowed to vertically integrate in order to help level the playing field and compete with the likes of VeriSign, Afilias or GoDaddy, who are primed to most benefit from new gTLDs with or without vertical integration. We

strongly oppose any proposal which ensures advancement of the existing large registries and registrars with market power. *.MUSIC (20 July 2010).*

The DAGv4 "default" position should be amended and exceptions should be put in place to allow for specific categories (e.g. a TLD based on a brand or a specific language community may want to have stronger ties with a specific registrar to ensure its acceptance and growth). *EuroDNS (22 July 2010).*

A hybrid approach under which a registry can act in a limited fashion as a registrar could be beneficial to community-based gTLDs both in terms of costs and in terms of ability to manage registrants. *BITS (22 July 2010).*

<u>Some form of vertical integration would be beneficial or even necessary for some of the new gTLD initiatives</u>. Giving new registry operators the opportunity to run an affiliated ICANN accredited registrar, even if restricted to no more than 100,000 names under the TLD, would greatly help them to have exposure to their target audience. Even more relevant strategically is to provide nondiscriminatory access to registry services to all ICANN accredited registrars because they are the key to a successful TLD. The registry operator would use a uniform agreement with all registrars. The registry operator could be evaluated in 1 or two years to assess its performance regarding the provision of equal and nondiscriminatory access to all ICANN accredited registrars so the limits on the number of allowed domains could be increased or completely removed. With this model, the registry operator can design a business model that can help all registrars be successful, while achieving sustainability and economic stability for the TLD. *NIC Mexico (21 July 2010).*

<u>Vertical integration requirements should be removed</u>. The addition of vertical integration rules to the DAGv4 may have negative consequences on applicants who seek to hire third parties to provide backend registry services. The effective choice becomes extremely limited. To avoid this problem, the requirements on vertical integration should be removed. *A. Al-Zoman (21 July 2010). Arab Team (21 July 2010).*

Full registry/registrar cross ownership should be allowed and would be beneficial to stimulating growth and innovation, especially in small and specialized TLDs. Cross ownership should not prohibit a registrar from selling domains from a registry in which it holds shares, provided equal access to registration is guaranteed and does not discriminate against other registrars. Some ccTLD registry operators have been acting as registrars for years. New gTLDs will likely reach a market penetration comparable to ccTLDs, especially new geoTLDs. It therefore makes sense to allow similar business models and models of integration in the sales channel. Any potential harms can be more effectively handled through enforcement. Compliance will be monitored through ICANN mechanisms as well as through competitors in the market. By contrast, a quota on ownership limitation is arbitrary and will not in itself prevent any harm. No cap should be implemented on cross ownership between a registry service provider (registry tech provider) and a registrar but similar levels of limitations of control should be required. With strong and flexible rules and a strong and empowered enforcement scheme, the provision of registry services by registrars as well as cross ownership of registries and registrars would pose no greater risk of harmful action or abuse than any other setup. ICANN and its staff need to make a decision to allow greater innovation and freedom of choice and to building a strong compliance framework. The restrictive policies of DAGv4 have served the interests of hardliners and incumbents to refuse any compromise. *Key-Systems (21 July 2010). Blacknight Solutions (21 July 2010). EuroDNS (22 July 2010).*

The vertical integration language in DAGv4 is unfair, biased, and anticompetitive and potentially violates antitrust and consumer protection laws. ICANN has given no justification for the wholesale exclusion of ICANN accredited registrars from participating in the new gTLD marketplace. *Demand Media (22 July 2010).*

JN2 proposal support.
In the spirit of reaching consensus on this issue, Neustar urges the Board to adopt the so-called JN2 proposal. It allows registrars and their affiliates to be registry operators provided they agree not to distribute names within a TLD for which they or their affiliates serve as the registry operator. It allows exceptions for single registrant TLDs, community TLDs and orphan TLDs. For the first 18 months, certain restrictions apply toward back-end registry service providers, after which they may petition ICANN for a relaxation of those restrictions. *Neustar (21 July 2010).*

If the Vertical Integration Working Group does not reach consensus, then regarding Section 2.9 of the registry agreement, Neustar recommends: (1) de minimis exception should be at least 5%, which is consistent with federal securities reporting and provides a clear public method of verifying ownership; and (ii) the beneficial ownership definition lacks critical elements needed to define it to include other indicia of indirect control (these critical elements are currently found in Rule 13-d of the rules under the Securities and Exchange Act of 1934), without which there will be loopholes leading to gaming. *Neustar (21 July 2010).*

Free Trade Model support. We support the Free Trade model. Cross ownership and vertical integration restrictions are artifacts of 1999 conditions and should be abolished in their entirety short of an actual showing of market dominance by specific players. We are also concerned about the current working group process—i.e., registries and registrars deciding together to shape the competitive landscape is harmful to the Internet, to ICANN and the participants in the group. Competition authorities in the U.S. and Europe are the right entities to examine and control issues of anticompetitive behavior on the Internet. We strongly oppose the Afilias/PIR proposal (aka RACK)—it mainly advances the interests of the proposers. The CAM model, among other problems, is liable to serious unintended consequences, up to and including wholesale governmental intervention in ICANN accreditation processes. We also will not support any proposal that includes an arbitrary percentage threshold of either ownership or control (e.g., JN2), just because it is less bad in other ways, or because the proposers seem less motivated by self-interest. If we are asked to choose between the various proposals other than the Free Trade model, we prefer that outlined in the DAGv4. *Minds + Machines (21 July 2010). .MUSIC (22 July 2010).*

Clarify the terms "registry services" and "Registry Services" as used in the guidebook. The use of both lower case and upper case for these words is confusing and requires clarification. We believe the upper case "Registry Services" is intended to create a specific definition to the list of "Registry Services" outlined at Question 23 of the Evaluation Criteria and within http://www.icann.org/en/registries/rsep. It is not clear if the lower case usage assumes the same meaning. In some sections the usage may be interpreted in a manner which is not ICANN's actual intent—e.g., Module 1, Restrictions on Registrar Cross-Ownership, point 3 (page 1-18). *AusRegistry (20 July 2010).*

Analysis of Comments

Vertical integration has been the subject of substantial study and review. The Vertical Integration PDP Working Group has submitted a Revised Initial Report on Vertical Integration Between Registrars and Registries (available at http://gnso.icann.org/issues/vertical-integration/revised-vi-initial-report-18aug10-en.pdf), which sets out several potential approaches to this issue. The GNSO has indicated that no consensus has been reached on this issue. As a result, the ICANN board of directors, following extensive and careful review of input from legal advisors, economic experts and the community has directed the ICANN staff to remove many restrictions on registry-registrar cross ownership in the draft registry agreement being posted as part of AGBv.5.

Although restrictions on cross ownership have been removed, the Board determined that the registry agreement should contain restrictions on any inappropriate or abusive conduct arising out of registry-registrar cross ownership, including without limitations provisions protecting against:

     a.   misuse of data; or

     b.   violations of a registry code of conduct;

The Board also directed that these provisions may be enhanced by additional enforcement mechanisms such as the use of self-auditing requirements, and the use of graduated sanctions up to and including contractual termination and punitive damages.

As a result of this directive, the registry agreement will now require that future Registry Operators comply with a Code of Conduct (a suggested form is set forth in new Specification 9), designed to prevent abuses that could result from registry-registrar cross ownership. Violation of this requirement is a breach of the new Registry Agreement.

In addition, ICANN will have the ability to refer issues raised by cross ownership to the relevant competition authorities.

Finally, Specification 1 to the draft registry agreement being posted as part of AGBv.5 has been amended to provide that ICANN will have the ability to cross-ownership issues through the consensus and temporary policy process.

Whois

Key Points

- Searchable Whois is supported by certain members of the community interested in the protection of third party intellectual property rights;
- While such a service may offer some benefits, the potential costs to other community members should be further studied.

Summary of Comments

Support for Searchable Whois. The special arrangement approved by the Board on an explicitly non-precedential basis for the tiny .name registry is basically irrelevant. The registry agreements ICANN recently signed for .asia, .mobi and .post go well beyond what is proposed in DAGv4 and represent

current best practice for gTLD registry agreement. They require fully searchable Whois services at the registry level and for all registrars sponsoring registrations in those domains, and also call for registrars to adhere to a compliance review policy. These reasonable and practical requirements should be carried forward in the base registry agreement for new gTLDs. Given that more accurate Whois data is an essential tool in combating malicious and illegal behavior online, ICANN has provided no cogent reason why it should not take a more proactive role in setting the ground rules for the new gTLD space. *COA (21 July 2010).* Microsoft strongly supports the proposed requirement for a fully searchable Whois service (Spec. 4, Section 1.8). The benefit would be even greater if registries were required to require their registrars to also provide fully searchable Whois. ICANN must improve Whois compliance efforts; otherwise the searchable Whois requirement is likely to be of less value. *Microsoft (21 July 2010).*

Opposition to Searchable Whois. Specification 4 contains a new Section 1.8 that is highly problematic. It presents technical, policy, privacy, security, and legal issues for the wider ICANN community. The DAG process is insufficient for understanding those issues and making informed, fact-based decisions about them. The RySG requests that 1.8 be deleted for the following reasons:

1. Policy: By making the service mandatory, ICANN would make gTLD policy unilaterally via the contract process. And it would circumvent a current GNSO policy-making effort. This WHOIS service is currently under review at the GNSO via its "Inventory of WHOIS Service Requirements" effort (http://gnso.icann.org/issues/whois/whois-service-requirements-draft-final-report-31may10-en.pdf) The technical experts who reviewed the service via the GNSO process noted that it presented a variety of technical, privacy, and social issues that needed further examination.

2. Technical: it is unknown if such services can be provided within the contract's WHOIS SLAs. Such a service is not technically easy to provide. To our knowledge, a service of this nature has never been attempted on a large scale. The requirement "without arbitrary limit" means the service must allow extremely large, broad searches, which could swamp or stall the service. They might also require cookie tracking, which is not even possible for port 43 queries.

3. Cost: the service will impose new, significant, and unknown costs on registry operators.

4. Legal: The service is not required to establish bad faith under the UDRP. Many adequate resources and tools exist to do that, and have been used successfully for the past ten years.

5. Technical: Specification 4 deals specifically with Port 43 and Web-based WHOIS. Those may be inappropriate mechanisms to perform such searches.

6. Privacy: the service presents some obvious issues that members of the wider ICANN and Internet community may be concerned about. The privacy issues should be examined carefully, and more attention should be brought to them than the DAG4 affords. The phrase "subject to applicable privacy policies" is confusing, and the RySG does not know what it might mean.

7. Security: The DAG process is insufficient to quantify the possible malicious uses of such a service. The issue deserves greater study.

8. Technical / Security: it is unknown what "control structure" may be sufficient "to reduce the malicious use of the searching capability itself." It is impossible for Registry Operators to build compliant control solutions since no one seems to have defined the problem.

9. Security: there are other, existing tools that provide cross-identification of domain names during professional investigations of malicious conduct. The proposed WHOIS service is not yet justified on the basis of security because no one knows if the service's drawbacks outweigh the supposed security benefit.

10. Security: the SSAC has demonstrated that WHOIS is mined by spammers (See SAC023: http://www.icann.org/en/committees/security/sac023.pdf) The service above could make this even easier for spammers and other bad actors.

11. Legal and cost: The parenthetical comments in 1.8 DAG4 misunderstand existing contracts. Existing contracts say that such WHOIS access may optionally be provided by "a participating registrar, at the registrar's expense"– not provided by the registry, or at the registry's expense, as DAG4 requires. *RySG (21 July 2010).*

This paragraph poses both substantive and procedural problems. The bracketed language proposes additional requirements for exposure of WHOIS data. The requirement would place unwarranted additional burdens on registries and registrants without corresponding benefits to the community at-large. Bracketed text buried deep in DAGv4 is not the appropriate place to make WHOIS policy. *W. Seltzer (21 July 2010). R. Dammak (July 2010).*

Thick Whois should be required by the Registry Agreement, as recommended by the IRT.
The DAGv4 requires registry operators to provide a publicly available WHOIS service but fails to emphasize the importance of providing accurate and accessible registry information. ICANN should educate registries regarding the importance of providing reliable registrant contact information that is available to users in a fair manner. This is particularly important for not-for-profits with limited budgets and resources. *AAMC (21 July 2010). IPOA (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Thick Whois lookup—inapplicable to government and military. The specification 4, the data disclosure pursuant to a thick Whois model obviously is not applicable to TLDs for government and military use as the security of that data is of great importance and should not be fully disclosed. The best solution is to make some exceptions and make the Whois lookup service available to the public within proper range. *CONAC (22 July 2010).*

Whois data quality policy disclosure. ICANN should require applicants to disclose their policies for Whois data quality—i.e. spell out how they will require registrars who sponsor registrations in the new gTLD to ensure the accuracy and currency of Whois data that they collect. The best approach is to include Whois data quality requirements in registry agreements with new gTLD operators, but disclosure in the application is a worthwhile fallback. ICANN should be able to use contract compliance tools to pursue registries that misrepresent their plans on critical issues such as improving Whois data quality. *COA (21 July 2010).*

Analysis of Comments

A requirement to provide searchable Whois data is strongly supported by certain members of the community. However, the RySG has raised a number of technical and legal impediments to the implementation of such a service. The ICANN board of directors has referred this matter to its working group on data/consumer protection, which has not completed its review. For the purposes of the draft registry agreement being posted as part of AGBv.5 contemporaneously with this summary and analysis, the draft requirement has been removed pending further ICANN board direction. Among other options, the working group will consider a proposal that the searchable Whois be retained in the Guidebook as optional – that an added point would be awarded for the commitment to implement this tool; community comment is also invited on this – please refer to the evaluation scoring criteria being posted for public comment as part of AGBv5.

The Whois model in the draft registry agreement is intended to be universally required but exceptions for government and military TLDs might be considered.

Whois requirements are spelled out in the draft registry agreement, and failure to maintain the prescribed records is a breach of the registry agreement entitling ICANN to take action to ensure accuracy. The question of whether to impose additional Whois verification or accuracy obligations on registries would be best addressed through GNSO policy processes, which can be made applicable to all gTLD registrars and registries and not just new gTLD registries.

Rights Protection Mechanisms

Key Points

- Registry-registrar agreements should act to bind registrars to the RPMs contained in the draft registry agreement;
- The draft PDDRP contains procedures for delaying the imposition of ICANN imposed remedies.

Summary of Comments

Section 2.8 Protection of Legal Rights of Third Parties.

1. The RySG notes that while the Registry Operator is required to include the RPMs identified in Specification 7 (including presumably the URS) in their registry-registrar agreements, ICANN should also endeavor to require registrars in their ICANN accreditation agreement to also abide by such RPMs. In addition, Registry Operator shall be entitled to require that registrars in their agreements with registrants require registrants to: (i) also abide by such RPMs (including the URS); (ii) specifically acknowledge that the Registry (and Registrar) has the right to take action with respect to a domain name as provided for under such RPMs and (iii) the Registry shall have no liability to either Registrar, Registrant or any other person for any action taken in accordance with the terms of any RPMs (including in particular the URS).

2. The language requires Registry Operators to "comply with all determinations made by ICANN pursuant to Section 2 of Specification 7." The RySG notes that a strict reading of this language may imply

that a Registry Operator may be in breach even if it is exercising its right to appeal or review decisions of the PDDRP or RRDRP panels. Therefore it should state: "Subject to any right to appeal or review under the applicable policies, Registry Operator must comply with all determinations and decisions made by ICANN pursuant to Section 2 of Specification 7."

3. Finally, Specification 7 allows ICANN to amend the RPMs at its discretion. It should be made clear that Specification 7 (and each of the RPMs contained therein) may only be modified through the consensus policy process as it falls within the "picket fence" under Section 1.2.5 of Specification 1. *RySG (21 July 2010).*

RPMs (5-11). CORE favors pre-launch and post-launch RPMs. These should not prevent the applicant from forming community-based registration eligibility criteria which obviate the necessity of the RPMs ICANN proposes. *E. Brunner-Williams (Module 5, 21 July 2010).*

Analysis of Comments

The registrar accreditation agreement with ICANN was recently amended following significant input from Internet stakeholders. Further revisions of that agreement can be made through that process and enforcement of new RPMs introduced by the new gTLD implementation will be added to that agenda. In any case, a requirement to comply with RPMs in the registry-registrar agreement is sufficient to bind registrars.

The draft PDDRP contains procedures for delaying the imposition of ICANN-imposed remedies. Agreeing with the RySG comment, the form registry agreement posted with the new version of the Guidebook will be amended to clarify that ICANN imposed remedies are subject to Registry Operator's rights under the relevant dispute resolution procedure.

Applicants are free to form community-based registration eligibility criteria in accordance with the applicant's application for the TLD. However, all registry operators will be required to comply at least with ICANN mandated RPMs. For certain community TLDs, this implementation should be straightforward and not onerous due to the registration restrictions in place.

Pricing

Key Points

- The RySG wants flexibility to be able to offer short-term marketing plans;
- Uniform renewal pricing is necessary to prevent predatory pricing, but different pricing models are available with proper disclosure and consent of registrants;
- Hard price caps are not necessary or appropriate for the new gTLD program.

Summary of Comments

Section 2.10 Pricing for Registry Services.
The language contained in the parenthetical that would require 30 days notice in the case of new registrations and 180 days with respect to renewals for the "elimination of any refunds, rebates,

discounts, product tying or other programs which had the effect of reducing the price charged to registrars" would unduly and unnecessarily restrict the ability of registries to engage in seasonal or short-term and targeted marketing programs and/or respond to changes in market conditions with the potential effect of actually reducing the ability of registries to compete on price. The proposed language would not provide new registries with the flexibility in pricing and marketing needed to compete in what is likely to become a crowded marketplace. The 180 day notice requirement when applied to the elimination of refunds, rebates, discounts, product tying or other programs is likely to discourage the introduction of innovative products and services.

Similarly, the requirement that a Registry Operator offer all domain name registration renewals at the same price, unless, the registrant agrees in its registration agreement with a registrar to a higher price at the time of the initial registration also fails to take into account the realities of the marketplace and the true nature of the relationship between Registries, Registrars and Registrants. Registrants enter agreements with Registrars, and the price they pay for a domain name is dependent upon a multitude of factors including term length, number of domains registered, and services purchased that are outside the control of the Registry. Registrars, not Registries, set the price charged and renewal terms to Registrants. Furthermore because of the many different registrar business models, the type of "conspicuous disclosure" of the renewal price contemplated by Section 2.10 is often not practical or realistic, particularly if the price is bundled with other services.

The proposed language would also effectively prohibit Registries from offering marketing programs, refunds, rebates, discounts, product tying or other programs directed at renewing registrants or in any way takes renewal registrations into account. The proposed language could also be deemed to limit the ability to up sell registrants or engage in marketing directed at particular markets.

The RySG recommends that (i) the notice period for the elimination of any refunds, rebates, discounts, product tying or other programs be the same 30 days for both new and renewals of domain registrations; (ii) that language be added to make it clear that nothing in this section prevents a registry from offering rebates, discounts, product tying or other programs of limited duration provided that the duration of such offering rebates, discounts, product tying or other programs is disclosed up front; and (iii) delete the second to last sentence of the section.

In addition, the RYSG repeats its comments from DAG3 which asked in the final sentence, what does "public query-based DNS lookup service" mean? Does that sentence mean that alternative models are not allowed, such as free registration with fees for resolution?

In light of the above, the RySG recommends that the text of Section 2.10 be amended as specifically recommended in RySG's comments.
RySG (21 July 2010).

ICA appreciates Section 2.10 renewal pricing clarification. ICA appreciates the clarifying language that "registry operator shall offer all domain registration renewals at the same price, unless the registrant agrees in is registration agreement with a registrar to a higher price at the time of initial registration of the domain name following clear and conspicuous disclosure of such renewal price to such registrant." This will assure that registries cannot tax domain registrants on the economic success of their domains by arbitrarily imposing higher renewal charges. *ICA (21 July 2010).*

Section 2.10—clarification. The phrase "at the same price" is unclear as it has no qualifier (i.e., the same price as what?). The following underlined language should be added to clarify this: "Registry Operator shall offer all domain registration renewals at the same price as the price charged for the initial registration of that name, unless…" *R. Tindal (21 July 2010).*

Price caps should be imposed. To show that ICANN is acting to protect consumers, it is imperative that there be hard price caps embedded in the agreements. Section 2.10 of the base agreement and specifications contains no hard price caps. Registries will be free to charge $1,000/year per domain or $1 million/year per domain, for example, to maximize their profits. Because of the "equitable treatment" clause, by not putting in price caps ICANN opens the door for VeriSign and other registry operators to have unlimited price increases. ICANN is not promoting competition but is perpetuating an abusive monopoly –i.e., why is every other technology going down in price, but .com costs are going higher? If ICANN is suggesting that competition will lead to lower prices, there is no good reason that the hard price cap should be any higher than that for .com. *G. Kirikos (1 June 2010).*

Price caps should not be imposed. Imposing price caps will have a detrimental effect on competition and increased diversity of services. Companies that focus on smaller, niche markets like .museum and .pro and which cannot benefit from economies of scale will be unable to exist since they would not be able to cover their costs if they could not charge more than .com. *M. Iqbal (9 June 2010).*

Analysis of Comments

ICANN understands that the current language with respect to special programs that have the effect of reducing the price charged to registrars may be unduly restrictive on registry operators' ability to conduct short term marketing programs for initial registrations and to respond to fast changing market conditions. ICANN has amended this language in the current draft of the form registry agreement posted with AGBv.5 to address this concern.

The requirement that each renewal registration be offered at the same price as all other renewal registrations is intended to require that all renewal registrations be priced identically. The provision is not meant to require a specific renewal registration be priced at the same price as its initial registration. The intent of this provision is to prohibit discriminatory pricing in the case of successful registrations that cannot easily change names upon renewal. The exception to this provision allows registry operators to operate "premium name" programs that can be renewed at higher prices so long as the registrant agrees to the higher renewal pricing at the time of initial registration and provides documents that evidence that agreement to Registry Operator. It is recognized that the registry operator does not have direct contractual privity with the registrant, but it is intended that this requirement could be satisfied by the registry operator through the registry-registrar agreement. In accordance with the RySG comment, the provision has been clarified to require that if a registry operator wishes to implement a premium pricing program for any of its domains, then it must receive documentation from the registrar (which may be required through the RRA) demonstrating that notice of the premium pricing has been provided to registrants and such registrants have given informed consent to the pricing scheme.

The final sentence of the pricing provision in the form registry agreement posted new Guidebook was modified to make clear that Registry Operator may not charge additional fees for a public query-based DNS lookup service.

After significant discussion and study, it has been determined that price controls would be inappropriate for the new gTLD program. The proposed registry agreement includes price notice provisions, but a general system of price controls would not be workable due to the expected diversity of registry business models and the need for registries to be able adapt their business models to changing environments and competition. Registries should not be restricted from offering a higher level of service or security if that might entail charging a higher price for their services. It is expected that new registries will compete vigorously with each other and with existing registries, both on price and services, to attract new customers and new initial registrations. (The renewal price provisions in the base registry agreement are intended to protect against discriminatory pricing on renewal.) There is no need for a centralized and uniform price control mechanism across all gTLDs, particularly where market power is not an issue. Nor could such a program be effective considering the number of innovative and different business models anticipated. Controls would shackle that innovation. However, if market power were to develop and be abused, then governmental consumer protection and competition authorities will have all powers available to them under law to ensure that consumers and competition are protected. Also, protections have been put in place in response to community comments in order to prevent certain abuses that might occur relating to renewal pricing. For additional discussion please refer to the reports posted at <http://www.icann.org/en/announcements/announcement-06jun09-en.htm>.

Other Registry Operator Covenants

Key Points

- ICANN will implement reasonable parameters on its abilities to conduct operational audits;
- Although disfavored by certain members of the registry community, the continuing operations (financial) instrument is a vital tool in ensuring the security and stability of the DNS and the Internet;
- ICANN technical staff has refined the emergency thresholds that could potentially trigger an emergency transition of a registry;
- Registry operator will be expected to cover the costs associated with an emergency transition as it ultimately would be at fault for the registry failure.

Summary of Comments

Section 2.1—the process for adoption of consensus policies is not specified. The second sentence should be changed as follows: "as such policy may in the future be modified in accordance [with] ICANN's Bylaws applicable to Consensus Policies." *RySG (21 July 2010).*

Section 2.11—Contractual and Operational Compliance Audits. The RySG accepts that ICANN has the right to conduct contractual and operation audits up to 2 times per year. However, ICANN should understand that these audits are disruptive to normal business operations and they should commit to conducting these audits in a manner that does not disrupt the normal operations of the registry. *RySG (21 July 2010).*

The RySG also notes that 3 business days is way too short of a notice period in that key personnel for registries that must be present during these audits plan their schedules much further in advance than 3

business days. Perhaps at least 5 business days may suffice to ensure that any key personnel are able to make themselves available to ICANN. *RySG (21 July 2010).*

Continued Operations Instrument – opposition. The requirement for a financial instrument that will guarantee at least 3 years of operation of essential registry services in the event of business failure is an unnecessary drain on the resources of prospective registries already damaged by the long delay of the new gTLD program. The requirement is especially punitive for small registries and will tie up important resources. It will discourage deserving applications and contribute to the failure of others. The goal of protecting registrants can be met by different means. Instead, continuity can be assured through cooperative agreements between registries and/or registry service providers who agree to provide these services in the failed registry. This sort of arrangement, already contemplated by ICANN in its Registry Transition Process document, should be extended to the application evaluation portion of the DAG. ICANN should provide for alternative, non-financial means of guaranteeing registry service continuity, either wholly or in part. *Minds + Machines 21 July 2010). NIC Mexico (21 July 2010).*

Continued Operations Instrument – support. Neustar supports the financial instrument requirement. ICANN has done a comprehensive job to deal with situations where a registry operator is also the back-end registry services provider. A financial instrument is appropriate in such a case since there is no third party to continue the registry operations and therefore ICANN could incur significant costs for transition. The current language does not adequately address the situation where the registry operator does not operate the registry services itself but outsources it to a back end registry services provider. In such cases failure of the registry may not result in loss of critical services if the back-end provider continues operations in the event of an applicant failure. This approach would not require a financial instrument. Neustar notes that ICANN has already addressed the issue of the back-end registry service provider failure by requiring contingency planning and submission of a transition plan. Neustar (21 July 2010).

Section 2.13—Emergency Transition. Taken together, 2.13 and 6.5 say that if a registry operator misses a single escrow deposit, or takes allowed maintenance periods for certain services, ICANN may remove the TLD from the registry Operator's control. We do not believe this was the intent, but these issues must be fixed so the contract is reasonable and not in conflict with itself. These provisions should be modified for the following reasons:

- DNSSEC: it is unknown what "DNSSEC" means here; the term must be defined. Note that registries are allowed SRS downtime, which means the ability for registrars (registrants) to update keys will occasionally and allowably be offline.
- Data escrow: currently the contract says that missing even one escrow deposit is an emergency and is cause to transition the registry. Such is not an emergency, especially since issues beyond the control of a registry operator (such as Internet transit issues and problems at the escrow provider) may occasionally prohibit the completion of a deposit. The contract should specify that a number of missed deposits in a row should constitute a breach, perhaps at least a week.
- DNS: As per 6.4, registries are allowed to have a DNS name server down for as many as 432 minutes (7.2 hours) per month. Four-hour downtimes would therefore be perfectly allowable. If ICANN is saying that "DNS service" for the TLD should always be 100% available through at least one nameserver, that should be made clear.

In addition, the RySG notes that the requirement that a Registry Operator pay ALL costs incurred is the equivalent of requiring the Registry Operator to write a blank check to ICANN and the designated Emergency Operator. There must be an element of reasonableness, a monetary cap, and an ability for

the Registry Operator to review (and even audit) those expenses as well as an opportunity to dispute the fees. *RySG (21 July 2010).*

Cost of continuity of operations. Determining the cost for registry continuity requires a discussion of what "functions" are "critical." Continuity activity is a sufficiently minimal capital reserve element and care should be taken that unnecessary cost is not created. ICANN should make commercially reasonable estimates of the reasonable minimal function cost and publish that for further comment. *E. Brunner-Williams (Module 5, 21 July 2010).*

Registry operator obligations to a TLD community (Module 5, sec. 2.14—transition to delegation). The requirement that the registry operator operates the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD provides a critical, long-term safeguard for any Community that chooses to delegate authority to a particular TLD operator. *Big Room (21 July 2010).*

"Relevant community that must be consulted" (p.4, gTLD Registry Transition Process Model). This reference provides assurance that a TLD operator will not change without input from the community under which the current and/or prospective TLD operator would derive authority. *Big Room (21 July 2010).*

Analysis of Comments

Section 2.1 has been clarified to require that changes to the RSEP process only be made pursuant to ICANN's Bylaws and the process for adoption of Consensus Policies.

ICANN has implemented reasonable parameters on its abilities to conduct operational audits in the draft registry agreement included in the Guidebook. The parameters seek to balance the desire for effective contractual compliance with the need to provide a predictable operating environment for registry operators.

The continued operations (financial) instrument that is required before a new registry launched operations is a vital tool in ensuring the security and stability of the DNS and the Internet. It will ensure that the financial resources are in place to operate and transition a failed registry. Additional costs imposed on registry operators are outweighed by the benefits to the Internet community and registrants as a whole. The presence of an independent back end registry services provider may not provide adequate safeguards against a failed registry if the services provider lacks the ability to recoup the costs of operating the registry. The continued operations instrument will provide for these costs.

In response to comment, the emergency thresholds that could potentially trigger an emergency transition of a registry have been modified. Revised thresholds are included in the specifications to the draft registry agreement included with this 5th edition of the Guidebook.

Registry operator will be expected to cover the costs associated with an emergency transition, as it is essentially the cause for the registry failure. ICANN recognizes that these costs must be reasonable under the circumstances and that documentation of the costs should be provided to registry operator (both of these issues have been addressed in the draft registry agreement included with the new Guidebook. Because of the wide variety of business models that may be introduced in connection with

new gTLDs and because the size and sophistication of each registry will differ greatly, ICANN is not in a position to make reasonably accurate predictions as to what the costs of transitioning a failed registry may be.

Covenants of ICANN

Key Points

- ICANN will consider any specific proposals to enhance its operational covenants.

Summary of Comments

Article 3—Covenants. The RySG still notes that the covenants in Article 3 are still worded differently and in many cases less favorably to gTLD Registries than the language contained in the proposed ccTLD Fast Track Agreements. Can ICANN please explain why such different wording is warranted? *RySG (21 July 2010).*

Analysis of Comments

Different agreements require different contractual terms that ICANN believes to be appropriate given the context.

ICANN included the specific language that the RySG requested for the ICANN covenant with respect to the root. If there are additional specific recommendations, ICANN will consider those as well.

Termination

Key Points

- ICANN has implemented the edits to subparagraph (d) regarding termination recommended by the RySG as they provide additional safeguards and therefore promote stability.

- Registry operator would no longer have the rights to operate the registry in the event of any termination of the agreement.

- ICANN has requested that the RySG provide more detail on what a Service Level Agreement with ICANN would cover and how it would be enforced.

Summary of Comments

ICANN discretion. ICANN should be able to terminate the agreement in appropriate circumstances. *MARQUES/ECTA (21 July 2010).*

Sec. 4.3 Termination by ICANN.

The RySG appreciates the changes added in Section d, however recommends that the following language be added: "With respect to proceedings described in this subparagraph (d) (i-v) that are involuntary proceedings commenced or instituted against Registry Operator, Registry Operator shall have the opportunity to contest such proceedings, and ICANN's right to terminate shall not take effect if such proceedings are dismissed within thirty (30) days following Registry Operator's receipt of notice of their institution."

The RySG understands why Section e was added, but remains concerned that the language above would supersede the rights to review and/or appeal decisions under the PDDRP. Therefore the RySG requests that ICANN make it clear in the language that this termination would only apply after all reviews and appeals under the PDDRP and this agreement are exhausted. *RySG (21 July 2010).*

Section 4.4. Termination by Registry Operator. The RySG repeats its comments from v3, as they are still relevant. More specifically, we would like a better understanding of what it would mean to terminate a contract with ICANN for ICANN's breach, considering that ICANN presently has the sole authority to grant gTLDs. Would the relevant registry get to keep the ability to continue operating the registry for that particular TLD? In any event, termination is not a sufficient remedy in the event of a breach by ICANN, as it provides a Registry Operator with no ability to recover any losses. *RySG (21 July 2010).*

In addition, RySG believes that 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 (which are not subject to the limitations of liability) along with a right to be awarded Specific Performance may be the only potential meaningful penalties as opposed to termination by the Registry Operator. *RySG (21 July 2010).*

Analysis of Comments

ICANN has implemented the edits to subparagraph (d) recommended by the RySG in the draft registry agreement included with the Guidebook.

Registry operator is free to challenge ICANN's determination to terminate the agreement pursuant to Section 2 of Specification 7 during the 30-day notice period provided by the agreement. The PDDRP also provides that any remedy imposed by ICANN will be stayed in the event that registry operator initiates an arbitration proceeding pursuant to Section 5.2 challenging the PDDRP determination. The draft registry agreement included with the Guidebook will clarify the ICANN's right to terminate is subject to Registry Operator's rights under the applicable dispute procedure.

In addition to the right to terminate the agreement in the event of a fundamental and material breach by ICANN that is uncured, registry operator may bring a claim in arbitration for damages. In the event of a termination by registry operator, ICANN would have the right to re-delegate the TLD pursuant to Section 4.5 of the agreement. Registry operator would no longer have the rights to operate the registry in the event of any termination of the agreement. The draft registry agreement included with the Guidebook clarifies that the Registry Operator would lose the right to operate the registry for the TLD in the event of a termination of the agreement or expiration of the term of the agreement.

The ability to challenge, as suggested by the comments, we believe will provide for less disruption and softer landings in cases of termination.

ICANN has requested that the RySG provide more detail on what a Service Level Agreement with ICANN would cover and how it would be enforced.

Re-delegation of TLD

Key Points

- Alterative provisions for a ".brand" TLD have been addressed in the registry agreement to the extent feasible in a manner to provide appropriate protections.

Summary of Comments

Draft Base Registry Agreement—section 4.5 redelegation alternatives.
COA is pleased that ICANN provided an alternative version of section 4.5 under which a TLD cannot be redelegated over the reasonable objection of the original delegate. This provision could be an important safeguard for brand owners who may be interested in experimenting with a .brand registry, since such new TLDs will not be applied for if there is a risk that the TLD might be redelegated to a third party. *COA (21 July 2010).*

The alternative Section 4.5 and the gTLD Registry Transition Processes model are helpful, but further clarity is needed. As written Section 4.5 is not clear whether the registry operator's ability to reasonably withhold consent applies to ICANN's transition of the TLD to a successor registry operator or to providing ICANN with the registry data for the TLD. If it is the former, the problem appears to be solved. If it is the latter, it would still be possible for a .brand TLD registry operator to decide to terminate the TLD and, subject to the terms of the registration agreement for its TLD, cancel the second-level registrations. In that event, there would be little useful registry data to transition, but ICANN could still transition the TLD to another registry operator not affiliated, connected or associated with or sponsored or approved by the brand owner registry operator. On its face, and subject to the alternative Section 4.5 ambiguity, the gTLD Registry Transition Processes Model would allow ICANN to launch an RFP to transition a .brand TLD to another registry operator where the .brand registry operator decided to terminate operation of the TLD and did not identify a prospective successor. It would be highly undesirable for an RFP process to result in transition of a .brand TLD to another registry operator not affiliated, connected or associated with or sponsored or approved by the brand owner registry operator. If that is not ICANN's intent, the appropriate clarifications and revisions should be made. *Microsoft (21 July 2010).*

Registry Transition Process Model. Hogan Lovells welcomes introduction of a new Registry Transition Process model which includes provisions for emergency transition in the case of prolonged Registry technical outages. *Hogan Lovells (21 July 2010).*

Analysis of Comments

The alternative Section 4.5 is derived from the .POST registry agreement and was originally contemplated to apply to those TLDs operated by intergovernmental organizations or government entities because it is likely there is no suitable successor operator. This scenario may also be applicable to certain (but not all) community TLDs, TLDs used for infrastructure purposes only, or other types. That

is why the agreement states that the decision to redelegate will be undertaken with discretion. Significant work to identify TLD types or criteria for deciding when delegation is always appropriate or inappropriate did not result in the development of criteria. There is too much uncertainty in anticipated TLD types. ICANN recognizes that delegation of a .brand TLD might not be necessary or appropriate in the event that the registry operator of such a TLD elected to voluntarily wind down the registry. The agreement affords discretion as to whether or not a TLD is re-delegated in order to protect registrants in the TLD and parties that might be negatively affected if a gTLD were to be inappropriately redelegated or not redelegated.

Dispute Resolution

Key Points

- ICANN has proposed a compromise with respect to the number of arbitrators in the draft registry agreement included with AGBv.5.

Summary of Comments

Section 5.2 Dispute Resolution—Arbitration. The RySG continues to object to the language on the number of arbitrators insisted on by ICANN. Although ICANN added language to allow 3 arbitrators, it is ONLY if both parties agree. This is not acceptable because it gives ICANN the unilateral right to always insist on 1 arbitrator. This is especially disturbing in light of the fact that ICANN continues to insist on punitive and exemplary damages. Given the seriousness of the remedies, the registry should have the right to sufficient safeguards, including the right to 3 arbitrators if it so elects. *RySG (21 July 2010).*

Analysis of Comments

As stated during the consultation held with the Temporary Drafting Group on 8 September 2010, ICANN has proposed a modified provision in the draft registry agreement included with AGBv.5 that provides for the three arbitrators in the event that ICANN is seeking certain remedies in the arbitration.

Registry Fees

Key Points

- The uniform registry fees proposed by ICANN in the registry agreement represent a good faith effort by ICANN to estimate the costs to ICANN of providing services to new gTLDs.
- The costs of the RSEP process will be borne by registry operator in an effort to match benefits to costs, (ICANN may elect to pay a portion of the fee);
- In line with past practice, collection of the registrar fee from registries is necessary in the event that registrars fail to approve the variable accreditation fee; registry operator will be able to recoup the cost of the fee from registrars.

Summary of Comments

Section 6.1 Registry-Level Fees. RySG repeats the comments it made to the v1, v2 and v3 Registry Agreements: "The GNSO policy on new gTLDs recommends that ICANN take a consistent approach to registry fees, but in no way mandates that ICANN impose a one-size-fits-all model. Registry operators strongly reject this model. The proposed mechanism seems to abandon any cost-recovery obligations and, in the end, amounts to a revenue share." *RySG (21 July 2010).*

Section 6.2 Cost recovery for RSEP. RySG urges ICANN to reconsider this provision in light of the strongly negative affect it could have on innovation in the TLD space as detailed in RySG's earlier comments on versions 1, 2 and 3 of the registry agreement. In addition, the RySG notes that no changes have been made to the amount of the fees recommended for the RSEP panels. We believe the level of fees seems extremely high. What are the individual cost factors that make up this estimate? The RSEP process was implemented several years ago when there was no historical basis that could be used to develop a cost model. There are now a few actual RSEP cases that have been processed. The cost model should be re-evaluated and made more cost effective. *RySG (21 July 2010).*

Section 6.3 Variable Level Registry Fee. RySG repeats is comments regarding v2 and v3 also objects to the notion of registry operators being forced to act as guarantors for registrars, especially in light of ICANN's role in accrediting these registrars, including vetting and due-diligence regarding financial qualifications of such registrars. At this point in time, registries have no ability to select the registrars they do business with. If ICANN were to revisit the obligation of registries to use all registrars accredited by ICANN that elect to do business in a TLD, then we can revisit this obligation as it would allow the registries to perform due diligence. If ICANN accredits registrars who can't or won't pay, this should not become an obligation of registries. RySG repeats the comments it made regarding the v3 Registry Agreement, which suggests additional language: *"*Registry Operator shall only be required to remit to ICANN the fees described in this Section ...that it actually receives from registrars after submitting invoices for such fees. Registry Operator shall not be deemed in any way to be a "guarantor" for registrars, and has no obligation to make affirmative collection efforts beyond those made in its sole discretion in the ordinary course of business. Registry Operator's failure to collect any such funds from registrars shall not be deemed a material breach of this Agreement." Finally, as more of the burden of payments to ICANN come from the registries, the registries believe that it should have a similar approval right to the ICANN budget as currently enjoyed by the registrars.
RySG (21 July 2010).

Different fee models for different types of TLDs. Given the high fees and costs associated with applying for and operating a new gTLD, ICANN should consider setting up different fee models for different types of TLD applications to alleviate the costs on applicants. A sensible fee model will greatly enhance the chance of success for the new gTLD process. *CNNIC (21 July 2010).*

Reduced Not-for-profit organizations. ICANN should reveal and detail its actual costs for reviewing each new gTLD application and consider setting a lower cost pricing structure for not-for-profit organizations that will allow ICANN to recover its costs without imposing additional overhead on the not-for-profit applicants. This transparency and pricing consideration should also apply to extended evaluation fees, objection filing and proceeding fees (in objection proceedings fees should be capped, or at least the initial fees that must be paid as a "deposit" on the proceeding). ICANN should consider a two-tiered cost structure to separate commercial uses of the new gTLDs from the informational, educational and lifesaving functions served by not-for-profit organizations. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

<u>Reduced fees for small cities, small cultural and linguistic community TLDs</u>.
Special consideration, including reduction of the $185K application fee and $25K annual fee, should be given for small cities and small cultural and linguistic communities which do not intend to compete with general commercial TLDs such as .com or new brand TLDs and for whom the current level of fees is not affordable. It is understood that a lower but appropriate application fee is still needed in order to prevent excessive applications. *JIDNC (21 July 2010)*.

<u>Reduced fees for developing country applicants</u>. Special consideration regarding technical requirements and fees for developing country applicants representing cultural, linguistic and geographical communities is appropriate and consistent with the advice of the GAC in its Brussels communication. A. Al-Zoman (21 July 2010). Arab Team (21 July 2010).

Analysis of Comments

The uniform registry fees proposed by ICANN in the registry agreement represent a good faith effort by ICANN to estimate the costs to ICANN of administering the new gTLD program. As such, fee reductions for different types of TLDs are not possible and would result in potential shortfalls in funding for the gTLD program.

The cost for RSEP will be the responsibility of the registry operator seeking to benefit from the proposed new service. Given the potential volume of new gTLDs and the multitude of potential services that could impact the security and stability of the DNS and the Internet, ICANN cannot agree to absorb this cost as there are not the resources available to do so. Alternatively, ICANN could raise fees in other areas but because there would not be a one-to-one match between effort and cost, the increase in fees would probably be set higher than necessary in order to mitigate risk. The current agreement provides the flexibility for ICANN to cover some of the RSEP costs in appropriate situations at its discretion. ICANN will seek to make the RSEP process as cost effective as possible.

The mechanism for the collection of the Variable Level Registry Fee (i.e., registrar fees) is based on all current registry agreements and is necessary in order to ensure that ICANN collects sufficient funds to perform its obligations. In the event that registrars fail to approve this fee, registry operator will be invoiced to cover the fee and may include it as part of the invoiced fees to registrars. Registry operator's registry-registrar agreement should contemplate this possibility and require registrar to agree to the increased fee in the event registrars fail to approve the fee.

Indemnification

Key Points

- With regard to risk sharing among ICANN and its contracted parties, the risks of TLD operation should be borne by registry operator;
- ICANN has agreed to consider certain limitations on registry operator's indemnification obligations.

Summary of Comments

Section 7.1 Indemnification of ICANN. The RySG repeats the concerns expressed in v3, namely, that this indemnification obligation remains uncapped and overbroad. Not only has ICANN ignored the comments made by the RySG, it decided to go the opposite way and add additional overbroad categories of indemnities in favor of ICANN. Not only does ICANN now require the registries to indemnify for everything that arises out of the operation of the registry or the provision of services, it now requires registries to indemnify for everything "arising out of or relating to intellectual property ownership rights with respect to the TLD" and "the delegation of the TLD to Registry Operator." This violates fundamental fairness, and the notion that indemnification is a risk-transfer mechanism to be used in allocating responsibility for a specific and identified risk of loss. In addition, most of the potential claims relating to or arising out of the delegation of the TLD relate to actions or omission by ICANN and not the Registry Operator. There is no reason for the Registry Operator to be indemnifying ICANN for actions or omissions beyond the control of ICANN. ICANN needs to stand behind its process for the delegation, including everything that is in Applicant Guidebook, dispute processes, etc. None of these were created by, or performed by, the Registry Operator. It is unconscionable to make the Registry Operator indemnify for these types of claims.

Therefore, the RYSG makes the following recommendations:

1. Eliminate the added language in DAG 4 regarding indemnifying for IP claims and claims arising from the delegation of the TLD;

2. Make the indemnity section mutual, limiting the indemnity section to material breaches of representations and warranties, and to gross negligence and willful misconduct of either party.

3. As stated in the RySG comments to v3, delete, "Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services" and replacing it with "Registry Operator's material breach of any representation or warranty specifically identified as such in the Agreement, or the gross negligence or willful misconduct of Registry Operator, its employees, agents, or contractors in the performance of this Agreement."

4. As stated in the RySG comments to v3, the RySG requests to insert "reasonable" before "legal fees". *RySG (21 July 2010).*

Regarding Section 7.1(b)-- The RySG repeats its v3 comments, namely, that the RySG advocates that the following sentence be deleted, "For the purposes of reducing Registry Operator's liability under Section 8.1(a) pursuant to this Section 8.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN's reasonable satisfaction, such other registry operators' culpability for such actions or omissions." There is no way the Registry Operator would know that information or have access to the information to make such a demonstration. *RySG (21 July 2010).*

Analysis of Comments

The risks of operating the TLD are appropriately borne by registry operator. Pursuant to the consultation held with the Temporary Drafting Group on 8 September 2010, ICANN has agreed to consider certain

limitations on registry operator's indemnification obligations in the event of claims related to matters that are completely outside the control of registry operator. ICANN staff has invited the RySG to propose language more precisely defining the exceptions to registry operator's indemnification obligations.

The indemnity limitation provisions introduced in Section 7.1(b) were included in response to comments of the RySG. If a registry operator wishes to avail themselves of this protection, it is appropriate that the registry operator bare the burden of demonstrating the relative culpability. If it is unable to do so, it is appropriate for registry operator to take on the full liability.

Definition of Security and Stability

Key Points

- ICANN staff has reviewed the use of the defined terms in the agreement and found that they are not inappropriate in the context in which they are used.

Summary of Comments

Section 7.3 Defined Terms.

In addition, the v3 (now v4) Registry Agreement language seems to come from the Registry Services Evaluation Policy (RSEP) definition of an "effect on security" that is found in all Registry Agreements. The RSEP discusses how new registry services should not negatively impact security, and that new registry services should be compliant with applicable relevant standards. That context is missing in the Guidebook. Without that context, the language has become more expansive and open to interpretation. Both ICANN and the RySG desire that registries function within applicable standards, and that current or future registry services not be the genesis of security problems. *RySG (21 July 2010).*

Regarding Section 7.3(b) -- The RySG believes this section is over-broad, and conflicts with Specification 6 section 1 ("Standards Compliance"), which refers only to IETF standards.
We also repeat our DAG3 comments: This language is unacceptable: "authoritative and published by a well-established, recognized, and authoritative standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments ("RFCs") sponsored by the Internet Engineering Task Force". ICANN should not leave the language open-ended and make contracted parties subject to any and all standards bodies. ICANN needs to more explicitly enumerate the standards and name the authoritative body, which we believe is the IETF. Application of additional standards should be considered via the Consensus Policy process instead. *RySG (21 July 2010).*

Moreover, the v3 Registry Agreement definitions misunderstand IETF practices and definitions. The contract language must be revised to adhere to proper terminology. The inclusion of "Standards-Track" [sic] is inappropriate, since only some documents on the "standards track" are authoritative. IETF Internet specifications go through stages of development, testing, and acceptance. Within the Internet Standards process, these stages are called "maturity levels." These maturity levels include "Proposed Standard", "Draft Standard", and "Standard" Specifications.[1] Documents at lower maturity levels are not Internet Standards, do not enjoy enough development or vetting, and registries should not be required to follow them.

Contracted parties should not be required to adhere to IETF Best Practices or "best current practice RFCs". By definition, best practices are *not mandatory*, and the IETF chose to make them Best Practices for a reason. Nor are IETF BCPs considered technical standards. They tend to deal with processes and procedures rather than protocols -- they represent a consensus of a way to do something because it is recognized that a user experience can be enhanced when there is an agreed-upon way to complete a task. However, interoperability is not usually applicable. As long as the user experiences standards-compliant behavior, ICANN does not need to say more about how that behavior is achieved. *RySG (21 July 2010).*

Analysis of Comments

ICANN staff has reviewed the use of the defined terms in the agreement and found that they are not inappropriate in the context in which they are used. ICANN must retain the right to act in response to certain threats to security and stability even if those threats are not caused by registry operator or affect systems other than registry operators' systems. ICANN is open to further discussion regarding specific proposed changes to "security and stability" definitions and related provisions, but a wholesale redefinition of stability to focus only on the stability of registry systems would not be appropriate or consistent with other ICANN agreements and policy.

Change in Control of Registry Operator

Key Points

- The new version of the agreement has implemented reasonable parameters for providing consent to proposed change in control transactions.

Summary of Comments

Section 7.5 Change in Control. The RySG repeats its v3 comments, namely, that:

a) In the second sentence, after "organized" insert the text, "in the same legal jurisdiction in which ICANN is currently organized and". This is in keeping with ICANN's recommendation 1.11.1, in its February 26, 2009 Implementation Plan for Improving Institutional Confidence, that ICANN retain its headquarters in the United States "to ensure certainty about ICANN's registry…agreements." This is also consistent with ICANN's promise in Section 8(b) of the Affirmation of Commitments that ICANN "remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community." RySG is concerned that ICANN's unwillingness to make the change it requested in its v2 Registry Agreement comments suggests a desire to evade these cited commitments by a re-organization. *RySG (21 July 2010).*

b) The RySG remains concerned about the impact of this section on securities laws as possibly requiring notification prior to public disclosure. Accordingly, the RySG recommends saving language, potentially as follows: "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."

In addition, the RySG believes with the additional language inserted, this section has become impractical and not feasible for public companies. There are absolutely no timelines imposed on ICANN, nor are there any real objective standards, which leads to unpredictability and instability. We believe a discussion needs to be had with the legal working group on the Operational and legal aspects of the entire process. We do not disagree that it is appropriate for ICANN to have a consent right, but commercially it needs to be a more stream-lined predictable approach to enable businesses to get loans, approval from shareholders, etc. Most regulators do this within 30 or 60 days. ICANN should adhere to a strict timeline as well. *RySG (21 July 2010).*

Analysis of Comments

ICANN has revised this provision in the draft of the form registry agreement posted with AGBv.5 to provide that no consent will be required for a reorganization assignment by ICANN only if such reorganization results in a similar entity within ICANN's current jurisdiction.

Potential securities law problems have not been adequately explained by the RySG and the suggested additional sentence is unworkable as many transactions are never required to be disclosed under applicable securities laws.

To provide business model predictability for gTLD registries, ICANN has implemented reasonable parameters for providing consent to proposed change in control transactions, including a 60-day total review period.

Amendment Process

Key Points

- As requested, ICANN will include a wide cross section of the community in future amendment working groups;
- For clarification, the revision of registry level fees is meant to be included within this process.

Summary of Comments

Amendment Working Group composition (registry agreement 7.6(e)(iv)). As all members of the wider GNSO community, particularly registrants, may be affected by amendments to registry agreements, each GNSO stakeholder group should be guaranteed representation in the working group convened to consider amendments. The addition of members beyond registries should not be left to ICANN's discretion. *W. Seltzer (21 July 2010). R. Dammak (July 2010).*

Section 7.6 Amendments and Waivers.
The RySG is very happy with the changes made in this section and we appreciate all of the work done by ICANN staff in conjunction with the legal working group. The only comments we have would be to add the notion of the determination of fees to pay to ICANN under the agreement as a "Restricted Amendment". We do not believe this is the appropriate process for the determination of how much a Registry Operator pays ICANN. If, however, this is left to the amendment process, then if a request were

made by ICANN to change the fees, then the Registries should have an approval right on ICANN's overall budget. We cannot be subject to a possible amendment of fees, without having any right to get an accounting and approval right over where those fees are spent. *RySG (21 July 2010).*

Analysis of Comments

ICANN will engage a wide cross-section of the community as part of the working group that will consider uniform amendments to registry agreements. However, it would not be appropriate or necessary for every GNSO stakeholder group to be represented in the group.

The negotiated uniform amendment provision provides ICANN with the ability to make important changes to the agreement without having to negotiate what could be hundreds of contracts separately. Raising fees is a key provision that ICANN intends to be within this process. The provision itself provides multiple safeguards against arbitrary and capricious increases in fees. In order to obtain the approval of registry operators to raise fees, ICANN will inevitably have to demonstrate the need for the those fees and the manner in which they will be spent.

Escrow Specification (Specification 2)

Key Points

- Technical comments have been considered by ICANN technical staff and implemented as appropriate;
- ICANN will not be a party to escrow agreements for new gTLDs;
- Amendments to specification 2 (Data Escrow) must be agreed upon by the escrow agent or an alternative escrow agent must be engaged.

Summary of Comments

Part A --Technical Specifications.
Care must be taken to properly define all terms. For example, "Registry Data", "Registry Database" and "Escrow Records" are never defined. "Deposits" is also not really defined, but is used throughout this Specification 2. In 1.2 reference is made to "full or incremental deposit", but these should follow the capitalized, defined terms.

Part A, 4.8 Detailed File Formats: This is missing the transaction file format for incremental feeds.

Part A, 4.8.1 Domains. #5 says "Registrar Handle for the initial sponsoring registrar". Infinitely reporting a domain's initial sponsoring registrar seems to serve no purpose, and is unduly burdensome.

Part B now says: "Registry Operator will be provided with the right to designate a third-party auditor to audit Escrow Agent's compliance with the technical specifications and maintenance requirements of this Specification 2 no more than once per calendar year." ICANN should not prohibit Registry Operators from auditing their escrow providers more frequently. Registry

Operators are basically held liable for the performance of escrow, and should have the right to look into problems responsibly. The base agreement allows ICANN to audit Registry Operators multiple times per year--ICANN should not prohibit similar diligence by Registry Operators.

Part B, #3 Ownership. A limitation on the "ownership" right must be placed as follows: "for the limited purpose of maintaining operation of the registry." This limitation should apply both during and after the term of the Registry Agreement.

Part B, #5: Copies. Should be amended to read: "… Registry Operator shall bear the expense of such duplication "if the escrow agreement so specifies".

Part B, #6: Release of Deposits. Amend to read: "… or receives one of the following written notices by ICANN, along with evidence that ICANN has so notified Registry Operator in writing," stating that…'

RySG (21 July 2010).

Data Escrow Technical Comments. For the specific reasons outlined in Demand Media's comments, Demand Media believes that use of an Incremental data extract process in the Registry Escrow process will increase complexity, development cost and lead-time to loading data. *Demand Media (22 July 2010).*

Escrow Agent (sec. 1.1). To avoid a significant technical bandwidth burden on the Escrow Agent, this section should state that the Full Deposit will reflect the state of the registry as of time (UTC) on each day as mutually agreed on by Registry Operator, ICANN and Escrow Agent. *Iron Mountain (22 July 2010).*

Deposit transmission mechanism (sec. 2). This section disagrees with Section 4.13(5) of Part A. Iron Mountain recommends that the Specification requires electronic escrow unless approved by ICANN. It is difficult to manage the timing and receipt of deposits which are submitted physically. It is a best practice to reduce the number of touch-points in order to increase speed and security. *Iron Mountain (22 July 2010).*

Escrow deposit format (sec. 4.4.). It appears that ICANN is giving the option to registry operators to submit their escrow deposits in either XML or CSV format. This section is ambiguously worded and needs to more clearly state the option. It is important to state that having multiple file formats can slow down ICANN's or another registry's ability to utilize the escrowed data. *Iron Mountain (22 July 2010).*

Field order in the record (sec. 4.8). Section 4.8 needs to be edited to say that the order in "which fields are presented is the order in which they must be in the respective record." If registry deposits have different data in different order, it is almost impossible to perform automated or partially-automated verification. The more manual any part of the escrow process is, the more expensive it will be to the registry operator. Inconsistent ordering of fields could also cause integration problems if a registry fails and escrow files are given to a new registry to be integrated. *Iron Mountain (22 July 2010).*

Depending on what is truly required to meet the verification requirement discussed in Sec. 7 of both Parts A and B, there needs to be a way to identify which syntax is being used (IPv4 or IPv6). Iron Mountain suggests changing the file type from "NSIP" to NSIP4"or "NSIP6", depending on the syntax. *Iron Mountain (22 July 2010).*

Algorithm; verification (sec. 4.13). Section 4.13(4) states a "suggested" algorithm for Hashes is SHA256. To promote consistency across registry escrow deposits with quicker utilization, reduced cost and higher quality of verification, Iron Mountain recommends requiring a singular Hash algorithm with SHA256 being preferred. There should also be more detail regarding HASH implementation. Also, in Section 4.13(4) it is not clear exactly what needs to be validated. By not specifying what verification means, how can ICANN ensure consistency across all Escrow Agents? A suggestion for what Verification could be is: the Deposit file will be split into its constituent reports (including the format report prepared by Registry Operator and appended to the Deposit), check its format, count the number of objects of each type, and verify that the data set is internally consistent. This program will compare its results with the results of the Registry-generated format report, and will generate a Deposit format and completeness report. *Iron Mountain (22 July 2010)*.

Data Escrow Agreements—ICANN should be a party to every agreement. The current DAG departs from best practice and merely requires ICANN to be named a beneficiary of a registry data escrow agreement. This will prevent ICANN from amending, modifying or terminating the agreement and will lead to tremendous variances among registry data escrow agreements that will ultimately make it difficult for ICANN to ensure that a minimum level of expectations are met and to ensure compliance. If there is one Registry Agreement with ICANN and the registry operator, then it also makes sense and is in the best interest of stability and registrants to have one Escrow Agreement with ICANN, the registry operator and the escrow agent as parties. ICANN should be included as a party to every registry data escrow agreement. *Iron Mountain (22 July 2010)*.

In addition:
- It seems imprudent that the escrow agent for the registry operator does not require ICANN approval. Per Specification 2 anyone can be named as the escrow agent.
- Requiring the escrow agent to deliver all the contents in its possession within 24 hours may not be technically feasible depending on volume, location and method of delivery.
- There is no description of how ICANN would like released data delivered –e.g., electronic? On physical media?
- Regarding 7.2 addressing verification procedure failure by the registry operator, there needs to be a more specific timeline for the registry operator to fix issues with its deposits.
- The intent of Section 8 is unclear, but the result is that it holds the escrow agent hostage. It is inappropriate to require the escrow agent to amend its escrow agreement with the registry operator based on any amendment to Specification 2 when the escrow agent is not a party to Specification 2. Ten days is not enough time for the escrow agent to consider whether it is willing to make these changes. If the escrow agent decides not to accept the changes, then ten days is definitely not enough time for the registry operator to find a new escrow agent, contract with them and begin depositing data. *Iron Mountain (22 July 2010)*.

Analysis of Comments

All technical comments from the RySG and Iron Mountain were taken into account by ICANN technical staff and are reflected, as appropriate, in the specifications to the draft of the form registry agreement posted with AGBv.5. Specifically, a number of technical requirements have been removed from Specification 2 in favor of a reference to the Domain Name Data Escrow Specification (development still in progress) available at http://wwwtools.rfc-editorietf.org/rfchtml/rfc5731.txtdraft-arias-noguchi-registry-data-escrow.

For ease of administration, ICANN will not be a direct party to escrow agreements for new gTLDs. ICANN is required to be a named third party beneficiary and as such will have certain rights to enforce the agreements in appropriate circumstances. If the minimum level of protections mandated by the specifications to the registry agreement are not met in the escrow agreements, ICANN can take action against registry operator directly to remedy such deficiencies.

The draft form registry agreement posted with AGBv.5 will include a requirement that ICANN approve the proposed escrow agent and any amendments to the escrow agreement.

Amendments to Specification 2 that registry operator agrees to must be implemented into the escrow agreement. If escrow agent is unwilling to make conforming changes, registry operator will be required to seek an alternative escrow agent or risk being found to be in breach of the registry agreement.

Functional Specifications (Specification 6)

Key Points

- All required specifications will be either in the body of the registry agreement or in the specifications, both of which can only be amended as specified in the Registry Agreement or upon mutual agreement;
- The appointment of an emergency back up registry operator is an important requirement for the continuity and stability of the registry;
- ICANN technical staff has considered all technical comments and implemented appropriate changes.

Summary of Comments

Functional and Performance specifications. All functional performance specifications should be included in the body of the agreement (or specifications) and should not reference a link on the web that may be modified by ICANN. If ICANN insists on a hyperlink it should have a date certain and it should be made clear that any changes must be mutually agreed to by the parties. *RySG (21 July 2010).*

6.2: Registry Services and Continuity
As per the RySG's objection to DAG3, Section 6.2 requires that a registry operator designate a back-up or successor registry operator-- before even beginning operations. This may be an impossible obligation for some registries to meet. It is unclear whether another registry would even promise to serve as a continuity provider, nor is it clear that the successor registry continuity provider would be compensated. Finally, if a registry fails, a reason for such failure could be due to a failed business model of the original registry. In such an event, no one should be forced to continue to operate a failed registry. Finally, requiring registries to back each other up in advance presents some business issues. *RySG (21 July 2010).*

RySG notes that registrars are not obligated to designate back-up or contingency successors. ICANN has a process for providing continuity when registrars fail, involving an EOI and bidding process. *RySG (21 July 2010).*

The RySG believes that Section 6.2's sentence should be replaced with: "Registry Operator shall have a business continuity plan." *RySG (21 July 2010).*

6.4 Performance Specifications
In general, Section 6.4 continues to contain a variety of critical problems, and RySG did not see that its DAG3 comments were worked into DAG4. Section 6.4's current contents:
1) are sometimes confusing,
2) discourage registry stability and security, and
3) depart from proven measurement and reporting practices that have served everyone well in the past. These departures from industry practice have been made without explanation. RySG therefore requests that ICANN work on a thorough review of section 6.4. A (non-exhaustive) list of examples is provided below (see our DAG3 public comments for additional). *RySG (21 July 2010).*

A general problem is that ICANN has created new SLA, measurement, and reporting regimes that do not always work well with the realities of registry operations. In the existing gTLD registry contracts, registries are allowed scheduled and unscheduled downtimes for their various services. Scheduled downtime allowances encourage regular maintenance, which strengthens registry security and stability. The requirement to report unscheduled maintenance is an indicator of unexpected problems and therefore contributes to registry security and stability. *RySG (21 July 2010).*

As we mentioned in DAG3, the new base agreement does not distinguish between scheduled and unscheduled downtimes, instead lumping them together. And the new agreement allows less total downtime than the existing contracts, which seems overly aggressive. Further, there are no longer any allowances for extended annual downtimes. Those are sometimes needed to comply with new requirements (such as new RFCs), moves to new data centers, etc. Together, these changes may discourage registry security and stability, rather than encouraging them. *RySG (21 July 2010).*

RySG's Non-exhaustive list of examples of where Specification 6 is confusing, or technically problematic.
DNS name server availability (page 54):
With regard to "DNS name server availability" of "432 min of downtime (99%)": Does this imply that one server with more than 432 minutes of downtime violates the SLA? Or is a server considered unavailable for the month if it had greater than 432 minutes of downtime? Say that a TLD has 10 servers globally dispersed and each had non-overlapping 45 minutes of downtime over a calendar month. Therefore 9 were operational at any point in time. What is the final DNS service availability for the month?
This may have an unintended consequence of favoring a 100 percent anycast solution, so that no single site is unavailable. Best practice currently is to have a combination of anycast and unicast for security and stability purposes, but this SLA may drive to all to anycast.

DNS, WHOIS, and SRS RTT (pages 54-57):
For these, is the registry expected to monitor RTT from the client? This would be confusing, costly, and an unnecessary departure from past proactive. Recommend that this be revised to measure from receipt and response of a query/transaction at the registry's gateway. If truly measured from the client, especially for EPP, the registry SLR is at risk from poorly connected registrars located in geographically regions distant from the registry. The registry has no ability to select registrars and therefore has no control over meeting this SLR. Why not just use the CNNP test for resolution services?

The SLAs conflate port 43 and Web-based WHOIS SLAs. Port 43 and Web are two completely different services. RTT for Web WHOIS is not really applicable and should be deleted.

Measuring EPP parameters (page 57)
Probes should query domain names, *not* IP addresses. The requirement will not allow registry operator to move or upgrade data centers or migration to new IP ranges. Registries require registrars to connect using the EPP domain name. Some IP addresses will be inactive at any point in time, such as those for alternate data centers or disaster recovery sites. This comment may also apply to DNS and WHOIS.

"DNS Update Time" (page 56):
With respect to "all the name servers", this is likely to result in the unintended consequence: discouraging deployment of DNS servers in developing regions where bandwidth limitations may create update delays. The logical response would be for registry operators to avoid deploying services in certain regions of the world. in order to make sure all servers can be updated within the required time. Is DNSSEC data included in "DNS information"? Seems likely from the context. A delay in updating DNSSEC data may be more probable than other updates. *RySG (21 July 2010).*

Analysis of Comments

All required specifications will be either in the body of the registry agreement or in the specifications, both of which can only be amended as specified in the Registry Agreement or upon mutual agreement. The referenced link would be to the page on the ICANN website that contains the specification attached to the agreement.

The requirement to appoint a back-up operator has been replaced with the requirement to maintain a business continuity plan.

ICANN technical staff will work with the technical community to ensure that the technical requirements in Section 6.4 comport to current best practice, are technically feasible and will promote security and stability across the DNS and the Internet. Several suggested changes are reflected in Specification 6 to the draft form registry agreement posted with AGBv.5

Miscellaneous/Other

Key Points

- Approval of the ICANN board will not be required for each new gTLD but the Board retains ultimate responsibility and oversight for the program and will consider individual applications in certain, limited circumstances;
- The current form of the agreement contains the requisite flexibility for multiple types of registry operators;

Summary of Comments

Board approval of each registry agreement. The explicit requirement for Board approval of each new registry agreement will add delay and uncertainty to what should be made a routine process. The Board is able to request informational updates and to intervene against a harmful decision without this procedural step. *W. Seltzer (21 July 2010). R. Dammak (July 2010).*

Role of not-for-profits. Language preceding the draft Registry Agreement refers to commercial purposes envisioned for new gTLDs and does not take into account the way in which some new registries may be used, such as to further a not-for-profit mission. *Red Cross (21 July 2010).*

Different forms needed. ICANN should develop agreements that address specific variations of application types rather than pursuing a one-size-fits-all approach. *E. Brunner-Williams (Module 5, 21 July 2010).*

Representation and warranties (sec. 1.3). Subsection (iii) should read: "Registry Operator has duly executed and delivered to ICANN…" The phrase "and the other parties thereto" appears to be a typographical error. *RySG (21 July 2010).*

Analysis of Comments

The ICANN Board has recently resolved that it will approve a standard process for staff to proceed to contract execution and delegation on applications for new gTLDs where certain parameters are met, but that the Board reserves the right under exceptional circumstances to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.

ICANN recognizes that new gTLDs will be used for a variety of purposes including non-commercial purposes.

The current draft of the registry agreement includes certain alternative provisions for different applicants and contains the requisite flexibility to apply to a variety of different types of gTLDs that are operated under differing business plans.

The reference to the "other parties thereto" is intentional and is meant to apply to the third party financial institution or other provider of the continuing operations instrument that will be responsible for funding the registry operations in the event of a registry failure. The draft form registry agreement posted with AGBv.5 will clarify that Registry Operator will be required to deliver a duly executed instrument.

RESPONDENTS

Amadeu Abril i Abril (A. Abril i Abril)
Adobe Systems Incorporated (Adobe Systems)
AFNIC
African ICANN Community
Erick Iriarte Ahon (E.I. Ahon)
Anne Aikman-Scalese (A. Aikman-Scalese)
AIM—the European Brands Association (AIM)

Abdulaziz Al-Zoman (A. Al-Zoman)
American Apparel & Footwear Association (AAFA)
American Bankers Association (ABA)
American Intellectual Property Law Association (AIPLA)
American Red Cross (Red Cross)
Ron Andruff (R. Andruff)
Arab Team
Arla Foods amba (Arla Foods)
Association of American Medical Colleges (AAMC)
At-Large Advisory Committee (ALAC)
AT&T
AusRegistry International Pty Ltd. (AusRegistry)
Bayern Connect
Big Room Inc. (Big Room)
BITS
Blacknight Solutions (Blacknight)
Eberhard Blocher (E. Blocher)
British Broadcasting Corporation (BBC)
Business & Commercial Users Constituency (BC)
Carlson
China Organizational Name Administration (CONAC)
CNNIC
Coalition Against Domain Name Abuse (CADNA)
Coalition for Online Accountability (COA)
Coloplast A/S (Coloplast)
Com Laude
Comerica Incorporated, Comerica Bank, and Comerica Bank & Trust, N.A. (Comerica)
Rafik Dammak (R. Dammak)
Demand Media
Domain Dimensions LLC (Domain Dimensions)
Avri Doria (A. Doria)
dotBayern Top Level Domain (dotBayern)
dotBERLIN Gmbh & Co. (dotBERLIN)
dotHamburg
dotMUSIC (.MUSIC)
dotKoeln Top Level Domain GmbH (dotKoeln)
dotZON GmbH (dotZON)
E.I du Pont de Nemours and Company (DuPont)
eco
Educational Testing Service (ETS)
EnCirca
EuroDNS
Jothan Frakes (J. Frakes)
W.W. Grainger (Grainger)
Robin Gross (R. Gross)
Hogan Lovells
HOTEL Top Level Domain GmbH (HOTEL)
HSBC Holdings plc (HSBC)

INDOM.com (INDOM)
Intellectual Property Constituency (IPC)
Intellectual Property Owners Association (IPOA)
Intercontinental Hotels Group (IHG)
International Anti-Counterfeiting Coalition (IACC)
International Business Machines (IBM)
International Olympic Committee (IOC)
International Trademark Association Internet Committee (INTA Internet Committee)
Internet Commerce Association (ICA)
Internet Society of China (ISC)
Mary Iqbal (M. Iqbal)
Iron Mountain
Marcus Jaeger (M. Jaeger)
Japan Internet Domain Name Council (JIDNC)
Japan Network Information Center (JPNIC)
JONAS
Key-Systems GmbH (Key-Systems)
George Kirikos (G. Kirikos)
Konstantinos Komaitis (K. Komaitis)
LEGO Juris A/S (LEGO)
LEO Pharma A/S (LEO Pharma)
Liberty Mutual Insurance Company (Liberty Mutual)
LifeScan
H. Lundbeck A/S (H. Lundbeck)
MarkMonitor
MARQUES/ECTA
Microsoft Corporation (Microsoft)
Minds + Machines
Damian Mitsch (D. Mitsch)
Motion Picture Association of America, Inc. (MPAA)
Multilingual Internet Group
National Cable & Telecommunications Association (NCTA)
Nestle Group
Neustar, Inc. (Neustar)
News Corporation
NIC Mexico
Nilfisk-Advance A/S (Nilfisk)
Not-for-Profit Organization Constituency Formation Committee (NPOC-FC)
Olezi
Panagiotis Papaspiliopoulos (P. Papaspiliopoulos)
Vassil Petev (V. Petev)
Philip Morris International Management S.A. (PMI)
Piper Aircraft, Inc. (Piper Aircraft)
Red Bull GmbH (Red Bull)
Registries Stakeholder Group (RySG)
Rosetta Stone Ltd. (Rosetta Stone)
Daniel Schindler (D. Schindler)
Scott Seitz (S. Seitz)

Wendy Seltzer (W. Seltzer)
June Seo (J. Seo)
Software and Information Industry Association (SIAA)
Solvay Chemicals Sector (Solvay)
Clare Speed (C. Speed)
Werner Staub
Sunkist Growers, Inc. (Sunkist)
The Coca-Cola Company (Coca-Cola)
United States Council for International Business (USCIB)
VeriSign, Inc. (VeriSign)
Verizon
Vestas Wind Systems A/S (Vestas)
VKR Holding A/S (VKR Holding)
Time Warner Inc. (Time Warner)
Richard Tindal
TLDDOT GmbH (TLDDOT)
Liz Williams (L. Williams)
WIPO Arbitration and Mediation Center (WIPO Center)
Mary Wong (M. Wong)

Reference Material 36.

ICANN ICANN Ema L st Arch ves

[gtld-guide]

Feedback from Unicode Technical Committee (UTC) on gTLD Guidebook

- *To*: gtld-guide@xxxxxxxxx, "Tina Dam" <tina.dam@xxxxxxxxx>, "Vint Cerf" <vint@xxxxxxxxxx>
- *Subject*: Feedback from Unicode Technical Committee (UTC) on gTLD Guidebook
- *From*: "Mark Davis" <mark@xxxxxxxxxxxxxx>
- *Date*: Thu, 13 Nov 2008 17:16:12 -0800

```
To:gtld-guide@icann.orgFrom: Unicode Technical Committee (UTC)Date:
2008-11-14

The following is approved feedback from the Unicode Technical Committee on
the ICANN document "New gTLD Program: Draft Applicant Guidebook (Draft RFP)"
(http://icann.org/en/topics/new-gtld-draft-rfp-24oct08-en.pdf<http://www.icann.org/en/topics/new-gtld-draft-rfp-24oct08-en.pdf>
). There is a copy of this email on:
http://docs.google.com/Doc?id=dfqr8rd5_358ffvqqhf9.

The structure of the feedback below
includes a citation of text from the document, suggested replacement
text or other changes to remedy the problem, and a rationale for the
change.

-----------------------------
2.1.1.3.2 String Requirements
-----------------------------

The label must be a valid internationalized domain
name, as specified in the technical standard
Internationalizing Domain Names in Applications
(RFC 3490). This includes the following
nonexhaustive list of limitations:
=>
The label must be a valid internationalized domain name, as specified in the
latest version of the IDNA specifications (see XXX). This includes, but is
not limited to, the following constraints. Note that these are in no way a
complete statement of the requirements of the IDNA specifications.

*Rationale.** Clearer wording, and you *really* don't want the reader to
think that what is listed here is in any way completely whatsoever.
*
-----------------------------

- Must consist entirely of characters
directional property.
[DELETE]

*Rationale.** This is completely false. It would disallow many IDNs that are
needed, and allowed by idna-bis-bidi. Note: it is questionable how much of
IDNA2008 this text should repeat, especially in the case of complex
provisions like BIDI. Moreover, "directional property" is undefined.
*
-----------------------------

All code points in a single label must be taken
from the same script as determined by the
Unicode Standard Annex #24: Unicode Script
Property.

=>

Labels are subject to a constraint based on the script value of their
characters. All characters in the label that do not have the Common script
value or the Inherited script value must share a single script value. Script
values are determined as specified in the Unicode Standard: see  Unicode
Standard Annex #24: Unicode Script Property.

*Rationale. **The constraint to single scripts is far too narrow. The script
values Common and Inherited are given to characters that are used with
multiple scripts, such as "-" or "2", or Arabic vowels. Forcing such obvious
characters to go through the exception process is needless overhead, and
obscures the exceptional cases.
*
-----------------------------
2.1.1.4.1 Requirements for Strings Intended to Represent Geographical
Entities
-----------------------------

This includes a representation of the
country or territory name in any of the six official
United Nations languages (French, Spanish,
Chinese, Arabic, Russian and English) and the
country or territory's local language.

=>

This includes a representation of the country or territory name in any of
the six official United Nations languages (French, Spanish, Chinese, Arabic,
Russian and English) and *any of* the country or territory's local language*
s*.
```

*Rationale. **It is quite common for a country or territory to have more
than one language, so that needs to be accounted for.
*

Applications for any string that represents a subnational
place name, such as a county, province,
or state, listed in the ISO 3166-2 standard.

=>

Applications for any string that represents a subnational place name, such
as a county, province, or state. These could be, for example, as listed in
the ISO 3166-2 standard.

*Rationale. **The ISO 3166-2 standard is not complete, and is not freely
available. Including the comma may imply to the reader that it is required,
that the sentence is to be read as: "Applications for any string that
represents a subnational place name (such as a county, province, or state)
listed in the ISO 3166-2 standard."
*

Applications for a city name, where the applicant
clearly intends to use the gTLD to leverage from the
city name.

*Issue.** City names are *very* ambiguous - look at the number of "Paris"
cities that exist. If Paris, Texas gets there first, what happens? Should
there be some qualification necessary to disambiguate city names instead?
*

1.3 Information for Internationalized Domain Name Applicants

If an applicant applies for such a string, it must provide
accompanying information indicating compliance with
the IDNA protocol and other requirements. The IDNA
protocol is currently under revision and its documentation
can be found at
http://www.icann.org/en/topics/idn/rfcs.htm.

[ADD AFTERWARDS]

This document presumes that the IDNA protocol has been revised in accordance
with the description at http://www.icann.org/en/topics/idn/rfcs.htm, and
makes use of terminology defined in the draft revisions. That revision may
change before approval, and such changes could require corresponding
modifications of the following text.

*Rationale**. It must be made clear to the reader that while we expect the
revision to succeed, the text following this in the document is subject to
change.
*
----

2. Language of label (ISO 639-1). The applicant will
specify the language of the applied-for TLD string, both
Module 1 Introduction to the gTLD Application Process Draft – For Discussion
Only
1-17 according to the ISO's codes for the representation of
names of languages, and in English.

=>

Language tag of label (according to IETF BCP 47 *Tags for Identifying
Languages*). The applicant will specify the language tab of the applied-for
TLD string, both Module 1 Introduction to the gTLD Application Process Draft
– For Discussion Only 1-17 according to the IETF BCP 47 *Tags for
Identifying Languages*, and in English.

*Rationale**: ISO 639-1 only covers a small fraction of the world's
languages. The correct reference, used in HTML, XML, and all modern
software, is BCP 47.
*
----

3. Script of label (ISO 15924).The applicant will specify the
script of the applied-for gTLD string, both according to
the ISO code for the presentation of names of scripts,
and in English.

=>

Main script of label (see *2.1.1.3.2 String Requirements*). The applicant
will specify the scripts of the applied-for gTLD string, both according to
the Unicode Script property, and in English.

*Rationale. This brings the text in line with the use of script in 2.1.1.3.2
String Requirements. It also prevents bogus information such as script
variants (Latin Fraktur), which are not properties of characters. The term
"scripts" takes account of the fact that some cases of multiple scripts are
allowed. (Note that this information is competely derivable from the
U-Label.)
*
----

4. Unicode code points. The applicant will list all the code
points contained in the U-label according to its
Unicode form.
=>

4. Unicode code points. The applicant will list all the codepoints contained

in the U-label according using the U+ notation. For example, for the
label "öbb",
the list would be: "U+00F6 U+0062 U+0062".

*Rationale. **This makes the intent clear. *

----
5. Representation of label in phonetic alphabet. The
applicant will provide its applied-for gTLD string notated
according to the International Phonetic Alphabet
(http://www.arts.gla.ac.uk/IPA/ipachart.html).

[DELETE]

*Rationale**. First, it is questionable what the purpose of this is -- how
is it to be used? How would it make a difference in the registration what
the IPA was? Secondly, the same word could have many different IPA readings,
narrow vs broad, or vary greatly by speaker (the same word spoken by a Scot
vs a Chicagoan). Third, very few registrants will be able to supply correct
IPA representations.*

----

6. Its IDN table. This table provides the list of characters
eligible for registration in domain names according to
registry policy. It will contain any multiple characters
that can be considered "the same" for the purposes of
registrations at the second level. For examples, see
http://iana.org/domains/idn-tables/.

*Question: we think this means a reference to a table rather than a complete
copy. If so, what format should such a reference take, is a link sufficient?
It should be clear exactly what a registrant needs to supply.
*
----

7. Applicants must further demonstrate that they have
made reasonable efforts to ensure that the encoded
IDN string does not cause any rendering or operational
problems. For example, problems have been identified
in strings with characters of mixed right-to-left and leftto-
right directionality when numerals are adjacent to
the path separator. If an applicant were applying for a
string with known issues, it should document steps that
will be taken to mitigate these issues in applications.

*Question.** It sounds like this is asking the applicant to change all the
program applications that use the domain name, which is clearly impossible.
What would be an example of "reasonable efforts"?
*

2.1.1.1 String Confusion Review

...
The similarity review will be conducted by a panel of String
Similarity Examiners. This examination will be informed by an
algorithmic score for the visual similarity between each
applied-for string and each of other existing and applied-
for TLDs. The score will provide one objective measure for
consideration by the panel.
...
The algorithm uses proprietary software to perform a series of mathematical
calculations to assess the visual similarity between strings based upon the
following parameters:
...

*Issue**. It is inappropriate for ICANN to use an algorithm which is not
public, and not based on public data.*

If the evaluators determine that a string poses stability
issues that require further investigation, the applicant must
either confirm that it intends to move forward with the
application process or withdraw its application.

*Issue**. What is an example of "stability issues" in a string? Should this
be "technical issue"? How is an applicant supposed to know what "stability
issue" means. All terms needs definition, and either before usage or in a
glossary. Currently there is a definition of stability of a "registry
service", is later, at the end of 2.1.3, but no definition or indication of
what "stability issues" are for string?*

- **Follow-Ups**:
  - **RE: Feedback from Unicode Technical Committee (UTC) on gTLD Guidebook**
    - *From:* Tina Dam

Reference Material 37.

From:	Petillion, Flip
Sent:	samedi 13 décembre 2014 02:32
To:	Contact Information Redacted
Cc:	Contact Information Redacted Janssen, Jan;
	Nelissen, Mariet
Subject:	FW: Booking.com v ICANN: follow-up from oral argument
Attachments:	RM 36 - public comment on Algorithm-c.pdf; RM 34 - agv1-analysis-public-comments-18feb09-en-c.pdf; RM 35 - summary-analysis-agv4-12nov10-en-c.pdf

Mr. Drymer and Members of the Panel,

First let me thank Mr. Levee for his swift turnaround in submitting the ICANN's staff analysis of public comments. I also thank the Panel for the clarification on Mr. Bernstein's question and for the opportunity to briefly respond.

I was able to access the complete documents referred to by ICANN on:

– https://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf ; and

– https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf

Please find a complete version of these documents (named **RM 34** and **RM 35**) attached.

Context of RM 34 and RM 35

RM 34 and **RM 35** contain a summary and analysis by ICANN's staff of public comments that were made in connection with the first *resp.* fourth version of the Applicant Guidebook.

RM 34 shows that members of the ICANN community expressed their concerns about the lack of transparency on the algorithm. (The comment highlighted by ICANN on page 97 of **RM 34** was not expressed by C. Gomes, as indicated in the summary, but was expressed by Mr. Mark Davis. The full comment of Mr. Davis is available on http://forum.icann.org/lists/gtld-guide/msg00021.html and is attached as **RM 36**.)

ICANN's response to this concern was that "*the algorithm primarily has a filtering role, reducing the work load on the panel to focus on the most likely cases of similarity*" (**RM 34**, p. 100). ICANN also specified that the string similarity review was a "*first check for obvious cases of similarity*" (**RM 34**, p. 99).

ICANN also highlighted the following sentence: "*The decision whether a string pair is confusingly similar or not is entirely with the panel*" (**RM 34**, p. 99).

It is important that this sentence is read within its proper context. ICANN's staff made this statement when dealing with community concerns about the role of the algorithm, making it clear that string similarity was not going to be decided upon the results of the non-transparent algorithm. This statement has no bearing on the fact that (i) the ICANN Board was responsible for the new gTLD program and (ii) the String Similarity Review Panel itself considered to advise ICANN (**Annex 8**, step 10).

RM 35 contains an observation about the lack of a specific appeal mechanism or extended review in relation to the string similarity review. The commenters submit that "*an applicant should have an opportunity within the ICANN process to request reconsideration of an erroneous or adverse decision*" (**RM 35**, p. 19).

ICANN had indicated that "*clarifications may be sought for String Similarity*" (**RM 35**, p. 18), and clarified in response to the above comment "*the need for clarifications is expected to be minimal*" (**RM 35**, p. 21).

ICANN did not comment on the need for an opportunity within the ICANN process to request reconsideration. ICANN merely indicated that an appeal mechanism was not part of the initial evaluation process – "*no area of IE offers a chance for appeal*" (**RM 35**, p. 21). In any event, the possibility to file a reconsideration request did exist as part of the program and as part of ICANN's overall obligations. ICANN did not limit – and could not limit – an applicant's right for redress.

Here are some key takeaways on the additional documents

1. The documents do not show that the community endorsed limitations to fairness or transparency. To the contrary, the community expressed its concerns about the lack of a specific appeal mechanism and about the lack of transparency on the algorithm. At that point in time, no one could reasonably have expected that (i) the ICANN Board would allow the use of anonymous evaluators, (ii) ICANN would give no information on the reasons for the string similarity review outcome, and (iii) there would be no opportunity to check the credentials, independence and impartiality of the evaluators.

2. The comfort that ICANN may have tried to give to the community in relation to the processes in the Applicant Guidebook disappeared when ICANN started implementing those processes in individual cases. When a piece of legislation gets enacted – or in ICANN terms, when a resolution accepting a policy (or Applicant Guidebook) gets adopted by the ICANN Board – there may be a window of opportunity for challenges to that piece of legislation on the basis that it violates higher norms (*e.g.* a Constitution, ICANN's Bylaws and/or Articles of Incorporation). A successful challenge during that period will have effect *erga omnes*. However, if no such challenge is made, it does not follow that the legislation can be enforced in individual cases, if it does violate higher norms. An entity that is subject to enforcement action must still have the opportunity to challenge the legality of the legislation or policy (specifically, its conformity with higher norms). The difference is that a successful challenge will only have effect in that individual case.

   It is of no relevance whether there was a debate regarding the legality of new legislation (or an ICANN policy) prior to its adoption, since such a debate could not prevent an entity that is subject to an illicit enforcement action from challenging the (unlawful) implementation of the policy in individual cases. In other words, Booking.com cannot be prevented from challenging the (unlawful) implementation of the Applicant Guidebook in the context of its .hotels application.

   The point is all the stronger here, since Booking.com never benefited from an initial window of opportunity during which it could challenge the legislation or policy. It was effectively barred from challenging the Applicant Guidebook at the time of its adoption by the fact that it could not – at that time – show any injury or harm. Furthermore, any challenge at that time risked causing substantial harm to Booking.com as it would have revealed its plans to apply for a new gTLD.

I remain at your disposal to answer any questions.

Sincerely yours,

Flip Petillion

-----Original Message-----
From: Stephen Drymer Contact Information Redacted
Sent: vendredi 12 décembre 2014 02:16

To: 'Jeffrey LeVee'

Cc: Hon. A. Howard Matz (Carolina Cardenas-Venino   Bernstein,
David H.; Petillion, Flip; Janssen, Jan; Kate Wallace

Subject: RE: Booking.com v ICANN: follow-up from oral argument

Thank you, Mr. LeVee.

As indicated in my earlier email, Booking.com is invited to provide brief additional documents relevant to the issues addressed in the materials provided by ICANN, should it wish to do so, by 9:00 (CET) on 13 December.

Kind regards.

Stephen L. Drymer

WOODS LLP

-----Original Message-----
From: Jeffrey LeVee
Sent: Thursday, December 11, 2014 7:35 PM
To: Stephen Drymer
Cc:

Subject: RE: Booking.com v ICANN: follow-up from oral argument

Mr. Drymer and Members of the Panel:

First, let me apologize that the links that we provided to you earlier today are not taking you to the materials we referenced. The links to the responses to the public comments prepared by ICANN staff appear to be broken.

Second, and as you requested, I am attaching PDF copies of the specific pages from the responses to the public comments that I referenced in my email.

Third, we have not been able to identify any additional materials related to the other topics that Mr. Bernstein addressed in his question.

Again, I apologize for the confusion.

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone:

(See attached file:
Excerpts-from-agv1-analysis-public-comments-18feb09-en.pdf)

(See attached file: Excerpts-from-summary-analysis-agv4-12nov10-en-1.pdf)

From: Stephen Drymer

To:

Date: 12/11/2014 02:10 PM

Subject: RE: Booking.com v ICANN: follow-up from oral argument

Dear counsel:

The members of Panel are having difficulty identifying from among the many links accessible at each of the two links provided by Mr. LeVee in his email earlier today the two specific links/documents that we are supposed to open in order to see and consider the cited pages.

For the sake of both efficiency and fairness, ICANN is requested to provide the Panel and Booking.com, at its earliest convenience and in any event no later than midnight (PST) today, links to or pdf copies of the two specific references identified by Mr. LeVee.

Booking.com will then have until have until 24 hours to provide any additional documents that it considers relevant to the issues addressed in the material to be provided by ICANN.

As a final observation, it is noted that the question posed by the Tribunal during the hearing, which gave rise to ICANN's offer to provide additional brief documentation, was not whether an SSP decision was meant to be final. Rather, Mr. Bernstein asked whether the community specifically debated and endorsed the SSP process that is expressly described in the Applicant Guidebook, which does not expressly refer to "transparency" (eg published standards, published decisions) and "fairness" (eg, opportunity to be heard).

Sincerely,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Contact Information Redacted   Envoyé : 11 décembre 2014 14:27 À : Contact Information
                                                                                          Redacted

Cc : Contact Information Redacted
(kwallace@jonesday.com) Objet : Booking.com v ICANN: follow-up from oral argument

Members of the Panel:

During yesterday's hearing, I offered to send some information reflecting whether ICANN had, during the development of the Applicant Guidebook, considered the question of whether the decision by the String Similarity Panel would be final. As I mentioned during the hearing, there were multiple drafts of the Guidebook, and each was posted for public comment.
ICANN Staff then would analyze and prepare written responses to those public comments.

Below are links to two of the Staff responses to public comments that ICANN views as relevant to our discussion yesterday:

New gTLD Draft Applicant Guidebook Version 4 Public Comment Summary and Analysis (12 November 2010), available at http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm (at pages 19, 21)

Public Comments Analysis Report (18 February 2009) Available at http://www.icann.org/en/topics/new-gtlds/comments-en.htm (at pages 97-99)

Per our discussion yesterday, I will not characterize or quote from these materials. I would, of course, be happy to answer any questions.

Regards,

 Jeff LeVee
 JONES DAY® - One Firm Worldwide
Contact Information Redacted

Fr Stephen Drymer   Contact Information Redacted
om
:

To 'Contact Information Redacted

Cc Contact Information Redacted

Da 12/09/2014 03:39 PM
te
:

Su RE: Booking.com v ICANN - Telephone hearing - 10 December - 9:00 PST /
bj 12:00 EST / 18:00 CET
ec
t:

Dear counsel :

The members of the Panel spoke briefly earlier today, and we look forward to tomorrow's hearing.

As you will recall, paragraph 9 of Procedural Order No. 1 provides: "Oral argument during the telephone hearing shall be limited to 20 minutes for each party (including time spent answering questions from the Panel), subject to

the Panel's right to extend the time as it deems appropriate and any right of reply or sur-reply as the Panel may order at that time."

The Panel is conscious of the importance of the issues raised in the parties' written submissions, and understands that the hearing will likely exceed the 40-60 minutes originally estimated in order to ensure that the parties' positions, including their responses to the Panel's questions, are adequately and fairly heard.

For ease of reference, I set out here the dial-in coordinates provided by the ICDR in its 23 November "Notice of Hearing" (copy attached):

For the US and Canada Contact Information Redacted
For Belgium: Contact Information Redacted
Passcode: 78948306 followed by the "#" sign

Kind regards,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Contact Information Redacted   Envoyé : 8 octobre 2014 04:22 À : Contact Information Redacted

Cc : Contact Information Redacted

Objet : RE: Booking.com v ICANN - Telephone hearing - 10 December

Dear Mr. Chairman,

Thank you for your mail. This is well noted.

Best regards,

Flip Petillion

From: Stephen Drymer Contact Information Redacted
Sent: mardi 7 octobre 2014 22:22
To: Contact Information Redacted

Cc: Contact Information Redacted

Subject: RE: Booking.com v ICANN - Telephone hearing - 10 December

Dear counsel :

Thank you for your very prompt replies. I propose that we schedule the telephone hearing for 10 December at 9:00 (PST)/12:00 (EST)/18:00/CET

Carolina: Are you able to provide a conference line for our use?

Stephen L. Drymer

WOODS LLP
Contact Information Redacted

Telephone hearing.

All:

ICANN would be available Dec. 9-11 but not the following week.

Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
Contact Information Redacted

Dear Mr Chairman,

Dear Members of the Panel,
Dear Colleagues,

All dates are fine for us.

Best regards,

Flip Petillion

From: Stephen Drymer Contact Information Redacted
Sent: mardi 7 octobre 2014 21:39
To: Contact Information Redacted

Subject: Booking.com v ICANN - Telephone hearing.

Dear counsel,

As you are aware, the timetable set out in Procedural Order No. 1 provides for a telephone hearing to be held after Respondent submits its Sur-Reply (no later than 20 November 2014) and prior to 19 December 2014. The members of the Panel have identified several dates during that period when we could be available for such a hearing: 9, 10, 11, 15 and 16 December.

Knowing that the run-up to the holidays can be a very busy period, I would ask you please to advise the Panel of your availability on those dates, by the end of this week, so that we may all block the time required for the hearing.

Thank you – and kind regards.

Stephen L. Drymer

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image moved to   Partner, Head of International Arbitration and ADR
file: Associé, responsable de l'arbitrage international et
pic18636.jpg)   d'ADR
Description Contact Information Redacted
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          Woods llp
          www.litigationboutique.com
          Contact Information Redacted

From:	Contact Information Redacted
Sent:	samedi 13 décembre 2014 14:25
To:	Contact Information Redacted
Cc:	Contact Information Redacted

Subject: Re: FW: Booking.com v ICANN: follow-up from oral argument

Members of the Panel:

I thank Mr. Petillion for finding the materials that we were not able to locate on short
notice. And inasmuch as I initiated this detour during Wednesday's argument, I will not
object to the fact that Mr. Petillion chose to provide additional argument. I will
respond only by stating that I do not believe that these materials address the question
posed by Mr.
Bernstein, and I obviously disagree with Mr. Petillion's "takeaways." Nor do I view these
materials -- which were created two and three years before the final version of the
Guidebook -- as shedding any important light on the questions before the Panel because the
Guidebook says what it says, and the Board's role vis-a-vis the review of String
Similarity review determinations has already been addressed at great length in the
parties'
papers and during argument.

Jeff LeVee
JONES DAY® - One Firm Worldwide
Contact Information Redacted

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  |FW: Booking.com v ICANN:  follow-up from oral argument
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First let me thank Mr. Levee for his swift turnaround in submitting the ICANN's staff
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I was able to access the complete documents referred to by ICANN on:
      -
      https://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-
en.pdf
       ; and
      -
      https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf

Please find a complete version of these documents (named RM 34 and RM 35) attached.
Context of RM 34 and RM 35
RM 34 and RM 35 contain a summary and analysis by ICANN's staff of public comments that
were made in connection with the first resp. fourth version of the Applicant Guidebook.
RM 34 shows that members of the ICANN community expressed their concerns about the lack of
transparency on the algorithm. (The comment highlighted by ICANN on page 97 of RM 34 was
not expressed by C. Gomes, as indicated in the summary, but was expressed by Mr. Mark
Davis. The full comment of Mr.
Davis is available on http://forum.icann.org/lists/gtld-guide/msg00021.html
and is attached as RM 36.)
ICANN's response to this concern was that "the algorithm primarily has a filtering role,
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34, p. 100). ICANN also specified that the string similarity review was a "first check for
obvious cases of similarity " (RM 34, p. 99).
ICANN also highlighted the following sentence: "The decision whether a string pair is
confusingly similar or not is entirely with the panel" (RM 34, p. 99).
It is important that this sentence is read within its proper context.
ICANN's staff made this statement when dealing with community concerns about the role of
the algorithm, making it clear that string similarity was not going to be decided upon the
results of the non-transparent algorithm.
This statement has no bearing on the fact that (i) the ICANN Board was responsible for the
new gTLD program and (ii) the String Similarity Review Panel itself considered to advise
ICANN (Annex 8, step 10).

RM 35 contains an observation about the lack of a specific appeal mechanism or extended review in relation to the string similarity review. The commenters submit that "an applicant should have an opportunity within the ICANN process to request reconsideration of an erroneous or adverse decision" (RM 35, p. 19).

ICANN had indicated that "clarifications may be sought for String Similarity" (RM 35, p. 18), and clarified in response to the above comment "the need for clarifications is expected to be minimal" (RM 35, p. 21).

ICANN did not comment on the need for an opportunity within the ICANN process to request reconsideration. ICANN merely indicated that an appeal mechanism was not part of the initial evaluation process – "no area of IE offers a chance for appeal" (RM 35, p. 21). In any event, the possibility to file a reconsideration request did exist as part of the program and as part of ICANN's overall obligations. ICANN did not limit – and could not limit – an applicant's right for redress.

Here are some key takeaways on the additional documents

1.   The documents do not show that the community endorsed limitations to fairness or transparency. To the contrary, the community expressed its concerns about the lack of a specific appeal mechanism and about the lack of transparency on the algorithm. At that point in time, no one could reasonably have expected that (i) the ICANN Board would allow the use of anonymous evaluators, (ii) ICANN would give no information on the reasons for the string similarity review outcome, and (iii) there would be no opportunity to check the credentials, independence and impartiality of the evaluators.

2.   The comfort that ICANN may have tried to give to the community in relation to the processes in the Applicant Guidebook disappeared when ICANN started implementing those processes in individual cases. When a piece of legislation gets enacted – or in ICANN terms, when a resolution accepting a policy (or Applicant Guidebook) gets adopted by the ICANN Board – there may be a window of opportunity for challenges to that piece of legislation on the basis that it violates higher norms (e.g. a Constitution, ICANN's Bylaws and/or Articles of Incorporation). A successful challenge during that period will have effect erga omnes. However, if no such challenge is made, it does not follow that the legislation can be enforced in individual cases, if it does violate higher norms. An entity that is subject to enforcement action must still have the opportunity to challenge the legality of the legislation or policy (specifically, its conformity with higher norms). The difference is that a successful challenge will only have effect in that individual case. It is of no relevance whether there was a debate regarding the legality of new legislation (or an ICANN policy) prior to its adoption, since such a debate could not prevent an entity that is subject to an illicit enforcement action from challenging the (unlawful) implementation of the policy in individual cases. In other words, Booking.com cannot be prevented from challenging the (unlawful) implementation of the Applicant Guidebook in the context of its .hotels application.

The point is all the stronger here, since Booking.com never benefited from an initial window of opportunity during which it could challenge the legislation or policy. It was effectively barred from challenging the Applicant Guidebook at the time of its adoption by the fact that it could not – at that time – show any injury or harm. Furthermore, any challenge at that time risked causing substantial harm to Booking.com as it would have revealed its plans to apply for a new gTLD.

I remain at your disposal to answer any questions.

Sincerely yours,

Flip Petillion

Subject: RE: Booking.com v ICANN: follow-up from oral argument

Thank you, Mr. LeVee.

As indicated in my earlier email, Booking.com is invited to provide brief additional documents relevant to the issues addressed in the materials provided by ICANN, should it wish to do so, by 9:00 (CET) on 13 December.

Kind regards.

Stephen L. Drymer

WOODS LLP
Contact Information Redacted

-----Original Message-----
From: Contact Information Redacted
Sent: Thursday, December 11, 2014 7:35 PM
To: Stephen Drymer
Cc: Contact Information Redacted

Subject: RE: Booking.com v ICANN: follow-up from oral argument

Mr. Drymer and Members of the Panel:

First, let me apologize that the links that we provided to you earlier today are not taking you to the materials we referenced. The links to the responses to the public comments prepared by ICANN staff appear to be broken.

Second, and as you requested, I am attaching PDF copies of the specific pages from the responses to the public comments that I referenced in my email.

Third, we have not been able to identify any additional materials related to the other topics that Mr. Bernstein addressed in his question.

Again, I apologize for the confusion.

Jeff LeVee
JONES DAY® - One Firm Worldwide
Contact Information Redacted

(See attached file: Excerpts-from-agv1-analysis-public-comments-18feb09-en.pdf)

(See attached file: Excerpts-from-summary-analysis-agv4-12nov10-en-1.pdf)

   From: Contact Information Redacted

Date: 12/11/2014 02:10 PM
Subject: RE: Booking.com v ICANN: follow-up from oral argument

Dear counsel:

The members of Panel are having difficulty identifying from among the many links
accessible at each of the two links provided by Mr. LeVee in his email earlier today the
two specific links/documents that we are supposed to open in order to see and consider the
cited pages.

For the sake of both efficiency and fairness, ICANN is requested to provide the Panel and
Booking.com, at its earliest convenience and in any event no later than midnight (PST)
today, links to or pdf copies of the two specific references identified by Mr. LeVee.

Booking.com will then have until have until 24 hours to provide any additional documents
that it considers relevant to the issues addressed in the material to be provided by
ICANN.

As a final observation, it is noted that the question posed by the Tribunal during the
hearing, which gave rise to ICANN's offer to provide additional brief documentation, was
not whether an SSP decision was meant to be final.
Rather, Mr. Bernstein asked whether the community specifically debated and endorsed the
SSP process that is expressly described in the Applicant Guidebook, which does not
expressly refer to "transparency" (eg published standards, published decisions) and
"fairness" (eg, opportunity to be heard).

Sincerely,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Contact Information Redacted   Envoyé : 11 décembre 2014
14:27 À : Contact Information Redacted

) Objet : Booking.com v
ICANN: follow-up from oral argument

Members of the Panel:

During yesterday's hearing, I offered to send some information reflecting whether ICANN
had, during the development of the Applicant Guidebook, considered the question of whether
the decision by the String Similarity Panel would be final. As I mentioned during the
hearing, there were multiple drafts of the Guidebook, and each was posted for public
comment.
ICANN Staff then would analyze and prepare written responses to those public comments.

Below are links to two of the Staff responses to public comments that ICANN views as
relevant to our discussion yesterday:

New gTLD Draft Applicant Guidebook Version 4 Public Comment Summary and Analysis (12 November 2010), available at http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm (at pages 19, 21)

Public Comments Analysis Report (18 February 2009) Available at http://www.icann.org/en/topics/new-gtlds/comments-en.htm (at pages 97-99)

Per our discussion yesterday, I will not characterize or quote from these materials. I would, of course, be happy to answer any questions.

Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
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To Contact Information Redacted

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Su RE: Booking.com v ICANN - Telephone hearing - 10 December - 9:00 PST / bj 12:00 EST / 18:00 CET ec
t:

Dear counsel :

The members of the Panel spoke briefly earlier today, and we look forward to tomorrow's hearing.

As you will recall, paragraph 9 of Procedural Order No. 1 provides: "Oral argument during the telephone hearing shall be limited to 20 minutes for each party (including time spent answering questions from the Panel), subject to the Panel's right to extend the time as it deems appropriate and any right of reply or sur-reply as the Panel may order at that time."

The Panel is conscious of the importance of the issues raised in the parties' written submissions, and understands that the hearing will likely exceed the 40-60 minutes originally estimated in order to ensure that the parties' positions, including their responses to the Panel's questions, are adequately and fairly heard.

For ease of reference, I set out here the dial-in coordinates provided by the ICDR in its 23 November "Notice of Hearing" (copy attached):

For the US and Canada: Contact Information Redacted
For Belgium: Contact Information Redacted
Passcode: 789

Kind regards,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Contact Information Redacted   Envoyé : 8 octobre
2014 04:22 À : Contact Information Redacted

Cc : Contact Information Redacted
                                          .
Objet : RE: Booking.com v ICANN - Telephone hearing - 10 December

Dear Mr. Chairman,

Thank you for your mail. This is well noted.

Best regards,

Flip Petillion

From: Contact Information Redacted
Sent: mardi 7 octobre 2014 22:22
To: Contact Information Redacted

Cc: Contact Information Redacted

Subject: RE: Booking.com v ICANN - Telephone hearing - 10 December

Dear counsel :

Thank you for your very prompt replies. I propose that we schedule the telephone hearing for 10 December at 9:00 (PST)/12:00 (EST)/18:00/CET

Carolina: Are you able to provide a conference line for our use?

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Contact Information Redacted   Envoyé : 7 octobre 2014

15:57 À : Contact Information Redacted

Objet :
RE: Booking.com v ICANN - Telephone hearing.

All:

ICANN would be available Dec. 9-11 but not the following week.

Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
Contact Information Redacted

Fr Contact Information Redacted
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Da 10/07/2014 12:52 PM
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Su RE: Booking.com v ICANN - Telephone hearing.
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Dear Mr Chairman,
Dear Members of the Panel,
Dear Colleagues,

All dates are fine for us.

Best regards,

Flip Petillion

From: Contact Information Redacted

Sent: mardi 7 octobre 2014 21:39
To: Contact Information Redacted

Cc: Contact Information Redacted

Subject: Booking.com v ICANN - Telephone hearing.

Dear counsel,

As you are aware, the timetable set out in Procedural Order No. 1 provides for a telephone hearing to be held after Respondent submits its Sur-Reply (no later than 20 November 2014) and prior to 19 December 2014. The members of the Panel have identified several dates during that period when we could be available for such a hearing: 9, 10, 11, 15 and 16 December.

Knowing that the run-up to the holidays can be a very busy period, I would ask you please to advise the Panel of your availability on those dates, by the end of this week, so that we may all block the time required for the hearing.

Thank you – and kind regards.

Stephen L. Drymer

    (Embedded   Stephen L. Drymer
image moved to   Partner, Head of International Arbitration and ADR
file: Associé, responsable de l'arbitrage international et
pic18636.jpg)   d'ADR
Contact
W000603-LOGO_RGB

                     Woods llp
                     www.litigationboutique.com
                     Contact Information Redacted

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This e-mail (including any attachments) may contain information that is private,
confidential, or protected by attorney-client or other privilege.
If you received this e-mail in error, please delete it from your system without copying it
and notify sender by reply e-mail, so that our records can be corrected.
==========[attachment "INT044.pdf" deleted by Jeffrey LeVee/JonesDay]

From:	Contact Information Redacted
Sent:	samedi 13 décembre 2014 18:03
To:	Contact Information Redacted
Cc:	Contact Information Redacted
Subject:	Booking.com v ICANN: PROCEEDINGS CLOSED

Dear counsel:

The Panel acknowledges receipt of the parties' post-hearing submissions. The proceedings are now closed. The Panel will proceed to deliberate and to prepare its Declaration.

Sincerely,

Stephen L. Drymer

WOODS LLP
Contact Information Redacted

-----Original Message-----
From: Contact Information Redacted
Sent: Saturday, December 13, 2014 8:25 AM
To: Contact Information Redacted
Cc: Contact Information Redacted

Subject: Re: FW: Booking.com v ICANN: follow-up from oral argument

Members of the Panel:

I thank Mr. Petillion for finding the materials that we were not able to locate on short notice. And inasmuch as I initiated this detour during Wednesday's argument, I will not object to the fact that Mr. Petillion chose to provide additional argument. I will respond only by stating that I do not believe that these materials address the question posed by Mr.
Bernstein, and I obviously disagree with Mr. Petillion's "takeaways." Nor do I view these materials -- which were created two and three years before the final version of the Guidebook -- as shedding any important light on the questions before the Panel because the Guidebook says what it says, and the Board's role vis-a-vis the review of String Similarity review determinations has already been addressed at great length in the parties'
papers and during argument.

Jeff LeVee
JONES DAY® - One Firm Worldwide
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en.pdf
       ; and
      -
      https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf

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were made in connection with the first resp. fourth version of the Applicant Guidebook.

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Here are some key takeaways on the additional documents

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I remain at your disposal to answer any questions.
Sincerely yours,
Flip Petillion

-----Original Message-----
From: Contact Information Redacted
Sent: vendredi 12 décembre 2014 02:16
To: 'Jeffrey LeVee'
Cc: Contact Information Redacted

Subject: RE: Booking.com v ICANN: follow-up from oral argument

Thank you, Mr. LeVee.

As indicated in my earlier email, Booking.com is invited to provide brief additional documents relevant to the issues addressed in the materials provided by ICANN, should it wish to do so, by 9:00 (CET) on 13 December.

Kind regards.

Stephen L. Drymer

WOODS LLP
Contact Information Redacted

-----Original Message-----
From: Contact Information Redacted
Sent: Thursday, December 11, 2014 7:35 PM
To: Stephen Drymer
Cc: Contact Information Redacted

)
Subject: RE: Booking.com v ICANN: follow-up from oral argument

Mr. Drymer and Members of the Panel:

First, let me apologize that the links that we provided to you earlier today are not taking you to the materials we referenced. The links to the responses to the public comments prepared by ICANN staff appear to be broken.

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Again, I apologize for the confusion.

Jeff LeVee
JONES DAY® - One Firm Worldwide
Contact Information Redacted

(See attached file: Excerpts-from-agv1-analysis-public-comments-18feb09-en.pdf)

(See attached file: Excerpts-from-summary-analysis-agv4-12nov10-en-1.pdf)

From:	Contact Information Redacted
To:	Contact Information Redacted
Cc:	Contact Information Redacted
Date:	12/11/2014 02:10 PM
Subject:	RE: Booking.com v ICANN: follow-up from oral argument

Dear counsel:

The members of Panel are having difficulty identifying from among the many links accessible at each of the two links provided by Mr. LeVee in his email earlier today the two specific links/documents that we are supposed to open in order to see and consider the cited pages.

For the sake of both efficiency and fairness, ICANN is requested to provide the Panel and Booking.com, at its earliest convenience and in any event no later than midnight (PST) today, links to or pdf copies of the two specific references identified by Mr. LeVee.

Booking.com will then have until have until 24 hours to provide any additional documents that it considers relevant to the issues addressed in the material to be provided by ICANN.

As a final observation, it is noted that the question posed by the Tribunal during the hearing, which gave rise to ICANN's offer to provide additional brief documentation, was not whether an SSP decision was meant to be final.
Rather, Mr. Bernstein asked whether the community specifically debated and endorsed the SSP process that is expressly described in the Applicant Guidebook, which does not expressly refer to "transparency" (eg published standards, published decisions) and "fairness" (eg, opportunity to be heard).

Sincerely,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

Objet : Booking.com v
ICANN: follow-up from oral argument

Members of the Panel:

During yesterday's hearing, I offered to send some information reflecting whether ICANN had, during the development of the Applicant Guidebook, considered the question of whether the decision by the String Similarity Panel would be final. As I mentioned during the hearing, there were multiple drafts of the Guidebook, and each was posted for public comment.
ICANN Staff then would analyze and prepare written responses to those public comments.

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21)

Public Comments Analysis Report (18 February 2009) Available at http://www.icann.org/en/topics/new-gtlds/comments-en.htm (at pages 97-99)

Per our discussion yesterday, I will not characterize or quote from these materials. I would, of course, be happy to answer any questions.

Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
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Su RE: Booking.com v ICANN - Telephone hearing - 10 December - 9:00 PST / bj 12:00 EST / 18:00 CET ec
t:

Dear counsel :

The members of the Panel spoke briefly earlier today, and we look forward to tomorrow's hearing.

As you will recall, paragraph 9 of Procedural Order No. 1 provides: "Oral argument during the telephone hearing shall be limited to 20 minutes for each party (including time spent answering questions from the Panel), subject to the Panel's right to extend the time as it deems appropriate and any right of reply or sur-reply as the Panel may order at that time."

The Panel is conscious of the importance of the issues raised in the parties' written submissions, and understands that the hearing will likely exceed the 40-60 minutes originally estimated in order to ensure that the parties' positions, including their responses to the Panel's questions, are adequately and fairly heard.

For ease of reference, I set out here the dial-in coordinates provided by the ICDR in its 23 November "Notice of Hearing" (copy attached):

For the US and Canada: Contact Information Redacted
For Belgium: Contact Information Redacted
Passcode: 78948306 followed by the "#" sign

Kind regards,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Contact Information Redacted   Envoyé : 8 octobre
2014 04:22 À : Contact Information Redacted

Cc : Contact Information Redacted

Objet : RE: Booking.com v ICANN - Telephone hearing - 10 December

Dear Mr. Chairman,

Thank you for your mail. This is well noted.

Best regards,

Flip Petillion

From: Contact Information Redacted
Sent: mardi 7 octobre 2014 22:22
To: Contact Information Redacted

Cc: Contact Information Redacted

Subject: RE: Booking.com v ICANN - Telephone hearing - 10 December

Dear counsel :

Thank you for your very prompt replies. I propose that we schedule the telephone hearing for 10 December at 9:00 (PST)/12:00 (EST)/18:00/CET

Carolina: Are you able to provide a conference line for our use?

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Contact Information Redacted   Envoyé : 7 octobre 2014
15:57 À : Contact Information Redacted

                              Objet :
RE: Booking.com v ICANN - Telephone hearing.

All:

ICANN would be available Dec. 9-11 but not the following week.

Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
Contact Information Redacted

Fr Contact Information Redacted
:

To Contact Information Redacted

Cc Contact Information Redacted

Da 10/07/2014 12:52 PM
te
:

Su RE: Booking.com v ICANN - Telephone hearing.
bj
ec
t:

Dear Mr Chairman,
Dear Members of the Panel,
Dear Colleagues,

All dates are fine for us.

Best regards,

Flip Petillion

From: Contact Information Redacted
Sent: mardi 7 octobre 2014 21:39
To: Contact Information Redacted

Cc: Contact Information Redacted

Subject: Booking.com v ICANN - Telephone hearing.

Dear counsel,

As you are aware, the timetable set out in Procedural Order No. 1 provides for a telephone hearing to be held after Respondent submits its Sur-Reply (no later than 20 November 2014) and prior to 19 December 2014. The members of the Panel have identified several dates during that period when we could be available for such a hearing: 9, 10, 11, 15 and 16 December.

Knowing that the run-up to the holidays can be a very busy period, I would ask you please to advise the Panel of your availability on those dates, by the end of this week, so that we may all block the time required for the hearing.

Thank you – and kind regards.

Stephen L. Drymer

    (Embedded   Stephen L. Drymer
 image moved to   Partner, Head of International Arbitration and ADR
 file: Associé, responsable de l'arbitrage international et
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                   Woods llp
                   www.litigationboutique.com
                   Contact Information Redacted

Reference Material 38.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process Panel

In the Matter of an Independent Review Process

Between:

Booking.com B.V.

Applicant

-and-   ICDR Case No: 50-20-1400-0247

**Internet Corporation for Assigned Names
and Numbers (ICANN)**

Respondent

FINAL DECLARATION

The Panel:

Hon. A. Howard Matz
David H. Bernstein, Esq.
Stephen L. Drymer (Chair)

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DECLARATION

WE, THE UNDERSIGNED PANELISTS, members of the Independent Review Process Panel ("**IRP Panel**" or "**Panel**"), having been designated in accordance with ICANN Bylaws dated 11 April 2013, hereby issue the following Final Declaration ("**Declaration**"):[1]

I.   INTRODUCTION

1.   This Declaration is issued in the context of an Independent Review Process ("IRP") as provided for in Article IV, Section 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers ("**ICANN**"; "**ICANN Bylaws**" or "**Bylaws**"). In accordance with those Bylaws, the conduct of this IRP is governed by the International Arbitration Rules of the International Centre for Dispute Resolution as amended and in effect June 1, 2009 ("**ICDR**"; "**ICDR Rules**") as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process ("**Supplementary Procedures**").

2.   The subject matter of the dispute here concerns alleged conduct by the ICANN Board in relation to one particular facet of the process by which new generic top-level domains ("**gTLDs**", also known as gTLD "**strings**") are applied for, reviewed and delegated into the Internet's domain name system ("**DNS**") root zone.

3.   As explained in this Declaration, the Applicant, Booking.com, alleges that, in establishing and overseeing the process by which so-called *string similarity reviews* are conducted, and in refusing to reconsider and overturn a decision to place Booking.com's applied-for gTLD string .hotels in a so-called *string contention set*, the Board acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN's Articles of Incorporation, Bylaws and gTLD Applicant Guidebook ("**Guidebook**").

4.   Reading between the lines of the parties' submissions, the Panel senses that both sides would welcome the opportunity to contribute to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here. Certainly the Panel considers that the present matter would ideally have been resolved amicably by the parties. This is particularly true given that the matter here concerns two of ICANN's guiding principles – transparency and fairness – as applied to one of ICANN's most essential activities – the delegation of new gTLDs[2] – in circumstances in which various members of the Internet community, including certain members of the ICANN Board's New gTLD Program Committee, have expressed their own concerns regarding the string similarity review process. That being the case, though, the Panel does not shy away from the duty imposed by the Bylaws to address the questions before it and to render the

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[1] As requested by the ICDR, the Declaration was provided to the ICDR in draft form on 26 January 2015 for non-substantive comments on the text (if any). It was returned to the Panel on 2 March 2015.

[2] As stated in the very first sentence of the Guidebook: "New gTLDs have been in the forefront of ICANN's agenda since its creation."

present Declaration, in accordance with, and within the constraints of the Bylaws, the ICDR Rules and the Supplementary Procedures.

II.   THE PARTIES

A.   The Applicant: Booking.com

5.   The Applicant, Booking.com, is a limited liability company established under the law of the Netherlands. Booking.com describes itself as "the number one online hotel reservation service in the world, offering over 435,605 hotels and accommodations."[3]   Booking.com's primary focus is on the U.S. and other English-language markets.

6.   Booking.com is represented in this IRP by Mr. Flip Petillion and Mr. Jan Janssen of the law firm *Crowell & Moring* in Brussels, Belgium.

B.   The Respondent: ICANN

7.   The Respondent, ICANN, is a California not-for-profit public benefit corporation, formed in 1998. As set forth in Article I, Section 1 of its Bylaws, ICANN's mission is "to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure option of the Internet's unique identifier systems." ICANN describes itself as "a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors and staff members from around the globe, as well as an Ombudsman. ICANN, however, is much more than just the corporation—it is a community of participants."[4]

8.   ICANN is represented in this IRP by Mr. Jeffrey A. LeVee, Esq. and Ms. Kate Wallace, Esq. of the law firm *Jones Day* in Los Angeles, California, USA.

III.   FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF

9.   We recount here certain uncontested elements of the factual and procedural background to the present IRP. Other facts are addressed in subsequent parts of the Declaration, where the parties' respective claims and the Panel's analysis are discussed.

A.   ICANN's Adoption of the New gTLD Program and the Applicant Guidebook

10.   Even before the introduction of ICANN's New gTLD Program ("**Program**"), in 2011, ICANN had, over time, gradually expanded the DNS from the original six gTLDs (.com; .edu; .gov; .mil; .net; .org) to 22 gTLDs and over 250 two-letter country-code TLDs.[5]   Indeed, as noted above, the introduction of new gTLDs has been "in the forefront of ICANN's agenda" for as long as ICANN has existed.

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[3] Request, ¶ 10.

[4] Response, ¶ 11-12.

[5] Request, ¶ 12; see also Guidebook, *Preamble*.

11.   The Program has its origins in what the Guidebook refers to as "carefully deliberated policy development work" by the ICANN community.[6]

12.   In 2005, ICANN's Generic Names Supporting Organization ("**GNSO**"), one of the groups that coordinates global Internet policy at ICANN, commenced a policy development process to consider the introduction of new gTLDs.[7] As noted in the Guidebook:

> *Representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward.*

13.   In October 2007, the GNSO formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations.

14.   In June 2008, the ICANN Board decided to adopt the policies recommended by the GNSO.[8] As explained in the Guidebook, ICANN's work next focused on implementation of these recommendations, which it saw as "creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval."[9]

15.   This process concluded with the decision by the ICANN Board in June 2011 to implement the New gTLD Program and its foundational instrument, the Guidebook.[10]

16.   As described by ICANN in these proceedings, the Program "constitutes by far ICANN's most ambitious expansion of the Internet's naming system. The Program's goals include

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[6] Guidebook, *Preamble*

[7] Request, ¶ 13, Reference Material 7, "Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR; Reference Material 8, "GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005) at pp. 3-4. See also Guidebook, *Preamble*. Booking.com refers to the GNSO as "ICANN's main policy-making body for generic top-level domains". Article X of ICANN's Articles of Incorporation provides: "There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains" (Section 1); the GNSO shall consist of "a number of Constituencies" and "four Stakeholder Groups" (Section 2).

[8] Guidebook, *Preamble*. A review of this policy process can be found at http://gnso.icann.org/issues/new-gtlds (last accessed on January 15, 2015).

[9] Guidebook, *Preamble*: "This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook."

[10] RM 10 (ICANN resolution). The Guidebook (in its 30 May 2011 version) is one of seven "elements" of the Program implemented in 2011. The other elements were: a draft communications plan; "operational readiness activities"; a program to ensure support for applicants from developing countries; "a process for handling requests for removal of cross-ownership restrictions on operators of existing gTLDs who want to participate in the [Program]"; budgeted expenditures; and a timetable.

enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs ...".[11]

17.   The Guidebook is "continuously iterated and revised", and "provides details to gTLD applicants and forms the basis for ICANN's evaluation of new gTLD applications."[12] As noted by Booking.com, the Guidebook "is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs."[13]

B. Booking.com's Application for .hotels, and the Outcome

18.   In accordance with the process set out in the Guidebook, Booking.com filed an application (Application ID 1-1016-75482) for the gTLD string .hotels.

19.   At the same time, Despegar Online SRL ("**Despegar**"), a corporation established under the law of Uruguay, applied (Application ID 1-1249-87712) for the string .hoteis.

20.   "Hoteis" is the Portuguese word for "hotels".

21.   According to Booking.com, Despegar is "a competitor of Booking.com".[14] Booking.com claims that it intends "to operate .hotels as a secure Internet environment providing hotel reservation services for consumers, hotels, and other stakeholders,"[15] while Despegar similarly intends .hoteis to be dedicated primarily to "individuals that are interested in, and businesses that offer, hotel- and travel-related content."[16] That being said, a key difference between the two applications, as Booking.com acknowledges, is that Booking.com intends to focus the services it will offer under its proposed gTLD "on the U.S. (with its strongly Anglos-Saxon traditions) and other English-language markets,"[17] whereas Despegar intends to target "Portuguese-speaking" markets."[18]

22.   As part of the Initial Evaluation to which all applied-for gTLDS were subject, .hotels and .hoteis were each required to undergo so-called *string review* in accordance with the Guidebook, the first component of which is a process known as *string similarity review*. As provided by the Guidebook, the string similarity review was conducted by an independent

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[11] Response, ¶ 14.

[12] Response, ¶ 14. The resolution (RM 10) adopting the Guidebook explicitly "authorizes staff to make further updates and changes to the Applicant Guidebook as necessary and appropriate, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process, and to prominently publish notice of such changes."

[13] Request, ¶ 13. See also Guidebook, Module 1-2: "This Applicant Guidebook is the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period."

[14] Request, ¶ 17.

[15] Request, ¶ 5.

[16] Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

[17] Request, ¶ 16.

[18] Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

String Similarity Panel ("**SSP**") selected and engaged by ICANN for this purpose. (Extracts of the relevant provisions of the Guidebook can be found below, at Part IV of this Declaration.) ICANN engaged InterConnect Communications Ltd. ("**ICC**"), a company registered under the law of England and Wales, specializing in communications sector strategy, policy and associated regulatory frameworks,[19] in cooperation with University College London, to act as the SSP.

23.   On 26 February 2013 ICANN published the results of all of the string similarity reviews for all of the applications for new gTLDs submitted as part of the Program. The announcement revealed, among other things, that two "non-exact match" contention sets had been created: .hotels & .hoteis; and .unicorn & .unicom.[20] Booking.com's applied for string .hotels (as well as the .hoteis, .uncorn and .unicom strings) had thus failed the string similarity review.

24.   The results of the string similarity review were notified to Booking.com by ICANN that same day. In its letter of 26 February 2013 ICANN wrote:

> *After careful consideration and extensive review performed against the criteria in Section 2.2.1.1 of the Applicant Guidebook, the String Similarity Panel has found that the applied-for string (.hotels) is visually similar to another applied-for string (.hoteis), creating a probability of user confusion.*
>
> *Due to this finding, the ... two strings have been placed in a contention set.*[21]

25.   The impact of being put into a contention set is that the proposed strings in the set will not be delegated in the root zone unless and until the applicants reach agreement on which single string should proceed (with the other proposed string therefore rejected), or until after an auction is conducted, with the highest bidder being given the right to proceed to the next step in the review process.

C. DIDP Request and Request for Reconsideration

26.   On 28 March 2013 Booking.com submitted a request for information under ICANN's Documentary Information Disclosure Policy ("**DIDP Request**") asking for "all documents directly and indirectly relating to (1) the standard used to determine whether gTLD strings are confusingly similar, and (2) the specific determination that .hotels and .hoteis are confusingly similar."[22]

27.   On the same date, Booking.com also filed a formal Request for Reconsideration ("**Request for Reconsideration**"). The "specific action(s)" that Booking.com asked to be reconsidered were: the decision to place .hotels and .hoteis in a contention set; and the decision not to

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[19] See http://www.icc-uk.com/

[20] Request, Annex 3. ICANN published document dated 26 February 2013. As its name suggests, a "non-exact match" connotes a determination that two different (non-identical) strings are visually similar within the meaning of the Guidebook. Another752 applied-for gTLDs were put into 230 identical contention sets.

[21] Request, Annex 3, ICANN letter dated 26 February 2013.

[22] Request, ¶ 30 and Annex 3.

provide a "detailed analysis or a reasoned basis" for the decision to place .hotels in contention.[23]

28.   ICANN responded to the DIDP Request on 27 April 2013. Although ICANN provided certain information regarding the review process, in its response to the DIDP Request, ICANN also noted:

> *The SSP is responsible for the development of its own process documentation and methodology for performing the string similarity review, and is also responsible for the maintenance of its own work papers. Many of the items that are sought from ICANN within the [DIDP] Request are therefore not in existence within ICANN and cannot be provided in response to the DIDP Request. ICANN will, however, shortly be posting the SSP's String Similarity Process and Workflow on the New gTLD microsite ...[24]*

29.   By letter dated 9 May 2013 Booking.com replied to ICANN, writing that "ICANN's response fails to provide any additional information or address any of Booking.com's concerns as conveyed in its DIDP Request or Request for Reconsideration."[25] On 14 May 2013, ICANN answered that it "intends to post the string similarity process documentation on or before ... 17 May 2013."[26] ICANN further informed Booking.com that "ICANN will afford you 30 days from the posting of the process document for the submission of a revised Request for Reconsideration."[27]

30.   On 7 June 2013, ICANN published the "String Similarity New gTLD Evaluation Panel [i.e., the SSP] – Process Description" ("**SSP Process Description**").[28]

31.   On 26 June 2013 Booking.com wrote to ICANN regarding both its DIDP Request and its 28 March 2013 Request for Reconsideration. In its letter, Booking.com noted among other things that "the generalized information ICANN thus far has provided does not explain a rationale for or analysis for the decision to put .hotels and .hoteis in a contention set and therefore does not allow Booking.com to appropriately amend its Request for Reconsideration." The letter concluded by stating: "Considering ICANN's obligations of transparency and accountability, there cannot be any 'compelling reason for confidentiality'.

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[23] Request, Annex 12, §3. The Request for Reconsideration (which appears to be in the form of a template) expressly states at §2 that it is a "Request for Reconsideration of ... Staff [vs. Board] action/inaction." The cover letter attaching the Request states that, "[d]espite the fact that the origin of the decisions is unclear, this Reconsideration Request is being submitted as a reconsideration of a 'Staff action'. In the event that the decisions referenced above are determined to be a 'Board action', this request may be amended." As explained below, the Request for Reconsideration was amended on 7 July 2013. That amendment did not alter the stated nature of the request in §2 or the description of the specific actions that Booking.com sought to have reconsidered (§3). Unless otherwise indicated, all further references in this Declaration to the Request for Reconsideration are understood to be the *amended* Request for Reconsideration.

[24] Request, Annex 5.

[25] Request, Annex 6.

[26] Request, Annex 7.

[27] Request, Annex 7.

[28] Request, Annex 8.

And ... there are numerous compelling reasons for publication of [the information requested by Booking.com]."[29]

32.   ICANN responded on 25 July 2013, explaining among other things that "the evaluation of the .hotels string by the SSP panel was performed according to the [SSP Process Description] ..." and "[t]he SSP's work was subjected to quality review, as has been publicly discussed."[30] Approximately six months later, on 9 January 2014, ICANN posted a letter dated 18 December 2013 addressed to ICANN by the SSP Manager at ICC (Mr. Mark McFadden) providing a further "summary of the process, quality control mechanisms and some considerations surrounding the non-exact contention sets for the string similarity evaluation ..." ("**SSP Manager's Letter**").[31] According to that Letter:

> *When ALL of the following features of a pairwise comparison [of non-exact match strings] are evident the evaluators found the string pair to be confusingly similar:*
>
> • *Strings of similar visual length on the page;*
>
> • *Strings within +/- 1 character of each other;*
>
> • *Strings where the majority of characters are the same and in the same position in each string; and*
>
> • *The two strings possess letter combinations that visually appear similar to other letters in the same position in each string*
>
>> o *For example rn~m & I~i*

33.   Meanwhile, on 7 July 2013 Booking.com had submitted its amended Request for Reconsideration. In its letter attaching the amended Request for Reconsideration, Booking.com stated: "Booking.com reserves the right to further amend its Request for Reconsideration upon receipt of the information it previously requested and urges ICANN to publish the requested information as specified in our letter of 26 June 2013."[32]

34.   By virtue of Article IV, Section 3 of the Bylaws, ICANN's Board Governance Committee ("**BGC**") is charged with evaluating and making recommendation to the Board with respect to requests for reconsideration. The Board's New gTLD Program Committee ("**NGPC**") receives and acts on such recommendations on behalf of the ICANN Board. In accordance with this procedure, Booking.com's Request for Reconsideration was evaluated by the BGC. In a detailed analysis dated 1 August 2013, the BGC "conclude[d] that Booking.com has not

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[29] Request, Annex 9.

[30] Request, Annex 10.

[31] Request, Annex 11.

[32] Request, Annex 13.

stated proper grounds for reconsideration and we therefor recommend that Booking.com's request be denied" ("**BGC Recommendation**").[33]

35.   At a telephone meeting held on 10 September 2013 the NGPC, "bestowed with the powers of the Board", considered, discussed and accepted the BGC Recommendation. Booking.com's Request for Reconsideration was denied.[34]

D. The Cooperative Engagement Process

36.   Booking.com thereafter filed a request for a Cooperative Engagement Process ("**CEP**") on 25 September 2013, with a view to attempting to reach an amicable resolution of its dispute with ICANN. In its CEP request, Booking.com wrote:

> *Booking.com is of the opinion that Resolution 2013.09.10.NG02 [the Board resolution denying its Request for Reconsideration] violates various provisions of ICANN's Bylaws and Articles of Incorporation. In particular Booking.com considers that ICANN's adoption of [the Resolution] is in violation of Articles I, II(3), II and IV of the ICANN Bylaws as well as Article 4 of ICANN's Articles of Incorporation. In addition, Booking.com considers that ICANN has acted in violation of Articles 3, 5, 7 and 9 of ICANN's Affirmation of Commitment …*[35]

37.   The CEP ultimately did not result in a resolution, and Booking.com duly commenced the present IRP.

38.   One further point should be made, here, prior to describing the commencement and conduct of the present IRP proceedings: The determination by the SSP that .hotels and .hoteis are so visually similar as to give rise to the probability of user confusion, and the resulting placement of those applied-for strings into a contention set, does *not* mean that Booking.com's application for .hotels has been denied or that .hotels will not proceed to delegation to the root zone. Rather, as noted above and explained in the extracts from the Guidebook reproduced below, the Guidebook establishes a process for resolving such contention, under which the applicants for the contending strings in the set – here, Booking.com and Despegar – may resolve the contention by negotiation, failing which the matter will proceed to auction. Ultimately, no matter the outcome of these IRP proceedings, Booking.com may yet be successful and .hotels may yet be delegated into the Internet root zone. However, the fact that .hotels has been put into a contention set does raise the risk that .hotels may never be delegated into the root zone, or that it may be more costly for Booking.com to obtain approval of its proposed string. It also has caused a significant delay in the potential delegation of the string into the root zone (which could prove to be detrimental to the ultimate success of Booking.com's proposed string if other applicants

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[33] Request, Annex 14, BGC Recommendation dated 1 August 2013, p.9. See also Request, Annex 15, NGPC Resolution dated 10 September 2013. As noted in footnote 1 to the BGC Recommendation, the Recommendation was ultimately finalized and submitted for posting on 21 August 2013.

[34] Request, Annex 15, NGPC Resolution dated 10 September 2013.

[35] Request, Annex 17.

whose strings were not put into a contention set are able to establish themselves as pioneer providers of hotel- and travel-related services under a different new gTLD).

E. The IRP Proceedings

39.   On 19 March 2014, Booking.com submitted a Notice of Independent Review, dated 18 March 2014, as well as a Request for Independent Review Process ("**Request**") accompanied by numerous supporting documents and reference materials.

40.   In accordance with Article IV, Section 3(9) of the ICANN Bylaws, Booking.com requested that a three-member IRP panel be constituted to consider and determine the Request. As the omnibus standing panel referred to in Article IV, Section 3(6) of the ICANN Bylaws had yet to be established, Booking.com further proposed, in accordance with Article 6 of the ICDR Rules, that each party appoint one panelist, with the third (the Chair of the panel) to be appointed by the two party-appointed panelists.

41.   On 25 April 2014, ICANN submitted a Response to ICANN's Request with supporting documents ("**Response**").

42.   The parties having thereafter agreed on the number of panelists and the method of their appointment, David H. Bernstein, Esq. was duly appointed as panelist by Booking.com on 1 May 2014, and the Hon. A Howard Matz was duly appointed as panelist by ICANN on 30 May 2014.

43.   On 17 July 2014, the ICDR notified the parties that Mr. Stephen L. Drymer had been duly nominated by the two party-appointed panelists as Chair of the Panel. Mr. Drymer's appointment became effective and the Panel was duly constituted as of 1 August 2014.

44.   On 21 August 2014, further to consultations among the panelists and between the Panel and the parties, the Panel convened a preparatory conference with the parties (by telephone) for the purpose of discussing organizational matters, including a timetable for any further written statements or oral argument. Both parties requested the opportunity to make supplemental submissions and to present oral argument.

45.   On 22 August 2014 the Panel issued Procedural Order No. 1 in which, among other things, it established a Procedural Timetable for the IRP. As specifically requested by the parties, the Procedural Order and Timetable provided for the submission of additional written statements by the parties as well as for a brief oral hearing to take place by telephone, all on dates proposed by and agreed between the parties.[36]

46.   In accordance with the Procedural Timetable, on 6 October 2014 Booking.com submitted its Reply to ICANN's Response, accompanied by additional documents ("**Reply**").

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[36] Paragraph 6 of Procedural Order No. 1 provided that, in its forthcoming Reply to ICANN's Response, "Booking.com shall only address two issues raised in Respondent's Response: (1) the nature and scope of the IRP requested; (2) the nature of the relief sought by Claimant." Paragraph 7 of Procedural Order No. 1 provided that "Respondent's Sur-Reply … shall address only the issues raised in the Reply."

47. In accordance with the Procedural Timetable, ICANN submitted a Sur-Reply on 20 November 2014 ("**Sur-Reply**").

F. The Hearing

48. As provided by Procedural Order No. 1 and the Procedural Timetable, a hearing was held (by telephone) on 10 December 2011, commencing at 9:00 PST/18:00 CET.

49. In the light of the significance of the issues raised by the parties, and given the many questions prompted by those issues and by the parties' extensive written submissions and supporting materials, the Panel indicated that it would allow the hearing to continue beyond the approximately one hour originally envisaged. The hearing ultimately lasted two and one-half hours. Counsel for each party made extensive oral submissions, including rebuttal and sur-rebuttal submissions, and responded to the panelists' questions.

50. Prior to the close of the hearing each party declared that it had no objection concerning the conduct of the proceedings, that it had no further oral submissions that it wished to make, and that it considered that it had had a full opportunity to present its case and to be heard.

51. As agreed and ordered prior to the close of the hearing, the parties were provided the opportunity to file limited additional materials post-hearing, in relation to a certain question asked of them by the Panel. This was done, and, on 13 December 2014, the proceedings were declared closed.

IV. ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS

52. We set out here the key elements of ICANN's Articles of Association, Bylaws and policies on which the parties rely in their submissions and to which the Panel will refer later in this Declaration.

A. Articles of Association

> 4. The Corporation shall operate <u>for the benefit of the Internet community as a whole</u>, carrying out its activities <u>in conformity with relevant principles of international law and applicable international conventions</u> and local law and, <u>to the extent appropriate and consistent with these Articles and its Bylaws</u>, through <u>open and transparent processes</u> that <u>enable competition and open entry</u> in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

> [Underlining added]

B. Bylaws

> **ARTICLE I: MISSION AND CORE VALUES**
>
> Section 1. MISSION
>
> The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers,

and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.

[...]

Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.

3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN

body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[...]

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

[...]

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

> *a. one or more staff actions or inactions that contradict established ICANN policy(ies); or*

> *b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or*

> *c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.*

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

> *a. evaluate requests for review or reconsideration;*

b. summarily dismiss insufficient requests;

c. evaluate requests for urgent consideration;

d. conduct whatever factual investigation is deemed appropriate;

e. request additional written submissions from the affected party, or from other parties;

f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and

g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

[…]

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for <u>independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws</u>.

2. <u>Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action</u>. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

3. A request for independent review <u>must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation</u>. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.

4. Requests for such independent review shall be referred to an <u>Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws</u>. The IRP Panel <u>must apply a defined standard of review to the IRP request, focusing on</u>:

a. did the Board act without conflict of interest in taking its decision?;

b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?

[…]

11. The IRP Panel shall have the authority to:

a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;

c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;

e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and

f. determine the timing for each proceeding.

[...]

14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. [...]

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. [...]

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

[...]

18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. <ins>The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties,</ins> and in its declaration <ins>shall specifically designate the prevailing party.</ins> The <ins>party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.</ins>

[Underlining added]

53.   Lest there be any misunderstanding as regards the proper subject matter of IRP proceedings or the role of the Panel, we note that, as was clearly established during the hearing, it is common ground between the parties that the term "action" (or "actions") as used in Article IV, Section 3 of the Bylaws is to be understood as action(s) *or inaction(s)* by the ICANN Board. The Panel observes that this understanding comports not only with the provisions of Article

IV, Section 2 of the Bylaws concerning "Reconsideration", which expressly refer to "actions or inactions of the ICANN Board", but with the clear intent of Section 3 itself, which stipulates at sub-section 11 that "[t]he IRP Panel shall have the authority to: ... (c) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws."

C. The gTLD Applicant Guidebook

54. As noted above and as understood by all, the Guidebook is (to borrow Booking.com's phrase) "the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs."[37]

55. The Guidebook is divided into "Modules", each of which contains various sections and sub-sections. The three Modules of primary relevance here are Modules 1, 2 and 4. Module 1, titled "Introduction to the gTLD Application Process," provides an "overview of the process for applying for a new generic top-level domains."[38] Module 2, titled "Evaluation Procedures," describes the "evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation."[39] Module 4, titled "String Contention Procedures," concerns "situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases."

(i) Initial Evaluation

56. As explained in Module 1, "[i]mmediately following the close of the application submission period, ICANN will begin checking all applications for completeness."[40] Initial Evaluation begins "immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation."[41]

57. Initial Evaluation is comprised of two main elements or types or review: *string review*, which concerns the applied-for gTLD string; and *applicant review*, which concerns the entity applying for the gTLD and its proposed registry services. It is the first of these – string review, including more specifically the component known as *string similarity review* – that is particularly relevant.

(ii) String Review, including String Similarity Review

58. String review is itself comprised of several components, each of which constitutes a separate assessment or review of the applied-for gTLD string, conducted by a separate reviewing body or panel. As explained in Module 2:

> *The following assessments are performed in the Initial Evaluation:*

---

[37] Request, ¶ 13.

[38] Module 1-2. Each Module of the Guidebook is paginated separately. "Module 1-2" refers to Guidebook Module 1, page 2.

[39] Module 2-2.

[40] Guidebook, §1.1.2.2: "Administrative Completeness Check", Module 1-5.

[41] Guidebook, §1.1.2.5: "Initial Evaluation", Module 1-8 (underlining added).

- *String Reviews*

  - *String similarity*

  - *Reserved names*

  - *DNS stability*

  - *Geographic names*

[...]

An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.[42]

59. As indicated, all complete applications are subject to Initial Evaluation, which means that all applied-for gTLD strings are subject to string review. String review is further described in Module 2 as follows:

> *[String review] focuses on the applied-for gTLD string to test:*
>
> - *Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion;*
>
> - *Whether the applied-for gTLD string might adversely affect DNS security or stability; and*
>
> - *Whether evidence of requisite government approval is provided in the case of certain geographic names.*[43]

60. The various assessments or reviews (i.e., string similarity, reserved names, DNS stability, etc.) that comprise string review are elaborated at Section 2.2.1 of Module 2. As mentioned, the most relevant of these reviews for our purposes is *string similarity review*, which is described in detail at Section 2.2.1.1. Because of the central importance of the string similarity review process in the context of the present dispute, this section of the Guidebook is reproduced here at some length:

> ### 2.2.1.1   String Similarity Review
>
> *This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.*
>
> *Note: In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.*

---

[42] Module 2-2. The same is true of applicant review, which is also comprised of various assessments concerning the applicant entity.

[43] Guidebook, §2.2: "Initial Evaluation", Module 2-4 (underlining added). See also Module 1-9: "String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS ..."

The _visual similarity check_ that occurs during Initial Evaluation is intended to augment the objection and dispute resolution process (see Module 3, Dispute Resolution Procedures) that addresses all types of similarity.

This similarity review _will be conducted by an independent String Similarity Panel_.

2.2.1.1.1 Reviews Performed

The String Similarity Panel's task is to _identify visual string similarities_ that would create a _probability of user confusion_.

The panel performs this task of assessing similarities that would lead to user confusion in four sets of circumstances, when comparing:

[...]

• Applied-for gTLD strings against other applied-for gTLD strings;

[...]

Similarity to Other Applied-for gTLD Strings (String Contention Sets) – All applied-for gTLD strings will be reviewed against one another to identify any similar strings. In performing this review, _the String Similarity Panel will create contention sets_ that may be used in later stages of evaluation.

A contention set contains at least two applied-for strings identical or _similar to one another_. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution.

[...]

2.2.1.1.2 Review Methodology

The String Similarity Panel is _informed in part by an algorithmic score for the visual similarity_ between each applied-for string and each of other existing and applied-for TLDs and reserved names. The score will provide _one objective measure for consideration by the panel_, as part of the process of identifying strings likely to result in user confusion. In general, applicants should expect that _a higher visual similarity score suggests a higher probability that the application will not pass the String Similarity review_. However, it should be noted that _the score is only indicative_ and that _the final determination of similarity is entirely up to the Panel's judgment_.

The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes. [footnote in the original: See _http://icann.sword-group.com/algorithm/_] Applicants will have the ability to test their strings and obtain algorithmic results through the application system prior to submission of an application.

[...]

The panel will _examine all the algorithm data and perform its own review of similarities between strings_ and _whether they rise to the level of string confusion_. In cases of strings in scripts not yet supported by the algorithm, the panel's assessment process is entirely manual.

The panel will use a <u>common standard</u> to test for whether string confusion exists, as follows:

***Standard for String Confusion** – String confusion exists where a string so nearly resembles another <u>visually</u> that it is <u>likely to deceive or cause confusion</u>. <u>For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user</u>. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.*

2.2.1.1.3 Outcomes of the String Similarity Review

An application that fails the String Similarity review due to similarity to an existing TLD <u>will not pass the Initial Evaluation</u>, and <u>no further reviews will be available</u>. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

<u>An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set</u>.[44]

[Underlining added]

61. Module 4 of the Guidebook, as mentioned, concerns "situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases." As explained in Module 4:

4.1   String Contention

String contention occurs when either:

1.   Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or

2.   Two or more applicants for <u>similar gTLD strings</u> successfully complete all previous stages of the evaluation and dispute resolution processes, and <u>the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.</u>

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a <u>contention set</u>.

---

[44] Module 2-5 to 2-9. As regards the concept of string contention, see also Guidebook, §1.1.2.10: "String Contention", Module 1-13: "String contention applies only when there is more than one qualified application for the same or similar gTLD strings. String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone."

(In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

Applications for identical gTLD strings will be automatically assigned to a contention set.

[...]

<u>The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS.</u> The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets ...

[...]

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation [NB: community priority evaluation applies only to so-called "community" applications; it is not relevant here] or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

[...]

62. As provided in Module 4, the two methods relevant to resolving a contention such as between .hotels and .hoteis are *self-resolution* (i.e., an agreement between the two applicants for the contending strings) and *auction*:

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications.

[...]

4.3 Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

63. Module 5 of the Guidebook, titled *Transition to Delegation*, describes "the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone."[45] Section 5.1 states:

> ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. *The Board reserves the right to individually consider an application for a new gTLD* to determine whether approval would be in the best interest of the Internet community. *Under exceptional circumstances, the Board may individually consider a gTLD application.* For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs *or of the use of an ICANN accountability mechanism.*[46]

> [Underlining added]

V. SUMMARY OF THE PARTIES' POSITIONS

64. The following brief summary of the parties' respective positions is provided with a view solely to assisting the reader to understand the present Declaration. It is *not* intended to recapitulate – and it does not recapitulate – the entirety of the parties' allegations and arguments. Additional references to the parties' positions, including submissions made by them in the course of the proceedings, are contained in the discussion at Part VI below.

A. Booking.com's position

(i) The Panel's Authority

65. Booking.com submits that the mandate of the Panel is "to determine whether the contested actions of the ICANN Board are consistent with applicable rules".[47] According to Booking.com:

> The set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN's Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN's Affirmation of Commitments, and both of which require compliance with inter alia International law and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.[48]

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[45] Module 5-2.

[46] Module 5-4.

[47] Reply, ¶ 3.

[48] Reply, ¶ 3.

66.   Booking.com submits that IRP panels have broad authority to evaluate actions of the ICANN Board. An overly restrictive interpretation of the standard of review, such as proposed by ICANN in these proceedings, would, says Booking.com, "fail to ensure accountability on the part of ICANN and would be incompatible with ICANN's commitment to maintain (and improve) robust mechanisms for accountability, as required by Article 9.1 of ICANN's Affirmation of Commitments and ICANN's core values.[49]

(ii) Booking.com's Claims

67.   The purpose of the IRP initiated by Booking.com is, in its own words, "to challenge the ICANN Board's handling of Booking.com's application for the new gTLD .hotels."[50] This includes the determination of the SSP to place .hotels and .hoteis in contention and the refusal of the Board (and its committees) to revise that determination. Elsewhere in its submissions, Booking.com makes an even broader claim; it asserts that it challenges the conduct of the ICANN Board in relation to what Booking.com refers to as the *setting up, implementation, supervision* and *review* of the entire of string similarity review process, and the Board's alleged failure "to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination" throughout.[51]

68.   In effect, Booking.com's specific claims can be divided into two broad categories: claims related to the string similarity review process generally; and claims related to the particular case of .hotels.

69.   Booking.com professes that this case "is not about challenging a decision on the merits [i.e., the decision to place .hotels in contention]"; it is about "ICANN's failure to respect fundamental [procedural] rights and principles in handling New gTLD applications, in particular in the context of String Similarity Review."[52]

70.   Booking.com also repeatedly emphasizes – and this is crucial – that *it does not challenge the validity or fairness of the process as set out in the Guidebook.* Rather, as indicated, it contests "the way in which that process was established, implemented and supervised by (or under the authority of) the ICANN Board."[53] Equally crucial, as will be seen, is Booking.com's acknowledgment that *the established process was followed* in the case of the review of .hotels.

a.   The string similarity review process

71.   According to Booking.com, the problem began when the ICANN Board failed to "provide transparency in the SSP selection process," in particular by failing "to make clear how

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[49] Reply, ¶ 6.

[50] Reply, ¶ 7.

[51] Reply, ¶ 15.

[52] Reply, ¶ 14.

[53] Reply, ¶ 17.

[ICANN] would evaluate candidate responses or how it ultimately did so."[54] The problem was compounded by the selection of ICC/University College London to perform string similarity reviews as the independent SSP. In Booking.com's words:

> [T]he identities of the unsuccessful candidates (if any) to perform the String Similarity Review remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ... There is no indication that any other candidate expressed an interest in performing the String Similarity Review. No information has been provided as to the steps (if any) taken by ICANN to reach out to other potential candidates. Numerous questions remain: How did ICANN deal with the situation if there was only one (or only a very few) respondent(s) wishing to perform the String Similarity Review? How did this impact on the discussions with InterConnect Communications? What are the terms of ICANN's contract with InterConnect Communications?[55]

72. Booking.com also faults ICANN for "allowing the appointed SSP to develop and perform an unfair and arbitrary review process", specifically, by allowing the SSP "to perform the String Similarity Review (i) without any (documented) plan or methodology ... (ii) without providing any transparency regarding the evaluators or the evaluation criteria ... and (iii) without informing applicants of its reasoning ...".[56]

73. Among other things, Booking.com takes ICANN to task for establishing and posting the SSP Process Description and the SSP Manager's Letter (see Part III.C above) only long after the string similarity review process had ended.[57]

74. It also alleges that the factors identified in the SSP Manager's Letter are "arbitrary and baseless ... not supported by any methodology capable of producing compelling and defensible conclusions ... [which] has allowed applications with at least equally serious visual string similarity concerns – such as .parts/.paris, .maif/.mail, .srt/.srl, .vote/.voto and .date/.data ... – to proceed while singling out .hotels/.hoteis."[58] According to Booking.com: "The failure to take actual human performance into account is at odds with the standard for assessment, i.e., the likelihood of confusion on the part of the average Internet user. Hence, the approach is directly contrary to ICANN's own policy."[59]

75. Booking.com further contends that the SSP process is unfair and non-transparent due to the fact that the identity of SSP members has never been publicly disclosed.[60]

76. Further, Booking.com argues that the process is unfair, non-transparent and arbitrary – and thus violates ICANN policy – for failing to provide for a "well-documented rationale" for each

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[54] Reply, ¶ 20.

[55] Reply, ¶ 20.

[56] Reply, ¶ 23.

[57] Reply, ¶ 24.

[58] Reply, ¶ 25.

[59] Reply, ¶ 25.

[60] Reply, ¶ 26-27.

SSP determination. In the absence of reasons for each string similarity determination, says Booking.com, "there is no basis on which decisions can be evaluated and, where appropriate, challenged."[61]

77.   Another ground for Booking.com's challenge is the alleged failure by the ICANN Board to providing "effective supervision or quality control" of the SSP: "If nobody but the evaluator has any insight into how the evaluation was carried out, no effective quality control can be performed."[62]   Nor, according to Booking.com, does the quality review of the SSP's work supposedly performed by JAS Advisers (the independent consultant engaged by ICANN for this purpose) overcome the problem of a lack of transparency:

> *Booking.com is not aware that any selection process was put in place in relation to the appointment of JAS Advisors to perform the String Similarity Review quality control. No criteria for performing the quality control were published. When ICANN was looking for evaluators, no call for expressions of interest or similar document was issued for the selection of quality controllers.*[63]

78.   In any case, says Booking.com, the "quality control review over a random sampling of applications to, among other things, test whether the process [set out in the Guidebook] was followed," which ICANN claims was performed on the SSP's work,[64] could not provide adequate quality control of the string similarity review process.[65]   Finally, Booking.com argues that the arbitrary and unfair result of the string similarity review concerning .hotels – *i.e.*, the decision to place .hotels and .hoteis in contention – demonstrates that, "whatever quality control review ICANN may have engaged in …must therefore have been deficient."[66]

b.   The case of .hotels

79.   Booking.com argues, in part on the basis of expert evidence which it adduces in this IRP proceeding,[67] that "[t]here is no probability of user confusion if both .hotels and .hoteis were delegated as gTLD strings into the Internet root zone … The SSP could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings."[68] It continues:

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[61] Reply, ¶ 28-29.

[62] Reply, ¶ 30.

[63] Reply, ¶ 31. Booking.com states that it "doubts" that any quality review was in fact performed, whether by JAS Advisers or any other entity.

[64] Response, ¶ 30.

[65] Reply, ¶ 34.

[66] Reply, ¶ 38.

[67] Request, Annex 20, Expert Report of Prof. Dr. Piet Desmet of the Faculty of Arts, Department of Linguistics of Leuven University, dated 10 March 2014. Portions of the work underlying Prof. Desmet's report were performed by Dr. Emmanuel Keuleers, Research Fellow in the Department of Experimental Psychology at Ghent University.

[68] Request, ¶ 58.

> *Since .hotels and .hoteis are not confusingly similar, the determination that they are is contradictory to ICANN policy as established in the Applicant Guidebook. Acceptance of the determination, and repeated failure to remedy the wrongful determination, is a failure to act with due diligence and independent judgment, and a failure to neutrally and fairly apply established policies as required by Bylaws and Articles of Incorporation.[69]*

80.   According to Booking.com, the Board should have acted to overturn the determination of the SSP either in the context of the Request for Reconsideration or under the authority accorded it by Module 5-4 of the Guidebook to "individually consider a gTLD application".[70]

81.   Booking.com claims that its DIDP Request alerted the Board to the need to intervene to "correct the errors in the process" related to .hotels, and that its Request for Reconsideration of the SSP determination further informed the Board of the many errors in the SSP's review of .hotels, "giving the Board ample opportunity to correct those errors."[71]   Booking.com claims that the Board's failure, when responding to the DIDP Request, "to offer any insight into the SSP's reasoning", its refusal to reconsider and overturn the SSP determination regarding .hotels on the sole ground (says Booking.com) that "the Reconsideration process 'is not available as a mechanism to re-try the decisions of evaluation panels'", and its failure to investigate Booking.com's complaints of a lack of fairness and transparency in the SSP process, constitute violations of ICANN's governing rules regarding string similarity review.[72]

82.   According to Booking.com, among the most compelling evidence of ICANN's failure in this regard are the statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com's Request for Reconsideration was denied.[73] Given the importance that the Panel attaches to these statements, they are addressed in some detail in the Analysis in Part VI, below.

83.   In its written submissions Booking.com asks the Panel to grant the following relief:

> *Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;*
>
> *Requiring that ICANN reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set;*
>
> *Awarding Booking.com its costs in this proceeding; and*

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[69] Request, ¶ 59.

[70] Reply, ¶ 39.

[71] Reply, ¶ 41.

[72] Reply, ¶ 41. In the passage of Booking.com's submissions referred to here (as elsewhere), Booking.com speaks of violations of ICANN's obligations of "due process", which, it says, comprise concepts such as the right to be heard, the right to receive reasons for decisions, publicity, etc. For reasons explained in Part VI, below, the Panel prefers to use the terms *fairness* and *transparency* to connote the essence of ICANN's obligations under review in this IRP.

[73] See Part II.C, above.

Awarding such other relief as the Panel may find appropriate or Booking.com may request.

84. At the hearing Booking.com *further* requested that the Panel not only require ICANN to disregard the SSP determination regarding .hotels/.hoteis, but also order ICANN to "delegate both .hotels and .hoteis."

B. ICANN's position

85. ICANN's position is best summed up by ICANN itself:

Booking.com's IRP Request is really about Booking.com's disagreement with the merits of the String Similarity Panel's conclusion that .hotels and .hoteis are confusingly similar. But the Panel's determination does not constitute Board action, and the Independent Review Process is not available as a mechanism to re-try the decisions of an independent evaluation panel. The IRP Panel is tasked only with comparing contested actions of the ICANN Board to ICANN's Bylaws and Articles of Incorporation; it is not within the IRP Panel's mandate to evaluate whether the String Similarity Panel's conclusion that .hotels and .hoteis are confusingly similar was wrong.[74]

86. According to ICANN, the Board "did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Guidebook."[75]

(i) The Panel's Authority

87. Throughout its submissions ICANN repeatedly stresses what it says is the very limited authority enjoyed by IRP panels.

88. As provided in Article IV, Section 3(4) of ICANN's Bylaws, ICANN observes that this Panel (as all IRP panels) is charged only with "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[76]

89. ICANN notes that, in undertaking this *compare-and-declare* mission, the Panel is further constrained to apply the very specific "standard of review" set out in Bylaw Article IV, Section 3(4), which requires the Panel to focus on three particular questions: "did the Board act without conflict of interest in taking its decision?"; "did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?"; and "did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?"[77]

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[74] Response, ¶ 9.

[75] Response, ¶ 8. Both parties agree that, as submitted by Booking.com, the "rules" at issue, against which the conduct of the ICANN Board is to be assessed, include the relevant provisions of the Guidebook.

[76] See for example Response, ¶2, ¶ 9.

[77] Response, ¶ 2.

90.   ICANN further asserts that the IRP process "is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved in ICANN activities,"[78] such as the action of the SSP which resulted in .hotels and .hoteis being placed in contention. Nor, says ICANN, may the IRP process be used as an "appeal mechanism" by which to overturn substantive decisions – such as the determination that .hotels and .hoteis are confusingly visually similar – with which an applicant may disagree.[79]

91.   In this regard ICANN states that the affirmative relief sought by Booking.com – specifically, a declaration requiring that ICANN "reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set" and (as requested at the hearing) that ICANN "delegate both .hotels and .hoteis" – exceeds the authority of the Panel.[80]

(ii) ICANN's Response to Booking.com's Claims

a. The string similarity review process

92.   According to ICANN, "[e]arly on in the iterations of the Guidebook, it was determined that, in the initial evaluation stage, the String Similarity Panel would only examine strings for visual confusion;" and "[i]f applied-for strings are determined to so nearly resemble each other visually that it is likely to deceive or cause confusion, the string will be placed in a contention set, which is then resolved pursuant to the contention set resolution processes in Module 4 of the Guidebook."[81]

93.   According to ICANN, it was also determined early on that, as stated in Section 2.2.1.1 of the Guidebook, "[t]his similarity review will be conducted by an independent String Similarity Panel," not by ICANN itself. ICC was duly selected to perform the string similarity review further to "an open and public request for proposals," pursuant to which, as the successful bidder, "ICC was responsible for the development of its own process documents and methodology for performing the String Similarity Review consistent with the provisions of the Guidebook."[82] ICANN emphasizes that "the Guidebook does not provide for any process by which ICANN (or anyone else) may conduct a substantive review of ICC's results."[83]

94.   In ICANN's submission, the alternative proposed by Booking.com, that "the ICANN Board – and the ICANN Board alone – was obligated to perform the String Similarity Review for the more than 1,900 new gTLD applications submitted," is "untenable and is not supported by ICANN's Bylaws or Articles."[84] As noted by ICANN, the Guidebook defines six distinct

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[78] Response, ¶ 3.

[79] Response, ¶ 49.

[80] Response, ¶ 55.

[81] Response, ¶ 15 (underlining in original).

[82] Response, ¶ 16.

[83] Response, ¶ 17.

[84] Sur-Reply, ¶ 7.

review processes that every gTLD application is required to go through, including string similarity review; each of those review processes was conducted by independent experts specifically engaged by ICANN staff for the purpose.

95.   ICANN submits that "there simply is no requirement – under ICANN's governing documents or imposed by law – that would mandate that the ICANN Board inject itself into the day-to-day affairs of the evaluation process in the manner Booking.com proposes."[85] It asserts that, consistent with well-settled legal principles, "neither ICANN's Bylaws, nor the Articles, nor the Guidebook requires the ICANN Board to conduct any analysis of the decisions of third party experts retained to evaluate string similarity."[86]

96.   Moreover, ICANN asserts that "[s]imply because the ICANN Board has the discretion [under Section 5.1 (Module 5-4) of the Guidebook] to consider individual applications does not mean it is required to do so or that it should do so, particularly at an initial evaluation stage."[87]

97.   ICANN claims that that Booking.com's repeated invocation of the Board's so-called obligation to ensure "due process" in the administration of the New gTLD Program is misplaced. First, neither applicable California law nor any provision of the Bylaws, Articles of Incorporation or Guidebook "specifically affords any gTLD applicant a right to procedural 'due process' similar to that which is afforded in courts of law."[88] Second, because ICANN conducts its activities in the public interest it nevertheless provides "more opportunity for parties to be heard and to dispute actions taken"[89] than most private corporate entities. Third, the "decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation within the ICANN community, including participation from end users, civil society, technical experts, business groups, governments and others."[90] Fourth, and perhaps most importantly, "ICANN adhered to the policies and procedures articulated in its Bylaws, Articles of Incorporation, and the Guidebook, the latter of which was adopted only after being publicly vetted with ICANN's stakeholders and the broader Internet community."[91]

98.   ICANN's response to Booking.com's various allegations regarding particular elements of the string similarity review process – including for example the selection of the SSP, the publication of the SSP's methodology, the anonymity of the individuals SSP members, the supposed lack of quality control – is essentially three-fold: first, the actions challenged by Booking.com are *not Board actions*, but actions of ICANN staff or third parties, which cannot

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[85] Sur-Reply, ¶ 10.

[86] Sur-Reply, ¶ 10.

[87] Sur-Reply, ¶ 11. It was established during the hearing that the several references to this discretionary authority in ICANN's written and oral submissions refer specifically to the authority conferred by Section 5.1 (Module 5-4) of the Guidebook.

[88] Sur-Reply, ¶ 18.

[89] Sur-Reply, ¶ 18.

[90] Sur-Reply, ¶ 18, fn 18.

[91] Sur-Reply, ¶ 18, fn 18.

be challenged by means of IRP proceedings; second, in any case, Booking.com's claims are *factually incorrect*, and there has been no violation of the Bylaws, Articles of Incorporation or Guidebook; third, Booking.com's claims are *time-barred* given that Article IV, Section 3(3) of the Bylaws requires that IRP requests "must be filed within thirty days of the posting of the minutes of the Board meeting ... that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."[92]

b. The case of .hotels

99.   ICANN's position as regards the determination to place .hotels and .hoteis in contention is similar in many respects to its position regarding the string similarity review process generally. ICANN argues that the Board played no role whatsoever in performing the review of .hotels; that the SSP's determination was in any event well supported and there was no violation of applicable rules; and that the Guidebook does not provide for any process by which ICANN (or any other body, including an IRP panel) may conduct a substantive review of a string similarity determination.

100.   In any event, ICANN asserts that .hotels and .hoteis in fact meet every one of the visual similarity criteria applied by the SSP, as set out in the SSP Manager's Letter. Moreover, .hotels and .hoteis scored a stunning 99% for visual similarity under the publicly available SWORD algorithm which, as provided by Section 2.2.1.1.2 (Module 2-7) of the Guidebook, establishes "one objective measure for consideration by the [SSP]". According to ICANN (in response to a question posed by the Panel during the hearing), this was the highest algorithmic score among the comparison of all non-identical pairs within the 1917 new gTLD applications received by ICANN;[93] the only other pair of non-exact match strings found to be confusingly visually similar – .unicorn and .unicom – scored only 94%.[94]

101.   According to ICANN, "it was not clearly 'wrong,' as Booking.com argues, for the [SSP] to find that .hotels/.hoteis are confusingly similar.[95]

102.   In conclusion, ICANN states that its conduct with respect to Booking.com's application for .hotels, including in evaluating Booking.com's Request for Reconsideration, was fully consistent with ICANN's Articles of Incorporation, its Bylaws and the procedures established in the Guidebook; and the fact that Booking.com disagrees with the SSP's determination to put .hotels and .hoteis in a contention set does not give rise to an IRP.

103.   ICANN asks the Panel to deny Booking.com's IRP Request.

VI.   ANALYSIS

A. The Panel's Authority

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[92] Sur-Reply, ¶ 20-42.

[93] A number of these applications were subsequently withdrawn.

[94] Identical pairs, of course, received a score of 100% for visual similarity under the SWORD algorithm.

[95] Response, ¶ 53.

104. The jurisdiction and authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws. To recap, Article IV, Section 3 of the Bylaws provides:

> 4. [The IRP Panel] shall be charged with <u>comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.</u> The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
>
> a. did the Board act without conflict of interest in taking its decision?;
>
> b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
>
> c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?
>
> [...]
>
> 11. The IRP Panel shall have the authority to:
>
> [...]
>
> c. <u>declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws;</u> and
>
> d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
>
> [...]
>
> 18. [...] The IRP Panel <u>shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties</u> [...]

> [Underlining added]

105. Similarly, Article 8 of the Supplementary Procedures reads:

> **8. Standard of Review**
>
> The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
>
> If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

106. There is no dispute as regards the Panel's duty to compare the actions of the Board to ICANN's Articles of Incorporation and Bylaws (and, in this case, Guidebook) with a view to

declaring whether those actions are inconsistent with applicable policies. Where the parties disagree is with respect to the standard of review to be applied by the Panel in assessing Board conduct.

107.   ICANN submits that its Bylaws "specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board ... the rules are clear that the appointed IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board."[96] Booking.com argues that this "is simply wrong. No such specification is made in ICANN's Bylaws or elsewhere, and a restrictive interpretation of the standard of review would ... fail to ensure accountability on the part of ICANN and would be incompatible with ICANN's commitment to maintain (and improve) robust mechanisms for accountability."[97]

108.   In the opinion of the Panel, there can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled – indeed, required – to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed "[a]ny ICANN body making a recommendation or decision") shall itself "determine which core values are most relevant and how they apply to the specific circumstances of the case at hand."

109.   In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN's best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook.

110.   There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. Nor, in this case, does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. In this regard it is recalled that Booking.com itself repeatedly stresses that it does not contest the validity or fairness of the string similarity review process as set out in the Guidebook, but merely whether ICANN's actions were consistent with various elements of that process. Stated differently, our role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable.

111.   Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below, the IRP Panel is charged with "objectively" determining whether

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[96] Response, ¶ 24.

[97] Reply, ¶ 6.

or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness.

112. In the only other IRP of which the Panel is aware in which such questions were addressed in a published decision, the distinguished members of the IRP panel had this to say about the role of an IRP panel, and the applicable standard of review, in appraising Board action:

> The Internet Corporation for Assigned Names and Numbers is a not-for profit corporation established under the law of the State of California. That law embodies the 'business judgment rule'. Section 309 of the California Corporations Code provides that a director must act 'in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders...' and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In 'recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization' – including ICANN -- ICANN is charged with 'promoting the global public interest in the operational stability of the Internet...' ICANN 'shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law...' Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International [sic] Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. <u>In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially</u>. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN ... that bear on the propriety of its conduct. In the instant case, <u>it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative</u>.[98]

[Underlining added.]

113. While on no way bound by that decision, we agree with its conclusions in this respect.

114. At the end of the day we fail to see any significant difference between the parties' positions in this regard. The process is clear, and both parties acknowledge, that the Panel is tasked with determining whether or not the Board's actions are consistent with ICANN's Articles of Incorporation, Bylaws and the Guidebook. Such a determination calls for what the panel in

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[98] ICDR Case No. 50 117 T 00224 08, *ICM Registry, LLC v. ICANN*, Declaration dated 19 February 2010 ("*ICM Registry*"), ¶ 136.

the *ICM Registry* matter called an "objective" appraisal of Board conduct as measured against the policies and rules set out in those instruments; all agree that it is the Articles, Bylaws and Guidebook which are determinative.

115.   That being said, we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an "IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board." In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board's action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves[99]), but merely to apply them to the facts.

116.   With the foregoing firmly in mind, the Panel turns now to the issues to be determined in order to resolve the present dispute.

B. The String Similarity Review Process

117.   The Panel is not unsympathetic to Booking.com's complaints regarding the string similarity review process as established by the Guidebook. There is no question but that that process lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness. For example, the Guidebook provides no means for applicants to provide evidence or make submissions to the SSP (or any other ICANN body) and so be fully "heard" on the substantive question of the similarity of their applied-for gTLD strings to others.

118.   Indeed, as stated at the outset of this Declaration, these observations and the concerns that they engender were voiced by several members of the ICANN Board's New gTLD Program Committee which voted to accept the BGC's Recommendation to deny Booking.com's Request for Reconsideration. The Panel can do no better than reproduce the statements made by the NGPC members in this respect, as recorded in the minutes of the NGPC's 10 September 2013 meeting:[100]

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[99] As discussed in more detail in the following section (at para. 117 and following) and again at Part IV of this Declaration, the important questions that Booking.com highlights in its pleadings, as to whether the string similarity review process is consistent with ICANN's guiding principles of transparency and fairness, and regarding the published views of various members of ICANN's NGPC in this respect, are matters which the ICANN Board, in its discretion, may wish to consider on its own motion in the context of the present case, in accordance with its authority under Section 5.1 (Module 5-4) of the Guidebook, or when it issues the Guidebook for round two of the New gTLD Program. Those questions include a lack of clarity surrounding the way in which the string similarity review is conducted by the SSP, and the absence of any means for applicants to be heard in the string similarity review process where they may have evidence to adduce or arguments to make (such as the evidence and arguments presented by Booking.com to this Panel), which could in fact be relevant to the SSP's determination.

[100] Request, Annex 16.

- Mr. George Sadowski stated his intention to abstain from the vote because, although "he understood that the BGC did the right thing, [he] thought the end result that was contrary to ICANN's ... and the user's best interests."

- Ms. Olga Madruga-Forti also stated her intention to abstain from voting on the BGC recommendation "because there was not sufficient rationale provided for why the string similarity review panel made its determination."

- In response to a comment by the Chair that the Request for Reconsideration deserved to be denied "[b]ecause the process was followed," Mr. Ray Plzak "agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don't agree with the outcome to make an objection, other than using a Reconsideration Request."

- Mr. Plzak "recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits."

- Ms. Madruga-Forti agreed and "recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted."

- Mr. Bill Graham also agreed with Mr. Plzak's suggestion, and noted that "generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members."

- The Chair "agreed with [Mr. Graham's] sentiment."

- The General Counsel and Secretary noted that ICANN ... "has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns."

119. Ultimately, five members of the NGPC voted in favour of the resolution accepting the BGC's Recommendation; two members were unavailable to vote; and four members abstained. The abstaining members offered the following voting statements:

- Mr. Plzak stated that he abstained from voting "because he is disappointed in what is being done to remedy the situation. [He] would like to see more resolve to fix the process."

- Ms. Madruga-Forti stated that:

    [T]he BGC has done an appropriate job of applying a limited review standard to the application for reconsideration, but unfortunately, in this circumstance, to apply that limited review accompanied by a lack of information regarding the rationale of the string similarity review panel is not possible in a logical and fair manner. The public interest would not be served by applying the limited review standard without proper information on the basis and reasoning for the decision of the panel. In my opinion, the public interest would be better served by abstaining and continuing to explore ways to

establish a better record of the rationale of the string similarity review panel in circumstances such as this.

- Mr. Kuo-Wei Wu agreed with Ms. Madruga-Forti's and Mr. Plzak's voting statements.

- Mr. Sadowsky provided the following detailed statement:

I have a strong concern regarding the ratification of the BGC recommendation to deny the reconsideration request regarding string contention between .hoteis and .hotels, and I therefore have therefore abstained when the vote on this issue was taken.

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process. As such, it can be useful, but it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the ... community and/or Internet users in general.

The rationale underlying the rejection of the reconsideration claim is essentially that the string similarity process found that there was likely to be substantial confusion between the two, and that therefore they belonged in a contention set. Furthermore, no process has been identified as having been violated and therefore there is nothing to reconsider. As a Board member who is aware of ICANN's ... Bylaws, I cannot vote against the motion to deny reconsideration. The motion appears to be correct based upon the criteria in the Bylaws that define the reconsideration process and the facts in this particular case. However, I am increasingly disturbed by the growing sequence of decisions that are based upon a criterion for user confusion that, in my opinion, is not only both incomplete and flawed, but appears to work directly against the concept that users should not be confused. I am persuaded by the argument made by the proponents of reconsideration in this case that users will in fact not be confused by .hoteis and .hotels, since if they enter the wrong name, they are very likely to be immediately confronted by information in a language that they did not anticipate.

Confusion is a perceptual issue. String similarity is only one consideration in thinking about perceptual confusion and in fact it is not always an issue. In my opinion, much more perceptual confusion will arise between .hotel and .hotels than between .hotels and .hoteis. Yet if we adhere strictly to the Guidebook and whatever instructions have or have not been given to string similarity experts, it is my position that we work against implementing decisions that assist in avoiding user confusion, and we work in favor of decisions that are based upon an incorrect, incomplete and flawed ex ante analysis of the ICANN Network real issues with respect to user confusion.

The goal of the string similarity process is the minimization of user confusion and ensuring user trust in using the DNS ... The string similarity exercise is one of the means in the new gTLD ... process to minimize such confusion and to strengthen user trust. In placing our emphasis, and in fact our decisions, on string similarity only, we are unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.

I cannot and will not vote in favor of a motion that reflects, directly or indirectly, an unwillingness to depart from what I see as such a flawed position and which does not reflect in my opinion an understanding of the current reality of the situation.

120.   These statements reflect to an important degree the Panel's own analysis.

121.   The elements of the string similarity review process were established and widely published several years ago, after extensive consultation and debate among ICANN stakeholders and the Internet community. Booking.com correctly describes the process established (or "crystallized") in the Guidebook as a component of "a consensus policy" concerning the introduction of new gTLDs.[101]

122.   The Guidebook makes clear that, as part of the initial evaluation to which all applied-for gTLDs are subject, each string would be reviewed for a number of factors, one of which is "string similarity", which involves a determination of "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion"[102]. The term "user" is elaborated elsewhere in the Guidebook, which speaks of confusion arising "in the mind of <u>the average, reasonable Internet user</u>."[103]

123.   The Guidebook explains that string similarity review comprises merely a "<u>visual similarity check</u>",[104] with a view to identifying only "<u>visual string similarities</u> that would create a probability of user confusion."[105]

124.   The Guidebook makes clear that string similarity reviews would be conducted by an independent third party – the SSP – that would have wide (though not complete) discretion both in formulating its methodology and in determining string similarity on the basis of that methodology.

125.   Section 2.2.1.1.2 of the Guidebook, titled "Review Methodology", provides that the SSP "is informed <u>in part</u> by an <u>algorithmic score</u> for … visual similarity," which "will provide one objective measure for consideration by the [SSP]." Section 2.2.1.1.2 further states that, in addition to "examin[ing] all the algorithm data," the SSP will "perform <u>its own review of similarities between strings</u> and whether they rise to the level of string confusion." It is noted that the objective algorithmic score is to be treated as "only indicative". Crucially, "the final determination of similarity is <u>entirely up to the [SSP's] judgment</u>." (Underlining added)

126.   In sum, the Guidebook calls for the SSP to determine whether two strings are so "visually similar" as to create a "probability of confusion" in the mind of an "average, reasonable Internet user." In making this determination, the SSP is informed by an "algorithmic score", to ensure that the process comprises at least one "objective measure". However, the algorithmic score is not determinative. The SSP also develops and performs "its own review". At the end of the day, the determination is entirely a matter of "the [SSP's] judgment."

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[101] Request, ¶ 13.

[102] Guidebook, §2.2 (Module 2-4).

[103] Guidebook, §2.2.1.1.2. (Underlining added)

[104] Guidebook, §2.2.1.1. (Underlining added)

[105] Guidebook, §2.2.1.1.1. (Underlining added)

127. By its very nature this process is highly discretionary. It is also, to an important degree, subjective. The Guidebook provides no definition of "visual similarity", nor any indication of how such similarity is to be objectively measured other than by means of the SWORD algorithm. The Guidebook provides no definition of "confusion," nor any definition or description of an "average, reasonable Internet user." As Mr. Sadowski of the NGPC put it: "Confusion is a perceptual issue." (Mr. Sadowski further noted: "String similarity is only one consideration in thinking about perceptual confusion, and in fact it is not always an issue.) The Guidebook mandates the SSP to develop and apply "its own review" of visual similarity and "whether similarities rise to the level of user confusion", in addition to SWORD algorithm, which is intended to be merely "indicative", yet provides no substantive guidelines in this respect.

128. Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms – for example, to inform the SSP's review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations – which Booking.com claims are required under the applicable rules. Clearly, certain ICANN NGPC members themselves consider that such input would be desirable and that changes to the process are required in order for the string similarity review process to attain its true goal, which Mr. Sadowsky referred to as "the minimization of user confusion and ensuring user trust in using the DNS". However, as even the abstaining members of the NGPC conceded, the fact is that the sort of mechanisms that Booking.com asserts are required (and which those NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.

129. We add that we agree with ICANN that the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com's claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN's Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws. As ICANN expressed during the hearing, if Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.

130. When asked during the hearing about its failure to object timely, Booking.com argued that it could not have known how the Board's actions – that is, how the process established in the Guidebook – would affect it prior to the submission of its application for .hotels. However, that is not a persuasive or meritorious answer. As did all stakeholders, Booking.com had the opportunity to challenge the Board's adoption of the Guidebook, at the time, if it considered any of its elements to be inconsistent with ICANN's Articles of Incorporation or Bylaws.

C. The Case of .hotels

131. In the light of the preceding analysis of Booking.com's challenge concerning the ICANN Board's actions in relation to the string similarity review process generally, the Panel is not

persuaded by its challenge concerning the Board's conduct in relation to the review of .hotels specifically.

132. There are two principal elements to this part of Booking.com's case: a challenge in relation to the process followed by the SSP; and a challenge in relation to the Board's handling of Booking.com's Request for Reconsideration of the SSP's determination. However, the fundamental obstacle to Booking.com's case is that *the established process was followed* in all respects.

133. Booking.com itself acknowledges that "the process was followed" by the SSP, which determined that .hotels and .hoteis were so visually similar as to warrant being placed in a contention set. So too did all of the NGPC members who commented on the matter recognize that "the process was followed" – for all their stated misgivings concerning the outcome of the process.

134. The same is true of the Request for Reconsideration. The Panel is struck by the extent and thoughtfulness not only of the NGPC's consideration of the issue, certain aspects of which are discussed above, but of the BGC's detailed analysis and its Recommendation to the NGPC, on the basis of which Booking.com's Request for Reconsideration was denied. Contrary to Booking.com's allegations, in neither instance was this merely a blind acceptance of a decision of a subordinate body. In fact, the reconsideration process itself, however limited and perhaps imperfect it may be, is inconsistent with Booking.com's claims of lack of "due process".

135. Although not addressed in great detail by the parties, the Panel considers several observations made by the BGC in its 1 August 2013 Recommendation to be particularly apposite:

> * *These standing requirements [for Requests for Reconsideration] are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff [or the Board] acted in contravention of established policies.*[106]
>
> * *Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.*[107]
>
> * *Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the [SSP] decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review*

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[106] BGC Recommendation, p. 2.

[107] BGC Recommendation, p. 4. The BGC explains that "Because the basis for the Request is not Board conduct, regardless of whether the 20 December 2012 version, or the 11 April 2013 version, of the Reconsideration Bylaws is operative, the BGC's analysis and recommendation below would not change."

methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology, Booking.com is asking the BGC (and the Board through the New gTLD Program Committee (NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the decision. In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of [SSP] decisions. While Booking.com may have multiple reasons as to why it believes that its application for .hotels should not be in contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the decisions of the evaluation panels.[108]

▪ Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that "it is contrary to ICANN policy to put them in a contention set." (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the [SSP]. No actual policy or process is cited by Booking.com, only the suggestion that – according to Booking.com – the standards within the Applicant Guidebook on visual similarity should have resulted in a different outcome for the .hotels string. This is not enough for Reconsideration.[109]

▪ Booking.com argues that the contention set decision was taken without material information, including Booking.com's linguistic expert's opinion, or other "information that would refute the mistaken contention that there is likely to be consumer confusion between '.hotels' and '.hoteis.'" (Request, page 7.) However, there is no process point in the String Similarity Review for applicants to submit additional information. This is in stark contrast to the reviews set out in Section 2.2.2 of the Applicant Guidebook, including the Technical/Operational review and the Financial Review, which allow for the evaluators to seek clarification or additional information through the issuance of clarifying questions. (AGB, Section 2.2.2.3 (Evaluation Methodology).)[110]

▪ Just as the process does not call for additional applicant inputs into the visual similarity review, Booking.com's call for further information on the decision to place .hotels and .hoteis in a contention set ... is similarly not rooted in any established ICANN process at issue.[...] While applicants may avail themselves of accountability mechanism to challenge decisions, the use of an accountability mechanism when there is no proper ground to bring a request for review under the selected mechanism does not then provide opportunity for additional substantive review of decisions already taken.[111]

▪ [W]hile we understand the impact that Booking.com faces by being put in a contention set, and that it wishes for more narrative information regarding the [SSP's] decision, no such narrative is called for in the process.[112]

▪ The Applicant Guidebook sets out the methodology used when evaluating visual similarity of strings. The process documentation provided by the String Similarity Review Panel describes the steps followed by the [SSP] in applying the methodology

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[108] BGC Recommendation, p. 5.

[109] BGC Recommendation, p. 6.

[110] BGC Recommendation, p. 6.

[111] BGC Recommendation, pp. 6-7.

[112] BGC Recommendation, p. 7.

set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of [SSP's] reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).[113]

* *The [SSP] reviewed all applied for strings according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the [SSP], ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the [SSP] considered its output as "advice" to ICANN (as stated in its process documentation) is not the end of the story. Whether the results are transmitted as "advice" or "outcomes" or "reports", the important query is what ICANN was expected to do with that advice once it was received. ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. Therefore, Booking.com is actually proposing a new and different process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.[114]*

* *As there is no indication that either the [SSP] or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hoteis in a non-exact contention set, this Request should not proceed.[115]*

136. These excerpts of the BGC Recommendation not only illustrate the seriousness with which Booking.com's Request for Reconsideration was heard, they mirror considerations to which we fully subscribe and which we find apply as well, with equal force and effect, in the context of Booking.com's IRP Request.

137. It simply cannot be said – indeed, it is not even alleged by Booking.com – that the established process was not followed by the ICANN Board or any third party either in the initial string similarity review of .hotels or in the reconsideration process.

138. Booking.com was asked at the hearing to identify *with particularity* the ICANN Board's actions (including inactions) in this case that it claims are inconsistent with ICANN's Articles of Incorporation, Bylaws or the Guidebook and regarding which it asks the Panel to render a declaration. It identified four:

* <u>The Board's adoption of certain provisions of the Guidebook</u>, including the allegedly ill-defined, unfair and non-transparent procedures for selecting the SSP and supervising the SSP's performance of the string similarity review process. As discussed, any claims in this regard are time-barred.

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[113] BGC Recommendation, p. 7.

[114] BGC Recommendation, p. 8.

[115] BGC Recommendation, p. 10.

- The Board's acceptance of the SSP determination. As ICANN argues, there was no action (or inaction) by the Board here, no decision made (or not made) by the Board or any other body to accept the SSP's determination. The Guidebook provides that applied-for strings "*will* be placed in contention set" where the SSP determines the existence of visual similarity likely to give rise to user confusion. Simply put, under the Guidebook the Board is neither required nor entitled to intervene at this stage to accept or not accept the SSP's determination. Booking.com is correct that the Board could nevertheless have stepped in and reversed the SSP determination under Section 5.1 (Module 5-4) of the Guidebook, but did not do so; that inaction is addressed below.

- The Board's denial of Booking.com's Request for Reconsideration. As discussed above, there is nothing in the evidence that even remotely suggests that ICANN's conduct in this regard was inconsistent with its Articles, Bylaws or the Guidebook. On the contrary, we have already stated that the detailed analysis performed by the BGC and the extensive consideration of the BGC Recommendation by the NGCP undermine any claim that ICANN failed to exercise due care and independent judgment, or that its handling of the Request for Reconsideration was inconsistent with applicable rules or policy. As discussed above, just as in the present IRP, the question in the reconsideration process is whether the established process was followed. This was the question that the BGC and NGPC asked themselves in considering Booking.com's Request for Reconsideration, and which they properly answered in the affirmative in denying Booking.com's request.

- The Board's refusal to "step in" and exercise its authority under Section 5.1 (Module 5-4) of the Guidebook to "individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community." As pointed out by ICANN during the hearing, the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com. In any case, the Panel does not believe that the Board's inaction in this respect was inconsistent with ICANN's Articles of Incorporation or Bylaws or indeed with ICANN's guiding principles of transparency and fairness, given (1) Booking.com's concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com's Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com's real dispute seems to be with the process itself rather than how the process was applied in this case (given that, as noted, Booking.com concedes that the process was indeed followed).

139.   The Panel further considers that these – in addition to any and all other potential (and allegedly reviewable) actions identified by Booking.com during the course of these proceedings – fail on the basis of Booking.com's dual acknowledgement that it does not challenge the validity or fairness of the string similarity review process, and that that process was duly followed in this case.

140. Finally, the panel notes that Booking.com's claim – largely muted during the hearing – regarding alleged "discrimination" as regards the treatment of its application for .hotels also founders on the same ground. Booking.com acknowledges that the established string similarity review process was followed; and there is absolutely no evidence whatsoever that .hotels was treated any differently than any other applied-for gTLD string in this respect. The mere fact that the *result* of the string similarity review of .hotels differed from the results of the reviews of the vast majority of other applied-for strings does not suggest discriminatory treatment. In any event, the Panel cannot but note the obvious, which is that .hotels is not alone in having been placed in contention by the SSP. So too was .hoteis; and so too were .unicom and .unicorn. Moreover, and once again, it is recalled that Booking.com does not claim to challenge the merits of the string similarity review, that is, the determination that .hotels and .hoteis are so visually similar as to warrant placement in a contention set.

D. Conclusion

141. In launching this IRP, Booking.com no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any IRP applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN's Articles of Incorporation or Bylaws. In fact, Booking.com acknowledges those obstacles, albeit inconsistently and at times indirectly.

142. Booking.com purports to challenge "the way in which the [string similarity review] process was established, implemented and supervised by (or under the authority of) the ICANN Board"; yet it also claims that it *does not challenge the validity or fairness of the string similarity review process as set out in the Guidebook.* It asks the Panel to overturn the SSP's determination in this case and to substitute an alternate result, in part on the basis of its own "expert evidence" regarding similarity and the probability of user confusion as between .hotels and .hoteis; yet it claims that it *does not challenge the merits of* the SSP determination and it acknowledges that *the process set out in the Guidebook was duly followed* in the case of its application for .hotels.

143. In sum, Booking.com has failed to overcome the very obstacles that it recognizes exist.

144. The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP), that could be considered to be inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (or any staff or third party) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (or any staff or third party) in relation to the string similarity review of .hotels in particular.

145. More particularly, the Panel finds that the string similarity review performed in the case of .hotels was not inconsistent with the Articles or Bylaws or with what Booking.com refers to as the "applicable rules" as set out in the Guidebook.

146. To the extent that the Board's adoption and implementation of specific elements of the new gTLD Program and Guidebook, including the string similarity review process, could

potentially be said to be inconsistent with the principles of transparency or fairness that underlie ICANN's Articles and Incorporation and Bylaws (which the Panel does not say is the case), the time to challenge such action has long since passed.

147.   Booking.com's IRP Request must be denied.

VII.   THE PREVAILING PARTY; COSTS

148.   Article IV, Section 3(18) of the Bylaws requires that the Panel "specifically designate the prevailing party." This designation is germane to the allocation of costs, given that Article IV, Section 3(18) provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."

149.   The same provision of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."

150.   Similarly, the Supplementary Procedures state, at Article 11:

> The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the
>
> prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.
>
> In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

151.   The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the Panel members and of the ICDR (we refer to all of these costs as "**IRP costs**").

152.   ICANN is undoubtedly the prevailing party in this case. That being said, the Panel considers that the nature and significance of the issues raised by Booking.com, and the contribution to the "public interest" of its submissions, are such that it is appropriate and reasonable that the IRP costs be shared equally by the parties. We consider that the extraordinary circumstances of case – in which some members of ICANN's New gTLD Program Committee have publicly declared that, in their view, the rules on the basis of which Booking.com's claims fail should be reconsidered by ICANN – warrants such a holding.

153.   The Panel cannot grant Booking.com the relief that it seeks. A panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are

or are not inconsistent with ICANN's Articles of Incorporation and Bylaws. We have found that the actions in question are not inconsistent with those instruments. The process established by ICANN under its Articles of Incorporation and Bylaws and set out in the Guidebook was followed, and the time to challenge that process (which Booking.com asserts is not its intention in these proceedings in any event) has long passed.

154.   However, we can – and we do – acknowledge certain legitimate concerns regarding the string similarity review process raised by Booking.com, discussed above, which are evidently shared by a number of prominent and experienced ICANN NGPC members. And we can, and do, encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, more immediately, in the exercise of its authority under Section 5.1 (Module 5-4) of the Guidebook (which it may choose to exercise at any time, in its discretion) to consider whether, notwithstanding the result of the string similarity review of .hotels and .hoteis, approval of both of Booking.com's and Despegar's proposed strings would be in the best interest of the Internet community.

FOR THE FOREGOING REASONS, the Panel hereby declares:

(1)   Booking.com's IRP Request is denied;

(2)   ICANN is the prevailing party;

(3)   In view of the circumstances, each party shall bear one-half of the costs of the IRP Provider, including the fees and expenses of the Panel members and the fees and expenses of the ICDR. As a result, the administrative fees and expenses of the ICDR, totaling US$4,600.00, as well as the compensation and expenses of the Panelists totaling US$163,010.05 are to be borne equally. Therefore, ICANN shall pay to Booking.com the amount of US$2,300.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Booking.com

(4)   This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

Hon. A. Howard Matz
Date: March 2, 2015

David H, Bernstein
Date:

Stephen L. Drymer,
Chair of the IRP Panel
Date:

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

March 2, 2015 ____   ____ _[signature]_ ____
Date   Hon. A. Howard Matz

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_____   _____
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_____   _____
Date   Stephen L. Drymer

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March 2, 2015
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Date   David H, Bernstein

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Date   Stephen L. Drymer

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154.   However, we can – and we do – acknowledge certain legitimate concerns regarding the string similarity review process raised by Booking.com, discussed above, which are evidently shared by a number of prominent and experienced ICANN NGPC members. And we can, and do, encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, more immediately, in the exercise of its authority under Section 5.1 (Module 5-4) of the Guidebook (which it may choose to exercise at any time, in its discretion) to consider whether, notwithstanding the result of the string similarity review of .hotels and .hoteis, approval of both of Booking.com's and Despegar's proposed strings would be in the best interest of the Internet community.

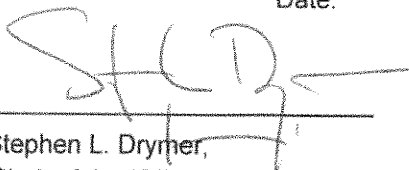FOR THE FOREGOING REASONS, the Panel hereby declares:

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(4)   This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

Hon. A. Howard Matz
Date:

David H, Bernstein
Date:

Stephen L. Drymer,
Chair of the IRP Panel
Date: 3 March 2015

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.
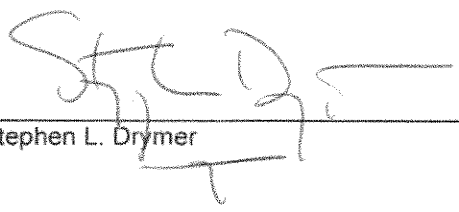
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Date

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Date

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3 March 2015
_____
Date

_____
Stephen L. Drymer

Reference Material 39.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
Pursuant to the Internet Corporation for Assigned Names and Number's (ICANN) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process.*

Gulf Cooperation Council ("GCC")) Gulf Cooperation Council Building) Contact Information Redacted)))) (Claimant))) Represented by Natasha Kohne and Kamran) Salour of Akin Gump Strauss Hauer & Feld,) Contact Information Redacted)))) And)) **Internet Corporation for Assigned Names**) **Numbers ("ICANN")**) 12055 Waterfront Drive, Suite 300) Los Angeles, CA 90094-2)) (Respondent)))	**ICDR Case No. 01-14-0002-1065**

Represented by Eric Enson, Rachel Zernik, and
Jeffrey LeVee of Jones Day, Contact Information Redacted
Contact Information Redacted

INTERIM DECLARATION ON EMERGENCY REQUEST
FOR INTERIM MEASURES OF PROTECTION

John A.M. Judge
Emergency IRP Panel
12 February 2015

I. INTRODUCTION

1. The Claimant Gulf Cooperation Council (the "Claimant" or "GCC") commenced this proceeding by filing a Notice of Independent Review with the International Centre for Dispute Resolution ("ICDR") on December 5, 2014 in accordance with the Bylaws of the Respondent, the Internet Corporation for Assigned Names and Numbers ("ICANN"). The purpose of this filing is to review the approval by ICANN of a new generic top level domain ("gTLD") for .PERSIANGULF and its proposed action to enter into a registry agreement with a third party for the award and operation of that top level domain under the New gTLD Program of ICANN. On the same day, December 5, 2014, the GCC also has sought emergency interim measures pursuant to the Rules of the (ICDR) for the appointment of an Emergency Arbitrator and also for an order compelling ICANN to refrain from taking any further steps to sign a registry agreement for .PERSIANGULF until the Independent Review Panel has been concluded.

2. Although the ICANN Bylaws and paragraph 12 of the Supplementary Rules for ICANN's Independent Review Process expressly preclude the grant of emergency measures of protection, ICANN has consented to the appointment of an Emergency IRP Panellist and to the consideration and disposition of GCC's Request for Emergency Measures in accordance with the Rule 6 of the ICDR Rules in effect June 1, 2014. By appointment dated 9 December 2014, John A.M. Judge was appointed by the ICDR as the Emergency IRP Panellist to consider the Claimant's Request for Emergency Measures.

3. The applicant for the proposed gTLD .PERSIANGULF is a private Turkish company which is not a party to the Independent Review Process nor to this Request for Emergency Measures of Protection. However in resisting the application for emergency measures, counsel for ICANN advanced not only the interests of ICANN but also those of that applicant which is seeking to secure a registry agreement for the proposed domain in dispute.

4. The Emergency IRP Panellist has carefully reviewed the following written submissions, evidence and authorities filed by the Claimant and the Respondent:

   a. The Notice of Independent Review and the accompanying Request for Independent Review Process, both dated 5 December 2014, with Annexes 1-34 (392 Pages) (the "Claimant IRP Request") and the Expert Report of Steven Tepp filed by the GCC;

 b. The Request for Emergency Arbitrator and Interim Measures of Protection also dated 5 December 2014, with Annexes 1 - 18 (269 pages), filed by the GCC (the "Claimant ER Request") ;

 c. ICANN's Response to the Request for Emergency Relief dated 17 December 2014 with Annexes R-ER-1-18 (approximately 665 pages) (the "ICANN Response");

 d. The Reply of GCC dated 22 December 2014 with the Witness Statement of Abdulrahman Al Marzouqi signed 22 December 2014, with attached letter exhibit (the "Claimant Reply" or the "Reply");

 e. ICANN'S Cooperative Engagement Process provided by counsel for ICANN on 23 December 2014.

Oral submissions from counsel for each party were also received by way of telephone conference call on 23 December 2014.

5. Based on the review of these materials, filed, and the oral submissions, this Emergency Panellist is satisfied for the reasons more fully set out herein that interim relief is warranted and therefore hereby declares on an interim basis that ICANN shall refrain from taking any steps to sign a registry agreement for the new gTLD .PERSIANGULF, until further order by an Independent Review Panel to be constituted, such declaration being expressly conditional on the terms and conditions as set out in paragraph 96 hereof.

II. BACKGROUND FACTS

a. The Parties

6. The GCC is a political and economic alliance of six Arab nations whose members are: (1) United Arab Emirates; (2) Saudi Arabia; (3) Kuwait; (4) Qatar; (5) Bahrain; and, (6) Oman. All of the member states border on that body of water separating the Arabian peninsula and the geographic area of the Islamic Republic of Iran ("Iran"), an area formerly known as Persia. That body of water is referred to in these reasons by way of the neutral term the "Gulf". Among other things, the GCC promotes common economic, cultural, religious and geographic beliefs shared by these Arab nations, including a belief that the proper name for the Gulf is the "Arabian Gulf".

7. ICANN is a California not-for-profit public benefit corporation formed in 1998 for the express purpose of promoting the public interest in the operational stability of the Internet by, inter alia, "performing and overseeing functions related to the coordination of the Internet domain name system ('DNS'), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system" (Exhibit R-ER-1, Articles of Incorporation, para. 3). According to ICANN's Bylaws, Article 1 Section 1, its mission is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operations of the Internet's unique identifier systems" including the DNS.

8. ICANN is itself a complex organization which facilitates input from stakeholders around the world and acts, as submitted by counsel, "as a community of participants". ICANN's Articles of Incorporation further provide that in carrying out its mandate, ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets." (Ex. R-ER-1, Articles of Incorporation, para. 4).

b. The Historical Name Dispute: "Persian Gulf" vs. "Arabian Gulf"

9. There has been a long standing dispute for more than fifty years between Arab states, many of which are in the GCC, and Iran, which is a non-Arab nation bordering the Gulf, over the proper name for the Gulf. Iran uses the term Persian Gulf while the Arab states refer to it as the Arabian Gulf.

10. This naming dispute is part of a broader series of historical differences and conflicts between Iran and one or more Arabian members of the GCC involving various matters of culture, religion, contested sovereignty of lands and islands, the use of commercial air space, participation in sporting events and even censorship of publications due to the use of one or other of the disputed terms to describe the Gulf. As a result of this history of disputes, the GCC and its members are extremely sensitive to use of the term "Persian Gulf" in virtually any context, including its use as a top level domain. Various examples of the ongoing dispute are more particularly described in the Claimant's IRP Request at paras. 25-29.

11. ICANN does not dispute that the GCC holds strong beliefs in its position regarding this naming dispute. However, ICANN challenges the merits of GCC's position in this IRP proceeding and on this Request for Emergency Measures on numerous grounds discussed below.

c. ICANN's Structure and the New gTLD Program

12. **Organizational Structure.** As a not for profit corporation, the business and affairs of ICANN are controlled and conducted by the ICANN Board, like any other corporation (Bylaws Article II, Section 1). However, ICANN has created a complex organization and governing structure, quite unlike that of any private or public corporation. It is a structure which promotes diversity, inclusion and participation on a global basis not only through its Board and staff, but also through various Supporting Organizations and Advisory Committees (see the Bylaws, Articles V to XI).

13. One such committee is the Governmental Advisory Committee (the "GAC") consisting of members appointed by and representing governments from around the world to consider and to advise ICANN on internet related issues and concerns of governments, particularly where there is an interaction between ICANN policies and national laws and international agreements or on matters otherwise engaging other public policy issues (Bylaws, Article XI, Section 2). Members of the Claimant GCC are members of the GAC.

14. Since the deliberations and advice of the GAC at specific times play an important role in the narrative of events on this application, it is appropriate to clarify the function of the GAC in relation to ICANN. According to ICANN's Bylaws, the GAC itself does not act for or on behalf of ICANN. Instead, it acts as an important advisory resource for ICANN. The interaction between the GAC and ICANN, acting through its Board, is specifically addressed in various provisions of the Bylaws including Article XI 2.1 as follows:

> j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
>
> k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to

public policy issues falling within their responsibilities.

It is clear that the ICANN Board is not bound by the GAC Advice. However, it must consider it and provide an explanation if that advice is not followed.

15. While complex in its structure, ICANN also emphasizes and promotes accountability and transparency in its practices and decision making, objectives which are critical for its work in relation to the Internet and its global community of users and participants to ensure fairness in its procedures (see Bylaws Article III). Indeed, the Bylaws establish various procedures for the review of various actions or inactions of the ICANN Board. The Independent Review Process is one such process intended to facilitate the review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws. It is this Independent Review Process (the "IRP") which has been invoked by the GCC. The material procedures and requirements for the IRP are reviewed more fully below.

16. **The New gTLD Program.** Historically, there have been a limited number of top level domain names, such as .com, .net and .org, as well as the country specific domains. As confirmed in the Articles of Incorporation, Article 3.(iii), the mandate of ICANN, pursued over many years, has been to develop procedures for expanding the number of top level domains and increasing the number of companies to act as registrars for the sale of domain name registrations. These efforts ultimately led to the introduction of the New gTLD Program to significantly expand the Internet's naming system and to thereby expand consumer choice and encourage competition and innovation. ICANN, with its community of supporting organizations and advisory committees, painstakingly developed through many iterations over time an Applicant Guidebook to set out the application instructions and procedures for the delegation of new generic domain names.

17. **GAC Input for the Applicant Guidebook.** As the Guidebook was under development, the GAC prepared its GAC Principles Regarding New gTLDs dated March 28, 2007 which set out certain GAC consensus advice to the ICANN Board on public policy principles to apply to the delegation of new gTLDs. The GAC recommended, inter alia, that the New gTLDs should respect the "sensitivities regarding terms with national, cultural, geographic and religious significance"(Claimant ER Request, Annex 1, Section 2.2.1.b). Furthermore, the GAC advised that "ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant

governments or public authorities." (Annex 1, Section 2.2.2). Finally, with respect to the implementation of these principles, the GAC advised that if "individual members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them" (Annex 1, Section 3.3). While these set out the expectations of the GAC, it must be recalled that the GAC serves only an advisory role and does not bind ICANN.

18. The gTLD Application Guidebook version 2012-06-04 (the "Guidebook") is the final version material to the application for and evaluation of the requested domain .PERSIANGULF as well as for the objection procedures which may be taken to the delegation of a proposed domain.

d. The Application for .PERSIANGULF and the Opposition of the GCC

19. On July 8, 2012, the Turkish company, Asia Green IT System Bilgisayar San. ve. Tic. Ltd. Sti ("Asia Green") applied for the registration of the gTLD .PERSIANGULF in accordance with the Guidebook. The founders of Asia Green are said to be of Persian origin (see Claimant Request for Interim Measures at p. 34 of 269; Annex 3, Asia Green application at page 4 of 50). The purpose of the gTLD .PERSIANGULF is said to provide a forum for serving people of Persian descent and heritage who are living around the world (see Asia Green application at page 5 of 50) and who share common business, cultural and religious interests in the Middle East and Persia specifically.

20. Asia Green also applied for the new gTLD .PARS. The term Pars refers to the ancient country located in southwestern Iran, and in particular Fars province, which is regarded as the cultural capital of Iran and is the original homeland of ancient Persians (Claimant Application, Annex 18, Application for PARS, page 5 of 53). The application for .PARS is essentially the same as that for .PERSIANGULF. Asia Green has in fact been granted the gTLD for .PARS and a registry agreement was signed in early September 2014 for the operation of the .PARS registry and the sale of domain names under that gTLD.

21. While the Asia Green application for .PARS proceeded without objection or opposition, the opposite is true of the .PERSIANGULF application. The GCC has opposed the .PERSIANGULF application consistently since the fall of 2012 throughout the application process.

22. ICANN has in its Response carefully reviewed the application process for .PERSIANGULF to illustrate that ICANN has at all times acted consistently with ICANN's Articles, By-Laws and the Guidebook in considering the Asia Green application and the objections of the GCC before allowing the application to proceed. In light of the position taken by ICANN on the merits of the IRP and this Request for Interim measures, it is appropriate to briefly set out the Guidebook procedures for the .PERSIANGULF application and the chronology of the steps taken by the GCC in opposition to it.

23. **The Guidebook Procedures.** The Guidebook, at 339 pages in length, sets out comprehensive procedures to which a domain application is subjected, procedures relied upon by ICANN in its opposition to the request for interim measures. Following the submission of a completed application with the requisite deposits and evaluation fees and an initial administrative review for completeness, the application is publicly posted on the ICANN website for community review and comment which may be taken into account by ICANN in determining whether an application meets the required criteria for delegation. (Exhibit R-ER-3, Guidebook 1.1.2.1 and 2). Thereafter a number of objection procedures may be triggered including:

  a. An Early Warning Notice which is a notice issued by the GAC indicating that the application is seen as potentially sensitive or problematic by one or more governments, though such a warning is not a formal objection and is not fatal to an application;

  b. A Consensus GAC Advice in which the GAC provides public policy advice to the ICANN Board based on a consensus amongst GAC members that a particular application should not proceed. While also not fatal, such GAC Advice creates a "strong presumption" for the Board that the application should not proceed. Absent a GAC consensus, there is no such presumption. (Guidebook, Articles 1.2.2.7 and Module 3, Section 3.1).

  c. A formal Objection may be filed initiating an independent dispute process leading to an expert determination on the validity of the objection based on specified and limited grounds, one being the Community Objection where there is substantial opposition to an application from a significant portion of the community to which

the gTLD domain may be explicitly or implicitly targeted(Guidebook at Article 3.2.1);

d. Independent Objection. The Independent Objector is a person appointed by ICANN with significant experience in the Internet community who exercises independent judgement in the public interest in determining whether to file and pursue a Limited Public Interest Objection or a Community Objection to an application (Guidebook, Module 3, Articles 3.2.1; 3.2.2.3; 3.2.2.4; 3.2.5).

e. Mandatory Government Support for certain Geographic Names. If the proposed domain is a geographic name, as defined in the Guidebook, then the applicant must also file documented support from or non-objection by the relevant or affected government. Such geographic names are narrowly defined to include capital city names, sub-national place names, such as a county, province or state, and certain UNESCO and UN designated regions or sub-regions. However, geographic names which do not fall within these express designations or narrow definitions do not require documented support or non-objection by the relevant government. If there is any doubt, the Guidebook further suggests that the applicant consult with the relevant government and public authority to enlist support or non-objection prior to submission. (Guidebook, Article 2.2.1.4.2)

In the event that an application successfully completes these stages, the application transitions through the delegation process which includes certain testing and technical set up and the negotiation and execution of a registry agreement.

24. The Asia Green application for .PERSIANGULF engaged all of these objection procedures, save the need for obtaining prior government support from affected governments. In that regard, it cannot be disputed that .PERSIANGULF is not within the definition of designated geographic names under the Guidebook. Therefore, Asia Green was not required to obtain the written support from the Claimant or its member states. It is also undisputed that Asia Green did not in fact consult with the Claimant or its members, whether there was any obligation to do so or not. The evidence does show that the Claimant or its member states have consistently opposed the application for .PERSIANGULF and clearly would not have supported the application if consulted.

25. **GCC Letters of Opposition.** In October 2012, representatives of the governments of the UAE, Bahrain, Qatar and Oman sent separate but similar letters to the Chair of ICANN and to the Chair of the GAC objecting to the delegation of .PERSIANGULF as a new gTLD on two grounds. First, the proposed domain referred to a geographical place whose name was disputed in light of the historical naming dispute over the Gulf. Second, the use of the proposed name targeted countries and communities bordering the Gulf (including the six member states of the GCC) which were not consulted about and did not support the use of this proposed domain, thereby confirming the absence of any community consensus for its use (Claimant ER Request, Annexes 8,9,10 and 11). Therefore, on these basic grounds, the governments objected to the delegation of the proposed domain.

26. **GAC Early Warning.** On November 20, 2012, the governments of the UAE, Bahrain, Oman and Qatar issued a GAC Early Warning objecting to the delegation and recommending that Asia Green withdraw the application for the same reasons as had been set out in the October letters of objection (Claimant ER Request, Annex 12)

27. **Review by the Independent Objector.** In December 2012, the Independent Objector completed a review of the naming dispute and the public comments against the .PERSIANGULF gTLD, concluding that an objection on either the limited public interest ground or the community objection procedure was not warranted (ICANN Response, Annex R-ER-5). With respect to the limited public interest ground, the Independent Objector noted that there were no binding international legal norms to settle the issue. Resolutions of the United Nations Conference on the Standardization of Geographical Names urge countries sharing a geographical feature to agree on a name, failing which the separate names used by each country should be accepted. As for the Community Objection, while accepting that there was a clearly delineated community implicitly targeted by the application and that a significant portion of that community opposed the application, the Independent Objector considered it "most debateable" that the gTLD would "create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community", that is the Arab communities, which was the threshold requirement under the Guidebook for the launch of an independent objection (ICAAN Response, Exhibit R-ER-5). In the view of the Independent Objector, the new gTLD should neither solve nor exacerbate the naming dispute. Instead it was appropriate to adapt to the *status quo* by taking no

position. He noted the GCC could file its own objection and could apply for the gTLD .ARABIANGULF. Therefore, the Independent Objector considered it inadvisable to file an objection.

28. **GCC's Community Objection.** On 13 March 2013, the GCC filed a Community Objection to the .PERSIANGULF application. The International Chamber of Commerce ("ICC") was designated as the dispute service provider under the Guidebook and it appointed Judge Stephen Schwebel, a noted American international jurist, to serve as the Expert Panellist to hear and determine this Community Objection.(Claimant Submission, Annex 2, Expert Determination, para. 2.)

29. **GAC Advice under the Guidebook for Pending Applications and GCC Objections.** As contemplated by the Bylaws, the Guidebook established a framework for the GAC to provide advice to the ICANN Board regarding pending gTLD applications. This is in addition to the general GAC advice provided in 2007 regarding the content of the Guidebook, as referred to in para. 17 above. Under Sections 1.1.2.7 and 3.1 of the Guidebook, any GAC member may raise concerns or sensitivities about any application with the GAC which must then consider and agree on advice to be forwarded to the ICANN Board for its consideration. Members of the Claimant raised the .PERSIANGULF application, amongst others, with the GAC and voiced objections at various meetings. The following GAC meetings and advice have been relied upon.

30. At the April 11, 2013 Beijing meeting, the GAC provided advice to the ICANN Board in respect of a number of gTLD applications. Some advice was on a consensus basis, thereby creating a presumption that the subject applications should not be approved. Other advice was on a non-consensus basis. With respect to a number of geographically based strings, including .PERSIANGULF, the GAC determined that further consideration was warranted and therefore advised ICANN simply not to proceed beyond Initial Evaluation in respect of that string (Claimant ER Request, para 13, Annex 13, GAC Beijing Communique, p 3).

31. In June 2013, the ICANN Board, acting through its New gTLD Program Committee (the "NGPC"), considered and accepted the advice of the GAC with respect to the .PERSIANGULF application, which advice was conveyed through the GAC Beijing Communique relied upon by the NGPC as being the official advice of the GAC. The NGPC decision, and rationale therefore, are set out in a resolution of the NGPC (ICANN Response,

Ex. R-ER-6) which annexed to it a table referred to as a "Scorecard" (ICANN Response, Ex R-ER-7), recording the NGPC Response to each item raised by GAC in the Beijing Communique. With respect to .PERSIANGULD, the NGPC accepted the GAC advice and it was noted in the Scorecard that the advice would not toll or suspend the processing of any of the applications.

32. At the July 13-18 Durban GAC Meeting, the GAC gave further consideration to .PERSIANGULF application , among others. This GAC meeting has generated two documents which contain conflicting information on the deliberation over .PERSIANGULF. The Claimant has relied upon the GAC Meeting Minutes, (Claimant ER Request, Annex 14 in which the discussion was recorded as follows:

> "The GAC finalized its consideration of .persiangulf after hearing opposing views, the **GAC determined that it was clear that there would not be consensus on an objection regarding this string and *therefore the GAC does not provide advice against this string proceeding.*** The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name. [emphasis added]

33. ICANN contrasts this language with the GAC Durban Communique which is received as the official document providing GAC Advice to the ICANN Board. This Communique (Claimant IRP Request, Annex 24) provides that "The GAC has finalized its consideration of the following strings, and *does not object to them proceeding:* ... ii. persiangulf (application number 1-2128-55439". This language suggests that there was in fact a consensus of the GAC members not to object to the application.

34. The Claimant's Reply Witness Adbulrahman Al Marzouqi attended the Durban meeting as the representative of the UAE and his evidence makes clear, at paragraphs 5, 6 and 7 of his Statement, that there was no consensus reached whatsoever, whether to support the application or to oppose it. The position taken by the Iranian representative and the opposing position taken Mr. Al Marzouqui for the UAE, apparently shared by others, prevented any consensus on any position regarding .PERSIANGULF. The general discord over geographic names was also reflected in the recommendation in the Durban Communique calling for further collaboration with GAC in refining the Applicant Guidebook for future rounds regarding the protection of terms with national, cultural, geographic and religious significance in accordance with the 2007 GAC Principles referenced above.

35. **ICANN Board Response and Notification September 2013.** The Durban Communique was relied upon by the NGPC of the ICANN Board as the formal statement of advice from the GAC to ICANN. Therefore, the NGPC noted and considered that GAC advice and responded to it by way of resolution and an attached "Scorecard" as follows:

> "**ICANN will continue to process the application** in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF." (emphasis added)

This NGPC resolution and the Scorecard were posted online on September 12, 2013 and the minutes and related materials were posted on 30 September 2013(the "NGPC Resolution and Scorecard"). It is this decision to "continue to process the application" which is said to be the action of the ICANN Board to approve the delegation of .PERSIANGULF and which therefore triggered the 30 period for filing a Request for an IRP. However, with the community objection still pending, the evidence is not clear as to the exact status of the application approval at that time. The ICANN Board and the NGPC did not and presumably would not unequivocally approve the delegation while the community objection was still pending.

36. **Community Objection and Expert Determination.** The Community Objection proceeded from March 2013 to October 30, 2013 when Judge Stephen Schwebel issued his Expert Determination, dismissing the Objection of the GCC. It must be noted that the necessary elements in support of a Community Objection are different from those required on an IRP. More importantly, they are significantly different from the threshold tests on an application for emergency measures in the context of an IRP. Judge Schwebel found that the GCC had met three of the four necessary elements for a successful Objection. He found that the GCC did have standing as an institution created by treaty having an ongoing relationship with a clearly delineated community, that is Arab inhabitants of the six member states of the GCC. It was plain and obvious that there was substantial opposition by the Arab inhabitants and the community to the application. It was also concluded that the Arab inhabitants would be implicitly targeted by the .PERSIANGULF gTLD. However, Judge Schwebel found that the GCC failed to meet the fourth element in that the GCC did not establish that the targeted community would "suffer the likelihood of material detriment to their rights or legitimate

interests", as required and defined under the Guidebook. Therefore, the objection was dismissed. He accepted that naming disputes such as that regarding the Gulf can be of high importance to States, "roiling international relations". However, in his view, the impact of the application .PERSIANGULF was difficult to discern and "it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute". Echoing the Independent Objector, he noted that the GCC was free to seek registration of the .ARABIANGULF. ICANN has repeated this argument in its Response although no such application for .ARABIANGULF has in fact been made by the GCC.

37. **October 2013 to December 2014: Contact between GCC and ICANN Leading to the Notice of Independent Review.** ICANN asserted in its Response that the GCC was conspicuously silent for over one year following the NGPC Resolution and Scorecard before filing the Request for Independent Review. ICANN relied on that period of delay as the bases for resisting the application. In its Reply, the GCC has endeavoured to provide an explanation and response to that position with additional evidence in the Witness Statement of Mr. Al Marzouqi on the continued dealings between the GCC and ICANN over the continued opposition of the GCC to the delegation. Following the September 2013 posting of the NGPC Resolution and Scorecard, Mr. Al Marzouqi apparently reached out to ICANN representatives. However, any efforts to resolve the matter were by agreement postponed until after the delivery of the Expert Determination since that Determination may have affected those efforts. After the October release of the Expert Determination, further discussions were apparently had without success, though the evidence of Mr. Al Marzouqi is vague on the details of these discussions.

38. The evidence of Mr. Al Marzouqi is however clear on a significant meeting held between ICANN and the GCC. It cannot be disputed that in June 2014, a meeting was arranged and held during the GCC Telecom Council Ministers Meeting in Kuwait City with the most senior representatives of ICANN, the CEO Fadi Chehade, and senior representatives of the GCC. According to the evidence of Mr. Al Marzouqi, the GCC representatives restated their concerns and objections regarding the application at that meeting. Following the meeting, these concerns were then confirmed in writing by letter dated 9 July 2014 from Mohanned Al Ghanim, Director General of the Telecommunication Regulatory Authority to the CEO of ICANN, Mr. Chehade (Letter Exhibit to the Witness Statement of Mr. Al Marzouqi). It has

not been disputed that this letter was received by ICANN. No written response from Mr. Chehade or ICANN was adduced in evidence, either before or after the oral argument of this application. No written response is referenced by Mr. Al Marzouqi in his statement. Indeed, he suggests that the only response was a suggestion in September by his unnamed "ICANN counterpart" that the GCC *may* have to file a request for independent review.

39. By September 2014, the manner of dealing with certain geographic names remained a live issue. At that time, there was no evidence of a definitive statement from ICANN that a registry agreement was about to be signed for .PERSIANGULF. By contrast, Asia Green had apparently signed a registry agreement for .PARS by early September 2014, which agreement is posted by ICANN online. Some proposed changes to the Guidebook had also been tabled which would require the agreement of relevant governments to the delegation of geographic names as new domains. (Claimant IRP Request, Annex 1, "the protection of geographic names in the new gTLDs process, v.3 August 29, 2014). Although the Claimant attributed this proposal to ICANN (Claimant IRP Request at para. 1), it appears on review to be the work of a sub-working group of the GAC, and not of ICANN itself. The evidence is not clear on this point. In any event, it serves to illustrate that the use of geographic names remained a live issue within the ICANN community of committees while the delegation of .PERSIANGULF remained pending.

40. According to Mr. Al Marzouqi, the handling of geographic names was a topic of continued discussion in October 2014 at the ICANN meetings in Los Angeles, all without a resolution. Thereafter, he advised the GCC in November to proceed with the request for an IRP which it did on December 5, 2014. He also states that at no time during the resolution efforts from September 2013 to November 2014 was it suggested that the GCC would be time barred from proceeding with an IRP.

III. THE INDEPENDENT REVIEW PROCESS AND THE REQUEST FOR INTERIM MEASURES OF PROTECTION

41. ICANN attaches considerable importance to the principle of accountability and to that end has enshrined two important procedures in Article IV of its Bylaws to ensure accountability of decisions: *1.* Reconsideration of a Board action; and, *2.* Independent Review of a Board decision or action (ICANN Response, Exhibit R-ER-1). The first provides for a review or

reconsideration of any ICANN action by the Board itself for the benefit of any person or entity materially affected by that action. That procedure was not implemented by the GCC. The second is for an Independent Review by a third party of the Board decision or action alleged by an affected party to be inconsistent with the Articles or Bylaws. The Claimant chose to proceed with the Independent Review Process, rather than a Reconsideration, as it was entitled to do.

42. Bylaw Article IV, Section 3 sets out the detailed procedures for the IRP and the following requirements were urged as material to this application:

   a. A Request for IRP must be filed within 30 days of the posting of the Board meeting minutes said to demonstrate a violation of the Articles or Bylaws(Art. IV, Section 3.3);

   b. In comparing the contested action with the Articles or Bylaws, the IRP panel must apply a standard of review that is specifically and narrowly defined, to focus on the following three questions(Art. IV, Section 3.4):

      i. Did the Board act without conflict of interest in taking its decision?

      ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in from of them?

      iii. Did the Board members exercise independent judgement in taking the decision believed to be in the best interests of ICANN?

   c. There shall be a standing panel of IRP panel members from which a panel can be readily constituted and all proceedings shall be administered by an international dispute provider (Art. IV, Section 3.6).

   d. The IRP Panel has specific and limited remedial authority (Art. IV, Section 3.11) to order, *inter alia*:

      i. Summary dismissal for frivolous or vexatious requests;

      ii. A declaration whether an action or inaction is inconsistent with the Articles or Bylaws; or,

      iii. A recommendation to the Board to stay any action or decision until such time as the Board reviews and acts upon the IRP opinion.

43. Prior to initiating a request for an IRP, a complainant is encouraged under the Bylaw to enter into a cooperative engagement process which is a voluntary ICANN process with the detailed

procedures being incorporated by reference into Bylaw Article IV, Section 3. These procedures include the tolling of the time for filing an IRP during each day of the cooperative engagement process up to fourteen days, unless a longer extension is mutually agreed in writing.

44. ICANN has also prepared the Supplementary Procedures for the IRP which confirmed the designation of the ICDR as the Independent Review Panel Provider. The ICDR Rules, together with the Supplementary Procedures and the Bylaws govern the IRP process. While the Supplementary Procedures expressly exclude the emergency measures of protection under the ICDR Rules (Paragraph 12, Supplementary Procedures), certain specified interim measures of protection may be recommended by an IRP Panel to the Board. These include a stay of any decision of the Board, such measure being consistent with those permitted under the Bylaw. As noted earlier, ICANN has agreed for the purposes only of this proceeding that an emergency arbitrator or panelist be appointed with the authority to issue an interim declaration to the ICANN Board as an emergency measure.

45. **Claimant's Position on Emergency Interim Measures.** The main submission put forward by the GCC in support of its request for emergency measures can be briefly summarized as follows:

   a. Article 6 of the ICDR Rules applies as no IRP panel has been appointed. Since ICANN is about to sign a registry agreement for .PERSIANGULF, the IRP Request will be rendered moot absent emergency interim relief (Claimant's ER Submission, para. 16);

   b. The four part test for establishing an entitlement to emergency interim relief have been met on the evidence, specifically:

      i. *Urgency.* The GCC will be deprived of a meaningful independent review if ICANN signs the registry agreement.

      ii. *Necessity.* There is no harm to either ICANN or to applicant, Asia Green, which outweighs the harm to the GCC absent any emergency interim measures. While Asia Green may be delayed in the processing of its pending application, such delay will cause no prejudice as Asia Green has the registry agreement for the .PARS gTLD which is intended to serve the

same market and constituency as it intends to target with
.PERSIANGULF.

    iii. *Protection of an Existing Right.* GCC has a right to a meaningful IRP in accordance with the ICANN Bylaws which will protected by the relief sought. That right will be useless without the emergency relief.

    iv. *A Reasonable Possibility of Success on the Merits of the IRP.* The GCC emphasized that the standard of establishing a "reasonable possibility of success" is a lower standard than a "reasonable likelihood" of success for the purpose of showing that ICANN acted in a manner inconsistent with numerous "guidelines". In the Claimant IRP Request dated December 5, 2014, the GCC placed emphasis and reliance on the GAC Principles Regarding New gTLDs presented March 28, 2007 and certain other GAC advice arising from GAC meetings in 2013 which ICANN is said to have ignored (see also Claimant's ER Request, paragraphs 21 – 25).

46. **Respondent's Position on Emergency Interim Measures.** ICANN resists the application for interim measures essentially on the general ground that ICANN did everything it was required to do under the applicable Articles and Bylaws and that it properly followed the procedures contemplated in the Guidebook. ICANN also submitted three specific grounds for denying the requested relief which can be briefly summarized as follows:

    a. The GCC is not reasonably likely to succeed on the merits of the IRP for two basic reasons. First, the IRP Request was filed long after the expiry of the 30 day filing period for doing so and is therefore time barred. Second, no ICANN Board action has been identified by the GCC said to violate the Articles or Bylaws.

    b. The unreasonable delay of over one year by the GCC in bringing the Request in and of itself justifies the dismissal of the request and serves to underscore the lack of any urgency, necessity and harm to GCC.

    c. The GCC has no demonstrable harm which outweighs the harm to others like Asia Green which has invested time, energy and money in its application. The integrity of the application process for which ICANN is responsible will also be harmed. The GCC will not be harmed as it can easily apply for .ARABIANGULF in order to serve its communities.

ICANN also reviewed in detail the procedures to be followed under the Guidebook and Bylaws and, based upon a detailed review of the chronology, submitted that ICANN did everything required of it to consider the concerns raised by the GCC members. In so doing, it took no steps inconsistent with the Articles or Bylaws.

47. **Reply of the Claimant.** In its Reply, the GCC addressed the key responding submissions of ICANN as follows:

    a. The ICANN decision and action in issue is well known and obvious – the decision to approve Asia Green's application for the new gTLD .PERSIANGULF (GCC Reply, para 11).

    b. The IRP Request is not time barred as ICANN has by its conduct from September 2013 to November 2014 effectively extended the time for filing as a result of ongoing discussions between the GCC and ICANN to resolve the issue, some of which involved the most senior executives of both organizations. Informal discussions continued through September and October and it was suggested to GCC by an unnamed ICANN representative that it may have to file an IRP request to reach a resolution. Therefore, there was no unreasonable delay as the GCC then proceeded to prepare and to file the Request dated December 5, 2014(GCC Reply, para, 6-9,17).

    c. The GCC also asserted that ICANN's action were inconsistent not only with the GAC advice previously identified, but also with certain specific core values of ICANN enshrined in Article 1, Section 1 of the Bylaws which are to guide decisions and actions of the Board, namely:

        4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision making;

        8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness;

        11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

    d. As to the balancing of the relative harm, whether the interim measures are granted or not, the GCC asserted that the harm to it by a denial of relief would be irreparable as it would

lose the valuable right to an independent review. By contrast, ICANN has offered no evidence of harm to it, nor to Asia Green, which would outweigh the harm to the GCC.

48. The positions of both parties were further developed and clarified in oral argument on the application heard by way of telephone conference call on December 23, 2014 which was approximately one and one half hours in duration.

IV. ISSUE FOR DETERMINATION ON THE INTERIM DECLARATION

49. Is the GCC entitled to an interim declaration by way of an interim measure of protection that ICANN refrain from signing a registry agreement for .PERSIANGULF pending the hearing of the GCC Request for an IRP? Specifically, on the limited evidence available, has the GCC satisfied the following tests proposed by the parties for the grant of interim relief:

    a. urgency;

    b. necessity;

    c. protection of an existing right; and,

    d. a reasonable possibility of success on the merits of the IRP?

V. DISCUSSION, ANALYSIS AND REASONS FOR INTERIM DECLARATION

50. The parties in their written and oral submissions have analogized the independent review process and this request for interim emergency measures within this IRP to an international arbitral proceeding under the ICDR Rules and the Supplementary Procedures. It is generally accepted that interim or provisional measures are intended and designed to safeguard the rights of the parties, to avoid serious injury pending the hearing of a dispute and to thereby ensure that the dispute process may function in a fair and effective manner. Interim measures protect both the rights of a party and the integrity of the dispute process. While some measures may be aimed at preserving evidence critical to the disposition of the main dispute, other measures are intended to preserve a factual or legal status quo to safeguard a right, the recognition of which is sought before the tribunal hearing the substantive merits of the particular dispute (see Gary Born, International Commercial Arbitration, Kluwer, 2009, Vol. II at p. 1944). The necessary elements of proof will differ depending on the nature of the interim emergency relief sought, whether to preserve evidence or to preserve the status quo. Here, the requested interim emergency measure is in the nature of injunctive relief to restrain

an action, the execution of a registry agreement, in order to preserve the status quo pending the completion of the IRP.

51. The ICDR Rules expressly provide the power to grant interim measures, such as injunctive relief, including on an emergency basis under Article 6 prior to constitution of a panel. That article applies here by express agreement. Such extraordinary relief prior to the determination of the substantive merits is discretionary and largely fact driven. The ICDR Rules and the Supplementary Procedures are silent as to the necessary tests to guide the exercise of discretion to award such relief. The parties have referred to numerous authorities, some diverging, on the appropriate factors to consider, particularly with respect to the extent of an assessment and consideration of the substantive merits of a case. These authorities include not only U.S. domestic court cases and international arbitral institutional rules and awards, but also a prior decision of another ICANN IRP panel under the ICANN Bylaws. Given the divergence between the parties on the applicable test for considering the substantive merits, it is appropriate to clarify and confirm the tests emerging from the authorities to guide the exercise of discretion in awarding any interim emergency relief.

52. The Claimant has relied heavily on the decision of the ICANN IRP Panel in *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13 (12 May 2014) in which an IRP Panel gave relief on an application for interim measures based on a four part test requiring proof of: (1) urgency; (2) necessity; (3) protection of an existing right; and, (4) a prima facie case or reasonable possibility of success on the merits (See Claimant ER Request, Annex 15, Decision at para. 37). ICANN has not put the first three criteria in issue, though each merits some elaboration. With respect to the fourth criterion, ICANN appeared to have accepted the applicability of that element, but then argued that the GCC has no reasonable *likelihood* of success for specific reasons.

53. The Claimant has also adopted the argument, which found success in the *DotConnectAfrica* IRP Panel decision, that interim relief was warranted as ICANN had failed to establish a standing panel of IRP panellists, as required under the Bylaws. In that case, the failure to establish a standing panel delayed the constitution of a panel for the specific case and significantly impaired the ability of the claimant to seek timely relief. There, the Panel found that the need for interim relief arose directly from the failure of ICANN to scrupulously honour its own procedural Bylaws. That argument does not carry the same weight or force in

this case as ICANN has designated the ICDR as the provider of panellists to serve on the IRP panel and the ICDR has acted promptly and efficiently in constituting a panel.

54. Here, the Request for an IRP was filed on December 5, 2014 and an IRP panellist was appointed on an emergency basis within four days, on December 9, 2014, with ICANN agreeing to the application of the ICDR Rules for emergency measures. A brief procedural hearing was held on the December 9 and the need for immediate emergency relief was then addressed but found unnecessary due to the undertaking of ICANN not to sign the registry agreement for .PERSIANGULF pending this application. The procedure for the appointment of the IRP panel or an Emergency Panel worked effectively and had no adverse impact whatsoever on the ability of the Claimant to seek effective interim relief. Interim emergency relief is not necessary or warranted based on this argument regarding the creation of the standing panel that found success in the *DotConnectAfrica* case. This case must be determined on the application of the generally accepted criteria for interim measures of protection.

a. Urgency or Irreparable Harm

55. The element of urgency imports the notion that the applicant will suffer imminent irreparable or serious harm if no interim relief is granted before the IRP hearing process is concluded at which time entitlement to relief for reparable or other harm may be finally addressed in the normal course (A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, Sweet & Maxwell, 4th ed. 2004, para. 7-29 and 7-30; Born, supra, page 1981 - 1982). Here, the GCC argues that its right to a fair and effective IRP process will be lost entirely if ICANN proceeds to sign a registry agreement for the disputed domain before the IRP proceeding can be held and completed. The relief sought by the GCC in its IRP Request expressly includes a declaration "requiring ICANN to refrain from signing the registry agreement [for .PERSIANGULF] with Asia Green or any other entity"(Claimant IRP Request, para. 75).

56. It is undisputed that ICANN intends to sign a registry agreement with Asia Green. ICANN'S undertaking to refrain from doing so is in place only pending the application for emergency measures and not until the final declaration in the IRP process. ICANN also intends to use its standard form registry agreement, a copy of which is available online. The registry agreement is for a term of ten years, subject to successive ten year renewals. As discussed

during oral argument, the terms of the standard registry agreement do not entitle or permit ICANN to terminate the agreement, without breach or compensation, if an IRP is successful and an IRP Panel declares that the ICANN should not have signed that particular agreement. The execution of the registry agreement cannot be readily and lawfully undone.

57. While ICANN argues the absence of any harm to the GCC, irreparable or otherwise, by the delegation of the domain and the signing of a registry agreement, it does so principally in the context of two other elements for relief, namely necessity or the balancing of the harm and also the absence of any reasonable likelihood of success on the merits of the IRP. ICANN's position on these points is discussed in detail below under those particular elements.

58. ICANN also argues that any perceptions or adverse impact arising from the registration of .PERSIANGULF can be simply counteracted by registration of the gTLD .ARABIANGULF by the GCC. There are two difficulties with this argument for this application. First, it does not address the importance of the right to a fair and effective IRP process and the loss of that right. Second, it raises the issue of the existence and scope of any duty or obligation to mitigate on a party which may suffer irreparable harm by the actions of another. Should the GCC be required to undertake the effort, time and expense of applying for and operating a competing registry in an effort to counteract the impact of the disputed domain? In any event, would such a competing registry avoid or undo harm caused by the other? This issue the will be also discussed in connection with the primary arguments of ICANN on the consideration of the merits of the IRP. Suffice it to say at this point that the option of GCC applying for .ARABIANGULF does not avoid the harm to the GCC in respect of the IRP process, absent any interim relief nor does it negate the harm arising from the delegation of .PERSIANGULF.

59. For this application, this Panel accepts that the right to an independent review is a significant and meaningful one under the ICANN's Bylaws. This is so particularly in light of the importance of ICANN's global work in overseeing the DNS for the Internet and also the weight attached by ICANN itself to the principles of accountability and review which underpin the IRP process. If ICANN proceeds to sign the agreement, the integrity of the IRP process itself will be undermined. The Claimant's right of review will be of no consequence whatsoever. The signing of the registry agreement will frustrate the Claimant's IRP Request, rendering the issue of injunctive relief moot as no IRP Panel would then make a declaration

that ICANN refrain from signing. This constitutes clear irreparable harm which will be suffered by the Claimant absent interim relief at this stage of the process. This harm is not simply a possibility but is a reasonable likelihood if no interim is granted.

b. Necessity or the Balancing of Harm

60. The test of necessity imports an assessment of the relative proportionality of harm suffered, that is, a consideration and balancing of the harm to the Claimant if the interim relief is not granted with the harm caused to the Respondent if the relief is in fact ordered. The irreparable harm to the Claimant is already described above.

61. In terms of potential harm arising from or caused by the grant of the requested declaratory relief, ICANN relies on harm to itself and also to the Applicant Asia Green. ICANN is rightly concerned about maintaining the integrity of the gTLD application process and processing the application quickly and efficiently. Beyond that, counsel candidly admitted, when asked in oral argument, that there will be little harm to ICANN itself in the event that interim emergency relief is granted. It can also be said that the integrity of the ICANN independent review process, to ensure accountability and transparency in decision making, is also an integral part of ICANN's application process which merits promotion and protection. While some prejudice by delay to the gTLD application may arise from the granting of the requested interim relief, that is in part counterbalanced by the advancement of the integrity in and legitimacy of the IRP process. Furthermore, the delay in the IRP is likely to be far shorter than the delay to date in the processing of the application. It is not clear what has caused the delay from October 2013 to November 2014 in the decision to sign the registry agreement, other than, as suggested by counsel for ICANN, the routine processing of the application and the negotiation of the agreement. In any event, any harm to ICANN by the grant of interim relief does not outweigh the harm to the GCC through the deprivation of a meaningful IRP process if no relief is granted and the registry agreement is signed.

62. Counsel for ICANN also pointed to and relied on the harm caused by the delay in the delegation to the applicant Asia Green which has invested time, effort and money into the pursuit of its application. That harm is said to be real and significant, with added continuing expense and delay in the conduct of business using the domain. It is said that this real harm stands in contrast to the vague allegations of harm to the GCC which may be caused by the

delegation of the disputed domain, particularly when the GCC could itself apply for and obtain .ARABIANGULF. It may be argued that the harm to Asia Green is not relevant to a consideration of relief on this application as Asia Green is not a party to this proceeding. However, in my view it is appropriate to consider such harm as it will also reflect upon and reinforce the potential reputational harm to ICANN with respect to the integrity of the application process.

63. In considering the harm to Asia Green, it must be remembered that Asia Green already has access to another delegated domain .PARS, for which a registry agreement is signed and is intended to target the same market as .PERSIANGULF. Asia Green will not be precluded from actively developing its business. Counsel for ICANN candidly admitted during oral submissions that he was not certain of the need for Asia Green to have two registries for essentially the same market, but noted that Asia Green had in any event spent considerable time and money for the disputed domain. Apart from the general impact of delay, there was no specific evidence of harm to Asia Green, such as a particular lost business opportunity.

64. In my view, the harm to the GCC absent any interim relief clearly outweighs any harm to Asia Green which may be caused by the grant of interim relief requiring ICANN to refrain from signing a registry agreement for .PERSIANGULF pending the IRP process. Any delay can be kept to a minimum by the prompt constitution of the IRP panel through the ICDR and a reasonable and efficient schedule for the conduct of the review. The application process has not in any event been proceeding in an overly expeditious manner, given that the application was made in July 2012. By September 2013, the NGPC Scorecard noted that ICANN will "continue to process the application" and it was only in November 2014 that the signing of a registry agreement appeared imminent. There is no evidence that a few more months of delay during the IRP will cause any specific prejudice or harm to Asia Green.

65. In balancing the harm which may arise, whether interim relief is granted or not, it is clear on a balance of probabilities and not mere possibilities, that the harm to the GCC absent any relief is irreparable and that the loss of an effective meaningful IRP process outweighs any harm to either Asia Green or ICANN arising from delay in the signing of the registry agreement.

c. Protection of an Existing Right

66. This criterion was accepted and applied by the IRP Panel in the *DotConnectAfrica* Decision on Interim Measures of Protection, relied upon by the Claimant, although it is not entirely

clear where this requirement originates in the authorities and what is intended by it. This requirement is not normally separately identified either in case law or in authoritative texts as a specific criterion for the grant of interim injunctions or interim measures of protection. It is perhaps plain and obvious that the grant of an interim measure to preserve a factual or legal status quo is virtually always dependent on the assertion of an identified legal or equitable right. However, some interim measures not applicable here, such as an order to freeze assets to preserve rights of execution, may relate to only potential rights as opposed to existing rights. In any event, both the Claimant and the Respondent have proceeded on the basis of the existence and application of this third criterion.

67. The ICANN Bylaws, Article IV, Section 3.1 establishes "a separate process for independent third party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." As stated in the Reply, it is this right which the Claimant seeks to protect, failing which the review will become meaningless after the execution of the registry agreement by ICANN. The protection of this right for the independent review of a Board decision to delegate the domain and enter into a registry agreement is an existing right which meets this pre-requisite for the grant of interim emergency relief.

d. A Reasonable Possibility that the Requesting Party will succeed on the Merits

68. The consideration and impact of the merits of the IRP is the main point of contention between the parties. They disagree not only on the basis of the available evidence, but more fundamentally on the definition and scope of this legal requirement. The Claimant maintains that it need show only a *reasonable possibility* of success on the merits of the IRP. The Respondent, while appearing to confirm the applicability of that test in its written submission (ICANN Response, para. 42), also submitted a more stringent standard that the Claimant must show a *reasonable likelihood* of success, which, ICANN submits, cannot be established on the evidence.

69. **The Applicable Test.** In the *DotConnectAfrica* Decision on Interim Measures, the IRP panel considered the competing tests of proof of a *prima facie* case and proof of a reasonable possibility of success and found that there was no meaningful difference between those two tests. They are essentially one and the same standard. That panel in *DotConnectAfrica* also

went on to state that interim relief should be available "on a standard of proof which is less than required for the merits under applicable law". This panel agrees with that finding. It should also be noted that in some fora, the requisite standard is couched in terms of whether a preliminary assessment reveals that there is a serious question to be tried or determined which is a standard the same or very similar to the standard of proof of *prima facie* case or proof of a reasonable possibility of success. The threshold is relatively low.

70. The standard of proof of a reasonable likelihood of success on the merits, as submitted by the Respondent, sets the bar too high for interim relief. That is essentially the same standard as balance of probabilities which is the normal civil standard to be applied at the hearing of the substantive merits of the IRP. The lesser standard of a *prima facie* case or a reasonable possibility of success is more appropriate for a number of reasons.

71. On an emergency interim application such as this, the submissions and the evidence are usually incomplete, largely due to the time constraints in developing the evidentiary record. That is the case here. More evidence and detailed submissions can be expected at a substantive hearing. Given the limited evidentiary record, the tribunal must refrain from prejudging the merits of the case on the interim relief application. If the higher standard of reasonable likelihood is applied, it is inevitable that the tribunal will be engaging in an early determination of the merits A prejudgement of the merits cannot be avoided if the same standard of proof is applied for emergency interim measures as for the substantive hearing. The lesser standard facilitates a provisional assessment without any binding or preclusive impact on the merits hearing. Once the threshold is met, the focus of the analysis will be on the test of irreparable harm and the balance of the respective harm pending the decision on the merits.

72. Where the grant of interim relief may in effect amount to a final determination and put an end to the entire dispute, a more extensive review of the merits may well be appropriate to weigh the likelihood of success along with the irreparability of harm and the balance of the respective harm. However, that is not this case. The grant of interim relief will not foreclose the completion of the IRP process. However, the refusal of interim relief likely will have that effect.

73. The standard of a *prima facie* case or reasonable possibility of success quite properly requires some consideration of the legal sufficiency and relative strength of the respective parties'

cases. Therefore, frivolous and weak cases can be identified and rejected to ensure that the interim measure of protection does not become an unjustified lever or windfall that can damage an innocent party (see Born, supra, at page 1992). In that regard, it cannot be said that the merits of the GCC's IRP Request is either frivolous or vexatious. It appears to raise serious questions about the decision making process of the ICANN Board under the Bylaws in connection with the approval of the application for .PERSIANGULF as a new gTLD.

74. **The Obligation of ICANN under the Bylaws.** The starting point for the discussion on whether the GCC has shown a reasonable possibility of success on the merits of the IRP is a clarification of the obligations of the ICANN Board under the Articles and Bylaws against which the actions and decision of the Board must be compared and measured. While the Claimant initially relied upon the various instances of GAC advice to the ICANN Board as the basis of its request for review, the Bylaws do not oblige the ICANN Board to accept any or all of the advice of the GAC or to take actions that are consistent only with the GAC advice. The Bylaws require the ICANN to take that advice into account and, where the advice is not followed, to provide reasons for so doing. (Exhibit R-ER-1, Bylaw Article XI, 2.1.j).

75. In its Reply, the GCC also expressly referred to and relied upon the core values set out in Bylaw Article I, Section 2.4, 2.8 and 2.11, quoted earlier at paragraph 47.c.1, and the obligation of the ICANN Board to be guided by those core values in making decisions. The Claimant identified these three of the eleven core values as the yardstick to measure and to assess the ICANN Board action to delegate the domain and to enter into a registry agreement with Asia Green. However, the last paragraph of Article I, Section 2 of the Bylaws makes it clear that the application of the individual or specific core values is necessarily qualified. Due to the breadth of the general language in the stated core values, the closing paragraph of Section 2 expressly provides that "situations will inevitably arise in which perfect fidelity to all eleven core values is not possible". The Board has latitude in its decision making and must of necessity exercise discretion in the balancing of all of the core values to arrive at any decision. Not all core values may be advanced to the same extent.

76. By the same token, the closing sentence of Article 1, Section 2 also sets out certain basic requirements with which the ICANN Board must comply in its decision making. According to the last sentence of Section 2, ICANN *shall*: (1) *"exercise its judgment"; (2) "to*

determine which core values are most relevant __and__ how they apply to the specific circumstances of the case at hand"; and, (3) *"to determine, if necessary, an appropriate and defensible balance among competing values "*. It is against these requirements that the relevant decision in issue of the ICANN Board must be assessed on the evidence. The ICANN Board does not have an unfettered discretion in making decisions. In bringing its judgment to bear on an issue for decision, it must assess the applicability of different potentially conflicting core values and identify those which are most important, most relevant to the question to be decided. The balancing of the competing values must be seen as "defensible", that is it should be justified and supported by a reasoned analysis. The decision or action should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion.

77. This obligation of the ICANN Board in its decision making is reinforced by the standard of review for the IRP process under Article IV, Section 3.4 of the Bylaws, quoted at paragraph 42 b. above, when the action of the Board is compared to the requirements under the Articles and Bylaws. The standard of review includes a consideration of whether the Board exercised due diligence and care in having a reasonable amount of facts before them and also whether the Board exercised its own independent judgement.

78. **The Decision in Issue.** The Respondent submitted, in part, that the Claimant had failed to identify any "action or decision" of the Board capable of review. The Respondent then also argued in the alternative that the only Board decision that could have injured the GCC is the September 2013 decision to "continue to process the application" in accordance with the Guidebook, following the GAC Durban Communique that the GAC did not object to the application (ICANN Response at para. 48). The Claimant submitted in Reply that the Board action in issue is well known and is simply the decision to proceed to delegate the domain .PERSIANGULF and to enter into a registry agreement. It is not disputed that ICANN is in fact about to enter a registry agreement with Asia Green for that domain.

79. The Emergency Panel accepts the Claimant's position that the Board decision and action in issue is the decision to proceed to delegate the domain .PERSIANGULF to Asia Green and to enter into a registry agreement, all pursuant to the Guidebook. If not for that decision, this Emergency Request would not have been brought. That decision is capable of review.

80. The only available documentary evidence of that Board decision adduced by the parties is the posting of the NGPC Resolution and Scorecard on September 12, 2013 to "continue to process the application", followed by the posting on September 30, 2013 of the Minutes and Briefing Materials related to that decision. There are no other Board resolutions or memoranda after September 2013 which otherwise address or confirm the Board deliberation or decision to make the delegation. It is in relation to the posting of the Resolution, Scorecard and Minutes that the Respondent has based its main arguments against any emergency interim relief, namely that the request for the IRP was time-barred or was in any event unreasonably and fatally delayed. It is appropriate to now address these two main related arguments asserted by ICANN regarding the September decision.

81. **The Issues of Time-Bar and of Delay.** ICANN has relied on the requirement under Article IV, Section 3.3 of the Bylaws that the request for an IRP "must be filed within 30 days of the posting of the Board meeting (and the accompanying Board Briefing Materials, if available)." It is said that the 30 day time limit is mandatory and, in this case, commenced on September 30, 2013. Therefore the filing period expired on October 30, 2013. As a result, the December 5, 2014 filing of the IRP Request is, according the ICANN, patently out of time. In addition, ICANN asserts that this lengthy delay from October 2013 to December 2014 was unreasonable and was left unexplained in the Claimant's initial submission. Accordingly it is submitted that such delay, in and of itself, further justifies the denial of extraordinary discretionary relief.

82. The GCC responded to the time-bar and delay arguments in its Reply. The GCC relied on the Witness Statement of Mr. Al Marzouqu which outlined the ongoing contact between him, as the GCC representative, and ICANN over the disputed domain, including the high level meeting in June 2014 to attempt to resolve the issue. Therefore, the GCC asserted that any time limit for filing the IRP Request was extended by ICANN's conduct.

83. In the view of the Emergency Panel, the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable. The evidence of Mr. Al Marzouqi, while vague in some of the detail, provides a number of reasonable examples of such conduct. First, as of September 30, 2013, the Expert

Determination was still pending and was not released until October 30, 2013. The alleged discussion with an unidentified ICANN representative to await the delivery of the Expert Determination before attempting any resolution is reasonable under the circumstances. Otherwise, the 30 day time limit would have expired by the time the Expert Determination was delivered. Second, and most importantly, it is beyond dispute that the President of ICANN met with the representatives of the GCC in early June 2014 with a follow up letter being delivered by the GCC representative to the ICANN President confirming a request not to proceed with the delegation of the disputed domain. The circumstances of the meeting and the unanswered follow up letter, while not expressly referring to the deadline for filing an IRP, are also suggestive of an extension of that filing period. Indeed, the tenor of the evidence with such a high level meeting in June 2014 reasonably suggests that the issue of the delegation was still under active consideration with no final decision having in fact been made. Third, Mr. Al Marzouqi also states that another ICANN representative, again unnamed, suggested in September 2014 that the GCC may have to file a request for IRP. The available evidence and reasonable inferences from that evidence support the defence that the time limit was extended for commencing the IRP, and there is a reasonable possibility that the GCC will succeed on this issue. It is recognized that the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself. After a full review of the evidence on the IRP and the application of the appropriate standard of proof, the IRP panel may well find that the time limit for filing was mandatory and that it expired on October 30, 2013 without any extension. However, at this stage, it is sufficient to find that there is a reasonable possibility that the time has been extended under the circumstances.

84. Counsel for ICANN also argued that the time limit for the IRP filing could be tolled or delayed, but only through the formal invocation of the Cooperative Engagement Process prior to the commencement of the IRP as provided for in the Bylaws Article IV, Section 3, para. 14. This is a voluntary process encouraged by ICANN to try to resolve issues or at least narrow the issues for a reference to the Board. A conciliation process following the commencement of an IRP is also encouraged. According to the copy provided by ICANN, the Cooperative Engagement procedure has an even shorter time limit for commencement, being only 15 days of the posting of the Minutes of the Board. While it is undisputed that the formal Cooperative Engagement Process was never started, it is also undisputed that an

analogous informal engagement process was in fact undertaken involving the most senior officers of both ICANN and the GCC with the apparent purpose of resolving the issues. The availability of the Cooperative Engagement Process is not the sole method for extending time for filing the IRP and is not determinative of this issue whether ICANN has extended the time the time for the commencement of an IRP by reason of its conduct in connection with the undisputed efforts at resolution undertaken in 2014, especially the June 2014 meeting with the senior representatives of the organizations and the July 9 letter.

85. Based on the limited evidence available at this stage, there is a reasonable possibility that, by reason of ICANN's conduct, any time limitation for filing an IRP was extended or otherwise would not be enforced. The Reply evidence of the GCC also provides a reasonable basis for a possible explanation of the delay of over one year, an explanation which may neutralize the defence of delay or laches to the grant of discretionary interim emergency relief.

86. During the IRP process, these issues can be more fully ventilated with additional evidence from both parties about the meeting and contacts. As ICANN did not file any evidence on this Emergency Request of the involvement and conduct of its representatives throughout 2014, it will have the opportunity to do so for the IRP hearing. This evidence will also further assist the determination of whether the 30 day time limit for filing the IRP under the Bylaws is mandatory or directory only or was extended or waived. The IRP Panel will therefore have a fresh opportunity on a complete evidentiary record to further consider the defences of the time bar and the delay.

87. **Comparison of the Bylaws with the Board's Decision and Decision Making Process.** The merits of the IRP will involve a determination of whether the action and decision of the Board with respect to the delegation and registry agreement for .PERSIANGULF was made in a manner consistent with the requirements under the Articles and Bylaws. The IRP Panel will make this comparative determination on the basis of a standard of balance of probabilities. At this stage, only a preliminary assessment can and should be made on these issues. It is sufficient to identify the presence of serious issues or serious questions and determine if there is a reasonable possibility of success on the available evidence. It is also essential to avoid any prejudgement or findings on the merits of these issues and to avoid influencing the IRP Panel in its eventual task.

88. The Respondent asserts that it has acted consistently with the Bylaws throughout. Based on a careful review of the Bylaws and the evidence, there are in my view a number of serious questions about the process of the Board's decision making and for which the Claimant has a reasonable possibility of establishing that the Board, or the NGPC has not met the Bylaw requirements in its decision making process. A series of more focussed questions about the decision making process emerge from the analysis of the evidence, including the following:

    a. Did the ICANN Board or the NGPC acting for the Board exercise its own independent judgment in deciding to proceed to delegate .PERISANGULF and to enter into a registry agreement or did it simply adopt the GAC advice in the GAC Durban Communique that the GAC did not object, without doing its own independent assessment?

    b. Did the NGPC identify, consider and take guidance from the core values as set out in Article I, Section 2 of the Bylaws, including values 4, 8, and 11 relied upon by the Claimant? Did the NGPC determine which of the core values were most relevant to the issue of the delegation of .PERSIANGULF in light of the history of the opposition and if so what is the evidence of that?

    c. Did the NGPC determine a balance of the competing values identified in Article I, Section 2 of the Bylaws with respect to the applied for gTLD and the objections to it? If so, what was it and on what was it based? Is that balance defensible, how, and where is that determination recorded? What is the evidence to confirm that a defensible balance of the competing values has been made?

    d. Did the NGPC exercise due diligence to consider a reasonable amount of facts in making its decision to proceed with the delegation under the circumstances? Apart from taking a position consistent with the GAC advice set out in the Durban Communique, what other facts were relied upon by the NGPC? Did the NGPC consider the opposition of the members of the GCC to the domain application as expressed in the Minutes of the Durban meeting, or alternatively was the NGPC entitled or obliged to disregard that opposition due to the wording of the Durban Communique? Given the delay from the September 2013 resolution to November 2014 when the registry agreement was about to be signed, was the NGPC obliged to consider and did it consider, in exercising due diligence, the facts of the

continued opposition of the GCC and the events occurring during that period, such as the June 2014 meeting between ICANN representatives, including President Chehade, and representatives of the GCC, as well as the July follow-up letter? Where is the evidence of that consideration in its decision making? Should the Board consider and weigh the August 29, 2014 policy statement setting out the concerns of the Sub-working group that geographic names generally should be avoided in absence of agreement of relevant affected governments?

e. When did the ICANN Board in fact decide to delegate the domain? Is it in fact on September 10, 2013 with the adoption of the Scorecard in response to the GAC Durban Communique or was the decision made at a later date, such as after the June 2014 meeting of the ICANN President and the GCC representatives in Kuwait City, in which case how was that decision made?

89. The September 2013 Board decision, as taken, was simply to "continue to process the application in accordance with the established procedures in the AGB". That decision does not reflect any assessment or application of the competing core values or a consideration of the three stated values relied upon by the GCC. Nor does it provide a statement of a defensible balance of the competing values. It is clear that the ICANN Board was aware of the objections of the GCC and its constituent governments to the application, both before and after the September resolution to continue to proceed. The evidence does not establish that this governmental opposition was taken into account at all in the Board decision to proceed with the delegation of the .PERSIANGULF domain to Asia Green, given the apparent reliance on the wording of the Durban communique. It is certainly not clear under the Bylaws that the evidence of the objections by the GCC and its member states, raised after the September 10 resolution and before the signing of the registry agreement, should **not** be taken into account. To the contrary, core value in Article I, Section 2.11 suggests that recommendations of governments are to be duly taken into account. That is a significant and serious issue for consideration on the IRP in respect of which the parties will be entitled to adduce additional evidence. On the basis of the available evidence, the Claimant has a reasonable possibility of success on the merits of the IRP.

90. ICANN has also asserted that "ICANN did precisely what it was supposed to do pursuant to the Guidebook" and that there "is no Article [of Incorporation], Bylaws provision or

'guideline' that requires the ICANN Board to do anything more than follow the processes that it has followed" (ICANN Response, para. 54). That argument itself raises a serious and fundamental question to be considered and determined by the IRP Panel about the inter-relationship of the obligations on ICANN under the Guidebook and the Bylaws. Does compliance with the Guidebook procedures for the processing of a domain application satisfy the obligations on the ICANN Board under Bylaws Article 1, Section 2 in terms of the consideration of competing relevant values and the determination of an appropriate and defensible balance of those competing values? That is not at all obvious and the circumstances suggest an answer in the negative. Upon completion of the various procedures for evaluation and for objections under the Guidebook, the question of the approval of the applied for domain still went back to the NGPC, representing the ICANN Board, to make the decision to approve, without being bound by recommendation of the GAC, the Independent Objector or even the Expert Determination. Such a decision would appear to be caught by the requirements of Article 1, Section 2 of the Bylaws requiring the Board or the NGPC to consider and apply the competing values to the facts and to arrive at a defensible balance among those values.

91. In its Response, ICANN also relied on the position expressed in the Comments of the Independent Objector (Exhibit R-ER-5) and on the findings of the Expert Determination (Claimant ER Request, Annex 2) to justify the propriety of the delegation. These specific recommendations are certainly material to the Board consideration, but they are not a substitute for the exercise by the Board of its own judgement in balancing the competing values as expressly required under Article 1, Section 2 of the Bylaws. Therefore, at this stage and based on the available evidence, the Claimant appears to have a reasonable possibility of success on the merits of the IRP.

92. Both the Independent Objector and the Expert also noted that the GCC could itself apply for .ARABIANGULF and thereby neutralize any objection with the delegation of .PERSIANGULF. ICANN in its Response has also relied on this argument. The Independent Objector stated that it is not the mission of the gTLD strings to solve or exacerbate such naming disputes, but they should adapt to the *status quo*. This directly raises the type of policy issue which should be addressed by the Board in a discussion and balancing of the core values of ICANN in Article 1, Section 2 and which calls out for a reasoned

discussion and defensible balance to be reached by the Board. There is no question about ICANN solving the naming dispute – it cannot. There is a serious question as to whether, in the context of a geographic naming dispute, the registration of one domain name and the encouragement to register the other will elevate the deeper dispute between the parties to a new level and introduce that dispute to the Internet and to the internet domain name system. As noted in the Expert Determination, denomination disputes can be of high importance, roiling international relations, particularly when it is a flashpoint for deeper disputes as appears to be the case here. While the suggestion of the Independent Objector is for the gTLD strings to adapt to the *status quo*, one of the objectives on an application for interim measures is to preserve the *status quo*. The context assists in determining what may be regarded as the *status quo*. According to the Independent Objector, since both disputed names are in fact used in practice in the different states, it is suggested that both be used. Absent agreement on a common name, that would be consistent with general rules for international cartography. However, in terms of the domain naming system and top level domains for the Internet, neither term is currently used – that is the *status quo* for top level domain names. It is that *status quo* which should be preserved pending the completion of the IRP. The GCC is not asking to use the domain .ARABIANGULF and at this point does not want to use that domain. It is simply seeking to maintain the status quo that neither name be used as a gTLD.

93. This Emergency Panel therefore finds that the GCC has a reasonable possibility of success on the IRP for the purposes of granting interim measures in the nature of injunctive relief. However, nothing in this Interim Declaration should be taken as a finding on the merits binding on the IRP panel or as a suggestion of any decision which the ICANN Board should or should not make in respect of the merits of the domain application in dispute. The IRP Panel will have an opportunity on a full evidentiary record to make the determination required of it pursuant to the ICANN Bylaws, Article IV, Section 3 whether the Board in making its decision has acted consistently with the provision of the Articles and Bylaws. That is not a review *de novo* of the merits of the decision of the ICANN Board, but a review of the decision-making process of the Board in light of requirements under the Bylaws.

e. Other Considerations for Interim Measures

94. Based on the foregoing analysis, the Claimant has established an entitlement to an order that ICANN refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF until the IRP is completed, or until such other order of the IRP panel. Of course in the event that the parties are able to amicably resolve the issues to their mutual satisfaction, the interim order and the proceedings can be brought to an end upon their consent. It is a common term or condition for the grant of such interim measures in the nature of injunctive relief to require the applicant to post security for any potential monetary damages or costs which may be caused by the grant of such measures in the event that the order is subsequently set aside or terminated. No request has been made at this time for security and the parties were not asked to brief the point. Therefore no order for such security shall be made at this time. However, the order made herein is without prejudice to any request which may be made in due to the IRP Panel which shall be free to consider that issue afresh.

95. Neither the Claimant nor the Respondent has sought costs of this Request for Interim Measures. The issue of costs was simply not addressed in the written or oral submissions. No order as to costs will be made at this time, but the issue of costs of this Request for Interim Measures shall be reserved to IPR panel.

VI.   Conclusion and Interim Declaration`

96. Based on the forgoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:

    a. ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;

    b. This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;

    c. This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and,

    d. The costs of this Request for Interim Measures shall be reserved to the IRP panel.

97. After the completion of the foregoing reasons for this emergency interim declaration and immediately before its release, the Tribunal received an email from the Claimant dated 11

February 2015, attaching a letter from ICANN dated 2 February 2015 which was apparently in response to the letter dated 9 July 2014 from Mr. Al Ghanim referred to in these reasons. In the February 2 letter, ICANN advised that the processing of the .PERSIANGULF application had been placed "On Hold". Apparently, Asia Green invoked the Cooperative Engagement Process in respect of some decision of the ICANN Board. As noted earlier, that process must be commenced within 15 days of the posting of the minutes of the Board which are said to violate the Articles or Bylaws. As a result of the application being placed "On Hold", the GCC took the position that their Emergency Request for Interim Measures had been rendered moot and asked for a declaration to be issued to that effect, but with an express reservation that the matter proceed in the event that ICANN does take further steps to sign an agreement with Asia Green.
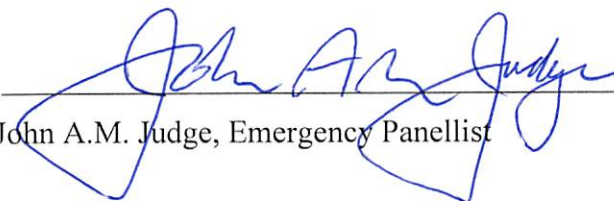
98. As for ICANN's position, the letter of February 11 also set out ICANN's position, quoting a letter between counsel that the placement of the application on hold had no bearing on this request for interim measures or on other accountability mechanisms already invoked. On 12 February 2015, ICANN also delivered a response opposing the GCC request. ICANN asserted that the GCC should either withdraw the Request for Emergency Relief or allow the decision with respect to that Request to be released if the "GCC wishes to ensure that the .PERSIANGULF application remains on hold". Clearly, ICANN did not agree that the Request was moot. ICANN asserted those accountability mechanisms under the Bylaws should proceed to completion, including this Request for Emergency Relief or, alternatively, that the GCC withdraw the Request for Emergency Relief.

99. On 12 February 2015 at 9:29 pm EST, the GCC replied to the ICANN position. The GCC did not withdraw its Request. The GCC maintained its position that the letter of February 2 from ICANN rendered the Request moot.

100. The parties are not in agreement on a consent disposition to this application. GCC has not withdrawn the Request for Emergency Relief. The Request remains extant. As a result, it is appropriate that this Declaration be released forthwith.

101. Having reviewed the letter of 2 February 2015 and the further submissions of the parties in the email of counsel of February 11 and 12, 2015, this Tribunal finds and confirms that the reasoning and result remains as set out above. The result is not altered or changed by these late submissions. Indeed, these materials reinforce the finding that the Declaration as set out

above should now be issued and released. Most importantly, the position taken by ICANN clearly indicates that, but for an order on this Request for Emergency Relief, the application will not remain on hold, suggesting that the registry agreement will be signed. The fact of the commencement of the Cooperative Engagement Process by Asia Green raises further questions as to what is the decision of ICANN Board in respect of the disputed application. For the purposes of the recently commenced Cooperative Engagement Process it may simply be the decision to put the application on hold pending the completion of the emergency request. The ICANN letter of 2 February 2015 is not an admission or commitment by ICANN that it will place the application on hold pending the completion of the GCC's IRP request. The request by Asia Green for the Cooperative Engagement Process raises many other questions as to the role if any of the GCC in that process and also the impact, if any at all, on the GCC request for the IRP. ICANN is rightly concerned that the accountability processes including the IRP should proceed as intended under the Bylaws. Therefore, for these reasons, the request of the GCC for a declaration that this Request is now moot is denied.

102. To be clear, and having taken into account the submissions of parties received on 11 and 12 February 2015, the interim declaratory relief as set out in paragraph 96 is hereby granted.

Signed in Toronto, Ontario, Canada for delivery to the Parties in Los Angeles, California, USA and Riyadh, Saudi Arabia.

Dated 12 February 2015.

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John A.M. Judge, Emergency Panellist