NEW gTLDs PROPOSED FINAL APPLICANT GUIDEBOOK PUBLIC COMMENT SUMMARY

Sources:

Public Comment Postings (12 Nov. 2010-15 Jan. 2011). The full text of the comments may be found at http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm.

GENERAL COMMENTS

Support for New gTLD Program

Key Points

- Supporters have argued, in general, that New gTLDs promote, competition, consumer choice, innovation and can help new businesses grow.

- Other supporters argue that while not perfect, the current proposed final AG is robust enough to support the launch of the new gTLD application process. The elements that still cause concern can be fixed within the proposed schedule.

Summary of Comments

One of ICANN's core principles is to bring competition to the registry space. New TLDs will bring innovation, consumer choice, and lower prices. Five years ago the battle was fought--the anti-TLD community lost and the vast majority of the community reached consensus that new TLDs should be introduced. The ICANN Board—with the GAC at its side—announced its approval in June 2008, which was the correct decision. The anti-TLD forces have been attempting to prevent the communities' will, consumer choice and innovation and it is no surprise that they are firing their last shots on the eve of final approval. Their efforts should be rebuffed. ICANN's implementation plan has taken into account the multitude of inputs from scores of individuals and entities. ICANN has made countless changes to the guidebook in the process and has explained its decisions along the way. Just because an input was disagreed with does not mean that it was ignored. How many economic studies are needed to show that there is demand for new TLDs? Perhaps the real life experience of a half-million .co names in three months is sufficient evidence. It is time to move on with the process--the Guidebook is ready to go and we have all waited far too long. *D. Schindler (5 Dec. 2010).*

While not perfect, the current proposed final AG is robust enough to support the launch of the new gTLD application process. The AG will evolve as the process moves forward.

It is time to put it to the test by approving the AG so we can move forward with the proposed timeline ICANN has set for the new gTLD launch which will create more competition in the market and greater benefits to consumers. *Network Solutions (8 Dec. 2010). Demand Media (8 Dec. 2010). AFNIC (9 Dec. 2010). AusRegistry (9 Dec. 2010). Domain Dimensions (9 Dec. 2010).*

The NCUC supports prompt commencement of the application program for new gTLDs. The elements that still cause concern (e.g. IO) can be fixed within the proposed schedule. *NCUC (10 Dec. 2010).*

It is time to put the demand to prove the unpredictable to rest and allow innovation and progress to flourish. At ICANN meetings policy based on consensus position is developed. Yet for the last two years we have heard a few self-protectionist opponents demand study after study that will prove the consumer need for innovation. In response many analogies have been expressed. Did the Wright Brothers do market studies to get a solid number on the demand to fly from consumers? Looking back, would that study have been accurate? How about the innovations to the bicycle? The consumer "need" for the iPhone? Juan Calle, president of .co said "With the new domain extensions, creativity can live to the right of the dot. Registries will have to innovate to stay alive." *E. Pruis (6 Dec. 2010).*

RySG supports the introduction of new gTLDs and believes the time has come to introduce further competition into the marketplace. RySG does believe certain issues it highlights in its comments need to be resolved and hopes that ICANN provides the latitude to allow further amendment to the AG even beyond the Cartagena meeting if necessary. RySG is ready to engage with ICANN Staff to ensure resolution of these items with no impact on the projected timetable for the new gTLD round. Use of the "TDG" legal group may be the appropriate forum to resolve these issues in a timely fashion. *RySG (7 Dec. 2010).*

New gTLDs are a platform for innovation. This change will benefit individual users and especially large brands on a scale not previously seen in the DNS. Brand owners will be the biggest beneficiaries; they will use their own top level domain to manage their Internet presence. When users grow to expect to find Internet resources at ".company" the need for brand protection and the opportunity for user confusion will be greatly diminished. We also should think in terms of how a large number of domains in the aggregate will provide competition for .com. This issue cannot be understood by studying the extremely limited TLD introductions of the past. *Tucows (8 Dec. 2010).*

Overall, it has been established that external benefits of the gTLD program exceed its external costs. For each new gTLD individually the right thing to do is to focus preventive action on the cases where external costs will occur. It is wrong to stop the entire gTLD program because of concern about externalities from some potential gTLDs. *W. Staub (10 Dec. 2010). F. Krueger (10 Dec. 2010).*

ICANN should move ahead with the new gTLD program so that the benefits of Internet connectivity can be expanded to places such as Africa. There are powerful and compelling reasons for Africa to need the .africa gTLD and now is the time for this opportunity to happen. *DotConnectAfrica (13 Dec. 2010).*

New gTLDs will create innovation and create a multitude and variety of jobs, all of which will create competition. New gTLDs will also bring more security to the Internet through the requirement to utilize DNSSEC. Please do not allow any further delay. Begin the communications period so people can get to work. *E. Pruis (6 Jan. 2011).*

New gTLDs should proceed without delay, as they will bring innovation and many benefits. In particular they will bring about "cause based TLDs" –ie. those TLDs that will benefit the greater and global public good. *DotGreen (9 Jan. 2011).*

Opposition to New gTLD Program

Key Points

- Critics have argued that the program does not serve the public interest, the risks outweigh the benefits and ICANN lacks sufficient public support. Some also oppose the introduction of an "unlimited" number of TLDs.

- Other critics express concern that the critical overarching issues, including among other things a failure to include strong trademark protections has not been fully addressed.

Summary of Comments

ICANN in pursuing the new gTLD program is acting against the broader public interest and only in the interests of itself and a small number of "insiders" who would directly profit from short term schemes that threaten the long term stability of the Internet naming system and that impose externalities on third parties (via increased confusion and defensive registration costs). "Innovation" from new gTLDs is a myth. The public has not been clamoring for new TLDs. The past new TLDs (e.g., .name, .asia, .jobs, .travel) were failures for the public. ICANN needs to go back and consider proposals such as the competitive bidding concept recommended by the DOJ (i.e., tender processes for operation of new TLDs for fixed terms at the lowest possible cost to consumers), or our suggestion of "Ascended TLDs" which uses the legal concept of easements to ensure fair allocation of new TLDs taking into full account the existing property rights of domain registrants. *G. Kirikos (13 Nov. 2010). G. Kirikos (24 Nov. 2010). AIPLA (6 Dec. 2010).*

ICANN and its Board need to get things right and stop gambling with the future of the DNS. ICANN needs to stop acting like a startup trying to make commercial gains for itself, and remember that it was created to serve the public interest. There has been talk

of forming a P2P DNS due to unhappiness with ICANN and also talk of creating "Response Policy Zones." This would threaten security and stability; it would be inconsistent with universal resolvability of domains due to blocking lists that would override ICANN's root. DAGv5 is nowhere close to "getting things right" and must be abandoned. *G. Kirikos (16 Jan. 2011).*

The Department of Commerce (DOC) ultimately has the full control over any new TLDs that enter into the root zone. If ICANN continues to pursue its current dangerous path of introducing new gTLDs, we call upon the NTIA, DOC, DOJ and GAC to put an end to ICANN's plan and leave open the option of dismantling ICANN by ending the IANA contract and taking the functionality in-house again. ICANN must scrap its existing work on new gTLDs and properly research all possible allocation mechanisms before any final decisions are made. DOC should reject all attempts to increase the number of new TLDs (besides the ones that have consensus public support, such as IDN ccTLDs) until such time as a process exists that has the support of all stakeholders. *G. Kirikos (13 Nov. 2010). G. Kirikos (24 Nov. 2010).*

The DOC/NTIA/DOJ should open up formal public comments via the Federal Register notices and allow for direct submissions by stakeholders on this matter and on ICANN governance in general. Public televised hearings in Washington might also be helpful to understand what alternatives might be available. The DOC/NTIA/DOJ and GAC should compel ICANN to write down objective, scientific and rigorous criteria under which they would abandon the project. This would crystallize all outstanding issues and allow the public to move on, once we have been able to demonstrate that we have met the standards for termination. It is not acceptable for ICANN to waste millions of our dollars to push the agenda of a small group of insiders or for ICANN to pretend that the thresholds have been met for the overarching issues. Good policy making requires objective standards. *G. Kirikos (10 Dec. 2010).*

IOC opposition and request for ICANN response to issues raised. The IOC maintains its opposition to the introduction of new gTLDs because it is inherently flawed and injurious to owners of famous trademarks—particularly non-profit rights holders that rely in part on special statutory protection. IOC's recommendations in its comments should not be taken as a waiver of the IOC's right to proceed against ICANN for damages resulting to the IOC or the Olympic Movement from the implementation of the proposed new gTLD system. If these critical issues are not resolved and ICANN chooses not to place the Olympic trademarks on the reserved names list, then the IOC and its National Olympic Committees are prepared to employ all available legislative, regulatory, administrative and judicial mechanisms to hold ICANN accountable for damage caused to the Olympic Movement. The IOC prefers a prudent solution reached by collaborative means. The IOC also requests that ICANN respond to the points raised by the IOC in a face to face meeting and/or in writing. *IOC (29 Nov. 2010).*

Microsoft continues to oppose introduction of an unlimited number of new ASCII gTLDs. It will not increase competition but will increase fraud and abuse and likely destabilize the Internet as a commercial platform, while imposing major financial burdens and

resource allocation requirements on virtually the entire non-contracting party, non-gTLD applicant business community. *Microsoft (9 Dec. 2010).*

ICANN still has failed to address the critical overarching issues, including among other things a failure to include strong trademark protections and to ensure that the costs of the program will not exceed its benefits, even after publishing five drafts of the AG. *INTA (8 Dec. 2010). U.S. Chamber of Commerce et al. (9 Dec. 2010). Microsoft (9 Dec. 2010). BBC (10 Dec. 2010). RE/MAX (10 Dec. 2010). Adobe Systems (10 Dec. 2010). Verizon (10 Dec. 2010). IHG (Module 5, 10 Dec. 2010). LEGO (11 Jan. 2011). VKR (12 Jan. 2011). Arla Foods (11 Jan. 2011). Vestas (11 Jan. 2011).*

The proposed new gTLD program should be halted until sufficient and convincing documentation has been produced that its impact will be to allow for more innovation, choice and change to the Internet's addressing system. There is no documentation available supporting the conclusion that the Internet suffers from insufficient competition in the domain name marketplace. All is based on unsupported "expectation." If such documentation cannot be produced—which the conclusions of the economic case study seem to suggest--then the new gTLD program as a whole should be cancelled. The only ones in favor of the program are the ones who can make money out of it—ICANN and the registrars. The Internet community including private users and brand owners are not interested. *H. Lundbeck (12 Jan. 2011).*

The overriding concern of RIAA et al. is that any music themed gTLD is used productively and responsibly, and not as a means to facilitate copyright or trademark infringement. ICANN should expeditiously implement appropriate changes to the DAG to address these critical concerns. RIAA et al. prefer a practical solution to its concerns and hope to avoid the need to escalate the issue further. *RIAA et al. (11 Jan. 2011).*

The TLDs "political" and "company" are very bad ideas because they will put Internet stability at risk and fracture it at some point—these are TLDs about issues that people often get very angry about. However, .toys, .cars, and .sports and so on should be okay because they define industries. The new gTLD program would force ICANN to put huge resources into legal battles instead of in maintaining infrastructure. Another result from all this so-called innovation is that governments, companies and individuals will have to pay to be exactly as they are now (i.e. tax). In addition, ICANN does nothing about the VeriSign monopoly abuse on domain prices. Instead of new gTLDs, why not start with the obvious issue of promoting competition and ending monopoly abuse which affects everyone? If ICANN really is a non-profit organization with one common goal of a secure, stable and unified global Internet, then it should stop the big money operations named as "innovation" and leave real innovation for online entrepreneurs. *Lucas (10 Jan. 2011).*

The GNSO's process for new gTLDs is so damaging to the Domain Name Space and the Internet as a whole that it should be sent back to the GNSO for serious revision,

rather than expecting the ICANN Board to try and out point the GAC with such a fundamentally flawed proposition. *P. Tattersfield (15 Jan. 2011).*

ICANN should completely abandon the new gTLD program as currently proposed and devise a new program of categories that will meet the purposes for which ICANN was set up and the Affirmation of Commitments. The new gTLD program is nothing less than an attempt to replicate the Dot Com registry at the TLD level to enable the transfer of the Internet's current $100 trillion value from its current owners to ICANN insiders for a tiny fraction of that value. Company brand TLDs will be delegated in the first year, setting off the effect that every other company meeting the criteria will have to be given the same opportunity for a .brand TLD. This will mean that the key element of the domain name will move from the left of the dot to the right of the dot. *P. Foody (18 Jan. 2011).*

ICANN Procedures

Key Points

- ICANN has performed careful analysis of the obligations in the Affirmation of Commitments and taken appropriate steps to meet all commitments. New gTLD program positions sometimes run counter to positions of interested parties. That does not mean that ICANN is not fulfilling its other duties, or that the opinions have not been fully discussed and considered.

- An effort is underway to enhance the reporting of rationale for all Board decisions. This has already been instituted for the Board meeting of 25 January 2011 and will be refined going forward. Rationale will accompany final decisions taken by the Board on the new gTLD program.

- The Board received updates on public comment received up to their meeting on 10 December, and ultimately, the comment period was extended through 15 January.

- Contributions by stakeholder groups, such as advice on implementation models, are indeed considered significant and have been considered at length by ICANN and the community and, where possible, incorporated.

Summary of Comments

ICANN obligations in the Affirmation of Commitments.
ICANN should ensure that it meets its obligations as contained in the Affirmation of Commitments (AOC) prior to implementation of the new gTLD program. To date there is an apparent failure to do so. The improvements in operations which ICANN committed to in the AOC (e.g., transparency, accountability, fact-based policy development) have yet to be seen.

In the context of the new gTLD program, ICANN is failing to meet its commitment to "provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied." For example, ICANN has failed to provide a thorough and reasoned explanation of how ICANN moved to the November 5, 2010, decision allowing full cross ownership. To ensure that the global public interest is being served, ICANN needs to clearly document and explain the decisions it makes on these and all issues, as recently affirmed by the GAC in its November 22, 2010 letter.

Despite ICANN's commitments in the AOC to adequately address issues prior to implementation of an expansion program, ICANN still has not completed the economic studies and analysis evaluating the threshold question of whether the benefits of expansion outweigh the costs. No information on how the required economic studies are to be finished and evaluated calls into question the credibility of establishing a timeline at this juncture. Given the volume of material recently posted by ICANN (Proposed Final AG and supporting documentation), a thorough and thoughtful analysis by the U.S. government will take more than the twenty working days allotted in the ICANN public comment process. The suggestion that the ICANN Board in Cartagena could make an informed decision regarding the timing of the new gTLD program launch is unrealistic.

NTIA (2 Dec. 2010). NCTA (10 Dec. 2010). AT&T (10 Dec. 2010). P. Tattersfield (10 Dec. 2010). Danish Ministry (10 Dec. 2010). CADNA (10 Dec. 2010). Adobe Systems (10 Dec. 2010). IHG (Module 5, 10 Dec. 2010).

ICANN's substitution of process for substantive dialogue (a drive toward conclusion without more meaningful dialogue) regarding the new gTLD program can hardly be reconciled with the AOC calling for ICANN "to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied." ICANN's policies should reflect the considered and reasoned input made by representative bodies with public responsibilities and substantive expertise. *WIPO Center (2 Dec. 2010). IACC (9 Dec. 2010). CADNA (10 Dec. 2010). BBC (10 Dec. 2010).*

The accelerated process with Board consideration of the guidebook on December 10 is inadequate for full consideration of the significant new elements contained in the proposed final AG. The fact that the Board appears to be rushing to take action on the guidebook before new Board members are seated creates a perception that the process lacks adequate transparency and accountability. Approval of the guidebook in its current form would not "adequately address" all the numerous issues identified in the AOC, paragraph 9.3. *COA (3 Dec. 2010). INTA (8 Dec. 2010) Microsoft (9 Dec. 2010). Time Warner (9 Dec. 2010). News Corporation (9 Dec. 2010). NCTA (10 Dec. 2010).*

ICANN's performance in drafting the AG illustrates the difficulties in the DNS being governed, supposedly in the public interest, by an entity that receives its funding from incremental fees on domain name registrations, and whose only means of enforcing its

policies is through legal contracts. ICANN's rush to launch a torrent of new gTLD registries without strong rules or the capabilities to enforce them reflects, more than anything else, ICANN's financial interest in continually increasing the number of domain names. *RE/MAX (10 Dec. 2010).*

Integrated approach. ICANN needs to incorporate all of the major overarching issues into a holistic implementation plan and develop comprehensive safeguards to address them. The segmented process used to date to address overarching issues has not produced such a decision. *AT&T (10 Dec. 2010).*

Board decision making process. The Accountability and Transparency Review Team (ATRT) provides guidance on the type of process that should be used for a proceeding as important as new gTLDs. Paragraph 20 of the ATRT recommends that the Board adopt the practice of articulating the basis for its decisions and identifying the public comments that were persuasive in reaching the decision. It also recommends that the Board identify the relevant basis and public comments that were not accepted in making its decision. The ICANN Board should complete this type of reasoned decision which will show its commitment to accountability and transparency, and help to ensure that ICANN's decision is "embraced, supported and accepted" by the public and the Internet community. *AT&T (10 Dec. 2010). CADNA (10 Dec. 2010).*

It is recognized that a wave of new gTLDs has the potential to bring innovation and greater competition to the DNS. However, it is our strong belief that the latest draft of ICANN's new gTLD plan would not meet its AOC obligations to adequately address consumer protection and rights protection. *U.S. Chamber of Commerce et al. (9 Dec. 2010).*

Public comment opportunity not meaningful. Those in ICANN responsible for the new gTLD program do not seem to take seriously into account the thoroughly documented concerns of numerous companies and persons interested in a well-functioning Internet which at the same time provides legitimate protection for trademark rights. The opportunity given by ICANN for public comments is in reality a fake one. The only thing that drives this new proposed program is money and not a sincere concern for optimum functionality of the Internet. *H. Lundbeck (12 Jan. 2011).*

Public Comment—Request for Extension of Time. ICA respectfully requests that ICANN extend the comment period on the proposed final AG by a minimum of two weeks and preferably by an additional three weeks. A 2-3 week extension would bring this comment period into line with that provided for prior versions of the guidebook. The proposed final AG has significant new material that ICA is working to assimilate and understand. Many ICA members are in Cartagena for the ICANN meeting militating against preparation of a fully informed comment letter for consideration by ICA membership prior to its submission in just under 4 days. ICA's extension request should in no way interfere with approval of a final AG by the ICANN Board that permits opening of the application window for new gTLDs in Spring 2011. ICA hopes that the December 10th comment deadline has not been set in order to facilitate such a vote by the ICANN

Board in Cartagena. The current comment deadline will occur just hours before the start of the Board meeting in Colombia. Given time and work burdens on ICANN staff there is no way they can review and meaningfully summarize suggestions and concerns expressed in the final round of comments (most of which are usually submitted within the final 24 hours of any comment period) to aid the Board in understanding them prior to a final vote. Given recent expressions of concern by the GAC and individual national governments regarding ICANN's policy process, and particularly the adequacy of explanations of policy decisions, it is particularly important that the Board vote on the final AG be conducted in a manner that demonstrates that all submitted comments have been accorded serious consideration. *ICA (6 Dec. 2010).*

It would be appropriate to extend the public comment period beyond the current deadline of 10 December 2010. *ccNSO (9 Dec. 2010). E. Brunner-Williams (10 Dec. 2010).*

Public comment period on Proposed Final Applicant Guidebook (PF-AG) is too short— additional time is requested for public comments. ICANN has only allotted 28 days to the stakeholder community to review the considerable revisions to the PF-AG and analyze all the supporting and ancillary documents posted by ICANN. This is considerably shorter than ICANN's earlier comment periods. *MarkMonitor (2 Dec. 2010). MarkMonitor (9 Dec. 2010).*

The revisions to the PF-AG are largely driven by the ICANN Board's decision to allow Vertical Integration, a dramatic departure from previous versions of the DAG. If this is the "final" DAG, then ICANN should provide adequate time to the stakeholders and community to enable review and development of substantive comments to this critical document. A longer comment period equaling or exceeding previous comment periods would be more prudent, especially since the Board and Staff have stated that they will evaluate the quantity of comments in relation to previous periods as a measure of support or lack thereof for the PF-AG. *MarkMonitor (2 Dec. 2010). MarkMonitor (9 Dec. 2010). INTA (8 Dec. 2010.*

The concurrent timing of the Cartagena meeting further constrains the time allowed for comments (impractical for Cartagena meeting attendees to take input from their constituencies gathered at the meeting and incorporate it into comments while meeting ICANN's comment deadline). *MarkMonitor (2 Dec. 2010).*

The Board is scheduled to meet on December 10, the day the comments are due. It is not possible for staff to analyze the comments, prepare briefing documents and submit them to the Board in the required time frame. The Board requires submission of documents several days before a Board vote on any specific topic. The ICANN Board must take sufficient time to consider the public comments before making decisions about the schedule for the implementation of the guidebook. *MarkMonitor (2 Dec. 2010). MarkMonitor (9 Dec. 2010). INTA (8 Dec. 2010). Microsoft (9 Dec. 2010). BBC (10 Dec. 2010).*

The BC is disappointed that so many of its concerns about the new gTLD guidebook have been disregarded despite repeated comments by multiple stakeholders. There are repeated instances where the majority of comments call for a change but staff ignores that majority without adequate explanation. BC members are particularly disappointed by ICANN's continued disregard for its concerns about effective RPMs. The current guidebook proposes a substantially weakened version of the tapestry of RPMs initially outlined by the IRT. Consumers and businesses are likely to be harmed by cyber squatting and other fraud likely to occur in hundreds of new gTLDs, especially at the second level. The BC incorporates again its July 2010 comments regarding market differentiation/translations-IDNs/community-based evaluation scoring and RPMs. *BC (6 Dec. 2010). Hogan Lovells (9 Dec. 2010).*

Vertical Integration Decision Process.
The process of getting to the VI decision (which was the correct decision) was messy. The ICANN Board and staff should provide the community and the GAC with clear, written reasons for this decision. *Tucows (8 Dec. 2010).*

The process for the Board's change of position on VI was flawed and no rationale was provided for the decision. *P. Tattersfield (15 Jan. 2011).*

GAC. GAC representatives should understand ICANN as a living process. Problems will be dealt with as they arise. The one thing that is certain is that the problems we expect are unlikely to be the problems we encounter. The ICANN community, including staff and Board, should engage in extraordinary efforts to provide the GAC with information they need in the form they need it in. This is appropriate given the transition to a more global community. *Tucows (8 Dec. 2010).*

Government notification. ICANN needs to outline in what instances government notification would result in denial of an application, and the formal channels that need to be taken to provide such notification and have it taken into account. *CADNA (10 Dec. 2010).*

The proposed final AG is unacceptable. ALAC requests that the critical issues of concern to Internet end users in a number of core areas –e.g., dispute resolution, applicant support, and the independent objector—be addressed quickly so as to minimize delays in the availability of new domains. ALAC also requests that the Board and staff implement ICANN's community process rather than be an obstacle to it. ALAC emphasizes that the role of ICANN staff is to execute the settled policy, not to agree or disagree with it, or indeed affect it at all. The proposed final AG ignores or repudiates almost all of the significant cross-community consensus presented since the last revision; ALAC has serious concerns about the sincerity of ICANN assertions of being a truly bottom-up process and discredits ICANN's claims of increasing transparency and accountability. *ALAC (8 Dec. 2010). P-NPOC (9 Dec. 2010).*

Failure of ICANN process.

An example of a failure of process is that we believe that the summary of the comments of DAGv4 was held back so that staff could update the comments after the Trondheim Board resolutions. What may have been better would be to get the summaries out sooner and then issue a separate summary document after Trondheim giving only the impacted comments and the update rationale. *P. Tattersfield (10 Dec. 2010).*

The new gTLD proposals have been fraught with many process failings by ICANN. For example there have been serious problems with how ICANN handles public input, giving the impression that the public's concerns are ignored when they conflict with a predetermined position. While the new gTLD proposal would be clearly benefiting ICANN and some would-be contracted parties, the potential resulting externalities for innocent third parties are unconscionable. Process failings have been highlighted also in the final recommendations of the Accountability and Transparency review team. *P. Tattersfield (15 Jan. 2011).*

Analysis of Comments

Some comments expressed the view that ICANN had not met its obligations under the Affirmation of Commitments, or that various issues had not been adequately addressed. Section 9.3 of the Affirmation provides that:

> *ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation.*

ICANN has performed careful analysis of these issues and taken appropriate steps to meet all commitments. It is important to note that appropriately addressing these areas has always been part of ICANN's work in preparing for the implementation of new gTLDs; these are not new areas that were identified as part of the Affirmation of Commitments.

The New gTLD Program affects diverse groups of interested parties, often with divergent objectives. Positions proposed by some groups in the program will often be opposed by others. The fact that some decisions taken are opposed does not mean that ICANN is not fulfilling its role as described in ICANN's charter documents, the Bylaws and the Affirmation of Commitments. Comments are carefully considered and analyzed in every case, as indicated in documents such as this.

ICANN has also committed to responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied. Several comments expressed a desire to see rationale for decisions made by ICANN. Much of this information has been provided in explanatory memoranda, the analysis of public comment, and, in many cases, the text of Board

resolutions. However, an effort is underway to enhance the reporting of this information. This has already been instituted for the Board meeting of 25 January 2011 and will be refined going forward.

Several comments expressed concern about the 10 December closure of the comment period on the Proposed Final version of the Guidebook. A comment correctly notes that this is shorter than previous comment periods. However, this was based on the history of substantial comment and discussion and the limited amount of new material. Additional reasons cited by comments requesting more time included new information on vertical integration (cross-ownership), the ICANN meeting in Cartagena, and the Board meeting on 10 December. Specifically, comments stated that the Board would not have adequate time to review and consider the comment received during the comment period before making a decision. The Board received updates on public comment received up to their meeting on 10 December, and ultimately, the comment period was extended through 15 January.

Some comments accused ICANN of being in a rush to launch to further its own financial interests. ICANN notes that the implementation process has been characterized by a prolonged dialogue because the program contains so many serious issues where impacted parties need to work together and difficult decisions have to be made. There have been multiple avenues and opportunities for consultation to provide adequate time for issues to be considered and compromises reached. ICANN has made multiple revisions to aspects of the program based on the input of stakeholders and these are reflected in the Guidebook.   Given the above history and commitments, it is ICANN's intention to reach resolution on these issues. It would be irresponsible to use community resources to run a process without the intention to see it through to conclusion.

A comment suggests that ICANN incorporate all overarching issues into a "holistic" implementation plan. The four overarching issues of Trademark Protection, Mitigating Malicious Conduct, Economic Analysis, and Root Zone Scaling have been addressed in parallel because, while there is some overlap, the expertise is different and solutions for one do not work as solutions for another. Certainly it is possible to view the impact of measures on another area, and this analysis has been done in the process of community discussions on these issues.

A comment emphasizes that ICANN staff should be executing settled policy rather than ignoring or interfering with consensus. In fact, the settled policy (i.e., the GNSO's 19 policy recommendations) is being implemented as directed by the Board. Other contributions by stakeholder groups, such as advice on implementation models, are indeed considered significant and have been considered at length by ICANN and the community and, where possible, incorporated.

TIMELINE/MODELS

Key Points

- Some commenters support publication of the final Applicant Guidebook to support a launch in May 2011, while other comments support a delay in the timeline stating more time is needed to address open (overarching) issues and minimize adverse consequences, especially in today's economy.

- Applicants for New gTLDs want to see a timeline. If program suffers further delays, it will further harm ICANN's credibility; there should also be consequences for the organization.

- Several comments argue for ICANN to consider a limited and discrete introduction of new gTLDs in the first round in a rational and controlled manner, in order to mitigate risks and maximize the economic and social benefits of the program.

Summary of Comments

Complete final rules. ICANN should write down the final rules of the applicant guidebook in order to be able to achieve the May 2011 opening date for applications. This achievement will undoubtedly contribute to improving community confidence in ICANN's work. *PuntoGAL (7 Dec. 2010). DOTZON (9 Dec. 2010).*

The Board should not allow any further delays and approve the May 30, 2011, application window for new TLDs. *DotGreen (9 Jan. 2011).*

Reliable timeframe. ICANN should expressly state a reliable date for the application period of the next round. This is critical to applicants' business planning. Otherwise some, if not many, applications will not be filed, contrary to ICANN's core value of introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest. *DOTZON (9 Dec. 2010). dotKoeln (9 Dec. 2010).*

Do not pursue a staged introduction of new gTLDs. ICANN should discount pleas for a "me-first" staged introduction of "good" or "unproblematic" or "uncontentious" new gTLDs. Apart from obvious self-interest, it is impossible to know which applications are "good" or "bad" until the applications are submitted and evaluated. The ICANN Board and staff should resist the temptation to pick "better" applications over "worse" ones. Previous rounds have shown that they are not very good at it. *Minds + Machines (10 Dec. 2010). F. Krueger (10 Dec. 2010).*

Fast track for cultural and linguistic gTLDs. Non-controversial Community-based gTLD proposals are being unduly delayed as a result of wider operational and policy development issues that do not concern them. A fast-track window for cultural and linguistic gTLDs will create an environment of trust within the process of implementing a predictable cycle of new TLD application cycles. It will enable applicants to become

operational with minimal risk to the integrity of the broader application process, and will spread the load of evaluating a large number of applicants in a bigger window. This is beneficial for ICANN's operational stability. All ccTLDs seek to respond to a specific need –to strengthen small cultural and linguistic communities. Our communities are, and have been, waiting for ICANN to open the window. We hope we will be able to apply in 2011 for .EUS with no more delays. *dotEUS Association (8 Dec. 2010). dotScot (9 Dec. 2010). ECLID (9 Dec. 2010).*

A one size fits all approach to new gTLDs is flawed, and by this approach ICANN is missing a huge opportunity to shape the proposed introduction of new gTLDs in the public interest. Without categories the new gTLD framework has to be far more constrained to cover for eventualities many of which have absolutely no bearing on all but one category and therefore introduce needless regulation and complexity for other categories. In a bottom up or consensus driven organization this raises serious concern when it is clear even to the uninformed observer that each different category will introduce markedly different externalities and provide markedly different levels of social benefits. This also leads to the impression that ICANN has been captured by vested interests and that the new gTLD process will be implemented as a one size fits all approach regardless of community concerns. The latest economic study (Phase II) recognizes that different categories of new gTLDs are likely to differ in both their need and the benefits they are likely to provide. The fact that ICANN believes it can enforce a VI Registry/Registrar code of conduct raises serious questions as to the validity of ICANN's assertions that it would be unable to enforce compliance of categories for new gTLDs. *P. Tattersfield (15 Jan. 2011).*

Creation of a super league--.brand TLDs. If .brand is allowed and reinforced worldwide in corporate communications, users will quickly recognize that a brand to the right of the dot is a major player and therefore by implication a brand to the left of the dot will be perceived as a lesser brand. A single layer model to the right of the dot can never replicate the complexities of businesses around the world. While initially appearing to offer more freedom for new domains, it actually offers less. E.g. if there is a ".dell" and ".ibm", the what about a ".hp"? HP is seriously disadvantaged simply because its brand is 2 letters and 2 letters are reserved for country codes. The single layer model offers a system where there can only be one organization to the right of the dot –ever. This is a step backwards from the existing system which by careful management of the competing open generic gTLDs allows multiple totally separate entities to each enjoy a similar level of branding in the second level to the left of the dot. Also, what about organizations that conflict with geographic areas (e.g. .amazon)? Or organizations or brands that share a name with places that may in the future have a need for an internet presence? Or companies whose brands are already taken like .cat? Most importantly, a super league destroys the ability of smaller and medium sized players to compete on a level playing field (due to $185K application fee and $25K fee per year needed to enjoy the same level of branding and to enter the super league). For start ups and smaller players the cost of admission to this branding advantage is likely to prove prohibitive. *P. Tattersfield (15 Jan. 2011).*

Generic names—creation of private monopolies. Similar to corporate .brands, generic names to the right of the dot will come to be perceived as superior (e.g., .news, .shop). Their existence will lead to the creation of a series of individual worldwide monopolies which will be awarded primarily for the benefit of the most economically advantaged. What happens if Microsoft applies for .search? This blurs the DNS framework with the existing entities providing a recipe for consumer confusion to be replicated in every vertical. The award of the .jobs gTLD illustrates the problems with awarding monopoly positions. Awarding a generic TLD in any industry to an applicant based in or controlled by someone in the same industry is game changing compared with the current system which allows numerous individual entities to compete equitably in the second level of open gTLDs and ccTLDs. Trademark law does not allow this advantage to be conferred; nor should ICANN. *P. Tattersfield (15 Jan. 2011).*

If a full consensus cannot be reached about the AGB, ICANN should open an early window for the non-sensitive and uncontroversial cultural and linguistic TLDs, so that they are not further unduly delayed as a result of wider operational and policy development issues which do not concern them. This would be the perfect test for the current community based rules. PuntoGAL is not asking for a specific set of rules to examine cultural and linguistic proposals. No one would be harmed by this early window and all the candidates and ICANN itself would benefit from it. *PuntoGAL (14 Jan. 2011).*

Step by step proposal—early window test. CORE has submitted to ICANN an annex to the step by step proposal offered at an earlier stage of the public comment process. The proposal offers a way to test the system with an Early Window based in both self-selection of the applicants offering the highest level of commitments in the yet-unsolved areas and a blocking mechanism to check that self-selection. The elements are:

- It is not restricted to any pre-defined category; applicants self-select.
- Applicants must provide detailed descriptions on how they specifically address the still-pending overarching issues and they must have an accountability mechanism;
- Each organized group within ICANN will have an opportunity to review the application and if needed to raise a "red flag" effectively blocking the application from moving forward in the Early Window Test. This means that the application is on hold until the final AG and related documents are effectively approved and implemented.

With this mechanism, no one would be worse off than they are today, and some applications would be allowed to move, which would be a significant step forward. *A. Abril i Abril (15 Jan. 2011).*

Discrete, limited rounds.
The June 2010 Economic Analysis recommended continuing ICANN's practice of introducing new gTLDs in discrete, limited rounds. By contrast ICANN seeks to facilitate a program that foresees an unprecedented 200 to 300 (and up to 1,000) TLDs in a first

round. The apparent discrepancy between advice and action calls for adequate explanation. *WIPO Center (2 Dec. 2010).*

ICANN should not proceed with a wide-open gTLD program until mechanisms are fully developed and adequately tested to address the numerous concerns that the program raises. If ICANN believes that further delays to the new gTLD program are unacceptable, then it should follow the GAC's most recent advice to conduct a "small pilot programme" for a strictly limited number of gTLDs designed to serve linguistic, geographical, and cultural communities. As the GAC suggests, such a pilot could provide actual data that could be used "to refine and improve the application rules for subsequent rounds." *AIPLA (6 Dec. 2010). U.S. Chamber of Commerce et al. (9 Dec. 2010). dotScot (9 Dec. 2010).*

ICANN should consider a limited and discrete introduction of new gTLDs in the first round in a rational and controlled manner, limited to community-based gTLDs in order to mitigate risks and maximize the economic and social benefits of the program. This position is receiving growing support in the ICANN community (e.g. GAC, Economic Framework document). *MarkMonitor (9 Dec. 2010). News Corporation (9 Dec. 2010).*

The Phase II economic report supports the position of AT&T and other commenters that ICANN should introduce new gTLDs in discrete, limited rounds and prioritize introduction of IDNs. *AT&T (10 Dec. 2010).*

The Ministry recommends a more cautious approach to introducing new gTLDs given that the issue of the economic pros and cons of introducing them to date has not been adequately addressed. The Ministry is concerned that the AG has not undergone sufficient improvements at this stage to serve as a basis for introducing new gTLDs. *Danish Ministry (10 Dec. 2010). R. Fernandez (10 Dec. 2010).*

ICANN should take an in-depth look at what it is setting forth and realize that a premature launch of new gTLDs puts the business and intellectual property communities at great financial risk. By postponing the launch, it will allow for better analysis of the provisions, most importantly the TMC and the URS. *IHG (Module 5, 10 Dec. 2010).*

ICANN is in fact recommending in the proposed final AG that it introduce new TLDs in discrete, limited rounds. It can use the experience of this round to make any necessary adjustments prior to future rounds. Due to the process and requirements, this round will be limited in duration to a discrete group of entities that can meet very limiting qualifications. All of the names that are applied for in this round will in practice enter the root in batches or phases over a lengthy period of time. *Domain Dimensions (9 Dec. 2010).*

Controlled introduction of new TLDs. ICANN should implement fewer new gTLDs than planned. ICANN should divide the applications into groups—e.g., a brand name group, a geo-name group, and a generic group. Both the lesser number of names implemented

and the grouping will make it possible to continuously analyze the benefits and cost to the community. By continuously analyzing small test groups of new TLDs, ICANN can adjust the introduction according to what cost and benefits are experienced with the different groups of TLDs. This will allow ICANN to introduce new TLDs in a controlled way to the benefit of the global Internet society. *DIFO (15 Jan. 2011).*

Additional time and effort needed for brand owner protection. The IOC agrees with the GAC that ICANN leadership must pay more concerted attention to mitigate the costs of new gTLDs to brand owners. Accordingly, ICANN should abandon its current timeline for the launch of the new gTLD program. *IOC (29 Nov. 2010) AIPLA (6 Dec. 2010). Adobe Systems (10 Dec. 2010).*

Market differentiation. Market differentiation—i.e. working towards a more semantic DNS—must be the way forward to an orderly expansion of the DNS. Anything less will lead to duplicative registrations and user confusion over the long term. *RNA Partners (10 Dec. 2010).*

Analysis of Comments

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

The frustration expressed by some regarding the delays for introducing new gTLDs is understood. It is a challenge to balance on one hand the discussions and solutions for important open issues and, on the other hand, the continuing program development and operational readiness. Significant efforts continue to examine and, together with the community, find solutions to these open issues, by discussions such as the upcoming Board- GAC consultations in Brussels.

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

Staff continues to make progress towards the program development and, at the same time, work with the global Internet community towards a level of consensus on the Program's outstanding issues.

Several comments argue for ICANN to consider a limited and discrete introduction of new gTLDs in the first application round. This is what is being proposed: the initial application round is a discrete round with a limited window for submissions, with criteria and procedures established for this round, as detailed in the Applicant Guidebook. It is limited not only by the various requirements but by the maximum delegation rates as

discussed in "Delegation Rate Scenarios for New gTLDs" (see
http://www.icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf).

Various comments suggested prioritization methods for a smaller limited application round, such as community-based applications or those that are "non-controversial." It should be noted that limited introductory rounds have been conducted previously, and there is no provision in the GNSO policy recommendations for creating a process that prioritizes application opportunities for one type of application over another. Further, development of new rules and procedures for a process with limitations that are fair and effective would be a complex and difficult undertaking – a lesson learned from previous rounds. ICANN would not pursue implementation of a limited application round without clear policy direction for guidance.

COMMUNICATIONS

Key Points

- The four month new gTLD communications plan will include not-for-profits/NGOs as an audience in its outreach.

Summary of Comments

Not-for-profit/NGOs—targeted outreach. The ICANN Board should instruct Staff to include in the four-month communications campaign targeted outreach about the new gTLD program to not-for-profit organizations/NGOs. The information should be about the application process as well as information of interest to third parties who may not be applying for their own new gTLD (e.g., objection procedures, RPMs, and other opportunities to comment on and participate in the process at a policy level). The outreach should also include information about opportunities for Applicant Support. *P-NPOC (1 Dec. 2010). Red Cross (9 Dec. 2010).*

Analysis of Comments

The goal of the new gTLD four month communications campaign is to increase global awareness of the new gTLD program. The communications program will raise awareness among interested parties and applicants worldwide on the *who, what, when, where and why* of new gTLDs. It will address a range of audiences, one of which is non-profits. Our goal is to educate so that interested parties are aware of the program details and things they need to consider, whether applying for a new gTLD or not.

MISCELLANEOUS/OTHER

<u>Whois verification</u>. We have proposed numerous times that all domain names be subject to WHOIS verification (i.e. mailed PIN codes to physical addresses of registrants) to curb abuse. ICANN ignored this proposal. This proposal would have the strong backing of the intellectual property constituencies as well as the support of most legitimate domain name registrants. It should be a precondition to any new TLD expansion. *G. Kirikos (13 Nov. 2010). G. Kirikos (10 Dec. 2010).*

APPLICATION PROCESS

Key Points

- Although a maximum of 1000 delegations per year has been established, the actual delegation rate is expected to be much lower (315-340 per year). An operational readiness plan is in place to ensure that ICANN is prepared for managing the application volume and enforcing the requirements on existing and new TLDs.

- There will not be "volume discounts" in the initial application round. The evaluation fee only covers new gTLD program expenses and not other efforts. It is the intention to gain from the experience of the initial round to hone the fee structure and provide additional aid to certain applicants in the following rounds.

- ICANN would not pursue a limited application round without clear policy direction for guidance. The GNSO policy recommendations do not direct the creation of a process that prioritizes application opportunities for one type of application over another. The development of new rules and procedures for a process with limitations that are fair and effective would be a complex and difficult undertaking – a lesson learned from previous rounds.

Summary of Comments

<u>1,000 new gTLDs per year</u>.
The number 1,000 is still an overwhelming number not only for registrants and the community but for ICANN itself to handle. CADNA would like to know what research/studies were conducted to arrive at and justify this number. The number should be significantly reduced to avoid potential problems (stretched resources making ICANN unable to properly enforce its rules, creating new opportunities for cybercriminals). *CADNA (10 Dec. 2010).*

The guidebook is misleading on the 1,000 per year limit. Despite ICANN's insistence that the "annual delegation rate" will be limited to "1,000 per year in any case, no matter how many applications are received", it is ICANN's stated goal that such a limit will apply for a period of less even than one year, let alone the period of several years that the term "annual" is usually interpreted as referring to. Notwithstanding subsection 1.1.2.3, subsection 1.1.6 says that ICANN's goal is to launch subsequent application

rounds as quickly as possible, and the goal is for the next round to begin within one year of the close of the initial round. Since subsection 1.1.2.3 has no timeframe attached to it, AGs for subsequent rounds will be able to dictate their own delegation rates and limits, if any limits are to apply at all. Also, the speed with which the second round is intended to start completely prevents any worthwhile examination of the effects of newly delegated gTLDs. *P. Foody (18 Jan. 2011).*

First batch (1.1.2.3). The first batch should be limited to significantly fewer than 500 applications in order to test the operational readiness of newly designed application processing and objection/contention systems. BC is not alone in this call for a more limited, discrete rollout (e.g., GAC, ICANN's recent economic report recommendation). A significant portion of the first batch should be comprised of Community-Based applications. Consistent with its longstanding position that name space expansion should create added-value, the BC supports the concept of non-controversial community TLDs as the optimal way to expand the name space because they create this kind of added-value competition. *BC (6 Dec. 2010).*

Newsfeed or mailing list notification of applications. Section 1.1.2.2 of the guidebook provides that ICANN will post all applications considered completed in batches and the objection filing period for that batch will commence at the same time (1.1.2.4). Given the possible large volume of applications, HKIRC recommends that ICANN provide a newsfeed or mailing list service regarding updates on the applications so that different stakeholders can prepare and file their objections, if necessary, in a timely manner. HKIRC (22 Dec. 2010).

Batching methodology (1.1.2.3).
To help applicants plan for the possibility of batch processing it is imperative that ICANN detail the exact method in which batching might be employed. The general descriptions in the AG give little information to applicants as to whether a first to file or similar timing method will be employed. If a first to file or similar method is used, applicants need to know that well ahead of the application window opening. *RySG (7 Dec. 2010).*

The batching methods to be used should be clearly defined prior to new gTLD launch. The method used for batching could materially affect the way in which applicants prepare their respective submissions. *MarkMonitor (Module 1, 7 Dec. 2010).*

Not enough attention has been given to the possibility of ICANN specializing its evaluation process by groups or batches of like-featured applications. *AFNIC (9 Dec. 2010).*

Batches—priority for cultural and linguistic TLDs. If ICANN creates batches for application processing, a community-based candidate should have priority over a commercial proposal. It is evident that proposals developed to achieve commercial profits do not have as much public interest as the ones promoted by cultural and linguistic communities. Many of the commercial proposals are financed by large

corporations, making inclusion in the first batch less critical. On the contrary, PuntoGAL and other cultural and linguistic candidates will find it very difficult to explain to their community supporters that their proposals are still waiting to be evaluated while ICANN examines commercial initiatives which do not have large support among Internet users and will not contribute to improving cultural diversity on the Internet. *PuntoGAL (7 Dec. 2010).*

Application submission period (1.1.1). Given the long and broad discussion on geoTLDs, a 30-day submission period should be sufficient, especially if the next application window arises a year later. *dotBERLIN (9 Dec.2010). .hamburg (9 Dec. 2010). .GMBH (9 Dec. 2010). AusRegistry (9 Dec. 2010). Domain Dimensions (9 Dec.2010). dotKoeln (9 Dec. 2010). dotBERLIN (12 Jan. 2011). DotGreen (9 Jan. 2011).*

Fee reduction—IDN scripts and other languages (1.2.10).
ICANN should design incentive mechanisms to encourage the build-out of IDNs and small or underserved languages. One such incentive would be reduction of the $185,000 application fee for additional IDN versions and translations of the applied-for string. The ICANN Board and staff have acknowledged that some applicant processing costs would be avoided when evaluating additional strings from the same applicant. The reduced fee should be set such that all incremental costs are covered by the applicant and not shifted to other applicants. If the applicant is seeking new translations of a current gTLD, all registrants should have the option to register their second level names in all of the linguistic variations offered by that TLD. *BC (6 Dec. 2010).*

The aggregate price of a community applicant applying for the same string in different languages and IDN equivalents should be discounted. These applications can be merged under one community application as a bundle. This will cut ICANN's costs. All the information, community criteria, registry technical requirements and financial information will only have to be verified once. The only part that needs to be verified with additional cost allocated is whether the equivalent translated string meets the technical script requirements set forth by ICANN. *dotMusic (10 Sept. 2010). RNA Partners (10 Dec. 2010).*

Not-for-profit/NGO application fee. The ICANN Board should instruct Staff to establish an evaluation fee/application fee that is appropriate for not-for-profit organizations/NGOs. Fees for not-for-profit organizations should reflect ICANN's actual costs for direct administration of the application process and should not include overhead for other ICANN activities. *P-NPOC (1 Dec. 2010). Red Cross (9 Dec. 2010).*

Developing countries—fees. It is expected that ICANN will adopt a favorable fee policy for developing countries. Huge fees would stifle the initiative of developing countries to apply for new gTLDs. *Internet Society of China (10 Dec. 2010).*

Applicant Support Development Program.

The ICANN Board should instruct Staff to initiate the Applicant Support Development Program. It should be announced before the start of the first round. The conditions of the program should be communicated and widely published as soon as possible to allow applicants to benefit from the program during the first round. *P-NPOC (1 Dec. 2010). Red Cross (9 Dec. 2010).*

The Applicant Support program if incorporated into the AG will sharply raise the initiatives of the applicants from developing countries to apply for new gTLDs and promote the balanced development of the global Internet. *Internet Society of China (10 Dec. 2010).*

Board consideration of JAS consensus approach (1.2.10). The Joint Applicant Support Working Group (JAS) has achieved significant consensus on many important issues and is under approval processes at both the GNSO and ALAC. ALAC urges the Board to ensure that its briefings on this matter fully and fairly consider the working group's recommendations. *ALAC (8 Dec. 2010). P-NPOC (9 Dec. 2010).*

Split fees into registration and resolution components. As previously suggested but ignored by ICANN, domain fees should be split. Where a domain name has no nameservers and does not resolve and was bought for defensive purposes then that person should only be charged the registration component and not the resolution component. The total cost for such a domain name would be a lot less. Defensively registered domain names are a source of pure cost to the public, but they are a pure profit center to registry operators and to ICANN. *G. Kirikos (10 Dec. 2010).*

Analysis of Comments

Regarding the expected maximum delegation rates, some comments requested the data used for this analysis. This was published at http://www.icann.org/en/announcements/announcement-03mar10-en.htm and at http://icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf for public comment.

Some comments expressed that the projected limited delegation rate specifying a maximum of 1000 per year was too high for both the community and potentially for ICANN operationally, and urged adoption of a smaller limit. It should be noted that these limits are in place as a maximum. As described in the papers mentioned above, the actual delegation rate is expected to be much lower. Note also that the operational readiness portion of the project is in place to ensure that ICANN is operationally prepared for managing the application volume and enforcing the requirements on existing TLDs. Based on current conditions, ICANN does not anticipate changes to these projections.

A comment questioned whether the maximum delegation rate was consistent with the goal to launch subsequent application rounds as expeditiously as possible. It is the intention to gain from the experience of the initial round, while avoiding lengthy delays

for the next phase of the program. The Board's resolution on Consumer Choice, Competition, and Innovation (see http://icann.org/en/minutes/resolutions-10dec10-en.htm) provided for early development of targets to inform the review called for in the Affirmation of Commitments which takes place after new gTLDs have been in operation for one year:

> *Resolved (2010.12.10.30), the ICANN Board requests advice from the ALAC, GAC, GNSO and ccNSO on establishing the definition, measures, and three year targets for those measures, for competition, consumer trust and consumer choice in the context of the domain name system, such advice to be provided for discussion at the ICANN International Public meeting in San Francisco from 13-18 March 2011.*

In addition, as noted in the delegation rates papers mentioned above, modeling will continue during, and after, the first application round so that root-scaling discussions can continue and the delegation rates can be managed as the program goes forward.

Various comments suggested prioritization methods for a smaller limited application round, such as community-based applications or those that are "non-controversial." It should be noted that limited introductory rounds have been conducted previously, and there is no provision in the GNSO policy recommendations for creating a process that prioritizes application opportunities for one type of application over another. Further, development of new rules and procedures for a process with limitations that are fair and effective would be a complex and difficult undertaking – a lesson learned from previous rounds. ICANN would not pursue implementation of a limited application round without clear policy direction for guidance.

Several comments requested more detail on the batching process that would be used in the event of a high volume of applications. It should be noted that this is a contingency process and will only be relevant in the event that the volume of applications exceeds what can be accommodated in the process as designed. A process external to the application submission process will be employed to establish evaluation priority. This process will be based on an online ticketing system or other objective criteria.

A comment suggests that ICANN give more attention to "specializing" the evaluation process by groups or batches of like-featured applications. We agree. This is contemplated to gain efficiencies in the process while allowing a fair and consistent evaluation across the set of applications.

A set of commenters suggested that the application submission period should be 30 days. ICANN has not established the length of this period; however, it is expected that it the necessary steps leading up to and including the submission of an application will take some time to complete. ICANN's intention is to ensure that the time period is sufficient for applicants to provide appropriate attention to these steps. The application period will be at least 60 days and no longer than 90 days.

Some comments suggested inclusion of means for "bundling" of applications for scenarios such as IDN variants or translations at discounted evaluation fees. ICANN does not expect to institute bundled application pricing for the reasons previously articulated. While there are efficiencies in the evaluation process that can be gained where an applicant applies for multiple strings, these have already been factored into the establishment of the financial model. Giving preferential pricing for bulk applications on such bases is not contemplated in the GNSO policy recommendations, and implementing such a suggestion would not be a straightforward exercise. It should be recalled that there is not a one-to-one mapping to determine what is and is not a variant or an exact translation of a string: this would add considerable complexity to the process. As has been noted previously, the level of uncertainty and risk is highest in the opening application round.

A comment also suggested bundled prices for second-level domain names in new gTLDs. It should be noted that procedures for second-level registration is a matter of policy established by the TLD operator.

A comment suggests establishing special fees for non-profit organizations/NGOs, and that states that fees should reflect actual costs rather than overhead for other ICANN activities. The established fee level covers the cost of operating the program, the program development costs, and allocates some funds for addressing the uncertainties. These costs include direct overhead but not costs attributable to other ICANN activities. 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. 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. Fee models can be re-considered for subsequent application rounds.

Every effort has been made to keep the evaluation fee as low as possible within the constraints of operating a responsible program. Recognizing that there are needs in developing countries, a working group comprised of representatives from various Internet constituencies is evaluating options for providing support to a defined set of applicants. The group is currently working on refining recommendations included in its latest report (see http://www.icann.org/en/topics/new-gtlds/jas-milestone-report-11nov10-en.pdf). Many comments were received in support of the work of this group. The group is a cross-SO/AC working group and is making important recommendations on how various types of applicant support could be implemented in the program; however, it should be clarified that this group is not following a policy development process.

A comment suggests that domain name registration fees should be structured so that a "purely defensive" registration that will not be used costs less than registering a domain name that would resolve to a working website. Prices for domain name registration are

generally at the discretion of the registry according to the model and its registrant base. The current registry agreements specify that consensus policies shall not prescribe or limit the price of registry services. This model has merit and has been discussed in the development of rights protection mechanisms. However, it would require considerable work to define is a purely defensive registration. There are "defensive registrations" now where the registrant derives financial or other benefit. Defensive registrations may act as "parking pages" from which point-and-click revenue is derived. Other defensive registrations point to main web sites, increasing traffic to that web site.

One comment suggested that ICANN provide a newsfeed or mailing list with application status updates. It is the intention that updated status for all applications will be available via ICANN's website, in a format that makes the information easily accessible. A newsfeed could be a useful addition to this and is being considered as a mechanism to communicate this information.

EVALUATION

Key Points

- There are a number of challenges with providing the names of directors, officers, partners and controlling shareholders of new gTLD Applicants. While there may be some incremental gain for specific applications in providing such information, the challenges of processing the public comments as well as ensuring a consistent process for all applicants are expected to outweigh potential benefits gained.

- In cases where consideration of the comments has impacted the result of the evaluation, the evaluators would seek clarification from the applicant.

- The evaluation question on security is designed to elicit a detailed description from the applicant of the security policies and procedures that will be employed in the TLD. Comments requesting clarification on various aspects of this question and criteria are currently being considered for the revision of the Guidebook.

- ICANN in general defers to the IETF on matters such as TLD string syntax.

Summary of Comments

Role of public comments (1.1.2.5). The AG provides no methodology for Independent Evaluators (IEs) to weigh public comments in their evaluation of an application. How they factor in public comments could materially affect the outcome for an applicant. The AG provides no explicit opportunity for the applicant to rebut such public comments. The AG should define the clear methodology that IEs will use to weigh public comments in the evaluation of an application. The AG should allow an applicant an explicit rebuttal opportunity, allowing an applicant to review comments filed "against" its application, for

a period of no more than 5 days. The shortness of the reply comment period is to allow the application in question to remain "on schedule."

> Clarification is needed on whether comments and reply or "rebuttal" comments will affect the timing of evaluation (i.e. will the application's place in line be affected and if so what criteria will be used to establish the new place in line?)
>
> Experts should not be permitted to consider evidence and arguments outside the confines of the objection proceeding and the papers submitted by the parties thereto. It would be against fundamental fairness to consider extraneous evidence. This should apply regarding 1.1.2.5 (evaluators) and 1.1.2.7 (dispute resolution providers—the third paragraph says "[p]ublic comments may also be relevant to one or more objections grounds" and "DRSPs will have discretion to consider them").

RySG (7 Dec. 2010). DOTZON (9 Dec. 2010). dotHOTEL (10 Dec. 2010). dotMusic (10 Dec. 2010).

Use of comments in string contention (1.1.2.8). RySG is concerned about the language providing that in the event of a community priority evaluation (module 4, string contention procedures) ICANN will provide the comments received during the public comment period to the evaluators with instructions to take the relevant information into account in reaching their conclusions. ICANN should define what "relevant" is. Also, this language could be interpreted by some that in order to score higher in the community evaluation that thousands of comments need to be generated on behalf of the application. Clarifying language should stress that while breadth of support may be a factor, quality of comments trumps waves of form comments. *RySG (7 Dec. 2010). dotBERLIN (9 Dec. 2010). .hamburg (9 Dec. 2010). DOTZON (9 Dec. 2010). .GMBH (9 Dec. 2010). dotKoeln (9 Dec. 2010).*

Length of comment period. The initial comment period is 45 days but open to extension. Who makes the determination that a comment period will be extended and what criteria will be used? *RySG (7 Dec. 2010).*

Community-based designation—definitions (1.2.3.1). The phrase "appropriate security verification procedures" requires clarification, particularly given the status of the HSTLD working group (i.e., how will "appropriate" be measured, what standards will be used?) *RySG (7 Dec. 2010).*

Legal compliance (1.2—Information for all applicants).
Removal of the word "terrorism" from the latest version of the AG is to be commended, but it was replaced by the "Legal Compliance" paragraph on page 28 which invokes the U.S. Treasury's OFAC and SDN lists to carry out a screening of applicants from all corners of the world against U.S. laws and requirements. In essence this means that only the English and IDN new gTLDs and their applicants that the U.S. government and its foreign policy say are okay will be permitted. This could potentially cause breaking

the single root of the Internet, needlessly alienating and instigating sovereign nations to start considering not only the option of boycotting ICANN's new gTLDs but also prompting them to consider alternatives to the ICANN root and its version of Internet governance. ICANN and all concerned parties need to assess the manner in which this has been handled. *Multilingual Internet Group (10 Dec. 2010).*

The new Legal Compliance paragraph in the guidebook should be eliminated. Also, ICANN should reconsider its direction and address the problem of being accountable to only a single government. Even removal of this new paragraph does not remove ICANN's ultimate accountability and responsibility to only the US government (AoC) being a California corporation.

- The new Legal Compliance paragraph brings back the critical concerns of many sovereign nations over the control of a single country over today's Internet. It also introduces serious problems for many to-be gTLD operators and sovereign nations who will find such terms unacceptable to permit themselves or their citizens to take part in said new gTLDs while subject to the laws and political conditions of only one government.
- It also risks the technical stability of the whole Internet and its unique identifiers. In the aftermath of the website shutdowns by the Immigration and Customs Enforcement (ICE) Agency of the U.S. government, someone is calling worldwide ISPs to set up alternative DNS roots. ICANN as a U.S. non-profit corporation is subject to the ICE at any time even for putting down a TLD.
- Most importantly this new direction is reminding many sovereign, independent nations and local communities that today's Internet is under the supreme control of the U.S. government through ICANN and IANA contracts and that these nations need to accept foreign controls over their sovereign territories in being able to operate TLDs in ASCII or IDNs in their local languages. E.g. a number of expected new gTLD applications will come from communities and municipalities that maintain autonomous sovereignty which will not accept being governed in their territories and jurisdiction by the laws of another (single) nation, nor participate in the objection process.

A. Al-Zoman (1 Jan. 2011). Arab TLD Committee (Module 1, 16 Jan. 2011).

<u>Legal compliance</u>. ICANN's codification of its continued compliance with U.S. law into the text of the AG is to be applauded. The "Legal Compliance" paragraph should remain unaltered in the final approved version. ICANN is and has always been a non-profit corporation chartered in the U.S. and thereby subject to its laws. It is disingenuous to argue that the Legal Compliance paragraph in the proposed final AG is an example of "control" by the U.S. government. Arguments conflating ICANN's legal compliance with the laws of its country of incorporation with any overarching political considerations are misguided and detrimental to the continued development of ICANN as a multinational entity. *Lawfare Project (13 Jan. 2011).*

Awareness of gaming. ICANN should make the dozens of evaluators aware that there will be attempts to game the AG rules to get advantages against competitors or get a TLD approved. Fake communities, hired objectors, brand look-alikes and squeezing out may be some of the many possible scenarios. *dotBERLIN (12 Jan. 2011).*

General Business Diligence and Criminal History (2.1.1).
MarkMonitor recognizes and appreciates the special consideration that entities traded on the top 25 exchanges are granted with regard to background due diligence but questions why this is the only special consideration made to rights owners. *MarkMonitor (Module 2, 7 Dec. 2010).*

Hogan Lovells welcomes this provision. *Hogan Lovells (9 Dec. 2010).*

Reliance entirely on stock exchanges' due diligence of officers and directors backgrounds is misplaced. ICANN should at least do a nominal check on publicly traded companies. *IPC (9 Dec. 2010).*

History of cyber squatting (2.1.2).
Screening of applicants against UDRP and legal databases is not an effective measure for determining cyber squatting. An overwhelming amount of cyber squatting is never disputed and would be missed by this approach. MarkMonitor recommends that an independent firm conduct investigations to uncover patterns of abuse in addition to using UDRP and legal databases. MarkMonitor also recommends that during the impending review of the UDRP that ICANN consider creating a consolidated data store for complainant, respondent, decision and other important data to make this process effective. *MarkMonitor (Module 2, 7 Dec. 2010).*

Microsoft is pleased that ICANN set the threshold for cyber squatting disqualification at 3 or more decisions with one occurring in the past 4 years. *Microsoft (9 Dec. 2010).*

Hogan Lovells supports this provision and to balance it would suggest adding that any entity or person that has been involved in a pattern of Reverse Domain Name Hijacking by any UDRP provider would also be banned from applying. *Hogan Lovells (9 Dec. 2010). ICA (9 Dec. 2010). S. Barclay (10 Dec. 2010).*

The proposed treatment of cyber squatting is imbalanced in that there is no new gTLD eligibility prohibition regarding complainants who regularly abuse the UDRP process. The background check criteria should be further amended to bar any individual or business entity that has lost a percentage or number of UDRP decisions from being eligible to be a new gTLD applicant. *Worldwide Media (10 Dec. 2010).*

Cyber squatting disqualification criteria (1.2.1).
ICANN should expand the disqualification criteria (k) to apply to affiliates or subsidiaries of the applicant. As currently drafted the cyber squatting disqualification applies only if the applicant or named individuals were involved. Cyber squatting has been documented at affiliates and subsidiaries of the registrars and registries who are likely

to be applicants for new gTLDs. *BC (6 Dec. 2010). Microsoft (9 Dec. 2010). CADNA (10 Dec. 2010).*

It should be clarified in 1.2.1 that the decisions of concern are adverse decisions; the phrase "involved in" is unclear. Also, the decisions of interest should final decisions. Both of these problems can be resolved using the phrasing "adverse, final decisions." Also, the grammatical error "in of" in subsection k should be corrected. *J. Berryhill (9 Dec. 2010).*

Section 1.2.1(k) should be amended to treat as equally disqualifying a pattern of abuses of the UDRP or litigation in attempts to take domain names from legitimate registrants (i.e., amend to "has been found liable for a pattern of abusive or bad-faith behavior, namely cyber squatting or reverse domain-name hijacking, as defined in the UDRP, ACPA, or equivalent legislation"). Also because this measure adds new consequences to old findings, applicants may not have had adequate incentive to challenge default or erroneous judgments in the past. Applicants should be permitted to explain the circumstances of those rulings and on good showing to exclude such findings from consideration. A determination of "pattern" should be based on the totality of the circumstances. *W. Seltzer (10 Dec. 2010).*

Cyber squatting history—definition is rigid and inequitable. The new definition in the proposed final AG is problematic and should be modified. Denying an entity the opportunity to operate a gTLD because of 3 (adverse) UDRP decisions is an extremely broad standard which will unintentionally disqualify otherwise qualified applicants.

> It does not allow for contextual analysis in terms of a "pattern" (i.e. it is difficult to conclude that an entity has engaged in a history/pattern of cyber squatting when they own hundreds or thousands of domain names and have lost a few UDRP or similar proceedings).

> There appears to be no language in this new section allowing analysis of whether the entity acted in bad faith or repeatedly attempted to abuse trademark rights in the past—it is just a matter of whether they lost three or more UDRP cases. In addition, imposing this unrelated ex post facto sanction to bar applicants for new gTLDs was not contemplated by the UDRP process. This is draconian and results in a retroactive change in the legal consequences of all UDRP decisions. By analogy, just because a company loses several contested patent, copyright or trademark infringement cases does not prohibit that company from ever applying for their own patent, copyright or trademark in the future.

> Further, the proposed language is not clear on what constitutes cyber squatting. Since there is no "universal" definition of cyber squatting is any "decision" (presumably negative) under the general definitions of the UDRP, ACPA and other national laws considered cyber squatting?

ICANN should not be seeking to exclude an applicant for anything but serial/egregious IP violations. ICANN should revert to the DAGv4 definition of "bad faith in regard to domain name registration" (a-d) and with this utilize a definition of history or pattern of cyber squatting that does not involve a specific number but rather is closer to a "customary way of operation or behavior" which allows for a contextual analysis for each applicant.
Demand Media (8 Dec. 2010). ICA (9 Dec. 2010). Worldwide Media (10 Dec. 2010).

A more reasonable approach would give credit to domain holders for UDRP wins (plus 1 for wins, minus 1 for losses, with a percentage of total domain ownership as the baseline for determining abuse (e.g. the disqualifying mark could be a 1% net loss rate compared to the total of domains registered). *Worldwide Media (10 Dec. 2010).*

A UDRP loss that has been reversed upon appeal to a court of proper jurisdiction should not be counted against an applicant. *ICA (9 Dec. 2010).*

ICA has provided (in an attachment to its comments) amended language for the text of Section 1.2.1 (Eligibility) to implement these changes:

- Criteria for automatic disqualification for cybersquatting. A stipulation that 3 or more final, adverse UDRP or judicial decisions against an applicant for cybersquatting must be the majority of such decisions rendered against an applicant to constitute automatic disqualification. This refinement of the test only goes to the criteria for automatic disqualification, and would not eliminate ICANN's discretionary powers to bar a particular applicant from being associated with a new gTLD. *ICA (15 Jan. 2011).*
- "Final" decision scope. Clarification that an adverse UDRP decision that is subsequently reversed under applicable national law, or that has been the subject of post-UDRP settlement in which the complainant acknowledges that the registrant had not engaged in cybersquatting, is not a final decision and should not count for purposes of the automatic disqualification test. *ICA (15 Jan. 2011).*
- Automatic disqualification for reverse domain name hijacking. A new item 1 specifying that an applicant found by UDRP panelists to have engaged in 3 or more attempted reverse domain hijackings (RDNH) with at least one occurring in the last 4 years, should also be automatically barred. *ICA (15 Jan. 2011).*

String similarity review (2.2.1).
ICANN did not respond to RySG's comments on AGv4 that the focus should be on a good user experience and that there may be instances where strings are judged to be similar but in a non-detrimental way. In those cases rather than eliminating those strings in the initial evaluation there should be opportunity for correcting the possible error. It is very possible that two strings could be similar but not create confusion and instead provide for a better user experience. A legalistic application of string similarity requirements that does not take into account the user experience would be an unfortunate mistake. *RySG (7 Dec. 2010).*

While the proposed final AG provides a definition that "similar" means strings so similar that they create a probability of user confusion, additional clarification is required in the form of examples. E.g., will .bank and .banque all be considered similar? 3-letter TLDs where this is only a difference of one letter? Will .eco be too similar to .co or .com? Given the significant investment required to apply for a new gTLD, understanding where potential contention may exist is of utmost concern to potential applicants. *MarkMonitor (Module 2, 7 Dec. 2010).*

String Requirements (2.2.1.3.2). Prohibiting inclusion of hyphens or digits in the string represents a significant change in approach; further explanation as to why this change was made should be included in the proposed final AG. *MarkMonitor (Module 2, 7 Dec. 2010).*

Single character IDN TLDs. HKIRC echoes and reiterates the positions of the Draft Final Report on Policy Aspects Regarding Introduction of Single Character IDN TLDs by the joint ccNSO and GNSO IDN working group on the matter of single character IDN TLDs. As innumerable single Chinese characters are meaningful in themselves, single character IDN TLDs should be acceptable, but must not be confusingly similar to single or two character ASCII TLDs. The requested single character IDN TLD strings should be analyzed on a case-by-case basis in the new gTLD process depending on the script and the language. *HKIRC (22 Dec. 2010).*

Reserved names—Olympic trademarks. The International Olympic Committee (IOC) has filed numerous comments opposing the new gTLD program and also requesting that if ICANN nonetheless moves forward to launch an unlimited number of new gTLDs, then the Olympic trademarks should be placed on a reserved names list. To date, the IOC has received no response from ICANN regarding this request. Numerous precedents support a special level of protection for the Olympic trademarks. The IOC reiterates that the Olympic and Olympiad trademarks belong on both the top level reserved names list (Guidebook Module 2.2.1.2) and the second-level reserved names list (Registry Agreement Specification 5). To be clear, placement on these lists is unrelated to the Globally Protected Marks List or the Trademark Clearinghouse. The IOC and its National Olympic Committees are committed to working with ICANN and the GAC to implement a reserved list of Olympic trademarks that ensures non-commercial free speech is not negatively affected. *IOC (29 Nov. 2010).*

Reserved names—regional ccTLD organizations (2.2.1.2). The following suggestion, offered in the past round of comments, was not taken by ICANN and is renewed here: 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 (13 Nov. 2010)* citing *E.I. Ahon (Module 2, 17 June 2010).*

Reserved names—Red Cross. In light of treaty protections and legislation and with due consideration to the important work of the Movement, Red Cross requests that the Board include the terms RED CROSS, RED CRESCENT and RED CRYSTAL (and any other terms that may be later protected by treaty or legislation) in: (1) the globally recognized reserved names list referenced in the AG (e.g. in 2.2.1.2); and (2) the globally recognized second level reserved names list provided in Specification 5 of the Registry Agreement. Red Cross asks that Staff be instructed to work with ICANN's TMC provider(s) and not-for-profit organizations/NGOs to develop a reasonable system for adding the names of not-for-profit organizations/NGOs, as well as the trademarks owned by these organizations, into the TMC databases described in appropriate sections of the AG. *Red Cross (9 Dec. 2010).*

Top level reserved names. The string requirements for gTLDs (section 2.2.1.3.2) have been compiled with recognition of the revisions to RFC 1123 in draft form: http://tools.ietf.org/html/draft-liman-tld-names-04. However the section 2.2.1.2 list of top level reserved names includes GTLD-SERVERS, IANA-SERVERS, RFC-EDITOR, ROOT-SERVERS. These names are not valid ASCII TLD labels according to the draft RFC. The hyphens in these names are not part of the allowed character set defined by the token ALPHA. *D. Sayers (Module 2, 30 Nov. 2010).*

Reserved names—not-for-profits/NGOs. The ICANN Board should consider requesting an Issues Report on the feasibility of adding the names of not-for-profits/NGOs to the Reserved Names list, working with these groups to develop reasonable criteria for inclusion in that list. *P-NPOC (1 Dec. 2010). Red Cross (9 Dec. 2010).*

Security policy (Evaluation question 35).
Applicants should be required to indicate specific security standards they intend to apply to their registry operations and their entire chain of control for registrations. Specific information will allow evaluators and potential objectors to assess TLD applications that call for higher security, such as those targeted to financial and e-commerce users. *BC (6 Dec. 2010).*

BITS is pleased with and supports the inclusion of amended question 35 in the AG. *BITS (9 Dec. 2010).*

ICANN should be more specific with the community as to what their standards are regarding the security measures put into place. *CADNA (10 Dec. 2010).*

Question 35 appears from "out of the blue." It has no prior existence in any prior DAG and represents a display of narrow, destructive advocacy work by some party with more access to ICANN than others.

- Security is not a defined term and therefore applicants and their evaluators cannot predict evaluation outcomes.
- The specific controls, HSTLD's current work product in particular, or ISO 27001, are not yet known to have any causal relationship with registry operational art,

and the scope of registry operational art any candidate control could in theory affect is not yet known to be materially significant to the secure operation of a registry.

- "Full interplay of business and technical requirements" is not a quantitative property, and it is doubtful that it is a quantitative property.
- Does "on hand or committed" include mutual assistance agreements or cooperative agreements with OARC or CAIDA or CERTS or similar centers of excellence?
- The "fails requirement" term should be changed to "does not attempt the (still partially defined) feature set."
- The language of question 44 should be seen for features that are optional at time of launch.
- At a minimum, the "criteria" associated with, and the scoring value of "2," should be removed from the DAG.
- All reference to the HSTLD should be removed from the DAG, as the HSTLD-AG has consensus that its work product not be referenced, let alone incorporated, into the DAG.
- The "fail" language should be changed to reflect some criteria "not attempted" rather than "failure", and the feature set should be optional at the time of launch (and so possible at a later point in time).

E. Brunner-Williams (Module 2, 11 Jan. 2011).

Financial gTLDs—security standards. BITS is aware that liability issues have forced ICANN to forgo the direct management and enforcement of a high-security zone standard. BITS requests the addition of the following language in the scoring section for question 35 of the TLD application (at pages A36-38). This language could be inserted as the last sentence of element 5 (requiring security measures commensurate with the nature of the applied-for string): "*Evaluators will use standards published by the financial services industry to determine if the applicant's proposed security approach is commensurate with the level of trust necessary for financial services gTLDs.*" Inclusion of this language, and the use of a single, defined set of security standards, should provide helpful guidance to both applicants and evaluators of proposed financial gTLDs. *BITS (15 Jan. 2011).*

Financial gTLDs--security standards independent working group. BITS intends to form a working group dedicated to the publication of security standards commensurate with the nature and use of financial gTLDs. *BITS (15 Jan. 2011).*

- Membership will be global in nature, enlisting participants from financial regulators and standards-setting organizations in addition to representatives from financial institutions. The group's goal will be to produce a standard set of controls that would be required of all financial gTLD operators. *BITS (15 Jan. 2011).*

- BITS will publicly release a terms of reference for the working group and provide periodic public updates. BITS plans to work with ICANN staff to provide information for use by the ICANN community regarding this working group and can provide briefings and working sessions at ICANN meetings or elsewhere as appropriate. *BITS (15 Jan. 2011).*

- BITS intends to publish the final elevated security standards for financial gTLDs on behalf of this independent and international working group. BITS will notify the broader financial services community about the pending security standards through an international trade publication or similar method. Final publication will include comments explaining the rationale for each standard. BITS expects the product to be used by the ICANN application evaluators, and plans to seek validation from an appropriate global standards-setting organization. BITS will ask financial regulators to confirm that the standards meet or exceed national and international safety and soundness regulations. *BITS (15 Jan. 2011).*

Recommended first character for a gTLD string. Attention is called to a potential problem with the issue of gTLDs under the 63 character with only one letter parameter (i.e. 62 zeros and an A). ICANN should stipulate that the first character in the gTLD string must be a letter. If this is the case, then I will file a formal expression of interest and application for the .A0 (dot a zero) gTLD to be used as a worldwide geographically organized Internet domain directory composed of single page basic contact information websites separated into personal, government and business sections in the same format used by the now obsolete printed phone book. It would be appropriate for the gTLD at the top of any alphabetically organized lists of gTLDs to be an index of domain names. I would allow any individual, organization, government, agency, institution or business to link to their proprietary .A0 directory index listing and redirect traffic to their main website or whatever destination url they wish. The Internet needs a simple, static, coherently organized table of contents that does not depend upon the best optimization program or the highest cost per click or the number of links to the most currently popular social site. It is common sense that the first or top gTLD should be the directory of domain names. *M. Moore (3 Dec. 2010).*

UDRP Losses—Effectiveness of Three Strikes Policy. Are the current rules "bulletproof" to prevent registrars who have lost UDRP decisions on multiple occasions from applying for new TLDs? The draft language on 1-18 has a huge loophole which would not appear to catch registrars where a party with the UDRP losses is not the registrar itself but a shell company (e.g., GoDaddy involved with domain name warehousing under a company called "Standard Tactics LLC"; and it appears highly likely that "Demand Domains" which has lost numerous UDRP cases is related to the registrar Demand Media/eNom). The following steps should be undertaken:

(1) There should be an independent study on the extent of cyber squatting by registrars and their related companies, looking at UDRP losses and the PACER system in the U.S. and also seeking the public's input. A deeper investigation should also "pierce the veil" of WHOIS proxy services to unmask the true clients

to determine if they are being used to hide the cyber squatting activities of registrars.
(2) The guidebook should be corrected to ensure that the intent of preventing cyber squatters from applying for TLDs is matched by the actual language (i.e. remove the loopholes that permit cyber squatting from related companies);
 (3) Address the issue of what is the acceptable "standard" to be a registrar--i.e. why would ICANN disqualify certain parties from being TLD operators but wink and allow those same parties to be registrars without any penalty whatsoever?

G. Kirikos (14 Nov. 2010).

Financial services definition—technical amendment. The word "typically" should be added after the word "activities" and before the word "peformed" ("financial services are activities typically performed by financial institutions…") This change ensures that an applicant seeking a financial services TLD will adopt security measures capable of protecting consumers without regard to the applicant's status as a financial institution. *BITS (9 Dec. 2010).*

Financial projections (Question 46, template 1). This is written as though the applicant will be building and operating the technical infrastructure itself, but some applicants will use third party registry operators as a back end for certain aspects. It is recommended therefore that ICANN adopt a second template optional for the applicant that would allow it to identify and bundle its outsourced costs. Alternatively, a second Sample Financial Template based on an outsourced registry solution that showed how the evaluators would like to see the outsourced services inside Template 1 would be helpful. *B. Fausett (9 Dec. 2010).*

Linkage of applications. The Application should allow an applicant to identify and link additional, related applications. This will also allow explanatory notes inside the Financial Projections about shared revenues and costs across all applications. *B. Fausett (9 Dec. 2010).*

String requirements. Significant changes in the proposed final AG raise concerns. By using a draft IETF document which has no clear consensus, a number of domains which are technically allowable (i.e. allowed by the protocol) will no longer be allowed as TLD strings. Section 1.2.1 disallows the use of numbers and hyphens in ASCII TLDs. This disallows TLDs such as .3com, a large corporate brand. If the concern is with rendering issues experienced by names that contain numbers at the boundaries, and right-to-left (RTL) IDN labels, it is already adequately addressed by the IDN BIDI rules in the IDNA RFCs. *AusRegistry (9 Dec. 2010).*

Bullet point 5 of section 1.3.1 should be required of all applicants that intend to allow registration of IDNs under their TLD to adequately address any concerns with rendering issues. Alternatively a rule could be made that RTL registrations are not allowed under TLDs (IDN and ASCII) that begin with numbers. There is also no reason to disallow

dashes; the language in previous DAGs was sufficient to address any potential issues with them. *AusRegistry (9 Dec.2010).*

In Section 2.1.2 the rationale for restricting only to PVALID is not clear. No string should be denied under this section as "it might not work in applications" scenarios are already prevented. *AusRegistry (9 Dec. 2010).*

The effect of Sections 2.1.3 and 2.1.5, restricting to the listed codepoint categories and to only one directional property, is to prohibit a large category of new gTLDs (Arabic IDNs) for no technical reason. *AusRegistry (9 Dec. 2010). AusRegistry (10 Dec. 2010).*

Anonymity of applicants. While ICANN will still conduct a background check on applicants, it has made a change to the process that effectively cuts the public out of that process by removing from public disclosure all information about directors, officers, partners, or controlling shareholders of new gTLD applicants (see attachment A to module 2, item 11, applicant background—"N" signifying no public posting). It may be reasonable for some of the contact information on new TLD applicants to be withheld from public disclosure, but this total information blackout extending even to the names of officers, directors, partners or controlling shareholders of applicants, is completely new to the process, completely unjustified and completely inconsistent with the transparency and accountability with which ICANN should operate the new gTLD system. *COA (3 Dec. 2010). IPC (9 Dec. 2010). RIAA et al. (11 Jan. 2011).*

Treat all applicants the same. The current background check provision would operate unfairly (e.g. cities having to perform a complete background check for their city TLD applications while stock market-listed companies are exempted). Two options for avoiding this are: Option 1—all applicants must be evaluated and pass through the background check the same way regardless if they are an SME, a global top 100 company, an honorable foundation or a government; or Option 2—Exempted from the background check are a government, a governmental body, a government-owned organization (e.g. company, foundation, association) or where the government is directly or indirectly shareholder of the applicant. *dotBERLIN (12 Jan. 2011).*

Analysis of comments

Role of Public Comment (Application Comments)

Some comments contained requests for more detail on the role of public comments in the evaluation process. In particular, some parties suggested that an applicant should have an opportunity to "rebut" public comments received on the application. Note that an applicant is free to respond to comments received in the public comment forum at any time. In a case where consideration of the comments has impacted the scoring and result of the evaluation, the evaluators would seek clarification from the applicant.

A comment suggests that public comments should not be considered by an expert dispute resolution panel in the case of a proceeding based on an objection. This

suggestion is problematic: it would not be possible or desirable to restrict a panel from considering publicly available information. Note that in the case of a community objection, for example, expressions of support and opposition are one of the factors considered by the panel, and this could include consideration of relevant public comments.

Some comments expressed concern with the use of public comment by the panel in the case of a community priority evaluation. Essentially, these suggested that the public comment forum would invite floods of comment in support of or opposition to an application in an attempt to influence the panel's consideration. Module 4 of the Guidebook states that: "To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, or filed for the purpose of obstruction will not be considered relevant." ICANN agrees that the public comment forum should not be used as a mathematical polling mechanism and that the instructions to the panel will make clear that quantity of comments is not in itself a deciding factor. The Guidebook is being revised to clarify this point in the area of support as well as opposition.

A comment asks under what circumstances a comment period would be extended. This decision would be made by ICANN if required by the volume of applications (i.e., if the processing times are extended in accordance with section 1.1.2.3) or other circumstances require. It would not be possible to specify every circumstance where such would occur.

Security Question and Criteria

Some comments focused on previous revisions to Question 35 (Security Policy) in the evaluation criteria. Commenters requested clarification on how an appropriate level of security would be determined in the case of a string with unique trust implications. Clarification was also requested on the details of specific security standards. The question is designed to elicit a detailed description from the applicant of the security policies and procedures that will be employed in the TLD. The Guidebook is being revised to incorporate these comments.

One comment states that the edits made to the security question and criteria for the Proposed Final version of the Guidebook appeared from "out of the blue." This is not the case: the changes are similar to language published in http://www.icann.org/en/topics/new-gtlds/draft-evaluation-criteria-30may09-en.pdf. This approach has been previously considered as one means of addressing concerns that different security expectations might be in place for various TLD models.

A comment notes that security is not a defined term and thus the question contains significant uncertainty. It is understood that security means different things to different people. Here, "security" is defined by the questions and criteria in the Guidebook. The revisions of the Guidebook attempt to clarify the areas covered in this question. This comment also suggests that some of the terms used in the criteria are not sufficiently

quantitative. The criteria are written to be as objective as possible, though purely objective criteria are not always effective because business models and security requirements vary across proposed TLDs.

The HSTLD framework is still theoretical and this is acknowledged in the Guidebook. The evaluation criteria for the security question are structured so that there is room for this or other types of security certification levels to be accommodated if developed in the future. One comment suggests that ICANN commit to using standards developed by the financial services industry, and notes that formation of a working group dedicated to this area is pending.

A comment questions whether resources "on hand or fully committed," as used in the evaluation criteria could include mutual assistance or cooperative agreements with various entities. The answer is yes, if they included evidence of commitment of resources, then these agreements could be used.

Some comments suggested edits to question 35 (Security Policy), to offer clarification that the requirement for a level of security that is commensurate with the nature of the applied-for string would not only apply to financial services TLDs, or to explain that this requirement does not relate only to financial institutions that might apply. Clarifications to this language are being developed in the revision of the Guidebook and ICANN is working with the financial services sector, which is developing criteria for what they define as financial services TLDs.

String requirements

Some comments questioned the changes made based on the revisions to RFC 1123 currently underway in the IETF. These comments seem to be concerning the draft (see http://tools.ietf.org/html/draft-liman-tld-names-04) rather than the Guidebook. There appeared to be different interpretations of RFC 1123, highlighting the need for clarification. As stated in the draft, the syntax for allowed TLD labels in the DNS is not clearly applicable to the encoding of IDNs as TLDs.

Thus, the revisions to RFC 1123 are intended to provide a concise specification of TLD label syntax based on existing syntax documentation, extended minimally to accommodate IDNs. The historical rules in this case come from RFC 1123, which specifies that top-level domain labels must be alphabetic.

Although the viewpoint has been expressed in the IETF and elsewhere that arbitrary syntax restrictions in TLD labels should be relaxed entirely, there is a substantial amount of software that might well make assumptions about TLD syntax, and those applications have the potential to malfunction if TLD labels in the root zone appear different. As stated in the draft:

> Neither [RFC0952] nor [RFC1123] explicitly states the reasons for these restrictions. It might be supposed that human factors were a consideration;

[RFC1123] appears to suggest that one of the reasons was to prevent confusion between dotted-decimal IPv4 addresses and host domain names. In any case, it is reasonable to believe that the restrictions have been assumed in some deployed software, and that changes to the rules should be undertaken with caution.

ICANN in general defers to the IETF on matters such as TLD string syntax. String requirements would be expected to be adjusted in the future to be consistent to future work completed in the IETF. Those with an interest in this area are encouraged to participate via the IETF process.

The restriction on numbers in TLD labels as provided in the string requirements for this version of the Guidebook does not affect the availability of IDNs as TLD labels. One comment raised questions regarding specific examples of IDN strings in light of various aspects of the string requirements, and these are being analyzed.

A comment suggests that ICANN should revise the string requirements to require that the first character in a TLD string be a letter. This is already a requirement per the string requirements in section 2.2.1.3.2 of the Guidebook.

A comment expresses support for the work of the Joint ccNSO/GNSO IDN Working Group (JIG) concerning single-character IDN TLDs. The report of the JIG on this topic can be found at http://www.icann.org/en/topics/new-gtlds/jas-milestone-report-11nov10-en.pdf. Based on the work of an independent working group, ICANN has stated that additional policy work must be completed before single-letter IDNs can be delegated.

Eligibility

Several comments suggested changes to the eligibility and background screening portion of the evaluation. Some comments supported the provision by which entities on the 25 largest global stock exchanges would be deemed to have passed the criminal history portion of the background screening check, while others opposed it. A comment suggested that ICANN conduct at least a nominal check on such entities. The principle behind this provision is that those entities on stock exchanges have already been through rigorous background screening (via the listing process), not that they are exempt from scrutiny by virtue of being listed on an exchange. Given that these entities have already been through this screening, it is not a good investment of application fees to repeat this same (or a lesser) inquiry.

Comments were also received on the portion of the background screening that concerns history of cybersquatting. A comment suggested that use of UDRP and legal databases would be insufficient, and suggested independent investigations in addition. It is important to note that the criteria are based on decisions, rather than allegations or other types of commentary. It is unclear that additional court or UDRP decisions would be found in additional investigation. There was also a suggestion that ICANN create a

consolidated data source for this information; this could be helpful and this comment is well taken and ICANN commits to work on this.

Concerning the history of cybersquatting, some comments suggested that the threshold of three or more decisions with one occurring in the past four years was appropriate, while others suggested changes. Some comments suggested that the standard for establishing a pattern should be more flexible to allow for discretion and review of the circumstances. A comment also suggested that the applicant's history could be considered via a balancing whereby an applicant received credit for UDRP wins and lost credits for losses. Other suggestions included considering on which side the majority of cases fell, regardless of total number.

It is important that there be an objective standard to avoid the additional cost and potential inconsistent results of an ad hoc review, and provide greater predictability for applicants. Previous comments on this section called for additional information on what would constitute a "pattern" of behavior, with the expectation that the standard should be generally available to applicants. An objective standard has been put in place; however, the standard does provide discretion as it is included as a general rule, which can be reconsidered if warranted by exceptional circumstances. It should be recalled that, in a UDRP case, the burden of proof is on the complainant, who must prove that each of three required elements are present. The standard of three or more decisions with one or more occurring in the last four years accounts for both a threshold of repeated behavior and a relevant span of time.

Some comments suggested that it was unfair to impose an "unrelated ex post facto sanction" based on UDRP decisions. It should be noted that all background screening criteria concern previous actions unrelated to the gTLD application process. UDRP decisions are used as evidence in establishing a pattern of activity.

Comments suggested that findings of "reverse domain name hijacking" (i.e., using the UDRP or other mechanism in bad faith to attempt to deprive a registered domain-name holder of a domain name) should be considered in this inquiry. Comments were generally supportive that this activity should be accounted for in the applicant's background. We agree and the Guidebook language has been updated to include "reverse domain name hijacking."

Other comments suggested that it was not sufficiently clear that only decisions that are final (i.e., have not been reversed via appeal mechanisms) should be considered. This change has been accommodated to clarify the language. Comments suggested that it be clarified that the "decisions" referenced would be decisions against the applicant. This has also been clarified in the provisions included here.

Some comments suggested that the same background screening criteria should apply to affiliates or subsidiaries of an applicant. This was considered in the design of the process. To avoid an exponential increase in costs and complexity, the process must

be limited in some way. The process has been designed to focus the due diligence on the applying entity and identify the most serious background issues.

Some comments suggested removal of the "Legal Compliance" provisions from this section of the Guidebook. Comments suggested that the requirement that ICANN comply with US laws could cause political problems for ICANN in some countries and could spur the development of alternate roots. The intention with this section is to be transparent about this aspect of ICANN's current legal structure. ICANN considers it important to disclose this information to prospective applicants, as well as to detail what steps ICANN takes in handling such cases (e.g., seeking and obtaining licenses). There is no choice but for ICANN to comply with these laws. The inclusion of this provision was also supported in some comments.

A comment suggested that ICANN conduct a study of cybersquatting behavior by registrars, and also consider the issue of accreditation standards for registrars. These suggestions are well-taken but off-topic for the Applicant Guidebook. Note that discussions on enhancement to the registrar accreditation process are already taking place; see http://icann.org/en/announcements/announcement-2-22nov10-en.htm.

A comment suggests that the public be given access to information about directors, officers, partners or controlling shareholders of new gTLD applicants to be consistent with transparency and accountability and to allow comments to be provided informing ICANN about certain applicants. While there is merit to this comment, disclosing the names as suggested would present significant challenges for a number of reasons:

1) From an application processing viewpoint,
   a. by only providing the name without other personally identifiable information, there is an increased likelihood that ICANN would receive significant false positive information as the public would not be able to conduct a background check to a level similar to what ICANN will be conducting.
   b. ICANN could receive a significant number of comments about a particular individual. Some of this information may be false positives, as stated in 1a, whereas other comments may only be rumor or speculation. ICANN and its provider would have to spend significant resources evaluating which comments would require further investigation.

2) The background check will be conducted based on publicly available information only. Allowing information that may not be publicly available to be provided for a single applicant or individual does not allow for a consistent process to be followed for all applications. For example, a commenter may provide information from an independently commissioned detailed background check that goes beyond just reviewing publicly available information. Not all applications may be subject to this level of outside review as the costs to conduct such a detailed background check may be prohibitive for

some commenters.

3)   The background check is meant to be an added precaution and does not replace existing provisions regarding provision of false information by applicants. The existing provisions still allow ICANN to take necessary steps to address the concern and/or reject the application.

4)   This is not a transparency issue. This is about the relative costs and benefits of posting specific information. Are DNS stability and competition goals better served if this information is published? The arguments above indicate that the risks of receiving false information and the costs of verifying publicly received information outweigh the benefits. The benefits are deemed to be small because the background checks will turn up relevant information and it is unlikely that the public comment would reveal additional publicly available information.

Transparency means being clear and open about the business decisions taken and following through on those decisions.

It should be noted that application comments can still be provided on applications and applicants including known officers, directors, partners, and the shareholders of the applying organization.

Reserved Names

Various comments suggested that names such as Olympic trademarks, regional ccTLD organizations, and Red Cross names should be placed on the Top Level Reserved Names List in section 2.2.1.2. With regard to the ccTLD organizations, this was considered; however, the top-level reserved names list is intended to be as narrow as possible, and cover only those names that have an impact on the DNS infrastructure or are part of the organizational structure of ICANN. The bodies mentioned are important DNS community members, but fall more into the category of constituencies, which are self-formed and self-governed, and it would expand the list considerably to include all of these as reserved names.

With regard to the inclusion of specific entities' names on this reserved list, it is understood that some names have statutory protection internationally. These can be handled on an objection basis. The protection of rights of third parties was a key policy recommendation on which the program is based. ICANN is considering the nature of these protections, and if appropriate, might augment the reserved names lists in special cases such as requested by the International Olympic Committee (IOC) and the International Red Cross, both of which are globally invested in representing the public interest. For example, the terms Olympic and Olympiad are protected by legislation in 25 countries and by treaty in 40 countries. (A comment notes that no response was

received from ICANN concerning protection of the Olympic trademarks. In fact, ICANN responded personally to this comment (see http://icann.org/en/correspondence/beckstrom-to-lacotte-23mar10-en.pdf) and recently met with IOC representatives during the ICANN public meeting in Cartagena.)

A related comment suggests that the Board consider requesting an Issues Report on the feasibility of adding the names of not-for-profits/NGOs to the Reserved Names list. The suggestion for working within the policy development process to address concerns is welcomed. It should be noted that that an Issues Report may also be requested by the GNSO Council or an Advisory Committee.

<u>Other comments</u>

A comment requested clarification to the template in question 46 (Financial Projections) for the case where an applicant chooses to outsource parts of its registry operations. The template has to do with the costs rather than how they are performed; however, ICANN will seek to clarify this in the instructions or provide an example.

A comment requested the ability to "link" application information in the financial projects template if an applicant is submitting more than one application. Explanatory information of this type can be presented in the notes section.

A comment suggests that ICANN make evaluators aware of potential for application abuses. ICANN agrees and is including this in the onboarding process for evaluators.

A comment suggested that ICANN did not respond to a previous suggestion from the GNSO on a change to the string similarity review to allow exceptions. In fact, ICANN responded at length in the analysis of comments on draft v4 of the Applicant Guidebook (see http://icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf). That response indicated that whether exceptions should be made to rules 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 criteria and requirements for operation of similar TLDs in a "non-detrimental" manner are 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.

Other comments provided examples of strings and requested clarification on how they would be treated in the string similarity review. It is not possible to provide rulings on hypothetical applications, without the full expertise and resources to be applied by the panel. It is understood that applicants may wish to have additional guidance, and this is one reason the algorithm has been made publicly available for testing purposes. Note that refunds are available on a tiered basis where an application is eliminated at this stage.

TRADEMARK PROTECTIONS – OVERALL COMMENTS

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.

- Discussions continue with interested stakeholders to refine RPMs in order to increase effectiveness and reduce costs to trademark holders and Internet users.

Summary of Comments

Support for AG trademark protections. The proposed final AG has significant protections for trademark rights at the top and second level and the efforts of ICANN and the community resulting in these protections should be applauded. There is no question that trademark owners will enjoy more protections in new gTLDs than they do in current gTLDs and many ccTLDs. The combination of these protections will be available to all trademark owners, including those like the International Olympic Committee who are seeking special treatment. *Demand Media (8 Dec. 2010). Domain Dimensions (9 Dec. 2010). Minds + Machines (10 Dec. 2010).*

DNS integrity and credibility.
The effort to design appropriate RPMs for an unprecedented expansion of the DNS is a unique opportunity to enhance the integrity of the space. Such an effort cannot avoid existing international legal norms including in the area of trademark law. The use or abuse of trademarks contributes a substantial part of the financial foundation of the existing (and likely future) registration system. *WIPO Center (2 Dec. 2010).*

While much process has been invested into the establishment of RPMs for new gTLDs, only RPMs that work for all parties will contribute to the genuine credibility of ICANN's new gTLD program. The opportunity to achieve this is prior to their promulgation. The WIPO Center remains available to share its experience with ICANN. *WIPO Center (2 Dec. 2010). AIPLA (6 Dec. 2010). MarkMonitor (9 Dec. 2010).*

RPMs are inadequate.
Little has changed in this area in the proposed final AG so COA references its July 21 comments. The almost complete lack of support for the final outcome among the

members of the community with the most at risk on the issue demonstrates that to a disheartening extent the process for reaching it –portrayed by ICANN as a triumph of the bottom up policy development process--has been a failure. It is also disappointing that the Economic Framework paper's call for an objective study of the full costs to trademark owners of new gTLDs is evidently being jettisoned (along with the rest of the Economic Framework roadmap) or at least postponed until after the new gTLD launch, when it will be too late to tailor the launch to minimize these costs. *COA (3 Dec. 2010). AIPLA (6 Dec. 2010). INTA (8 Dec. 2010). IACC (9 Dec. 2010). Microsoft (9 Dec. 2010). IPC (9 Dec. 2010). News Corporation (9 Dec. 2010). CADNA (10 Dec. 2010). BBC (10 Dec. 2010). Adobe Systems (10 Dec. 2010). Verizon (10 Dec. 2010). IHG (Module 5, 10 Dec. 2010). LEGO (11 Jan. 2011). VKR (12 Jan. 2011). Arla Foods (11 Jan. 2011). Vestas (11 Jan. 2011). Telstra (23 Dec. 2010). Time Warner (15 Jan. 2011). DIFO (15 Jan. 2011).*

Unless the RPMs are improved, ICANN will be sacrificing the concerns of an overwhelming majority because of the overloud complaints of a well-meaning but misguided minority who want lesser protections. A small but significant number of the members of MARQUES or ECTA are evaluating the new gTLD opportunity. A failure to adjust the balance of trademark protections in favor of rights owners and the general public will be a deterrent to application and will undermine trust in ICANN. *MARQUES/ECTA (10 Dec. 2010).*

The proposed final AG does not provide any RPMs at the top level. *AT&T (10 Dec. 2010).*

The current scheme for rights protection is fundamentally flawed for lack of addressing main issues, including:
    (1) restoring the potency of the URS and providing at least for indefinite suspension of the domain;
    (2) adopting a meaningful loser pays for the URS and if it works applying it to the UDRP;
    (3) providing examples of what does and does not constitute a "good faith" basis for seeking an extension of time to respond to a URS complaint;
    (4) leveraging the TMC across the full array of RPMs to reduce the cost and time in proving and adjudicating what is often the least controversial issue: the presence of rights evidenced in valid national trademark registrations;
    (5) meaningful mechanisms to prevent or, failing that, terminate promptly malicious conduct; and
    (6) a plan to correlate the introduction of new gTLDs to demonstrated demand and social utility of proposed new registries.
INTA 8 (Dec. 2010).

ICANN's current new gTLD plan does not meet AOC paragraph 9.3. The current plan still requires businesses to pay for defensive registrations in perhaps hundreds of new gTLDs at prices that are unconstrained by ICANN or other regulatory bodies. These defensive registrations will be necessary to prevent consumer fraud and confusion on

the part of users who are rightfully concerned about deceptive websites and online scams. The legal expenses and domain acquisition costs of defensive registrations will not be offset by potential economic or informational value to either registrants or Internet users. *AIPLA (6 Dec. 2010). U.S. Chamber of Commerce et al. (9 Dec. 2010). NCTA (10 Dec. 2010).*

Specification 7 is deficient with respect to rights protection and dispute resolution mechanisms. It neither conforms to the "tapestry" of protection measures recommended by the IRT nor does it provide an adequate substitute. The comments from the IPC and WIPO Center should be considered for integration into the proposed final AG. The recent publication of the Economic Report Phase II provides guidance that supports more comprehensive changes to RPMs in order to reduce the costs associated with new gTLDs for rights owners. *MarkMonitor (Module 5, 7 Dec. 2010).*

Globally Protected Marks List (GPML).
The GPML should be implemented (if it is good enough for ICANN it is good for others; also suggested by Economic Report to reduce brand abuse). *MarkMonitor (Module 5, 7 Dec. 2010). MarkMonitor (9 Dec. 2010). Adobe Systems (10 Dec. 2010). LEGO (11 Jan. 2011). VKR (12 Jan. 2011). Arla Foods (11 Jan. 2011). Vestas (11 Jan. 2011). Telstra (23 Dec. 2010). INTA (14 Jan. 2011).*

The Phase II economic report concludes that there is a higher rate of defensive registrations among the most valuable global brands, demonstrating the need for a GPML. There is a direct linkage between trademark infringement involving well-known corporate brands and malicious conduct that harms consumers. The .co registry has implemented a GPML as a way to attract customers and establish industry leadership regarding RPMs. This should be viewed as best practice incorporated into all new gTLDs. *AT&T (10 Dec. 2010).*

ICANN should extend to any organization that has won five or more UDRPs protection of the type proposed by the IRT in the GPML, at least during the first 3 years of the new gTLD program. This protection allowed any legitimate rights owner to register a name on the list provided it was for non-infringing use. *MARQUES/ECTA (10 Dec. 2010).*

Compliance agent. ICANN should appoint a professional agency to be the new gTLD Compliance Agent. This agency should undertake an annual compliance audit on all applicants and have the right to pay unannounced site visits on all new gTLD registry operators. Fees of this agent could be covered by income from contention auctions. *MARQUES/ECTA (10 Dec. 2010).*

Advisory Committee. ICANN should establish (independent of the IPC) an Advisory Committee for a 3-year period to monitor and recommend improvements in rights protection and to assess the economic impact of the new gTLDs. WIPO could have a key role on this committee. This committee would address the concerns addressed by the majority of commentators on previous editions of the guidebook who in the ratio of

5:1 have overwhelmingly called for greater protections. *MARQUES/ECTA (10 Dec. 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 quite sufficient, while others believe that the new RPMs that have been developed are not enough to protect trademark holders or minimize the need for defensive registrations.

As has been previously stated, 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. Comments regarding specific RPMs are discussed elsewhere in the document. Discussions with representatives of Intellectual Property interests and others continue. Additional changes will be made to enhance the protections in the Guidebook. Some of those specific changes are also discussed elsewhere in the document under the headings of the specific RPMs.

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. Later, the Board resolved as follows:

> The Board notes that the suggestion for a globally-protected marks list (GPML) was not adopted by the Board (in 2009), including for the following reasons: it is difficult to develop objective global standards for determining which marks would be included on such a GPML, such a list arguably would create new rights not based in law for those trademark holders, and it would create only marginal benefits because it would apply only to a small number of names and only for identical matches of those names.
>
> *See* http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6.

It is clear that the trademark interests have continued to raise the GPML as possible RPM. While this discussion may continue, no further progress or decisions have been made.

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 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.

With respect to comments about specific RPMs, as noted above, the details have been dealt with in relation to each of the adopted mechanisms. Further, discussions with intellectual property interests (as well as the Governmental Advisory Committee) are continuing and additional changes are anticipated in response to those discussions.

One commenter suggested that a Compliance Agent be appointed to conduct audits and inspections. As a reminder, Specifications 9 was added to the draft base Registry Agreement that provides for internal as well as ICANN conducted audits. (*See* http://www.icann.org/en/topics/new-gtlds/draft-agreement-specs-clean-12nov10-en.pdf.) Further, the ICANN Contractual Compliance Department will continue to expand and enhance its auditing capabilities as new gTLDs are introduced.

Finally, one commenter suggested that ICANN establish an Advisory Committee for a 3-year period to monitor and recommend improvements in rights protection and to assess

the economic impact of the new gTLDs. Such a committee is already contemplated by the Affirmation of Commitments (AoC). Pursuant to the AoC, ICANN committed as follows:

> If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

See http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm.

Thus, the AOC sets out the fact that a committee will be established, it lays out what the committee will evaluate and how the composition of that committee will be determined. Indeed, establishment and operation of the Accountability and Transparency Review Team, as well as the Whois Review Team and the Stability, Security and Resiliency Review Team called for by the AoC will inform this process.

Trademark Clearinghouse (Clearinghouse)

Key Points

- Validation of use is intended to provide an easily resourced mechanism so that all marks receiving the same type of advantage from a particular RPM are evaluated at substantially the same level.

- As recommended by both the IRT, a limitation to identical match with respect to sunrise and trademark claims services has been adopted**.** A recommendation that the Clearinghouse include a limited number of the mark + a key term is being considered.

- Costs should be borne by the parties utilizing the services. The Clearinghouse is expected to result in savings for all parties over existing practices.

General

Summary of Comments

The Clearinghouse is not a real remedy but is essentially just a database. *BC (6 Dec. 2010). LEGO (11 Jan. 2011). VKR (12 Jan. 2011). Arla Foods (11 Jan. 2011). Vestas (11 Jan. 2011).*

The TMC is not an RPM but is a database. It must be combined more effectively with other measures to stop trademark infringement. It does not support inexact matches (economic report supports inclusion of inexact matches). *MarkMonitor (Module 5, 7 Dec. 2010). MarkMonitor (9 Dec. 2010). AT&T (10 Dec. 2010). BBC (10 Dec. 2010). Adobe Systems (10 Dec. 2010). Verizon (10 Dec. 2010). IHG (Module 5, 10 Dec. 2010).*

The Clearinghouse will in sum be an additional cost to trademark owners with limited usefulness. *Verizon (10 Dec. 2010).*

The Clearinghouse is a practical step that will help to minimize brand protection costs. *Demand Media (8 Dec. 2010).*

The Clearinghouse should be available to complainants under the UDRP also, both for purposes of registrations under the new gTLDs and under the existing gTLDs. *NCTA (10 Dec. 2010). AutoTrader.com (10 Dec. 2010).*

Analysis of Comments

The role of the Trademark Clearinghouse continues to be the subject of comment from various constituencies and stakeholders. Some question its role, some suggest that it should interact with other existing trademark enforcement avenues for relief, while others state that the Clearinghouse in its present form is an effective way in which to minimize brand protection costs. ICANN appreciates all of these comments, which have been heard and considered, often more than once. The Clearinghouse, in its present form, attempts to balance the important efforts to enhance trademark protections, while also taking heed of registrants' legitimate use of words in a domain name that might also be subject of a trademark. Accordingly, subject to further refinement through the GAC consultation and other comments received to date, the positions in the Clearinghouse proposals will be finalized substantially similar to as it was in the Proposed Final Applicant Guidebook.

As has been stated previously, the purpose of the Trademark Clearinghouse is set forth in the most recent version of the Applicant Guidebook which provides "The Trademark Clearinghouse is a central repository for information to be authenticated, stored, and disseminated pertaining to the rights of trademark holders. As such, ICANN will contract with service provider or providers, awarding the right to serve as a Trademark Clearinghouse Service Provider, i.e., to accept, authenticate, validate and facilitate the

transmission of information related to certain trademarks." (*See* page 249 of the Draft Applicant Guidebook at http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf.) This central repository enables the trademark holder to avail itself of all rights protection mechanisms in the pre-delegation process. The Clearinghouse is thus considered as more than a database and was suggested by the Implementation Recommendation Team (IRT), which was made up of those supporting trademark interests.

It should be noted that the Clearinghouse was created by the IRT to reduce costs to Trademark holders. Rather than registering for sunrise or IP Claims services in each of every new gTLD, they could register just once. The Clearinghouse also serves as a vehicle for RPMs: sunrise and IP claims services. Therefore, while not an RPM in itself, the Clearinghouse presents benefits to trademark holders: cost reduction, standardization of RPMs and a vehicle for RPM implementation.

To the extent there is any question about what "validation" by the Clearinghouse means, this issue has been addressed in response to other comments below. In short, validation only refers to validation that the trademark is in actual "use" in commerce, which as currently proposed is needed to ensure protection in a sunrise services offering by a registry (or to utilize the URS). No use validation is required for participation in a pre-launch Trademark Claims service.

Although the Trademark Clearinghouse may later serve other purposes, at this point it will be used only in connection with the New gTLD Program and will not be extended to other avenues such as the UDRP that was not developed in connection with the GNSO's New gTLD Policy Recommendations.

Fees and Costs

Summary of Comments

The range of costs is still unclear. ICANN, working with the selected service providers, should publish a proposed cost list as soon as possible, both for inclusion in the Clearinghouse and for other maintenance and renewal fees, to facilitate planning for brand owners. *MARQUES/ECTA (10 Dec. 2010).*

The current Guidebook fails to address problems with the Clearinghouse on which CADNA has commented extensively in the past. The Clearinghouse will likely place significant monetary burdens on trademark owners. ICANN should review the Clearinghouse and see if changes can be made to provide more information on criteria and fees as well as jurisdictions. *CADNA (10 Dec. 2010).*

It is unfair in principle that brand owners who have already borne the costs of obtaining national trademark registrations should also bear any or all of the cost of providing data to the Clearinghouse. Registries and registrars should also contribute to the cost of the Clearinghouse as the Clearinghouse will provide benefits to them and since they (and

not most trademark owners) will be the main beneficiaries of the new gTLDs overall. ICANN should also bear some of this cost even if only initially as an up-front investment recovered back through use. *BBC (10 Dec. 2010).*

Costs of developing and operating the Clearinghouse should be borne by ICANN and its registries and registrars. The Clearinghouse will reduce administrative costs for registries and registrars. If the Clearinghouse is to be effective, the cost of registration must be less than the cost of independently monitoring new gTLDs (particularly for trademark owners based in countries with relatively weak currencies). *Telstra (23 Dec. 2010).*

Fees for listing a trademark on the Clearinghouse database should be minimal. If fees are set too high, this will defeat the Clearinghouse's aim of reducing costs for trademark owners. *Telstra (23 Dec. 2010).*

Analysis of Comments

Many comments continue to revolve around who will pay for the Clearinghouse and the fees that will be charged. The IRT and the STI have considered this issue and ICANN recognizes its importance. We have heard and considered all of the comments in this area and have made decisions based on all of them from all stakeholders.

As stated by the STI, and adopted in the latest version of the Guidebook, "[c]osts should be borne by the parties utilizing the services. ICANN should not be expected to fund the costs of … operating the TC." Notwithstanding, ICANN will bear the costs of establishing the Clearinghouse and will share those costs with the Provider(s).

While the fees that the Provider(s) will charge have not been established, ICANN agrees that economical fees can and should be part of the consideration and ultimate selection when the Provider is selected through the open bidding process. While trademark holders may have to incur some costs to register their marks in the Clearinghouse, or possibly have their mark validated for use, any trademark holder seeking to enforce a mark will, at times, have to incur costs to do so. Further, every effort will be made to keep costs of providing the RPMs as low as possible and it is believed that the Clearinghouse will reduce costs in the long run. Indeed, rather than having to register, and pay a registration fee, for each and every sunrise or pre-launch claims services offered by each new gTLD operator, a trademark holder will need to register just once in the Clearinghouse. Thus, while it may lower administrative cost for registry operators, it is also intended to significantly lower, no increase, the financial burden on trademark holders.

Eligibility for Inclusion and Protection

Summary of Comments

Declaration. The declaration/affidavit requirement is burdensome. Why would a certified copy of a valid trademark registration certificate or the official online database record of the relevant trademark registry not suffice? *BBC (10 Dec. 2010).*

"Blocking" RPM. A service offering "blocks" that do not resolve for the TLD should be provided to TLD registries. The Economic Report Phase II noted that there is value in giving trademark holders the ability to block the use of trademarked items beyond a sunrise period and recognizes that some trademark holders are interested in preventing other parties from using domains containing trademarks but are not interested in affirmatively using those domains. *EnCirca (9 Dec. 2010). News Corporation (9 Dec. 2010).*

Common law trademarks. Extending Clearinghouse to common law marks that are substantively authenticated would streamline other RPMs such as UDRP and URS, which allow claims for relief based on common law rights. At a minimum, registry operators should be allowed to include those marks in their RPM and to do that they will need the data in the Clearinghouse. *IACC (9 Dec. 2010). MarkMonitor (9 Dec. 2010).*

Dot-TLD marks should be included.
It is unfair to exclude Dot TLD marks. Numerous online-only business and other organizations have come into being that only use a mark that incorporates a TLD, e.g. GO.COM. Marks consisting of a generic term followed by a TLD would be excluded from a Sunrise service, which addresses a potential gaming or abuse concern. In addition, all other RPMs are adversary in nature, so that the registrant or proposed registrant can make the argument that despite a registration a mark cannot serve as a trademark and therefore the owner of the mark is not entitled to protection. *NCTA (10 Dec. 2010). AutoTrader.com (10 Dec. 2010).*

If a mark has been awarded by a legal entity, even one that includes an extension, on what grounds does ICANN re-delegate what the government has already validated? E.g., ICANN is saying that GoDaddy.com, a legal trademark, will not be included in the clearinghouse—why not? If someone registers BingBingDeeDee.net as a trademark, there is only one BingBingDeeDee.net. Why does the clearinghouse skip protection? *L. Timmons (Module 5, 13 Nov. 2010).*

Identical match.
This provides little practical protection to brand owners as most examples of malicious conduct or cyber squatting involve a domain name consisting of a trademark plus a generic or descriptive term. At a minimum, a match should include plurals of and domain names containing the exact trademark. *IACC (9 Dec. 2010). MarkMonitor (9 Dec. 2010). IPC (9 Dec. 2010). EnCirca (9 Dec. 2010). BBC (10 Dec. 2010). Adobe Systems (10 Dec. 2010). Verizon (10 Dec. 2010). LEGO (11 Jan. 2011). VKR (12 Jan. 2011). Arla Foods (11 Jan. 2011). Vestas (11 Jan. 2011).*

The Clearinghouse must not only look for identical matches but also domain names that are "confusingly similar." It is imperative that the Clearinghouse return to the provisions

set out in the original IRT draft. Being allowed to only submit one entity to be covered in the Clearinghouse is not cost-effective, efficient, or in the best interest of trademark owners trying to protect against abuses. This needs to be changed, especially for companies such as IHG who have more than one brand to protect. *IHG (Module 5, 10 Dec. 2010).*

Trademark Claims should warn registrants on both exact matches and strings that are wholly inclusive of a trademark contained within the Clearinghouse. They should also be required along with the Sunrise Period to reduce costs to brand rights holders and provide a disincentive for abuse. *MarkMonitor (Module 5, 7 Dec. 2010). Hogan Lovells (9 Dec. 2010).*

A trademark claim should be issued to every applicant for a term that is identical or similar to or containing a trademark in the Clearinghouse. *MARQUES/ECTA (10 Dec. 2010).*

The "match" criteria for an existing trademark should be broadened to include the mark plus a generic word. Without this additional protection, the efficiency of the Clearinghouse will be greatly diluted. In the alternative, names which consist of a trademark and a generic word should be allowed to be registered in the TMC. *Telstra (23 Dec. 2010).*

Limiting notification to identical marks, should be dropped. *EnCirca (9 Dec. 2010).*

Word marks.
Many trademark owners have word + device marks (e.g. word marks in stylized text) which presumably would be excluded. *BBC (10 Dec. 2010).*

Clarification is needed on, among other issues, the criteria for word marks, e.g., non-Latin script word marks (*cf.* increasing IDN domain name registrations) or those with additional design elements. *WIPO Center (2 Dec. 2010).*

"Substantive evaluation" requirement.
Excluding all non-U.S. trademark registrations by requiring "substantive evaluation" for proof of use before a trademark registration is admitted to the Clearinghouse is a significant oversight in need of correction. In the most recent proposed final Applicant Guidebook, in its desire for inclusiveness the Board has actually (inadvertently we presume) actually excluded nearly all trademark registrations in the world from being eligible for Sunrise protection or the URS, absent full examination by the Clearinghouse, by introducing a new requirement that registration include evaluation of use. In a majority of countries (i.e. the civil law countries) rights arise through registration, not use. An even larger majority of trademark laws merely provide that a registration is vulnerable to cancellation upon third party petition if it has not been used for a period of years after registration.

The U.S. is almost unique in evaluation proof of use in almost all cases prior to registration. Thus the Board uniquely advantaged U.S. trademark registrants in the URS or any Sunrise scheme. INTA hopes that the Board did not intend this consequence and urges ICANN to clarify that "substantive evaluation" should require only evaluation on absolute grounds, as most countries' trademark laws provide valid trademark rights without use for years after registration. The most appropriate course is <u>not</u> to require that the mark be in use. If the Board is determined to respect only marks that are in use, it would be more appropriate merely to require the trademark owner to declare or affirm that the mark is in use, and perhaps amend the Sunrise Challenge mechanism to allow challenge on the basis that the sunrise mark had not been in use for the period that would subject it to cancellation under the law of the jurisdiction where it was registered. *INTA (8 Dec. 2010). Hogan Lovells (9 Dec. 2010). MarkMonitor (9 Dec. 2010). IPC (9 Dec. 2010). EnCirca (9 Dec. 2010). BBC (10 Dec. 2010). RE/MAX (10 Dec. 2010).*

If evidence of use were submitted in order to "validate" the mark, it would cause grave concern if that evidence were made available to any third parties as this could be highly confidential and sensitive commercial information. The underlying evidence of use to "validate" the mark should not be published in any way or to any person. *BBC (10 Dec. 2010).*

It should be clarified what is meant by the term "validation" in the context of the Clearinghouse, with an explicit statement that the Clearinghouse itself is not a legal authority with the power to grant trademark rights. An alternative term such as "verify" may be an option. *MARQUES/ECTA (10 Dec. 2010).*

It is not clear if there is a difference between "validation" services and "evaluation" services. If there is a difference, this needs to be spelled out. If there is no difference, then the terms need to be modified and made consistent. Section 7.4 should be modified to: "Validation by Trademark Clearinghouse service provider shall require evaluation on absolute grounds." *IPC (9 Dec. 2010).*

Clearinghouse sections 7.3 and 7.4 should remove the reference to evaluation on relative grounds and evaluation of proof of use. *IPC (9 Dec. 2010).*

Section 7.3 also violates section 1.6 describing the purpose of the Clearinghouse. *EnCirca (9 Dec. 2010).*

Based on an informal survey, it seems that only trademarks registered in the U.S., Canada and the Philippines are subject to a substantive examination as defined in the proposed final Applicant Guidebook, and that trademarks registered outside these three countries without an eligible counterpart registration (i.e. registered before 26 June 2008) in one of those three countries would be excluded from participation in the Sunrise Services and the other protections proposed for registered trademarks such as the Clearinghouse and URS. IBM believes that ICANN did not intend to exclude so many trademarks registered in various jurisdictions outside the U.S., Canada and the Philippines and requests that ICANN reconsider this definition so that trademark owners

that have focused on trademark protection outside of these three countries can avail themselves of these important protection mechanisms. *IBM (10 Dec. 2010).*

The current proposal discriminates against trademark owners who have registrations within jurisdictions that do not evaluate for use. All owners of trademarks should be treated equally by the Clearinghouse. Registry operators should be left to decide whether they want to introduce a check for use when they launch. *MARQUES/ECTA (10 Dec. 2010).*

The standards for recognizing marks under the Trademark Claims and Sunrise service should be the same—that marks may be recognized irrespective of whether the country of registration conducts a substantive review. *BBC (10 Dec. 2010).*

Revise section 7.1.3 language as follows: Registries must recognize all word marks: "(i) that are registered (not just applied for); and have been through the relevant period for opposition applied in the country of registration; and are not subject to a pending opposition, revocation or cancellation action; and are in use;" and it would be sufficient for the rights owner to make a simple declaration of use. Sections 7.3 and 7.4 should be deleted (now redundant). This revision, requiring use of a trademark in order to enter the Clearinghouse database, is designed to create qualification hurdles high enough to exclude cyber squatters seeking to register terms in the Clearinghouse without setting the hurdle so high that legitimate rights owners cannot qualify. The use requirement may prevent a few genuine brand owners from benefiting from the sunrise period but these will not be too numerous and cyber squatters are less likely to target trademarks for products that have yet to be launched. *BC (6 Dec. 2010). Hogan Lovells (9 Dec. 2010).*

In essence most trademark owners would need to resort to validation by the Clearinghouse validation service providers. This will create an expensive burden for trademark holders. This is unreasonable and a form of unjust enrichment on the part of Clearinghouse validation service providers. Also, given the potential for conflict of interest, the assessment of which countries conduct substantive review upon trademark registration should be carried out by an independent body to the extent this is possible. *Hogan Lovells (9 Dec. 2010). BBC (10 Dec. 2010).*

If the problem of substantive evaluation cannot be successfully resolved so as to ensure no discrimination and associated additional costs for certain trademark owners, it is worth exploring as an alternative the possibility of subjecting protection of trademarks by Sunrise mechanisms to a chronological condition whereby trademarks would need to have been registered prior to a specific cut-off date in order to be eligible for protection as was the case in previous launches (.asia, .tel). There must be room for maneuver for certain national and regional trademark registries to be considered as meeting the standard of "substantive evaluation" at the point of registration without satisfying the three requirements as set out in the proposed final AG. *Hogan Lovells (9 Dec. 2010).*

ICANN's attempt to define substantive evaluation has created new problems. ICANN should define "substantive evaluation" to mean evaluation on absolute grounds. *Microsoft (9 Dec. 2010).*

Many jurisdictions do not appear to require use prior to registration. The current design of the Clearinghouse implies that many trademarks registered in good faith will face a potentially costly additional process--in particular, SMEs that may not have obtained multiple national trademark registrations. A proper review of the Clearinghouse proposal requires additional information as to the use criteria to be applied, the envisaged fees and any differentiation thereof, and which if any jurisdictions the Clearinghouse apparently intends to exempt from validation. *WIPO Center (2 Dec. 2010).*

If ICANN continues with this discrimination the question remains over who will draw up the list of countries that undertake substantive review. The Clearinghouse service provider or ICANN should not perform this task. Instead, a third party organization with the appropriate legal expertise should develop the list. *MARQUES/ECTA (10 Dec. 2010).*

Inclusion of not-for-profits/NGOs names and trademarks. The ICANN Board should instruct Staff and the approved Clearinghouse provider(s) contracted by ICANN to add the names of not-for-profit organizations and NGOs and any trademarks owned by them into the Clearinghouse databases without a fee. The names and trademarks selected for inclusion should (a) meet the same criteria as required for other marks to be included in the Clearinghouse, as stated in Module 5; or (b) be subject to an alternative review procedure to establish use-based rights. *P-NPOC (1 Dec. 2010). Red Cross (9 Dec. 2010).*

Olympic trademarks. The Clearinghouse should include Olympic trademarks protected by future statutes and treaties. Limiting statutory-based inclusion in the Clearinghouse to only marks under existing treaties unduly discriminates against future Olympic games, host cities and corresponding trademark rights. The justification for this limitation given by ICANN staff—to prevent potential abuse—is without merit. Moreover, there is no rational basis for the Clearinghouse to protect all future marks validated through judicial proceedings but to deny protection for future marks validated through legislative proceedings (i.e. special statutory protection for future Olympic games). ICANN staff should strike this limiting clause from the criteria for inclusion in the Clearinghouse or should adapt it accordingly. *IOC (29 Nov. 2010)*

Sunrise.
Sunrise periods are primarily revenue generating activities for registrars, and they do not effectively protect brands and the consumers they serve. *MarkMonitor (Module 5, 7 Dec. 2010).*

There is no provision for a price cap to help limit sunrise period fees. *Verizon (10 Dec. 2010).*

A sunrise is not an RPM and is not adequate; it is merely a means of facilitating defensive registrations by the trademark owner and does nothing to prevent abusive registrations. We would prefer to see a mandatory pre-launch Trademark Claims service, but there would be a need for a greater level of protection than is currently the case. *BBC (10 Dec. 2010).*

Trademark Claims Services.
The Trademark Claims service is of limited value because it is optional. *Verizon (10 Dec. 2010).*

There should be a process allowing trademark owners to object prior to registration of a domain name; this would save time and money and not force the parties into a post-grant URS. Also ideally one national registration per mark should be recorded in the Clearinghouse. But since there will be no notification to the trademark owner of the application to for registration and no opportunity to communicate with the registrant prior to registration, one national mark may not be sufficient, thereby increasing costs and workload. *BBC (10 Dec. 2010).*

IP Claims should also have a dispute policy that can be invoked by trademark owners. *EnCirca (9 Dec. 2010).*

Section 6.4(d) should remain for sunrise registrations but more flexibility should be allowed for IP Claims since they do not result in a registration for the trademark owner. *EnCirca (9 Dec. 2010).*

What procedures does ICANN propose to put in place to confirm the truth of the registrant's warranty that their registration and use of the domain name will not infringe the rights of which they have been notified (e.g. sworn statement, independent assessment)? *BBC (10 Dec. 2010).*

The claims service should be mandatory throughout the life of new gTLD registries, not just at pre-launch. *Telstra (23 Dec. 2010).*

Sunrise and Trademark Claims Are Insufficient. These services are not new and exist today. Neither have sufficiently hindered bad faith registrations. Both mechanisms are pre-launch and need also to be post-launch to have any real value. They also differ regarding which trademarks are recognized—trademark claims recognizes trademarks that are registered in countries conducting a so-called substantive review or examination. There is no explanation for this difference, which means that all CTMs and most national European trademarks are excluded from the sunrise service. *LEGO (11 Jan. 2011). VKR (12 Jan. 2011). Arla Foods (11 Jan. 2011). Vestas (11 Jan. 2011).*

Clearinghouse should be exclusive source for RPMs. The Clearinghouse should be the sole exclusive agent for all RPMs offered by new gTLDs where registered trademarks are required for eligibility. The following language should be added: "If a TLD provides ANY Rights Protection mechanism that requires verification of registered trademark

rights in order for applicants to be eligible for the RPM, then the trademark clearinghouse must be EXCLUSIVELY used for this purpose." TLDs should be prohibited from offering an optional validation service for sunrise or IP claims that is also provided by the Clearinghouse. Making the Clearinghouse the exclusive agent for trademark validations also remedies a flaw in specification 7, which as currently written does not prevent any bad faith behavior by Registries since by definition any use of an RPM is optional for trademark owners. *EnCirca (9 Dec. 2010).*

Both the Trademark Claims and Sunrise Period processes should be required for pre-launch by every gTLD registry. *MarkMonitor (9 Dec. 2010).*

Analysis of Comments

The Clearinghouse, a suggestion by the IRT, endorsed by the STI, is meant to house underlying data that supports certain trademark protection mechanisms. Those protection mechanisms are varied.

Criteria for entry into the Clearinghouse, and later validation, has been the subject of widespread comment and review. It is evident that there is some confusion about substantive evaluation at the time of trademark registration versus validation for use by the Clearinghouse Validation Service Provider and that will be clarified in the Guidebook. Also of some discussion is whether the Clearinghouse-supported RPMs should reach broader that identical matches of trademarks. Further at issue is the value of sunrise and pre-launch claims services. There are some additional concerns and considerations that have been raised. All of these issues are discussed below.

As noted, numerous comments seek understanding and clarification of "substantive evaluation" as set forth in the Guidebook. In order to make clear what is 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), in pertinent part:

> 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.

Some have suggested that requiring validation for use would result in discrimination against certain holders of certain registrations. As stated previously, it is not believed that such a requirement would lead to discrimination. To the contrary, validation of use is intended to provide a mechanism so that all marks receiving the same type of advantage from a particular RPM are evaluated at substantially the same level.

All nationally or multi-registered marks, as well as those protected by treaty, statute or as determined by a court to be valid, are eligible for inclusion in the Clearinghouse. Further, that same universe of marks is eligible for all trademark claims services offered by any new gTLD registry operator. While marks must be validated for use in order to serve as the basis for sunrise protection, the Clearinghouse Validation Service Provider, or possibly even another provider, will provide those validation services. While investigation of what validation would require is still under review, consideration is being given to requiring a simple declaration from the trademark holder that the mark has been in use and provision of a sample of that use in commerce (such as a label, advertisement, screen shot or the like). Validation for use is an appropriate bar for sunrise protection since, in sunrise services, certain marks get an advantage over others. Indeed, having the "evaluation for use" requirement will reduce the possibility of abuses and add a level of protection to for legitimate trademark holders during a sunrise period.

One comment argues that validation data should be kept confidential. However, as contemplated, data showing use will be in the public domain. Thus, submitting evidence of use is not believed to raise any confidentiality issues.

Whether to include common law marks in the Clearinghouse has also been the subject of discussion. 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 be used to game the system. The result of review and input from a variety of stakeholders was to create a list of specific criteria for entry. If objective criteria are used, such as registrations, there is no way in which to allow for common law marks that have not been court validated to be included, or discretion would have to be exercised, and the unintended result will be that similarly situated applicants will be treated differently. Accordingly, common law marks will not be included in the Clearinghouse.

Some question the need for a declaration at the time of entry into the Clearinghouse. 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, trademark 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 attesting to the validity of the mark is less time consuming and much less costly than a certified copy of a registration. Thus, it will be

required. The inclusion of a sworn declaration requirement is not believed to increase the costs of submission; at the same time, requiring it will help maintain the integrity of the data and ensure that it is reliable, accurate and up to date.

Some comments suggest that limiting protections to "identical match" under trademark claims or sunrise services is too restrictive. While this suggestion has been the topic of much discussion, both the IRT and the STI adopted this same limitation to identical match with respect to sunrise and trademark claims services. Further, expansion into names simply containing marks could be unwieldy and require discretion, which could lead to disparate treatment. Recent discussions suggest that the Clearinghouse should also include a limited number of entries consisting of the mark + a key term. This expansion is still under consideration as marks that might receive protection with respect to trademark claims services – but only to the extent that the key terms are related to the mark in a significant way and the number of additional entries is limited in an a objective way (for example a specific maximum number such as five).

Clarifying questions have been raised with respect to protection for names or marks that are protected by treaty or statute. In the last version of the Guidebook, only marks under treaties or statutes existing or in effective before 26 June 2008 were protected. The limitation was developed in order to prevent potential abuse. The suggestion to remove this limitation has been considered and it has been determined that it does make sense to remove the time limitation from trademark claims services protection, which does have broader scope, but maintain it for sunrise protections which provides one mark with an advantage over another. Thus, section 3.2.3, 3.6 and 7.1.2 could refer to marks protected by statute or treaty "in effect at the time the mark is submitted to the Clearinghouse for inclusion."

Special treatment in the Clearinghouse for NGOs or "not for profit" organizations, as one commenter has suggested, is inappropriate. What constitutes an NGO or "not for profit" organization will have varying definitions and simply because an organization is an NGO or not for profit does not mean that its mark holder is entitled to different treatment than other organizations. This would add a level of discrimination that all stakeholders are trying to eliminate to the extent possible.

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 to be 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, standing alone, does not indicate source, and because allowing marks in the Clearinghouse that include a

TLD will increase the likelihood of confusion, abuse and gaming, on balance they are excluded. This exclusion will also obviate the need for registration of defensive trademarks in this area.

The Sunrise and Trademark Claims services have been the subject of much discussion, as well. Some would like an opportunity to object to a domain name prior to it being awarded, others suggest that the Trademark Claims service should be mandatory or extended to post-launch.

At the outset, it should be noted that the role of the Clearinghouse, the Trademark Claims Service and the Sunrise have been discussed at length by the IRT and the STI. The goal of these services is not to provide a blocking mechanism as there are often numerous legitimate reasons many different people would want to use a word that might be covered by a trademark registration somewhere in the world. In that same vein, a mandatory pre-registration notice/dispute policy is not feasible or necessary, particularly in light of the affirmative requirement imposed on the registrant that it must attest to having a legitimate interest in the applied for TLD. Moreover, in many cases, without content associated with a particular domain name, it would be difficult to ascertain what, if any, harm might be suffered by a trademark holder such that it would have a right to seek relief. Thus, on balance, neither a blocking mechanism, nor a pre-registration dispute resolution mechanism would serve a role commensurate with the burdens and costs on the potential registrant and the potential registry.

With respect to application of either the claims service or sunrise post-launch, the IRT has stated that these services will not be mandatory because of the existence of other post-launch mechanisms including the URS, the PDDRP, as well as all courts of competent jurisdiction. As noted by the IRT "[t]he 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."
*(htt*p://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf, footnote 6.) Further, there are many commercial IP watch services available.

Whether to make both the Trademark Claims Service and Sunrise mandatory was also considered by the STI. It was decided that the gTLD registries would be required to have either one or the other. While neither system can ensure against nefarious behavior, there is no system that can and both are additional and mandatory layers of protection that were previously not required of the gTLD operator. There are a number of post-launch rights available to any trademark holder to the extent a gTLD or domain name is registered and such registration causes a cognizable harm.

Clearinghouse Provider Services

Summary of Comments

<u>RPM and Process Patent considerations</u>. To prevent conflicts among RPM providers in the future, the following language should be added to Module 5: "All potential service providers for RPMs and the trademark clearinghouse, should clearly indicate if they have any pending or accepted filings related to process patents describing a TLD Rights Protection Mechanism." *EnCirca (9 Dec. 2010).*

Provision of ancillary services by the Clearinghouse provider or third parties could lead to a loss of confidentiality in data provided to the Clearinghouse. Any data submitted to the Clearinghouse should be held only by the Clearinghouse and used for the sole purpose of assisting with the implementation of gTLDs. *Telstra (23 Dec. 2010).*

Analysis of Comments

The role of the Clearinghouse set forth in the most recent version of the Guidebook adopts the intent of the IRT, as considered by the STI, which is to ensure that the Clearinghouse Provider does not obtain any competitive advantage over competitors for ancillary services. Thus, absent a license from the trademark holder, the Clearinghouse database will only be permitted to hold data for the purpose of implementing the service of the Clearinghouse. The Provider(s) will be selected through an open bidding process, any relevant data bearing on its ability to be an impartial provider or otherwise impacting the competitiveness of others will be evaluated. All relevant information will be disclosed and evaluated.

Uniform Rapid Suspension System (URS)

Key Points

- IRT recommendations remain intact:
  - the current URS proposal expands the types of trademarks that can use URS to Clearinghouse-validated marks, marks protected by treaty or statute, and those that are court-validated.
  - the IRT proposed, and the STI adopted, a clear and convincing burden of proof.
  - the IRT proposed, and the STI adopted, suspension as the remedy.
- Complaint forms might be shortened to lower expected costs.

General

Summary of Comments

The URS is a strong tool for trademark owners in cases where there is a clear and actual infringement of their trademark rights. *Demand Media (8 Dec. 2010).*

We cannot emphasize strongly enough that the URS as outlined in the Guidebook is not that which was originally envisaged by the IRT. The original IRT proposal should be revisited to remedy this situation. *Hogan Lovells (9 Dec. 2010). Adobe Systems (10 Dec. 2010). INTA (14 Jan. 2011).*

There are still serious procedural issues and open-ended questions about the URS which are of practical significance to the entities that may choose to administer this system. These matters need to be addressed before the Board can vote to approve the URS. ICANN should include the NAF in discussions regarding the implementation of the URS before it is finally approved. *NAF (8 Dec. 2010).*

Registration-driven compromise risks impacting the effectiveness and efficiency of the URS to the point of missing the fundamental intent behind the WIPO and IRT proposals. The imbalance consists in such features as: panel appointment even in default cases; panel examination of possible defenses in default cases; possibility of appeal during 2 years from default; higher burden of proof; uncertainty as to results (possible gaming and revolving-door monitoring); use of conjunctive bad faith registration and use; limiting marks forming basis of URS claim to either so-called substantive review or clearinghouse validated marks (with cost and time implications); apparent translation requirements; seeming option for re-filing; possibility of de novo appeals; and significant timelines.
Further, there are unbalanced word limits, language issues possibly affecting effectiveness of notice; ambiguity about the language of the complaint; failure to contemplate privacy/proxy services; non-refundable fees for minor administrative deficiencies; default notice by post following on prior complaint notice by post; inefficient time extension modalities; unclear rationale for an appeals layer; unclear concept of panel certification; lack of parity in consequences for a repeat abusive registrant; unclear provider tracking obligations that exclude registrant behavior. *WIPO Center (2 Dec. 2010). IACC (9 Dec. 2010). Hogan Lovells (9 Dec. 2010). MarkMonitor (9 Dec. 2010). News Corporation (9 Dec. 2010). NCTA (10 Dec. 2010). MARQUES/ECTA (10 Dec. 2010). CADNA (10 Dec. 2010). BBC (10 Dec. 2010). RE/MAX (10 Dec. 2010). Verizon (10 Dec. 2010). IHG (10 Dec. 2010).*

As the BC stated in its earlier comments, the URS is not a rapid process and takes nearly as long as using the UDRP with a higher burden of proof and provides little certainty. *BC (6 Dec. 2010). IACC (9 Dec. 2010). Hogan Lovells (9 Dec. 2010). MarkMonitor (9 Dec. 2010) AT&T (10 Dec. 2010). Telstra (23 Dec. 2010).*

Panels should not be appointed in default cases. Adequate reporting should be instituted to prevent gaming. *MarkMonitor (7 Dec. 2010).*

The details and operation of the URS should be evaluated after a trial period to ensure that it is fulfilling its intended purpose of being fast, efficient and fair. *Telstra (23 Dec. 2010).*

Analysis of Comments

The URS continues to be the subject of comments by various stakeholders. There are some that applaud the new RPM and others that have expressed a concern that it is not going to be effective or that it is simply too different than what was proposed by the IRT. All comments are being considered in the development of the current URS proposal.

The IRT proposal was reviewed by the STI and was modified, but the concept of the URS has not been challenged. The proposal underwent further significant public comment; the modifications are a direct result of such comment. While comment seems to suggest that the current proposal is diametrically different than the IRT URS proposal, many of the IRT recommendations remain substantially the same in the current version of the URS, or trademark protections have been enhanced. As some examples:

- The response time is the same - 14-days (the current version does provide for a one-time extension of no more than seven days if a good faith basis exits).

- Which trademarks can be the basis of a URS claim is broader in the current URS proposal than in the IRT proposal – the IRT required finding that domain name is identical or confusingly similar to a mark in which the Complainant holds a valid trademark registration issued by a jurisdiction that conducts substantive examination prior to registration; the current URS proposal expands this to Clearinghouse-validated marks, marks protected by treaty or statute, and those that are court-validated.

- The burden of proof is the same – clear and convincing evidence.

- The requirement for showing bad faith is the same – must be registered <u>and</u> used in bad faith.

- The fact that Examination is required even in default cases is the same.

- The time for a Panel to render a decision is limited in current URS proposal (goal of three (3) days, no later than 14 days) – there was no such limitation proposed by the IRT.

- The remedy is the same - suspension.

- The length of suspension in the current URS proposal can be extended by a year after current registration expires – there was no such possibility of extension in the IRT proposal.

- The evil intended to be addressed is the same – clear-cut cases of abuse.

The changes that have been implemented have been the result of input from a numerous stakeholders and reflect the attempt to balance the rights of trademark

holders and legitimate registrants that may happen to have registered domain names that involve a trademark from somewhere in the world.

Questions about the method of initiating a complaint, whether to have a form, how defenses should be reviewed and the languages in which the proceedings have been conducted have been raised and addressed during the various public comment periods. At every stage of the review, the intent has been to provide a rapid rights protection mechanism directed toward the clearest cases of trademark abuse. The nature of the proceedings is believed to achieve that end.

Discussions are continuing and some additional implementation detail revisions will likely be made, for example, creating a form complaint that reduces the 5000-word limit to 500 words. The 500-word limit might not, however, be placed on the respondent, as the respondent will be required to describe the legitimate basis upon with the domain name is registered. The respondents word limit be decreased from 5,000 to something less, possibly 2,500 words, in order to decrease the examinations panel's time requirements and thereby enhance circumstances for a relatively loss cost process. (Remember that in the vast majority of cases, it is expected that the respondents will not answer.)

Making these changes to the complaint form is consistent with the IRT and the STI proposals. The IRT proposed certain fields to be included in the complaint form and the IPC has proposed an additional 500-word limited text box for explanatory language. The STI's proposal is consistent with the IRT's recommendations. The STI suggested: "The form of the complaint should be simple and as formulaic as possible. There should be reasonable limits on the length of complaint and answer. The complaint should allow space for some explanation, and should not be solely a check box." The final recommendations will be explored and determined prior to issuance of the final guidebook.

The GAC has also indicated that it would be providing to ICANN some specific implementation recommendations for the URS, which will be discussed during the GAC and Board consultations in Brussels and during the March ICANN Public Meeting.

Other specific questions and comments about particular aspects of the proceedings will be addressed in the sections below.

Procedures

Summary of Comments

Time Periods.
The URS should be implemented so that it is substantially faster than the UDRP.
MarkMonitor (7 Dec. 2010).

Regarding the one year later review of the URS after it takes effect; the flaws in and limitations of the current URS proposal are so patent that it is absurd to permit a year of what will undoubtedly be ineffectiveness before addressing them. *NCTA (10 Dec. 2010).*

Response time.
There is no explanation why the response time was shortened from 20 days to 14 days. The 14-day period is unfair to individuals who might not expect such URS notices and might not even know about the URS process. This also contradicts 4.3, which says that notices are sent by postal mail, which has widely varying delivery times, especially for international delivery. The URS provider should be required to guarantee the delivery within a defined time frame (e.g. by using express courier services), which would also provide a proof of delivery. The 20 days to file a response to a URS request should then start at the time of the paper mail delivery. Further, notice to registrants by email is unreliable. There is no guarantee that an email is delivered at all since it could be caught by spam filters, tampered with along the way, etc. *P. Vande Walle (Module 5, 24 Nov. 2010). NCUC (10 Dec. 2010).*

The 20-day URS response time should be restored or extensive guidance should be provided regarding the grounds for which a 7-day "good faith " request for response extension will be granted. *ICA (9 Dec. 2010).*

The Board erred in unilaterally reducing the response time from 20 to 14 days. This decision is unreasonable and goes against the Board not making policy except where the community has failed to reach consensus. The STI came to general consensus on a 20-day period. It is all the more unreasonable given that the word limit for the complaint is set at 5,000 words. *A. Greenberg (, 9 Dec. 2010). ALAC (10 Dec. 2010). A. Greenberg (10 Dec. 2010).*

The 14-day response time denies applicants sufficient time to obtain a lawyer and is inconsistent with ensuring that registrants receive actual notice of a complaint. The time to respond should be a function of the age of the domain name –14 days + 5 days x age of domain in years (e.g., a registrant might get 5 more days to respond for every year that the domain name has been registered). This would ensure that complaints are brought in a timely manner—i.e. within the first year. Note: The URS section 9.6 is inconsistent—it still talks about a 20-day response period. *G. Kirikos (13 Nov. 2010).*

Examination–timing correction (9.6). This section contains on old timeline. The new timeline is 14 days. *NAF (8 Dec. 2010).*

URS page limits.
The word limit should be less than 5,000 words for complaints/responses. It may even be helpful to impose a page limit on exhibits. *NAF (8 Dec. 2010). Hogan Lovells (9 Dec. 2010).*

The word limit should be reduced to a much smaller number such as 500 words. *IPC (9 Dec. 2010).*

Shorten the permitted length of the pleadings to make the Determination easier for the Examiner, which owing to anticipated lower fees, will likely be preparing very short decisions. *NAF (8 Dec. 2010).*

Administrative Review.
Forcing a dismissal for easily corrected errors wastes time. Parties should be allowed to amend the complaint to bring it into compliance rather than require a dismissal and subsequent refilling. As currently written these rules will not make things faster and will increase expense. *NAF (8 Dec. 2010).*

It is a matter of fundamental fairness to let a respondent respond however they can with the Examiner making inferences from omissions as appropriate. The UDRP does not provide for any compliance check for responses. It should not be incumbent on the Provider to translate all documents –it is logical to pass them on to the panel that speaks the language. In additional since all submissions are forwarded to the Examiner whether they are compliant or not (URS 5.6 says Providers will check for deficiencies but says nothing about what if a Response is not compliant), a deficiency check would only use up energy and add time to the process. *NAF (8 Dec. 2010).*

Fees.
This rule has the effect of extending the case time. It is likely that a significant number of respondents will wait the full 30 days after a Determination to respond, thereby increasing the average time a case would take under the URS as opposed to the UDRP. *NAF (8 Dec. 2010).*

A late answer should not be allowed under any circumstances without a fee and the time for filing a late response should be limited and only allowed upon a showing of good cause. *NCTA (10 Dec. 2010).*

There should be a fee where a response is filed late or there is no incentive to deal with this in a timely manner. *BBC (10 Dec. 2010).*

There should be a fee for filing a response to a complaint. *LEGO (11 Jan. 2011). VKR (12 Jan. 2011). Arla Foods (11 Jan. 2011). Vestas (11 Jan. 2011).*

The ICANN Board should encourage the URS provider to provide discounted fees for complaints brought by verified not-for-profit organizations/NGOs. *P-NPOC (1 Dec. 2010). Red Cross (9 Dec. 2010).*

URS 1.2(d). Add word "shall" instead of "should" if it is a requirement that the complainant include a copy of the currently available Whois information. *NAF (8 Dec. 2010).*

English translation issues (4.1). Is the Registrant's presumed language the language predominantly used in the country listed for the Registrant in the Whois? If the Whois has a privacy shield, is the location of the privacy services used? If the respondent cannot read the complaint because it is in English, clarification is requested that it is not the Provider's job to translate the complaint (only the letter is in English, not the complaint itself). Is the Response accepted if it is in the non-English language? *NAF (8 Dec. 2010).*

Notices (4.3). This section should be clarified that it applies to all notices under Rule 4, not to all correspondence about the case. Also, if the Whois lists a privacy service, does the Provider need to do anything else with respect to the notice? *NAF (Dec. 2010).*

Time Limits--exceptions (URS 4). The time limits should include an exception for weekend/holiday deadlines, or the Providers should be granted the power to make Supplemental Rules that help smooth out case administration hassles. *NAF (Dec. 2010).*

Case Management.
Permit/offer an incentive to Providers who use an entirely online portal/case management interface (supplemented with paper/fax notices of commencement), which can streamline the process of sending and receiving documents. *NAF (8 Dec. 2010).*

Consider what next steps will be if a Registry Operator does not notify the Provider of the lock in a timely manner. How long must the Provider wait to proceed (if instructed to proceed). A best practices document accompanying the AG could iron this out ahead of time. *NAF (8 Dec. 2010).*

URS 1.2(d). Add word "shall" instead of "should" if it is a requirement that the complainant include a copy of the currently available Whois information. *NAF (8 Dec. 2010).*

Analysis of Comments

The time in which a URS proceeding takes place has been the subject of extensive comment. While some advocate for a 20-day response period, and oppose the recent change to a 14-day response period, many have suggested that the timing should be even shorter than 14 days. In response to public significant public comment, the Board recently resolved that the response time be shortened from 20 days back to the 14 days proposed by the IRT. The latest version of the URS reflects this change. (*See* http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6)

To the extent there are concerns about the time in which it takes for a registrant to get notice and prepare a defense; a seven-day extension of time can be obtained if there is a good faith basis for such an extension. Further, limiting the complaints as the trademark interests have suggested, to a form complaint with a 500-word limit explanation, should simplify the effort required for responses. Finally, in light of the fact

that relief from default is virtually automatic if a response or appeal is filed within a two-year time period, there should be no concern that initial a response time is limited to 14 days.

There is no process that can address the clear-cut cases of abuse and balance the rights of the registrant that can take place immediately. The trademark holder and the registrant each have to have an opportunity to present their positions and should have the right to have their positions evaluated. The procedure currently envisioned for the URS attempts to balance each of these needs and the timing for the complaint, response, and prompt review and prompt decision making is intended to reflect the need for speedy resolution while ensuring an opportunity to be heard. The notice provisions are similarly intended to give these balancing need effect. No one method of service is fool proof. email can go unanswered, regular mail takes time. Recognizing the pros and cons of each method of service, process must be delivered by post, electronically and by fax to maximize the possibility of timely notice.

It has been indicated that 14-day response time needs to be incorporated into other sections of the Guidebook to make timing provisions consistent, (i.e. Section 9.6) it will be. Thank you.

With respect to comments about the length of the complaint and response, please see the analysis in the "General" Section above.

Although some have suggested that dismissal of complaints that do not comply with requirements is a waste of time, allowing an amendment is unfair to the registrant who is also entitled to a prompt resolution. The goal of the URS is efficient and prompt resolution, if the complaint does not meet the standards, it will be dismissed.

Both the complaint and the response will be checked for compliance. One comment suggests that it is unfair for responses to be reviewed for compliance because a respondent should be permitted to answer in any way they wish to do so. While the respondent is free to assert any defense or fact that would negate a claim of bad faith, procedural requirements must still be adhered to for the process to remain efficient and fair to all participating in it. It is not anticipated that the compliance check will in any way impede the respondent's ability to assert legitimate defenses to any claim.

Some have commented on the fees for instituting or responding to a URS proceeding. As set forth in the Guidebook, it is anticipated that the Provider will set them and that in keeping with the goal of the URS to be a cost effective RPM, they will be approximately $300 US. In terms of a response fee, the IRT suggested one, but the STI suggested it be only in the case of a late filing (30 days after the due date). The STI provision is what has been accepted, as it comports with the nature of the quick, efficient and low cost RPM.

It has been suggested that a discount be given to complaints brought by verified not for profit organizations or NGOs. What constitutes a verified not for profit organization may

be difficult to ascertain on an expedited basis thereby undercutting the very core of the URS remedy. All the same, whether to afford such a discount and the manner in which it would be applied will be left to the sole discretion of the Provider. Fees are paid directly to the provider, not to ICANN so that there is no fee that ICANN could forego.

The method of notice and the language in which notice should be given have been the subject of comment, as well. It has been suggested that Section 4.3 be modified to make it clear that it applies only to Section 4. This clarification will be made.

All of the day-to-day procedures have not been outlined in the Guidebook, including those relating to translations. The Provider ultimately will additional rules and procedures. It is anticipated that such procedures will include what happens if a Registry Operator does not notify the Provider of the lock in a timely manner as well as the length of time the Provider can wait to proceed (if instructed to proceed). However, the suggestion about not including weekends or holidays in the timing of the URS procedures would not be workable given the number of holidays recognized throughout the world. Public discussion indicates that 14 calendar days is the appropriate time in which to respond.

All specific word change suggestions will be considered and made where appropriate. Thank you.

Burden, Evaluation and Standards

Summary of Comments

Grounds for complaint. The URS should come into line with developments in DRS provision around the world. The grounds for a complaint should be that a name has been registered or is being used in bad faith. The link to the UDRP should be broken. *MARQUES/ECTA (10 Dec. 2010).*

Burden of proof.
The URS is weak in that the burden of proof is on the trademark owner to prove that the registrant has no legitimate interest in the domain name. *LEGO (11 Jan. 2011). VKR (12 Jan. 2011). Arla Foods (11 Jan. 2011). Vestas (11 Jan. 2011).*

It is not clear how the burden of proof (clear and convincing evidence) can be met within a form of complaint that is as "simple and formulaic as possible." There is a tension between requiring a relatively high standard of proof and streamlining the process by reducing the evidence needed to be provided by trademark owners. This issue requires further consideration; additional guidance should be provided regarding how it is intended that trade mark owners might satisfy the standard. *Telstra (23 Dec. 2010).*

The URS suffers from a higher burden of proof than the UDRP. *MarkMonitor (7 Dec. 2010).*

Defenses. The proposal is one-sided, adding defenses (DAG 4.0) from Nominet's dispute resolution policy but failing to include presumptions supporting a finding of abuse. Virtually all of the changes made since the initial RPM proposals have made it more difficult to prevail in a URS proceeding. *NCTA (10 Dec. 2010).*

Evaluation.
The language of section 1.2.f.i should be revised as follows: "that (i) is registered (not just applied for); and has been through the relevant period for opposition applied in the country of registration; and is not subject to a pending opposition, revocation or cancellation action; and is in use;" A new footnote should be added to accompany appearance of the phrase "in use": "It will be sufficient for the rights owner to make a simple declaration of use." Footnote 1 should be deleted (now redundant). This revision, requiring use of a trademark in order to enter the clearinghouse database, is designed to create qualification hurdles high enough to exclude cyber squatters seeking to register terms in the clearinghouse without setting the hurdle so high that legitimate rights owners cannot qualify. *BC (6 Dec. 2010).*

URS section 1.2(f) (i) should remove the reference to evaluation on relative grounds and evaluation of proof of use. *IPC (9 Dec. 2010).*

We urge ICANN to eliminate discrimination on the grounds of substantive evaluation in the URS context. *Hogan Lovells (9 Dec. 2010). LEGO (11 Jan. 2011). VKR (12 Jan. 2011). Arla Foods (11 Jan. 2011). Vestas (11 Jan. 2011).*

The current proposal's "use" requirement severely reduces the number of marks that will be eligible for protection under the URS. This change is another example of a process that is being rushed without adequate opportunity for meaningful input and review. *NCTA (10 Dec. 2010).*

Analysis of Comments

Many have commented on the burden of proof in a URS. Some suggest that clear and convincing is appropriate while others have claimed that the burden of proof is too high. The intent of the URS is to address the most clear-cut cases of abuse. As such, a higher burden of proof is appropriate. The IRT has stated that contestable issues are not appropriate for URS resolution. (*See* page 34 of final IRT Report located at http://www.icann.org/en/topics/new-gltds/irt-final-report-trademark-protection-29may09-en.pd). Given that directive, the clear and convincing standard is appropriate. At the same time, there has been a suggestion that including defenses somehow impermissibly shifts the burden or makes it too difficult to prevail. None of the defenses listed are absolute, nor do they create a presumption on behalf of the registrant. They are intended to give notice to complainants as to what will constitute clear cases of abuse and what will not. No presumptions exist for either party.

The type of trademark that can form the basis of a complaint has also been the subject of public comment. Some have urged that the requirement of a substantive evaluation

should be removed. While protections are given for a broad set of trademarks – even broader than the URS envisioned - It should be noted that since the URS is designed to remedy clear-cut cases of infringement in an expedited fashion, the URS states that certain registered or otherwise protected trademarks will be suitable for review in a URS proceeding. As noted by the IRT in its Final Report on page 38 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 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." (*See* http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf)

The Board recently resolved that the marks must undergo substantive review for inclusion in the Trademark Clearinghouse and to form the basis of a URS. (*See* http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.7) In that regard, the Board stated,

> 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*.*

Some have suggested that requiring validation for use would result in discrimination against certain holders of certain registrations. As stated previously, it is not believed that such a requirement would lead to discrimination. To the contrary, validation of use is intended to provide a mechanism so that all marks receiving the same type of advantage from a particular RPM are evaluated at substantially the same level.

While marks must be validated for use in order to serve as the basis for a URS proceeding, the Clearinghouse Validation Service Provider, or possibly even another provider, will provide those validation services if not completed at trademark registration. While investigation of what validation would require is still under review, consideration is being given to requiring a simple declaration from the trademark holder that the mark has been in use and provision of a sample of that use in commerce (such as a label, advertisement, screen shot or the like). The IRT and the STI both agreed, in essence, that validation for use is an appropriate limitation for marks serving the basis for a URS proceeding

Default

Summary of Comments

Panels should not be appointed in default cases. *MarkMonitor (7 Dec. 2010).*

The default section 6 has no substantive effect and no practical significance (e.g., all default cases proceed to examination). If a declaration of default is intended to have a substantive effect that needs to be clearly stated. *NAF (8 Dec. 2010).*

Consider eliminating an Examiner Determination for Default cases (this would make the Default section have more meaning). This would also eliminate questions about having multiple Determinations for one case. *NAF (8 Dec. 2010)*

In section 6.2 - mail and fax notifications are not necessary. If the complaint was served with mail and fax notices and there is no response, sending a default notice by mail and fax is unlikely to provoke a response. Email should be sufficient; other methods increase cost and time. *NAF (8 Dec. 2010).*

Revise Section 8.4. As currently written it effectively ensures the dismissal of all URS complaints in which no response was submitted. It should be revised as specifically provided for in Microsoft's comments. *Microsoft (9 Dec. 2010).*

By whom will the Registrar be prohibited from changing content? What is the penalty if the Registrar changes content? Who monitors for content changes? Why is it that the content cannot change during the "default period" but can change during the response period? *NAF (8 Dec. 2010).*

Section 6.3 should be located in the appeals section, not the default section, or placed in a new section called Re-opening. *NAF (8 Dec. 2010).*

Regarding 6.4, who tracks what the original IP address was? *NAF (8 Dec. 2010).*

The current proposal invites gaming and abuse by registrants. Assuming that proper notice was given, absent good cause NCTA strongly opposes allowing a default determination to be vacated or reviewed. In the event that the URS allows default determinations to be revisited, the window for doing so should be brief and the registrant should be required to pay a substantial fee. *NCTA (10 Dec. 2010).*

Analysis of Comments

Several comments have been posed relating to the default provision of the URS, and the language providing that all complaints will be reviewed. Some have suggested that default should result in an automatic win for the Complainant. The decision to provide for examination even in cases of default was proposed by the IRT. Thus it is part of the

current URS proposal. The reason for examination in the case of default is to insure that the remedy will be applied in a clear-cut case of abuse. By the same token, the mere fact that all complaints are reviewed does not mean that they will be dismissed as one commenter has suggested. It simply means that the goal of the URS, to stop clear-cut cases of infringement, is maintained.

The manner in which default applies has also been the subject of public comment. Some have urged that allowing default cases to be reopened by filing a late response diminishes the effectiveness of the remedy or encourages gaming. Default will continue to remain a viable remedy and it is unlikely that gaming will result since there is no incentive to answer after default has been entered. However, there are reasons to allow review of default. There are cases where a legitimate domain name registrant was denied an opportunity to be heard. In those cases, the registrant should be heard. To that end, providing notice of default by mail fax and email will be continued to insure that the registrant is notified of the default. (Remember that, in the vast majority of cases, no response is expected and this provision will rarely come into play. When it does, it provides a cheap remedy for a possible error.)

The changes that can be made to the content of the web site and the parties to be held accountable for such changes have also been the subject of comment. Some of the implementation details that are procedural will continue to be explored and enhanced throughout the pendency of the URS. However, the questions will be reviewed and considered and additional details, if feasible, will be included in the final version of the URS.

Appeals

Summary of Comments

Timing for Appeal.
A rendered URS decision should not be subject to appeal for two years after the registration period of the name expires. *MarkMonitor (7 Dec. 2010). BBC (10 Dec. 2010).*

The period should be shortened to 90 days or the expiration of the domain, whichever is shorter. *IACC (9 Dec. 2010).*

Many URS cases will effectively be exponentially longer because a case that was once closed in around 45 days will now need to remain available for re-opening anytime up to two years later. *NAF (8 Dec. 2010).*

The two-year de novo review (6.4) raises many practical issues: is the complainant allowed to supplement its pleadings now that time has passed? Is the original Determination amended (by whoever rehears the case) or is a second Determination published, and do the two have to be linked? Is the complainant obligated to keep the Provider apprised of changes to counsel? If not, what actions on a Provider's part will

constitute notice to the Complainant that the case is being re-opened? *NAF (8 Dec. 2010).*

The de novo review standard allows the unsuccessful appellant to simply hope for a different decision by a new reviewer; this end result only favors one party—the domain name registrant. *NCTA (10 Dec. 2010).*

Domain Name resolution. BBC objects to the proposal that where the registrant files a request for de novo review the domain name then resolves back to the original IP address. The status quo should be maintained pending the outcome of any 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 at most. *BBC (10 Dec. 2010).*

Abuse (URS 11.3). This section is ambiguous. If the appeal can be made to the same provider, and if any provider/examiner fee is paid by the appellant, are any additional pleadings allowed by either the appellant or the original registrant? What is the remedy—overturning the entire Determination or just the finding of abuse? Does the second examiner modify the first examiner's written Determination? Can a substantive appeal be filed simultaneously with the appeal of the finding of abuse? Should Providers have a special sublist of appellate examiners, and should those examiners be 3 member panels? *NAF (8 Dec. 2010).*

New evidence. Barring an appellant from introducing any new evidence whatsoever on appeal should not be characterized, as ICANN does in the DAG, as "handicapping" an opponent. It is a limitation but a fair one that is consistent with the goal of the URS in providing a cost-effective, expedited process. *NCTA (10 Dec. 2010).*

Process questions. The appeal process is given only three short paragraphs; it raises many procedural issues, including: How "limited" is the right to introduce new material? Is it limited merely by the Provider's page/word constraints? What are the timelines for the appeal (briefs, Determination)? Can an appellate examination be done by a three-member panel if one or both parties agree? If a complainant loses its URS case but prevails on appeal does the period for the "non-resolving domain name" start with the URS filing or with the time the appellant prevailed? Can a complainant appeal under 11.8 be brought simultaneously with the substantive appeal? What happens to the publicly available URS Determination if an appeal overturns the Determination below (should it still be publicly available?) *NAF (8 Dec. 2010).*

Analysis of Comments

The time in which to file an appeal has been the subject of comments. Some have inquired as to why two years has been selected; some suggest that this period is too long. The two-year period only applies if relief is sought from Default. Otherwise the respondent has 14 days as set forth in Section 12.4. Gaming is not likely to occur since section 12.3 provides that "Filing an appeal shall not change the domain name's

resolution." While the IRT did not propose an appeal to the URS provider, as the STI did, the IRT did suggest the possibility of a URS Ombudsman, at least in cases where the complainant prevails. Understanding that the review by the URS Ombudsman would be limited to abuse of discretion or the process by the Examiner, the STI suggested that the review be de novo, which is what has been adopted. In response to comments that the STI proposal allowed for appeal at any time, the current URS proposal limited that to two years.

That an appeal can be de novo has also been the subject of comments. Although some have suggested it will benefit the registrant, such a characterization does not seem accurate. The URS examiner will only have a limited evidentiary submission. Thus, it is not likely that de novo review would lengthen the process, nor would it change the resolution of the domain name as one comment suggests. Section 12.2 is clear that "Filing an appeal shall not change the domain name's resolution." Given the bad faith standard, independent review in such limited circumstances seems to be in the best interest of the parties. Accordingly, the de novo standard should remain.

The evidence limitation set forth in Section 12.2 was suggested by the STI, to be a fair limitation on final resolution consistent with the goal of the URS in providing a cost effective and expedited process. Any other characterization of the process would be inaccurate. The IRT did not provide any comments with respect to potential additional evidence submission upon appeal.

The specifics of the limitation, as well as the briefing requirements and timing will be left to the Provider to determine and ample notice will be provided.

(Remember that, in the vast majority of cases, no response is expected and the appeal provision will rarely come into play. When it does, it provides a cheap remedy for a possible error.)

Remedies and Fee Shifting

Summary of Comments

Transfer or first option to register.
Given the high standard for prevailing on a URS complaint, either transfer or providing the prevailing complainant with the first option to register the domain name after the suspension has run its course would be a far more equitable and reasonable remedy. In light of all the changes made to the URS proposal, the nature of the available remedies should be revised to restore balance and to encourage trademark owners to take advantage of the URS. *NCTA (10 Dec. 2010).*

The complainant should have the chance of requesting the transfer of a domain if there is no response or a complaint is upheld. *MARQUES/ECTA (10 Dec. 2010). Adobe Systems (10 Dec. 2010). Verizon (10 Dec. 2010).*

From the perspective of customers who are searching for the website of a major brand, finding a page with information about the URS is not particularly helpful and may be detrimental to the brand. Because the URS is intended to operate only in clear cases of cybersquatting, if this is found to be the case then there is no reason not to transfer the domain name to the complainant. *Telstra (23 Dec. 2010).*

The successful complainant should be given first refusal to register the domain name when it next comes up for renewal to avoid a perpetual cycle of cyber squatting risk, domain watching and URS actions. *BBC (10 Dec. 2010).*

Interim remedy. Given that a domain that has been locked after a compliant is filed still resolves and is visible for a period of time, there should be an interim remedy at least in cases of significant potential harm to a trademark owner and the pubic (akin to an interim injunction in court actions). *BBC (10 Dec. 2010).*

Permanent remedy. As noted in previous comments, the remedy for abusive use needs to be a permanent one. By only suspending the domain name and forcing the Complainant to defensively register it under their trademark, it has become more cost consuming than it should be. Clarity is an absolute must in these provisions before this new gTLD launch can occur. *IHG (10 Dec. 2010).*

Implementation timing. The remedies section does not address how long the Registry has to implement the Determination. NAF has seen countless cases where the complainant prevails but the registrar drags its feet for up to a year to transfer the name. *NAF (8 Dec. 2010).*

Abusive Complainants.
The current version of the applicant guidebook still includes the lowered and insufficiently rigorous standards for imposing penalties on complainants with no comparable provisions for registrants who have been found to have made repeated abusive registrations. No rationale for these changes was or has been provided by ICANN. *NCTA (10 Dec. 2010).*

URS includes a draconian two-strike policy for abusive complaints and deliberate material falsehoods. It is unjustifiably mired by its procedures (e.g. obligatory panel review for respondent default, 2-year statute of limitations for de novo appeal from default, etc.) *IOC (29 Nov. 2010).*

Loser pays.
Losers should pay in scenarios where Trademark Claims have been invoked. *MarkMonitor (Module 5, 7 Dec. 2010).*

A loser pays model is not unprecedented and would go a long way to protect consumers by providing a necessary disincentive to cyber squatting. While INTA realizes that this requires further discussion and input from stakeholders, the concept of allowing a registrant the opportunity to opt-in or opt-out of a URS proceeding upon

notice of a complaint is worth analyzing. A loser pays model would help create a system that curbs the rampant cyber squatting that is already seen in the existing gTLD space and which is further expected in new gTLDs, by rightfully putting the cost on the domain name registrants who infringe on intellectual property, or at least reducing the expense by foregoing full proceedings where registrants have no real interest in defending a domain registration. If ICANN is unwilling to embrace the numerous changes and proposed mechanisms that would address nefarious activities on the front end, then ICANN should work with the community to put appropriate "teeth" in the mechanisms that deal with these activities on the back end. *INTA (8 Dec. 2010).*

There is no loser pays mechanism in the URS, which would be essential in an URS of any real value. *LEGO (11 Jan. 2011). VKR (12 Jan. 2011). Arla Foods (11 Jan. 2011). Vestas (11 Jan. 2011).*

A loser pays model would end 90% of domain infringement and minimize the negative economic impact many businesses fear would result from introduction of new gTLDs. *MARQUES/ECTA (10 Dec. 2010).*

Domain lock for serial infringers. A complainant who files three abusive URS complaints can be banned from using the URS, but a serial infringer can lose 1,000 complaints without penalty. The burden should be shifted so that a serial infringer who has lost 3 complaints automatically has his domain locked. *MARQUES/ECTA (10 Dec. 2010).*

Analysis of Comments

Many have commented on the remedy available to a URS complainant. Some have suggested that the remedy be a transfer, others have suggested that a right of first refusal for the domain name. The IRT proposed suspension, not transfer. Since the URS is intended to be a prompt remedy for clear cut cases of abuse, the remedy reflects the evil the RPM is designed to prevent. While the first refusal alternative has been suggested, given that the URS exists only for clear-cut cases of abuse, on balance, suspension was deemed the appropriate remedy, so the first refusal will not be adopted. However, recall that the complaint will have the right to extend the registration, and thus the suspension, for an additional year. The extension provides that the domain name will be suspended significantly longer than the period recommended by the IRT.

The IRT envisioned that if a complainant wants the domain name transferred to it, the complainant can avail itself of other available alternatives, including seeking injunctive relief in an appropriate court or initiating UDRP proceedings.

The time in which the Registry has to implement the decision of the Provider has also been the subject of inquiry. Adding more specificity will be considered and included in the final version of the URS proposal as is deemed appropriate.

Some have questioned the circumstances under which a complaint can be found to be abusive. It has been suggested that the remedies for abusive complaints and material falsehood are not meaningful because they are subject to review and appeal. Upon review, in light of the standards, and the fact that the conduct can be sanctioned, it is believed that the rights of review and appeal should be maintained. Furthermore, doing so is not likely to under cut the remedy in any way. Rather, it will preserve the remedy by maintaining the integrity of the process.

Fees to be charged to the complainant and to a party responding have been the subject of comments, as well. A straight loser pays system was rejected by the IRT. The IRT noted that, "it is important to ensure that individual domain name registrants do not feel they cannot afford to file an answer. Second, there was concern that with the number of defaults that will likely occur, using the UDRP as a model, and the prevalence of false Whois information, recovery of such fees would be next to impossible." It was also thought that such a system might result in abuses. At present no effective loser pays method has been presented for consideration.

The fact that registrants who have lost numerous proceedings should have domains locked was not proposed by the IRT and thus has not been included as part of the latest URS proposal. Such a proposal requires careful consideration. It may, for example, incent the falsification of Whois information.

Post Delegation Dispute Resolution Procedure (PDDRP)

Post Delegation Dispute Resolution Procedure (PDDRP)

KEY POINTS

- The registry should be liable for its affirmative conduct resulting in infringement of trademarks; the standards for the PDDRP are crafted to achieve that goal.

- The requirement for clear and convincing evidence was proposed by the IRT and implemented. Based on future discussion, this might be amended to a preponderance of the evidence requirement if the high bar set by the standards, as currently written, remain in tact.

- Showing use of a mark is an important requirement and could be as simple as providing a declaration from the trademark holder that the mark has been in use, along with a sample showing that use in commerce (such as a label, advertisement, screen shot or the like).

General

PDDRP Should apply to registrars.

The PDDRP should also target registrars. *IOC (29 Nov. 2010)*

Where ICANN appears to be moving toward vertical integration it would appear consistent to apply the same principle to the PDDRP and comparable mechanisms so as not to exclude such lower-level registration intermediaries. *WIPO Center (2 Dec. 2010). CADNA (10 Dec. 2010).*

The PDDRP as proposed goes well beyond requiring a complainant to show some specific harm but rather requires proof that the gTLD registrar has a pattern of registering domain names that specifically infringe the complainant's marks. Despite the degree of abusive conduct there would be no basis for a PDDRP complaint against a gTLD operator where no single trademark owner has one mark that is specifically affected by abusive registrations in one registry. NCTA submits that unless and until the PDDRP is revised so it can address the systematic abuse by a registrar, regardless of the identity of the trademark owner, the PDDRP will never be used. *NCTA (10 Dec. 2010).*

Standards

Willful blindness.
To be effective the PDDRP must include a willful blindness standard including corresponding reasonably designed safe harbors for intermediaries. Continuing failure to address this issue will leave a gaping hole in higher-level administrative enforcement within the DNS. *WIPO Center (2 Dec. 2010). MARQUES/ECTA (10 Dec. 2010). RE/MAX (10 Dec. 2010).*

The PDDRP should instill accountability among registration authorities by adopting a willful blindness standard of liability. *IOC (29 Nov. 2010). Hogan Lovells (9 Dec. 2010).*

NCTA supports a standard that would require that the registry have first been put on express notice of abusive registrations, but nevertheless turns a blind eye to them. NCTA continues to believe that excluding registrants from liability under the PDDRP for any domain name registrations by third parties unless it can be shown that they were actively encouraged by the registry will effectively eliminate any potential usefulness of the PDDRP. The requirement for some benefit by the registry other than registration fees will also effectively neutralize the PDDRP. Without the possibility that they will be held responsible for ignoring abusive registration of which they have notice, registries will be free to pocket these fees and continue to ignore the abuses taking place. *NCTA (10 Dec. 2010).*

By limiting the process to affirmative conduct, ICANN discourages best practices by its registries, including those who intentionally design their operations to engage in bad faith activities through passive mechanisms. By stating that even when the registry is on specific notice of trademark infringements they are not liable sends a message that ICANN will tolerate certain illicit activities by its registries if structured the right way. The definition of affirmative conduct 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 (10 Dec. 2010).*

Burden of proof/evidentiary standard.
The PDDRP contains unrealistically high burdens of proof at both the first and second level. *BC (6 Dec. 2010). Verizon (10 Dec. 2010).*

Many multiple procedural layers (e.g., reviews, appeals) and questionable design choices (e.g., evidentiary standards, blanket exemption of third party abusive second level names, three member panel option for registry, etc.) appear to accommodate primarily the interest of prospective respondents. This hollows out the value of the PDDRP instead of taking a progressive step toward self-regulation between bona fide stakeholders. *WIPO Center (2 Dec. 2010). CADNA (10 Dec. 2010).*

The PDDRP should have a lower burden of proof. *MarkMonitor (Module 5, 7 Dec. 2010).*

The standard should be preponderance of the evidence. *IACC (9 Dec. 2010).*

Section 6. The conditions for safe harbors are uncertain in scope and depend on "encouragement" and "inducement" which could be vague and could prohibit general promotion. "Encouragement must be specific to the alleged infringing registration. Accordingly, section 6 should be revised to state: "A registry operator is not liable under the PDDRP for any domain name registration that: i) is registered by a person or entity that is unaffiliated with the registry operator; (ii) is registered without an intentional direct or indirect encouragement, inducement, initiation or direction specifically related to the challenged registration, of any person or entity affiliated with the registry operator…." *RySG (7 Dec. 2010).*

Impact of VI decision.
The Board's elimination of vertical separation necessitates revision to the PDDRP to ensure that the definition of "registry operator" tracks the Section 2.9(c) language in the agreement to ensure that the conduct of a registrar vertically integrated with a registry operator is imputed to that registry operator for purposes of the Section 6 "Standards." In addition the need for consideration and amendments to the process as a result of the VI decision is shown by, e.g., the utter lack of reference to registrars, which could now provide loopholes. *INTA (8 Dec. 2010). Microsoft (9 Dec. 2010). IPC (9 Dec. 2010).*

The impact of the Board's dramatic reversal on cross ownership on the PDDRP needs to be explained and considered over a period of more than a few days. *Time Warner (9 Dec. 2010).*

Procedures

Costs and loser pays. It would be more equitable for each party to share the costs up-front while retaining the "loser pays" model once the decision is rendered. *INTA (8 Dec. 2010). IPC (9 Dec. 2010).*

Section 9.2.1. The language should be revised as follows: The Complainant is a holder of a word mark "(i) that is registered (not just applied for); and has been through the relevant period for opposition applied in the country of registration; and is not subject to a pending opposition, revocation or cancellation action; and is in use;" A new footnote should be added to accompany appearance of the phrase "in use": "It will be sufficient for the rights owner to make a simple declaration of use." This revision, requiring use of a trademark in order to enter the clearinghouse database, is designed to create qualification hurdles high enough to exclude cyber squatters without setting the hurdle so high that legitimate rights owners cannot qualify. *BC (6 Dec. 2010).*

Threshold Review.
Threshold reviews should be conducted by a person independent of the PDDRP provider, not one chosen by the PDDRP provider. The Threshold Provider should be separate from both the PDDRP Provider and the Expert Panel to avoid even the appearance of automatic satisfaction of the Threshold Review Criteria and movement to the Expert Panel (and more fees for the PDDRP Provider). *RySG (7 Dec. 2010).*

The threshold review panel seems to be superfluous. The panel's purpose is to conduct an administrative compliance review, which already falls under the responsibilities of the PDDRP provider. *CADNA (10 Dec. 2010).*

Remedies

Challenge of a Remedy (section 21). RySG suggests specific language to further clarify this issue. It believes that all parties agree that any challenge under this section will involve a de novo review. Suggested language for section 21.4: insert "which shall consider all issues de novo" in the third sentence after the words "arbitration dispute." *RySG (7 Dec. 2010).*

Availability of Court or Other Proceedings (section 22). This issue should be understood but it may be helpful to further clarify that the review rights are cumulative with the insertion of a second sentence to section 22.1: "All procedures for the review or challenge of any determination of liability or remedies in this PDDRP are cumulative and not intended to be to the exclusion of any other form of review or challenge provided herein." *RySG (7 Dec. 2010).*

The PDDPR should define remedies for common abuse. Remedies should contain specific bounds for penalties that provide disincentive for abuse. *MarkMonitor (Module 5, 7 Dec. 2010).*

Even if a complainant wins there are no sanctions against a registry and no corresponding duty by ICANN to investigate or sanction the registry. *BC (6 Dec. 2010). Verizon (10 Dec. 2010).*

It defies common sense to prohibit deletion, transfer or suspension of second level registrations where they are the basis for the PDDRP claim. *Microsoft (9 Dec. 2010).*

Limiting relief to owners of word marks is unjustified and unacceptable. *Microsoft (9 Dec. 2010).*

Remedies must be clarified to exactly how suggested remedies may differ if the registrant is found to be under the ultimate control of the registry operator (section 18.1). The arbitration provisions of the registry agreement (21.4) must be clarified regarding whether ICANN can implement a remedy once the arbitration has concluded if the decision against the registry operator is upheld. *IPC (9 Dec. 2010).*

Miscellaneous

Correction to section 8.2—amended complaint. The word "not" should appear before the word "receive" (missing word). *INTA (8 Dec. 2010). Microsoft (9 Dec. 2010).*

Section 7.2.3(h) should be removed –it is inconsistent with section 6.1 and unnecessary. *Microsoft (9 Dec. 2010).*

Summary of Analysis

As noted in prior comment analysis, not all suggested revisions have or could have been included in the PDDRP as some were either not implementable or were directly at odds with each other, thereby requiring some balancing of interests. All comments have all been carefully considered in the development of the implementation details of the PDDRP, even if not implemented.

Some suggest that the PDDRP needs to be extended to registrars in order to be effective. As stated previously, while this may be something to consider in the future, such expansion is not at issue here and is not under consideration as part of the implementation of the new gTLD RPM.

In terms of the criteria for liability, discussion and comment continues 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. Others have suggested that notice of and ignorance to infringing names in the registry should be the standard for finding liability. As set out in the latest version of the Trademark PDDRP proposal, and set forth in the last version of the PDDRP Comment Summary and Analysis:

>   [W]illful 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. . . . 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; http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf

The registry should be liable for its affirmative conduct resulting in infringement of trademarks; the standards for the PDDRP are crafted to achieve that goal. Accordingly, while it is clear that some still think that the standard should include willful blindness, or some derivative of willful blindness, there is no plan to change the standard in the current version of the PDDRP. There are many other avenues to after registrants that are infringing trademarks, and those must not be forgotten through the development of a variety of RPMs.

Some suggest that the burden of proof and evidentiary standard are too high and that the PDDRP seems to favor the registry operators. The requirements for clear and convincing evidence and a bad faith requirement is what the IRT proposed. So long as the high bar set by the standards as currently written remain intact, the suggestion to lower the burden of proof to a preponderance of the evidence is something that might be considered. In fact, this has been a topic in recent community discussions and may be revisited in discussions with the GAC.

One group has suggested that unless encouragement, inducement, initiation or direction is "intentional", no liability can be found. Given the breadth of the provisions providing defenses to registry operators, in balance with the rights of the potential complainants, the suggested changes do not seem appropriate. If encouragement, inducement initiation or direction is found, whether intentional or not, the complainant must still prove the liability of the registry operator. Thus, no revisions will be made to this defense.

While some suggest revisions to the requirements for what marks a complainant must have in order to file a PDDRP, the substantive suggested change seems to be the nature of what is sufficient to show use. While investigation of what Clearinghouse validation of use would require is still under review, consideration is being given to requiring a simple declaration from the trademark holder that the mark has been in use,

along with a sample showing that use in commerce (such as a label, advertisement, screen shot or the like).

Some suggest that the Board's decision on cross-ownership between registries and registrars changes the nature of the PDDRP and requires a broadening of its reach that should track section 2.9(c) of the draft base registry agreement. The language in section 6 of the PDDRP, was if fact taken from the draft base registry agreement and was simply adapted to fit the term registry operator, and not "affiliate." Accordingly, it is clear that the PDDRP will be equally effective in a registry-registrar co-ownership situation and other revisions need not to be made to the PDDRP because of the Board's decision on cross-ownership.

Some have suggested clarifying language that seems unnecessary to make at this time. Others have suggested the removal of certain adjectives from the standards such as "unjustifiably" impairing the distinctive character, creating "an impermissible" likelihood of confusion or, a "substantial" pattern or practice. Omitting "unjustifiably" and "impermissible" seems reasonable, as it does not substantively change the nature of the standards. Omitting "substantial," however, does seem to substantively change the standards. As noted above, if a lowering to the burden of proof is considered and adopted, lowering the standards should not be adopted. Further language revisions can be considered so long as they are non-substantive.

One commenter suggests that remedies should be defined for common abuse. It seems pre-mature to develop remedies for common occurances of abuse when the PDDRP remains untested. To the extent a pattern of particular types of abuse emerges, developing specific remedies for specific forms of abuse can and should be revisited.

Others comment that even if the complainant wins, there are no sanctions against the registry operator and ICANN should issue sanctions. Further, there *is* a form of sanction always available. The Expert Determination will recommend, and ICANN will impose remedies deemed appropriate given the circumstances and the findings of the Experts. It is true that there are no monetary sanctions provided for the PDDRP. However, the range of possible remedies against the registry operators reaches up to and includes termination of the registry agreement. This breadth of possible remedies should provide much the same results as possible monetary sanctions, which are meant to punish bad actors.

One commentor has suggested that the PDDRP should provide for deletion, transfer or suspension of second level registrations where they are the basis for the PDDRP claim. It must be recognized that the registrant of the infringing name is generally not a party to the PDDRP. Seeking deletion, transfer or suspension is possible through other RPMs that provide for claims against the registrant (URS, UDRP, court action). The PDDRP is meant to reach the registry operator's conduct. Further, the PDDRP does provide for deletion, transfer or suspension to the extent registrants have been shown to be officers, directors, agents, employees, or entities under common control with a registry operator. This last clarification responds to the comment about how remedies can be

different if the registrant is under the control of the registry operator. Of course, all other remedies would also be applicable.

Some suggest that it would be more equitable for the parties to share costs up front, while retaining the "loser pays" provisions at the conclusion of the proceedings. This has been the subject of much discussion. Balancing this fee- shifting provision, with the fact that a registry operator will always be the respondent, rather than individual registrants as in other RPMs, as well as the fact that the registry agreement includes failure to comply with the PDDRP a breach of the registry agreement, it seems equitable to not require the registry to consistently front the full amount in the PDDRP.

One comment requests that the PDDRP provide protection for trademarks other than "word marks." The issue regarding limiting relief to infringement of word marks only has been repeatedly discussed in response to comments to the PDDRP, the Clearinghouse and the URS. Using marks that are not just word marks to support protection in domain names, that are just words, will require discretion and subjectivity, and likely disparate treatment; the goal of the RPMs is to treat mark holders with equal consideration under equal circumstances. Further, including additional marks being afforded protection under the PDDRP that would require analysis and evaluation, will add another level of complexity to an already complex process.

In addition to substantive comments, some requests for clarification and some suggested edits in response to typographical errors will be made in the final version of the PDDRP. Thanks for catching those. Another suggested that section 7.2.3(h) is internally inconsistent with section 6.1 and not necessary. This suggestion has been considered, but not taken as these provisions do not appear inconsistent.

REGISTRY RESTRICTION DISPUTE RESOLUTION PROCEDURE (RRDRP)

Key Points

- The RRDRP was developed to allow an independent analysis as to whether a particular domain fails to comport with the limitations placed on the registrations of a community based TLD.

- The prospect of an expedited complaint procedure in advance of the RRDRP has been included in the RRDRP since the October 2009 version of the Applicant Guidebook.

Summary of Comments

RRDRP should be same as PDDRP.

RySG recommends that at least the requirement that a Registry Operator must pay to respond should be amended to be identical to the PDDRP. Section 9 of the RRDRP should mirror Section 10 of the PDDRP. *RySG (7 Dec. 2010).*

There should be an Independent Threshold Review as in the PDDRP to limit meritless complaints. The wording of the Threshold Review as set out in the current PDDRP should be added into the RRDRP—with only minor changes for differences in the proceeding. A certification that the party has not already filed a similar action against the community TLD in another ICANN proceeding should be added. *PIR (Module 5, 15 Jan. 2011).*

The protections against abuse in the RRDRP should be as strong as those in the PDDRP, including:
- Parties to the dispute must not be allowed to have two chances at the same case in two different proceedings (PDDRP and RRDRP).
- For standing and standards, as in the PDDRP, the RRDRP must have a high requirement for standing and standards. ICANN should raise the standards and set a clear and reasonable burden of proof on the complainant. Standing should not be allowed to provide ammunition for those who lost fights in their communities—including the fight to run the community TLD (seeking to show their "harm") and/or the grudges and differences that run through almost all communities.

- The complaint requirements should be changed. At a minimum, the aggrieved party must show by clear and convincing evidence that:
    - (1) it has an ongoing relationship with a defined community that consists of a restricted population that the gTLD supports;
    - (2) the registry has failed in a substantial and consistent manner to serve the defined community (as the registry has defined it and as ICANN has accepted it in the registry agreement);
    - (3) the registry operator's affirmative conduct has caused substantial harm to the complainant; and
    - (4) there is a pattern of bad conduct harmful to the complainant.

PIR (Module 5, 15 Jan. 2011).

Impact of VI decision. The Board's elimination of vertical separation necessitates revision to the RRDRP to ensure that the definition of "registry operator" tracks the language in the agreement to ensure that the conduct of a registrar vertically integrated with a registry operator is imputed to that registry operator. In addition the need for consideration and amendments to the process as a result of the VI decision is shown by, e.g., the utter lack of reference to registrars, which could now provide loopholes. *INTA (8 Dec. 2010).*

The RRDRP fails to curtail registries that are willfully blind to rampant cyber squatting in their namespace. *RE/MAX (10 Dec. 2010).*

<u>Expedited procedure</u>.
The individual complaint proceeding in footnote 1, which has been proposed for the first time in DAGv5 without public discussion, should be deleted on the grounds that it has not been properly explained, justified or vetted with the Internet community. It would expose a community TLD to the risk of a series of challenges to individual second level domain name registrations, potentially opening the floodgates of harassment and abuse. *PIR (Module 5, 15 Jan. 2011).*

Regarding footnote 1, INTA supports development of a process that may enable disputes to be resolved quickly and easily but does not believe that filing an "initial complaint" directly with the registry operator should be a required first step before initiating an RRDRP if the complainant prefers to initiate an RRDRP immediately. *INTA (8 Dec. 2010).*

<u>Costs</u>
Similar to the PDDRP this section was dramatically amended to be nearly identical. This would be acceptable if the Registry Operator did not have to pay fees up front (i.e. response to complaint). If the Registry Operator has to pay fees to respond, contrary to RySG's recommendation, then those fees should be returned to it if it wins: "13.4 If the Provider deems the Registry Operator to be the prevailing party, the Registry Operator shall be entitled to a refund of its filing fees." *RySG (7 Dec. 2010).*

It would be more equitable for each party to share the costs up-front while retaining the "loser pays" model once the decision is rendered. *INTA (8 Dec. 2010).*

<u>Challenge of a remedy (section 20)</u>. It may be helpful to clarify that this is reviewed de novo. *RySG (7 Dec. 2010).*

<u>Availability of Court or Other Proceedings (section 21)</u>. This issue should be understood but it may be helpful to further clarify that the review rights are cumulative. *RySG (7 Dec. 2010).*

<u>Shift in the burden of proof</u>. The main problem with the RRDRP is that it shifts the burden of proof to the responding party. The RRDRP promotes a system that sees registry operators being asked to proceed to substantive evaluations relating to the substantive elements of the complaint. This places an unreasonable burden on registry operators that does not exist under any other dispute resolution mechanism, and ICANN has provided no justification for it. ICANN needs to explain the rationale of asking registry operators to conduct such an evaluation—i.e. what makes community based objections so inherently distinctive from all other objections that would warrant a shift in the burden of proof? In current practice compliance requirements are imposed on registrars, not registries. Asking registry operators to investigate the reported noncompliance enforces a culture that will eventually see registry operators proceeding to control content, which falls outside of their contractual remit. Registry operators are not content providers, they are party to domain name registration contracts between

registrars and registrants, and they lack the tools and possibly the legitimacy to proceed to such substantive evaluations. *K. Komaitis (Module 5, 14 Jan. 2011).*

Language limitation. The RRDRP should not be limited to the English language. Community gTLDs are perhaps among the few cases where language will be a major issue. Various communities around the world do not have English as their first language and they should be able to submit complaints in their own language. The RRDRP should allow parties to choose the language they feel more comfortable with. *K. Komaitis (Module 5, 14 Jan. 2011).*

Appellate panel—no rotation. The appellate panel should not rotate. A permanent panel of diverse international experts, perhaps not appointed by the provider but through an ICANN process and serving all providers, offers advantages of consistency and uniformity which are key to a successful dispute resolution mechanism. *K. Komaitis (Module 5, 14 Jan. 2011).*

Remove arbitration references. Any references to "arbitration" should be removed as this dilutes the purpose and validity of the RRDRP and will create various problems for both registry operators and the communities. Arbitral proceedings have a very unique and concrete nature and the RRDRP is inherently distinctive. *K. Komaitis (Module 5, 14 Jan. 2011).*

Remedies.
Registry operators should be required to monitor not only the domain names at issue in the RRDRP proceeding, but also registrations from the registrants involved. *INTA (8 Dec. 2010)*

If a complainant wins, only a refund of their fees is possible but neither monetary damages nor sanctions are possible. ICANN is also not required to take any steps to investigate or sanction a registry for compliance purposes. *Verizon (10 Dec. 2010).*

The remedies that could be imposed by a provider pose an extraordinary risk—e.g. suspension of accepting new domain name registrations in the gTLD, and termination of a registration agreement. ICANN should provide the community TLDs with special protections, but instead the RRDRP provides them with more threats and more exposure to serious risks. *PIR (Module 5, 15 Jan. 2011).*

Corrections.
In Section 8.2 the word "not" should appear before the word "receive" (missing word). *INTA (8 Dec. 2010) IPC (9 Dec. 2010).*

The word "shall" seems to be missing from section 13.2 ("The Provider shall appoint…"). *IPC (9 Dec. 2010).*

Analysis of Comments

As noted in prior comment analysis, not all suggested revisions have or could have been included in the RRDRP as some were either not implementable or were directly at odds with each other, thereby requiring some balancing of interests. All comments have been carefully considered in the development of the implementation details of the RRDRP, even those not adopted.

Many of the comments above suggest that the RRDRP should match the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP). There are, however, significant differences. Particularly, one party suggests that a registry should only be liable under the RRDRP if it "has failed in a substantial and consistent manner to serve the defined community" and has conducted itself with a "pattern of bad conduct harmful to the complainant." Similar requirements were imposed on registry operators in the PDDRP so as to ensure that the registry operator would be liable for its own conduct, and not conduct of others, such as registrants. Here, even if the registry operator has just one name in the registry that does not comport with the registry restrictions, then it is and should be liable for that conduct, as it is the registry that is required under its contract to ensure the restrictions are satisfied. This is the same reason why the burden of proof is written the way it is, and will not be changed.

Thus, the PDDRP by its nature involves a third party, the registrant (unless the registrant is the registry). The RRDRP, on the other hand, was developed to allow an independent analysis as to whether a particular domain fails to comport with the limitations placed on the registrations of a community based TLD, and thus a possible breach of the ICANN agreement. This independent analysis will help ensure that ICANN does not become involved in analyzing content on the Internet, which is outside of ICANN's mission.

Relieving the requirement that registry operators pay a response filing fee is not as compelling as it is with respect to the PDDRP. Further, the mandatory advance expedited review before an RRDRP can be filed, which is similar to an online Whois Data Problem Report System (WDPRS) complaint (see below for more details), provides the registry operator with sufficient notice of the complained of activity such that a threshold review would add an unnecessary level of complexity. (The WDPRS provides an online tool for people to complain if they think that Whois data for a particular registration is inaccurate or incomplete. Those complaints are automatically transmitted to the registrar for investigation.)

In response to comments suggesting that the RRDRP track the registry agreement as to the definition of the registry operator, as noted above, with the RRDRP, it is the actual registry operators' conduct that is at issue because it is the registry, not any other party, that is bound to follow the terms of the registry agreement and the limitations on registrations allowed in the registry.

Some suggest that the RRDRP needs to be extended to registrars in order to be effective. As stated previously, while this may be something to consider in the future, such expansion is not at issue here and is not under consideration as part of the

implementation of this RPM.

With respect to the proposal that an expedited procedure similar to the WDPRS be employed, while some suggest that it not be a pre-requisite, others suggest that the Proposed Final Version of the Applicant Guidebook is the first time such a mechanism has been proposed. To correct the record, while this is the first comment on this topic, the prospect of an expedited complaint procedure in advance of the RRDRP has been included in the RRDRP since the October 2009 version of the Applicant Guidebook:

> Initial complaints by those claiming to be harmed by the non-compliance of community restricted TLDs might be processed through an online form similar to the Whois Data Problem Report System at InterNIC.net. A nominal processing fee could serve to decrease frivolous complaints. The registry operator would receive a copy of the complaint and would be required to take reasonable steps to investigate (and remedy if warranted) the reported noncompliance. Implementation of such an online complaint process is under investigation and consideration.

See http://icann.org/en/topics/new-gtlds/draft-rrdrp-04oct09-en.pdf; *see also* http://icann.org/en/topics/new-gtlds/draft-rrdrp-clean-15feb10-en.pdf; http://icann.org/en/topics/new-gtlds/rrdrp-clean-28may10-en.pdf; http://www.icann.org/en/topics/new-gtlds/rrdrp-clean-12nov10-en.pdf.

Given the differences between the RRDRP and the PDDRP, it is appropriate to continue to require the registry operator to pay a response filing fee, which is meant to cover administrative costs.

Comments relating to adding clarity will be adopted. Further, while the first round of all processes are meant to be conducted in English, this will be addressed and revisions considered as the New gTLD Program progresses throughout various rounds. Note that UDRP proceedings occur in English.

It would be extremely difficult to maintain one appellate panel that would be equipped to review decisions on all RRDPR proceedings, as one commenter suggests. There will be a large range of communities that may require a large range of expertise to resolve disputes. Reviewing determinations in those proceedings will also be widely varied. Thus, to have panels appointed as appeals are filed seems the most reasonable approach.

One commenter calls for removal of the term arbitration because the RRDRP is distinctive from arbitration. The reference to arbitration, however, is not as it relates to the RRDRP, but if someone files arbitration pursuant to the registry agreement challenging the imposition of a remedy. Thus the reference to arbitration is appropriate, as it is not meant to apply to the RRDRP.

While there have been some comments about amending remedies, note that the remedies, which are only recommendations from the panel, do cover a broad range of options. Further, the comment that ICANN is not required to take any steps to investigate or sanction a registry for compliance purposes is misplaced. Contractual compliance will continue to remain an obligation of ICANN, notwithstanding any dispute resolution proceeding that may be filed by a third party.

In terms of comment about changes or corrections to language will be considered and made as appropriate.

Objection Procedures

Key Points

- While still under consideration, the Board has expressed some interest in allowing the GAC (and the ALAC) as a whole to file objections with funding support from ICANN.

- The Applicant Guidebook will be revised to make clear that the IO shall not take action unless at least one comment in opposition is made in the public sphere.

- Neither the expert panel, in rendering its determination, nor ICANN, in approving or disapproving an application for a new gTLD, makes a decision that is final and binding upon a sovereign state.

- The ultimate goal of the community-objection process is prevent the misappropriation of a community label by delegation of a TLD and to ensure that an objector cannot keep an applicant with a legitimate interest in the TLD from succeeding.

Procedures

Summary of Comments

Choice of law. The lack of an explicit choice of law provision for the "objections" allowed under the new gTLD policy (dispute resolution procedures Art 2(e) 9ii)-(iii)) raises concern. Based on a forthcoming study, lack of a specific choice of law provision in the UDRP has caused inconsistent application and the skewing of results in favor of respondents with certain nationalities. Dispute resolution procedures Art. 2 (e) (i) and (iv) also raise concern because they provide rights to people without any legal basis for doing so, and have the potential to restrict speech on the Internet without sufficient justification. *D. Simon (Module 3, 11 Jan. 2011).*

Waive Government Objection Fees. It is not practical to ask governments to pay for objection fees. In cases of government objections that are not a proxy for a business or

social interest, the objection fees should be waived. ICANN can revisit this policy if there are abuses of it. *Demand Media (8 Dec. 2010).*

Reduced fees for not-for-profits/NGOs. The ICANN Board should require its selected dispute resolution providers to provide reduced fees for not-for-profit organizations/NGOs for all steps of the new gTLD dispute resolution procedures that incur fees (e.g., sections 3.2.2, 3.2.4, 3.3.7, Article 14 and associated adjudication fees). *P-NPOC (1 Dec. 2010). Red Cross (9 Dec. 2010).*

Proposed Externalities Objection Process. External costs of each new gTLD individually can be reduced to a negligible amount if an Externalities Objection Process is added to the new gTLD program. The Externality Objection would stop a given gTLD if a panel rules that the gTLD causes unacceptable external costs. The burden of proof must rest on the objector. External costs are unacceptable if aggregate user benefits of the proposed TLD are clearly lower than the aggregate external costs. They are also unacceptable when the aggregate external cost is higher than the burden the gTLD operator would have to avoid them. The mere possibility of making the objection brings enough incentives for gTLD applicants to remain on the safe side. The application of course has to be held to account after delegation. This is one more reason why the PDDRP should apply to all TLDs and not just community-based TLDs. *W. Staub (10 Dec. 2010).*

Posting of objections—timing and central repository (3.2.1). RySG recommends that ICANN publish filed objections within 5 calendar days of the filing of an objection. RySG recommends that there be one central repository (i.e. ICANN) for all objections and comments. *RySG (7 Dec. 2010).*

Dispute resolution principles (3.4). Clarity should be provided on what is the burden of proof for the objector. *RySG (7 Dec. 2010).*

Legal Rights Objection –trademark rights (3.4.2). Clarity should be provided on how much weight will be given to different types of trademark rights (e.g. registrations, pending applications, common law, foreign, arbitrary and descriptive trademarks). *RySG (7 Dec. 2010).*

Independent objector.
Description of the methodology ICANN will use to solicit interest from IOs should be added, as well as specific decision criteria regarding the selection and supervision of the IO. *BC (6 Dec. 2010).*

ICANN needs to get a third party or a portion of the ICANN community involved in the selection of an IO, or needs to be much more transparent about the process and perhaps offer a way for the ICANN community to object to ensure that the IO is actually independent and will not simply carry out ICANN's agenda. *CADNA (10 Dec. 2010).*

Critical safeguards for the public interest have either been removed or have been left out. Instead of a way to prevent applicants and objectors from outspending their opponents, the IO has been re-architected to as a tool to allow the introduction of anonymous, unaccountable, opaque objections. ALAC now believes that the IO role should be eliminated. If the IO is eliminated significant costs savings can and should be achieved. The potential for the IO's misuse has been made clear and any benefit it would have would be outweighed by its invitation for gaming and bullying. The accessibility issues that the IO was designed to address can be fulfilled if the CWG recommendations are implemented. If the ICANN Board and staff insist, against the public good, on implementing the IO, they must at least implement all necessary safeguards to prevent the dangers inherent in the current design. *ALAC (8 Dec. 2010). P-NPOC (9 Dec. 2010).*

There is no accountability requirement that an objection brought by an IO be tied to at least one specific party who claims that it will be harmed if the TLD goes forward. Transparency is missing; a proposal for secret objections by governments and others cannot stand. If there must be an IO, actual objectors must come forward and be transparent about their role to prevent the new TLD. "Risk mitigation" is not a legitimate policy objective for ICANN (i.e. use IO as a forum to quietly kill controversial TLDs to ward off ICANN's ability to be sued in courts of law). The global public interest regarding the DNS is ICANN's primary obligation, not its own corporate interest. The IO also lacks true independence, as the IO is employed by ICANN and the third party contracted to select the experts who will determine the objection is also hired by ICANN. The expert panel will lack neutrality since it will have an incentive to agree with the IO (ICANN) who hired it. *NCUC (10 Dec. 2010).*

The IO proposal seems to allow objections to be made on an anonymous and unaccountable basis. *DCFE (10 Dec. 2010).*

ICANN Board Role.
It is understood that ICANN may need to outsource objection and evaluation tasks during the new gTLD application process. But a decision to outsource services does not enable ICANN to escape accountability for decisions made by outsourcing vendors. ICANN's Board must be the final resolution body for disputes that arise during evaluation and objection processes. The challenges of managing both internal and external outsourced objection processes underlie the BC's recommendation for an initial batch of fewer than 500 applications. *BC (6 Dec. 2010).*

The decision to censor a TLD should not be outsourced but should be made by the ICANN Board directly. *DCFE (10 Dec. 2010).*

Response fees paid by applicants (3.2.4). Section 3.2.4 should be deleted. If an application is contested, it ought not to trigger a second fee just so that the applicant can defend the rationale already included in their original application. This is made more appropriate inasmuch as ICANN notes in the guidebook that some objections may be frivolous. *BC (6 Dec. 2010).*

Protection of IGOs.
The WIPO Center notes positively that the Guidebook now foresees a degree of protection at the top level for IGOs. Regarding second level registrations, ICANN's clarification on envisaged protection would be welcome. The 2007 ICANN Staff Report on Draft IGO Domain Name DRP provides a basis for addressing disputes concerning the registration or use of a domain name in a manner that would *e.g.* be a misleading use that falsely suggests a connection with the relevant IGO, or that would violate a treaty. *WIPO Center (2 Dec. 2010).*

Hogan Lovells is pleased with the specific provisions for the protection of names and acronyms of IGOs within the scope of Legal Rights Objections. *Hogan Lovells (9 Dec. 2010).*

Analysis of Comments

One comment expressed a concern about the lack of an explicit choice of law provision for the objection and dispute resolution procedure. In the cases of these objections, the rules are based on the standards and not the law of an individual jurisdiction. Through the development of the program and extensive public comment the process itself defines the standards that panels will apply in an objection proceeding. These standards are set out in the Applicant Guidebook (§ 3.4), to which Articles 2(e) and 20 of the New gTLD Dispute Resolution Procedure (the "Procedure") refer. The Limited Public Interest Objection, Applicant Guidebook § 3.4.3, refers specifically to international law and to certain treaties and other international instruments. Note also Article 4(d) of the Procedure, which stipulates that the place of objection proceedings, which may have legal relevance, shall be the location of the DRSP that is administering the proceedings.

Some suggest, including the GAC, that fees for the objection processes should be waived for governments. This will be a topic of discussion during the GAC/Board consultation in Brussels and ICANN's March meeting. The cross-community working group that was formed to discuss issues relating to Recommendation 6 (Rec6 CWG) of the GNSO's New gTLD Policy Recommendations discussed something similar – whether the GAC itself should have to pay fees if it, as a group, files objections. While the Board has expressed a preference towards allowing the GAC (and the ALAC) as a whole to file objections with some nature of funding from ICANN, no decisions have been formally made. More information on this topic will likely be developed throughout the meetings between the Board and the GAC.

Reducing objection fees for NGOs or "not for profit" organizations, as two commenters have suggested, cannot be accommodated. What constitutes an NGO or "not for profit" organization will have varying definitions. Making a determination of which organizations would be entitled to reduced fees would add a level of subjectivity, and likely disparate treatment that all stakeholders are trying to eliminate to the extent

possible. In any event, fees are paid directly to dispute resolution providers, not to ICANN. Fees are at negotiated rates, so there is no room for discounts.

The development of an "Externalities Objection", based upon the allegation that aggregate user benefits are lower than aggregate external costs has been suggested. Analysis indicates that this new form of objection would lead to dispute resolution proceedings that are costly and time-consuming, with unpredictable outcomes (i.e., high cost, questionable benefit). The four existing categories of objection address external costs (such as legal rights and community). Other mechanisms have been inserted into the program, which mitigate external costs. At this time, is does not appear necessary or appropriate to add a general objection to the process, although this may be a topic of discussion with the GAC and the Board in Brussels.

One group has suggested that ICANN publish objections within five calendar days after the filing of an objection. It should be noted that objections are not filed with ICANN so there could be a short delay in notification. Further, each of the dispute resolution providers will be publishing relevant information relating to objections on an ongoing basis (*see* Procedures, Article 9(e) at http://www.icann.org/en/topics/new-gtlds/draft-new-gtld-drp-clean-12nov10-en.pdf. There will be consideration of having ICANN's website point to those various postings.

In terms of how much weight should be given to various types trademarks, it will within the discretion of the panel to determine. First, the panel must determine if there is a right in a particular trademark that serves the basis of the complaint. Then the panel must determine, pursuant to the standards delineated, if that mark is infringed. The panel will then make its determination based on its finding. It will not be based on the strength of the registration, use, or otherwise, in a vacuum.

Some comment on the selection and qualifications of the Independent Objector (IO). Section 3.1.5 of the Applicant Guidebook describes the qualifications of the IO and how he/she will be selected. The Explanatory Memorandum, published on 18 February 2009 provides further information. (*See* http://www.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf.) More detailed information and guidelines regarding the selection of the IO will be provided in due course. The proposal and selection process will be as transparent as feasible.

Some challenge the independence of the IO and one group has suggested that the IO be eliminated. ICANN does not agree with comments that suggest the Independent Objector process is "ripe for abuse" or that "critical safeguards" are lacking. The IO may receive comments and suggestions from the public, but – with a mandate to act in the best interests of the public who use the Internet – he/she will then decide independently whether to file an objection and how to pursue any objection that is filed. As ICANN explained in its response to the report of the Rec6 CWG (http://www.icann.org/en/topics/new-gtlds/explanatory-memo-morality-public-order-12nov10-en.pdf.), the IO is accountable before the expert panel. In the unlikely event that the IO submits a Limited Public Interest Objection that is manifestly unfounded or

an abuse of the right to object, the objection will be dismissed in the "Quick Look" procedure. An objection filed by the IO that passes the "Quick Look" test is still subject to the same scrutiny by the experts as any other objection. So the IO would not have a privileged position, wielding unchecked power.

The concern over the IO's independence is addressed by process details and safeguards. The mere fact that ICANN pays the IO does not make the IO beholden to ICANN. All safeguards are put in place, similar to those for the ICANN Ombudsman, so that the IO makes his or her own decisions and proceeds in the public interest, not in the interests of ICANN.

The Rec6 CWG, and comments herein, express concern over the IO filing an objection without any publicly stated opposition to an application. In consideration of these comments, the Applicant Guidebook will be revised to make clear that the IO shall not take action unless at least one comment in opposition is made in the public sphere.

One comment referred to ICANN's Board as the "final resolution body". Indeed, while relying upon the determinations of experts regarding issues raised in objections, the Board retains ultimate responsibility for the New gTLD Program.

Comments about the fees that must be paid for filing and responding to objections, as well as the time periods and deadlines in the process have been submitted. ICANN has analyzed and responded to these comments in previous rounds. It may be helpful simply to reiterate here that the system of advance payment of costs is structured so that the prevailing party is reimbursed for its advance payment. *See* Procedure, Art. 14(e).

In terms of IGOs, as commenters have noted, ICANN has added protections for them in the protection of rights objection and dispute resolution process.

Limited Public Interest Objection (Morality & Public Order (M&PO))

Summary of Comments

Support for Guidebook approach. The Guidebook treats the M&PO issue in an appropriate and balanced manner. The reality is that there will be few, if any, applications that raise morality, public order or cultural sensitivity. Too much planning and investment goes into a gTLD application and corresponding business operations for an applicant to risk getting mired in a dispute over these types of concerns. We cannot plan for every scenario where one or two countries may be sensitive to a particular thing. If problems arise after launch the rules and procedures can be revised going forward. *Demand Media (8 Dec. 2010).*

Opposition to DRSP process.
ICANN has ignored the community consensus (the Cross-Community Working Group (CWG) approach which changes the fundamental nature of string evaluation from a

subjective comparison of morality to an objective analysis of objections against international law). The fundamentally inappropriate DRSP concept remains essentially untouched in the proposed final Guidebook. ALAC has substantial concerns that the CWG details have been inadequately and insufficiently presented to the ICANN Board and that as a result the CWG recommendations have not received appropriate consideration. *ALAC (8 Dec. 2010). P-NPOC (9 Dec. 2010).*

The Board should adopt the final recommendations of the Rec6 CWG in response to the GAC concerns about morality and public order objections. This working group superbly modeled the consensus building that makes ICANN successful. *E. Pruis (6 Jan. 2011).*

DRSP Provider.
The areas addressed by this objection go beyond the scope and expertise of the International Chamber of Commerce. Due to the significant importance regarding the public interest and community, more representative and more neutral authorities should be introduced to take on the duty of the DRSP. *Internet Society of China (10 Dec. 2010).*

If there is a DRSP, it is inappropriate for the ICC to serve as the authority selecting experts for disputes involving basic human rights such as freedom of expression. *DCFE (10 Dec. 2010).*

Applicable Law. Compliance with the limited public interest objection principles should be determined according to both the principles of international law and the laws of each sovereign state. If the objection is judged only by principles of international law, it is very likely to result in approval of some gTLDs which conflict with laws of some countries, which is obviously unfair to such countries. *Internet Society of China (10 Dec. 2010).*

Clarification needed. The section on limited public interest objection refers to generally accepted legal norms; "generally accepted" needs to be clarified. *CADNA (10 Dec. 2010). BC (6 Dec. 2010).*

Standards.
Given a well-recognized international right to freedom of expression, the criteria used to suppress TLDs must be very narrowly circumscribed and the authority used sparingly. Only those TLDs that clearly violate well-established international laws should be blocked under section 3.4.3. The current version of the Guidebook does not sufficiently respect legitimate free expression rights. ICANN's Board and staff should make appropriate modifications in the final Guidebook. The burden of proof should always be on objectors to prove that a proposed TLD is illegal; the default should be to allow diverse and even controversial forms of expression. *DCFE (10 Dec. 2010).*

The possibility that a manifestly unfound limited public interest objection may be considered an abuse of the right to object may make trademark owners less inclined to object, allowing more bad actors into the pool. *CADNA (10 Dec. 2010).*

<u>Objection Title</u>. The title of the section should be changed to "objections based on general principles of international law." The term public interest is too broad and ill-defined and lacks any firm basis in international law. The term "morality and public order" should also be stricken from the text (e.g. on page 3-18). *DCFE (10 Dec. 2010).*

<u>Standing</u>. Open-ended guidelines for who may file a Limited Public Interest objection may create a perpetual loop of opposition. A more specific regime is recommended. *BC (6 Dec. 2010).*

Analysis of Comments

The Limited Public Interest Objection is based upon generally accepted legal norms relating to morality and public order that are recognized under principles of international law. The specific standards that have been adopted for this objection reflect generally accepted legal norms, as explained in the memorandum that ICANN published on 30 May 2009. (*See* "Standards for Morality and Public Order Research" at http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf). It has been suggested that gTLD strings must also comply with the laws of each sovereign state. However, such a rule would, in effect, grant to each state a veto over the global Internet, which is unacceptable. An individual state may limit free expression in a way that cannot be qualified as a generally accepted legal norm relating to morality and public order that is recognized under principles of international law. It may be noted in this context, however, that states retain sovereign rights; the new gTLD dispute resolution procedure does not infringe their sovereignty in any way. Neither the expert panel, in rendering its determination, nor ICANN, in approving or disapproving an application for a new gTLD, makes a decision that is final and binding upon a sovereign state.

In response to the request for clarification of the term "generally accepted", please read the explanatory memorandum, "Standards for Morality and Public Order Research", dated 30 May 2009. It would not be feasible to provide a specific definition of "substantial opposition", as this factor depends upon the circumstances of individual cases.

Some suggest that trademark owners will be less inclined to file a Limited Public Interest Objection because if the objection is found to be abusive, they may lose their right to file an Infringement of Rights objection later. First, no actor should file manifestly unfounded objections. Second, a finding of abuse regarding Limited Public Interest Objections will not count against the ability to file Infringement of Rights objections.

One comment asserted that the current version of the Guidebook does not sufficiently respect legitimate free expression rights. However, that comment gave no details or examples. The standards for Limited Public Interest Objections are set out in Guidebook section 3.4.3, and the procedure for considering such objections is stipulated by the New gTLD Dispute Resolution Procedure. It has not been shown how these standards

and procedures fail to respect legitimate free expression rights. Regarding the objector's burden of proof, see Procedure Article 20(c).

As explained during previous rounds of comments, ICANN considers the ICC's International Centre for Expertise to be well qualified to select eminent jurists of international reputation to serve as experts on panels considering Limited Public Interest Objections. Comments regarding the Independent Objector and the respective roles of the expert panel and the ICANN Board are addressed elsewhere in this analysis.

Contrary to some comments made – ICANN did not ignore the work of the Re6 CWG. Further, concerns that details of the Rec6 CWG's report were insufficiently presented to the ICANN Board are unfounded, as the published materials amply demonstrate. (*See, e.g.*, http://www.icann.org/en/topics/new-gtlds/explanatory-memo-morality-public-order-12nov10-en.pdf.) The fact that ICANN did not accept all of the Rec6 CWG's recommendations should not be interpreted to mean that those recommendations were ignored or given short shrift. Where ICANN did not accept a recommendation, it provided an explanation. In particular, ICANN does not consider that the fundamental nature of string evaluation under the existing objection procedure for Limited Public Interest Objections could reasonably be described as a "subjective comparison of morality". There are very specific and concrete standards for assessing applied-for strings in the event of a Limited Public Interest Objection. (*See* Guidebook section 3.4.3.) Who may file an objection on these grounds is also laid out the Guidebook.

Notwithstanding the positions stated in the current version of the Guidebook, as has been noted above, some further changes are anticipated in light of the fruitful discussions between ICANN and the Rec6 CWG in Cartagena and subsequent clarifications. Further, as the community is well aware, this particular area of the new gTLD Program is a subject of the GAC-Board discussion. The GAC and the ICANN Board will be discussing their views about the objection process during its meetings in Brussels, as well as during the March ICANN meeting. These discussions may also include a discussion about the title of this objection.

Community Objections

Summary of Comments

Expand grounds for Community objections. In many cases it is not possible for the objector to supply evidence in material terms against an applied-for gTLD representing or related to a community. For instance, the string "Hongkonger" is not a geographic name protected by the Guidebook yet representing Hong Kong people as a clearly and distinctly defined community. If a non-Hong Kong-based organization applies for the string "Hongkonger", it would be difficult for the community of Hong Kong people to file an objection during the process, as the potential and possible detriment to the interests of Hong Kong people could not be deduced a priori in economic or reputational terms. The same goes for more generic terms like "Honkie" (a common nickname for Hong

Kong people) and "Kiwi" (a common name for New Zealanders). Communities are institutionally disadvantaged in the process of dispute resolution for new gTLDs. HKIRC recommends that community objections with reasonable ground, not limited to those stipulated by subsection 3.4.4 of the guidebook, should also be formally considered by a panel of experts. *HKIRC (22 Dec. 2010).*

Substantial Opposition. The language is too vague in the requirement that the objector has to prove substantial opposition in the community that the objector is representing. "Substantial opposition" also needs more specific definition. *CADNA (10 Dec. 2010). BC (6 Dec. 2010).*

Support for elimination of complete defense. BITS is pleased with this change as the provision unintentionally foreclosed a community's ability to object to an applicant perceived as unsuitable. *BITS (9 Dec. 2010).*

Detriment.
Without explanation some radical changes have been sprinkled into various important aspects of the proposed final Guidebook, which could have a serious detrimental impact on the public. For example, the proposed final Guidebook has suddenly and without explanation raised the bar for community objections so dramatically that it is doubtful that anyone could possibly win such a proceeding. There has been a radical shift in section 3.4.4. to requiring not only that the objector prove that the community that it represents is likely to suffer a "material detriment" if the objected-to application is approved (the word "material is newly added and undefined) but also that "material detriment" is likely to be inflicted on the "broader Internet community" (this term is also undefined). ICANN staff seems to have unilaterally and without explanation chosen to eviscerate the community objection process, which hardly advances ICANN's fulfillment of its public interest obligation. *COA (3 Dec. 2010).*

The "material detriment" standard should revert back to the prior standard and the requirement to show "material detriment" to the broader Internet community should be removed. *RIAA et al. (11 Jan. 2011).*

Analysis of Comments

One commenter has suggested, in essence, that the criteria for raising a community-based objection are too narrow because a potential objector may not be able to provide evidence. If evidence is not available, then it seems appropriate that the applicant should not be required to defend against an objection. A community objector must show that: "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* Guidebook, Section 3.1.1 at http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-clean-12nov10-en.pdf.) If there is a true community and substantial opposition can be shown then an objection is valid. Otherwise it is not. Evidence is appropriately required in all types of objection proceedings. Absent evidence, no objection should stand.

One commenter seeks clarification on the term "substantial opposition." As a determination of this will result from a balancing of a variety of factors, a specific definition is difficult. However, the factors are laid out quite specifically in the Guidebook at section 3.4.4 (*see* http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-clean-12nov10-en.pdf).

Some have commented on the heightened level of detriment required to prevail in an objection proceeding, while another group has expressed support for the elimination of the complete defense. These two revisions were tied together. The ultimate goal of the community-objection process is prevent the misappropriation of a community label by delegation of a TLD and to ensure that an objector cannot keep an applicant with a legitimate interest in the TLD from succeeding.

Previously, with the complete defense in place, if a community could satisfy the criteria it would otherwise need to prevail on an objection, that applicant would always prevail in an objection proceeding. It was pointed out that this could lead unintended consequences.

> Example with the complete defense in place: an actual community of corrupt widget makers known for selling defective widgets applies for a community-based string, and the community of the legitimate widget makers who sell non-defective widgets objects. The corrupt widget makers could successfully lodge a complete defense, blocking the legitimate objection. This would have been the wrong result. Thus, the complete defense has been deleted from the new gTLD process.

> Example, with the deletion of the complete defense: legitimate widget makers apply for a TLD and corrupt widget makers object. The objection can show simple detriment to the corrupt widget making community and block the legitimate string. This is also an unwanted consequence that must be avoided. One way to avoid this consequence was to require proof of detriment to more than just the objecting community.

ICANN is still open to alternative suggestions, but reverting back to simple detriment to the objector alone is not acceptable. Some additional detriment is required in order to block a string. We look forward to further discussion on this topic to help us arrive at a workable solution.

MALICIOUS CONDUCT

Key Points

- Public comment will inform the evaluators in their evaluation process. Security measures should be commensurate with the type of TLD.

- The suggestion that rapid takedown measures be put into effect requires community discussion outside the new gTLD process as it involves new policy considerations.

- The High Security Zone working group will issue its final report in March. Certain aspects of the HSTLD control framework may be made applicable to all TLDs.

Summary of Comments

The malicious conduct measures remain insufficient. ICANN should develop new mechanisms and improve upon existing provisions in the proposed final AG to minimize the ability of malicious actors to exploit the DNS for illicit purposes and financial gain. ICANN should require in the AG that information about the protections against malicious conduct proposed by the new gTLD applicant is explained in enough detail in the application process so the community can comment on these measures. *IPC (9 Dec. 2010).*

Security measures appropriate for the applied-for gTLD string—evaluation criterion 35. There is some evidence of responsiveness in the proposed final AG to the numerous complaints that the issue of preventing malicious conduct had not been adequately addressed. For example, while COA is disappointed that the more effective options it proposed were rejected, revised criterion 35 could if correctly implemented provide at least some additional assurance that ICANN appreciates its public interest obligation in this area. It is important that ICANN clarify that the reference to "financial services oriented TLDs" in this criterion is just an example and that the requirement for enhanced protections "commensurate with the nature of the applied-for gTLD string" would also operate in other areas--e.g., health care-related TLDs, TLDs directed to children, and all TLDs that present an unusually high risk of being the venue for criminal, fraudulent or illegal conduct, including but not limited to copyright piracy. *COA (3 Dec. 2010). IPC (9 Dec. 2010).*

It is a problem that answers to question 35 are not made public, so public assistance to evaluators in applying this criterion could not be fulfilled. This problem can be solved in one of two ways. First, question 35 responses could be made public (subject to appropriate redactions as necessary to protect sensitive security information); or second and perhaps more simply criterion 28 could be modified to require applicants to present "comprehensive abuse policies and procedures that effectively minimize potential for abuse in the TLD, *taking into account the nature of the applied-for gTLD string and the intended uses of registered domain names in the gTLD."* If the concept of a commensurate level of security now featured in criterion 35 were also adopted as a criterion for "commensurate level of abuse prevention and mitigation," under question 28, the public could provide the needed assistance to evaluators, because all responses to question 28 are made public. *COA (14 Jan. 2011).*

COA supports (1) providing for some sort of formal objection procedure that could be instituted against applications that, in the view of the objector, fail to meet this "protection commensurate with the nature of the string" criterion; and (2) for clarifying

that not only financial services-oriented TLDs, but also others that present an unusually high risk of being the venue for criminal, fraudulent or illegal conduct, could be required by the evaluators to meet "new independent standards for demonstration of effective security controls" or of effective abuse prevention or mitigation, as the case may be. *COA (14 Jan. 2011).*

Rapid takedown or suspension systems. ICANN should require registry operators to adopt and implement rapid takedown or suspension systems to combat malicious conduct, one of the most widely discussed mechanisms for combating the expansion of malicious conduct which is expected as new gTLDs are introduced. *Microsoft (9 Dec. 2010).*

The recommendations in the proposed final AG will be extraordinarily helpful in combating malicious conduct and this issue should be considered resolved. *Domain Dimensions (9 Dec. 2010).*

Best practices. Given the history of online music infringement, RIAA et al. is concerned that a music themed gTLD will be used to enable wide scale copyright and trademark infringement. RIAA et al. would like to work with ICANN and others to ensure that best practices are developed and used to ensure this type of malicious behavior does not occur. *RIAA et al. (11 Jan. 2011).*

High Security Zones. ICANN should have proceeded with a High Security Zones Verification Program and made it mandatory for applicants. *Microsoft (9 Dec. 2010).*

Analysis of Comments

Some community members remain concerned about the potential for malicious conduct in new gTLDs and have expressed that more work, including proceeding with the HSTLD program and making it mandatory, needs to be done. ICANN has worked closely with the community on a number of initiatives intended to mitigate malicious conduct in new gTLDs. On 12 November 2010, an updated explanatory memorandum on mitigating malicious conduct was published that details progress on the nine initiatives identified in a 3 October 2009 explanatory memorandum on this topic.

Regarding comments that have been made about the criteria for questions 28 (Abuse Prevention and Mitigation) and 35 (Security Policy), ICANN is consulting with internal and external experts around how both questions might be modified in a way that could provide the community with a greater sense of confidence that applicants have adequately detailed their security and abuse prevention and mitigation policies "commensurate with the nature of the applied for TLD string and taking into account the intended uses of registered domain names in the gTLD." Modifications are being made for the next version of the Applicant Guidebook, including additional consideration of information in applicant answers that will be made public.

The revisions of the Guidebook also seek to clarify the line between types of information that should be made public and that which should not be divulged for security reasons.

The community's interest in having an opportunity to participate in the evaluation of the security and abuse prevention mechanisms in an application is understandable. Operation of a TLD is a significant undertaking, and security measures planned should be well understood so that users and registrants know how to deal with the new TLD. Also, valuable insight might be passed to the evaluators through public comment.

It must also be noted, however, that evaluators will be competent in the fields of security measures and other aspects of TLD operations. The evaluation process itself must be able to and is designed to stand on its own so far as adequately vetting applications for these and other aspects of the criteria. Nonetheless, it is important that the applications be open to the greatest extent possible, to provide the community notice as to the types and models of TLDs seeking delegation.

At this time ICANN does not intend to introduce an objection process in the area of potential for malicious conduct. In order for such a process to be considered, clear, objective criteria must be devised. No public comment to date has suggested such criteria. Neither has discussion among the implementation team and the community resulted in a viable objection mechanism. Evaluators will be asked to ensure that security measures are commensurate with security needs. Additionally, public comments will be used to inform evaluation panels as part of their application analysis.

With regard to the HSTLD program, work by that Advisory Group continues and they anticipate publishing their final report in March 2011. The final report will include an overview of the group's work during the last year, including input received in response to the RFI issued on 22 September 2010, and how it got to the position that a potential program should be voluntary. The HSTLD recommendations will take into account the ICANN Board resolution from 25 September 2010 that, "ICANN will not be certifying or enforcing the HSTLD concept; ICANN is supporting the development of a reference standard for industry that others may choose to use as a certification standard of their own. ICANN will not endorse or govern the program, and does not wish to be liable for issues arising from the use or non-use of the standard."

Two comments addressed an interest in ensuring that there are adequate measures in place to mitigate trademark issues. One commenter suggested that ICANN should require registry operators to adopt and implement rapid takedown or suspension systems and the second suggested best practices should be developed. Specification 7 to the draft new gTLD Registry Agreement describes the minimum requirements for Rights Protection Mechanisms, including the implementation of a Uniform Rapid Suspension System (URS), that registry operators are required to employ in their TLD.

Outside the URS or some other dispute mechanism, the interest in, and potential development of a registry-operated rapid takedown model has been discussed as part

of best practices for entities operating in the domain name ecosystem. Problems raised in some of these mechanisms include liability for decisions where there has been no formal decision regarding abuse. These discussions should continue and ICANN could lead them to consider development of an independent rapid takedown system.

In addition to the areas discussed above, the most recent version of the Registry Agreement contains a Registry Code of Conduct, intended to address several forms of potential market abuses.

ROOT ZONE SCALING

Key Points

- Making such support mandatory is prudent given the expectation that IPv6 demand is expected to grow dramatically following the depletion of the IPv4 number space.
- Making DNSSEC support mandatory is in the best interests of satisfying the expected global demand for DNSSEC by registrants, and of the increasing deployment of DNSSEC in general.
- The most recent study indicates that anticipated coincident introduction of IPv6, DNSSEC, IDN and new gTLDs has not occurred, that IPv6, DNSSEC and IDNs have been introduced without incident and that the effects of new gTLD introduction can be weighed on their own.

Summary of Comments

<u>High Security Zones</u>. ICANN should have proceeded with a High Security Zones Verification Program and made it mandatory for applicants. *Microsoft (9 Dec. 2010).*

<u>IPv6</u>. It is an error to impose IPv6 or to not allow for dual-stack or transitional mechanisms on applicants whose markets do not yet offer IPv6 capacity in a meaningful way. In this regard, attention is drawn to ARIN Policy Proposal 123. *E. Brunner-Williams (9 Dec. 2010).*

<u>DNSSEC—"value-add" distinctions should be made</u>. It is an error to impose DNSSEC without distinguishing between applications for which it adds value and those for which it only adds theoretical value. For proposals in which we can reasonably assume that significant transactional value will be exchanged within a name space, signing the parent zone and its leaf nodes is prudent (e.g., any ".bank" should be signed). For proposals in which we can reasonably assume that little transactional value will be exchanged within a name space, signing the parent zone and its leaf nodes has only nominal value (e.g., any ".museum" need not be signed). *E.-Brunner-Williams (9 Dec. 2010).*

Reports and studies. CADNA would like to see the reports and studies (and their authors) that back up ICANN's claim that introducing new gTLDs will not affect the security and stability of the DNS. ICANN should look towards a truly objective analysis based on hard numbers, facts and evidence. *CADNA (10 Dec. 2010).*

Analysis of Comments

High Security Zones**:**

We observe that mandatory support for High Security Zones does not appear to be a root-scaling issue. Discussion of the creation of HSTLDs continues and is discussed elsewhere in this document. Work on a High Security programme continues.

IPv6 Support

We observe that mandatory support for IPv6 does not appear to be a root-scaling issue; IPv6 glue has been present in the root zone for many years and no harmful effects have been observed to the generation, distribution or serving of the root zone.

New gTLD registries serve, in the general case, a global constituency. The presence or absence of commodity IPv6 services in the particular local region in which a new gTLD registry is located is not especially pertinent to the question of whether there is demand or necessity for IPv6 support by registrants located in regions where local market conditions are different.

Support for IPv6 in a registry schema, and in the TLD zone which is generated from data stored according to that schema, is largely unrelated to the availability of IPv6 transport, and hence to local market conditions.

It is best practice to distribute TLD nameservers across a wide topological and geographical area in order to add diversity to the system and make it less prone to failure due to localized conditions (e.g. the partition of a country from the Internet, or a natural disaster). Given that registry operators are guided to distribute nameservers in this fashion, the ability to deploy nameservers with IPv6 transport is unrelated to local market conditions.

Making such support mandatory is prudent given the expectation that IPv6 demand is expected to grow dramatically following the depletion of the IPv4 number space.

Mandatory Support for DNSSEC

We observe that mandatory support for DNSSEC does not appear to be a root-scaling issue; the deployment of DNSSEC in the root zone and the subsequent publication of trust anchors as DS RRSets in the root zone by many TLDs have yet to result in any observed harmful effects to the generation, distribution or serving of the root zone.

It is not reasonable to make assumptions about the usefulness or applicability of DNSSEC across a diverse population of registrants for any particular new gTLD. It seems reasonable given experience with other signed TLDs to expect that for any new gTLD, regardless of intended purpose, there will be some demand for registrants' zones to be signed. It is perfectly feasible, to build in an example mentioned in the comment, that a bank might choose a non-bank-specific gTLD when naming services for which DNSSEC is entirely applicable.

Whilst islands of trust have been used as a transition mechanism to allow early deployment of DNSSEC in some cases, it is not expected that this deployment strategy will scale given the complexity involved in trust-anchor distribution. Ensuring that DNSSEC is supported in new gTLD registries eases this complexity significantly, since key distribution to users of a service is largely no longer needed, keys being discovered by validators automatically from parent zones.

We observe that the usefulness of DNSSEC as a component contributing towards the security and stability of the DNS increases as it sees greater deployment; demand for validation increases as the number of signed zones increases, for example.

Making DNSSEC support mandatory is in the best interests of satisfying the expected global demand for DNSSEC by registrants, and of the increasing deployment of DNSSEC in general.

Reports and Studies

SSAC published a report[1] on root scaling in August 2009. The study indicated that controlled delegation rates, rather than total number of delegations, were a key aspect in maintaining root zone stability.

ICANN published a report[2] in September 2009 which provided a quantitative model of the root zone which was used to simulate scenarios relevant to root scaling.

ICANN published a study[3] in October 2010 analysing the project effects of recent and projected events on root zone stability. The study indicates that anticipated coincident introduction of IPv6, DNSSEC, IDN and new gTLDs has not occurred, that IPv6, DNSSEC and IDNs have been introduced without incident and that the effects of new gTLD introduction can be weighed on their own. The paper indicates that, at projected delegation rates, root zone stability will not be denigrated by the delegation and operation of new gTLDs.

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[1] "Scaling the Root – Report on the Impact on the DNS Root System of Increasing the Size and Volatility of the Root Zone", 31 August 2009, http://www.icann.org/en/committees/security/sac046.pdf
[2] "Root Scaling Study: Description of the DNS Root Scaling Model", 1 October 2009, http://www.icann.org/en/committees/dns-root/root- scaling-model-description-29sep09-en.pdf
[3] http://www.icann.org/en/topics/new-gtlds/summary-of-impact-root-zone-scaling-06oct10-en.pdf

The ICANN board consulted root server operators in September 2010[4] and was informed that all root servers (and related DNS provisioning infrastructure) are capable of accommodating 1000 new gTLDs per year.

ICANN has committed[5] to limit the number of applications that will be processed to 1000 per year, a measure that is consistent with the advice provided by root server operators and with the studies analyzing maximum application processing rates.

STRING SIMILARITY AND STRING CONTENTION

Key Points

- One comment suggests prioritizing one community-based application over others, addressing subsets of a community

- One comment proposes separate treatment for not-for-profit organizations to address the disadvantage such organizations may have in auction situations

- One comment claims that similar strings applied for by the same applicant should not be considered in contention

- One comment requests that appropriate linguistic expertise be engaged in the string similarity review panel

- Arriving at the best outcome in a contention situation requires careful balancing of several variables, and this is the reason that a number of factors are included in the analysis.

- The Guidebook is being revised to provide clarification on the assessment of support and opposition in a Community Priority Evaluation.

Summary of Comments

Similar string/synonym gTLDs—market differentiation. ICANN should address the issue of confusingly similar strings to prevent defensive registrations and user confusion (e.g. applications for .music, .song, .tune, etc.) An effective policy that gives priority to one community-based application that serves all legitimate community stakeholders is highly recommended. dotMusic (10 Dec. 2010).

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[4] "Adopted Board Resolutions, Trondheim, Norway", ICANN Board of Directors, 25 September 2010, http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.3

[5] http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.3, http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2

Auctions—Impact on not-for-profits/NGOs. The ICANN Board should instruct Staff to reconsider the impact of the auction procedure on not-for-profit organizations/NGOs. The auction procedure will likely put not-for-profits/NGOs with limited budgets at a distinct disadvantage in acquiring new gTLDs that are desired by two or more parties. P-NPOC (1 Dec. 2010). Red Cross (9 Dec. 2010).

String Contention Sets (2.2.1.1).
String Contention Sets must not include similar strings requested by a single applicant seeking linguistic variations of the applicant's other applied-for string. If String Similarity Reviews were strictly applied, variations of a TLD string might be placed into a contention set even though the strings would be operated by the same applicant, for identical purposes, in multiple languages and/or scripts. That would not be a logical or intended result of the String Similarity Review. BC (6 Dec. 2010). CADNA (10 Dec. 2010).

Improve string similarity review procedure. As the string similarity judgment is subjective, it is expected that ICANN should provide a fair and open mechanism for comments and objection during the string review and dispute resolution process. ICANN should work out a feasible procedure so that linguists coming from the string language community can be engaged in the string similarity review panel, and ICANN should seriously consider the suggestion of the corresponding community. Internet Society of China (10 Dec. 2010).

Analysis of Comments

The comment proposing prioritization of applications according to a conceptual hierarchy based on the meaning of the strings would, in the general case, implicitly assume both a) that such strings be considered in contention with one another and b) that the contention be resolved by prioritizing the application with the widest reach. In general, the assumptions a) and b) have no grounds in the adopted policy and are alien to the approach followed in the Application Guidebook. However, for the specific case of a community application in contention, the Community Priority Evaluation scoring duly considers the extension of the community, the reach implied by the meaning of string and the corresponding relevance of any opposition registered. This amounts to a balanced assessment of the acceptability of the application in relation to the community addressed, as reflected in the overall score in relation to the threshold for affording Community Priority. The proposed position is not to modify the approach in the light of this particular comment.

The comment proposing separate treatment of non-profit organizations as applicants in string contention resolution situations, in particular with a view to avoid (or compensate them in) auctions, implies 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 and the proposed position is not to modify the process in this regard. The comment implicitly suggests introducing a

new application category for non-profit organizations, which is a matter addressed elsewhere.

The comment claiming that confusingly similar strings in applications lodged by the same applicant should not be considered in contention invokes an array of potential policy issues, as previously addressed in conjunction with version 4 of the Applicant Guidebook. Quite clearly, those policy issues need first to be resolved to safeguard avoidance of user confusion both in the short and the long run, and the proposed position is to await the development of such policies before considering the suggestion. It deserves to be mentioned that IDN variant strings within the scope of a single application is a different matter, as addressed elsewhere in the Applicant Guidebook.

The comment requesting that appropriate linguistic expertise be engaged in the string similarity review panel is very well taken and, indeed, one of the requirements foreseen for the procurement of panel providers.

COMMUNITY PRIORITY EVALUATION

Key Points

- A comment expresses concern about gaming or inappropriate use of the community priority evaluation which may harm community-based applicants and requires proper training and guidelines for the evaluators.
- A comment expresses concern that the uniqueness aspect of criterion 2 (Nexus) could be used to exclude some community-based applicants.
- A comment suggests that Criterion 3 (Registration Policies) could inappropriately award points to an applicant for restricting registrations in the TLD.
- A comment suggests that name selection and content/use should be considered together in regard to criterion 3 (Registration Policies).
- Some comments request further specification on the weighting of support and opposition in criterion 4 (Community Endorsement).
- Some comments proposed lowering the scoring threshold for community priority evaluation from 14 to 13 points, while another comment supported the scoring criteria and suggested that the current threshold be retained.
- A comment suggests that fears of gaming are given a higher value in the process than trust for community-based applicants.
- Some comments proposed additional points for date of establishment of the TLD initiative, and documented outreach activities.
- Some comments state that community-based governance mechanisms should be part of the criteria.

Summary of Comments

Third party evaluators guidelines. It is imperative that appropriate training and guidelines are given to the third party evaluators which are consistent with the

foundations of ICANN's AOCs to prevent harm to genuine community TLD applicants and prevent gaming of the process through loopholes. *dotMusic (10 Dec. 2010).*

Community accountability. The current evaluation process gives points to applicants that restrict registrations to members of the community. That is a wrong process since many communities are based on behavior, not formal membership. On the other hand there is no provision requiring a community-based gTLD applicant to prove that the gTLD will be subject to a credible community governance process. The litmus test for credible community accountability is whether there is an objective governance process by which the respective community can replace the individuals in charge of day-to-day operations of the TLD. *W. Staub (10 Dec. 2010).*

Community priority evaluation (4.2.3).
Given the possibility that some applicants will try to take advantage of loopholes which would prevent community TLDs scoring higher than standard TLDs, one extra point in the Community Priority Evaluation should be given for the conditions specifically stated in dotBERLIN's comments. *dotBERLIN (9 Dec. 2010). .GMBH (9 Dec. 2010). dotMusic (10 Dec. 2010).*

In the definitions and guidelines of criterion #4 further specification of the weighting of support and opposition should be provided. The current community evaluation scoring system does not fully support the goal of scoring community TLDs higher than standard TLDs, especially regarding the weight attributed to some objections from the community in comparison to support of big parts of the community (+/- 2 points). *DOTZON (9 Dec. 2010). dotHOTEL (10 Dec. 2010).*

The criterion 4 guidelines regarding opposition must be aligned with the objectives of the new gTLD program. The words "not compatible with competition objectives" should be added to section 4.2.3 of Community Priority Evaluation Criteria (page 4-18—i.e., "sources of opposition that are …not compatible with competition objectives….will not be considered relevant"). *dotMusic (10 Dec. 2010).*

Community priority in string contention (4.2.1). Section 4.2.1 should provide that an application must score at least 13 (not 14) points to prevail in a community priority evaluation. The intention of community priority will not be realized if Community applicants cannot reasonably reach the 14 point threshold (e.g. just 2 objection filings would make it impossible for an applicant to achieve the required 14 points). The BC remains unconvinced that the ICANN Staff has adequately analyzed the possibility and probabilities of applicants reaching 14 points. *BC (6 Dec. 2010). RNA Partners (10 Dec. 2010).*

Community priority evaluation criteria (4.2.3).
Regarding criterion 2, the requirements for nexus and uniqueness are too stringent and may disqualify worthy applicants from being considered a Community. *MarkMonitor (Module 4, 7 Dec. 2010).*

Do not modify community scoring. ICANN should ignore pleas to modify at the last minute the community scoring from self interested candidates. *F. Krueger (10 Dec. 2010). Bayern Connect (10 Dec. 2010).*

Flaws in community procedures.
The procedure as defined in the proposed final AG has no element of trust for the community applicant and is so motivated by the fear of gaming that it may have now become almost impossible for a new gTLD to viably declare itself as a community gTLD. The AG plan deviates substantially from the GNSO recommendations IG-H. There is no balanced adjudication of comparative claims by a DRSP as recommended by IG-H. Instead there is just a grading set that would allow a preponderance of evidence of community support for one applicant to be overruled by two shills working for a competitor (criterion 4B). The AG also has removed a point for a name that had other meanings—i.e. any community whose name is also a common word, proper or otherwise, will lose 1 point. These two conditions together are enough to exclude many communities from consideration, yet they say nothing about the validity of a community application and have nothing to do with criteria set in the GNSO Recommendation's IG-H. Communities have been treated with suspicion, and not with the special care intended by the GNSO's recommendations. It would be best if communities vying for the same name were subjected to comparative evaluation by a DRSP. Alternatively conditions 2B and 4B should be removed or at a minimum should be subject to greater refinement. *A. Doria (Module 4, 9 Dec. 2010).*

Ideally, eligibility, name selection and content and use should be considered together, and the result should be rated from 0 to 3. At the very least, name selection and content and use should be considered alternative, not cumulative solutions, or decrease the "pass" scoring to 13. The current version of the scoring leads to undesirable results: it promotes adopting unreasonable registration policies, while on the other hand it would prevent not just the most reasonable but even the most restrictive existing community/sponsored TLDs from passing the test. *A. Abril i Abril (Module 4, 10 Dec. 2010).*

Balancing support and opposition. ICANN should follow this approach: Consideration will be given to the extent, both amount and relevance, of the overall endorsement that has been submitted by the applicant, which will be compared to the extent, both amount and relevance, of the opposition expressed; care will be taken to balance the support and the opposition in any determination. *dotGay (Module 4, 10 Dec. 2010).*

Analysis of Comments

A comment expresses concern about gaming or inappropriate use of the community priority evaluation which may harm community-based applicants. Arriving at the best outcome in a contention situation requires careful balancing of several variables, and this is the reason that a number of factors are included in the analysis. The process is intended to support good-faith community applicants, but the outcome of any given case

cannot be guaranteed. The requirement of appropriate training of and guidelines for evaluators is well taken and in line with the foreseen process.

A comment expresses concern that the uniqueness aspect of criterion 2 (Nexus) could be used to exclude some community-based applicants. This criterion is intended to offer a higher score where the analysis is straightforward and the claim of priority more obvious. This does not mean that an application featuring a non-unique name as the TLD string would be disqualified, simply that in this case the claim of priority is subject to greater interpretation and thus requires more complex analysis.

A comment suggests that Criterion 3 (Registration Policies) could inappropriately award points to an applicant for restricting registrations in the TLD. Restrictive registration policies may receive a high score in certain cases; however, this is not necessarily true in every case. The Guidebook states in the guidelines on this criterion: "More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application."

A comment suggests that name selection and content/use should be considered together in regard to criterion 3 (Registration Policies). ICANN does not see these as linked: a registry could easily allow registrants to register any name they chose, so long as the content of corresponding websites conformed to its established policies. Alternatively, a registry could also allow registrants to use names for any purpose, so long as they conformed to the name selection policies (e.g., names must be in the form of <name of organization.TLD>.

Some comments request further specification on the weighting of support and opposition in criterion 4 (Community Endorsement). The Guidebook provides guidance on the analysis that occurs in this area. The concerns about attempts to influence the outcome of a community priority evaluation by virtue of the volume of submissions favoring a particular outcome are understood. ICANN does not expect the analysis to consist merely of mathematical comparisons, or to automatically penalize applicants for objections (in which, to reach the contention resolution stage, the applicant would have prevailed) without additional consideration of the context. Specifically, the Guidebook states:

> When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed
> in this context. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for "Opposition." To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, or filed for the purpose of obstruction will not be considered relevant.

The Guidebook makes this point with regard to opposition, and is being revised to provide this clarification in the area of support also. Furthermore, the proposal to add "not compatible with competition objectives" is a worthwhile clarification in the explanation for criterion 4.

Some comments proposed lowering the scoring threshold for community priority evaluation from 14 to 13 points. As stated in the Guidebook:

> It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria below.

Another comment supported the scoring criteria and suggested that it be retained. As noted previously, 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.

A comment suggests that fears of gaming are given a higher value in the process than trust for community-based applicants. It is in fact the intention to design a process that does not facilitate easy abuse, and this necessarily means that community-based applications must undergo some scrutiny if they are claiming a priority over other applications on this basis. This is in line with the GNSO Implementation Guideline H:

> Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exceptions:
>
> (i)   the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application

It should be recalled that no evaluation of community credentials takes place unless the community-based applicant is claiming a priority as a result of string contention.

Some comments proposed additional points for date of establishment of the TLD initiative, and documented outreach activities. As noted previously, the addition of 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.

Some comments state that community-based governance mechanisms should be part of the criteria. 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 community priority evaluation is not intended to be a means of requiring various types of community representation models. However, it is expected that an accountability to the community is present, as demonstrated by the other criteria (e.g., delineation of the community, registration policies, and documentation of support).

VARIANT MANAGEMENT

Key Points

- ICANN will continue to support study and development activities toward a variant management solution for the top level, so that users around the world will be able to take advantage of increased opportunities in a secure and reliable DNS.

Summary of Comments

IDN Variant TLDs (1.3.3). Methods for resolving variant TLD conflicts should be identified and communicated to the community well in advance of the launch of the new gTLD program. The methods used to resolve such conflicts could materially affect the way in which applicants prepare their respective submissions. *MarkMonitor (Module 1, 7 Dec. 2010).*

Paired delegation of Simplified Chinese and Traditional Chinese gTLDs. The AG should allow the paired delegation of Simplified Chinese (SC) and Traditional Chinese (TC) gTLDs to bring better usability and readability to millions of Chinese Internet users. To Chinese users, SC and TC are one language and they are identical. Based on millions of Chinese users' rights of using the Internet and usability and readability, we encourage and welcome paired delegation of SC and TC gTLDs.

> We have growing concerns about whether it is compliant with ICANN's Bylaws to avoid this challenge of variant management especially when it is affecting billions of global users' rights of using the Internet. Any attempt to separate SC from TC would constitute a cultural segregation because it would lead to user confusion and the marginalization of millions of users who view SC and TC as essentially identical.

> Allowing SC and TC strings identically adopted as IDN TLDs offers tremendous convenience to Chinese users whose keyboards, input methods, and sometimes

display methods support only one or the other. Some research has shown that Chinese users expect both versions of domain names to be held and used by the same registrant. A 2009 CNNIC survey indicated that 95% of respondents are eager to own pure Chinese domain names.

Based on this research, CNNIC strongly opposes delegating only one version of a Chinese gTLD to an applicant, which will surely deprive the registry operator, CDN registrants and Chinese users worldwide of the right to properly use CDNs.

CNNIC (30 Nov. 2010). CDNC (9 Dec. 2010).

CDNC recommends amending the AG to reflect paired delegation of SC and TC versions of domain names to one applicant at one time. The String Similarity Panel (2.4.1) should be divided into two parts: a string similarity panel for proposed labels in Alphabetic/Phonetic scripts and a CDN evaluation panel for proposed labels in Chinese characters. The Registry Agreement should be amended to reflect that a CDN and its preferred variant will be seen as one TLD for review, approval, and contractual purposes, per current practice at the second level for Chinese TLDs. The new gTLD plan should also permit single character CDN TLDs. *CDNC (9 Dec. 2010).*

Given the practicality and viewability of IDNs in the Chinese language, variant strings in Chinese must be delegated to the same IDN TLD manager for the new gTLD to work seamlessly. This principle of delegation is necessarily applicable to Chinese IDN TLDs when the simplified and traditional Chinese characters are interchangeable and both widely used by the Chinese language community at large. HKIRC recommends that the guidebook be amended to reflect that variants of an applied-for Chinese IDN TLD will be delegated to the same successful applicant on condition that a workable variant management mechanism is provided. *HKIRC (22 Dec. 2010).*

Analysis of Comment

A comment suggests that more information is needed on the mechanisms used for resolving variant TLD conflicts. As described in section 1.3.3 of the Guidebook, no variant gTLD strings will be delegated through the New gTLD Program until variant management solutions are developed and implemented. Where multiple applicants apply for strings that are identified by ICANN as variants of one another, the applications will be placed in a contention set and will follow the established contention resolution procedures.

Other comments on this subject express that a means for delegating variants at the top level is needed in the case of simplified and traditional Chinese.

It is noted that IDN ccTLD variant strings 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. The references and information provided in these comments are very useful and appreciated.

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).
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.

As resolved by the Board in November, ICANN is proceeding with the implementation of an IDN Variant Issues project. The current plan proposes the creation of teams composed of community experts in linguistics, DNS, registry operations, and policy.

Specifically, ICANN proposes to conduct five case studies (suggested cases are Chinese, Arabic, Latin, Indic, and Cyrillic) to investigate the set of issues that need to be resolved to facilitate a good user experience for IDN variant TLDs. From these five case studies, an Issues Report will be created.

ICANN will continue to support study and development activities toward a variant management solution for the top level, so that users around the world will be able to take advantage of increased opportunities in a secure and reliable DNS.

GEOGRAPHICAL NAMES

Key points

- ICANN will comply with a legally binding decision from a court of competent jurisdiction.

- A government approving an applicant could impose, as a condition or support or non-objection, that the registry be operated under the legal framework of the country.

- In accordance with GAC advice, country and territory names will be reserved at the second level, but can be released through a defined process, which could be similar to the .INFO procedure.

- No changes will be made to the treatment of city names in the applicant guidebook.

Summary of Comments

Jurisdiction.
It is not clear to the Ministry under what circumstances a potential new TLD falls under and is operated under Danish jurisdiction or other national jurisdictions and under what circumstances it falls under and is operated under California jurisdiction. This is of course especially relevant in cases where the TLD has a relation to Denmark in some form or other (e.g. geographic TLDs). *Danish Ministry (10 Dec. 2010).*

TLDs related to a geographical area should be governed by that area's jurisdiction (e.g., ".denmark" or ".jylland" should be governed by Danish law and not other jurisdictions). Without a promise to respect state court decisions in relation to a given geographical TLD, it will become difficult to enforce consumer's rights in the country in question. *DIFO (15 Jan. 2011).*

The guidebook does not take into account several possible scenarios regarding TLDs of geographic interest. It is unclear how ICANN would react to scenarios such as, e.g. if a government withdraws a non-objection letter for a geoTLD application (e.g. if the registry subsequently changes the thematic focus of its services) or when an application is filed as a standard application but infringes on governments' (or local authorities') rights or public interests. *Danish Ministry (10 Dec. 2010).*

In the various documents it is of utmost importance to be clear on which jurisdiction ICANN is talking about. There are differences in wording about courts and jurisdiction in DAG4, in the proposed sample letter in the AG, in Article 7.13 of the Registry Agreement and in the 23 November letter of Peter Dengate-Thrush. This should be looked into and the text should be revised to clarify that ICANN will comply with a legally binding court order from the relevant court in the jurisdiction of the government or public authority that has given the support to the applicant. *UNINETT (Module 2, 10 Dec. 2010).*

The wording of the current version of the AG regarding ICANN's duties in the case of a post-delegation withdrawal of government support has been considerably weakened compared with version 4. The AG text should be brought in line with the wording in the 23 November 2010 letter by Peter Dengate-Thrush to the GAC (i.e., "ICANN will comply with" in that letter, not "ICANN may implement" in the proposed sample letter and in Article 7, clause 7.13 of the New gTLD Agreement). As it stands the local administration has no guarantee that ICANN will follow a legally binding decision in the relevant

jurisdiction (which should be the jurisdiction of the country served by the geographical TLD) if there has been a dispute between the government/public authority and the applicant. This may reduce the willingness of governments to support applications for geographic names. *UNINETT (Module 2, 10 Dec. 2010).*

Country names.
Thought should be given to country names such as "England" in section 2.2.1.4. It is not an ISO 3166-1 country name, so it is not excluded under section 2.2.1.4.1. It is a sub-national place listed in ISO 3166-2 but it does not have a sub-national government or public authority (in contrast to Scotland, Wales and Northern Ireland which have sub-national governments which could provide support for a geographic TLD application). England's affairs are governed by the national government of the United Kingdom. The following addition is suggested for section 2.2.1.4.2 paragraph 3: "If no sub-national government or public authority exists for a sub-national place name that is listed in the ISP-3166-2 standard then the associated national government will be accepted as the relevant authority." *D. Sayers (Module 2, 30 Nov. 2010).*

Clarification on reserved country names at second level. Clarification is needed as to which forms from the ISO 3166-1 need to be reserved at the second level. In 5.1, what is meant by the expression "short form (in English)"? Does this refer exclusively to the English short country names used by the ISO 3166 Maintenance Agency? There is some confusion because the ISO 3166-1 list also contains two and three-letter country codes. Does the "short form" referred to in the AG also include the two and three-letter codes? *K. Golovina (Module 5, 10 Dec. 2010).*

Release of country names. The procedure for release of country names in Module 5 should be clarified. Are the rules and procedures for release referred to in Module 5 entirely up to the discretion of the registry? Will it be necessary to apply for official approval from ICANN before releasing the names? *K. Golovina (Module 5, 10 Dec. 2010).*

Country or territory names (2.2.1.4.1).
Will the Geographic Names Panel reject an application that is considered to be similar to an alpha-3 code, long form or short form name, or must the string be an exact match to the alpha-3 code, long form or short form name to be considered a country or territory name? *MarkMonitor (Module 2, 7 Dec. 2010).*

HKIRC supports and appreciates the exclusion of strings that are country or territory names on the ISO 3166-1 list, their translations in any language, abbreviations, permutations, and transpositions, from this application round of new gTLDs. HKIRC opines that these strings shall always be protected and never made available for application through a gTLD process. *HKIRC (22 Dec. 2010).*

Capital City names (2.2.1.4.2).
In case an ostensibly "good faith" applicant for confusingly similar strings like .pari or .belin shows up he can easily drag a .paris or .berlin application into a contention set

with a subsequent auction. This may end up in a scenario where the cityTLD applicants are forced to pay a high redemption fee. We think it is not acceptable that malicious TLD applicants make cityTLDs a target for blackmail. *dotBERLIN (9 Dec. 2010).*

ICANN should further expand the scope of protection of geographical names in the first round and take into consideration capital city names, city names as well as sub national geographical names in ISO 3166-2. Also, special cases should be considered properly – e.g. in China, provinces, directly-administrative municipalities, and self-autonomous regions with full names and abbreviation names. *Internet Society of China (10 Dec. 2010).*

City names. Allowing individuals to purchase city names is contrary to settled policy and will only lead to consumer confusion. The expectation that names associated with territorial jurisdictions are in fact public resources is an expectation that has been fostered by IANA and ICANN for the past 15 years. To make the argument that the new gTLD evaluation process cannot rationally implement a check for government support or non-objection because of the listed difficulties is not supported by the evidence. Only applications which have government support or which can demonstrate non-objection should be allowed by ICANN, and no private individual should be allowed to assume the color of government. *E. Brunner-Williams (10 Dec. 2010).*

City names Several choices exist for lists of cities. Lists such as "table 8, Population of Capital Cities and Cities of 100 000 or More Inhabitants" http://unstats.un.org/unsd/demographic/products/dyb/dyb2008/Table08.xls published in the *United Nations Demographic Yearbook,* or Thomas Brinkhoff's list of the 479 agglomerations of the world with a population of 1 million inhabitants <http://www.citypopulation.de>, used above to consider the non-uniqueness issue, can be used. *E. Brunner-Williams* (1 December 2010)

.Brand TLDs—second level prohibition of country and territory names. For brand owners wishing to obtain .brand gTLDs, the prohibition of country and territory names at the second level hampers their ability to market regionally. Special considerations should be made for these types of gTLD registries. *MarkMonitor (Module 5, 7 Dec. 2010).*

Geographical TLDs should be registered as ccTLDs. If new gTLDs are introduced, geographical TLDs should be registered as ccTLDs, not as gTLDs. *DIFO (15 Jan. 2011).*

Commonly used names. We fully support the GAC position on enhancing and extending geographic protection of strings to include those that are considered as "commonly used names." One possibility is to allow the "owners" of these geographically protected strings to select the best name, which represents their protected strings (possibly an abbreviation as the literally protected string could be too long and impractical for use as a gTLD). *Arab TLD Committee (Module 1, 16 Jan. 2011).*

Analysis of Comments

APPLICABLE LAWS AND REMEDIES FOR POST DELEGATION DISPUTES

Which laws will be applicable to a successful applicant?

The successful applicant will be required to enter into a Registry Agreement with ICANN, which is a California nonprofit public benefit corporation.

Disputes arising under or in connection with the Agreement will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Los Angeles County, California.

For registries that are intergovernmental organizations or governmental entities or other special circumstances, the arbitration will be conducted in the English language and will occur in Geneva, Switzerland, unless another location is mutually agreed upon by the Registry Operator and ICANN.

On the issues of whether TLDs related to a geographical area should be governed by the legal system of that area. In correspondence to the GAC on 23 November 2010, the ICANN Board Chair suggested that the government approving the applicant can impose that requirement on the applicant as a condition of support or non-objection. While an agreement between the gTLD registry and the government or public authority would not be enforceable by ICANN, ICANN would comply with a legally binding decision from a court of competent jurisdiction.

Will ICANN comply with a legally binding court order from the relevant court in the jurisdiction of the government or public authority that has given support to the applicant?

Yes, ICANN will comply with a legally binding order from a court in the jurisdiction of the government or public authority that has given support to an applicant as required in the rules for geographical names.

In response to oral comment, received during meetings with the ccNSO and the GAC in Cartagena, ICANN committed to reinserting language consistent with the version 4 Guidebook language in the *Sample Letter of Government Support* in the next version of the Applicant Guidebook, namely:

[Government / public authority] further understands that ICANN *will comply* with a legally binding decision in the relevant jurisdiction where there has been a dispute between [government/public authority] and the applicant. (Emphasis added.)

In addition, the next version of the Guidebook will also contain information advising the applicant that ICANN *will comply* with a legally binding decision in the relevant

jurisdiction where there has been a dispute between the relevant government or public authority and the registry operator. (Emphasis added.)

It should be noted that ICANN's commitment to comply with court orders is to the government or public authority, rather than the registry operator. Therefore, as the obligation is to the government/public authority, that obligation is described in some place in the Guidebook other than the registry agreement. The registry agreement is a bilateral contract between ICANN and the registry operator – it sets forth ICANN's obligations and rights with respect to the registry operator and vice-versa, and is not the appropriate place to describe ICANN's commitments to governments.

On this basis, the language contained in the Registry Agreement related to Government Support stating, is appropriate as a signal of ICANN's obligation that is stated elsewhere, inter alia, "... in the event of a dispute between such governmental entity and Registry Operator, ICANN *may implement* the order of any court sitting in such jurisdiction in favor of such governmental entity related to the TLD." (Emphasis added.)

What other options are available to governments/public authorities to remedy disputes with supported applicants who change the thematic focus of its services, or is no longer complying with the terms under which the letter of support, or non-objection was provided?

Governments or public authorities that provide support, or do not object to, an application for a geographic name TLD, may enter into an agreement with the applicant, which sets out the terms and conditions of their support. A *Sample Letter of Government Support* is provided as an Attachment to Module 2 of the Applicant Guidebook as guidance to applicants and governments. This includes an optional paragraph, which notes that there will be a separate agreement outlining the conditions under which the Government or public authority supports the applicant in the operation of the TLD, and circumstances under which support would be withdrawn.

As a guiding principle, it is considered important that a government or relevant public authority be able to show through a defined process that a registry operator has deviated from the conditions of original support or non-objection. In addition to ICANN complying with a legally binding court order; the Registry Restrictions Dispute Resolution Procedure is also available for resolving post-delegation disputes that may arise between the relevant government and public authority that supported, or did not object to, the geographic name new gTLD application, *provided the application was submitted as a community-based TLD.* (The government could require that the TLD applicant apply as a community based TLD as a condition of governmental approval – thereby making these remedies available to the government.)

The remedies that can be recommended to ICANN under this procedure include:

- Remedial measures for the registry to employ to ensure against allowing future registrations that do not comply with community-based restrictions;

- Suspension of accepting new domain name registrations in the gTLD until such time as violation(s) is cured; or, in extraordinary circumstances;

- Providing for the termination of a registry agreement.

RELEVANT GOVERNMENT OR PUBLIC AUTHORITY

What is considered the 'relevant' government or public authority to support an application for a country or territory name, or a sub-regional name?

The comments stated that England is not listed in the ISO 3166-1 standard and as such is not a country or territory name as defined in the Applicant Guidebook, but is a sub-national place name as listed in the ISO 3166-2 standard and that the relevant government is, in this instance, the national government of the United Kingdom.

To provide guidance to applicants, the Guidebook identifies the level of government/public authority support it 'anticipates' would be required for the different geographic name categories nominated in the applicant guidebook, i.e., national government approve applications for capital city names and state; provincial or local governments approve applications for sub-national (including city) place names. However, this is provided as guidance only and it is the applicant's responsibility to ascertain from enquiries with government officials the relevant level of government support required for a geographic name as defined in the applicant guidebook. The Guidebook also suggests that to assist in determining whom the relevant government or public authority may be for a potential geographic name, the applicant may wish to consult with the relevant Governmental Advisory Committee (GAC) representative http://www.gac.icann.org/gac-representatives .

The applicant guidebook contains a *Sample Letter of Government Support* as an attachment to Module 2. This letter suggests that the author of the letter confirms they have the authority of the government/public authority to be writing on this matter. The letter also recommends an explanation of the government entity, relevant department, division, office or agency, its functions and responsibilities to be included in the letter.

RESERVATION OF COUNTRY AND TERRITORY NAMES AT THE SECOND LEVEL

Clarification required on the reservation of country and territory names at the second level; the process for release; and .brand names should be excluded.

The reservation of country and territory names at the second level is the result of consultations between the ICANN Board and the Governmental Advisory Committee (GAC) on the implementation of the GAC Principles regarding new gTLDs, specifically paragraph 2.7[6]. Correspondence relating to this matter can be found at:

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[6] 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 or

- The first letter was from ICANN CEO to the GAC Chair on 17 March 2009
  http://www.icann.org/en/correspondence/twomey-to-karklins-17mar09-en.pdf
- The second letter was from GAC Chair to ICANN CEO on 24 April 2009
  http://www.icann.org/en/correspondence/karklins-to-twomey-24apr09.pdf
- The third was from the GNSO Council to GAC Chair on 15 May 2009
  http://gnso.icann.org/correspondence/gnso-ltr-to-gac.pdf
- The fourth was from GAC Chair to ICANN CEO on 26 May 2009
  http://www.icann.org/en/correspondence/karklins-to-twomey-29may09-en.pdf

The "short form (in English)" does refer specifically and exclusively to the short form of countries, in English, as listed in column 2 of the ISO 3166-1 standard. (See Section 6.1 of ISO 3166-1:2006, or an extract of this column from the standard at http://www.iso.org/iso/english_country_names_and_code_elements)

The short form does not include other columns of the ISO 3166-1 standard, such as the alpha 2 and the alpha 3 codes listed. However, all two character labels are reserved separately in accordance with Specification 5 of the Draft Registry Agreement.

What are the rules for the release of country names at the second level?

The rules for the release of country and territory names at the second level should be developed in accordance with advice provided to the ICANN Board by the GAC http://www.icann.org/en/correspondence/karklins-to-twomey-29may09-en.pdf on 29 May 2009.

The GAC advice includes:

> "…that in their applications the registries should be asked to indicate how they intend to incorporate GAC advice in their management of second level domains. The GAC (and the rest of the ICANN community) should then be invited to comment on the appropriateness of proposed measures.
>
> In their considerations the registries may draw on existing methodology which is based on the successful process developed for the reservation, and release of country names under .info"

The Applicant Guidebook provides guidance for the applicant on this issue in the Attachment to Module 2. The Evaluation Questions and Criteria contain the questions that the applicant will be asked when applying for a new gTLD. Q22 relates to the protection of geographic names and states that the applicant is required to:

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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 gTLD.

- Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD. This should include any applicable rules and procedures for reservation and/or release of such names.

Notes to this question provide:

- Applicants should consider and describe how they will incorporate GAC advice in their management of second-level domain name registrations. See "Principles regarding New gTLDs" at http://gac.icann.org/gac-documents. For reference, applicants may draw on existing methodology developed for the reservation and release of country names in the .INFO top-level domain. Proposed measures will be posted for public comment as part of the application. Information about the .INFO procedure is available at: http://gac.icann.org/press-release/reservation-country-names-dot-info-icann-board-resolutions-10-september

In addition, the Draft Registry Agreement contains the following:

Draft Registry Agreement
Paragraph 2.6 Reserved Names of the Draft Registry Agreement, states in part "Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall comply with the restrictions on registration of character strings set forth in (Specification 5)". Specification 5 provides a schedule of reserved names at the second level of gTLD registries, including:

> **5. Country and Territory Names.** The country and territory names contained in the following internationally recognized lists shall be initially reserved at the second level and at all other levels within the TLD at which the Registry Operator provides for registrations:
>
> 5.1. the short form (in English) of all country and territory names contained on the ISO 3166-1 list, as updated from time to time;
>
> 5.2. the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and
>
> 5.3. the list of United Nations member states in 6 official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names.

Why do .brand TLDs have to follow the same second level prohibition for country and territory names?

It is appreciated that .brand TLDs may wish to use country and territory names at the second level of their TLD to replicate operations or business models and that the

process could be seen as restricting their ability to market regionally. However, brand owners are required to follow the same requirements in accordance with the advice provided by the GAC. While the .info procedure is nominated as the example process to follow, it may possible that a more simplified proposal would be acceptable given that it would be one entity, rather than a number of unknown entities/registrants, seeking to register a country or territory name in a TLD. However, this would require consultations with the GAC to gain their views on this issue. One reasons for the .info procedure is to protect sovereign rights associated with country and territory names at the second level. In the case of a .brand TLD, the brand owner can demonstrate that second level registrations do not interfere with those rights and ask the government for release of the names.

GTLD VERSUS ccTLD

Should geographical TLDs be registered as ccTLDs?

In response to concerns raised by the ccNSO and the GAC that making country and territory names available in the new gTLD program would blur the distinction between ccTLDs and gTLDs, the Board has agreed not to make country and territory names, as defined in the applicant guidebook, available in the first round of the new gTLD program pending the outcome of policy discussions by the ccNSO. The Board has acknowledged that defining the distinction between country code and generic names may warrant broader cross community policy discussion between ICANN's Supporting Organizations and Advisory Committees.

Country and territory names are conceptually related to ccTLDs, and it is reasonable that consideration be given to whether these names should be available as gTLDs or ccTLDs. However, it does not necessarily follow that all geographic TLDs should be registered as ccTLDs. The PDP that was undertaken by the GNSO, while not recommending a category of TLD for geographic names, does provide a structure and process that allows the addition of geographic TLDs under the new gTLD program.

There has been considerable discussion within the community suggesting the introduction of finer categorization of types of TLDs (i.e., something other than a ccTLD or gTLD). ICANN is 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 owners 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 TLD 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.

CITY NAMES

Why can't the Applicant Guidebook include reference to a list of city names that require government approval in order to be delegated? (Comments include reference to existing lists.)

The lists suggested through public comments are useful reference documents for applicants to consult when considering TLD name choices. However, the lists identified reflect some of the challenges ICANN experienced in researching a reliable robust list. A review of the UN list published at http://unstats.un.org/unsd/demographic/products/dyb/dyb2008/Table08.xls reveals many inconsistencies. For example, areas of Australia have identified areas that are regions and not cities; there are many city names missing from Africa — Egypt has Cairo listed as the only city and many other cities are missing from Arab countries. The other suggested list at http://www.citypopulation.de/ appears to be maintained by a private individual with no clear ongoing maintenance commitment and clear standard for rigour and impartiality.

In addition, this and other lists present additional problems:

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 while balancing these policy objectives.

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 and did not find reason to further 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.

It is acknowledged in the Guidebook (and in correspondence and discussions with the GAC) that city names present challenges because city names may also be generic terms or brand names and, in many cases, no city name is unique. Unlike other types of geographic names defined in the Guidebook, there are no established lists that can be used as objective references in the evaluation process. This makes it impracticable or impossible for evaluators to effectively check whether applications for strings are city names and would exclude thousands of legitimate uses and applications. In addition, given that many of the names of cities are duplicated across the world, it would also be impracticable for the evaluators to determine which government or public authority is 'relevant' in the context of the rules of the Applicant Guidebook. Thus, all city names are not afforded the same types of protection as country and capital city names.

However, there are other mechanisms identified in the Guidebook, which could assist in addressing any disputes over a city name. For example, applicants are encouraged to identify potential sensitivities in advance and work with the relevant parties to mitigate concerns related to an application. There are also avenues available to governments to object to an application.

Applications will be posted for information and public comment. Governments may communicate directly to applicants using the contact information posted in the application, e.g. to send a notification that an applied-for gTLD string might be contrary to a national law, and to try to address any concerns with the applicants.

Governments may also provide a notification process 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.

In terms of submitting a formal objection to the application, the most appropriate mechanism is through the Community Objection process. Established institutions with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. The criteria for resolving the objection are provided in the Guidebook.

What protections are provided for city names that are in a contention set because they are confusingly similar with another applied for TLD?

There is no priority given to an application for a city name with documentation of support or non-objection of 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 may apply as a 'community' application, understanding that additional criteria apply.

In responding to the example provided, that .pari or .belin could easily drag a .paris or .berlin application into a contention set with a subsequent auction, and could become a target for blackmail. The application process has been developed to provide a number of safeguards to reduce the risk for gaming, and hopefully blackmail, as suggested in the example above. In addition to resolution through the contention set, which will be discussed below, there are other avenues also available to governments, such as:

- Governments may provide a notification using a notification procedure that will be defined or 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.

- Governments may also communicate directly to applicants using the contact information posted in the application, e.g. to send a notification that an applied-for gTLD string might be contrary to a national law, and to try to address any concerns with the applicants.

- A formal objection could be made through the Community Objection process. Established institutions with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. The criteria for resolving the objection are provided in the Guidebook. ICANN does not wish to comment on the outcome of a speculative dispute.

- If the objection to .pari is not successful, this does not mean that .pari would prevail over .paris in a community priority evaluation procedure used for resolving string contention sets. However, as above, ICANN does not wish to comment on the outcome of such a dispute.

Has ICANN fostered the expectation that names associated with territorial jurisdictions are in fact public resources?

With respect to city names, these have not been provided any special treatment by ICANN in the past. These names have been freely available for registration in gTLDs

and ccTLDs all over the world. By contrast, country and territory names have been subject to protection at the second level of gTLDs since the approval of .INFO, which requires the approval of the relevant government before a country name can be released for use at the second level. All sTLD contracts from the 2004 round included language in the schedule of their agreements regarding reservation of geographic and geopolitical names at the second level of .info.

For example, the .ASIA agreement provides:
http://www.icann.org/en/tlds/agreements/asia/appendix-6-06dec06.htm

> E. Geographic and Geopolitical Names. All geographic and geopolitical names contained in the ISO 3166-1 list from time to time shall initially be reserved at both the second level and at all other levels within the TLD at which the Registry Operator provides for registrations. All names shall be reserved both in English and in all related official languages as may be directed by ICANN or the GAC.
>
> In addition, Registry Operator shall reserve names of territories, distinct geographic locations, and other geographic and geopolitical names as ICANN may direct from time to time. Such names shall be reserved from registration during any sunrise period, and shall be registered in ICANN's name prior to start-up and open registration in the TLD. Registry Operator shall post and maintain an updated listing of all such names on its website, which list shall be subject to change at ICANN's direction. Upon determination by ICANN of appropriate standards and qualifications for registration following input from interested parties in the Internet community, such names may be approved for registration to the appropriate authoritative body.

COMMONLY USED NAMES'

Why are "commonly used [geographic] names" not protected in the same manner as geographic names as defined in the Applicant Guidebook?

The comments suggest that, all "commonly used" geographic names might be protected. The Board has sought to ensure, throughout the process of developing a framework for new gTLDs, that there is a clear process for applicants, and appropriate safeguards for the benefit of the board community including governments. The current criteria for defining geographic names as reflected in the Proposed Final Version of the Applicant Guidebook are considered to best meet the Board's objectives and are also considered to address to the extent possible the GAC principles. These compromises were developed after several consultations with the GAC – developing protections geographic names well beyond those approved in the GNSO policy recommendations. These definitions, combined with the secondary avenue of recourse available by way of objections were developed to address the GAC's concerns.

In developing the process for geographic names, ICANN has relied upon ISO or UN lists to assist with geographical definitions in the context of new gTLDs. The combined

total of names currently protected in the new gTLD process is well in excess of 5000 names, and providing protection for "commonly used" interpretations of these names would multiply the number of names and the complexity of the process many-fold.

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 a commonly used name for a region or country may apply as a 'community' application, understanding that additional criteria apply.

REGISTRY AGREEMENT

General

Consumer protection. ICANN does not protect consumers when considering registry contractual changes. With Vertical Integration even registrars would not be looking out for consumers anymore. *G. Kirikos (13 Nov. 2010).*

Criteria for Board refusal of an application (5.1). Specified criteria for Board refusal of an application should be clearly outlined so that potential applicants can make informed decisions about the likelihood that the Board may ultimately reject their respective applications. *MarkMonitor (Module 5, 7 Dec. 2010).*

Continuity of operations.
The AG's requirement for 3 years operating expenses in either an irrevocable letter of credit or an irrevocable cash escrow deposit could tie up significant funds and hamper all new gTLD registries. ICANN Staff should be allowed to work with RySG to identify workable alternatives that don't unduly burden new entrants but that also provide adequate resources for continuity purposes. *RySG (7 Dec. 2010). B. Fausett (9 Dec. 2010).*

New gTLD registry operators should not be forced into paying high fees and being captive properties of existing facilities based registries (who are their competitors) in order to be able to meet the continuity of operations requirement. This will not encourage the growth of facilities-based competition, diversity of capacity and independence, the sine qua non of diversity of content. Such applicants risk paying more in revenue points and policy manipulation to these service providers than the true value. The incremental cost to existing providers of providing continuity operations is close to zero. The AG should instruct such new gTLD applicants that they may form risk pool cooperatives and invent mutual insurance so that they can without capture by an existing back-end service provider write "guaranteed' in response to the continuity instrument question. *E. Brunner-Williams (9 Dec. 2010). Minds + Machines (10 Dec. 2010).*

The Board should allow TLD applicants to include a contract with a registry services operator as a qualification/substitute for the current Instrument or Letter of Credit for continued registry operations of the TLD. *DotGreen (9 Jan. 2011).*

Competition issues (2.9 (b)). What will trigger referral of competition issues to competition authorities? How will the triggers be developed and by whom? *RySG (7 Dec. 2010)*

Cost Recovery for RSTEP (6.2). RySG repeats its previous comments that this provision should be reconsidered in light of the strongly negative effect it could have on innovation in the TLD space. *RySG (7 Dec. 2010)*

Vertical Integration (VI)

Key Points

- The Board's decision to eliminate restrictions on vertical integration was the product of lengthy discussions and consultations detailed at http://www.icann.org/en/minutes/draft-cross-ownership-rationale-04feb11-en.pdf.

- ICANN will retain the express right to refer vertical integration issues to the appropriate completion authority and requires flexibility in the manner in which it makes such referrals.

- Previously established GNSO guidance with respect to new TLDs does not allow for differentiated treatment of ".brand" TLDs with respect to the non-discriminatory use of ICANN-accredited registrars.

Summary of Comments

The Board's decision to eliminate cross ownership restrictions between registries and registrars makes sense and is timely. Those restrictions are artifacts of 1999 conditions and have no use short of an actual showing of market dominance by specific players. Elimination of artificial limitations of ownership and/or control is the only principled way forward for a number of reasons:
(1) Cross ownership restrictions would disproportionately discourage developing world gTLDs. Registrars now in the developing world are the obvious choices to start a new gTLDs. Cross ownership restrictions would prevent those registrars from starting a new gTLD, contrary to the sentiment of various sectors of the ICANN community that they wish to encourage developing-world gTLDs.
(2) Cross ownership restrictions can be circumvented, except by small and developing world registries that don't have the resources and lawyers to "fine tune" their corporate structures to get around cumbersome rules. Richer and more devious players would find their way around the rules, leaving poorer, more honest companies to follow the rules to their detriment.
(3) A history of cross ownership restrictions is not a good reason to continue them, as recognized in the ICANN Board resolution.

(4) Cross ownership restrictions could have left some gTLDs without a sales outlet. Nothing except elimination of vertical integration and cross ownership controls deals with the real problem of small registries who cannot find a registrar to carry their TLDs. The gTLDs with a special requirement (such as providing registration services in a little-spoken language) might not have been accommodated.

(5) Competition authorities, not ICANN, are the proper mechanism to examine and control issues of market power and anticompetitive behavior.

(6) The restrictions have not been shown to reduce consumer harms. If consumer harms and gaming issues arise in new gTLDs, then specific actions to prevent specific harms should be undertaken.

(7) The restrictions would increase the chance of new gTLDs failing. The broad registrar channel is the wrong marketing method for specialty TLDs that need to appeal to their customers. Some new gTLDs will depend on providing and reinforcing their message on a registrar site and they are the best choice to create that registrar. An inability to target their market and provide end-to-end reinforcement of that message could seriously damage the prospects of that gTLD.

(8) The restrictions would harm ICANN's credibility. Keeping anti-competitive restrictions from another era would inevitably have led to accusations that ICANN was trying to fix the economic landscape of new gTLDs. *Minds + Machines (8 Dec. 2010). Bayern Connect (8 Dec. 2010). Demand Media (8 Dec. 2010). AusRegistry (9 Dec. 2010). dotMusic (10 Dec. 2010).*

The Board decision to allow cross ownership was wise and will benefit the Internet community. *E. Pruis (6 Jan. 2011).*

Eligibility (1.2.1). IBM appreciates ICANN's decision to not create new rules prohibiting registrars from applying for or operating new gTLD registries. IBM supports the additional enforcement mechanisms added in lieu of the previously proposed restrictions on cross ownership. *IBM (10 Dec. 2010).*

Additional time for consideration of new VI approach. The Board's entirely new approach to Vertical Integration (the linchpin of which is a draft "Registry Operator Code of Conduct"—Specification 9 to the draft Registry Agreement) was first announced in a resolution adopted at an unscheduled Board meeting held seven days prior to the release of the proposed final AG. This initiative, floated in the proposed final AG, deserves much more than 28 days of review, discussion, and public comment before being adopted. To take just one example, section 1(c) of the Code of Conduct raises numerous issues regarding how it will be applied in specific instances (e.g., .brand TLDs) and how it will operate in conjunction with other policies such as those dealing with the warehousing of domain names. COA looks forward to a full discussion of the draft Registry Code of Conduct and of the Board's sudden reversal of its position on VI. COA questions if such a discussion will ever occur if the Board acts on the guidebook in Cartagena. This rushed process is no way to resolve intelligently such a complex and consequential issue. *COA (3 Dec. 2010). INTA (8 Dec. 2010). Hogan Lovells (9 Dec. 2010). Time Warner (9 Dec. 2010). IPC (9 Dec. 2010). P. Tattersfield (10 Dec. 2010).*

ICANN has failed to take into account the impact of the new VI decision on Registry Agreements.
ICANN has not indicated when and how it will refer a registry/registrar to a competition authority when abuse of power arises. ICANN has failed to fully develop and think through the requirements for Registry Agreements and should not now rush to consider the AG to be final as it will be the foundation for operation and compliance with respect to the expanded Internet. *INTA (8 Dec. 2010).*

The Board erred in the VI decision. *E. Brunner-Williams (16 Jan. 2011).*

Consumer protection. ICANN does not protect consumers when considering registry contractual changes. With Vertical Integration even registrars would not be looking out for consumers anymore. *G. Kirikos (13 Nov. 2010).*

Competition issues. There is a lack of any formal structure for determining when to make a referral to a competition authority. Given concerns about ICANN's lack of compliance resources, how will this be policed? *BBC (10 Dec. 2010).*

What will trigger referral of competition issues to competition authorities? How will the triggers be developed and by whom? RySG (7 Dec. 2010)

Existing registries. How will existing registries be able to participate in the opportunity for VI? What specific conditions and requirements would apply if an existing registry decides to transition to the new form of the agreement (and how will they be determined and by whom)? *RySG (7 Dec. 2010)*

.Brand TLDs.
Single registrant-single user domains enabled by the VI decision will simplify and hasten the ability of large brands to take advantage of the coming innovation. *Tucows (8 Dec. 2010). Bayern Connect (8 Dec. 2010).*

COA is acutely interested in the impact of the Board's new VI policy on so-called .brand TLDs. While there is no evident reason why TLD registries in this category should be barred from controlling their own accredited registrar, it is equally unclear why they should be barred 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. The Board's VI decision addresses the first issue (though in an overbroad way, extending to every TLD registry of any description) but it leaves the other two unaddressed. *COA (3 Dec. 2010).*

While the Board eliminated VI restriction in this version of the guidebook, Module 5 still includes provisions that could unduly restrict how a single registrant TLD distributes and manages lower-level registrations that are entirely under their ownership and control. Changes should be made to remove those restrictions. *BC (6 Dec. 2010).*

This exception should be inserted: "A single registrant ('dot brand') Registry Operator must use an ICANN accredited registrar, but is not required to provide non-discriminatory access to all registrars where any name permitted for registration at the second level must be under the control of the Registry Operator or its affiliates." The Registry Agreement should not unduly restrict single registrant TLDs from using only a wholly-owned or closely affiliated registrar to register and manage names that it controls (e.g., for divisions, product lines, locations, etc.) *BC (6 Dec. 2010).*

Brand owners running a TLD for their own use should not be required to implement nondiscriminatory access to all ICANN accredited registrars. Brand TLDs should have complete control over which registrars can register a domain name in their zone. Section 2.9 of the draft registry agreement should clearly state that registries, through their ICANN-approved Registry-Registrar Agreement, are allowed to control access to their registries. *UrbanBrain (14 Jan. 2011).*

RySG suggests lifting this requirement or at a minimum define for which purposes the domains could NOT be used if registered through an owned or closely affiliated registrar. The continued requirement to use a third party registrar for dot Brand TLDs could have the unintended effect of suppressing interest from the brand community towards applying for a brand TLD. *RySG (7 Dec. 2010).*

Analysis of Comments

The history and evolution of the ICANN Board's position on vertical integration is detailed in a draft rationale document posted at <http://www.icann.org/en/minutes/draft-cross-ownership-rationale-04feb11-en.pdf>. The Board has determined that there has been sufficient community discussion and expert analysis of vertical integration issues and has determined to move forward with eliminating vertical integration contractual barriers as unnecessary for the protection of consumers and the development of the expanded DNS marketplace.

ICANN recognizes that consolidation in the registry/registrar industries could raise competition issues. As such, ICANN has expressly retained the right to refer potential cross ownership arrangements to applicable competition authorities. ICANN requires flexibility in how and when it makes the decision to refer these matters to competition authorities. Specific criteria for such referrals are not appropriate in the registry agreement or the applicant guidebook. It is important to note that under current law in many jurisdictions any aggrieved third party may attempt to refer business arrangements to competition authorities for investigation of possible abuses, but the competition authority itself retains the power to act to remedy such abuses.

As indicated in the Board resolution on vertical integration on 5 November 2010 <http://www.icann.org/en/minutes/resolutions-05nov10-en.htm>, ICANN will allow existing registry operators to transition to the new form registry agreement that does not contain restrictions on vertical integration, subject only to any reasonable restrictions or conditions that may be necessary related to the legacy TLD.

Per Principle 19 set forth in the GNSO's Final Report – Introduction of New Generic Top-Level Domains, "Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars." The GNSO report did not provide for different treatment for so called ".brand" TLDs. It would be inappropriate to include a provision in the registry agreement for new TLDs that is contrary to GNSO guidance on the new gTLD program.

Pricing

Key Points

- As previously described, price caps will not be implemented for new gTLDs but measures are instituted to prevent opportunistic behavior when registrations are renewed.

- The pricing provisions with respect to renewal registrations will be revised to address RySG concerns around temporary targeted marketing programs.

- The 10-year limitation of the term of registrations is intended to promote Whois accuracy and domain utilization.

Summary of Comments

Price Caps. ICANN continues to refuse price caps to protect consumers and will put the burden on governments to fix any future abuses of market power. *G. Kirikos (13 Nov. 2010).*

The pricing provisions for registry services should be removed. The AG contains notice requirements for price increases (30 days notice or initial registrations; 180 days notice for renewals). These rules would create a disparity between new TLD and existing TLD pricing policy and practices. ICANN's framework provides no basis for ICANN to dictate registry pricing policies and practices. ICANN has established that there will be no price caps for new TLD contracts and has decided to allow full VI of registries and registrars, absent market power and a determination by a competition authority in instances where market power may be a factor. *RySG (7 Dec. 2010).*

Pricing provisions should be revised to give registries flexibility in pricing and marketing. As currently written, section 2.10(b) would unduly restrict registries from engaging in seasonal and targeted marketing programs and/or responding to changes in market conditions with the potential effect of actually reducing registries' ability to compete on price. RySG recommends that the section be revised to allow registries to engage in marketing and promotional programs directed at encouraging renewal registrations in the same manner as section 2.10(a) would allow such programs for new registrations. *RySG (7 Dec. 2010)*

Renewals. We see no good reason why a renewal system should be obligatory for new gTLDs and urge the ICANN to adapt the AG to make innovations or at least the use of different proven systems in this field possible. This would mean making changes to the base agreement (2.10 pricing and specification 6, paragraphs 3 and 8, as specifically noted in SIDN's comments). To avoid any doubts for now and the future we suggest adding in the contract (art. 2.2. or Specification 1) that "Consensus policies specifically aimed at a system where Registry Operator offers domain name registrations for fixed periods of time are not applicable in the case where Registry Operator offers domain name registrations for an indefinite period of time with the possibility of termination." *SIDN (9 Dec. 2010).*

Registration term. The proposed Registry Agreement retains what appears to be a legacy provision restricting registries to offer registration terms of no more than 10 years. This limits opportunities for registrants, registries, registrars and back end providers, all of whom might benefit from greater flexibility. The registry and others in the chain should be permitted to offer alternative registration periods as long as they clearly and accurately describe their offerings. *W. Seltzer (10 Dec. 2010).*

Analysis of Comments

As detailed in previous comment analyses, after extensive discussions and expert consultation, the Board has determined that price caps are neither necessary nor appropriate for the new gTLD round. For additional background, please refer to <http://www.icann.org/en/announcements/announcement-06jun09-en.htm>.

As discussed with the RySG and other interested parties on the Temporary Drafting Group call on 27 January 2011, ICANN staff understands the concern with the restriction on differentiated pricing for renewals of registrations in new gTLDs and that they might discourage marketing programs and discounts that would be beneficial to registrants. The forthcoming draft of the registry agreement will be revised to attempt to alleviate these concerns with respect to targeted, short-term marketing programs. However, the exceptions will be drafted narrowly with the understanding that the purpose of the provision is to prevent abusive pricing practices with respect to registration renewals.

With respect to the limitation on the term of registrations of 10 years, this provision has been included in all of ICANN's gTLD registry agreements since 1999, and there does not appear to be any compelling reason to remove it. Requiring registrations to be renewed at least once every ten years has the beneficial effect of promoting Whois accuracy and domain utilization (by allowing domains to expire eventually if they are no longer used or no longer have accurate contact information). Also, potential income from future domain renewals could promote long-term registry financial stability and increase the chance that a successor operator would be willing to take over operation of a registry in the event of a registry operator's business failure.

Other Registry Operator Covenants

Key Points

- The proper forum for discussions regarding modifications to the UDRP is ICANN's GNSO, and extending new UDRP-related obligations to registries should be discussed in that context rather than through contractual obligations for new gTLD registry operators.

- The contractual compliance audit provisions will be revised to clarify that ICANN may conduct an audit regardless of whether or not Registry Operator has paid the costs and expenses of that audit.

Summary of Comments

Compliance with UDRP decisions. A Registry Operator's obligation to comply with UDRP decisions should be added to Section 5.4.1 and wherever else appropriate in the AG. Past instances of registrar noncompliance with UDRP decisions unfortunately suggest the advisability of this belt and suspenders approach in order to provide relief and ensure implementation of UDRP decisions, without resort to ICANN's overburdened compliance staff. *INTA (8 Dec. 2010)*

Auditing for Compliance (2.11).
Section 2.11 should provide that non-payment of registry fees shall not be a reason for ICANN to delay a registry audit that is otherwise called for. In situations where the Registry Operator must pay audit expenses, ICANN should ensure that delays in payment do not delay or undermine a compliance audit. The Board's decision to eliminate restrictions on cross ownership and VI will likely result in gTLD registry operators being affiliated with registrars. This will cause the TLD operator to pay the cost of audits of their own contractual and operational compliance. The BC is concerned that payments could be withheld or delayed in order to delay or distract auditors from compliance audit tasks. Contractual and operational compliance is ultimately the responsibility of ICANN, not the Registry Operator. ICANN may need to outsource audit services; the decision to outsource does not enable ICANN to escape accountability for non-compliance by its contracted Registry Operators. *BC (6 Dec. 2010).*

Analysis of Comments

The UDRP is ICANN's oldest consensus policy, dating to 1999. It imposes obligations only on registrars, not on registries. The proper forum for discussions regarding modifications to the UDRP is ICANN's GNSO, and extending new obligations to registries should be discussed in that context rather than through contractual obligations applicable only to new gTLD registry operators. Any alleged non-compliance by registrars with their obligations under the UDRP should be brought to the immediate attention of ICANN's contractual compliance and legal teams.

The provisions of Section 2.11 of the proposed registry agreement will be revised to clarify that the costs or expenses of any audit that are the responsibility of the Registry

Operator will be reimbursed to ICANN after the audit has been conducted. The initial costs will be paid by ICANN and no delay in the audit function will take place. See also the Analysis and Proposed Position with respect to the draft Registry Operator Code of Conduct below for additional clarification on the circumstances under which Registry Operator will be required to reimburse ICANN or the costs and expenses of compliance audits.

Termination

Key Points

- Changes consistent with the RySG's requested revisions to ICANN's termination right for bankruptcy related actions and certain criminal convictions will be made to the next version of the registry agreement.

- Terminations related to RPMs will be governed by the applicable RPM and it is not appropriate to require additional findings in order to initiate such a termination.

- If Registry Operator intends to continue its registry operation business in spite of an ICANN breach, it may pursue other remedies under the registry agreement in lieu of termination.

Summary of Comments

Bankruptcy related termination. Section 4.3(d) is problematic. The language should be changed at least as follows: "(iii) attachment, garnishment or similar proceedings are commenced against Registry Operator and represent a substantial threat to continued operation of the registry by the operator, and not dismissed within …(60) days of their commencement." *RySG (7 Dec. 2010)*

Termination related to criminal convictions. ICANN can terminate the new gTLD Registry Agreement by conviction of an officer or Board member for financial activities with no clear opportunity to cure. These new grounds for termination are ill defined as they do not require knowledge or culpability on behalf of the operator, and do not require that the conduct relate to the registry business. The new gTLD Registry Agreement should provide an explicit opportunity to cure this basis for termination. This section should be revised with the language recommended by RySG in its comments. *RySG (7 Dec. 2010).*

Termination related to compliance with RPMs. This section should be revised to make it consistent with other termination provisions, as follows: "ICANN may, upon thirty (30) calendar days' notice to Registry Operator, terminate this Agreement pursuant to Section 2 of Specification 7, subject to Registry Operator's right to challenge such termination as set forth in the applicable procedure, if an arbitrator or court has finally determined that Registry Operator is in fundamental and material breach of such Section 2 of the Specification, and Registry Operator fails to comply with such

determination and cure such breach within (10) calendar days or such other time period as may be determined by the arbitrator or court." *RySG (7 Dec. 2010)*

Termination related to failure to meet DNS DNSSEC SLAs based on new measurement methodologies. The language should be revised to state: "propagation will be initiated within 60 minutes" not "completed within 60 minutes." *RySG (7 Dec. 2010).*

Termination by Registry Operator. RySG repeats the same concerns it raised in its AGv4 comments which were not addressed by ICANN: termination of the agreement by a registry for an ICANN breach that is not cured is not a very viable option and would leave various issues unresolved. Service level agreements should also be established for ICANN. *RySG (7 Dec. 2010)*

Automatic extension. Language should be added to allow for the automatic extension of a term if the Registry Operator and ICANN are negotiating a renewal in good faith. *RySG (7 Dec. 2010)*

Analysis of Comments

ICANN's termination right with respect to bankruptcy related actions and convictions of officers or directors of Registry Operator of certain crimes will be revised in a manner consistent with the RySG's comments.

ICANN's termination right with respect to non-compliance with the RPMs set forth in Specification 7 was revised in the last version of the draft registry agreement to make clear that such termination right was subject to the rights of Registry Operator set forth in those RPMs. It would not be appropriate to require ICANN and the Registry Operator to comply with the enforcement and appeal mechanisms of each RPM and then to require ICANN to bring an arbitration claim and show violations of the RPM in order to enforce ICANN's right to terminate the agreement. The procedures and mechanisms of each RPM are standalone provisions and so long as ICANN has complied with those procedures and mechanisms, if ICANN is permitted to terminate the registry agreement under a specific RPM, it is appropriate to allow it to do so without resorting to additional procedural dispute resolution mechanisms.

The thresholds for technical compliance set forth in Specification 6 are under ICANN and community review and will be revised in the next version of the registry agreement.

Registry Operator's right to terminate the registry agreement in the event of an ICANN breach pursuant to Section 4.4 is intended to allow Registry Operator to exit the registry operation business in the event that it determines that its business is no longer viable as a result of the ICANN breach. If Registry Operator wishes to continue operating the registry in spite of ICANN's breach, it may seek other remedies under the registry agreement, including damages and specific performance, through the dispute resolutions provisions provided in Article 5. Subjecting ICANN to service level

requirements is still open to discussion, but no concrete proposals have been put forward to date.

Given the long-term nature of each registry agreement and Registry Operator's ability to initiate extension negotiations with ICANN at any time, it would not be appropriate to allow for automatic extensions based on ongoing good faith negotiations. It is the responsibility of ICANN and the Registry Operator to negotiate extensions in a timely fashion.

Transition following Termination

Key Points

- In response to numerous comments, ICANN will include proposed language in the next draft of the registry agreement for community review and feedback that would provide for alternative transition arrangements for single-registrant/single-user gTLDs.

Summary of Comments

.Brand Termination. This exception should be inserted: "4.5 shall not apply to single-registrant ('dot brand') Registry Operators which own the intellectual property rights of the applied for TLD." Single registrant TLDs will be operated by entities whose IP rights survive any termination of their registry operating agreement with ICANN. Moreover, all second level domains would be under control of the TLD operator, who is in the sole position to determine whether interests of domain owners are better served by transition or outright termination of the gTLD. In situations where a single-registrant owns or controls all second level domains, an expiration or termination of the gTLD may lead to the closure of the gTLD or transfer to a new entity by a bankruptcy court or administrator instead of transition to a new operator. In these circumstances, the registry operator has reason to deny transition or transfer of registry data to a new operator designated by ICANN. Where ICANN transitions a single-registrant (dot brand) TLD to a new operator, IP rights of the original operator should not be conveyed to the new operator or to ICANN, as transferring registry data may reveal trade secrets to a third party, including customer lists. *BC (6 Dec. 2010).*

Microsoft has appended Attachment A to its comments (proposed amendment to the Registry Agreement) to address its concerns that registry operators of .brand TLDs must have discretion to terminate operation of the .brand TLD registry without concern about ICANN's transition of the TLD to a third party, possibly a competitor. *Microsoft (9 Dec. 2010).*

ICANN should remove transitions for .brands and adopt as mandatory the "wind down" proposal set forth in IPC's comments which will provide .brand registries with the ability to rationally exit registry activities without losing control of their brands and existing trademark rights. *IPC (9 Dec. 2010).*

A .brandname/.companyname TLD should have a phase-out mechanism that would allow the registry to discontinue operations after a certain number of years. The details of such a phase-out period should be negotiated between ICANN and the brand TLD operator and be included in the final registry agreement with the brand holder. *UrbanBrain (14 Jan. 2011).*

Analysis of Comments

ICANN recognizes that delegation of some ".brand" TLDs 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. While considerable effort has been devoted to developing a clear set of rules regarding when a TLD should be transferred and when a TLD should close, not have yet been found to be acceptable. For every potential set of rules developed, an exception or potential abuse has been found to render that rule set ineffective. Thus far, the only viable alternative is to provide this discretion to sunset in the registry agreement. ICANN and the community continue to work on options for a set of rules or to better convey the intent of the discretion. In the limited case of .brand and other TLDs that operate as single-registrant/single-user TLDs it would probably make sense to not force an outgoing operator to transition second-level registration data (since presumably the operator could just delete all the names as the registrant anyway and then there would be nothing to transition), and therefore ICANN will put forward proposed language for community review and feedback that would provide for alternative transition arrangements for single-registrant/single-user gTLDs.

Dispute Resolution

Key Points

- ICANN has previously accepted a compromise position on the use of arbitration panels.

- The ICC is an appropriate forum for registry agreement disputes.

Summary of Comments

Number of arbitrators. RySG applauds the allowance of additional arbitrators when exemplary or punitive damages or operational sanctions are being sought, but this should be extended to situations where the monetary relief sought exceeds $1 million. Further as the decision to seek punitive or exemplary damages is solely within ICANN's control, fairness and due process considerations should provide that extending the hearing beyond a single day should not require both parties to agree. Either party should be able to request that the hearing be extended beyond a single day which

request the arbitrator must grant if reasonable. The provision's language should be revised as recommended in RySG's comments. *RySG (7 Dec. 2010)*

Forum for arbitration. Section 5.2 should be revised to allow the parties to decide the forum of arbitration. There is a potential conflict of interest using the International Chamber of Commerce (ICC) as ICC is an ICANN vendor for LPI and Community disputes. If there are concerns that the parties cannot agree on an arbitration forum, ICANN can propose a list of default arbitration forums which must include additional internationally recognized forums other than ICC, such as WIPO or CMAP. *IPC (9 Dec. 2010).*

Analysis of Comments

After numerous rounds of comments and discussions, ICANN agreed to add the right to have arbitration heard before three arbitrators in the event that ICANN was seeking extraordinary remedies (i.e. punitive or exemplary damages or operational sanctions). Claims for monetary damages (even large claims) do not require multiple arbitrators to adjudicate and the additional expense associated with a multiple arbitrator panel is not justified in the event of such claims.

In response to comments, the arbitration provision will be revised to provide for an additional day to conduct a hearing in the event that the arbitrator(s) determines it to be necessary, either on its own determination or at the reasonable request of one of the parties.

The International Court of Arbitration of the International Chamber of Commerce is recognized as an objective and efficient arbiter of disputes in the international community. Disputes surrounding what forum to pursue an arbitration claim in would add needless additional complexity and expense to arbitration claims.

Fees

Key Points

- ICANN acknowledges that prospective registry operators would prefer not to have to pay for the cost of their registry service innovations. However, ICANN lacks the resources to absorb these costs.

Summary of Comments

Cost Recovery for RSTEP. RySG repeats its previous comments that this provision should be reconsidered in light of the strongly negative effect it could have on innovation in the TLD space. *RySG (7 Dec. 2010)*

Analysis of Comments

The cost for convening a Registry Service Technical Evaluation Panel will be the responsibility of the registry operator seeking to benefit from the proposed new service. It should be noted that such proposed new services are only referred to such panels if ICANN reasonably determines that the proposed new service might raise significant stability or security issues. 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. Also, ICANN is a not-for-profit and if registry fees and other sources for revenue cover these costs going forward, the direct RSEP fee may be eliminates. However, in the near term, the uncertainty of costs require that fees matching the RSTEP costs should be paid.

Definition of Security and Stability

Key Points

- The specific uses of the defined terms "Security" and "Stability" in the context of the registry agreement have been reviewed and found to be reasonably appropriate.

- The appropriate forum for altering the definitions is the Consensus Policy process.

Summary of Comments

RySG repeats and refers to its recommendations made in its AGv4 comments on changes to the definitions of security and stability, which were not made in the current AG. *RySG (7 Dec. 2010)*

Analysis of Comments

The specific uses of the defined terms "Security" and "Stability" in the context of the registry agreement have been reviewed and found to be reasonably appropriate.

The terms "Security" and "Stability" were defined in ICANN's Registry Services Evaluation Policy, and any change to their use in that context should be reviewed through the Consensus Policy process. The revised draft of the registry agreement will provide that the definitions may be amended and restated through the Consensus Policy process. As noted in response to earlier comments on this subject, the definitions are intentionally broad in order to take into account the security and stability of Internet systems outside of registries that rely on the stable and secure operations of registry

infrastructure. If there are any specific instances in the agreement where commenters believe the terms might be used inappropriately, commenters are invited to send specific suggested edits along with rationale for the proposed changes.

Change in Control of Registry Operator

Key Points

- Appropriate changes to the notice periods in the change in control provisions will be made in the next version of the registry agreement.

Summary of Comments

Notice periods. ICANN has 60 days to notify Registry Operator that it does not consent, while Registry Operator only has to give 30-day notice of a Change in Control or material sub-contracting arrangement. The last sentence of section 7.5 should be revised as RySG recommends in its comments (make the standard ICANN timeframe 30 days unless ICANN has requested additional information, which would provide ICANN with 60 days). RySG also refers ICANN to its previous AGv4 comments in which it made additional suggestions regarding section 7.5 for which there was no response or changes made by ICANN. *RySG (7 Dec. 2010)*

Analysis of Comments

ICANN will clarify the notice periods and timing requirements for ICANN review of change in control and material subcontracting arrangements in the next version of the registry agreement, consistent with the comments of the RySG.

Additional comments submitted by the RySG to this provision were addressed in the comment analysis of AGv4. The RySG has not provided any additional detail regarding potential legal violations that would require revisions to the language of this provision.

Escrow – Specification 2

Key Points

- The final RFC related to data escrow is in process and registry operators will be expected to comply with the RFC in force at the time of the execution of the registry agreement.

- An escrow agent that can demonstrate the capability to fulfill the technical and legal requirements of Specification 2 will generally be acceptable to ICANN.

- Escrow release triggers are intended to be broad for the protection of registrants.

Summary of Comments

Deposit Format. To RySG's knowledge there is not and never has been a finalized RFC related to data escrow. What will be the required timeframe to update data escrow upon subsequent RFCs, assuming a final RFC is approved? Absent specific requirements there is likely to be a high variance across registries. *RySG (7 Dec. 2010)*

Extensions. This section is highly generic with little framework around what registry services require escrowing, leaving this open and subject to variances in application of the rule. *RySG (7 Dec. 2010)*

Processing of Deposit Files. These requirements may be difficult to integrate into a full end to end solution with the escrow agent. *RySG (7 Dec. 2010)*

Notification of Deposits. This will be an onerous process and seems redundant; if ICANN is being notified by the escrow provider of the deposit, then why does the registry operator need to do the same? What happens when the registry operator notifies of a submission and the escrow operator provides a conflicting report? How is the following to be implemented: "the Deposit has been inspected by Registry Operator and is complete and accurate"? Is a person expected to inspect it each day? *RySG (7 Dec. 2010)*

Escrow Agent. It seems odd that ICANN would not publish requirements for escrow agents to help streamline registry implementation timelines and make the process more efficient. What are the criteria that ICANN will use when determining whether an escrow agent is authorized to enter into an agreement? *RySG (7 Dec. 2010)*

Escrow data access. Registries' experience has shown that deposits are subject to technical issues at the agent's end, the registry end, or during the transmission. The language seems really aggressive in terms of allowing ICANN to access the escrow data given possible failure in transmission without much time for remediation or even mention of an issue with the escrow provider. *RySG (7 Dec. 2010)*

Analysis of Comments

There is no requirement to implement each of the draft RFCs with respect to data escrow. ICANN expects that the final RFC will be in place prior to the execution of registry agreements for new gTLDs. In the event that the final RFC is not in place, registry operators will be required to comply with the most recent draft of the RFC and will be required to implement changes within 180 days of the adoption of a new or revised RFC.

Data relating to all Registry Services (as defined in the registry agreement) is required to be escrowed. ICANN will work with the registry and escrow agent community to ensure that a full end-to-end solution is feasible.

An escrow agent that can demonstrate the capability to fulfill the technical and legal requirements of Specification 2 will generally be acceptable to ICANN. Specific

published requirements for escrow agents in addition to the requirements in the registry agreement are not necessary and may unduly limit the number of qualified escrow agents.

ICANN expects to receive reports from both the escrow agent and the registry operator. If there is a discrepancy in the reports, registry operator is expected to reconcile that discrepancy to ensure accurate escrow data. The method for inspecting the data is at the discretion of registry operator.

The escrow release triggers are intended to protect registrants in the TLD. ICANN will use its discretion in determining to require an escrow release in the event of immaterial transmission errors.

Whois – Specification 4

Key Points

- It has been determined that searchable Whois will not be a requirement of new gTLDs, but that additional points will be awarded during the application process for those prospective registry operators that wish to provide this service voluntarily.

- ICANN staff is committed to enforcing compliance with thick Whois requirements.

- Specific verification procedures could be specified by ICANN at the registrar level rather than the registry level and such procedures are subject to Consensus Policy development.

- It is ICANN's intention that the ZFA Plan will be expressly integrated into the registry agreement.

Summary of Comments

Fully Searchable Registry Whois. Revised criterion 26 invites confusion and misunderstanding. ICANN is inexplicably condemning the provisions it entered into with the 3 existing registries (.mobi, .asia, .post) and stipulating that while an applicant can receive "extra credit" in the application for offering fully searchable Whois, it only receives that credit if the facility is not open to all members of the public but only to those who qualify as "legitimate and authorized users," apparently as defined by the registry. In effect this arrangement would penalize registries that choose to operate their Whois service as ICANN states is required by the .mobi, .asia or .post agreements. The real danger is that registries may lose sight of the fact that they are required to offer "plain vanilla" Whois service, fully compliant with Specifications 4 and 6, to all members of the public without imposing a gatekeeping function, and regardless of whether or not they also offer fully searchable Whois to a select group. ICANN should spell this out and also remove the provision under which a registry applicant forfeits its extra credit in this

area if it does what ICANN says 3 existing registries have been required (in some cases for the past 4 years) to do. *COA (3 Dec. 2010). IPC (9 Dec. 2010).*

Reinstate searchable Whois.
Because the removal of the requirement for searchable Whois hampers UDRP complainants' ability to show a pattern of bad faith registrations, MarkMonitor requests that the requirement for searchable Whois be reinstated. *MarkMonitor (Module 5, 7 Dec. 2010).*

ICANN should retain the requirement and reaffirm its past community-developed guidance on fully searchable thick Whois for the new gTLDs and eliminate the ambiguity in section 5.4.1. *INTA (8 Dec. 2010). IACC (9 Dec. 2010). Microsoft (9 Dec. 2010). BBC (10 Dec. 2010). RE/MAX (10 Dec. 2010).*

Whois compliance.
ICANN must also improve Whois compliance efforts to maximize value from searchable Whois. *Microsoft (9 Dec. 2010).*

Whois has been an area of grave concern and frustration especially in having inaccurate records in UDRP proceedings. ICANN's request for more comment on Whois is an empty gesture if ICANN does not take the comments into account and is not transparent about how it will process those comments and make some real changes in a new version of the guidebook. *CADNA (10 Dec. 2010).*

Whois privacy/proxy service rules. Whois privacy/proxy service rules should be regulated more strictly to ensure that mechanisms to reveal undisclosed information be implemented if particular circumstances so require. Currently, no specific rules exist on this issue. Many Registrars ensure the possibility to request the disclosure of the registered domain holder data, whenever these data have been concealed for privacy protection of individuals. This is achieved by filing an expressed and motivated request to that effect. The concerned Registrars reveal the registered domain holder information once they have verified that the petitioner has a legitimate reason for obtaining the data. This is a good approach to balancing the needs of trademark owners and privacy/proxy service providers and ICANN should work toward the achievement of this goal. *ECTA (28 October 2010) attachment to MARQUES/ECTA(10 Dec. 2010).*

Thick Whois Model. Telstra strongly supports a mandatory obligation for all new registries to provide Whois information under the thick Whois model, meaning that one Whois service stores the complete Whois information for all registrars. This information is essential for the transparent and effective operation of the URS in an environment of potentially hundreds of new gTLDs. *Telstra (23 Dec. 2010).*

Whois verification. We have proposed numerous times that all domain names be subject to Whois verification (i.e. mailed PIN codes to physical addresses of registrants) to curb abuse. ICANN ignored this proposal. This proposal would have the strong backing of the intellectual property constituencies as well as the support of most

legitimate domain name registrants. It should be a precondition to any new TLD expansion. *G. Kirikos (13 Nov. 2010). G. Kirikos (10 Dec. 2010).*

Registration Data Publication Services. Paragraph 2.1. provides that Registry Operators will make zone files available as per the ZFA plan. The contract provides a link to the ZFA Plan, which has not been finalized. Since the ZFA is an extra-contractual document that could be changed over time, and registry operators will be required to adhere to it, RySG wants assurance that changes to the ZFA will go through an appropriate process. Provision of zone files is a registry service, as mentioned in Specification 6 section 2, which normally would be subject to GNSO Consensus Policy process. *RySG (7 Dec. 2010)*

Analysis of Comments

The issue of searchable Whois was referred by ICANN to the ICANN Board Data Consumer Protection Working Group <http://www.icann.org/en/committees/consumer-protection/>. The DCP-WG's final report noted "The DCP-WG advises the Board that making searchable Whois mandatory is a policy matter that would have to be referred to the GNSO, but we accept it being optional as proposed in current version of the Applicant Guidebook. We flag that there are consumer and data protection issues that could be raised through a searchable Whois system." <http://www.icann.org/en/committees/consumer-protection/report-on-recommendations-07dec10-en.htm>.

At its meeting in Cartagena, the ICANN Board adopted this recommendation and therefore searchable Whois will continue to be offered at the option of each registry rather than as a mandate applicable to all new registries. This is consistent with the current gTLD agreements, a few of which (.mobi, .asia, .post) do mention that searchable Whois will be offered. The provisions governing the searchable Whois requirements in each of the current registry agreements that provide for it were inserted voluntarily by the applicable registry as part of the negotiation process and were not required by ICANN. Those provisions all mention that the service would be offered "subject to applicable privacy policies," and therefore the guidebook's approach of taking into account privacy considerations is not inconsistent with current practice. ICANN will review the language of the agreement to ensure as requested by comments that it is clear that registries are required to offer "plain vanilla" Whois service, fully compliant with Specifications 4 and 6, to all members of the public without imposing a gatekeeping function, and regardless of whether or not they also offer fully searchable Whois to a select group.

ICANN compliance staff is committed to enforcing compliance with thick Whois requirements and will continue to explore ways to improve Whois record keeping practices. An ICANN operational readiness plan is on place for scaling to address the needs of an expanded marketplace.

Whois "verification" is the subject of Registrar Accreditation Agreement section 3.7.8, which provides that registrars will comply with any Consensus Policies established by ICANN "requiring reasonable and commercially practicable (a) verification, at the time of registration, of contact information associated with a Registered Name sponsored by Registrar or (b) periodic re-verification of such information." Any new Whois verification requirements for gTLDs should be discussed and approved through the GNSO. ICANN's approach in developing the new gTLD program has been to maintain the status quo on Whois to the extent possible, and to not make substantial changes to Whois requirements without the benefit of bottom-up policy development discussions.

It is ICANN's intention that the ZFA plan will be finalized prior to launch of new gTLDs via a collaborative process with relevant community members and the operative provisions of that plan will be inserted into Specification 4 and thus become a part of the registry agreement. The plan could then be amended through the agreed process available for amendments to the registry agreement itself.

Reserved Names – Specification 5

Key Points

- Use of "geonames" at the second level is expressly contrary to existing GAC advice regardless of the type of TLD attempting to register such names.

- Continuing discussions surrounding the allowance of single character labels and two-character IDN labels will be considered in the revised draft of Specification 5.

- ICANN relies on the ISO 3166-1 listing of country and territory names as an objective listing of appropriate restricted names.

Summary of Comments

.Brand TLDs. Brand TLDs should be allowed to avoid the requirement in Specification 5 that if they require use of a geoname (e.g. ".jp") at the second level they must first initially reserve names on the ISO 3166-1 list. Brand TLDs pose no threat to governments or geo-name abuses. *UrbanBrain (14 Jan. 2011).*

An exception should be added for single registrant TLDs with respect to geographical names at the second level. Single registrant (dot brand) TLDs will reasonably want to create second level domains for their operating units or chapters in each country or region (e.g. Canada.canon or Haiti.RedCross). *BC (6 Dec. 2010).*

Single character and two character IDN gTLDs. This specification contains no mention of ongoing discussions around single character gTLDs or allowance of two character IDN gTLDs at the second level. RySG recommends that this be corrected. *RySG (7 Dec. 2010)*

Sovereign status of Indian tribal governments. ICANN should include Indian tribal governments within the ISO 3166-1 listing of country and territory names which are granted special reservations and protection under Specification 5 of the guidebook. This is essential to ensure that tribal governments are able to operate without confusion over official government websites and the vital information that is provided on issues ranging from tribal elections, to emergency services, to tribal school and health facilities. The U.S. government list of federally recognized tribal governments, published on a regular basis, could serve as a starting point for protection of tribal names (see, e.g., Federal Register, Oct. 1, 2010, Vol. 75, No. 190, page 60810). Tribes have a unique status under the U.S. Constitution and numerous federal laws, treaties and federal court decisions and they need the same level of protection in the guidebook as what is afforded other countries and territories listed within ISO 3166-1. Only tribal government websites should be authorized to use a tribal name gTLD, unless express consent is granted by the tribal government. There are also strong intellectual/cultural property reasons to protect tribal names. Tribes have a strong interest in ensuring that their names are not used for inappropriate or exploitive purposes. Many tribes have limited resources and might be hard-pressed to find resources to withstand the stringent appeal process of the proposed guidebook. Their scarce resources are better used to support community programs and economic development. *National Congress of American Indians (11 Jan. 2011).*

Analysis of Comments

Based on advice from ICANN's Governmental Advisory Committee, registries will be prohibited from registering country and territory names at the second level in new gTLDs. These second-level names can be released using a ".info type" procedure. Further study and GAC consultation would be required before granting exceptions to this general prohibition for certain types of TLDs, including ".brand" TLDs. See fuller discussion in the Geographic Names discussion.

ICANN will review the wording of specification 5 with respect to whether or not single-character and two-character IDN labels should be reserved and will revise if appropriate to ensure clarity and to track agreed outcomes based on community discussions.

ICANN acknowledges that numerous groups would like to be afforded the same treatment in terms of registration restrictions as countries as territories that are included on the list of the ISO 3166 list. However, ICANN has relied since its founding on ISO 3166-1 as an objectively and externally developed list of country and territory names. ICANN prefers to rely on official published lists applicable on a global basis. Future changes to the schedule of reserved names could be developed through ICANN's GNSO.

Functional Specifications – Specification 6

Key Points

- ICANN technical staff is currently engaged in productive discussion with members of the registry community and other interested parties regarding revisions to the SLAs that will alleviate the concerns of the RySG.

Summary of Comments

EPP and RDPS SLAs measurement—because of problems with new plan, RySG requests a return to historical methods. If ICANN's goal is to verify the functioning and general responsiveness of registry systems (as ICANN does now by pinging registrar Whois servers), there is no impediment to doing that separately, and outside the contractual framework. Further, RySG questions whether ICANN has the need or ability to meet all of the operational requirements for connecting to the registry SRS, including maintaining ACL certificates, login credentials, system updates, etc. *RySG (7 Dec. 2010). AFNIC (9 Dec. 2010).*

The impact of ICANN's abandoning the existing model and going to a new plan as stated in the current AG version 5 (to build an SLA monitoring system) on this measurement is that registry performance reporting will be inconsistent between SLA performance that is visible to the registry and that which is visible to ICANN, and not accurate to actual performance. This could easily result in erroneous SLA violations and contract breach when a registry is actually operating in a fast and highly available fashion. Measurements under this new plan may yield highly variable results for any given registry depending upon network conditions and will yield higher numbers than currently seen in ICANN registry reports. The new system will disadvantage registry operators that are located farther from ICANN's monitoring system, or are located in developing countries that do not have high bandwidth. While ICANN plans to publish the results publicly, the new system will offer no real consistency and no basis for comparison, making some registries look worse (or even non-compliant) than others without basis. The new measurement system would yield higher response time, but ICANN has not increased the DAG4 EPP and RDPS SLA metrics to compensate. RySG knows of no method to establish what thresholds might be reasonable under the proposed new system. *RySG (7 Dec. 2010)*

DNS update SLAs and DNSSEC impacts of new system. In the DNS update SLAs, ICANN has not provided any consideration for DNSSEC signing activity or considered SLA impacts related to DNSSEC operations at all. This SLA approach will likely discourage registries from deploying DNS servers in developing regions where SLA risks increase due to network latency or unavailability that is not under the control of the registry operator. *RySG (7 Dec. 2010)*

Penalties and new system. RySG does not see how ICANN can impose penalties for SLA violations (cancel registry contract, designate a successor operator, levy escalating penalties) when registries have no control over what is being measured or whether the violation is due to faulty monitoring, network latency or registry performance. *RySG (7 Dec. 2010)*

<u>Standards Compliance—IDN</u>. There is no guidance given regarding timelines in implementing new RFCs or updates in guidelines. *RySG (7 Dec. 2010)*

<u>Emergency Thresholds</u>.
Failure of one full escrow deposit is still a violation, and grounds for cancelling the registry contract and designating a successor operator. As RySG noted in its DAGv4 comments, such failures may not be the fault of the registry operator (e.g. problem on the escrow provider's system or an Internet transit issue). The contract should not hinge on one deposit. *RySG (7 Dec. 2010)*

The "Emergency Thresholds" now refers to the DNSSEC "proper resolution," an undefined concept; RySG does not know what this threshold means. *RySG (7 Dec. 2010)*

Missing escrow deliveries are grounds for ICANN to cancel the registry contract. However, Specification 2, Part B, Sections 6.1-6.3 refer to the release of escrow deposits <u>by the escrow agent</u>. This makes the registry operator responsible for a failure by the escrow provider, over which the registry operator may have no control. RySG supports responsible and professional escrow management, but does not believe that the registry contract should be breachable by a party other than the registry operator. *RySG (7 Dec. 2010)*

Analysis of Comments

ICANN technical staff is currently engaged in productive discussions with members of the registry community and other interested parties regarding revisions to the SLAs in Specification 6 that are intended to alleviate the concerns of the RySG. The next draft of the registry agreement will contain revised thresholds and operational standards that are intended to balance the interests of the internet community and consumers in general in efficient and reliable registry operations and each registry operators' limited control over certain performance metrics.

Continuing Operations Instrument – Specification 8

Key Points

- To date, cash escrow accounts and letter of credit are considered by ICANN to be the only adequate protection against registry failure.

- ICANN welcomes additional detailed proposals on this topic from interested parties.

Summary of Comments

<u>Current requirements too onerous</u>. The AG's requirement for 3 years operating expenses in either an irrevocable letter of credit or an irrevocable cash escrow deposit could tie up significant funds and hamper all new gTLD registries. ICANN Staff should

be allowed to work with RySG to identify workable alternatives that don't unduly burden new entrants but that also provide adequate resources for continuity purposes. *RySG (7 Dec. 2010). B. Fausett (9 Dec. 2010).*

Back-end provider as alternative
The Board should allow TLD applicants to include a contract with a registry services operator as a qualification/substitute for the current Instrument or Letter of Credit for continued registry operations of the TLD. *DotGreen (9 Jan. 2011).*

New gTLD registry operators should not be forced into paying high fees and being captive properties of existing facilities based registries (who are their competitors) in order to be able to meet the continuity of operations requirement. This will not encourage the growth of facilities-based competition, diversity of capacity and independence, the sine qua non of diversity of content. Such applicants risk paying more in revenue points and policy manipulation to these service providers than the true value. The incremental cost to existing providers of providing continuity operations is close to zero. The AG should instruct such new gTLD applicants that they may form risk pool cooperatives and invent mutual insurance so that they can without capture by an existing back-end service provider write "guaranteed' in response to the continuity instrument question. *E. Brunner-Williams (9 Dec. 2010). Minds + Machines (10 Dec. 2010).*

Analysis of Comments

After review of various alternatives, it was determined that cash escrows and letters of credit provide the only meaningful protection against abrupt registry failure and the resulting registrant harm. However, ICANN staff, through the Temporary Drafting Group and other venues, has sought input on viable alternatives. Contracts providing for back-end services in the event of registry failure may not be adequate as the back-end service provider may have no incentive to honor the contract if the registry fails and the registry operator ceases doing business, and ICANN lacks the resources to force compliance with such contracts in an efficient manner. Similarly, the use of a "risk pool cooperative" has not been developed in adequate detail to demonstrate how such a cooperative would work and how ICANN could ensure that the costs of temporarily continuing failed registries would be covered by the cooperative members, especially in the event that multiple members of the pool failed in a similar time frame.

With respect to the amount required to be secured in either a cash escrow or through a letter of credit, ICANN is considering initiating a request for proposals/information from back-end registry operators in order to determine the expected cost of maintaining critical registry functions for the relevant time periods. Assuming that consensus can be developed on the appropriate amounts, ICANN will provide additional guidance in the next draft of the applicable guidebook.

Code of Conduct – Specification 9

Key Points

- ICANN appreciates the detailed comments received on the Code of Conduct and will make appropriate edits to its provisions;

- The scope of the Code of Conduct will be refined to apply only to parties providing Registry Services but it cannot be expanded to non-contracting parties that have no existing relationship with Registry Operator;

- Certain prohibitions in the Code of Conduct will be relaxed in the event that the proposed conduct is not discriminatory and information that is disclosed is widely available;

- With respect to single-registrant (.brand) TLDs, ICANN will attempt to tailor to the code of conduct to provide flexibility to operators to the extent appropriate so long as the TLD is used by the registry operator solely for its own operations and registrations are not sold or made available to consumers or other third parties.

Summary of Comments

Support for Registry Code of Conduct in principle. IACC welcomes addition of the proposed code in principle but is concerned that its purportedly universal application to all prospective new gTLDs may prove unduly limiting (e.g. does paragraph 1 make equal sense for single user top level domain registries). IACC (9 Dec. 2010).

Registry Code of Conduct requires clarifications. Terms need to be defined, certain restrictions need adjustment (e.g., the prohibition against the registry registering domain names in its own right, the provisions about access to user data or proprietary information of a registrar utilized by or affiliated with the registrar, internal reviews). IPC (9 Dec. 2010).

Registry Code of Conduct is objectionable. The current draft of the Code is objectionable in at least two respects. First, it contains serious ambiguities that could: raise questions regarding marketing and promotional programs currently implemented by registries and registrars; potentially be a source of disputes between third parties and ICANN or registries/registrars; enable third parties to use ambiguities in the current draft of the Code to claim that ICANN is not properly enforcing fair or equitable conduct among registries and registrars, including that ICANN is breaching its obligations under registry agreements not to engage in arbitrary, unfair or inequitable conduct.

The following suggestions will decrease the uncertainties that the current draft would create:

The proposed Code should be clarified and its application narrowed to the designated new TLD in question. As currently proposed the Code applies to all registry operators, regardless of vertical integration (base agreement, section 2.14). Neither the proposed registry agreement nor the Code distinguish between practices with respect to the new TLD subject to that agreement and practices with respect to other TLDs or back-end

arrangements the operator may have (e.g. an existing gTLD), thus subject to different registry agreements. Thus, the proposed Code would have undue application to practices of registry operators with respect to other TLDs such as .info or .org whether or not vertical integration is permitted and without regard to the terms of applicable existing registry agreements. RySG (7 Dec. 2010).

The language of the draft registry agreement (base agreement v. 5, section 2.14) and the Code should be revised as specifically recommended in RySG's comments to deal with the problem that unlike provisions in existing registry agreements, the Code may not permit practices that vary among registrars in order to account for differences among them--e.g., section 1.a. ICANN has recognized the need to differentiate among parties so long as all parties are provided comparable opportunities. The draft Code shows no apparent recognition of ICANN's past principles in this regard and thus would be a source of uncertainty and could be competitively harmful. RySG (7 Dec. 2010).

Second, it allows discrimination in the sharing of data with related vertical parties. Limiting the sharing of "proprietary" or "confidential" data is illusory protection for other registries because the decision as to what to treat as "proprietary" or "confidential" data is voluntary and virtually without limit. Sections 3 and 4 should provide that the registry operator shall not permit the sharing of data from the registrar "unless that same data is reasonably available to all registries." In addition a new section 7 should be added: "7. Nothing set forth herein shall limit the ability of any Registry Operator or Registry Related Party, or subcontractor to enter into arms-length transactions in the ordinary course with a registrar with respect to products and services other than the Designated TLD." RySG (7 Dec. 2010)

Registry Code of Conduct—front running of domain names. 1.d should be revised to read as follows: "register names in the TLD or sub-domains of the TLD based upon proprietary access to information about searches or resolution requests for domain names not yet registered." Front-running is not defined in the guidebook but has been used to describe registrations based on contract parties' knowledge of user searches for available names. The Code of Conduct should restrict abuse of proprietary data to acquire unregistered names, whether that occurs as front-running or by other inappropriate methods. E.g., a registry has the unique visibility of nearly all traffic for non-existing records requested by resolvers. That means a registry can see all non-registered domain names that are typed (or mistyped) by users, indicating potential names to acquire for their own speculative or monetization purposes. BC (6 Dec. 2010).

Front running should be prohibited, but this restriction should not apply to single registrant TLDs. IPC (9 Dec. 2010).

Scope of the Code. Given the removal of VI and cross ownership of registries and registrars, the Code of Conduct should bind all registrars and resellers and incorporate the Registry Accreditation Agreement. IPC (9 Dec. 2010).

The provisions about registries bearing the cost of any audit of compliance with the VI Code of Conduct are unclear. Was it the intent to make vertically integrated registries pay for just the Code of Conduct costs of the audit? If so, the wording needs to be fixed. If not, then this is a disincentive to vertically integrate. It should be clarified that only those costs that relate to compliance with section 2.14 are to be automatically imposed on the registry operator. RySG (7 Dec. 2010).

.Brand TLDs. New item 4 should be inserted: "Nothing set forth in articles 1, 2, or 3 shall apply to a single-registrant ('dot brand') Registry Operator acting with respect to user data that is under its ownership and control, or with respect to conduct reasonably for the management, operations and purpose of the TLD." The Code of Conduct should not restrict dot-brands from using an owned or closely affiliated registrar to register and manage names they control (e.g. for divisions, product lines, locations, customers, affiliates, etc.). BC (6 Dec. 2010).

Brand TLDs should be specifically exempted from Specification 9, Part 1, of the draft new gTLD agreement. UrbanBrain (14 Jan. 2011).

Single registrant gTLDs will certainly exhibit a preference for a particular registrar, and they will likely desire registration of domains based upon NXD data. There are many other special needs faced by single registrant branded gTLDs that are not accommodated by the Code of Conduct, contract and other elements of the gTLD program. The community should consider forming a special team to create gTLD program elements that support this important user group. MarkMonitor (Module 5, 7 Dec. 2010).

Community input on abuses/compliance. Before or during the application process, ICANN should seek community input on potential abuses (including lists developed by the VI and RAP working groups), detection data, the data needed to detect, and protection mechanisms/compliance methods. Community input should also be sought on punitive measures to ensure compliance. The Code of Conduct does not expose an exhaustive list of abuses, nor does it identify the data required to detect the abuses. It also does not expose the compliance mechanisms that will help protect registrants. BC (6 Dec. 2010).

Analysis of Comments

ICANN staff expressly sought and welcomes additional specific comments on the contents of the proposed Registry Operator Code of Conduct (the "Code"). Based on the comments received to date, ICANN proposes to revise the Code in the following manner:

- Section 1 will be modified to clarify that the Code only applies to the TLD that is the subject of the Registry Agreement to which the Code is attached.

- Section 1 will further be modified to clarify (i) that the Code of Conduct only applies to parties related to Registry Operator or bound by contract with Registry Operator that provide Registry Services (as defined in the Registry Agreement) with respect to the TLD and (ii) that the Code of Conduct only applies to Registry Operator's operation of the registry for the TLD and not to other unrelated businesses.

- Section 1(a) of the Code will be modified to allow for special treatment of registrars or resellers so long as the opportunity to qualify for comparable special treatment is available to all registrars or resellers on substantially similar terms.

- Section 1(b) of the Code will be eliminated as in response to comments indicating that it would raise difficult enforcement and interpretation questions, particularly in the case of single-registrant/.brand gTLDs.

- Section 1(c) of the Code will be eliminated as it is repetitive of Section 3.

- Section 1(d) of the Code will be expanded to capture a broader definition of "front running" as suggested in the public comments.

- Sections 3 and 4 will be incorporated into subsections of Section 1 and modified to allow for disclosure of user and registry data so long as such disclosures are generally available to all third-parties on substantially similar terms.

- A new Section will be added to clarify that the Code does not limit the ability of Registry Operator to enter into arms-length transactions in the ordinary course with any registrar or reseller with respect to products and services that are unrelated in all respects to the TLD.

The scope of the Code is intended to be broadly construed. Registry Operators are expected to enforce the Code with respect to controlled Affiliates and through contractual relationships with Registry Service providers. However, it is not possible to bind unaffiliated registrars and resellers specifically as they are not a party to the Registry Agreement.

If (i) a compliance audit pursuant to Section 2.11 is being conducted to ensure compliance with the Code and (ii) the Registry Operator is affiliated with a registrar or reseller, then the cost of such audit will be borne by Registry Operator. Registry operators that are not affiliated with a registrar or reseller will not be responsible for such costs unless otherwise provided in Section 2.11. Likewise, if Registry Operator is affiliated with a registrar or reseller but the audit relates to contractual compliance other than compliance with the Code, Registry Operator will not be responsible for the costs of the audit unless otherwise provided in Section 2.11.

Any of the foregoing revisions may be modified or rejected based on ongoing community discussions regarding the appropriate content and scope of the Code.

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National Cable & Telecommunications Association (NCTA)
National Congress of American Indians
National Telecommunications and Information Administration (NTIA)
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