

ICANN Board-GAC Consultation:

- **Objection Procedures, including requirements for governments to pay fees**
- **Procedures for the Review of Sensitive Strings**
- **Early warning to applicants: whether a proposed string would be considered controversial or to raise sensitivities (including geographical names)**

EXPLANATION OF ISSUES/HISTORY

The GNSO and ICANN Board approved policy recommendations for new gTLDs included four major areas where a third party can raise an objection to the creation of a new gTLD. A new gTLD string should: (i) not be confusingly similar to an existing top-level domain or a Reserved Name (Rec. 2); (ii) not infringe the existing legal rights of others (Rec 3); (iii) not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law (Rec 6); and (iv) be rejected if there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted (Rec. 20). See http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm#_Toc43798015.

The GNSO also recommended that “[d]ispute resolution and challenge processes must be established prior to the start of the [new gTLD] process,” and “[e]xternal dispute providers will give decisions on objections.”

In Brussels in June 2010, and then in a letter to ICANN dated 4 August 2010 (<http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf>), the GAC:

[R]ecommends that community-wide discussions be facilitated by ICANN in order to ensure that an effective objections procedure be developed that both recognizes the relevance of national laws and effectively addresses strings that raise national, cultural, geographic, religious and/or linguistic sensitivities or objections that could result in intractable disputes. These objection procedures should apply to all pending and future TLDs.

In response to the GAC’s recommendation, a cross-community working group was formed to deal specifically with Rec 6 objections (“Rec6 CWG”). The Rec6 CWG has since issued recommendations on both Morality & Public Order, and Community based objections.¹

(<http://gns0.icann.org/bitcache/27d221c45bd9d8c234246849d716202bacd6f3ee?vid=14699&disposition=attachment&op=download>).

¹ Suggesting the governments should be able to protect place names, and country, territory or regional language or people descriptions using the community based objection process

ICANN has responded to many of the working group's recommendations by revising the most current version of the Guidebook and has sought clarification on other recommendations.

Specifically, the newest version of the Guidebook includes the following Rec6 CWG recommended changes:

- A note encouraging applicants to pre-identify possible sensitivities.
- Language indicating that governments may send notifications re: national laws to applicants or via public comment forum (but clarified that this shall not be deemed a formal objection).
- Additional treaties as reference.
- A change in references from "international principles of law" to "principles of international law"
- Language stating that Expert Panel Determinations shall be based on the string itself, but also on stated context if available.
- The name of objection was changed from Morality and Public Order to "Limited Public Interest Objection".

No change was needed with respect to whether governments could utilize the community-based objection process, because that was always contemplated.

Subject to this consultation with the GAC, ICANN expects additional changes to be made, including whether the GAC may file objections on behalf of its members, (although that has not specifically been identified as a GAC request) and whether the GAC or individual Governments should pay dispute resolution fees.

REMAINING AREAS OF DIFFERENCE WITH GAC:

A. Specific Differences

1. The GAC suggests that the Independent Objector (IO) could be a possible avenue available to governments. See Letter from the GAC to ICANN, dated 18 August 2009 at <http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>

Under the Guidebook, the IO (Independent Objector) shall be independent and if the IO "determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest." See New gTLD Dispute Resolution Procedures at <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-clean-12nov10-en.pdf> at section 3.1.5, page 3-7.

2. The GAC suggests that Governments should not have to pay the same costs as others to file an objection. See Letter from GAC to ICANN, dated 23 September 2010 at <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>. The GAC points to the fact that it has a Bylaws process whereby it can provide advice to the Board for consideration. See Letter from the GAC to ICANN, dated 18 August 2009 at <http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>

Since publication of the last version of the Applicant Guidebook, the Board has considered the Rec6 CWG recommendation that the GAC (and ALAC), as a group, should be able to file some or all objections at no or a reduced cost. Although the Board has not reached a formal decision, there is a sense of the Board that it will agree to allow the GAC (and the ALAC) to file objections as a group on behalf of its members so long as doing so is based on some type of consensus of the group members. Further, the Board also thinks that providing some level of funding for objections filed by the GAC (or the ALAC) as a group is an appropriate change to the process.

3. The GAC states that the current objection procedures do not effectively address strings that raise national, cultural, geographic, religious and/or linguistic sensitivities or objections that could result in intractable disputes. See Letter from GAC to ICANN dated 4 August 2010 at <http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf>

Under the Guidebook, protections for these types of names are provided by a series of objections and processes: the requirement for government approval of certain geographical names, Community-based objections (Rec 20), and Limited Public Interest (or Morality & Public Order Rec 6) objections. The last provides that a string will be excluded if there is a determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law. See Applicant Guidebook, Module 3, section 3.3.4 at <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-clean-12nov10-en.pdf>. It is recognized that principles from international treaties are incorporated into national laws in a range of different ways, and a panel would need to consider the relevant text in national laws.

4. The GAC suggests that the objection procedures should apply to all pending and future TLDs. See Letter from GAC to ICANN dated 4 August 2010 at <http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf>. ICANN has been asked to note that both the UK and New Zealand take the position that the objection procedures should apply only to new gTLDs.

The Guidebook, and all of the procedures developed for processing applications for and objections to new gTLDs, apply only to new gTLDs and not to existing TLDs or other TLDs (e.g IDN-ccTLDs) that will not be evaluated under the New gTLD Program.

5. The GAC believes that prior reviews of new gTLD strings can serve as an “early warning” to applicants, providing an opportunity to amend or modify the proposed string prior to proceeding further in the application process or provide opportunities to determine whether the applicant is the sole appropriate manager or relevant authority for that particular string, or whether the proposed string is either too broad to effectively identify a single entity as the relevant authority or appropriate manager, or is sufficiently contentious that an appropriate manager cannot be identified and/or agreed. See Letter from GAC to ICANN, dated 22 November 2010 at <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-22nov10-en.pdf>

Language has been added to the Guidebook indicating that governments may send notifications regarding national laws directly to applicants or via public comment forum (see Applicant Guidebook, Module 1, section 1.1.2.5 <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf>) once the applications are publicly posted. Such notifications are not meant to serve as formal objections or be cause for a modification to an application. It was decided early in the process development that applicants should not be able to amend applications or applied for strings in order to prevent abuses.

B. Discussion

Independent Objector (IO)

As noted above, the GAC suggests that the IO could be a possible avenue available to governments. See Letter from the GAC to ICANN, dated 18 August 2009 at <http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>.

The purpose of the IO is to act in the public interest as an independent party to stand in the shoes of a party that did not wish to object. The IO concept was developed partially with Governments in mind. Understanding that Governments may not want to enter into the objection process, the IO could object if the IO independently felt that such an objection would be warranted. All public statements made in response to applications will be available to the IO, who will pay careful attention to the arguments made by any party thinking an objection should be filed in the public interest. An IO may certainly take into account any public statements made by a Government or its representatives in making a determination of whether to file an objection. It is important to note, however, that it will be up to the IO to make the ultimate determination on whether to file an objection.

After understanding specific requirements for assistance or facilitation contemplated by the GAC, there might be other ways to meet the needs described by the GAC without using the IO.

Costs of Objection Process

As noted above, the GAC suggests that Governments should not have to pay the same costs as others to file an objection. See Letter from GAC to ICANN, dated 23 September 2010 at <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>. At present there is no provision in the Applicant Guidebook for relief from dispute resolution fees for governments or any other objectors. Fees are paid directly to the dispute resolution providers.

As noted in his letter to the GAC on 23 September 2010 (<http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>), Peter Dengate Thrush stated:

The Board discussed the GAC's position that governments should not be required to pay a fee for raising objections to new gTLD applications, and does not agree with the GAC on this point. It is the Board's view that governments that file objections should be required to cover costs of the objection process just like any other objector; the objection process will be run on a cost-recovery and loser-pays basis (so the costs of objection processes in which governments prevail will be borne by applicants). How would the dispute resolution process be funded: a speculative increase in application fees or increased fees to gTLD registrants? Either of these cases or others seem difficult to implement and unfair.

However, as stated above, the Board is presently thinking that providing some level of funding for objections filed by the GAC (or the ALAC) as a group is an appropriate change to the process, so long as the decision to bring the objections is based on a consensus of GAC (or ALAC) members, and not just one or a few members.

Further, with respect to the GAC's statement that it has the ability to provide public policy advice to the Board (see Letter from the GAC to ICANN, dated 18 August 2009 at <http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>), ICANN's Chairman noted in his letter to the GAC on 22 September 2009 (<http://www.icann.org/en/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf>) that:

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

Procedures and Standards for Objections

The goal of the objection procedures is to provide a path for people to block certain applied-for strings in the new gTLD Program defined in the Policy and provide a predictable, smooth running process. The elements needed to achieve such a goal are: (1) a predictable path for objecting; (2) a dispute resolution process outside of ICANN; (3) dispute resolution panelist with the appropriate expertise; and (4) the clearest and most uniform set of standards possible.

a. Predictable Path: The procedures for filing and the administration of an objection are clearly stated. Further, each selected dispute resolution provider has established, published rules with time frames, established standards and expected fees. Having existing and established rules makes the objection path as predictable as possible.

b. Process outside of ICANN: ICANN does not have the capacity or the expertise to manage the administration of an unknown number of objections. Further, without an independent provider selecting independent experts to issue expert determinations on an objection, ICANN will become embroiled in the facts and circumstances of each and every dispute.

c. Expert Panelists: The goal of having appropriately experienced expert panelists, is to ensure that those issuing determinations on such objections have experience in dispute resolution processes and also in the relevant areas. For Limited Public Interest objections, that experience should include resolving international disputes that involve the subject matter of those likely to be at issue in those type of objections. It is envisioned that such experts include retired or sitting judges on the International Court of Justice, or similar tribunals. The community objection process would similarly require panelists experienced in the relevant community or culture at issue, as well as having relevant linguistic skills.

d. Clear Standards: The standards for both Limited Public Interest and Community-based objections are described in the Applicant Guidebook. See sections 3.4.3 and 3.4.4 in Module 3 of the Applicant Guidebook at <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-clean-12nov10-en.pdf>

Significant research in numerous jurisdictions in every region of the world was conducted to arrive at the undeniably widely accepted legal norms found in the enumerated grounds set forth in the Rec 6 or Limited Public Interest standard. (See <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf> for a summary of that research.)

Expanding the grounds for a Limited Public Interest objection, such as the GAC has suggested (see Letter from GAC to ICANN dated 4 August 2010 at

<http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf>), could lead to a lack of clarity on the grounds upon which such an objection could be filed or succeed. Note, however, that the already existing Community-based objection could be utilized to resolve many of the disputes arising from national, cultural, geographic religious and/or linguistic sensitivities. Rec 20 reads: “There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted. (See Module 1 of the Applicant Guidebook, section 3.1.1. at <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-clean-12nov10-en.pdf>)

Finally, it is important to note that the GNSO’s policy recommendations were limited only to TLDs to be introduced by way of the new gTLD Program. Applying such process to existing or pending TLDs that are not evaluated under the New gTLD Program would require additional policy work by the community.

Early Warning

As noted above, the GAC believes that prior reviews of new gTLD strings can serve as an “early warning” to applicants, providing an opportunity to amend or modify the proposed string prior to proceeding further in the application process or provide opportunities to determine whether the applicant is the sole appropriate manager or relevant authority for that particular string. See Letter from GAC to ICANN, dated 22 November 2010 at <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-22nov10-en.pdf> See Letter from GAC to ICANN, dated 22 November 2010 at <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-22nov10-en.pdf>

There is language in the current version of Module 1 of the Applicant Guidebook at section 1.1.2.5 (<http://www.icann.org/en/topics/new-gtlds/draft-new-gtld-drp-clean-12nov10-en.pdf>) about providing notification to applicants once ICANN has published the applications. Specifically,

Governments may provide a notification using the public comment forum to communicate concerns relating to national laws. However, a government’s notification of concern will not in itself be deemed to be a formal objection. A notification by a government does not constitute grounds for rejection of a gTLD application.

Providing an opportunity for an applicant to amend or modify the proposed string (or to alter the applicant) prior to proceeding further in the application process if receiving such notification could result in substantial abuses of the process. For example, allowing for modification after applications are submitted could lead to the call for opening up the entire application process again and it could seemingly create delays that would unacceptable and render the program stagnant. Applications could become placeholders for applicants to view the marketplace after applications are published and gain an advantage with a modification to their application. While cures for specific

instances can be developed and debated, maintaining a fair environment becomes very difficult or impracticable.

RELEVANT GUIDEBOOK SECTIONS AND OTHER PAPERS

1. The New gTLD Dispute Resolution Procedure (the “Procedure”) can be found at: <http://www.icann.org/en/topics/new-gtlds/draft-new-gtld-drp-clean-12nov10-en.pdf>
2. Module 1 of the current version of the Applicant Guidebook can be found at <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-clean-12nov10-en.pdf>
3. Module 3 of the current version of the Applicant Guidebook can be found at: <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-clean-12nov10-en.pdf>
4. Letter from Peter Dengate Thrush to the GAC on 22 September 2009 can be found at <http://www.icann.org/en/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf>
5. Letter from Peter Dengate Thrush to GAC dated 23 September 2010 can be found at <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>
6. The Rec6 CWG Recommendations can be found at <http://gnso.icann.org/bitcache/27d221c45bd9d8c234246849d716202bacd6f3ee?vid=14699&disposition=attachment&op=download>
7. A summary of research conducted on developing the Rec 6 standards can be found at <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>

- REFERENCE DOCUMENTS: OBJECTION PROCEDURES, INCLUDING
REQUIREMENTS FOR GOVERNMENTS TO PAY FEES**
- PROCEDURES FOR THE REVIEW OF SENSITIVE STRINGS**
- EARLY WARNING TO APPLICANTS: WHETHER A
PROPOSED STRING WOULD BE CONSIDERED
CONTROVERSIAL OR TO RAISE SENSITIVITIES
(INCLUDING GEOGRAPHICAL NAMES)**
- **SUMMARY OF ACTIONS TAKEN RESPONDING TO GAC AND PUBLIC COMMENTS**
- **CHRONOLOGICAL LISTING OF GAC ADVICE AND COMMENTS ON NEW GTLDS
AND RESPONSES PROVIDED BY ICANN AND KEY DOCUMENTS PUBLISHED ON
THE TOPICS**

SUMMARY OF ACTIONS TAKEN RESPONDING TO GAC AND PUBLIC COMMENTS

Objection Procedures, including requirements for governments to pay fees

Procedures for the Review of Sensitive Strings

Early warning to applicants: whether a proposed string would be considered controversial or to raise sensitivities (including geographical names)

- Efforts have been made to limit the costs to all parties, including governments, for participation in the objection procedure.
- The procedure includes provisions specifically aimed at reducing complexity and avoiding protracted proceedings. These include electronic filings, limits on length of submissions, time limits for submissions, and opportunities for consolidation of objections.
- The costs of the objection procedure are allocated on a “loser pays” basis. That is, while there is an investment up front, and there are some costs involved in preparing filings, the bulk of the cost is incurred by a party only where they do not prevail in the proceeding.
- ICANN will be proposing that funding for GAC or ALAC objections be made available.
- The Independent Objector has been instituted and may act as a backstop for cases where a group may be unable to file an objection for cost or other reasons.
- It has been indicated that the community objection policy was created to address concerns in the GAC Principles on new gTLDs so that appropriate consideration is given to sensitivities regarding terms of national, cultural, geographic and religious significance.

THIS TABLE PROVIDES A CHRONOLOGICAL LISTING OF GAC ADVICE AND COMMENTS ON NEW GTLDS AND RESPONSES PROVIDED BY ICANN AND KEY DOCUMENTS PUBLISHED ON THE TOPICS.

Objection Procedures, including requirements for governments to pay fees

Procedures For The Review Of Sensitive Strings

Early warning to applicants: whether a proposed string would be considered controversial or to raise sensitivities (including geographical names).

GAC Advice and Comments	ICANN Responses and Relevant Documents
<p>28 March 2007: GAC Principles regarding New gTLDs</p> <p>2.1 New gTLDs should respect:</p> <p>a) The provisions of the Universal Declaration of Human Rights¹ which seek to affirm "fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women".</p> <p>b) The sensitivities regarding terms with national, cultural, geographic and religious significance.</p>	<p>ICANN mapping with GNSO Policy Recommendation</p> <p>2.1a) is addressed by the GNSO Recommendation 6; "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law". The GNSO Principle G is also of relevance in this context, stating that "The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law". The GNSO Recommendation 6 establishes a ground for objections from third parties to strings proposed by applicants. It is foreseen in the implementation planning that such objections will be handled by a dispute resolution service provider outside of ICANN.</p> <p>2.1b) is addressed This principle is addressed by the GNSO Recommendation 20; "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 Recommendation establishes grounds for objections and subsequent dispute resolution handling, as further developed in GNSO Implementation Guideline P. The GNSO Recommendation 6 is also of relevance here, stating; "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law." See also the comment under 2.2 below.</p>

¹ See <http://www.un.org/Overview/rights.html>

<p>10 March 2009: Comments on V1 of Applicant Guidebook</p>	<p>24 October 2008: Applicant Guidebook Version 1 http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf</p> <p>29 October 2008: Explanatory Memo—Morality and Public Order Objection Considerations in New gTLD http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf</p> <p>18 February 2009, version 1 Public Comments Analysis Report http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf</p>
<p>24 June 2009: Communiqué Sydney</p> <p>States among other things:</p> <p>The GAC discussed the Draft Applicant Guidebook version 2 and feels that it does not yet respond to all the concerns that governments have. The GAC notes that considerable work is underway seeking to address several critical yet outstanding issues but the GAC remains concerned about a number of important issues:</p> <ul style="list-style-type: none"> - The complexity and cost of the objection procedure and the implications of the proposed procedure for governments to submit objections, for example, on public order and morality grounds. 	
	<p>18 February 2009: Applicant Guidebook Version 2 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf</p> <p>18 February 2009: Explanatory Memo—Description of Independent Objector for the New gTLD Dispute Resolution Process http://www.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf</p> <p>31 May 2009, Summary and analysis of public comments on version 2 http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf</p>
	<p>30 May 2009: Excerpts of Applicant Guidebook—Dispute Resolution Procedures http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-30may09-en.pdf</p> <p>30 May 2009: Explanatory Memo—Standard for Morality and Public Order</p>

	<p>research http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf</p> <p>30 May 2009: Explanatory Memo—Proposed ICANN Registry Restrictions Dispute Resolution Procedure http://www.icann.org/en/topics/new-gtlds/rrdrp-30may09-en.pdf</p>
<p>18 August 2009: Comments on V2 of APPLICANT GUIDEBOOK GAC notes sensitivities with regard to terms with national, cultural, geographic and religious significance. Serious concerns about the practical modalities for address objections on these grounds, including ICANN’s proposal to establish a panel of three judicial experts which may not fully take account of cultural and other national and differences in legal interpretation as to what is morally offensive or threatening to public order. More work is required on costs and the ability to object, noting that public interest groups may wish to object but may be unable to do so due to the costs involved. Governments should not have to follow the same procedures and pay the same costs as others. It is inappropriate for ICANN to require a public body to incur the same costs or subject itself to the limitations associated with a formal objection process primarily designed for non-governmental stakeholders. ICANN bylaws provide a more appropriate mechanism for the GAC or a member of the GAC to provide advice directly to the Board in issues of public policy. Noted that public comment is an avenue for governments and the Independent Objector could also be a possible avenue available to governments. The IO might also consider representations from governments at no cost to Them. Invited Board to include sub procedures in Applicant Guidebook version 3. Also points out that in many cases governments might already have to bear the costs associated with industry stakeholder and cross-government consultation, and increase their monitoring of the application process more generally just to make sure they are aware of the issues raised by the applications for new gTLDs.</p>	<p>22 September 2009: Reply from ICANN Chairman http://www.icann.org/en/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf</p> <p>With regard to the issues raised regarding procedure and cost, the New gTLD Dispute Resolution Procedure (the “Procedure”) was designed to be a well, defined, smooth procedure. The procedures can be found at http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedure-18feb09-en.pdf and are summarized in Module 3 of the Guidebook. The Procedure includes provisions that are specifically aimed at reducing complexity and avoiding protracted proceedings, such as:</p> <ul style="list-style-type: none"> ▪ Electronic filings (Article 6(a)); ▪ Limits upon the length of written submissions (Articles 8(b) & 11(e)); ▪ Short time limits for submissions and other steps in the procedure (Articles 7(a), 7(e), 9(a), 10(a), 11(b), 13(a), 17(b), & 21(a)); ▪ Consolidation of objections (Article 12); ▪ Strict limits upon document production (Article 18); and ▪ Strict limits upon hearings (Article 19). <p>ICANN would welcome specific suggestions for improving the Procedure. However, the benefits that may be derived from further reducing the complexity and duration of the proceedings must be balanced against the panel’s duty to ensure that the parties are treated with equality and that each party is given a reasonable opportunity to present its position (Procedure, Article 4(e)).</p> <p>It is foreseen that morality and public order objections will be heard and decided by panels of experts who are eminent jurists of international reputation. The panels will comprise three experts, in order to ensure that diverse backgrounds and perspectives are present in the Panel. See Procedure, Article 13(b)(iii). Such proceedings will necessarily involve a certain level of costs, for example, to cover</p>

the time and costs associated with engaging the eminent jurists who serve on the panel.

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

Considerable legal research was undertaken which examined the rules of public policy, as they apply to freedom of speech and encompassed the treatment of names of that may have national, cultural, geographic and religious sensitivities in a representative sample of countries, which included Brazil, Egypt, France, Hong Kong, Malaysia, South Africa, Switzerland and the United States of America. The possibility of objecting to an applied-for gTLD on the grounds of morality and public order is derived from the GNSO's Recommendation No. 6, which states, in part, that "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law." Various competing interests are potentially involved, for example the rights of freedom of expression versus sensitivities associated with terms of national, cultural, geographic and religious significance. While freedom of expression in gTLDs is not absolute, those claiming to be offended on national, cultural, geographic or religious grounds do not have an automatic veto over gTLDs. The standards summarized by Recommendation No. 6 indicate that a morality and public order objection should be based upon norms that are widely accepted in the international community. It is felt that a rule that did not require wide acceptance would facilitate pressure to align the standards with those imposed by the most repressive regimes. In addition to the Draft Applicant Guidebook (Module 3), ICANN has published explanatory memoranda, dated 29 October 2008 <http://www.icann.org/en/announcements/announcement-29oct08-en.htm> and 30 May 2009 <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>, that set out the specific standards that have been adopted for such objections and the legal research upon which those standards is based.

ICANN considers that a rule-based dispute resolution procedure, leading to a reasoned expert determination (that will normally be published) by three jurists of international renown, is an appropriate method of addressing and resolving disputes arising from objections based upon morality or public order. Indeed, no viable alternative has been suggested.

The Draft Applicant Guidebook does require governments to follow the same procedures and to pay the same costs as other objectors; however, it must be emphasised that the process has been developed to provide more than one avenue for governments, or anyone else, to raise concerns about an application. It has become quite common for governments and other public entities to participate in international dispute resolution proceedings with private parties (e.g., arbitration and other alternative dispute resolution procedures). For example, international arbitration is generally stipulated for the resolution of disputes between States and private investors under bilateral investment treaties (BITs). Such arbitrations may be conducted under rules such as those of the International Centre for the Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC). Recent years have seen a great increase in the conclusion of BITs. The United Nations Conference on Trade and Development (UNCTAD) has reported that the number of BITs increased dramatically in the 1990s, from 385 in 1989 to a total of 2,265 in 2003, involving 176 countries.² The total reached 2,676 by the end of 2008.³

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

Finally, it should be recalled again in this context that the Independent Objector may file an objection against an applied-for gTLD in cases where governments (and others) choose not to do so. The Independent Objector will be entitled to take into

² Source: http://www.unctadxi.org/templates/Page___1007.aspx (last visited 25 August 2009).

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

	<p>account comments made by any person or entity (including, of course, governments) when deciding whether to file an objection.</p>
	<p>12 March 2010, Status report on EOI; Vertical Integration; Trademark Clearinhouse and Uniform Rapid Suspension System; Post Delegation Dispute resolution Procedure – Legal Rights; Registry Restrictions Dispute Delegation Procedure – Community; IDN 3 character requirement; Communications Plan http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#4 22 April 2010, New gTLDs – reporting against new project plan http://www.icann.org/en/minutes/minutes-22apr10-en.htm Board Briefing Materials: One [PDF, 2.66 MB] Two [PDF, 1.61 MB] Three [PDF, 4.95 MB]</p>
	<p>4 October 2009: Applicant Guidebook Version 3 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf 15 February 2010, Summary and analysis comments version 3 http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf</p>
<p>10 March 2010: Comments on V3 of APPLICANT GUIDEBOOK Objection mechanism should be improved, included to ensure that objection fees are cost based rather than set a high deterrence level and governments should not be subject to paying fees. Restates previous position that GAC members can provide advise directly to the ICAN Board as foreseen in the bylaws, and not be required to subject objections to an independent third party service provider.</p>	<p>5 August 2010:Reply from ICANN Chairman http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-05aug10-en.pdf I reiterate my response of 22 September 2009, to the GAC on this issue: <i>“It is difficult to predict with accuracy whether the costs of the objection procedure will prove to be a barrier to legitimate objections; however, it is felt that the existence of a fee to lodge an objection is necessary as a deterrent to frivolous objections. Interested parties may pool their resources to finance an objection that they consider to be legitimate and important. The rule that the prevailing party will be fully reimbursed for the filing fee and advance payment of costs that it paid (Article 14(e)) is intended to lessen the financial burden upon parties that file a well-founded objection. Finally, it should be recalled that the Independent Objector may also file an objection where, for various reasons (including cost), no other objection had been filed.”</i> <i>“Governments that are members of the GAC have a mechanism to provide advice</i></p>

	<p><i>to ICANN’s Board, in accordance with ICANN’s Bylaws; however, it is not clear that Bylaw was intended to provide an avenue for governments to provide advice on operational matters of this nature. The ICANN Board wishes to have a neutral, expert determination, based upon certain published standards, when deciding whether to accept an application for a new gTLD or if an objection should be upheld.”</i></p> <p>Reviewing that response and the issues posed in your letter, I would add the following. ICANN (and the community) devoted substantial resources to develop the policy and implementation models to protect important interests through an objection based dispute resolution benefit. Still, specific suggestions for improvements are encouraged and I understand some Supporting Organizations and Advisory Committees are forming groups to study the issue. ICANN staff will support that work. The costs of that process are paid directly to the dispute resolution provider – no fees are added as a deterrent to potential objectors. In fact, one intended result of the process is to discourage applicants of controversial names that may infringe upon those important interests.</p> <p>We note that governments pay fees for other services, enter into agreements, and pursue conflict resolution. We do not believe that governments should be afforded special consideration by exempting them from paying fees associated with filing an objection. To do so would result in an inflation of costs for other objectors to cover the costs incurred by government requests. This is different, however, from arrangements to assist impecunious governments. If the GAC is able to provide the principle on which they base their request for exemption, it will be considered for inclusion into the procedure.</p>
<p>4 August 2010: Comments on Morality and Public Order The GAC firmly believes that the absence of any controversial strings in the current universe of top level domains (TLDs) to date contributes directly to the security and stability of the domain name and addressing system (DNS) and the universal resolvability of the system. As a matter of principle, and consistent with Sections 3(b) and 8(a) of the Affirmation of Commitments and the core values contained in Article 1, Section 2 of ICANN’s Bylaws, the GAC believes that the objective of stability, security and universal resolvability must be preserved in the course of expanding the DNS with the addition of new top level domains to the root. The GAC urges the Board to ensure that his fundamental value, which preserves the integrity of the DNS, is incorporated as an element of the public interest standard to which it has committed in the Affirmation of Commitments.</p>	<p>23 November 2010: Reply from ICANN Chairman http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf</p> <p>In accordance with the GAC request, ICANN has facilitated the cross-community discussions on the process for addressing the GNSO policy recommendation that, “[s]trings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.”</p> <p>The Board welcomes the report from the Recommendation 6 Working Group and has requested staff to undertake analysis of the report to determine how recommendations could be incorporated into the Guidebook and conduct a</p>

In this regard, the GAC believes that procedures to identify strings that could raise national, cultural, geographic, religious and/or linguistic sensitivities or objections are wanted so as to mitigate the risks of fragmenting the DNS that could result from the introduction of controversial strings.

While the GAC appreciates that the proposed objection procedure on “Morality and Public Order” grounds included in DAGv4 was intended to satisfy the concern noted above, the GAC strongly advises the Board to replace the proposed approach to addressing objections to new gTLDs applications based on “morality and public order” concerns with an alternative mechanism for addressing concerns related to objectionable strings. The terms “morality and public order” are used in various international instruments, such as the Paris Convention for the Protection of Industrial Property, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights (ICCPR). Generally, these terms are used to provide the basis for countries to either make an exemption from a treaty obligation or to establish by law limitations on rights and freedoms at the national level. Judicial decisions taken on these grounds are based on national law and vary from country to country. Accordingly, the GAC advises that using these terms as the premise for the proposed approach is flawed as it suggests that there is an internationally agreed definition of “morality and public order”. This is clearly not the case.

The GAC therefore recommends that community-wide discussions be facilitated by ICANN in order to ensure that an effective objections procedure be developed that both recognizes the relevance of national laws and effectively addresses strings that raise national, cultural, geographic, religious and/or linguistic sensitivities or objections that could result in intractable disputes. These objection procedures should apply to all pending and future TLDs.

consultation with the Working Group before the Cartagena meeting with the aim of finding additional areas of agreement for incorporation into the Applicant Guidebook.

I wish to make a few points regarding the GAC letter of 4 August on this topic. I do not consider this to be a stability issue per se but rather a policy issue where ICANN is implementing the consensus position developed by the GNSO. There are controversial names delegated and registered now at different levels of the domain name system that do not result in security or stability issues.

Additionally, the new gTLD implementation to date has addressed the issues described in the Affirmation of Commitments: competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection. The issues raised by the GAC are neither stability / security nor AoC issues – but they merit the full attention of the community.

The solution that appears in version 4 of the Applicant Guidebook was developed following extensive legal research that examined restrictions in a representative sample of countries, which included Brazil, Egypt, France, Hong Kong, Malaysia, South Africa, Switzerland and the United States of America. Various competing interests are potentially involved, for example the rights of freedom of expression versus sensitivities associated with terms of national, cultural, geographic and religious significance. While freedom of expression in gTLDs is not absolute, those claiming to be offended on national, cultural, geographic or religious grounds do not have an automatic veto over gTLDs. The standards summarized by Recommendation No. 6 indicate that a morality and public order objection should be based upon norms that are widely accepted in the international community.

In addition to the Draft Applicant Guidebook (Module 3), ICANN has published explanatory memoranda, dated 29 October 2008 <http://www.icann.org/en/announcements/announcement-29oct08-en.htm> and 30 May 2009 <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>, that set out the specific standards that have been adopted for such objections and the legal research upon which those standards is based.

Importantly, in addition to the Morality and Public Order objection and dispute resolution processes, the Community Objection standards were developed to address potential registration of names that have national, cultural, geographic and religious sensitivities.

I understand that some GAC members have expressed dissatisfaction with this

	<p>process as it was first described in version 2 of the Guidebook. The treatment of this issue in the new gTLD context, was the result of a well-studied and documented process which involved consultations with internationally recognized experts in this area. Advice containing thoughtful proposals for amending the treatment of this issue that maintains the integrity of the policy recommendation would be welcomed. The expression of dissatisfaction without a substantive proposal, does not give the Board or staff a toehold for considering alternative solutions. While the report of the recently convened working group still does not constitute a policy statement as conceived in the ICANN bylaws, ICANN staff and Board are working to collaborate with the community to adopt many of the recommendations.</p>
	<p>28 May 2010: Applicant Guidebook Version 4 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf</p> <p>28 May 2010: Explanatory Memo—“Quick Look” Procedure for Morality and Public Order Objections http://www.icann.org/en/topics/new-gtlds/morality-public-order-quick-look-28may10-en.pdf</p> <p>12 November 2010: Summary and analysis of comments version 4 http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf</p>
<p>23 September 2010: Comments on V4 of AG Reiterates its position that governments should not be required to pay a fee for raising objections to new gTLD applications. There are a number of reasons why sovereign nations should not pay fees to object to strings which they consider to be objectionable:</p> <ul style="list-style-type: none"> - sovereign nations are not protecting a commercial interest (as opposed, for example, to the protection of trademarks) but are instead protecting their national interests and the public interest (as they see it); - the cost of blocking a controversial gTLD for a Government may be less than the upfront cost of opposing a controversial gTLD. If ICANN’s policy objective is for one unified Internet, it should ensure that sovereign nations have low costs in raising their concerns about individual gTLDs in the first instance; and - as a general principle of public policy, the group responsible for causing a regulatory response should bear the cost of that regulatory response. This is 	<p>23 November 2010: Reply from ICANN Chairman http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf</p> <p>The criteria for community objections was created with the possible objections to place names in mind and as such the objection process “appropriately enables governments to use this.” The <i>New gTLD Dispute Resolution Procedure</i> is outlined in an Attachment to Module 3, pp P-1 to P-11 and was also developed so that it is equally accessible to those who wish to utilize the process.</p> <p>The Board discussed the GAC’s position that governments should not be required to pay a fee for raising objections to new gTLD applications, and does not agree with the GAC on this point. It is the Board’s view that governments that file objections should be required to cover costs of the objection process just like any other objector; the objection process will be run on a cost-recovery and loser-pays basis (so the costs of objection processes in which governments prevail will be</p>

<p>consistent with the principle that the collective (i.e. tax payers, citizens) does not bear a burden caused by special interest groups, without a substantial and identifiable public benefit.</p>	<p>borne by applicants). How would the dispute resolution process be funded: a speculative increase in application fees or increased fees to gTLD registrants? Either of these cases or others seem difficult to implement and unfair.</p>
	<p>25 September 2010, Board Retreat Trondheim http://www.icann.org/en/minutes/resolutions-25sep10-en.htm</p> <p>GNSO New gTLD Recommendation 6 Objection Process The Board acknowledges receipt of the Rec6CWG 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 Rec6 CWG 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.</p> <p>Board Briefing Materials: One [PDF, 3.23 MB] Two [PDF, 2.03 MB] Three [PDF, 816 KB] Four [PDF, 240 KB] Five [PDF, 546 KB]</p>
	<p>12 November 2010: Proposed Final Applicant Guidebook http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf</p> <p>12 November 2010: Explanatory Memo—Morality & Public Order http://www.icann.org/en/topics/new-gtlds/explanatory-memo-morality-public-order-12nov10-en.pdf</p>
<p>22 Nov 2010: Interim GAC comments relating to new gTLDs The GAC notes the work undertaken by the cross constituency Recommendation 6 Working Group which was set up to address the concerns raised by the GAC and ALAC during the Brussels meeting and in whose deliberations three GAC members participated. The GAC will be interested in the Board’s views of the recommendations contained in the report of the Group. The GAC believes it is necessary that further discussion and development of string review processes to</p>	

<p>identify those proposed strings that are: contrary to national law, policy or regulation (for example, several governments restrict the registration of certain terms of their ccTLDs); and/or that refer to religions, ethnicity, languages, or other cultural identifiers that might raise national sensitivities. The GAC believes the integration of prior reviews into the implementation of new gTLDs can serve as an “early warning” to applicants, providing an opportunity to amend or modify the proposed string prior to proceeding further in the application process. The prior reviews would also provide opportunities to determine whether the applicant is the sole appropriate manager or relevant authority for that particular string, or whether the proposed string is either too broad to effectively identify a single entity as the relevant authority or appropriate manager, or is sufficiently contentious that an appropriate manager cannot be identified and/or agreed.</p>	
<p>9 December 2010: Communiqué Cartagena That the GAC will provide the Board at the earliest opportunity with a list or "scorecard" of the issues which the GAC feels are still outstanding and require additional discussion between the Board and the GAC. These include:</p> <ul style="list-style-type: none"> • The objection procedures including the requirements for governments to pay fees; • Procedures for the review of sensitive strings; • The need for an early warning to applicants whether a proposed string would be considered controversial or to raise sensitivities (including geographical names). <p>----</p> <p>The GAC commends the initiative of the Recommendation 6 Cross Constituency Working Group (Rec6CCWG).</p> <p>The GAC will take into account the Board’s responses to the recommendations of the Rec6CWG in its further consideration of gTLD issues.</p> <p>Consistent with the GAC’s letter of 22 November 2010, the GAC anticipates working with the Board and other members of the ICANN constituencies, in particular the ALAC, in further consideration of the integration of prior reviews to serve as an early warning to applicants whether a proposed string would be considered controversial or to raise sensitivities.</p>	<p>10 December 2010, Board meeting</p> <p>New gTLD Remaining Issues http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2</p> <p>Resolved (2010.12.10.21), the Board:</p> <ol style="list-style-type: none"> 1. Appreciates the GAC's acceptance of the Board's invitation for an inter-sessional meeting to address the GAC's outstanding concerns with the new gTLD process. The Board anticipates this meeting occurring in February 2011, and looks forward to planning for this meeting in consultation and cooperation with the GAC, and to hearing the GAC's specific views on each remaining issue. 2. Directs staff to make revisions to the guidebook as appropriate based on the comments received during the public comment period on the Proposed Final Applicant Guidebook and comments on the New gTLD Economic Study Phase II Report. 3. Invites the Recommendation 6 Community Working Group to provide final written proposals on the issues identified above by 7 January 2011, and directs staff to provide briefing materials to enable the Board to make a decision in relation to the working group's recommendations. 4. Notes the continuing work being done by the Joint Applicant Support Working Group, and reiterates the Board's 28 October 2010 resolutions of thanks and encouragement. 5. Directs staff to synthesize the results of these consultations and comments, and to prepare revisions to the guidebook to enable the Board to make a decision on the launch of the new gTLD program as soon

	<p>as possible.</p> <p>6. Commits to provide a thorough and reasoned explanation of ICANN decisions, the rationale thereof and the sources of data and information on which ICANN relied, including providing a rationale regarding the Board's decisions in relation to economic analysis.</p> <p>7. Thanks the ICANN community for the tremendous patience, dedication, and commitment to resolving these difficult and complex issues.</p>
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