Dear Board Members:

Re: New gTLD Workshop Information – Trondheim, Norway, 24-25 September 2010

Below is information regarding the upcoming New gTLD Workshop, which has been compiled by the ICANN Staff in support of this event.

The below approach has been approved by the Chairman is setting a plan for the Workshop, and was discussed last week during the Chairman's Agenda Setting Call with the Board Executive Committee.

Below is the list of issues for the remaining work topics on new TLDs. The topics are divided as follows:

(1) topics which might be covered via an approach similar to our "Consent Agenda" (explained further below);

(2) topics that will require Board discussion at the workshop; and,

(3) additional work to be done for launch that does not require Board discussion.

ISSUES LIST

Consent Items (explanation provided below for proposed Consent Items):

1. Trademark protection - there are really only two specific outstanding issues: (1) whether to reduce the response time to a URS complaint, and (2) clarifying the definition of substantive review of a trademark application

2. Root scaling - we want to declare the issue resolved since DNSSEC and IDNs have been introduced so the simultaneous introduction of 4 new technologies is sort of moot

3. Variant management - there is no change from the Guidebook plan to reserve but not delegate variants until there is a technical solution for their delegation, we need to nail down the definition of variant so it is clear to applicants

4. String similarity - we don't want to introduce the GNSO concept of delegating similar strings in the first round - there are too many policy and technical questions that require intensive discussion.

5. Geographic names - there are two issues: whether to include translation of sub-regional names in the 3166-2 list (no); and whether to augment the list of continent /

regional names with another official list to include names such as arabstates or middleeast (yes)

6. Applicant support (Nairbi Res 20) - staff will adopt some of the recommendations of the working group that will issue its report soon. Recommendations not adopted will be considered in the next round.

Discussion Items:

7. Board role in the gTLD approval process

8. Malicious conduct

9. Economic studies

10. Vertical integration

11. Morality and public order

12. New gTLD Budget

13. Registry Agreement issues

Other issues being worked not required for discussion:

1. Communications planning

2. Operational readiness

3. Overall risk management

4. Reporting of evaluation results

MATERIALS

Board materials will include a one-page matrix briefly describing all the issues, and a short paper for each of 13 issues.   The matrix briefly describes each issue and the staff recommendations.

The papers have been kept short with the assumption that Board members are familiar with these issues. Each short paper describes: the current environment & recent

developments, the recommendations, and the reasons supporting them. Where possible, an alternative to the staff recommendation is provided. Some papers include background materials in the annex.

Most of the papers will be furnished in the next 24 hours. The last of the papers (approx. 2 of the 13 papers) will be finalized shortly (after final information is received) and provided separately to this list.

"CONSENT AGENDA" ITEMS – explanation

We hope to resolve some issues if possible via email before the Workshop (which was Bruce's idea endorsed by a couple of others) and have made suggestions for issue areas that could be resolved up front, and placed them on a proposed Consent Agenda.

With the Consent Agenda Items, there is a clear choice, in many of those, the Staff recommendation can be adopted without requiring Workshop discussion.

To manage the discussion, a separate email list is being established Redacted ⬛⬛⬛⬛⬛⬛. Rod asked to temporarily create this joint board/staff list specifically to prepare for this board retreat.

That list includes the Board and selected staff members. (I used the new email for this email.)

Board members are encouraged to start email discussions on topics here to save time at the Workshop. Staff members on the list will actively participate in those discussions to provide answers or point to information.

To use the list and start a discussion use a Subject Header that includes the issue such as [Subject: Malicious Conduct]. Staff will work to redirect those discussions under the subject heading where possible.

Some issues require discussion in any case so that Board reasoning as well as a decision can be published in the next set of materials. These would be in the discussion items for the meeting.

As a starting point, we want to be optimistic about the number of items that might be on the consent agenda as the general tendency is to take items off that list rather than to add to it.

MEETING AGENDA

With the assumption that some of the issues are successfully placed on sort of a Consent agenda - we don't know know how many issues will be discussed in the day-and-one-half allotted to us. WIth that in mind, please consider the following as an agenda for now:

For each topic of new gTLDs, there would be a 10-15 presentation by staff (depending on issue complexity) that would outline the issues, the staff recommendation and the basis that recommendation. The rest of the time for the topic would be discussion by the Board.

WORKSHOP SCHEDULE
(proposed schedule to be adjusted based upon board discussions prior to Workshop):

Thursday - 23 September ---

5:00pm - 6:00pm (tentative) - Audit Committee meeting

7:30pm - Board & Staff Social Dinner

Friday - 24 September ---

9am - 9:30am - Introduction to approach on new gTLDs for the retreat

9:30am - 10am - Consent Agenda Items

10am - 12:30 - Block of new gTLD discussion

[see issues list and approach to order of issue items below]

12:30pm - 1:30pm - Lunch Break

1:30pm - 3:30pm - Block of new gTLD discussion

3:30pm - 4:00pm - Break

4:00pm - 6:00pm - Block of new gTLD discussion

Break

7:00pm - 9:00pm - Board Working Dinner

Saturday - 25 September ---

9am - 10:30am - Block of new gTLD discussion

10:30am - 10:45am - Break

10:45am - 12:30pm - Block of new gTLD discussion

12:30pm - 1:30pm - Lunch Break

1:30pm - 4:00pm - Other program and Board Alone Time [if we a report to community or resolutions to draft, staff could work on these, at this time)

5:00pm - 6:00pm - Board Meeting [formal notice will be provided separately]

Workshop -Table of Contents

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2010-09-24-001 Geographic-Names

Current environment:

Country and territory names will not be available in the first round of new gTLDs. Geographic names, as defined in the Applicant Guidebook, will require evidence of support, or non-objection, from the relevant government/s or public authority/s. The geographic names are categorized as follows:

- any string that is a representation, in any language, of the <u>capital city name</u> of any country or territory listed in the ISO 3166-1 standard,

- an application for a <u>city name</u> where the applicant declares that it intends to use the gTLD for purposes associated with the city name,

- an application for any string that is an exact match of a <u>sub-national place name</u>, such as a county, province, or state, listed in the ISO 3166-2 standard, and

- an application for a string which represents a <u>continent or UN region</u> appearing on the "composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" list.

Recent developments:

I. <u>Sub-national place names</u>: During the Brussels meeting, members of the GAC requested that translations of names on the ISO 3166-2 list also be protected.

II. <u>UN Regions and Continents</u>: The Council of Arab Telecommunication and Information Ministers (the Council) has called for ICANN to recognize the Arab region as a geographic region that represents the 22 member countries of the League of Arab States. They believe the restrictive definition in the guidebook is in conflict with the operational precedent of many UN agencies that specifically recognize the Arab region. The ITU has also written to ICANN on this matter, as they have been asked to develop an application for '.arab' on behalf of the League of Arab States.

It is understood that this request was made in the belief that defining the "Arab Region" or "Arab States" as a geographic name in the context of new gTLDs will reduce the possibility of another entity applying for the ".arab" string because support or non-objection will be required from relevant governments.

Recommendation:

I. Sub-national place names:
    It is recommended translations of the ISO 3166-2 list not be included and the Guidebook remain unchanged.

II. Continents and UN Regions:
    It is recommended that the definition of Continent or UN Regions in the Guidebook be augmented to include UNESCO's regional classification list which comprises: Africa; Arab States; Asia and the Pacific; Europe and North America; Latin America and the Caribbean. This will protect the string "Arab States" but not ".arab".

    (Alternatively, the status quo could prevail as the '.arab' application proposed might qualify as a community TLD. Community preferences were developed by the GNSO specifically to address protections for communities. Competing applications for '.arab' could be resolved through self-resolution or community priority evaluation.)

Basis for Recommendation:

I. Sub-national place names:
    One of the principal objectives of the guidebook is to provide a smooth-running process that offers clarity to applicants. There are almost 5000 names (many of which are shared or generic words) on the ISO 3166-2 list. Providing protection for translations in all languages of this list would multiply the number of names and the complexity of the process many-fold.

    The community objection process does provide a secondary avenue of recourse and was, in fact, designed with geographic place names in mind. An application will be rejected if an expert panel determines that there is substantial opposition to the string from a significant portion of the community to which the string may be explicitly or implicitly targeted.

II. Continents or UN Regions:
    The addition of the UNESCO list will not provide additional protection for .arab, however, it will show that ICANN has listened to the concern and shown flexibility in working to find a solution. In the context of the forthcoming ITU Plenipotentiary in October, it is anticipated that if no change is made to the Guidebook in relation to this request, this will be used as an example of ICANN's lack of sensitivity to issues of sovereignty.

    The UN Regions are defined in the existing Guidebook by a list developed by the United Nations Statistical Division (UNSD), and one that was used by ICANN to assist

in assigning country names to ICANN Regions: Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings http://unstats.un.org/unsd/methods/m49/m49.htm.

Many UN agencies do organize their work or regional office locations by region and in this context many do recognize the 'Arab States', such as the UN Development Programme, the International Labor Organization and the United Nations Educational, Scientific and Cultural Organization (UNESCO). However, there is no uniformity in how the UN agencies classify their respective regions and research did not reveal any consistencies in what countries are members of the Arab States.

ICANN and UNESCO have an ongoing working relationship reflected in a Cooperation Agreement. Since UNESCO is one of the few agencies that assign countries to regions, it is recommended that UNESCO's classification system be adopted.

UNESCO identifies 20 members to the Arab States; 19 of these are common with the 22 members claimed by the League of Arab States. According to the Guidebook, an application for the string '.arabstates' requires support from at least 60% of the national governments in the region. As the Council claims unanimous support from its members, the application would meet the necessary criteria.

The expansion of the UN regions to include those used by UNESCO is limited and complementary to the original list, and should not cause confusion for potential applicants or the community. Africa is the only grouping which is common to the two lists, and it is specified that the UNSD list takes precedence.

The wording in the Guidebook would be changed to the following:

o   an application for a string listed as a UNESCO[1] region or appearing on the "composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" list, or a translation of the string in any language[2].

o   In the case of an application for a string which represents a continent or UN region, documentation of support will be required from at least 60% of the respective national governments in the region, and there may be no more than one written objection to the application from relevant governments in the region and/or public authorities associated with the continent or the UN region.

o   Where there are common UN regions on both lists, the "composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" takes precedence.

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[1] http://www.unesco.org/new/en/unesco/worldwide/
[2] http://unstats.un.org/unsd/methods/m49/449regin.htm

2010.09.24-002 New-gTLD-Applicant-Support

New gTLD Applicant Support   [2010.09.24-002]

Current Environment:

The Join SO/AC Working Group (JAS WG) was formed in response to an ICANN Board Resolution in Nairobi, inviting the community *"to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs."* The GNSO Council proposed a Joint SO/AC Working Group. The WG has 22 members from ICANN's SOs/ACs and individuals.

The WG is in the process of developing the Final Report. A draft excerpt of the recommendations being discussed is available in the Annex.

Recent Developments:

The WG is drafting a Final Report to be distributed to the chartering organizations (i.e., ALAC, GNSO) and scheduled for publication in October. The Final Report will incorporate the feedback received from the community during two main public consultations, more specifically: (a) ICANN Brussels live event (June 23) and (b) Public Comment period (June 16 to August 23).

As currently drafted, the report makes recommendations on the following types of applicant support:

- Cost reduction (evaluation and registry fee modifications)

- Sponsorship and fundraising (ICANN-sourced and external financial assistance)

- Non-cost considerations (technical or logistical support)

The draft report also contains recommendations on possible need-based criteria and limitations on aid.

Recommendations:

- For the first application round, staff should consider ways to define and implement non-financial types of aid, especially to those meeting the recommended need conditions. This support includes: (a) logistical support in the application process (i.e., outreach and education, assistance in securing vendors) and (b) technical and operational training for applicants to operate or qualify to operate a gTLD.

- Due to the high level of risk and uncertainty associated with the first application round, the fee levels currently in the Applicant Guidebook should be maintained for all applicants in the first round. Any financial support to applicants for the first round should be developed by others and come from sources outside of ICANN.

- Staff should identify organizations willing and able to assist with additional program development, for example, refining the criteria, qualification/compliance processes, and managing grants.

- The Board should accept the Final Report produced by this WG and support any policy and implementation work that is indicated as necessary by the report.

Basis for recommendations:

Offering discounts based on reconsideration of one or more elements of the current costing model would increase the uncertainties for a program with considerable existing risk. The existing fee structure was established after a long and careful calculation of all costs, by taking into account a very complex process and environment leading to first-round launch and outcomes. Modifications to the current costing model and the development of exceptions at this point would increase risk without a revised strategy or resources to cover the projected costs.

Non-financial means of support help meet the program objective of a diverse applicant pool and are consistent with ICANN's core mission. ICANN can execute these activities within the existing program structure, while continuing to support future work and developments toward a robust set of support resources.

A well-executed financial support program requires qualified administration and management. An experienced, established organization, with expertise in grant management, should be involved in creating such a program. The criteria and process for evaluating and managing qualifying applicants to receive support requires research and development work. Part of the implementation work could be initiated by staff; nevertheless, in order to make a program like this operationally successful, more expert advice and partnership are needed with organizations knowledgeable in the area of grant management.

The working group should continue to be supported. After the Final Report is completed, the WG has agreed that the work items below should be undertaken. Most of these items require both policy and implementation input and it is recommended that a joint team of Staff and SO/AC members be created to:
   o Establish the criteria for financial need and a method of demonstrating that need;
   o Discuss and establish methods for coordinating any assistance volunteered by providers (consultants, translators, technicians, etc.); match services to qualified applicants; broker these relationships and review the operational quality of the relationship;
   o Establish methods for coordinating cooperation among qualified applicants, and assistance volunteered by third parties;
   o Begin the work of fund raising and establishing links to possible donor agencies;
   o Review the basis of the US$100,000 application base fee to determine its full origin and to determine what percentage of that fee should be waived for applicant.

2010.09.24-003 Root-Zone-Scaling

Current Environment and Recent Developments

On 3 February 2009 the ICANN Board adopted resolution 2009-02-03-04 calling for a joint RSSAC/SSAC study (the RSST study) to consider root zone scalability in light of potential root zone growth and changes to technologies that might impact the stability of the root zone management system. Some of these changes were already underway, including IPv6 in the root zone, and test IDN names in the root zone. Some were planned, including DNSSEC, the rollout of country code IDN names and the addition of new TLDs.

To a large extent, actual deployment progress in all of these technology domains over the last 18 months points to the answer to the original question: there is no identified significant risk to system stability with the adoption of IPv6, IDNs, DNSSEC, and root zone expansion – at least at the scale estimated by ICANN staff for the new gTLD process over the next many years. This is also consistent with the findings of the "L" Root study performed by DNS OARC under contract to ICANN and the RSST study.

In part due to the analysis performed by the RSST team, it is clear that more should be done to ensure stability of the root zone management system over time. First, monitoring of overall system behavior and performance should be improved (actually, beginning with a discussion of appropriate metrics and models). Work done to date points to systemic rate of change – not absolute scale – as being of the greatest relevance to root operators and others. Growth expectations, scale and performance should be carefully monitored, and formal communication channels established between ICANN staff and other relevant parties to ensure data are widely and publicly shared, and possible risks avoided before they can occur.

Recommendation

While RSSAC and SSAC have not yet taken formal positions on the issue or the studies, staff recommends that the Board recognize the substantial work and real-world experience gained in implementing IPv6, DNSSEC and IDNs and the hard work of RSSAC and SSAC members in tackling the underlying stability question, and declare the root zone scalability issue resolved for the next rounds of gTLD expansion. Further, the Board should call on staff to:

- take on a monitoring regime in consultation with other system partners as an element of the new gTLD program roll-out, and

- establish effective communications channels with root-zone operators and RSSAC to ensure timely response to changes in the environment.

Basis for Recommendation

A more complete rationale and analysis can be found in the annex: "Summary of Impact to Root Zone Scaling."

Between 2004 and 2010, the root of the DNS has been undergoing significant change, both in terms of content as well as its support infrastructure. From the addition of Internationalized Domain Names (IDNs) in the root to the deployment of IPv6 and DNSSEC, it is safe to say that more change has occurred in the last 5 or 6 years than has occurred since the DNS was first deployed. With the imminent acceptance of applications for new generic Top-Level Domains (gTLDs), further substantive changes in the root of the DNS can be expected.

It was this planned and change underway in the DNS that prompted the Board to adopt a resolution for a joint RSSAC and SSAC study to be conducted to analyze "*the impact to security and stability within the DNS root server system of [the IPv6, IDN TLDs, DNSSEC, and new gTLDs] proposed implementations.*"[1]

This resolution resulted in the completion of two studies. One, a simulation study of "L" Root performance, the other the RSST study.[2] These studies made important observations about possible limits to the root system, including limits to the pace of scaling and limitations other than the purely technical, e.g. in processing TLD applications through ICANN, NTIA and VeriSign. However, they did not find meaningful technical limitations in system scaling. Those involved with the RSST study recommended ongoing system modeling and monitoring, and improved communication with ICANN staff on gTLD forecasts and plans.

Deployment Experience

IDNs: From the perspective of the DNS, aside from a slightly longer average label length, Internationalized Domain Names are essentially indistinguishable from any other domain name. The addition of IDNs to the root was thus no different to the DNS than adding any other non-IDN TLD to the root. As such, no impact at the DNS level was observed. As of 15 September 2010, there are 26 IDN TLDs in the root, of which more than a dozen are non-test TLDs.

IPv6: Inclusion of IPv6 means adding IPv6 "glue" (resource) records for both TLDs and for Root Servers and providing support for IPv6 transport. As of 6 September 2010, there are 283 IPv6 "glue" records in the root zone covering 203 TLDs. IPv6 addresses for the root servers were added to the root zone starting in February 2008. Historically, concerns were raised about this change because these larger resource records would increase the size of a DNS response, and there was concern if this would be handled correctly by the myriad

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[1] Resolution 2009-02-03-04. See http://www.icann.org/en/minutes/prelim-report-03feb09.htm

[2] See http://www.icann.org/en/topics/ssr/root-zone-augementation-analysis-17sep09-en.pdf and http://www.icann.org/en/committees/dns-root/root-scaling-study-report-31aug09-en.pdf.

varieties of large and small Internet infrastructure boxes. While much work remains to be done for IPv6 compatibility in the Internet overall, no major problems have been found in the simple availability of IPv6 in the naming system.

DNSSEC: DNSSEC was officially enabled in the root zone on 15 July 2010. Similar to the case of IPv6, there was concern that DNSSEC deployment would increase the size of DNS responses and the size of the root zone file itself, and that this could cause instability in the Internet infrastructure. While response sizes and the root zone file have increased in size, and will continue to increase as more zones are signed, no substantive issue has been found as a result. The full deployment of DNSSEC faces other operational challenges that will be tackled by the community as deployment experience becomes more mature. However, size and scale are not stability issues.

New TLDs: ICANN has had some experience with new TLDs over the years as new country codes have been added, and recently with the addition of new IDN ccTLDs without negative technical impact. The concern has been that with many new TLDs delegated in the new gTLD process, stability of the root server and distribution system could be in question. At the levels anticipated by ICANN staff in process-limited estimates of new gTLD introduction in the first rounds – likely on the order of 200 to 300, and not to exceed 1,000 applications processed/year – no meaningful technical stability issues have been identified. There will be operational issues to resolve in coordinating among ICANN (both IANA, gTLD processing and Board oversight), NTIA and VeriSign. Most importantly, there is a need and opportunity for modeling, monitoring, and coordinating between ICANN staff and the root server and broader technical communities.

2010.09.24-004 String-Similarity

Current environment:

The adopted new gTLD policy recommendations prohibit delegation of new gTLD strings that are confusingly similar to each other or to existing TLD strings.[1] This requirement has been implemented in the new gTLD process with a String Similarity review during Initial Evaluation that addresses visual similarity, and a String Confusion objection ground whereby any kind of similarity can be considered. Qualified panels make the decisions in both these procedures. There are no options for exceptions from a finding of confusing similarity.

Recent developments:

The GNSO Council[2] and the Registries Stakeholder Group[3] have requested that exceptions be granted from findings of confusing similarity. The reason for granting an exception would be that a string pair that was found to be confusingly similar constitutes a case of "non-detrimental confusion," for example, if the applicant/operator is the same for both strings or if there is an agreement between the involved applicants/operators that provides for improved user experience.

The GNSO Council indicated that the proposal is a matter for direct implementation and that no additional policy development is needed, i.e., ICANN can change the string similarity evaluation to add an Extended Evaluation where there is a finding of probable string confusion. The Extended Evaluation could consider whether the confusion has been rendered non-detrimental.

One result of the GNSO idea may be the delegation of variant TLDs – given that variant TLDs are very similar.

Recommendation:

Similar strings should not be delegated absent an in-depth policy examination of the issues. The suggested modifications raise a complex set of policy issues (similar to those discussed regarding variants). The proposal should not be considered as a plain implementation matter.

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[1] Recommendation 2: Strings must not be confusingly similar to an existing top-level domain or a Reserved Name.
[2] See letter at http://gnso.icann.org/mailing-lists/archives/council/msg09379.html
[3] See comment submitted at http://forum.icann.org/lists/string-similarity-amendment/msg00002.html

This recommendation is for a conservative approach. If appropriate, the outcome of the work listed above can be considered for implementation when completed. Policy work in this area should be encouraged.

[Alternatively, the Board can direct ICANN staff to develop a set of criteria for delegating similar TLDs.]

Basis for recommendations:

The policy states that strings resulting in user confusion should not be delegated: avoidance of user confusion is a fundamental objective to protect end-user interests and promote a good user experience.

The criteria and requirements for operation of similar TLDs in a "non-detrimental" manner are not obvious or straightforward. The exact criteria and requirements for such a situation to be unequivocally fulfilled have to be defined and need to be agreed upon by the wider community.

The String Similarity review and the String Confusion objection provisions already protect delegated TLDs against applications featuring confusingly similar strings. To confer a right to delegated TLDs to use such strings themselves is a change in principle and of importance. Such rights can be used to introduce chains of successively similar TLD strings, potentially reaching far away from any direct similarity with the original TLD string.[4] The appropriateness of such consequences, and any limitations to be imposed, also need to be discussed and agreed upon by the wider community.

The actual operation of "non-detrimentally" confusingly similar strings raises issues regarding user experience and user expectations already identified in discussions about "equivalent" and "variant" strings. Operational requirements to safeguard such aspects need to be developed, introduced and enforced. For example, should it be a requirement for all such TLDs to resolve to the same addresses or not?

If exceptions for "non-detrimentally" confusingly similar strings are granted, there must also be safeguards to guarantee that the necessary conditions remain permanently fulfilled, calling for particular contractual conditions as well as for compliance measures. These need to be developed and agreed upon by the wider community. The requirements in this regard would be even more pronounced for any exception granted for strings to be operated by different operators under any particular agreement aimed at improved user experience.

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[4] For example, an operator of .STR would be entitled to run .SIR, if found to be confusingly similar to .STR. Then, the same operator would be entitled to run .SIP, if found to be confusingly similar to .SIR, etc.

The changes proposed by the GNSO deserve proper consideration and may ultimately prove to be beneficial. However, this is not a foregone conclusion and requires positive outcomes of all the investigations mentioned above. While the necessary investigations are taking place, such strings will not be delegated. Amending rules on similar strings at this stage in order to allow delegation adds another layer of complexity to an already complex process. After complete investigation, this might prove to be a good solution; however, the first round cannot become all things to all people. The process should be kept as straightforward as possible to avoid unnecessary risks.

In the meantime, the available protection against applications with confusingly similar strings will safeguard both user and operator interests, so there are no obvious justifications for haste in modifying the existing approach.

2010.09.24-005 Trademark-Protection

There are essentially two substantive issues open for debate relating to Trademark Protection in the new gTLD Program.[1]

(1) The first is the definition of <u>substantive review</u> (as in requirement that registries need to afford sunrise protection to registered marks only subjected to a substantive review).

(2) The second is the speed of the URS proceeding.

I.   Substantive Examination or Review

Current environment:

For registry sunrise periods – the Guidebook states that Registries must recognize all text marks: (i) nationally registered in a jurisdiction that conducts a substantive examination of trademark applications prior to registration; or (ii) that have been court- or Clearinghouse-validated; or (iii) that are protected by a statute or treaty. The same limitations are placed on those who are eligible to file a URS proceeding. (For Trademark Claims services – all registered marks must be recognized by the registry, regardless of the jurisdiction or level of review performed upon registration.)

Recent developments:

Numerous comments requested that term "substantive evaluation" be clarified or changed to "examination on absolute grounds." (An absolute grounds examination is one element of substantive evaluation, see below.) Some suggested that the limitation for use of the URS to mark holders of marks that have been subject to a substantive evaluation is too restrictive. Many comments asked what a Trademark Clearinghouse provider must do to validate marks that were not subject to a substantive evaluation upon registration.

Recommendation:

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[1] A variety of comments also suggest that the definition of "identical match" for protection under trademark claims or sunrise services is too restrictive, and that the Trademark Claims services should extend to the post launch environment. There is no recommendation to change these aspects of the Trademark Clearinghouse Proposal, as both the IRT and the STI adopted these limitations. Comments on other less substantive implementation details will be addressed, as appropriate, in the final version of the Guidebook.

Provide a clear definition for "substantive evaluation" and retain the requirement for full substantive review as it relates to protection under sunrise services, thereby providing a specific benefit to trademark holders. (I.e., do not reduce the requirement to only "absolute grounds.")

Substantive review has three requirements, reviews on:

– *Absolute grounds: a review which is undertaken to ensure that the applied for mark can in fact serve as a trademark, i.e., to associate the mark to the source. So, review is given to ensure the mark is distinctive, and not generic, deceptive or descriptive.*

– *Relative grounds: a review to determine of previously filed marks to determine if they preclude the registration of this application.*

– *Use: a review to ensure that the applied for mark is in current use by the applicant as a mark.*

Specifically, the examination is required on absolute grounds AND use of the mark in order to obtain protection in sunrise services.

The Trademark Clearinghouse and URS proposal will be revised to clarify what will be entailed in a subsequent Trademark Clearinghouse validation in order to be guaranteed protection by registries in sunrise services.

Rationale:

The issue boils down to whether the applicant has made actual use of the trademark.

The goal for requiring substantive evaluation is to ensure that a mark provided sunrise protection is one that has been examined on absolute grounds, which is meant to determine that it is not generic or descriptive word, and it is distinctive. The mark should also be examined or validated to show that the description of goods and services for which the trademark was registered complies with an acceptable identification of goods and services and that there is use of the mark in commerce.

Without a requirement of use the system could be gamed. For example, one could register a mark that is truly incapable of serving as a mark (black as a color) but can create a false description of goods to make it appear the mark in facts applies to that good (i.e. "black's fishing tackle") to get priority of rights to the word "black". But, if that mark is never used in commerce, by the time someone challenges that mark, via

what is called a cancellation proceeding, the registrant will not care because it will be five years down the road and the gaming will have already taken place.

Only legitimate trademark holders that in fact use valid trademarks in commerce should be given protection and rights in a sunrise services and should be able to use the URS.

II.   URS Timing Requirements

Current environment:

The URS Proposal which is part of AGBv4 currently provides for the following timelines: (i) filing of a response to a complaint is required 20 days after the complaint is filed (with a possible seven day extension if a good faith basis exist). The STI considered the IRT recommendation of 14 days and expanded it to 20 days (the same response time as the UDRP).

Recent developments:

Public comments by trademark holders and business stakeholders have suggested that allowing 20 days to pass between the filing of complaint and the filing of the response dilutes the "rapid" aspect of the URS and allows injurious conduct to extend an additional seven days for these clear instances of abuse. Some also think that 14 days is too long and recommend that the time period be limited to seven days.

Recommendation:

Change the response time from 20 days to 14 days as it was originally contemplated by the IRT with one opportunity for an extension of seven days if there is a good faith basis for such an extension.

Rationale:

As stated by the IRT, the goal of the Uniform Rapid Suspension System is to be an expedited process for trademark holders to employ in the most clear-cut cases of infringement, with rapid being the key term.[2] The proposal should reflect the need for a rapid process, while balancing the rights of legitimate registrants.

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[2] "The intent in proposing the URS is to solve the most clear-cut cases of trademark abuses, while balancing against the potential for an abuse of the process." (*See* http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf.)

The IRT recommended that a response be required within 14 days after the URS complaint is filed.[3] While the STI recommended that a respondent be given 20 days to respond, rationale stated during the discussions revolved around the fact that this longer response time should to be given to legitimate registrants who may not be paying attention to the notice, on vacation, or unavailable in any given 14 day period to respond.

Publishing the STI recommendation for public comment, the Guidebook URS proposal adopted a 20 day response period. Upon further reflection, and in response to comments, it makes sense to revise this proposal to increase the rapidity at which URS proceedings will be conducted because there are other safeguards for bona fide registrants:

- whether a response is filed or not, there will be an examination on the merits of the complaint;

- the remedy is a simple suspension of the domain name; there is no transfer of the domain name away from the registrant, so in the unlikely event that the registrant can make a case but is unable to reply, the name can be restored;

- the STI also created an appeals process such that if any registrant fails to respond in a timely fashion, that registrant will have up to two years to seek relief from default by simply filing a response. At that time further examination of the merits will take place, including analysis of the response. So the lengthening of response time and the addition of the appeals process is sort of a belt and suspenders approach;

- it seems inappropriate to lengthen the time of all URS proceedings (and the injury) to protect the extremely rare registrant that fails to appreciate that a URS complaint has been filed relating to a domain name that presumably is a going concern, when notice is to be made via email, facsimile and postal mail and when the registrant has an appeal mechanism available.

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[3] (*See* http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf at page 30.)

2010-09-24-007 Board-Role

Current Environment:

In past instances where new gTLDs have been introduced, the Board has had significant involvement in considering and approving applications on an individual basis. To date, drafts of the Applicant Guidebook have not specified a process for Board approval regarding applications in the New gTLD Program.

Recent developments:

As the work on the program nears completion, there are increasing expectations of greater precision about this part of the process. Public comments on draft v4 of the guidebook, as well as in Brussels, have called for more definition of the Board's role in the evaluation process.

In addition, there is a general realization that the current Board process will not scale for an environment where there are potentially hundreds of new gTLD applications.

The Board Risk Committee discussed these issues at its August meeting and the approach recommended in this paper is, in part, a result of that discussion.

Recommendation:

While retaining ultimate discretion, the Board should provide a process-level authorization to staff to proceed to contract execution and delegation on applications where certain parameters are met (e.g., the application criteria were met, no material exceptions to the form agreement terms, an independent confirmation that the process was followed). Where all thresholds are met, the process will include formal approval of the TLD, without requiring additional Board review.

The guidebook should disclose to applicants the agreed parameters for process-level authorization, and clearly indicate what factors will trigger a Board review, for example, if special agreement terms are demanded, or there is a substantial change in the application details from those originally submitted.

Board review might also result from use of an accountability mechanism (e.g., a reconsideration request or independent review panel proceeding). Sufficient time periods following process-level approval would be included in the process to allow for use of the accountability mechanisms. Applicants and others wishing to challenge a decision in the process should be referred to these mechanisms.

A graphic depiction of the proposed process is included in the annex to this paper.

Basis for recommendation:

- From a practical standpoint, **the process should be as efficient as possible.** Board review of individual application results could be a significant drain on Board resources and create a bottleneck resulting in delays for applicants. The evaluation process has been built with pre-defined and transparent procedures to a far greater extent than has been the case in the past, and there should be less need for detailed Board review.

- **Considerable investment has been made to create a predictable evaluation process, with timelines and clearly defined milestones.** Consistent with this objective, the Board's process should also be well understood by applicants and by the community generally.

- **The proposed process is analogous to the treatment of applications for registrar accreditation.** Individual registrar applications do not go to the Board for approval, but the Board does approve changes to the Registrar Accreditation Agreement.

- **The Board should generally not be in the position of overriding results where the process has been properly followed.** This approach helps to preserve the independence of the Board, and protects the organization against the perception of directors exerting undue influence over an approved process.

2010-09-24-008 Mitigating Malicious Content

Current environment:

Identifying and implementing mechanisms to mitigate the potential for malicious conduct was classified as one of four overarching issues for the New gTLD program. Since October 2009, ICANN has worked with the community on this issue to develop nine proposed measures to help mitigate the potential issues in this area (See Annex A for the full list).

Recent developments:

While most of the recommended measures have been fully accepted and/or implemented, a subset remain as subjects of discussion: i) background checks, ii) orphan glue records, and iii) high-security TLD (HSTLD) designation. These are discussed individually below.

1. **Background check**. The recommendation for additional vetting of proposed registry operators was implemented by instituting a form of background check in the evaluation process. Public comments have called for: (1) additional explanation and detail around the process and criteria to be used, and (2) response to the community objection to use of the term "terrorism."

2. **Orphan glue records**. Orphaned DNS records are name server records that exist in delegation, but whose parent domain names no longer exist. The issue of concern is that orphaned DNS records can be maliciously abused. This is currently being studied by the SSAC and their findings are expected to be posted for information and discussed at the Cartagena meeting.

3. **High Security Zone (HSTLD) designation**. The HSTLD Advisory Group continues to work on the proposal for establishment of a voluntary High-Security (HSTLD) designation. The concept has generated discussion due to the voluntary nature of the program and a perceived expansion in the scope of ICANN's activity. The group will publish a Request for Information (RFI) in September to collect additional information to help assess the viability of this program. The summary of RFI responses will be posted for information and discussed at the Cartagena meeting.

Recommendations:

The Board should consider the mitigation of malicious conduct issue resolved sufficiently to launch the first application round. The remaining issues should not delay launch with the following specific recommendations:

1. **Background check**. The background check has been amended to add detail and specificity in response to comment. The specific reference to terrorism is removed (as is the the over-simplified list of background check areas). In order to comply with applicable laws in the United States, ICANN is required to perform checks against lists of those entities and people with whom we are prohibited from doing business. Background check detail will be included in the guidebook as outlined in Annex B to this paper.

2. **Orphan glue records**. Current provisions in the guidebook require each applicant to describe proposed measures for management and removal of orphan glue records for names removed from the zone. This requirement should remain in place, and will be adjusted if SSAC makes a new recommendation in its report on this issue.

3. **High Security Zone (HSTLD) designation.** The HSTLD program is not on the critical path to launch; it is a voluntary, third-party operated initiative that will be an enhancement to the program. Thus, the timing for completion of the HSTLD program should not impact the launch of the gTLD application process. Progress continues to be made, and a community decision on an HSTLD program can be implemented when made.

    Based on the status of work in these areas, staff's recommendation is that the malicious conduct efforts (including the areas mentioned above) should be considered complete.

Basis for Recommendations:

Closure of Overarching Issue

The mitigation of malicious conduct effort was led by multiple industry sources, including the Anti-Phishing Working Group (APWG), Registry Internet Safety Group (RISG), the Security and Stability Advisory Committee (SSAC), Computer Emergency Response Teams (CERTs) and key members of the banking, financial, and Internet security communities. These parties described several potential malicious conduct issues and encouraged ICANN to consider ways these might be addressed or mitigated in the New gTLD Program. Their recommended measures have resulted in a number of changes to the implementation and are expected to provide an increased level of protection for users against malicious behaviors.

Background Checks

Additional explanation and detail – process and criteria to be used:
Inclusion of a background check in the evaluation process is a result of the malicious conduct consultation that recommended proactive vetting of applicant registry operators to reduce malicious conduct risks.

The revised background checks build upon existing proactive checks in the Guidebook: general business due diligence is performed to determine whether the applicant is organizationally, legally, technically, and financially capable of performing the required duties. After delegation, numerous features of the gTLD Registry Agreement together with technical and financial escrow mechanisms provide substantial registrant protection for a range of potential issues that may arise during operations. When viewed as a whole, the protection mechanisms provide a proactive and reactive "defense in depth" strategy to protect the entire stakeholder community.

In response to public comment: the background screening portion of the evaluation process has been clarified, re-designed to respect privacy concerns (i.e., using only publicly available sources of information) and maintain proper focus (i.e., consideration given to factors indicating abuse of trust or bad business activity).

The criteria established for background checks (see Annex 2) are aligned with the "crimes of trust" standard sometimes used in the banking and finance industry. They are limited to two areas of inquiry: criminal history and pattern of improper domain-name-specific behavior. These criteria are designed to minimize subjectivity, add predictability to the process, and help applicants to self-select whether to apply.

Specific information regarding use of the word "terrorism":
The word "terrorism," included previously in a list of possible background check areas, is removed from the Guidebook. That list has been replaced by the additional material described just above. The information below, related to terrorism and other areas of concern, describes ICANN legal obligations that remain a necessary part of applicant vetting.

ICANN must comply with all U.S. laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control ("OFAC") of the US Department of the Treasury. Such sanctions are based on U.S. foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States. OFAC acts under Presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under US jurisdiction.

With respect to the new gTLD program, ICANN must screen both the entities that apply and principals of those entities against all of the sanctions lists. This must be done and ICANN must have clearance for all individuals and entities before ICANN will be able to accept any money or process an application for a new gTLD.

Countries and individuals against whom sanctions have been imposed appear on specific lists, such as the Specially Designated Nationals ("SDN") list. OFAC sanctions prohibit all U.S. citizens and residents, including entities such as ICANN, from providing goods or services to any country or individual on the enumerated lists without a specific license from the government.

For individuals listed on any of the prohibited lists, such as the SDN list, ICANN will not seek a license. Some specific countries, however, have been listed, which means that ICANN cannot provide goods or services to any citizen or resident of those countries, even if the individuals or entities themselves are not on any prohibited list. In previous cases, when ICANN has been requested to provide services to individuals or entities in those countries, ICANN has sought and obtained licenses. No request for a license in these circumstances has ever been rejected.

ICANN has standard corporate compliance processes to review all applicants and their principals.

Orphan Glue Records

Orphaned DNS records are name server records that exist in delegation, but whose parent domain names no longer exist.

It is evident that the community recommendation has benefit. An APWG study estimated that approximately 3% of domains used for phishing were using "orphan name server" records, i.e., remnants from a domain that was previously removed from a registry, creating a "safe haven" for criminal domain registrations.

As recommended in the malicious conduct consultation, the evaluation criteria in the Guidebook include a requirement that as part of their published anti-abuse policies, all gTLD applicants must provide a description of how orphan glue records will be removed at the time a name server entry is removed from the zone.

SSAC has formed a working group to study this issue in an additional community consultation. The recommendations generated by the SSAC working group may offer additional guidance to registries regarding how to manage orphan records and can be included in the gTLD process when available. In the meantime, registries are asked to demonstrate a plan for removing them.

High-Security TLD (HSTLD) Designation

This initiative is also a result of the community consultation on mitigating malicious conduct. The purpose of the HSTLD designation initiative is to create an acceptable set of standards and criteria that will enhance trust in a high-security zone, through the application of appropriate operational and security controls and measuring relevant registry and registrar performance against the controls. TLD registries that elect to pursue designation as an HSTLD would be able to demonstrate such through some method of public display, such as a verifiable seal or a mark.

There has been significant debate within the multi-stakeholder group that is working on this issue. Representatives of the financial community in particular have supported adoption of the HSTLD program to help instill in users a confidence that transactions and other information flow within a registry are in a secured environment. Some current gTLD registries have commented that a high-security zone designation for a subset of TLDs could imply that other TLD operators do not provide appropriate security.

It is envisioned that ICANN's role in the program is to work with the community to establish program standards and criteria, and to help set, refine, and manage the governance of the program. Actual assessment of TLDs against the standards and criteria will be performed by independent entities.

Because the proposed HSTLD program is voluntary, the creation of this designation is not considered a shift in policy. While some comments have urged that the HSTLD controls should be adopted as minimal requirements for all new gTLDs, this would represent a change from the current recommendations and would require a policy discussion.

No action is needed on the HSTLD initiative at this time since it is complementary to the program and need not be in place before applications are accepted. The HSTLD advisory group continues to advance the work on this proposal, and it is expected that the forthcoming RFI will provide valuable guidance from third party providers who would be in a position to administer such a process on creating a workable structure to support the next steps.

2010-09-24-009 Morality-Public-Order

Current environment:

The standards and procedures for filing an objection to a new gTLD string on "Morality and Public Order" ("M&PO") grounds are laid out in Module 3 of the Draft Applicant Guidebook version 4 ("AGBv4") (*see http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf)*, in a form previously considered and settled by the Board. Essentially the same process and standards have been included in the Guidebook since version 2.

In short, the procedure calls for a party to object to a string, through an independent dispute resolution process, if the string incites or promotes: (I) violent lawless action; (ii) discrimination; (iii) child pornography; or (iv) anything else that reaches the same level of the first three grounds.

Recent developments:

During the Brussels meeting the Governmental Advisory Committee ("GAC") expressed concern over the M&PO objection procedure and standards. On 4 August 2010, the GAC sent a letter to ICANN's Chairman restating the concerns raised in Brussels, and suggesting that a community-wide discussion be held to "ensure that an effective objections procedure be developed that both recognizes the relevance of national laws and effectively addresses strings that raise national, cultural, geographic, religious and/or legitimate sensitivities or objections that could result in intractable disputes." *See* http://www.icann.org/correspondence/gac-to-dengate-thrush-04aug10-en.pdf.[1] The GAC did not provide any specific advice on how the M&PO objection procedure or standards should be revised.

Shortly after the GAC sent its 4 August 2010 letter to ICANN's Chairman, a working group consisting of various members of the GAC, the ALAC, the Commercial Stakeholder group, the Non-Commercial Stakeholder group, the Registrars Stakeholder group, the Registries Stakeholder group, Nominating Committee appointees and individuals, was established to discuss possible revisions to the procedures and standards for filing M&PO objections. The group is also discussing changing the reference to the phrase "Morality and Public Order."

The recommendations of that group may take the form of "implementations advice" or may be an in-fact change to the approved policy.

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[1] The letter is strongly supported by the USG (outwardly by the NTIA and apparently by the State Department and White House).

Recommendation:

Retain the process for filing M&PO objections as set forth in AGBv4, but listen to the advice of the working group for changes, especially in terminology or other sensitive (non-operational) areas. Any suggestions that do come from the working group, however, must be measured against the goals that the M&PO objection process was meant to achieve, as set out below. Recommendations that meet these goals (changes to terminology or certain adjustments to standards) can be incorporated into the process. If the recommendation in-fact change the GNSO policy itself, they cannot be made effective absent a bylaw compliant policy development process.

Rationale:

The goal of the M&PO objection process is to provide a path for people to utilize if they want to object to certain applied-for strings, while attempting to mitigate risk to ICANN and the new gTLD process. The elements, described in greater detail below, needed to achieve such a goal are as follows: (1) a predictable path for applicants; (2) a dispute resolution process independent of ICANN; (3) dispute resolution panelists with the appropriate expertise; and (4) the clearest and most uniform set of standards possible.

1. Predictable Path for Applicants:

Having existing and established rules makes the objection path as predictable as possible to provide a clear roadmap for applicants: one of the cornerstones of the GNSO's New gTLD Policy.

The process as set out in AGBv4 provides a predictable timeline and path for objection. The procedures for filing and the administration of an objection are clearly stated in the Guidebook. Further, the selected dispute resolution provider has established rules that will apply to the process once filed.

Without this or an equally robust process, people or governments will not know how to object to an applied for string if they think it is appropriate to do so. "Objections" will be lodged in numerous ways, which cannot be predicted. ICANN will likely see: objections lodged in writing to the full Board, calls made or notes sent to individual Board members, governmental intervention in a variety of different ways, or criticism via media outlets. Such unpredictability will be chaotic and it will be difficult to ascertain which "objections" are valid and should be seriously considered.

2. Process Outside of ICANN:

Determinations in the objection process set forth in AGBv4 are made by an independent dispute resolution provider. The parties in the dispute (the applicant and the objector) do not include ICANN. ICANN will not be involved with determining whether an objection has been properly lodged, whether it should proceed to determination, or whether it has merit. Most importantly, ICANN will not be a "party" to the dispute itself.

Not providing a process outside of ICANN will be detrimental to operations of the organization. ICANN does not have the capacity or the expertise to manage the administration of an unknown number of objections. Further, without an independent provider selecting independent experts to issue expert determinations on a dispute, ICANN will become embroiled in the facts and circumstances of each and every dispute. Redacted
For these reasons, the objection process should be as independent as possible.

3. Dispute Resolution and International Dispute Expertise:

Efficient, consistent dispute resolution requires panelists possessing requisite expertise in a complex field.

The established dispute resolution process calls for the dispute resolution expert panel for M&PO objections to consist of "three experts recognized as eminent jurists of international reputation, in proceedings involving a morality and public order objection." (*See* section 3.3.4 at 3-12 in AGBv4.) The goal is to ensure that the experts issuing determinations on such objections have experience not only in dispute resolution processes, but also in areas involving freedoms and human rights that reach a the level of public policy and order likely to be at issue in M&PO objections. It is envisioned that experts include retired and possibly sitting judges on the International Court of Justice, or similar tribunals.

The dispute resolution provider is the International Center of Expertise ("Center of Expertise") of the International Chamber of Commerce ("ICC") arbitration and mediation division.[2]   Comment indicates there is some community uncertainty about the role of the ICC: the ICC will be responsible for administering the objections and for selecting the expert panelists. It will then be up to the expert panelists, not the ICC, to hear the

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[2] "ICC arbitration is respected worldwide. It is supervised by the ICC Court and administered by the Court's Secretariat. . . . No other arbitration institution can match ICC's global reach. . . . [Para.] In the year 2009, ICC arbitration took place in 53 countries and involved arbitrators of 73 different nationalities." (*See* http://www.iccwbo.org/court/arbitration/id5256/index.html)

dispute and use their expertise in issuing a determination as to the prevailing party in the dispute.

4. Clear Standards:

Clear standards lead to predictable, consistent results.

Presently, the standards or grounds upon which an applied-for gTLD string may be objected to as being contrary to morality and public order are if it incites or promotes: (i) violent lawless action; (ii) discrimination based upon race, color, gender, ethnicity, religion or national origin; or (iii) child pornography or other sexual abuse of children; or if an applied-for gTLD string would be contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law.

As discussed when first considering standards, this standard was crafted to balance the need for clarity and provide some discretion to panelists in the event of unanticipated controversy,

The standards and grounds for objection were developed in an attempt to implement GNSO Policy Recommendation No. 6 for new gTLDs that "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law."[3]

Research indicates that two generally accepted legal norms are that: (i) everyone has the right to freedom of expression; but (ii) such freedom of expression may be subject to certain exceptions that are necessary to protect other important rights.[4] However, it is difficult to identify specific legal norms relating to morality and public order applicable to potential gTLD strings that are generally accepted under principles of international law. Thus, an alternative is to identify legal norms that are widely accepted on the national level. Significant research in numerous jurisdictions in every region of the world was conducted to arrive at the undeniably widely accepted legal norms found in the enumerated grounds set forth above. (*See* http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf for a summary of that research.)

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[3] The GNSO also indicted in Recommendation No. 6 that: **"**Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)."

[4] *See* The ICCPR, the UDHR and regional treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights.

5. Example

The GAC has suggested that the objection process "effectively addresses strings that raise national, cultural, geographic, religious and/or linguistic sensitivities, or objections that could result in intractable disputes."[5] (Importantly, it should be noted that the already existing community-based objection could be utilized to resolve many of the disputes arising from national, cultural, geographic religious and/or linguistic sensitivities.)

It is also suggested that possibly members of the Governmental Advisory Committee ("GAC") sit as a panel to hear objections by governments on M&PO grounds or, alternatively, consider all applications against the new standard in the paragraph above.

Depending on their final form, these potential recommendations could violate the four key values above.

Expanding the grounds for objection, such as the GAC has suggested, could lead to a lack of clarity on the grounds upon which an M&PO objection could be filed or succeed. The standard articulated is not clear and how the GAC might consider all applications and which ones would be the subject of objection is not clear. Therefore, the process would not be clear and predictable for applicants and the standard might lead to inconsistent results.

It seems unlikely that, as a general rule, GAC members have any formal dispute resolution training or experience in resolving disputes relating to this subject matter. Thus, having GAC members serve as the "dispute resolution panel" could significantly challenge the presently envisioned timelines of the dispute resolution process and thereby cripple the efficiency and effectiveness of new gTLD program.

Notwithstanding the above, the cross community working group work is an important step in finalizing the M&PO objection process and the work is being carefully considered. The group's consensus-based recommendations will be considered and changes that are in line with the stated goals of the M&PO objection process will be implemented to the extent possible.

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[5] *See* http://www.icann.org/correspondence/gac-to-dengate-thrush-04aug10-en.pdf

2010-09-24-010 Budget

Current environment:

ICANN released an explanatory memo on 1 June 2010 (http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm) discussing the New gTLD Program Budget including the assumptions used to arrive at the expected costs to progress implementation of gTLD policy recommendations, complete operational readiness activities, and process applications once submitted. To properly align these activities and costs the new gTLD budget was segregated into 3 phases:

- *Development* – represents costs necessary to progress the implementation of the gTLD policy recommendations – these funds are included in the ICANN Annual Budget and Operating Plan;

- *Deployment* – the incremental costs necessary to complete the implementation of application evaluation processes and systems but that should not be authorized until the launch of the program is fairly certain; and

- *Application Processing* - represents costs necessary to accept and process new gTLD applications, conduct contract execution activities, and conduct pre-delegation checks of approved applicants prior to delegation into the root zone.

The *Development* phase has been approved and is being funded via ICANN's FY11 Operating Budget. The *Deployment* and *Application Processing* phases comprise the "New gTLD Budget" and an approval request has been withheld until the launch of the program is fairly certain.

Recent developments:

A number of outstanding community concerns impacting the completion of the Applicant Guidebook (AGB) are resolved or are close to resolution, and those that remain open have minimal impact to the processing of applications.

A briefing on the new gTLD Budget was provided to the Board Finance Committee (BFC) in Brussels. Subsequent to this briefing the new gTLD budget was updated based on comments received on Applicant Guidebook version 4 and a re-evaluation of certain application evaluation activities. Updates include Contingency Planning and Testing for the overall program, implementing a robust background checking process, implementing an applicant support process for a certain set of applicants, and securing additional resources such as the Independent Objector, URS and Trademark Clearinghouse providers, and international staff.

The BFC will now meet prior to Trondheim to review the updated gTLD Budget. The BFC meeting may result in an approval of the gTLD budget and recommendation by the BFC

to the Board to approve the gTLD budget for execution. This paper is being submitted in advance of this meeting with the understanding that there may be additional updates based on the direction of the BFC.

Recommendation:

If the BFC so indicates next week, we recommend that the Board approve the new gTLD budget and allow for the execution of activities to occur in the two phases described above: Deployment and Application Processing.

- The Deployment budget (see the Annex) should be released immediately to complete the remaining activities necessary to accept and process applications.

- The Application Processing budget should be released with the approval of the final Applicant Guidebook.

Basis for Recommendation:

Deployment Budget

- The requirements for evaluating applications have changed minimally from version 3 to version 4 of the AGB and are not expected to change significantly after this last round of changes based on public comments.

- A number of remaining Deployment activities are expected to take some months to complete and should be advanced starting now to avoid unnecessary delays in launching the gTLD program. For example,

  o The implementation of certain application evaluation processes are near a point where the Panelist firms must be retained to integrate and finalize their respective evaluation activities.

  o Program management activities, including the configuration of the TLD Application System (TAS), require additional resources to be completed in time to ensure effective management of the overall program.

  o Other necessary roles in the application process (i.e., Independent Objector, Application Coordinators, and Customer Service) must be filled in advance of the launch.

Application Processing

- While the majority of application processing activities will not occur until the submission of applications, certain costs will be incurred prior to receipt of application fees from applicants. For example,

  o applicant support for applicants, and

  o general and administrative costs associated with the gTLD team such as salaries and office space.

2010-09-24-011 Registry-Agreement-Issues

Remaining Issues in Base Registry Agreement   [2010.09.24-011]

Background

On 31 May 2010, ICANN posted for comment version 4 of the Draft Applicant Guidebook for new Generic Top-Level Domains ("AGBv4") <http://icann.org/en/topics/new-gtlds/comments-4-en.htm>. AGBv4 contained the fourth draft of the form Registry Agreement for new gTLDs (the "Draft Registry Agreement"). The Draft Registry Agreement incorporates numerous significant modifications based on public comments received by ICANN on each of the form registry agreements contained in the first three Draft Applicant Guidebooks. Despite the significant modifications, ICANN received dozens of additional comments on the Draft Registry Agreement during the comment period for AGBv4, the most numerous of which were delivered by the Registries Stakeholders Group (the "RySG").

Prior to the posting of AGBv4, ICANN held a consultation with representatives of the RySG, prospective registry operators, registrars and other non-contracted stakeholders. During this consultation a temporary drafting group ("TDG") was established to work collaboratively to address open issues in the Draft Registry Agreement; see <http://blog.icann.org/2010/04/new-gtld-consultation-pddrp-and-agreement-amendment-processes/>. As a result of the TDG process, a compromise was achieved on a mechanism for amending the Draft Registry Agreement in the future, an issue that had been one of the most contentious in the previous versions of the Draft Registry Agreement.

After the close of the comment period on AGBv4, the TDG reconvened via conference call on 8 September 2010 to discuss certain remaining open issues.

As a result of the September 8 consultation, ICANN made concessions and believes it has reached reasonable compromises on several key issues including:

— ICANN's ability to perform contractual compliance audits,

— emergency transition costs,

— the process and scope of arbitration proceedings in the event of a contract dispute,

— change of control approval, and

— the parties respective rights upon a change in control of the other party.

Despite the constructive dialogue, a few significant open issues remain. This paper addresses the remaining significant open issues in the Draft Registry Agreement, along with the RySG's position on each issue and ICANN staff's recommended approach. The following are not an exhaustive list of every issue that the RySG has raised and does not address the continuing controversy over vertical integration of registries and registrars, which is the subject of a separate paper.

The TDG has been a very successful tool for community dialogue and settling difficult issues.

Issue 1: What notice and consent is required for registries charge increased or premium renewal prices?

<u>Current Approach</u>

In response to community members that are concerned that registry operators could unfairly raise prices for particular successful registrations, the Draft Registry Agreement provides that the registry operator will provide uniform pricing for all renewal registrations, unless registrant has notice and consents to the higher renewal price. The intent of this provision is to ensure registries can not charge premium pricing upon renewal of valuable names. Premium pricing of some names (i.e. specific name renewals that could be priced higher than other standard name renewals) while protecting registrants from price gouging for successful registrations.

<u>RySG Objection</u>

The RySG objects to this provision on conceptual and contractual grounds. First, the RySG does not believe that ICANN should mandate that all name renewals be priced identically because this places undue restrictions on its ability to conduct its business as the market dictates. In this regard, the RySG believes this provision is akin to an indirect price cap, which ICANN has already elected not to impose directly; for background please see <http://www.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf>. From a contract perspective, RySG objects to the language of the provision that allows an exception when the registrant has specifically consented to a higher price because the registry operator will have no direct contractual relationship with the registrant and will have no effective way of ensuring that registrant consent has been obtained.

<u>Staff Recommendation</u>

The current provision is necessary to protect registrants from predatory pricing upon renewals and the term should be retained. For purposes of RySG's contractual objection, the language necessary to comply with the draft provision could be included in a registry's registry-registrar agreement requiring registrar to get the consent of registrants to premium pricing renewals. This approach should alleviate the problem of a lack of contractual relationship between registrants and registry operator.

Issue 2: Should registries be able to sue ICANN for more than one year of registry fees?

Current Approach

The Draft Registry Agreement limits the monetary liability of the parties in the event of a breach of the agreement to an amount equal to 12 months of registry fees. In addition, in the event of repeated and material breaches of the agreement, ICANN may seek punitive or exemplary damages. Either party may seek specific performance in the event of a breach resulting from non-performance of the other party's obligations. In addition, in the event of repeated and material breaches that are not corrected, either party may terminate the agreement.

RySG Objection

The RySG believes that the contract in general does not provide registry operator with sufficient remedies. RySG notes that the monetary limit for damages in the event of a breach is too small to provide significant relief and that termination is an illusory remedy as it would result in the registry operator losing control of the registry and thus exiting the business entirely.

Additionally, RySG wants ICANN to enter into service level agreements with registries that provide for enhanced remedies in the event of an ICANN breach.

Staff Recommendation

The limitation of liability should remain as is.

The remedies for registry operator are limited but appropriate given that ICANN is a non-profit entity that cannot afford to be open to unlimited liability from what could be hundreds of future registry operators. Registry operators enjoy similar limitations of its liability under the Draft Registry Agreement and will only be exposed to additional damages in the event of extreme and repeated wrong doing.

The proposed separate service level agreements with each registry operator is not yet workable, given that the RySG has not provided any specific recommendations on what matters such agreements would cover. ICANN staff believes that ICANN's long-standing and established role with respect to the DNS and the Internet, as well as its covenants under each registry agreement (such as the process for considering new registry services) and registry operator's ability to specifically enforce those covenants, provide sufficient protections for each registry operator with respect to ICANN's obligations.

Issue 3: Should ICANN be able to collect a variable transaction fee from registries if registrars decline to pay ICANN directly?

Current Approach

Consistent with all existing registry agreements, the Draft Registry Agreement provides that registry operator will pay an additional fee to ICANN in the event that ICANN accredited registrars (as a group) fail to approve the variable accreditation fees established by the Board for any ICANN fiscal year. Currently, registry operators provide in their registry-registrar agreements that the registrars will reimburse registry operator in the event that registry operator is required to pay the fee.

RySG Objection

The RySG believes that this provision requires each registry operator to act as a guarantor of registrars. The RySG believes that is should not be put in the position of having to pay this fee in the event that ICANN accredited registrars (as a group) fail to approve variable accreditation fees because registry operator is not in a position to approve accreditation of registrars or to determine which registrars it will do business with. The RySG requests a limitation on this fee that would make it payable only if registry operator successfully recoups the fees from registrars.

Staff Recommendation

The provision for the pass-through of fees is necessary to ensure that ICANN receives adequate funding in the event that ICANN accredited registrars (as a group) fail to approve the variable accreditation fees. This approach is consistent with every existing registry agreement. Deleting the provision would put half of ICANN's revenue in the hands of one or very few registrars.

Such fees have never been imposed in the history of ICANN but if they were, registry operators would have the right to invoice registrars for such fees and thus recoup the fees paid to ICANN. If a registrar failed to pay the fees as invoiced, such registrar would be in breach of its registry-registrar agreement and registry operator could take further action against registrar to recover the fee.

Note that this fee will not apply to registry operator in the event that registrars (as a group) approve the variable accreditation fees but certain individual registrars fail to pay.

Issue 4: Should ICANN require registries to offer "searchable" Whois?

Current Approach

At the request of certain community members that are concerned about intellectual property protections, ICANN staff included a proposed provision as part of the Whois specification to the Draft Registry Agreement that would require registry operators to provide a Whois database that is searchable by several categories. This would increase the ease with which individuals or entities registering certain names could be identified, especially for use in determining who to proceed against as part of a URS or other rights protection mechanism procedure. The Coalition for Online Accountability (IPC) points out that Whois databases were searchable in this fashion prior to 2000, and that such requirements exist in some current registry agreements.

RySG Objection

The RySG objects to this provision on several grounds. First, RySG claims that searchable Whois might not be able to be technically implemented in modern Whois databases on a large scale and with ICANN service level requirements. Further, RySG claims that such a service would be unduly costly and would raise a myriad of legal and privacy concerns. The RySG also raises concerns that such a service could be used for malicious purposes.

Staff Recommendation

Yes, searchable Whois should be required. The technical community should determine technical details of such a service (one potential solution is a web-based service). There is a question of whether the privacy and potential malicious conduct costs of such a service might outweigh the benefits to community members. While this deserves further study, it should be pointed out that Whois searchability reorganizes existing public data. Retaining the requirement for searchable Whois will likely trigger significant protest from community segments in addition to the registries, while eliminating the requirement will be protested by intellectual property stakeholders.

Issue 5: Should registries have to indemnify ICANN against lawsuits arising out of delegation or operation of the registry?

Current Approach

The Draft Registry Agreement gives ICANN broad indemnification rights from the registry operator against claims that may arise in connection with the delegation or operation of the registry. However, such indemnification rights do not apply in the event of claims that arise due to a breach by ICANN of its obligations under the agreement or as a result of ICANN's willful misconduct.

RySG Objection

The RySG feels that the indemnification scheme is unfair and may subject registry operators to liabilities in connection with claims that arise as a result of matters completely outside the control of registry operator. RySG objects especially to indemnifying ICANN for claims arising out of or relating to "intellectual property ownership rights with respect to the TLD" and "the delegation of the TLD to registry operator". The RySG also requests that the indemnification be made mutual and be limited to material breaches of representations and warranties contained in the agreement and to gross negligence and willful misconduct of either party.

Staff Recommendation

The indemnification right should remain but ICANN staff has invited the RySG to propose language more precisely defining the exceptions to registry operator's indemnification obligations for inclusion in the next version of the Draft Registry Agreement. The registry operator should assume all risk of operating the registry and that ICANN should be protected against claims that are brought as result of registry operator's obtaining the TLD and the manner in which registry operator conducts its business. Given the potential scope of the new gTLD program, ICANN cannot subject itself to third-party liability based on the acts of numerous and geographically remote registry operators. Entities wishing to apply for new TLDs should factor the risks of third-party claims into their respective business models and be prepared to pay ICANN's costs in the event that ICANN is subjected to claims arising out of registry operator's business operations. It is conceded that registry operators should not be subjected to liability for matters arising completely outside of the control of registry operator such as the design of the evaluation process itself.

2010-09-24-012 Vertical-Integration

Topic: Vertical Integration   [2010.09.24-012]

Current environment:

There is disagreement on whether registrars should be allowed to operate registries (and consequentially whether registries should be allowed to operate registrars).

Two years of community discussions on the topic of Vertical Integration have not produced consensus on whether or not registrars should be prohibited from applying to operate registries.

Over-simplistically:

Vertical Integration	Vertical Separation
Registrars and select non-commercial stakeholders generally want to **allow** registrars to run registries (and vice-versa) based on the theory that allowing registrars to compete against established registries (and allowing registries to compete at the retail level) would lead to better prices, choices and service for consumers – much like how grocery stores are able to offer house brands, or Apple, Inc. is allowed to operate retail stores to sell MacBooks and iPhones directly to consumers.	Registries and commercial stakeholders generally want to **prohibit** registrars from running registries (and vice-versa) based on the theory that allowing registry-registrar cross-ownership would it make it easy for registries that are co-owned with registrars to take advantage of registry data to charge high prices for valuable registrations. Some stakeholders propose limited exceptions such as exempting "dot-brand" TLDs from having to register names only through outside registrars.

There are many nuances. For example, registries supported co-ownership with the caveat that a co-owned registrar could not provide "back-end services" or sell names for the affiliated registry. Registries support varying percentages of ownership based on their and other business models.

ICANN's newer (since 2005) gTLD registry agreements generally restrict established registries from owning registrars, but ICANN has never before had a rule prohibiting registrars from applying to operate registries. For reference, all seven of the new gTLDs introduced by ICANN in 2000 have featured some degree of registry-registrar cross-operation or cross-ownership.

Recent developments:

In March 2010 (Nairobi), the Board resolved as a default position that no co-ownership would be allowed in new gTLDs, but that if the GNSO were to develop a policy on the

subject prior to the launch of new TLDs, the Board would consider using the hypothetical new policy for the New gTLD program <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5>.

In May 2010, ICANN published version 4 of the Draft Applicant Guidebook, which included a note that the Board encouraged the GNSO to recommend policy on this issue, and that the Board would review this issue again if the GNSO did not make recommendations in time for launch of the new gTLD program <http://icann.org/en/topics/new-gtlds/comments-4-en.htm>.

The GNSO's Vertical Integration Working Group published its Initial Report for public comment from 23 July – 12 August <http://icann.org/en/public-comment/public-comment-201008-en.htm#vi-pdp-initial-report>. The summary of public comments included the following observations:

- ICANN should quickly resolve the issue of Vertical Separation.

- No consensus is likely to emerge from the VI Working Group in favor of any of the substantive models discussed in the Initial Report.

- There is generally no support for the models reflected in the Nairobi Board resolution and Guidebook v4.

- There is general support for the Key Principles described in the Initial Report that:
  - Certain new gTLDs likely to be applied for in the first round may be unnecessarily impacted by restrictions on cross-ownership or control.
  - A process should be adopted that would allow applicants to request exceptions and have them considered on a case-by-case basis.
  - Single Registrant, Single User TLDs (SRSUs) should be explored further.
  - Recognized the need for enhanced compliance efforts and the need for a detailed compliance plan to enforce any vertical integration restrictions.

- There are general concerns regarding adopting a model that requires involvement of national competition authorities that may not understand or have experience with the domain name marketplace.

The Working Group is divided on whether registrars should be allowed to operate registries (and consequentially whether registries should be allowed to operate registrars). The VI-WG's recent "Revised Initial Report on Vertical Integration between Registrars and Registries" is posted at <http://gnso.icann.org/issues/vertical-integration/revised-vi-initial-report-18aug10-en.pdf>. The report includes a number of proposals to address vertical integration for the new gTLD program, but the VI-WG has not reached consensus as to which one to recommend.

Details of each proposal are presented in the Initial Report. Also, a summary and analysis of the proposals by Professors Salop and Wright is in the attached annex. (Professors Salop

and Wright are experts in antitrust law and the economic analysis of industrial competition; earlier this year the Board considered their paper entitled "Registry-Registrar Separation: Vertical Integration Options" <http://blog.icann.org/2010/03/vertical-integration-options-report-available-to-community/>.)

Recommendation:

Staff recommends that the Board carefully review and consider the GNSO's "Revised Initial Report on Vertical Integration between Registrars and Registries," which includes details on all the various proposals and viewpoints.

The Board can choose from essentially four options: strict separation, limited cross-investment, limited integration, or free market:

1. Strict separation: as presented in Draft Applicant Guidebook v4, registrars would be prohibited from applying for or operating registries, and registries would be prohibited from owning registrars or resellers. Some stakeholders propose limited exceptions (such as exempting small registries or "dot-brand" TLDs) from having to register names only through outside registrars).

2. Limited cross-investment: as proposed in the JN2[1] or RACK+ proposals, registries and registrars could own up to (and no more than) of the 15% the stock in each other.

3. Limited integration: as proposed in the CAM3 or Salop-Wright proposals, registrars could operate registries and vice-versa, but any applications for cross-operation from firms with large market share would be referred for review by national competition authorities.

4. Free Trade: as proposed in the "Free Trade" proposal, registries would be free to own and operate registrars, and registrars would be free to own and operate registries.

Categories:
Significant VI-WG discussion involved exceptions to a prohibition on vertical integration. Under what set of circumstances could there be co-ownership? For example, there were suggestions that a ".brand" registry, small registries or community based registries be exempt from separation rules.

Recommendation: Categories should not be used as a basis for providing exemption or exception unless the criteria are very clear and objective, and the implementation does not add complexity that puts the process at risk. An example of a category that is clear and

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[1] The expressions such as "JN2" and "RACK+" are shorthand for GNSO Vertical Integration Proposals. They are briefly described below and fully described in the "Revised Initial Report on Vertical Integration between Registrars and Registries."

objective is number of names under management. Examples of categories that add significant complexity and risk are designation as .brand or community TLDs.

Basis for Decision:

The Board is presented with these options for resolution of the discussions on vertical integration because the GNSO has not reached consensus. Listed below are the results of a poll taken before the release of the Initial Report:

Proposal Name	In Favor	Could Live With	Opposed	No Opinion	Did not vote
JN2	12	11	16	2	26
Free Trade	16	4	20	1	26
RACK+	12	3	23	2	27
CAM3	2	12	24	2	27
DAGv4	0	11	27	2	27
IPC	1	5	29	5	27

VI-WG participants were mostly against the strict separation proposed in Draft Applicant Guidebook v4 – none were in favor and 27 were opposed. Participants also showed little support for the IPC's proposed dot-brand exceptions – only 6 votes of support versus 29 opposed. For analysis and comparison purposes only, combining the two proposals allowing only limited cross-investment (JN2 and RACK+) yields 38 votes of support (either or "in favor" or "could live with") for those proposals combined. By contrast there were a total of 34 indications of support for the two proposals (CAM3 and Free Trade) that would allow for vertical integration of registries and registrars either by default or by waiver. Note that this was an informal poll and is being referenced here merely to indicate the absence of consensus. In reality, proposals cannot be combined – they are very different and not readily merged into blocks.

The VI-WG is currently developing a list of potential harms that could result from various approaches. See https://st.icann.org/vert-integration-pdp/index.cgi?harms . In discussing the various options, the WG has also emphasized that an effective structure for compliance and enforcement under each option is an area that should be considered.

Each of the options available to ICANN presents risks:

Option	Rationale	Risks
1. Strict Separation (AGBv4) – no cross-ownership permitted (with possible exception for dot-brand)	Would stop registries from profiting from registry data by using affiliated registrars; restrictions could be relaxed in the event GNSO reaches consensus in the future.	Redacted
2. Limited cross-investment (JN2 or RACK+) – cross-investment over 15% prohibited (with possible exceptions for community, orphaned or single-user TLDs)	Would stop registries from profiting from registry data by using registrars controlled by the registry; partially based on restrictions on ownership of registrars in current registry agreements.	Redacted

Option	Rationale	Risks
3. Limited integration (CAM3 or SW) – cross-operation permitted subject to review by competition authorities	Would benefit consumers through lower prices and better services made available by registries that could sell directly to consumers; supported by expert economic analysis from Professors Salop and Wright.	Redacted
4. Free trade – no restrictions on registry ownership of registrars or vice-versa	Would benefit consumers and facilitate innovation, like house-brand groceries or iPhones and MacBooks bought directly from Apple, Inc. retail stores; registries will be able to efficiently monetize the rights to TLDs whether or not they control registrars.	Redacted