Draft Minutes of
Special Board Meeting

12 February 2009

A Special Meeting of the ICANN Board of Directors was held via teleconference 12 February 2009 @ 20.00 UTC. Chairman Peter Dengate Thrush promptly called the meeting to order.

In addition to Chairman Peter Dengate Thrush the following Directors participated in all or part of the meeting: Harald Tveit Alvestrand, Raimundo Beca, Steve Crocker, Demi Getschko, Steven Goldstein, Dennis Jennings, Rajasekhar Ramaraj, Rita Rodin Johnston, Jean-Jacques Subrenat, Bruce Tonkin, Katim Touray, Paul Twomey (President and CEO), and David Wodelet. Roberto Gaetano was not present.
The following Board Liaisons participated in all or part of the meeting: Janis Karklins, GAC Liaison; Ram Mohan, SSAC Liaison; Thomas Narten, IETF Liaison; Thomas Roessler, TLG Liaison; Wendy Seltzer, ALAC Liaison; and Suzanne Woolf, RSSAC Liaison. The Chairman, Dennis Jennings, Rita Rodin Johnson and Paul Twomey all joined via telephone with ICANN management and staff from the ICANN Marina del Rey office.

Also, the following ICANN Management and Staff participated in all or part of the meeting: John Jeffrey, General Counsel and Secretary; Doug Brent, Chief Operating Officer; Kurt Pritz, Senior Vice President, Services; Paul Levins, Executive Officer and Vice President, Corporate Affairs; Kevin Wilson, Chief Financial Operator; Denise Michel, Vice President, Policy; Diane Schroeder, Director of Board Support; and Barbara Roseman, General Operations Manager, IANA.

Meeting Topic: The New gTLD Program:

Kurt Pritz introduced the new gTLDs topic, discussed the staff process of collecting the comments, analysis, and publication of information. He also reviewed the agenda and topics to be discussed, and open issues for board discussion.

Specific Issues:

<u>Trademark Issues</u>

Kurt Pritz discussed specific trademark rights issues. He explained that we have existing as well as new players in the environment suggesting rights protection mechanisms be introduced into the process. Kurt noted that he wants to engage with them on what would be implementable and effective, and that additional communication will take place over the next several months. Paul Levins and John Jeffrey will be providing additional leadership in those discussions. He discussed

the possibility of setting up formalized discussions in different regions, including Asia, North America, Europe. John Jeffrey also noted that we have started discussions with WIPO, regarding how they could help with that process.

The Chairman noted that just saying we will have further consultations about protecting rights sounds a bit open-ended. He noted that ICANN needed to be clearer on what we are asking for in the consultations and need to be presenting on a much tighter format. He thinks we can be more specific in breaking down discussions on terms of rights in top level and what to do about second level. If the thought is a list of reserved names that we would consider we should say that because just saying we will consult is less direct and detailed, inquiring whether there are other ideas that are being discussed.

Rita Rodin Johnson stated that she and Wendy Seltzer and others have talked about the various issues on these topics. Trademarks are national in nature and one company can have rights in one country while another party holds the rights to the same name in another country. She is sympathetic to the idea of companies needing to engage in multiple and costly defensive registrations. Staff needs to distill all of the issues down to specifics so the Board can discuss and help reach solutions .

John Jeffrey noted that out of the PDP process, a number of principles were set out, but that we should expect to review some of the issues that have been raised through that process, particularly those issues which were not dealt with in the policy as they are more implementation oriented, as new parties come to the table. He noted that in the comments and during recent sessions with the community there were significant business participants, such as counsel for Fortune 500 companies wishing to protect their companies brands. Rather than staff producing a proposed solution, it is necessary to go back out and have more conversation and constructive discussion, because there were new issues being raised from new parties. He noted that in this timeline, it makes more sense to discuss outreach to talk about this constructively.

Rita Rodin Johnson agreed, but asked if staff could present the options that are being considered. John Jeffrey noted that it is important that staff not introduce new plans alone, but that the community has input and that input should be brought out in discussions in a public forum so all can discuss and consider. He noted the possibility that there are solutions that might benefit all involved.

Steve Goldstein then asked that when American Banking Association wants to hold back on .BANK, why should we hold back on any string for anyone?

Dennis Jennings noted that it would be useful to have a clear understanding of the rights that registering a trademark actually gives someone. He noted that it is not protection, but exclusive use in a particular category and protection from anyone else using the same mark, in the same category, in the same jurisdiction. We need a clear statement of what one gets with a trademark.

Paul Twomey noted that this is a reason why we want WIPO as part of process as independent expert. We need to find an expert partner to work through some of those solutions.

Thomas Roessler noted that the board should carefully balance the different interests at stake, and noted that the GNSO is set up to deal with these issues through the PDP, including highly effective representation of IPR issues. He also noted that the board needed to pay attention not to re-open issues if there is no new information.

The Chairman noted that there is a difference between indicating that we need consultation on the implementation now and saying that it should have been part of the process earlier, so we're making it up on the fly. We need to make sure we are not re-opening old discussions that were rejected as part of the policy process.

Rita Rodin Johnson agrees with The Chairman and likes the concept of working with WIPO, as well. This is a difficult issue that cannot be underestimated, but also should not allow people to undermine the process.

The Chairman suggests that the way forward is to put details around the bones of further discussions, indicating what seem to be issues and what are the rights at issue. With that we would ask for their solutions to this problem. We have been around this when the UDRP was introduced and do not want to re-open problems without reaching better solutions. He will support going back to community with comments, solutions and ask what is missing, but they should not be open-ended discussions.

Rita Rodin Johnson asked if there is a reason we cannot ask various parties to send us summary papers with the issues that many agreed to, as part of that process. Harald Alvestrand agreed that we should have a consultation process, a deadline and a default outcome. The Chairman thought Harald Alvestrand set out a good point.

<u>Demand for new gTLDs:</u>

Kurt Pritz posed the question – What is the demand for new gTLDs and what case has ICANN made to launch this round? ICANN did do demand studies that drove us to use about 500 applications as a model (although maybe less now given economy). In light of the various comments and letters received, we are now conducting further analysis in addition to the policy work that has already gone on.

The Chairman noted that this question is only marginally valid because it appears that it is asking innovators to justify innovations, which they should not have to do. There should be an open market to innovate and protecting interests is not an argument for requiring justification of demand.

Rita Rodin Johnson agreed with the Chairman. She does not necessarily agree that there should be hundreds of new TLDS, but her opinion doesn't matter as the Board should not try to second guess the GNSO policy. Our stakeholders said we need to do it and that there is demand, so we should move forward.

Janis Karklins noted that the GAC is working on contributions and comment on the applicant guidebook and it will be delivered in Mexico. He stated that in preliminary document he has seen, there are a number of questions about the study Kurt Pritz referenced relating to competition, new IDNs and TLDs. The GAC will indicate that we think the questions will need to be answered before the introduction of new TLDs.

Paul Twomey noted that we expect to have an economic report around the time of Mexico, but not within a sufficient time before to make it part of the information to be released with the applicant guidebook. He noted how the GAC process works and asked that if the GAC comments on the first version are coming at the time we are issuing a nest version of the applicant guidebook, would it be appropriate to recognize a new timetable and that GAC comments on the second version will be provided later?

Janis Karklins noted that if posting of next version of applicant guidebook is just 10 days before the meeting; there would not be sufficient time to respond. Comments will be published in Mexico and the GAC will have another conference call on the 19th and will take into account whatever changes will be provided, but the underlying issues raised in comments by some governments are part of what will be published in Mexico. So if the GAC members find that a new version satisfies their concerns there will not be any statement. But if not satisfactory changes then we will be talking about that as well, if possible.

The Chairman stated we are looking forward to getting the GAC analysis. He also noted that no one will be expected to have digested the new applicant guidebook by Mexico, but hopefully the amount of changes will be smaller on the next applicant guidebook. So a quicker analysis will be hoped for on that one. Mexico City will be to set out and discuss the work that has been done.

<u>Annual Registration and Applications Fees</u>.

Kurt Pritz stated that in the new version of the applicant guidebook, the application fee remains the same and the annual fees will go down to $25,000 minimum, with transaction fee at 25 cents per. The application fee is cost justified. We have done additional analysis of costs and while some components decreased a bit with new analysis, others increased, so it is essentially the same. Kurt Pritz noted that we did get questions about helping support application fees for those not able to afford them, but we think we need to wait for the second round as an improvement to process. In this first round, it would be added complexity that might be gamed. We

are getting information from panelists that may be evaluators, and that will have a significant costing element. In short, the application fee stays the same and annual fees are reduced. And he believes most comments were about the annual fee.

Raimundo Beca stated that he has made two proposals on the application fees that are inconsistent from what he heard in Cairo. First he believes we should reduce the application fee by the amount of historical costs because he does not believe there is a clear calculation of the amount or understanding as to what is covered by new gTLDs. His second proposal is that people should be able to pay portions of the application fee in stages, rather than all at once and possible get refunds, which he feels will always be a matter of discussion. He does not believe it is defendable to ask for money up front from those who do not have the money and he thinks it would be easier for people to obtain incremental loans if they can show the application is progressing through the process.

The Chairman noted that the justification for historic component is something that the BFC has been through at some length, and he asked if others on the Finance Committee wanted to comment.

Raimundo Beca pointed out that he is a member of the Board Finance Committee (BFC) and made the same point several times, but has not been heard until now. The Chairman noted that his point has been debated in the BFC and he wanted to hear someone else form the BFC on the issue. Dennis Jennings noted that as for the historical component, the view was taken that is it a element for recouping investment made by ICANN in helping increase competition in the TLD space and that ICANN should be able to do that.

Doug Brent noted that Raimundo Beca's suggestion that an applicant could pay a portion of the application fee as it reaches milestones was being discussed in the process. It has been heard and not acted on, because the direction of requiring the fee up front is founded on the principle of conservatism. If we ask for $185,000 up front, we ensure they have the ability to pay it. The refund mechanism is the balance point to ensure that if the application does not go all the way through the process they will receive a refund.

The Chairman noted that the refund is an important aspect. If an application does not proceed through entire process, applicants should be able to get some money back. Rita Rodin Johnson noted that ICANN should be clear to the community if it will not be a full refund, but rather prorated.

Dennis Jennings explained that the BFC's view was that in the process of operating a TLD, the $185,000 application fee is only portion of the actual costs and it is demonstration of the capability an applicant to follow through. While we are sympathetic to the idea of taking money as we go, the complexity does not seem worth it.

Jean-Jacques Subrenat noted that Kurt Pritz mentioned that requests for financial assistance with application fee could be addressed in second round. Setting aside cost, he asked if any questions or concerns have been raised about accessibility or availability of domain names in the second round.

Kurt Pritz confirmed there had been thinking on this topic, but the decision is part of the balancing of the issues. So discussion of every issue in implementing new gTLDs is balancing and devising a method by which the need for "scholarship applications" can be measured in first round in terms of gaining knowledge. And given the availability of literally billions of available names, we have heard comments and done balancing in this first round, and we have not specifically addressed possibility of depletion of certain names.

Harald Alvestrand stated that if we are worried about too many applications, then having those in line that cannot pay the whole fee at beginning is not helpful. Also, Harald noted that to Jean-Jacques Subrenat points, if there is a string and a community did not apply but is concerned about losing the name, then the objection process is available, and that if they lose they can just pick another name.

Janis Karklins noted that in its comments, the GAC will question a single fee structure and will be suggesting there might be differentiation of fee structure for TLD applicants that are not seeking a commercial string, but rather a social or cultural string. The second concern is the fee level and management of potential surplus. We think the fee structure should encourage the new applicants, and incumbent TLD operators should not put in favored positions, as it might undermine stability and raise questions of competition. There will be a number of comments on this issue.

Rita Rodin Johnson asked if Janis Karklins was saying that if an entity wants to run a not-for-profit TLD it should get a discount?

Janis Karklins confirmed that this is what the GAC is suggesting. Maybe a community wants a TLD that might serve interests of the cultural community. It would be not-for-profit organization and they would serve only limited number of people. He did acknowledge that the question is where to draw the line and how to define, and that it should be considered with the fee structure.

Rita Rodin Johnson noted that as chair of the audit committee, the committee has requested that the CFO create a process to ensure that cost recovery is clearly and transparently documented and reportable to the community. She noted that if it is the Board's view to conduct a cost-recovery process, then she feels strongly about stating that principle and not differentiating between applicants during this round.

Dennis Jennings agreed with Rita Rodin Johnson that it is not ICANN's role, but a sovereign role, to provide social assistance. The Chairman noted, however that the

original proposal from GNSO did allow for flexible fees, but that it was recognized that there is a tremendous problem of value setting and determining worthiness.

Janis Karklins responded that this argument is valid if we are looking to America and Western Europe. He added that looking to other continents like Asia and Africa is different. If we do really want to promote competition and encourage registries from non-Western countries, we need to think about incentives to encourage them to step into the market. We need to as what we can do to promote participation, innovation, and new players in market not just from the US or Western Europe.

The Chairman stated that one of the ways we've looked at it is to consider Rita Rodin Johnson's point of cost recovery in this exercise, along with Janis Karklins's point of bringing in different resources, is through setting up a foundation to support that, but not doing that at the same time as the first round of applications. That is appealing as dealing with both. We need to know what is the cost recovery amount, publish the numbers, and then trying to figure out how to fund it later and not make policy now with holes.

Bruce Tonkin sated that this item has had a lot of discussion in the GNSO. The view was that in the first round, there is enough complexity in process without adding another level. But then in the second round we could give a lot more attention to the issue, and it could be a foundation or some other way, but ICANN needs to telegraph that this will be addressed in second round and to estimate when that may happen.

The Chairman asked if it would be possible to include what Bruce Tonkin is suggesting. Paul Twomey commented that once we see how the first round works, we may try to develop a way to help guide people to set up applications that do not create unnecessary costs. So maybe certain types of guided applications could be considered, as lower-cost applications.

Bruce Tonkin responded that in first round, a portion of applications cost is allocated to risk. If those risks are managed or lowered, then that portion of the fee would likely decrease in the second round. The Chairman then also suggested that maybe we can explain that experience from the first round will help us more accurately quantify the portion of fees attributed to risk for the second round.

Katim Touray agrees with Rita Rodin Johnson speaking strongly about cost recovery, but if everything is on that basis then there is no room for discounts for non-profits. But if cost is main issue, we could tell the story on the cost structure. Is there anything that is a cost element that can be out-sourced to reduce cost of service? This could make it easier to allow non-profits to submit gTLD proposals.

The Chairman responded that a number of mechanisms have been discussed such as providing foundation for funding or guiding applicants. But this will be telegraphed for the second round, at which time we will have quantified some of the risk.

Geographical Names:

Kurt Pritz noted that we are not materially changing what is in applicant guidebook at this time, but that additional material and refinements will be made. The applicant guidebook discusses a process that looks for governmental approval for TLDs of geographic names. The GNSO policy seeks to protect certain interests and one purpose of the Community-based objection process is to protect those interests. And advice from the GAC said geographic names should not be given as TLDs without approval of relevant government. So in implementation we wanted to protect interests identified by GNSO and one way to verify that the application is from a bona fide party is that it has support of that community. So process asks for the support upfront to help mitigate contention later.

Staff's position is that this implementation is not a departure from either the policy recommendation, and remains unchanged in applicant guidebook. This requirement also provides a way to resolve conflict between ccTLD and gTLD process. If both have approval for the same string, the relevant government should work it out.

Steve Goldstein questioned whether we have followed GAC advice on this issue. He stated that he is still trying to figure out how we would resolve application for .AMERICA. What government would prevail and how would we decide what Government would prevail?

The Chairman thinks it is more than that because I believe the premise is built on a fundamental misconception that a government has propriety right over name of the country.

The Chairman agreed with Steve Goldstein that we have not followed GAC recommendation on this issue and he thinks that we need to be clear why we are departing from the GNSO recommendation as well. He noted that we should look for discussion on this topic during the Mexico City Meeting.

Rajasekhar Ramaraj asked how the applicants are to know, what level of government support is required?

Kurt Pritz stated that the applicant guidebook requires ministerial level approval and provides additional detail of what a letter from a government would have to say. The GNSO anticipated objections from governments and if such an objection is taken the dispute resolution panel would look to see if the applicant has the support of the community.
The GNSO process was intended to protect those names, but to do so would require objection by governments, or at least sets out what is community-based and that TLDs should not abuse or misappropriate a community label. This the

implementation is to provide a dispute process for such objections, but in trying to address risk of process where governments may come to us and say process is not working or they need to take the dispute outside of ICANN, this provides a safe-guard that governments are requesting by requiring advance support.

Paul Twomey – I agree there is an IP perspective on this issue, but the GAC dealt with a series of political risks as well. I think the GAC was looking at the issue from a more practical viewpoint. Their list was especially extensive, and we had discussion. For some of the names, we could work through process, but for others it was impossible to come to your example of .AMERICA, we have proposed that all relevant governments would have to agree.

The Chairman then asked if that means that if anyone wants . Africa, they will need all 55 states to agree? Dennis Jennings then asked if we are looking for a "no objection" statement or a "formal agreement and approval"? Paul Twomey explained that the documentation says that "no objection" must be in writing.

The Chairman noted that this is an issue of the Board in terms of which policy we will take. At the moment, the applicant guidebook follows the GAC principles and we have not negotiated any deviation, which is what we would have to do to change the applicant guidebook.

Katim Touray noted the discussion of governments having proprietary rights over geographic names. He then asked what would we do if a government was so unhappy with the awarding of a gTLD that it took retaliatory action that could be disruptive to the process, and what are we doing to address this risk?

The Chairman stated that the authority ICANN has is to meet needs of Internet and user community. He noted that we should propose policies and implementations, that do not provoke actions like that, and that ICANN needs solution acceptable by the broad Internet community. We should not come up to the situation where we're bullied to serve one or two interest. The Chairman then asked how responders have accepted the proposition in the applicant guidebook, which differs from the GNSO recommendation.

Kurt Pritz noted that the GNSO reserved names working group (WG) published a report that said there should not be a reserved names list or special process for governments. He noted that members that worked on that with the GNSO, which is a broad cross-section of the community, determined there should be no special process. There is less disagreement over protection of just country names, but we have also included sub-regional and capital names, with the sub-regional names be limited to those found on the ISO 3166-2 lists.

Morality and Public Order (M&PO):

Kurt Pritz stated that ICANN's counsel has taken advice from outside counsel, international arbitration organizations, senior jurists and international lawyers. He noted that the recommendation from the October 2008 Explanatory Memo has been moved into the revised applicant guidebook. It defines that the standard for Morality and Public Order Objections, has three bright line tests and a fourth for others that may rise to this same level under international principles of law. It also provides for expansive rather than narrow standing. He noted that one purpose of the dispute resolution process is to safeguard specific interests and the GNSO indicated in its policy recommendation to allow for this process and to address risk to ICANN in the process, and that risks are heightened if panelists have no discretion.

The Chairman noted that the staff recommendation is that anyone who wants to object should be allowed to do so, because no one has monopoly over this issue and governments may not utilize the process. He asked if the Board is comfortable that this ground of objection is open to all.

Jean-Jacques Subrenat asked about the meaning of the phrase "metered use of discretion." Kurt Pritz explained that metered means that the fourth bullet requires an understanding of a legal norm recognized under international principles of law, not in a single jurisdiction.

Wendy Seltzer noted that the tension is that with the broad standing and broad discretion, we sacrifice a lot of predictability. She noted that there is a connection between standing and standards. If we expand both we lose predictability in the process. If anyone can bring a complaint, then difficult to predict when application is brought if it will be knocked out.

The Chairman noted Wendy's point and then suggested the Board discuss standing, pause, and then go through standards, and then see consequences of having both open and broad.

The Chairman commented that anyone who uses the Internet should have ability to influence what goes on with Internet.

Thomas Roessler noted that we generally need to think about scaling process with undetermined number of inputs, including giving anyone standing and creating an institutionalized objector. Do we have any idea how combination of unlimited standing, broad discretion by panel, and Independent Objectors, work? Could be operational and institutional nightmare. The Chairman asked if his concern was regarding the volume issue and Thomas Roessler said yes a how we can scale it.

Thomas Roessler then noted that he is not sure what we mean by anyone – is it a legal entity or an individual? If it is individual, then we will end up situation that won't work because everything could grind to a halt. Maybe limit to those who can raise objection.

The Chairman agreed that making it a workable process is what we are trying to do. In making it so one can object on morality objection – gaming system, must be considered.

Rita Rodin Johnson noted that many of us have had a problem with this recommendation, as it is difficult and inappropriate to determine what is offensive to the entire world. However, if we are going to include this, the fourth item in the proposed standard is too subjective. There must be an objective standard to measure this objection among international treaties. She noted that she is not convinced that there is a rational basis to include an objection on the basis of morality and public order. She noted that if we are just talking about standing, then it is purely a legal term, and that typically you must have "skin in the game" to have standing. She noted that ICANN should not endorse a standard that will encourage an unlimited number of objectors, as that could make for quite a disorganized and unjustified process. She again stated that she is not sure why we should include morality and public order as an objection.

Paul Twomey commented that he thinks this is good conversation. On the standing issue, in the GNSO discussion, there were concerns about this. When it comes to standing, there were concerns that governments may not bring an objection. Also, it might be preferable for those governments that may be pressured by an interest group to get the interest group to take up the issue. Third and important, people were assuming governments will take action, they will use all avenues to achieve objective and will be drawn into political arena. In the GNSO is the standing governments or others so careful not to say but then where do we draw line?

Harald Alvestrand thinks the case for having expansive standing has been well made. Another issue is whether Board will consider a decision of the panel binding. Initially it was to get this away from the Board. But language in applicant guidebook puts it into our court.

The Chairman is sympathetic to having narrow standing. If we open it up to the entire world, it is too open. The objector should have "skin in the game". The Chair noted that more work is needed here, indicating if governments are the only choice, there is a need for a standing definition to establish interest connection between the group and their interest and what damage they would suffers to bring an objection. A trouble, with the approach is that it will create interlocutory hearings. We have to have some threshold for members of community.

The Chairman noted that maybe if you analyze standards, that may have a greater bite. What are options re: standards?

Kurt Pritz stated that legal research was performed by counsel, looking at law in numerous jurisdictions and what was developed were three areas that across all jurisdictions were acceptable restrictions. That opinion also included other areas

not incorporated, but also advice that attention to be paid to treaties about human rights and account of those treaties should be made where some sting rises to the same level. This melds with the GNSO recommendation that those treaties should be considered. One of my answers to Rita may be that if there is string that is perfectly acceptable under international principles of law that we want to set up a mechanism in which a tribunal could also say that it is acceptable. There are to be internationally recognized jurists considering these objections. And it is better the have that dispute outside ICANN.

The Chairman noted that the issue for us is that we have been given a recommendation from the GNSO. We have identified three such conventions and there seems to be little objection for the first three. Incitement of violent lawless action, discrimination and child pornography seem to be well-accepted principles. Do we need to go further than that? In my mind, if some applicant can show there is one that as strong as the other three they should be allowed, but some are concerned about a catch-all. The catch-all is trying to reach the same level as the other three. Will that provide mechanism that stops strings form breaching international morality and public order.

Bruce Tonkin noted that could have a different requirement for reaching decision for the first three types of objections, compared to the last catch-all objection. For first three maybe we need two out of three panelists is agree and for the fourth one, maybe requires unanimous decisions.

Rita Rodin Johnson asked who has the burden of proof. Is it the applicant or person saying there is a violation? One of her issues is developing a structure without a judgment call especially given the international aspect of this process. She does not question the wisdom of having the independent body, but asked why we want to take the step at all and is it necessary? She has not heard anything that changes her mind.

John Jeffrey noted that, as Bruce commented, there will be objections to string applications and no place for them to go except the Board or to court. This attempts to provide a path where objection or public comment is anticipated and having a process for hearing the objections, rather than consider possibility of no objections. Further, the concept of the Independent Objector provides for a process where a government is unaware or unwilling to participate.

Paul Twomey noted that if panel does or does not agree with objector then we can at least support our position if we take the same view.

Rita Rodin Johnson stated that ICANN is a technical body. We are not supposed to be making any judgment on content. These are still content based objections – will the existence of this TLD cause some action? We are not creating mechanism to have that discussion – just letting an independent body say it is so.

The Chair responded that people are looking to have a safe and stable establishment and this looks like an orderly management of the process. Allowing others to go fight about content shows we are proper steward because we created a process where people can have that argument.

Rita Rodin Johnson asked why isn't the answer is that if a government does not like a string it just blocks it. She does not see how an arbiter decides someone is right or wrong with a string proposed via a subjective standard.

Bruce Tonkin reminded that it has to be international norms, not just one national law. Rita Rodin Johnson noted that her issue is that the subjective element of the test will permit a panel to determine if, for example, the TLD will result in violent lawless action. Maybe .GIRL could incite violent lawless action in a certain part of the world and if the arbitrator is sympathetic to that sentiment, the objection will be successful and the rest of the world will be deprived of having the TLD. That does not seem to be ICANNs job or the correct result as it plays to the lowest common content denominator.

Dennis noted that wherever we are we have to abide by the law of the jurisdiction where we operate under international law. We have to consider American and California laws, and we cannot be seen as inciting violence. That has to be outsourced to say whether that violates international law. He think what we have here is absolutely right. And the fourth item is appropriate. Dennis noted that he feels quite strongly this is correct.

The Chair notes that what Rita says has merit in terms of the first three criteria - the standard should be adjusted to say this the "incitement to lawless action" has to be according to internationally recognized standards.

Harald Alvestrand noted that his worry is that it is open ended so any panel can claim that something is contrary to generally accepted legal norm, if we add 'identified" generally accepted legal norm, that would be helpful

The Chair clarified that Harald Alvestrand is saying " Generally accepted identified legal norms?" Bruce Tonkin supports that one must identify the international treaty under which you are complaining.

The Chair also noted that he thinks we need to link fourth to previous three and it must have same status as previous three. Equally generally identified accepted legal norms. "Equally, generally accepted identified legal norms." Read it and add the fourth bullet.

The Chair then moved to standing – is it anyone, governments, or a hybrid?

Dennis Jennings noted that it is normal to require a sufficient body of general opinion. Maybe a certain number of people have to object before any action could be taken?

The Chair stated that we are trying to find a nexus with the harm rather than just a personal sense that someone does not like a string. Something more than just an interest needs to be established. Harald Alvestrand is afraid of the slippery slope with an arbiter deciding who has standing.

The Chair responded that this is what happens in the law and it is a legitimate defense. He is not sure we can avoid it, and noted that it is safeguard rather than problem. John Jeffrey noted that this issue is one of the reasons the staff recommendation makes it broad because we were afraid that it would make the process much slower. The Chairman noted that we also need to start cautiously.

Jean-Jacques noted that standing or interest of individuals may be constrained or neglected by governments. So he would go along with staff's recommendation to have broad standing.

The Chairman inquired what should be included in the guidebook?" We have an agreement on standards. As for standing, let's publish that we have concerns about openness, concerns about limiting to one class, and indicate that we are working on proposal, and mention interlocutory hearings on standing.

Kurt Pritz then described the Independent Objectors as a party that could lodge objections in the public interest. The other item still open is resolution of dealing with contending identical strings. He indicated that the advice we have received is that auction, should be used as the most efficient mechanism. There are some categories of community-based names that would not be auctioned. Then there is the registry agreement and how it would be amendment. There was some criticism that community would have to follow amendments. An economic study was done on separation of registries and registrars. After study done, there was public consultations and two meetings held to discuss possible model, and the discussion is ongoing and will be further discussed in Mexico City.

Auction:

The Chairman notes that there is still considerable discussion about auction. He thinks that others with better options than auctions should bring them, and without other proposal auction is the default. Raimundo Beca thinks default should be auctions, but before deciding it we should be clear what we will do with cash we get from auctions. Harald Alvestrand and Bruce Tonkin agrees.

The Chairman noted that there should be more explanation. State that we will look at others, although other types of distribution can be gamed, just as auction can be.

Determine what happens with funds. Bruce Tonkin noted that if we have a random selection, people will just put in more applications.

Rita Rodin Johnson said wouldn't that just get us to same result? SC noted that maybe you would get to the same result, but seeking more applications is a less efficient and less clear way to getting to right answer. Steve Goldstein noted that the general counsel has provided privileged advice regarding legality of some mechanisms that must be considered.

Bruce Tonkin agreed and noted that .BIZ got involved in a law suit when its random selection process was considered by some to be a lottery.. Why not reserve name forever.

Bruce Tonkin noted that it we use this as a blocking mechanism, it would encourage people to submit applications with the intent of blocking a competitor getting a name.. He asked if we can we put something out that ICANN is considering establishing arms length fund and if staff can prepare preliminary paper on mechanism of foundation.

The Chairman asked staff to prepare preliminary discussion on that, include taking it out for public comment. Doug Brent asked if we could publish position about auctions, with indication that it is just our current thinking. And other areas, not current resolution. The Chairman noted that we can state that we waiting for a better proposal.

Rita Rodin Johnson is uncomfortable with auction as they favor the wealthier applicants. She does not think it is fair. She would like to see legal arguments in favor of the various positions..

Bruce Tonkin countered that auction gives certainty.

The Board then reached the following conclusions from the discussion:

1) General sense of the board was attained regarding need for additional public comments and the requirement for an additional round (third round) of comments before any RFP could be issued.

2) A resolution on the issues surrounding the need to resolve contending identical string applications. It was noted by Board Members that there had been considerable discussion on auctions as the mechanism for string contentions and other possible mechanisms. The Board members discussed the need to understand how proceeds from any auctions might be dealt with before it could be considered further. Following this discussion, the Chairman asked whether it would be appropriate to direct staff to prepare a preliminary paper and proposed the following resolution, which was moved by Bruce Tonkin and seconded by Steve Goldstein:

It is hereby resolved (2009-02-12-001), that Staff is directed to prepare a preliminary paper setting forth possible guidelines for a foundation or other mechanism that might be established to appropriately deal with the proceeds that might result from auctions.

The board unanimously passed this resolution by a voice vote.

3) On other topics where there was insufficient time for a full discussion, it was agreed that the proposed positions could be set out in the guidebook and publication documents and that this would allow for additional public comments to be considered.

The Meeting was adjourned at 23.10 UTC.