NEW gTLD Program

SUMMARY REPORT AND ANALYSIS OF PUBLIC COMMENT – Applicant Guidebook Excerpts and Explanatory Memoranda

EXECUTIVE SUMMARY

As the launch of the process for delegating new gTLDs nears, ICANN continues to solicit and consider public comment in order to hone the implementation plan. Most recently, amendments were published to several sections of the Applicant Guidebook – the instruction manual for gTLD applicants. These amendments were published for comment.

This document summarises these comments and is intended to provide an indication of the analysis and balancing that occurred when determining how the suggestions could best be incorporated into the Guidebook. Each comment was carefully read, considered and analyzed for how the ideas expressed might appear in the evaluation process.

There were fewer comments in this iteration of the Guidebook for two reasons. One, comments were focused on specific excerpts of the Guidebook, and two, there were fewer changes this time as some issues are settling and some issues were addressed in different comment fora (e.g., the trademark issues) had a separate comment section. Nonetheless, most comments are well-thought through and merit full attention.

Sources

Public Comments Postings (31 May to 20 July 2009). Links to the full text of these postings (for Modules 2-5) may be found at http://www.icann.org/en/topics/new-gtlds/comments-e-en.htm.

GENERAL CONCERNS/OTHER

I. Key Points

- ICANN's launch of new gTLDs targets the narrowly tailored ICANN mission to: ensure DNS stability and security; encourage competition and choice for consumers; expand regional participation in the DNS; and facilitate the multi-stakeholder policy development model.

- The new gTLD implementation strives to meet each of the GNSO policy recommendations, recognizing that each is targeted at meeting the elements of ICANN's mission statement described above.

II. Comment Summary

New gTLD Program: process, GNSO and staff role

The "Analysis and Proposed Position" sections of the May 31-posted Analysis of new gTLD Public Comments do not adequately address the real concerns raised in the comments. ICANN points back to the "GNSO Council" vote that happened ages ago, as though it still has any validity. Real consensus can only be formed if it was the GNSO itself that would create future guidebooks via a PDP process workgroup-style system, one open to all stakeholders. The staff-created and staff-centric approach is not working; it is elevating the role of staff compared to the level of the public and is top-down instead of bottom up. *G. Kirikos (31 May 2009).*

Business owners—cost, timing, and business development concerns

How accessible will the gTLD process be for business owners and potential business owners? Is there any actual dollar amount that has been considered for the cost of a gTLD? When is the tentative date that this process will be operational? How is ICANN going to prevent and distinguish between domain squatters and businesses with legitimate business models in place to purchase a gTLD and build a business around it? The need to limit domain squatters is understandable but there is also limitless potential to build businesses around these new domains. *J. Springer (19 June 2009).*

Rationale for new gTLDs; support for expansion plan, but more clarity needed

ICANN's reasoning for opening new gTLDs is not convincing and not clear, and there is skepticism from many in the Internet communities. It is agreed that there should be a plan for expansion. ICANN should not be event driven (reacting only to what is being proposed). How frequently ICANN opens new rounds of new gTLDs is not clear (i.e., is it only based on requests by the private sector). It is also not clear how end users' opinions are being considered. *A. Al-Zoman (19 July 2009).*

Need to address impact of new gTLDs on countries and communities

ICANN's proposal does not adequately address the social, economic and technical impacts of new gTLDs on countries and communities, or the interest of Internet users and the entire Internet. Instead ICANN is focused on the number and size of the new domain names. ICANN's proposal lacks: a comprehensive analysis of economic and competition impacts; business awareness; and an analysis of the risk of end user confusion and/or harm. *A. Al-Zoman (19 July 2009).*

New gTLDs are not generic any more

New gTLDs should be only for generic names and should not include names—e.g., geographic, community, language, country, brand, etc.) *A. Al-Zoman (19 July 2009).*

Social/linguistic/cultural and public authority-sponsored TLDs

ICANN should give consideration to the specific need for non-commercial categories of TLDs including social, linguistic and cultural TLDs, and public authority-sponsored TLDs, including appropriate application procedures and financial arrangements, taking into account non-profit operation and developmental objectives. *A. Al-Zoman (19 July 2009).*

End user trust and confidence

With so many gTLDs in the market, users will lose their faith in the DNS (many similar labels (2nd LDs) with multiple (10s or 100s) TLDs. *A. Al-Zoman (19 July 2009).*

Process-language barrier

The whole process, including consultations, documentations, forms, communications, people involved) is done in English. Non-English speaking communities would be left behind because of the language barrier. For example, there is a process for English TLDs different from "other" languages' TLDs; there is a need for a linguistic committee to approve IDN TLDs but it is not needed for English TLDs. ICANN, as an international body, should treat all languages equally, regardless of the location of ICANN's headquarters. The current technical limitation of the DNS (i.e., ASCII based system) should not deter the support of the "other" languages on an equal footing. *A. Al-Zoman (19 July 2009).*

Need to define top level domain

ICANN needs to define what is a top-level domain in order to avoid useless squandering of time and financial resources of ICANN reviewers, staff and those of new TLD applicants, and to avoid needless bogging down of the process based on string confusion, misappropriation of community and infringement on the rights of others. The definition should be "the apex of a well-defined human activity, a community or a sector." The key word in that definition is "apex," which directly equates to the word "top" of "top-level domain." This area was well-addressed in the new TLD application process used in the last round of introductions of new TLDs, but is missing from the current DAG and this omission needs to be rectified. Going forward, ICANN staff cannot discard or overlook the core principles used before in adding new TLDs unless it intends to unilaterally abandon the logical expansion of the domain name space that the ICANN community has worked so long and hard to establish from the outset of ICANN's existence. This would be tantamount to abandoning the bottom up principles upon which ICANN was founded and stands today. Without this critical definition ICANN would open the door to a proliferation of TLDs that would be miniature sub-segments of apex TLDs (e.g., a .nyc as well as a .brooklyn, .bronx, etc.), leading to user confusion at best and without doubt challenges from apex TLDs, unnecessary registrations and pernicious compliance issues.

This issue can be addressed and clarified in the definition of "confusingly similar strings." The current definition should be expanded beyond the semantic equivalence to also address the diminution of a TLD. This will not only address user confusion but also stop the loss of valuable resources that will be wasted on a myriad of objections that could have been avoided from the start. This issue is in the interest of all stakeholders in the new TLD process, especially trademark holders, those with responsibility for Internet security and stability, ICANN compliance staff and most importantly Internet users now and in the future. *R. Andruff (21 July 2009).*

Material misrepresentations—ICANN audits of registries

COA called for changes to the draft registry contract in its April 2009 comments to ICANN to ensure that ICANN has full authority to audit registries for material misrepresentations made in the application and for material statements that are no longer true, regardless of whether these

representations concern the relationship to a defined community. COA urges ICANN to respond substantively to this concern. *COA (20 July 2009)*.

Government and community concerns

The new gTLD program does not yet respond to all the concerns that governments have. With the new program ICANN is involving itself in an area beyond its mandate. By allowing itself to set some policies to harmonize the whole (Internet) it is intervening indirectly in world cultural issues and worse, is breaching local community harmonies. If local community/country cultural concerns are not treated sensitively, the right for a new gTLD may ignite a civil war in that local community. Local communities cannot depend on objection mechanisms to avoid such a catastrophe. The new gTLD program has a serious deficiency regarding the protection of values that are safeguarded by communities, countries, nations and governments since ancient times (e.g., geographic names, religion values, morality and public order, social security, local trade names/marks, etc.) *A. Al-Zoman (19 July 2009)*.

III. Analysis

Since it was founded in 1998, one of ICANN's key mandates has been to create competition in the domain name market, "The new corporation ultimately should … oversee policy for determining the circumstances under which new TLDs are added to the root system." The secure introduction of new gTLDs, as specified in the White Paper, remains an essential element in fostering competition and choice for Internet users in the provision of domain registration services.

The introduction of new gTLDs is identified as a core objective in each of MoUs (1998 – present) and the Joint Project Agreement: "Define and implement a predictable strategy for selecting new TLDs." The study and planning stages, extending back several years include two trial rounds of top-level domain applications held in 2000 and 2003. Experiences from those rounds have been used to shape the current process.

The policy recommendations to guide the introduction of new gTLDs were created by the Generic Names Supporting Organization (GNSO) over a two-year effort through its bottom-up, multi-stakeholder policy development process. The GNSO approved its Final Report on the Introduction of New Top Level Domains in September 2007 by a 19-1-3 vote, a clear supermajority under the ICANN Bylaws.

Principles guiding the policy development process included that:

- new gTLDs will benefit registrant choice and competition;

- the implementation plan should also allow for IDNs at the top level;

- the introduction of new gTLDs should not cause security or stability issues; and

- protection of various appropriate interests requires objection and dispute resolution processes.

This summarization of comments and the analyses are intended to meet the goals raised in the general concerns above and in the specific issues described below.

IDN

I. Key Points

- The topic of management of variant strings and the minimum number of characters in a gTLD string remains under discussion.

  - The proposed reservation of variant TLDs until a delegation function exists that ensures aliased functionality is urged not to apply to gTLD strings in CJK scripts.

  - The proposed required minimum of 3 characters in a gTLD string is considered based on mistaken arguments and requested to be relaxed to allow for shorter strings, in particular for CJK strings.

II. Summary of Comments

IDN variants

JET urges ICANN to implement TLDs with IDN variants, at least for the Chinese, Japanese and Korean strings, according to RFC 3743. Implementation of IDN variants is of utmost importance to these communities as variants are often used interchangeably, similar although not the same, as uppercase and lowercase characters in English. Not implementing RFC 3743 would result in registrants having to pay multiple times for the "same" domain name. *JET (20 July 2009).*

CJK Languages: mistaken arguments in support of 3-character string requirement

The explanatory memorandum on the 3-character string requirement has a series of mistaken arguments in support of requiring 3 "distinct characters" for each gTLD string.

- **First,** the memorandum's discussion of "fairness of treatment" between CJK based languages and other languages is false. Proposing "equal treatment" in terms of uncomparable measurements is grossly unfair. In any non-ideographic language, there are very few words composed of just 2 characters. By contrast, most words in CJK expressing a generally understood concept are composed of just two ideographs and at least 1,000 often-used Chinese and Japanese words are just one character. In Korean, words appear to a Westerner as one or two characters but in reality these are syllable blocks composed of multiple Jamo characters.

- **Second,** the memorandum is false in arguing in favor of requiring three-character strings by stating that few Chinese characters are words, or that most Chinese words consist of more than one character. The overwhelming majority of words one can find in a Chinese, Japanese or Korean dictionary are composed of what appears as one or two "distinct characters" to a Westerner but which are actually "compound words," – i.e., combinations of full words. It is impossible to see how one could justify imposition of a Western-style "abbreviation" by requiring more characters than the full word!

- **Third,** with regard to the memorandum's discussion of the suggestion that ICANN perform a trial implementation of a certain small number of gTLDs with less than 3 characters to inform the development of a process for allocating such strings more widely, there are no stability issues to address with such a trial, and requiring such a trial would be a deliberate and malevolent act of discrimination.

- **Fourth,** the memorandum's statements about issues related to the lack of a model for "translating" TLDs (e.g., two letter ISOs cannot be translated meaningfully into IDN strings of less than 3 characters) are misguided. There is no reason why IDN TLDs should be "translations" of Western (or any other) expressions, and there is no need for them to be

"abbreviations" in the Western sense. In addition, language-to-language translations of TLDs tend to be either hilarious or confusing. A generalized translation-based approach to TLDs is utterly impossible.

- **Fifth,** the concerns cited in the memorandum that delegation of single and two-character labels now might jeopardize the future shape of the ccTLD delegation mechanism do not exist. Mapping codes to names is a compilation effort, not standardization, as the country names exist independently of the standards or documentation authority. The compilation effort is already protected in the gTLD process as country names may only be used with the approval of the relevant government. As a result, there is no imaginable standardization or compilation effort whatsoever that could possibly be "jeopardized" by allowing 2-character or 1-character ideographic gTLDs.

The proper way forward is to adapt the Draft Applicant Guidebook. One solution is to make the minimum length dependent on script. ICANN should also allow the respective language communities to request a minimum string length based on considerations specific to the underlying languages or script. *W. Staub (9 June 2009).*

CJK three characters problem

The policy of three or more visually distinct letters or characters is not practical for Chinese, Japanese and Korean. With respect to the discussion in the explanatory memorandum, JET points out the following: (1) On "fairness of treatment" ICANN cannot rely on "character counting" for fairness. It is not unusual to find Chinese or Japanese translation of an English text shorter by a magnitude of 3 times or more by character counts. (2) The statement that "few Chinese characters are words" is wrong. Every well-formed Chinese character, on its own, has a meaning. (3) Regarding the "ICANN ccTLD delegation function," JET agrees that there is a certain elegance in a simple rule (like reserving two characters for ccTLDs allowing one to immediately identify the type of TLD it is from the string). However, this rule may not be feasible in IDN ccTLDs in the long run (an example given is Singapore in Chinese). In addition, the ccTLD Fast Track Draft Implementation Plan has no restriction that IDN ccTLDs be two characters only. JET is also unaware of any intention from the Maintenance Agency for ISO 3166 country codes to expand the list beyond ASCII character codes. Therefore the three character legacy rule should not be applied to IDN. *JET (20 July 2009).*

"Fairness of treatment" in CNNIC's view is to enable every person on the globe to have access to the Internet, regardless of race or language. Given the dominance of ASCII characters on the Internet, it is high time to give the fairness treatment to IDNs. The statement that "few Chinese characters are words, most Chinese words are two or more characters" appears to be a misnomer. Each single Chinese character is a word and in some cases can possess multiple meanings. The presence of a second character is then used to clarify this meaning. In fact it is very hard to find a 3 character word in Chinese; this usually exists as "borrowed" words (i.e., translated phonetic pronunciation of an English term). In the East Asian community it is agreed that the 3-character limitation will exclude most meaningful words as a TLD string. This is why CNNIC is repeatedly raising this issue and appealing for the lift of this limitation. *CNNIC (21 July 2009).*

Community consultation—IDN TLD and removal of three character limitation

Removing the 3 character limitation would be a major policy decision. ICANN should carefully consult with the relevant communities regarding these IDN TLD issues. *JET (20 July 2009).*

Three-character new gTLD rule questioned

Is it correct that the current position with regard to the new gTLDs is that two character new gTLDs are not allowed (.bp, .bt, .hp, etc.) although ICANN has been presented with counter arguments as to why these rules should be relaxed? *R. White (23 June 2009).*

III. Analysis and Proposed Position

There have been broad community discussions and opinions on the topics of variant TLD management and allowable number of characters in a gTLD string. These discussions have taken place both online at the designated public comment forum, as summarized above, and in several meetings throughout the ICANN meeting in Sydney. Those discussions indicated that requiring gTLD strings to be three or more characters would hobble the utility of new TLDs in certain languages (such as Chinese, Japanese and Korean) where complete words are routinely expressed in one or two characters. The current position in the Guidebook requires that TLD strings be at least three characters long. This has been interpreted as a requirement for both the A-label, as well as the U-label. The reason for this rule in the past has been to avoid confusion with country code labels. Country code labels are and have been limited to two-character ASCII strings.

Before developing a mechanism for determining which two-letter IDN labels might be delegated, two threshold questions (and some associated issues) must be answered. What is the possibility that a two-letter non-Latin label would be so similar to an ASCII TLD that user confusion would result? What is the possibility and timing that the ISO list will be expanded to include non-Latin scripts?

Preliminary discussions indicate a low possibility that two-letter non-Latin labels would be confused with existing or anticipated ASCII country code labels. Therefore, clear, fair rules for delegating certain two-character labels as gTLDs must in some way avoid confusion by only allowing those scripts that will never result in confusion.

Regarding the second question, there have been many discussions about expanding the ISO lists of country names to possibly include country code names that will be delegated in the Fast Track process, as well as expanding the character set beyond English into other languages. From those discussions it appears that such a process would take many years. Therefore, rules are being developed that comply with the policy work of the GNSO and the IDNC working group and also allow, under certain conditions, the delegation of two-character names in the gTLD name space.

The topic was also discussed during the ICANN Board meeting in Sydney (see http://syd.icann.org/node/3782 for details) and it was decided that ICANN should form a small working group to discuss these two topics and provide the community with their recommendation in time for the ICANN meeting in Korea (25-30 October 2009).

Discussions on possible methods of managing variants at the top-level indicated that restricting variants from being delegated in the DNS root zone might disfranchise certain regions that otherwise would benefit greatly from the introduction of IDN TLDs.

Delegating variant TLDs in the root zone without a mechanism for ensuring that the TLDs are treated in a method that guarantees a good user experience is a stability concern related to confusability for end-users. This can be compared to the "companyname.com" situation, where two domain names (one with all Latin characters and the other with mixed Latin and Cyrillic) look identical, but were different technically. Users clicked on the "wrong" address leading to a

site different than expected. This activity resulted in a change in the IDN Guidelines, requiring that scripts not be mixed in domain names unless there is a linguistic reason for doing so (i.e., in the case of Japanese that is represented by mixing of four scripts). This is also a requirement for TLDs, but does not solve the variant issue.

At the same time, disallowing or blocking variant TLDs means that some users will have a very difficult time using the IDN TLDs. In some cases it is not possible for the user to know which character he or she is typing. Some keyboards will offer one or another variant character but not both. In this way, without the variant TLDs in the root, communities may be getting error messages when attempting to reach, for example, a web address with a domain name under one of these IDN TLDs. This is not the intent IDN deployment. Rather, the objective is to help all communities have equal access to the Internet.

Not all variants are visually confusing. To maximize benefit, ICANN attempted to define variants in a narrow manner, only including variants that are visually confusing. The intent was allow variant TLDs be delegated in the DNS root zone that are not confusing with others while a stable solution was found to address the variants that are similar.

At this time though, it is an open question whether stability issues include variant TLDs that look different, and are typed differently, but are used interchangeably for the same term by the users.

Another open question is the content of an agreement between the IDN TLD operator and ICANN requiring that registrations under the two variant TLDs be handled (say, in a bundled or aliased manner, following RFC3747, or a different technical solution) in a certain manner.

Finally, there is the question of whether it is necessary to enforce rules required for the development of IDN Tables. IDN Tables hold information about the characters that should be treated as variants. The TLD operators develop IDN tables. Presently, TLD operators are urged to consider linguistic and writing system issues in their work of defining variants, and cooperate with other TLD operators that offer the same or very similar looking characters. This is not always practically possible, and there are currently no rules about defining variants. There also are no defined dispute mechanisms in cases where communities may disagree on a variant definition.

The working group has been formed and is working on the two topics under the charter proposed during the Sydney Board meeting, and plan to publish their recommendation prior to the Korea meeting. This will include a plan for releasing two-character labels in some form so that Internet use is not hobbled.

TRADEMARK PROTECTION

I. Key Points

- Significant community discussion has occurred and several consultation sessions have been conducted concerning trademark issues.

- Several solutions to potential trademark issues are proposed in this version of the Guidebook and in separate documentation posted for community comment.

II. Comment Summary

Added protection

There needs to be more effective protection for intellectual property rights including local ones. *A. Al-Zoman (19 July 2009).*

III. Analysis

In response to comments to the first applicant Guidebook the Board formed the Implementation Recommendation Team (IRT), asking them and others to develop specific solutions to address the issue raised in this comment. As a result, several specific solutions have been published for public comment and discussed in depth in public consultations held in Sydney, New York and London. The results of the public comment forum and the transcripts of the consultation sessions have been summarized and published under separate cover. Analysis of those solutions and the comment summaries has led to recommendations for implementation of certain specific rights protection mechanisms into the proposed Applicant Guidebook or, alternatively, as models for further discussion.

Please refer to companion documents to see this analysis regarding the IRT recommendations.

EVALUATION

I. Key points

- Community status requirements are more detailed.

- Background information and security requirements for applicants are strengthened.

II. Summary of Comments

Community-based designation

Question 24 should provide greater transparency and detail regarding claims of community status. That should enable potential objectors to make more informed decisions about whether to invoke the community objection procedure and also facilitate the comparative evaluation/community priority process, if applicable. *IPC (20 July 2009).*

Applicant background—support for requiring more transparency

IPC applauds the proposal to require greater transparency about new TLD applicants. The drafted questions should be reviewed and broadened where necessary to ensure that they capture the needed information. For example: (1) information should be requested regarding all partners of an applicant that takes a partnership form; (2) ICANN should inquire about criminal or fraudulent activities of the officers of entities (e.g., corporations) that hold a significant interest in the applicant; (3) Criminal record disclosures should not be limited to financial or fiduciary related crimes, but at a minimum should cover all felonies; (4) Disciplinary actions by governments should not be limited to those imposed by the relevant person's or entity's domicile; (5) Question 11(f) should be rephrased to cover all allegations of intellectual property infringement "in connection with the registration or use of" a domain name; (6) The notes should spell out that all applicants will be subject to a background check, and that false, misleading or materially incomplete responses will be grounds for rejection of the application. *IPC (20 July 2009).*

Corporate gTLDs should be recognized as a category, although a different label might be used

COA continues to believe it would be beneficial and efficient to recognize a category of gTLD applications open for registration only by persons or entities standing in a specified relationship with a particular company (e.g., employees, suppliers and/or distributors). Under the current typology, many such applicants may be tempted to "shoehorn" their applications into the community TLD category, but this is not the intended purpose for the community category and could have inadvertent detrimental consequences for legitimate community applicants. Given that the ICANN staff responded to this proposal by concluding that the ICANN community should continue to discuss TLD categories, COA would welcome guidance from ICANN about when and where further discussion of this issue will take place and how it might be brought to a substantive conclusion prior to when the applicant guidebook takes final form. *COA (20 July 2009).*

Security policy

IPC commends ICANN for recognizing in Question 36 that "due to the nature of the applied-for gTLD string" some applicants may be expected to meet higher security standards than would be the case for other, less sensitive strings. Also, IPC is pleased with the statement that "certain financial or industry-oriented TLDs" may require stronger safeguards (e.g., this category should include TLD strings referencing industry sectors associated with high levels of online intellectual property infringement, and that the security and other policies of applicants for such strings should be expected to include adequate safeguards against such illegal (and in some instances criminal) activities). In any event, the criterion that the applicant demonstrate "security measures appropriate for the applied-for gTLD string" is an important and potentially valuable addition to the evaluation process. *IPC (20 July 2009).*

Whois (question 38)—improvement incentives for new registries

ICANN should take this opportunity to provide incentives for new registries to take on some of the responsibility for ensuring that the ICANN-accredited registrars which they employ to sponsor registrations live up to their obligations regarding Whois: e.g., encourage registrars to take proactive steps to improve accuracy of Whois data; that they consistently cancel registrations of those who supply false Whois data; and, if they provide proxy or private registration services (if allowed by the registry), that they include and implement a process enabling copyright or trademark owners with reasonable evidence of actionable harm to obtain access to the actual contact data of registrants. Registries committing to these policies should receive extra points in the evaluation process. *IPC (20 July 2009).*

Funding and revenue (question 52)

Confirmation is requested regarding whether an "Exceeds Requirement" score can be achieved by satisfying one (not both) of the second or third criteria, in addition to satisfying the first and fourth criteria. *eNOM (21 July 2009).*

III. Analysis

A comment suggests refining a question regarding claims of community status with more details. Although the Guidebook question is fairly detailed, it is agreed that additional detail will improve transparency and facilitate community priority evaluation, if such a case arises. Accordingly, staff has specifically reviewed the drafting of this question to seek to improve clarity in these regards for the next version. In particular, the applicant is asked to provide more detail regarding aspects of the community representations and detail about the structure of the

representative organization. There is additional information required to describe the nexus between the applied for name and community. See the Guidebook for complete information.

ICANN's work with the community on mitigating potential malicious conduct through increased application scrutiny is described in an explanatory memorandum published coincident with this work. Changes have been made to the Guidebook, in accordance with the comments provided here. Partners are included in those required to provide information; it is believed that entities holding a significant interest are shareholders (including corporations) and shareholders are required to present information about prior criminal activity – it is not considered practical however to inquire about officers of shareholders in all cases as there could be a cascading effect; the list of crimes to be disclosed does include all felonies and also includes misdemeanors involving financial or fiduciary related crimes; disciplinary actions by governments are no longer limited to those imposed by the relevant person's or entity's domicile; Question 11(f) has been broadened rephrased to cover all allegations of intellectual property infringement in connection with the registration or use of a domain name; the terms and conditions include and module 1 has been augmented to note that all applicants may be subject to a background check, and that false, misleading or materially incomplete responses may be grounds for rejection of the application. ICANN may not conduct the check in all instances but puts the applicant on notice that it may be conducted.

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

- Community-based TLDs

- Geographic Name TLDs

- Everything else (called standard or open TLDs)

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

Beyond the accommodations sought, many or all of the suggested categories seem to be variations of community-based TLDs. The preference for community-based TLDs in the evaluation/contention process is based on policy advice from the GNSO and is intended to ensure that community-based applicants receive the TLD string to which their community is strongly related. Perhaps the most important aspect of the suggested categories is that an applicant within these categories does, in fact, receive the string associated with its community, and that is what the existing process is designed to do.

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

maintain not-for-process status? These discussions and debates will take considerable time and resources and may ultimately not result in consensus.

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

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

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

In the case of security: an applicant for a new gTLD might have the option of taking steps to gain a verified high security zone status by meeting a set of requirements additional to those that are in place for all applicants. If achieved, this status would allow the new gTLD registry operator to display a seal indicating that it is verified as a high-security zone, to enhance consumer awareness and trust. The processes required to achieve verification include verification of both registry operations and supporting registrar operations. The verification assessment is performed by an independent entity, external to the gTLD evaluation process.

These high security zones will contribute to increased reliability and accuracy of Whois – the registrar must actively monitor and authenticate the accuracy of Whois data.

Regarding the question whether an "Exceeds Requirement" score can be achieved on the specified application question by satisfying one (not both) of the second or third criteria, in addition to satisfying the first and fourth criteria – all four criteria must be satisfied in cases where they apply. Some applicants may have all funding from existing sources or all from projected revenue – it which case only the second or third criterion apply. It is case specific.

GEOGRAPHICAL NAMES

I. Key Points
- At the second level, registrations of specific representations of country and territory names (i.e., in official lists), require a .info style of approval for release from reservation.

- Top-level registrations of certain regional and sub-regional names, country and territory names, and capital city names require the approval (or non-objection) of the relevant governments.

II. Comment Summary

Concern about definition of geographical names

eNOM generally endorses the additional clarity and guidance on geographic names, but is concerned that the phrase "in any language" that applies to country, territory and capitol city names at the top level may cause unintended consequences. It could create situations where an applied for string is a widely and commonly used (non-geographic) term in its own language but is also an "exotic" translation of a geographic term in some other language ("exotic" meaning the translation is in a language not commonly used in the country/territory the DAG provision is trying to protect). It causes unpredictability as applicants cannot identify all possible language variations of all countries, territories and capitols. It may result in a commonly used term in one language being denied to Internet users of that language because the term is also an exotic translation of a geographic place. In order to mitigate this situation, the DAG should be modified to give the Geographic Names Panel discretion to allow a string to proceed in certain circumstances (suggested language: "If the applied for string is a common generic word and, in the judgment of the Geographic Names Panel the translated language is of peripheral relevance to the designated country, the Panel can recommend that the requirement for obtaining Government approval be waived—except the relevant Government can still file an objection to the waiver"). *eNOM (21 July 2009).*

Country names and territory names on the ISO list should be treated as ccTLDs

To allow the "given names" of countries to be defined as generic (and thus delegated as gTLDs) is illogical and incompatible with any normal understanding of the term generic. Allowing a TLD that is a meaningful representation of a country to be a gTLD is likely to involve ICANN in the internal policy of a country. It is highly likely that the government will at some stage want to have policy input into what a country TLD is used for or expect it to be answerable under national law. A change in government could radically affect the official position within the country about the gTLD which could adversely affect the stability and security of the DNS. There will also be significant confusion caused for Internet users if some country names are ccTLDs under local law and with local policies while others are gTLDs bound by ICANN policy processes (e.g., registrar accreditation, dispute resolution and Whois). ccNSO Council (6 July 2009). The main concerns of UNINETT Norid AS about geographical names are not reflected in the third DAG draft. The principle repeatedly set forward by the ccNSO Council –that all country names and territory names are ccTLDs, not gTLDs—has not been taken into account. UNINETT Norid AS fully supports the ccNSO's input and requests that it be given serious consideration when revising the DAG version 3. UNINETT Norid AS (6 July 2009).

Concern about blurring of ccTLDs and gTLDs

Introducing new gTLDs for geographic names or languages will blur the difference between ccTLDs and gTLDs and make setting new different policies for ccTLDs and gTLDs more difficult. *A. Al-Zoman (19 July 2009).*

National and public policy interests

ICANN needs to ensure respect for national and public policy interests, including the need for adequate protection of geographic names and delegation/re-delegation procedures. *A. Al-Zoman (19 July 2009).*

ICANN policy to protect geographical names—interference with legal rights of businesses

ICANN is making new international law which will wrongfully interfere with the legal rights of businesses. E.g., could ICANN explain on what basis it can deny an application by Bern

Unlimited, LCC which owns a number of national trademark registrations with the word mark BERN? Now multiple national governments are granting this business the legal right not only to use the mark in commerce but to protect it against others using it in a confusingly similar manner. However, under ICANN's proposed rules this business will be prohibited from applying for a TLD if the Swiss government does not give its approval or non-objection. *M. Palage (21 July 2009).*

Concerns about defining country names and territory names (DAG Section 2.1.1.4)

The current formulation proposed for defining country names does not cover the same terms that were protected by the earlier definition of "meaningful representation." Acknowledging the desire for a defined list, it is also important to keep the fundamental principles associated with national sovereignty firmly in view. Lists can often easily be circumvented and not respond to reasonable expectations from the governments or users based in the country concerned. New gTLD applications will not be processed automatically so there is no need for a defined list. The list creation formula itself is very complicated. Parties not currently involved in this process will not yet have had the opportunity to check that all meaningful representations of their country names are properly protected in these lists. *ccNSO Council (July 2009).* In DAG Section 2.1.1.4., the definition of which strings are counted as country names has changed significantly and does not cover the same terms that were protected by the earlier definition of "meaningful representation." The basic problem of a defined list is that it can be circumvented or may not cover what was intended by the broader definition of "meaningful representation." (The two islands of Svalbard and Jan Mayen, and Bouvet Island, are examples of a country/territory that experiences problems with the new definition.) UNINET Norid AS requests reinstatement and expansion of the previous definition of "meaningful representation" of a country or territory name according to the comments submitted in April 2009 by the ccNSO Council. *UNINETT Norid AS (6 July 2009).*

Country/Territory Names—support for safeguards

IPC supports in principle the concept of safeguards against use at the top and second levels for certain country and territory names, identified through objective criteria, even though these names do not enjoy specific protected status under international treaties. This concept is fundamentally the same as the one underlying the Globally Protected Marks List proposed by the IRT. IPC notes that in Section 2.1.1.4, safeguards would also apply to "permutations or transpositions" of country names. While examples are provided for permutations, none is provided for transpositions. It is difficult to evaluate the proposal without a further explanation of those terms. If a broad interpretation were given to those terms, it could improperly expand the scope of the safeguards. *IPC (20 July 2009).*

Second level country and territory names protection

eNOM supports the proposed expansion of reserved names in Module 2 to include initial protection of country and territory names at the second level. This new contract provision satisfies the GAC Principles Regarding New gTLDs as related to geographic names. *eNOM (21 July 2009).*

Section 2.1.1.4.1—expansion of geographical names, including ISO 3166-1 alpha-3 codes

GoDaddy opposes inclusion of ISO 3166-1 alpha-3 codes in the definition of geographical names: first, the alpha 3 codes are not as widely used or recognized as country or territorial abbreviations, as compared to the related alpha-2 codes. Most international users, and even many residents of a given country or territory, often do not associate the alpha-3 code with that country; second, reserving alpha-3 codes as geographic names will potentially collide with many

well-known (and often unrelated) companies, organizations, and entities that use the identical string as an acronym, abbreviation or ticker symbol, and may wish to use them as gTLDs (examples provided in comments text). Other strings in the alpha-3 list would be significantly more recognizable as potential top-level domains than the countries they represent (examples provided in comments text). *GoDaddy (20 July 2009).*

Adherence to GAC principles

ICANN should adhere to GAC principles in general, and also adopt the following specific principles: New gTLDs should respect the sensitivity about terms with national, cultural, geographic and religious significance; ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant government or public authorities. *A. Al-Zoman (19 July 2009).*

III. Analysis

Country and Territory Names

Definition of country and territory names

The ccNSO has raised concerns that some terms that were protected under the 'meaningful representation' definition are no longer afforded protection, and that it is important to keep the fundamental principles associated with national sovereignty firmly in view. Conversely, GoDaddy has raised concerns that the revised criteria is too far reaching, particularly the inclusion of the alpha-3 codes. However, it is likely that an alpha-3 code representing a country or territory would have been considered under the previous definition as a "short-form designation for the name of the country or territory that is recognizable and denotes the country or territory". This was previously noted on page 53 of the Analysis and Public Comment, February 2009 document, which states, inter alia, "…the definition of meaningful representation of a country or territory name includes short-form designation of the name of the Territory. This could include three letter country codes such as .AUS for Australia and .AUT for Austria."

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

The revised definition continues to be based on the ISO 3166-1 standard and fulfills the Board's requirement of providing greater clarity about what is considered a country or territory name in the context of new gTLDs. It also removes the ambiguity that resulted from the previous criteria that the term meaningful representation created.

The Board's intent is, to the extent possible, to provide a bright line rule for applicants.

While the revised criteria may have resulted in some changes to what names are afforded protection, it has not changed the original intent to protect all names listed on the ISO 3166-1 list, or a short or long form the name. It is felt that the sovereign rights of governments continue to be adequately protected as the definition is based on a list developed and maintained by an international organisation. In addition to the protections provided in the applicant guidebook, the objection process does provide a secondary avenue of recourse. An application will be

rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.

The IPC noted its support in principle for the concept of safeguards against the use, at the top and second level, of certain country and territory names. However, a question was raised about what is a 'transposition' of a country or territory name given that no example is provided in the guidebook. Transposition is considered a change in the sequence of the long or short–form name, for example, "RepublicCzech" or "IslandsCayman."

As stated in the comments, it is acknowledged that the translation of country or territory names 'in any language' may provide some uncertainty for applicants given the absence of a comprehensive list. However, the proposed solution suggested by eNom is considered to be inconsistent with the intention to respect the sovereign rights of governments in the process. In the event that the Geographic Names Panel determines that a string is a translation of a country, territory or capital city name in any language, it is not considered appropriate to provide the GNP with the discretion to waiver the requirement for obtaining government support or non-objection if, as suggested, the panel also considers that the 'translated language is of peripheral relevance to the designated country'. It is only the relevant government or public authority that rightfully has the discretion to make that decision.

In circumstances where the applicant did not know that the string requested represented a country or territory name in another language, the applicant will be given 60 days to contact the relevant government or public authority to acquire the necessary support or non-objection to the use of the string.

A resource document available to applicants is a list of country names in their respective official language/s and translation in the 6 official UN languages prepared by the Working Group on Country Names of the United Nations Conference on the standardization of Geographical Names

http://unstats.un.org/unsd/geoinfo/9th-UNCSGN-Docs/E-CONF-98-89- Add1.pdf

Blurring the distinction between ccTLDs and gTLDs—should country and territory names be treated the same as ccTLDs

The ccNSO and other ccTLD managers have raised concerns that allowing applications for country and territory names in the gTLD process will blur the distinction between ccTLDs and gTLDs. Further, it is asserted that to allow the 'given names' of countries to be defined as generic (and thus delegated as gTLDs) is illogical and incompatible with any normal understanding of the term generic. They have requested that applications for country and territory names not be allowed in the gTLD process, at least until the completion of the IDN ccTLD PDP, which will address this issue. The current timetable for the completion of this process is mid 2011. Comments received from others support the notion of country and territory name applications being allowed under the gTLD process.

While understanding the concern that it is important to maintain the distinction between a ccTLD and a gTLD, there is also anticipation that governments may want a .country name TLD. With the exception of names allowed under the IDN ccTLD fast track, this is only possible under the new gTLD process, under very specific circumstances. With regard to concerns that a country name is not a generic term, in the context of ICANN terminology, a ccTLD has

traditionally been referred to as a two letter[1] country code TLD while most TLDs with three or more characters[2] are referred to as "generic" TLDs, or "gTLDs". At the time the DNS hierarchy was developed, the number of characters was the distinguishing factor between a ccTLD and a gTLD. To date, there has been no community agreement on whether there is a need to redefine these terms.

The treatment of country and territory names, in version 2 of the Draft Applicant Guidebook was developed in the context of the points raised by the GAC, the ccNSO, and the GNSO policy recommendations. Applications for country and territory names will require evidence of support or non-objection from the relevant government or public authority, which is consistent with GAC principle 2.2[3], and that evidence must clearly indicate that the government or public authority understands the purpose of the TLD string and the process and obligations under which it is sought.

Geographic names were discussed during the GNSO Policy Development Process, and while two letter TLDs are not available in the new gTLD process in recognition of the possibility of new ccTLDs, the GNSO Reserved Names Working Group did not find reason to protect geographic names and considered that the objection process was adequate to protect a geographic name, while the GAC considered that such terms should be avoided unless in agreement with the relevant governments or public authorities.

The treatment of country and territory names in the gTLD process has been developed to provide safeguards to ensure that the relevant government or public authority's sovereign rights are respected, and that the process is understood. It is ultimately the government or public authority's discretion whether to support or not support an application for a country name TLD, and circumstances under which they would be willing to do so.

Capital City Names

A concern has been raised that ICANN is making new international law because TLDs which contain capital city names will require the approval of relevant governments. ICANN has sought to protect the geographic name only, for example the name of the city or the country or territory. Citing the example used in the comment received, a business wishing to apply for .bernunlimited would not require the support of the Swiss government. However, an application for .bern would require the support or non-objection from the relevant Swiss government or public authority,

OBJECTION PROCESS

Procedures

I. Key Points

- ICANN agrees that it is important to encourage the DRSPs to consolidate objections whenever possible and is reaching out to the DRSPs to do just that.

- ICANN is communicating with the DRSPs to ensure a process is in place whereby a running list of objections will be made public throughout the objection period.

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[1] http://www.icann.org/en/general/glossary.htm#C
[2] http://www.icann.org/en/general/glossary.htm#G
[3] ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities

II. Summary of Comments

Government/Country Objection Procedure—cost and complexity

The cost and complexity of the objection procedure and implications of the proposed procedure for governments to submit objections based on, e.g., morality and public order grounds, should be taken into consideration. Some countries are not represented in ICANN and might not learn about problematic domain names in a timely manner to be able to object. *A. Al-Zoman (19 July 2009).*

Running list of objections

COA is pleased that ICANN will consider and discuss with the DRSPs a process whereby by a running list of objections is published as objections are filed during the filing period. This could minimize the risk of needless duplication in objection procedures. This should be spelled out as a requirement in the final version of the applicant guidebook. *COA (20 July 2009).*

Community Objection Procedures—consolidation of challenges

COA looks forward to how encouraging the DRSPs to allow for consolidation of challenges will be operationalized in the final version of the applicant guidebook and whether it is specified (as it should be) that this encouragement applies to consolidation of objections filed by the same party against multiple applicants for the same or highly similar character strings. *COA (20 July 2009).*

Community objection—procedural problems not addressed

The proposed changes do not address procedural problems with the community objection process, including doing more to encourage consolidation of objections filed by the same party against multiple applicants, publishing a running list of objections received, and providing greater predictability on fees. *IPC (20 July 2009).*

III. Analysis and Proposed Position

Comments received relating to objection procedures involve a running list of objections, consolidation, government awareness, and the costs and complexities of the objection process in general.

ICANN has sought to create an objection process that is fair and reasonable in cost, taking into account the legitimate interests and expectations of applicants, potential objectors, and other members of the community. The institution of an Independent Objector is designed, in part, to account for the anticipated reluctance of some governments to participate in the objection process.

In terms of awareness, the new gTLD program has been widely publicized, and specific publicity campaigns are planned for the actual launch of the program. Thus a government does not necessarily need to be represented in ICANN (although all participation is certainly welcome) to learn about the program. With a reasonable amount of attention, governments and other interested parties will learn about gTLD applications in a timely manner.

ICANN has agreed that it will encourage all providers to allow for consolidation of objections to the extent possible, but it will be up to the DRSPs to make the final determination. It should be recognized, however, that multiple applications for different community-based gTLDs may not present the common issues of fact and law that make consolidation appropriate.

ICANN does intend to work with the DRSPs to publish a running list of objections as they are received rather than waiting until all objections have been filed.

At this time, it is difficult to predict the actual amount of fees for community-based objections. With experience, it may be possible to provide more information and some greater degree of predictability.

COMMUNITY-BASED OBJECTIONS

I. Key Points

- Eliminating the "detriment" requirement by way of presuming it simply by the filing of an objection appears aimed at giving certain objectors with standing a veto power over applications. Such a power is not the envisioned result of the objection process.

- If an objector represents a different community than the applicant but has not applied for the gTLD, there appears no legitimate reason why that objector should be entitled to prevent an applicant that can satisfy the community standing requirements from obtaining the gTLD if no harm to the objector can be shown.

II. Summary of Comments

Community objection—changes endorsed

eNOM endorses the changes made to the community objection section in Module 3. They more clearly align this form of objection with the objective of community—i.e., to prevent the misappropriation of a string that uniquely or nearly uniquely identifies a well-established and closely connected group of people or organizations. *eNOM (21 July 2009).*

Community Objection—detriment and level of recognized stature or weight among sources of opposition

COA reiterates its view (also supported by IPC) that when a challenger has shown that it meets the criteria of community delineation, substantial opposition and targeting, detriment should be presumed, unless the applicant can show otherwise. A legitimate community representative is in the best position to determine whether its community will be harmed by recognition of a gTLD that targets it. Regarding ICANN's proposal to take into account the "level of recognized stature or weight among sources of opposition," COA urges that the representative nature of community institutions be considered as a factor here (i.e., an entity authorized to speak by a large number of individuals or entities should be accorded a high "level of recognized stature or weight"). *COA (20 July 2009).* IPC appreciates the clarification of section 3.4.4 that a "community" may be composed of legal entities (including business groups), not just individuals. One overarching problem with the objection criteria is the definition of "detriment" that an objector must show; it evidently does not include harm that may result from granting another party exclusivity in the proposed community-based gTLD string, particularly in the situation where multiple parties may be able to claim to speak for significant portions of the community. Any representative institution with sufficient standing to bring an objection should be rebuttably presumed to risk suffering detriment if the challenged TLD is awarded to the applicant. The detriment requirement should also be clarified to address cases where the objection is based either on the applicant's lack of standing to represent the community or the legitimacy of the community definition itself. In such cases, a detriment showing should not matter because the complaint presents threshold issues that should be subject to review on a complaint from any party with a good faith belief that it would be harmed, whether or not that harm falls into the detriment categories in section 3.4.4. *IPC (20 July 2009).*

Complete defense clarifications

IPC commends the "complete defense" clarifications in section 3.4.4, especially that the applicant has the burden of demonstrating this defense, and ensuring that it cannot be invoked by an "open TLD" applicant. However, it should be further reviewed—the rules are much too strongly biased toward granting the gTLD to the first to apply for it, a result that could end up harming the communities that the rules purport to protect. *IPC (20 July 2009).* ICANN's explanation of why the "complete defense" is needed does not explain why it could be invoked by an applicant even if no other community-based application for the same string had been received, or even if the challenger represents a community that is defined completely differently from the community defined by the applicant. Even in the circumstance ICANN uses to justify the need for the "complete defense," all it does is shift the locus of judging relative legitimacy from the community objection DRSP to the "comparative evaluator" at a later stage in the process. COA urges ICANN to reconsider the "complete defense" and modify it so that proof of the applicant's (hypothetical) standing to bring a challenge is only one factor to be considered by the DSRP in resolving a real community objection challenge. *COA (20 July 2009).*

Community objection—standing

COA does not object to the proposal to state that determining standing will be the result of a balancing of factors (proposed amended section 3.1.2.4), but its inclusion underscores the need for greater clarity and specificity on the issue of standing in the final version of DAG v.3. It would be enlightening to all parties to provide examples of challengers who may possess or lack standing. It should be possible to provide examples that use existing strings, so as not to prejudice any future application or any challenge thereto. Established trade associations or member/affiliate organizations for a particular creative or economic sector must be assured of standing in this community objection process. COA also urges ICANN to spell out how organizations can join together to file objections and cumulate their qualifications for standing purposes. *COA (20 July 2009).*

Unfair burden shift to communities

The new gTLD objection process shifts responsibilities from ICANN to the communities, when it is ICANN's duty to make sure that communities are not hurt by the introduction of new gTLDs that would cause havoc. Communities will have to continuously monitor ICANN's processes to prevent harm to a community's values from introduction of a new gTLD. This model cannot be used to deal with many morality and public order issues across the board, and would put some communities on high alert and they might not wait for ICANN to pass a verdict on a new gTLD. *A. Al-Zoman (19 July 2009).*

III. Analysis and Proposed Position

ICANN appreciates the time that the community has spent on reviewing the community objection process. ICANN has paid close attention to comments received and, as has been recognized, has made some significant revisions in view of many of the comments. As summarized above, the most recent comments, some of which previously have been stated, relate to detriment, available defenses, factors to consider relating to opposition, standing and burden shifting.

Proof of detriment is an essential element of the Community Objection process. Mere opposition to an applicant and its applied-for gTLD should not be a sufficient basis for presuming detriment. Thus, it is correct that detriment "does not include harm that may result from granting another party exclusivity in the proposed community-based gTLD string, particularly in

the situation where multiple parties may be able to claim to speak for significant portions of the community." If several parties are able to claim to speak for significant portions of a community, each may be entitled to apply for a community-based gTLD, and there are procedures in the new gTLD program for determining which applicant in this situation will be successful. Eliminating the "detriment" requirement by way of presuming it simply by the filing of an objection, appears aimed at giving certain objectors with standing a veto power over applications. Such a power is not the envisioned result of the objection process. If an objector with standing can prove "detriment" and satisfy other criteria, its objection may prevail. If a party considers itself equally or more entitled to speak for a given community, that party may apply for a community-based gTLD – and eventually enter the string contention stage with another applicant, if necessary.

The complete defense is appropriate "even if no other community-based application for the same string had been received, or even if the challenger represents a community that is defined completely differently from the community defined by the applicant. If the objector represents a different community but has not applied for a gTLD, there appears no legitimate reason why that objector should be entitled to prevent an applicant that can satisfy the community applicant standing requirements, and is doing no harm, from obtaining the gTLD. The rules do favor those who apply for a new gTLD; there is a presumption that a qualified applicant will be granted the gTLD. As is typical in disputed matters, objectors bear the burden of proving why, according to certain stipulated criteria, the application should be rejected. However, the rules do not necessarily favor the first applicant to apply within a given round, which is evidenced by the string contention stage of the application process.

In terms of opposition, ICANN sees no prohibition against the DRSP panel considering "the representative nature of community institutions" (i.e., an entity authorized to speak by a large number of individuals or entities) as a factor in analyzing opposition. It seems appropriate that the "level of recognized stature or weight among sources of opposition" afforded by the panel will likely depend on the particular facts or circumstances.

ICANN has developed an objection process that is meant to be as open and transparent as possible by providing relevant factors for consideration of standing. ICANN does not think it appropriate to provide examples of what individuals or entities might have standing to object, as it should be left to the DRSP panels in light of the established criteria; the facts and circumstances are unique to each situation.

While ICANN will enforce obligations undertaken by the registry operator in its agreement with ICANN, it is not ICANN's duty to supervise the operation of new gTLDs and to ensure that communities are not hurt by those gTLDs.

MORALITY AND PUBLIC ORDER

I. Key Points

- It would be inconsistent with the universal dimension of M&PO objections for a narrowly defined injury or potential harm, to serve as a basis for standing.

- ICANN recognizes that the dispute resolution procedure should discourage and limit objections that are manifestly unfounded and/or an abuse of the right to object and is working on developing standards to ensure such objections are dealt with quickly and efficiently.

II. Summary of Comments

Morality and Public Order Objections—frivolous complaints

ICANN needs to pursue this area with caution, especially with respect to standing requirements so as not to open up the process to challenges based on specious grounds or for purposes of harassment. Standing requirements tied to consideration of injury or potential harm to the complainant are less vulnerable to such abuse. A process for screening out frivolous objections could be indispensable. It is not clear if there is a penalty for filing a frivolous morality and public order objection that is rejected at the initial stage. ICANN should consider how to penalize complaints deemed frivolous on initial review (e.g., forfeiture of filing fee) in light of the potential for abuse and the potential chilling effect of morality and public order objections on controversial communications. *IPC (20 July 2009).*

Morality and Public Order objection—quick look review to deter frivolous and malicious objections

The significant broadening of standing to object is likely to increase the incidence of frivolous or malicious objections. eNOM strongly endorses the idea of a "quick look" review to reduce the need for full dispute proceedings in such cases. During "quick look" the DRSP could deny an objection where the applied for TLD is very clearly not in breach of the standards in DAG section 3.4.3. An objector found to be frivolous or malicious should not have any portion of their objection fee refunded. *eNOM (21 July 2009).*

Morality and Public Order Objection—harassment and suppression of speech; independent objector

ICANN must also recognize that non-frivolous objections may be made to harass and to suppress speech. The possibility for such abuse means that standing grounds should be defined narrowly to reduce bad faith but non-frivolous complaints to the extent practicable. The independent objector is empowered to take action against "highly objectionable" gTLD applications on morality and public order grounds, which should act as a sufficient check on obviously problematic gTLDs. *IPC (20 July 2009).*

III. Analysis and Proposed Position

ICANN appreciates the comments and agrees that balancing needs to occur with respect to standing to file Morality and Public Order (M&PO) based objections and trying to discourage frivolous objections. As stated below, provisions will be added to the Procedure to empower the Panel to dismiss objections that are manifestly unfounded and/or an abuse of the right to object at an early stage of the proceeding (the quick look review).

The rationale for M&PO objections and the standards that will be applied in the dispute resolution process must be borne in mind when considering this proposed rule of standing. The relevant GNSO policy recommendation refers to generally accepted legal norms that are recognized under international principles of law. The specific grounds upon which an applied-for gTLD may be considered contrary to morality and public order have been identified because they are very widely accepted.

It would be inconsistent with the universal dimension of M&PO objections to narrowly define injury or potential harm, as providing a basis for standing. The harm that is done by incitement to violent lawless action; by incitement to discrimination based upon race, color, gender, ethnicity, religion or national origin; and by incitement to child pornography or other sexual abuse of children extends far beyond the direct or immediate victim of the offense.

If an applied-for gTLD were to constitute incitement to violent lawless action against some person or group of people, it is not only the victim(s) of that action who would have a legitimate interest in preventing the crime. An applied-for gTLD that incites hatred or discrimination against, say, A or B is not merely harmful to A or B. Every person is (or should be) concerned by such incitement. It would surely be inconceivable to allow only A to object to the applied-for gTLD <.killA>, and only B to object to <.killB>. Similarly, it would be difficult to defend – or even to formulate – a rule that grants standing to some and denies standing to others to object to the incitement or promotion of child pornography.

These considerations, along with other practical issues, have led to the decision to grant standing to any person to file a Morality and Public Order Objection. At the same time, ICANN recognizes that the dispute resolution procedure should discourage and limit objections that are frivolous, manifestly unfounded and/or an abuse of the right to object. ICANN points out that the New gTLD Dispute Resolution Procedure already provides that the losing party shall pay the full costs of the procedure. In addition, provisions will be added to the Procedure to empower the Panel to dismiss objections that are manifestly unfounded and/or an abuse of the right to object at an early stage of the proceeding (the quick look review).

ICANN does not consider that rules of standing are the appropriate means of screening out "bad faith but non-frivolous" objections. This is a task for the panelists, addressing the merits.

INDEPENDENT OBJECTOR

I. Key Points

- The Independent Objector seems like a sensible inclusion in the process.

II. Summary of Comments

Independent objector

The scope, methods and funding for the independent objector seem sensible. There are likely to be few, if any, cases where the independent objector initiates an objection, but it is important to have this capability in place as a contingency. *eNOM (21 July 2009).*

III. Analysis and Proposed Position

ICANN agrees that having the Independent Objector in place is sensible. ICANN introduced the Independent Objector as an element of the dispute resolution process in draft v2 of the Applicant Guidebook, to remedy the situation that might arise where, for one reason or another, no objection is filed against a "highly objectionable" gTLD application. ICANN presented the rationale and briefly described how that person would act in an Explanatory Memorandum published for comment on 18 Feb 2009, entitled "Description of Independent Objector for the New gTLD Dispute Resolution Process." See http://www.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf.

Comments on this subject contained several requests for more information and definition concerning this role. The updated text below discusses the Independent Objector in greater detail.

Mandate and scope

The IO may file objections against highly objectionable gTLD applications to which no objection has been filed. The IO is limited to filing two types of objections: (1) Morality and Public Order

objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections.

The IO may file a Morality and Public Order objection against an application even if a Community objection has been filed, and vice versa. The IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed. Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground.

The IO may consider public comment when making an independent assessment whether an objection is warranted. ICANN will submit comments to the IO from the appropriate time period, running through the Initial Evaluation period until close of the deadline for the IO to submit an objection.

The new material also discusses rules for staffing and funding the I/O role.

POST-DELEGATION PROCESSES AND ENFORCEMENT

I. Key Points

- Community-based registry operators should be held to the restrictions they promised to apply to registrations in the gTLD

- Providing for a complaint process and administrative dispute resolution process for community members to utilize when they believe the restrictions are not being followed seems appropriate and efficient.

II. Summary of Comments

Registry restrictions DRP proposal raises questions

Providing a channel for third parties to object to the failure of a community-based registry to enforce certain of its requirements is valuable, but the proposal also raises questions. For example: Why would the procedure be restricted to community-based TLDs (e.g., what about open TLDs with registration or use rules)? Would the availability of the procedure relieve registry operators of the responsibility to enforce the stated restrictions themselves or undermine their incentive to provide customized enforcement mechanisms (e.g., registry-specific procedures to challenge registrant eligibility)? Is it appropriate for ICANN to abdicate any responsibility for enforcing the agreement it has with the registry (which contains the restrictions in question), instead turning the job over to third parties (even if the contract formally denies them any status as "beneficiaries" of the contract)? The RRDRP should not become an incentive or excuse for weak ICANN compliance and audit efforts. How would an RRDRP be integrated with other post-delegation remedies, such as the procedure proposed by the IRT for use with registries that fail to live up to other representations made in the application and/or contained in the registry contract with ICANN? *IPC (20 July 2009).*

Post-delegation obligations

COA commends ICANN for proposing a process whereby third parties (including but not limited to members of affected communities) could instigate investigations of alleged failures of community-based registries to live up to the commitments they made in the new gTLD evaluation process and that are contained in their registry agreements with ICANN. COA agrees with IPC that the proposal for an RRDRP raises many questions. *COA (20 July 2009).*

Post delegation dispute resolution mechanism

While it is not explicitly listed in this excerpt of the DAG, GoDaddy opposes the adoption of a new Post Delegation Dispute Resolution Mechanism as described in the IRT final report. The report advances that a mechanism for post-delegation disputes is essential for the protection of trademark holders' rights. The assertion of this need presumes that the outlined pre-delegation dispute methods, or that ICANN's ability to enforce its contracts with new gTLD registries, will be unsuccessful. GoDaddy believes that these issues are distinctly separate from the rights of trademark holders. Rather than adopt the IRT's proposal, GoDaddy urges ICANN to (1) ensure that all stakeholders have confidence in the existing dispute resolution procedures outlined in Module 3, and (2) enforce compliance of all new gTLD registry agreements. *GoDaddy (20 July 2009).*

III. Analysis and Proposed Position

ICANN appreciates that post-delegation dispute processes need more detail and ICANN is working towards developing that detail.

The need for a Registry Restrictions Dispute Resolution Procedure (RRDRP) is based on the idea that it would not be fair to give a preference in the New gTLD allocation process (which will be provided in the community priority (comparative) evaluation stage) to an applicant based on a promising to restrict use of a TLD to a particular community, and then not require the applicant to keep its promise. Specific requirements must be satisfied in the application for a community-based TLD, and the successful applicant must undertake in the registry agreement to implement the community-based restrictions it has specified in the application. See DAG v.2, 1.2.2.1, 1.2.2.2. Such promises are not required for non-community-based gTLDs. Thus, restricting the application of the RRDRP to only those registry operators that are required to keep promises relating to community as set out in the gTLD application and registry agreements seems appropriate.

The RRDRP is not meant to be the only mechanism by which registry operators will be required to comply with registry agreements. Providing for a complaint process and administrative dispute resolution process for community members to utilize when they believe the restrictions are not being followed, however, seems appropriate and efficient. ICANN will of course continue its other compliance efforts with respect to all registry agreements, including those for new gTLDs.

With respect to a post-delegation dispute resolution mechanism for legal rights, ICANN is in the process of considering and taking consultation on the IRT's proposal and other proposals from the community. ICANN recognizes that intellectual property owners have various legal options to defend their rights. One option could be an administrative procedure through which violations of intellectual property or other legal rights concerning new gTLDs may be identified and stopped without resort to litigation.

STRING CONTENTION

Community Priority (Comparative Evaluation)

I. Key Points

- The de-aggregation of criteria as published in the excerpts is well received according to the comments. Some comments request further explanations and some also propose refinements and detailed interpretations of the expressions used in the criteria. In the next

version, staff will expand the criteria section with explanatory notes regarding the expressions used, to improve clarity and predictability.

- While some comments welcome the tentative lowering of the scoring threshold to 13 out of 16 points, others claim that this level unduly will facilitate gaming and request a return to the previous threshold, 14 out of 16. Since the addition of the explanatory notes in the next version will clarify scoring and additional testing has occurred, it is intended to set the threshold at the previous mark of 14, although still as a tentative approach awaiting consolidated views and comments on this section as expanded.

- A couple of comments suggest that an even lower threshold should be applied in case there is only one community application in a contention set. This suggestion is interesting but appears at odds with the policy objective of only awarding priority to qualified community applications, while safeguarding against gaming attempts as highlighted by other comments. The next version will accordingly keep the current approach of applying the same scoring standards and threshold regardless of the number of community applications present in a contention set.

- One comment proposes that all IDN applications should be regarded as community applications and be subject to community vetting and approval. While this suggestion would tend to hobble IDNs, it should be noted that the choice to file an application as community-based is up to the applicant and there are no provisions in the application handling process to force a change of an application in this respect. However, in the case an application is seen as violating the rights of a community, the community has the option to file a community-based objection regarding that application. No change in this respect is foreseen for the next version.

II. Summary of Comments

Comparative evaluation criteria

The disaggregation of the scoring criteria is an improvement and makes the overall process easier to understand. IPC also supports lowering the threshold that must be met (13 rather than 14 out of a possible 16 points) in order to survive the "community priority" evaluation and avoid having an auction. This relaxation is particularly needed where only one community-based TLD application is involved. It seems unjustified that ICANN still proposes to treat these cases in the same way as those in which more than one applicant within a contention set claims the backing of a community. *IPC (20 July 2009).*

Comparative Evaluation –structure concerns

As currently structured, comparative evaluation will too often serve simply as the anteroom to an auction as a means of awarding a TLD string to one of the competing applicants. This gives insufficient weight to the goal of according preference to community-based applications as against "open" proposals. COA commends ICANN for the changes made to lower the threshold that must be met (13 rather than 14 out of a possible 16 points) in order to survive the "community priority" evaluation and avoid having an auction. But it apparently remains the case that any community application which has been the subject of a community objection by an objector with standing automatically loses 2 points even though by definition it has vanquished the objection. Once that occurs there are many pitfalls which could cause the application to lose two more points and slip below the threshold required. The high threshold for surviving comparative evaluation seems particularly unjustifiable in the circumstance in which there is only one community-based application for a particular string. ICANN has never explained why

the evaluation process must be equally rigorous in such a case, as it would be when two community-based applications are contending for a single string. While a further relaxation of the 13-point threshold ought to be considered across the board, it seems essential in this situation. *COA (20 July 2009).*

Comparative evaluation –clarification of specific criteria is needed

For example, there are likely to be situations which fall between the only two criterion 3A provides. Criterion 2B also needs clarification; relatively few character strings (in Latin characters at least) that identify communities would not also be identical to words with completely different meanings in some language. If that counts as "other significant meaning" criterion 2B would rarely be satisfied. *COA (20 July 2009).*

Comparative evaluation

GoDaddy generally supports the methods of evaluation described in Module 4, but has some concerns about lowering the threshold score. ICANN must ensure that only true community-based applications are granted priority, and that the system is not abused or gamed. ICANN should publish the results of the ICANN staff's scenarios to test this scoring method for public review. *GoDaddy (20 July 2009).*

Comparative evaluation criteria

By nature IDN is a "community-based" TLD because IDN is a localized service to serve Internet users using certain language. It is recommended that an IDN application consult the related community to avoid complications from future objections. If a language or script is shared among different nations and regions, a coordinating mechanism should be structured among these stakeholders. The opinion of the supermajority of the specific language user should be respected. Also, CNNIC recommends that ICANN fully consider the opinion of the Chinese Domain Name Consortium (CDNC) when evaluating Chinese TLD applications. The users served by members of CDNC account for over 99% of Chinese Internet users worldwide and this consortium is a legitimate representation of the Chinese domain name community. *CNNIC (21 July 2009).*

Community priority criteria

The complex principle of community should give preference to applicants whose selected string so closely reflects the applicant group's identity that to allow another applicant to have that string would impinge on the rights of the group. "Rights" should mean that the string is the name of the group, and has no other meanings, so in effect it "belongs" to them. Community is proper for applicants who do not have legal (e.g., trademark) rights in the string but nevertheless should not have to compete with other possible applicants for the string. *eNOM (21 July 2009).*

Community and generic strings

Community should not be abused by applicants seeking to obtain and limit a generic string that has many uses. Such general strings should be allowed to be shared by the wider Internet community. When a legitimate community string is communicated (by itself and without other words) there should be no doubt which group of individuals or organizations the string refers to, and by definition there should be very limited or no other uses of the string outside a description of that group. *eNOM (21 July 2009).*

Proposal to deter "gaming" of community bids

Because community bids beat open bids, there is a huge incentive for applicants to claim community and this may encourage gaming of the process, leading to disputes and potential litigation. To support legitimate community bids and reduce such gaming abuses, Section 4.2.3 should be clarified as follows:

- *Criterion 1—community establishment*—there should be clear definitions of the terms "organized", "size", and "longevity". "Organized" should require documented evidence of community objectives, processes, operations and activities that were not associated purely with the pursuit of the TLD. "Size" should require tens of thousands of community members (at a minimum) and "longevity" should require that the community have been "organized" for at least two years prior to the TLD bid. In all cases the tests should be applied to the **actual community cited in the application** and not to individual members who have coalesced to form the community.

- *Criterion 4—community endorsement*—a score of 1 for support currently states: "Documented support from at least one group with relevance, but insufficient support for a score of 2." eNOM interprets this to mean that if the string is potentially relevant to more than one possible group the evaluator will apply a score of 1 (unless all possible groups have joined to form the applying community). This interpretation is logical because to define it otherwise would guarantee a support score of 2 to any applicant. It would be useful to applicants to have a note explaining that "if the string is potentially relevant to more than one possible group the evaluator will apply a score of 1 (unless all possible groups have coalesced to form the applying community)."

- *String nexus*— this is the most important criterion and eNOM applauds the new language that brings nexus scoring more into line with a community's "name" and "identity" as opposed to just "association" or "relevance" (as it appeared in prior drafts). An "I am a ___" test is a good indicator whether an applicant should score a 2 or more on nexus. Under this test the applicant or a member of the applicant's community should be able to complete that sentence where the TLD string fills in the blank. If the subsequent sentence makes grammatical and logical sense we think a nexus score of 2 or more is possible. If the sentence does not make grammatical or logical sense a score of 2 or more would not be achieved.

- *Uniqueness*—eNOM supports the new uniqueness score but believes that uniqueness is so important that applicants who meet this test should get 2 points instead of the proposed 1 (i.e., there would be a 2 or 0 score for uniqueness). Such scoring would be consistent with the February 2009 Analysis of Public Comment that concluded: "There is merit in considering uniqueness in the nexus between string and community as a main factor for achieving a high score. To be an unambiguous identifier, *the 'ideal' string would have no other associations than to the community in question* "(emphasis added).

- *Maximum number of points*—Increasing the uniqueness component to 2 points would make a total of 5 possible points for nexus, which is appropriate given the importance of this criterion. The maximum overall points would then become 17 instead of the current 16. In conjunction with this, eNOM strongly recommends that the current 13 points to pass the threshold be returned to its previous level of 14 except that whereas previously a score of 14 out of 16 was required for community now there would be a 14 out of 17 pass threshold. Even if the total number of points is not increased from 16 to 17, eNOM strongly recommends that the point total to achieve community be changed back to 14 (as it was in

the prior DAG) so as to align community with its true objective: "to prevent the misappropriation of a string that uniquely or nearly uniquely identifies a well established and closely connected group of people or organizations." *eNOM (21 July 2009).*

Nexus criteria

The criteria to score 2 points are the same as to score 3 points when using "to cause to be identical to" as the definition of the word "identify." The guidebook needs to be crisp where it can be, which assists the goal of being objective rather than subjective. Crucial words should be used in the context of their intended meaning and definition. The intention cannot be for the criteria to be the same for 3 points and 2 points. The simple remedy is to change "The string identifies the community" to "The string identifies WITH the community". This change allows people to interpret the proper meaning and definition in the context of the criteria and understand the difference of how to score 3 points versus 2 points for Nexus. *R. Fassett (10 June 2009)*

III. Analysis and Proposed Position

The de-aggregation of criteria as published in the DAG excerpt is well received according to the comments. Some comments request further explanations of the criteria and some also propose refinements and detailed interpretations of the expressions used in the criteria. ICANN staff is grateful for these suggestions and will expand the next version of the criteria section with explanatory notes regarding the expressions used, to improve clarity and predictability.

A broad spectrum of suggestions was made to make amendments to the scoring mechanism. Some comments welcome the tentative lowering of the scoring threshold to 13 out of 16 points as essential to avoid an outcome whereby many contention sets end up in an auction. Others, however, claim that this level unduly will facilitate gaming by applicants that may construe "communities" for the purpose of getting an upper hand in a contention set. They accordingly request a return to the previous threshold, 14 out of 16. One comment proposes an alternative; raising the maximum score for "uniqueness" to 2 while setting the winning threshold at 14 out of 17. The addition of the explanatory notes in the next version is intended to provide additional clarity for applicants in determining whether the TLD they proposed is a community-based TLD in accordance with the definition in the Guidebook and the intent of the policy recommendation. The new definitions and empirical testing of the standards indicate that the score of 14 should be restored as a threshold for the next version. The threshold will remain as a tentative approach, awaiting consolidated views and comments on this section when it has been expanded with the explanatory notes.

A couple of comments suggest that an even lower threshold should be applied in case there is only one community application in a contention set. This suggestion is interesting but seemingly at odds with the objective of only awarding priority to qualified community applications above open applications, while safeguarding against gaming attempts as highlighted by other comments. The next version will accordingly keep the current approach of applying the same scoring standards and threshold regardless of the number of community applications present in a contention set.

One comment contends that a community objection by an objector with standing, even if not upheld by the DRSP, would automatically make the application lose 2 points in criterion 4B, "Opposition". On balance, however, this objection too seems to go against the thrust of the policy intent; it is less likely that the objection alone (especially when defeated) would be seen as proof of "strong and relevant" opposition, leading to a score of 0. The score of 1 for "relevant

opposition from at least one group of non-negligible size" is a plausible alternative outcome, but this too depends on the circumstances and cases must be considered individually – with no automatic determinations based upon previous processes such as the objection procedure.

A comment suggests that the tests undertaken by staff be published. It should be noted that the tests were made in an iterative way with the objective of achieving the current de-aggregation of criteria, by using successive criteria drafts together with batches of hypothetical examples (including hypothetical opposition cases) where a staff group scored the examples individually, compared notes and redrafted criteria when scoring and understanding of the criteria diverged. This "work-in-progress" succession of drafts, examples and scores is prone to misunderstanding and the examples could easily be both misinterpreted and misrepresented as well. Rather than publishing this complex set, staff believes that the publishing of the explanatory notes in the next version is a more constructive way of advancing the dialogue on Community Priority.

One comment appears to propose that all IDN applications should be regarded as community applications and be subject to a kind of community vetting and approval. It should be noted that the choice to file an application as community-based is wholly up to the applicant and that there are no provisions in the application handling process to force a change of an application in this respect. However, in the case an application is seen as violating the rights of a community, the community has the option to file a community-based objection to that application. Additionally, IDN applications should not be restricted as to business model. There are as many commercial uses for IDN TLDs as for ASCII/Latin TLDs and IDN applicants should not be restricted to a limited set of uses for their TLD. It is believed that the current community-based provision satisfies the underlying requirement in the comment for protecting a community's interest and no change is foreseen for the next version in this respect.

AUCTIONS

I. Key Points

- One comment noted there is still concern about the use of auctions to resolve contention among competing gTLD applications, including the form of organization to receive proceeds and use of funds.

- One comment suggested that ICANN lengthen the time for bidders to provide final payment to ICANN following an auction from ten days to thirty days, due to restrictions on foreign currency and money transfer.

II. Summary of Comments

Two comments related to auctions were received during the comment period on the revised excerpts: the use of auctions as a meta-question and the timing of auction payments.

Auctions

IPC reiterates its strong concerns about using auctions to award new gTLDs.

These concerns include the uses of proceeds and the effectiveness of auctions as choosing the most deserving or most appropriate applicant (to paraphrase the IPC report. The comments can be separated into two arguments: whether auctions are the most appropriate form of contention resolution and, if it is, "there is a unspoken issue hovering over the auctions … what ICANN will do with the proceeds of any auctions it holds to allocate new TLDs"? *IPC (20 July 2009).*

Auctions—timing of payment after winning bid

While it is expected that money should be prepared when entering into the bidding process, it still poses a challenge for some winning bidders to make the money to ICANN timely in the short timeframe of ten business days of the end of the auction. Quite a few countries impose restrictions on foreign currency and the money transfer will take a long process before it reaches ICANN's account. Given the complexity of the international financial systems, CNNIC advises that ICANN extend the timeframe from 10 days to 30 days. *CNNIC (21 July 2009)*.

III. Analysis and Proposed Position

The Intellectual Property Constituency (IPC) reiterated its previous comments about the use of auctions in the new gTLD process. ICANN sought to address these comments in its Explanatory Memo on Resolving String Contention published on 22 October 2008 (see http://www.icann.org/en/topics/new-gtlds/string-contention-22oct08-en.pdf). The current comment section makes similar arguments stating that the initial arguments were not addressed in the memorandum or subsequent analyses. These concerns include the uses of proceeds and the effectiveness of auctions as choosing the most deserving or most appropriate applicant (to paraphrase the IPC report): whether auctions are the most appropriate form of contention resolution and, if it is, "there is a unspoken issue hovering over the auctions … what ICANN will do with the proceeds of any auctions it holds to allocate new TLDs"?

The validity of the IPC comments on this topic is recognized. The ability to pay more in an auction isn't the indicator of eventual benefits to registrants. The GNSO indicated that community representations should be a factor in determining contention cases. In response, a process has been developed to identify bona-fide community applicants and provide them with a preference in every case of contention. Other factors to give a preference have been discussed: language groups, city groups, not-for-profit organizations, applicants from least developed countries to name a few. Attempting to create a methodology for an effective sort of beauty contest is very difficult. The brightest line distinction is perhaps the community designation requested by the GNSO and that implementation has proven to be extraordinarily difficult. Other factors are susceptible to gaming and will result in vague evaluation criteria.

ICANN has taken the position that auctions are the contention resolution method of last resort – and it is thought that auctions will occur rarely. The community priority (comparative) evaluation process can be used by community-based applicants to avoid auctions with large commercial entities. The community priority evaluation criteria are written purposefully in a way that will admit and empower small community-based applicants. The score for succeeding in the community priority evaluation is high to avoid contention between large commercial entities and community applicants.

After community priority evaluation, if there is still contention, parties are encouraged to settle. This is the opposite of spectrum auctions where parties are commanded to stay apart. ICANN encourages settlement as the most economical and effective method to delegate the TLD. Agreements can be made that better meet the needs of all contending parties and potential registrants. With the economic incentive to settle, it is thought that auctions will not occur frequently.

With regard to the use of funds, ICANN has done considerable work that will be published for public comment. For example, it has been determined that ICANN's receipt of string-contention auction proceeds must not jeopardize its public charity status under IRC § 509(a)(2), and that it might consider establishing or making arrangements with separate nonprofit entity to receive

auction proceeds where ICANN's role is limited to designating conditions and restrictions necessary to ensure the funds are used for the public benefit. Potential uses of funds include: improving Internet infrastructure, capacity building in developing areas, lowering costs for applicants from developing areas, creating grants for benefit of Internet community, lowering registration fees, supporting ccTLDs of developing countries, creating a security fund, fund "insubstantial" lobbying activities in favor of global public interest, or generally promote the global public interest in DNS stability.

It is suggested that ICANN extend the period of time for winning bidders to provide payment from ten days to thirty days, as some countries impose restrictions on foreign currency transfers. ICANN will consider this suggestion as further detail is provided on the auction process for the next version of the Applicant Guidebook.

ICANN believes that, in most instances, requiring payment from winning bidders within 10 business days of the auction will not impose an undue hardship on applicants and that it will produce a fairer auction process than a longer payment period. In entering an auction, a participant is on notice that it might be obligated to disburse funds in the near future. The effective notice period then, is much longer than 10 days. The 10-day requirement in the current Guidebook is based on study of other international auction models. However, in the event that a given applicant anticipates that it would require a longer payment period due to documentable government-imposed currency restrictions, the applicant may advise ICANN well in advance of the auction and ICANN will consider applying a longer payment period to all applicants in the auction(s) in which the given applicant is participating.

REGISTRY AGREEMENT

I. Key Points

- Thick Whois requirement will ensure reliable access to data on registrations in new gTLDs.

- Specially-tailored Whois models will continue to be available through ICANN's "Procedure for Handling Whois Conflicts with Privacy Law."

- ICANN will investigate providing incentives for new registries that take steps to promote Whois accuracy.

II. Summary of Comments

IPC commends ICANN for requiring thick Whois registries in response to concerns of the IRT and others

This requirement will among other things greatly help in tracking down intellectual property infringement and other abuses. It is consistent with the practice of the vast majority of existing gTLD registries. Any privacy concerns are adequately addressed by existing procedures. ICANN should also take this opportunity to provide incentives for new registries to take on some of the responsibility for ensuring that the ICANN-accredited registrars which they employ to sponsor registrations live up to their obligations regarding Whois. *IPC (20 July 2009).* COA strongly supports IPC's comments, especially support of the thick Whois requirement from all new gTLDs. To COA's knowledge, ICANN has never responded to the proposal for provisions in the draft registry agreement to obligate registries to take steps to ensure compliance with Whois-related obligations by ICANN-accredited registrars within the new TLD. There is precedent for such provisions in the .asia registry agreement. *COA (20 July 2009).*

Thick Whois—support

INTA IC strongly supports the proposal to require all new TLD registries to implement a "thick" Whois model, and commends ICANN for adopting this recommendation in the latest proposed DAG amendments. Simplifying access to accurate and reliable contact details for the true owner of the domain name registration is necessary to prevent abuses of intellectual property and to protect the public by preventing consumer confusion and consumer fraud in the Internet marketplace. INTA supports open access to accurate ownership information for every domain name in every top-level domain registry, for addressing legal and other issues related to the registration and use of the domain name. *INTA IC (20 July 2009).*

Telnic Model Adoption–support

It would be a giant step forward to adopt the Telnic model for all new gTLDs regardless of which jurisdiction they are under. This would allow addressing legitimate concerns of both the individuals seeking more privacy and those of LEA and others that need to access the full data. *P. Vande Walle (29 June 2009).* See also *S. Mosenkis (19 July 2009).*

Harmonize Whois for registries and registrars

It should also be logical to adapt the RAA to harmonize the Whois requirements for registrars to match those of registries. It would make little sense to protect the privacy of individuals at the registry level if full data is displayed by the registrar Whois anyway. We need to be consistent. *P. Vande Walle (29 June 2009).*

Significance of thick Whois requirement for new TLDs

The IRT report stated that provision of Whois information at the registry level under the thick Whois model is essential to cost-effective protection of consumers and intellectual property owners. eNOM notes that the "com" and "net" registries, which hold 84% of all gTLD registrations, are not thick, so that the logical conclusion of the IRT report is that cost-effective trademark protection is not possible in "com" and "net". eNOM further notes that given the new DAG version's mandatory Thick Whois requirement for new TLDs, this must be seen as a major victory for the IRT and a significant reduction in trademark protection costs versus "com" and "net". *eNOM (21 July 2009).*

III. Analysis and Proposed Position

The comments on this subject generally supported the proposed changes to the registry agreement's Specification #4 on "Registration Data Publication Services." ICANN will adopt and maintain these changes in the next version of the Applicant Guidebook. The rationale for the changes was described in an explanatory memorandum titled "Thick vs. Thin Whois for New gTLDs" <http://icann.org/en/topics/new-gtlds/thick-thin-whois-30may09-en.pdf>. As described in the explanatory memorandum, not only would thick Whois ensure reliable access to data on registrations in New gTLDs, but there would also be stability benefits that could accrue to registrants.

One commenter urged the adoption of a tiered access model (from dot-tel) across all new registries and also the modification of the Whois obligations in ICANN's registrar agreements. Another commenter recommended the adoption of features present in two existing gTLD agreements (dot-asia and dot-mobi) that indicate a role for registry enforcement of registrar Whois accuracy obligations. While such recommendations might have merit, mandating them across all new registries would not be consistent with ICANN's goals for the New gTLD program as described in the explanatory memorandum: "Whois is the subject of continuing work within

ICANN's policy development process. In launching new gTLDs, ICANN's goal has been to maintain the status quo so as not to pre-empt or side-step the bottom-up policy development work." Such proposals could be appropriately addressed within the GNSO's continuing work on Whois and RAA changes.

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