ICANN
Transcription
GNSO New gTLD Subsequent Procedures Working Group
Thursday, 22 August 2019 at 03:00 UTC
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JULIE:

Good morning, good afternoon, good evening, everyone. Welcome to the New gTLD Subsequent Procedures Working Group call, on Thursday, the 22nd of August, 2019, at 03:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken via the Zoom room.

I'd like to remind all participants to please state your name before speaking for transcription purposes. Please keep phones and microphones on mute when not speaking to avoid background noise.

With this, I will turn it over to Jeff Neuman. You can begin, Jeff.

JEFF NEUMAN:	Thanks. If I could just quickly check, Julie. At the beginning, you came in and out. Was that just on my side? If someone can just confirm. I just want to make sure it's not my – okay, it was choppy for … Okay, Steve. Thanks.
	Welcome, everyone. We're going to tackle certainly a topic that's got a lot of interest. I'm glad to see a number of people on the call, despite the unfriendly time in a lot of places in the world. So thank you for coming.
	The agenda is up on the screen. I think we're not going to get past the closed generics issue. I'm pretty confident we'll probably spend the whole time talking about that issue. But before we get there, let me just ask if there are any updates to any statements of interest.
	I'm seeing Tom Dailey. You have your hand raised. Please.
TOM DAILEY:	Thank you, Jeff. I've made a minor update to my statement of interest to reflect this week's appointments by the NomCom, which includes my appointment to the GNSO Council from the end of ICANN 66. Thank you.
JEFF NEUMAN:	Great. Congratulations, Tom. I think it's congratulations, but you can let me know after you take that position and several months in. But, not. Definitely congratulations. I am hoping you will stay involved in this as well despite your extra responsibilities on the GNSO. So thank you very much.

Let me just see if there are any others before I move on. Any other updates?

Justine has just posted that she has been selected by the NomCom as an ALAC member for Asia/Australia/Pacific Islands, but for current SubPro purposes, she remains a member of At-Large and serves as ALAC At-Large liaison for Subsequent Procedures.

Congratulations, Justine, and thank you for reporting on the update. Great. Let me just if there are any others.

Okay. Tom, your hand is still up, but I think that's leftover, if I'm not mistaken – yeah. Great. Let's move on. Actually, one thing to address. I know Jim posted. There was one item left over from the last call on the previous issue, but I'm going to propose that we, as I said at the end of that last call, handle that online and see if there are any issues through e-mail. If it rises to the level where we need to discuss that on a call, we can do that on a subsequent call. But I think a lot of people here on this call showed up to discuss the closed generics issue, so I definitely want to spend as much time as possible on that.

I'm going to ask Steve or Julie, whoever's got – thank you. You beat me to it. You knew what I was going to ask. On the screen right now – perhaps someone could post a link to this document as well in the chat – is the summary document on closed generics. I want to start with a quick note because there have already been some people that have, including myself, gone into the document and have made some changes.

I just want to remind everyone of the purpose of this document. The purpose of this document is not to restate what is in the public comments summary. That is linked in what you'll see in that third bullet as the Sub-Group B public comment analysis. I know that this is a controversial subject, and I know that there are many people that are going to advocate for one side or the other or for something in between. Again, this summary document is to make sure that all the positions are represented in a summary fashion but not to just restate what's in the public comment analysis.

What I put in there and what Steve also updated with some history and context … Because I think this issue is a little bit different than probably any other issue in the sense that this was an issue that came up after applications were submitted. It was not necessarily contemplated, or I should say that there was no direct policy on point prior to the guidebook being published. The Board took an action with respect to this matter that we'll talk about. The Board, when it took that action, said that that action was only for the one round and basically said to the GNSO to give this issue to our group to try to set some policy on this issue.

Of course, I'll let people get in the queue. I see it's building it up already.

Normally, when we talk about a default being what happened in 2012, this is a difficult one because what happened in 2012 is that the Board [was] basically saying it shouldn't necessarily set a precedent unless the GNSO community comes back and says it should be a precedent. So let's really put out heads together and see if we can agree on this issue one way or the other or something in between and work through the issues

because that's going to be important for us to try to do our best to resolve.

With that said, before we get into talking about the history, Kathy's got a comment. So, please, Kathy.

KATHY KLEIMAN: Hi, Jeff. Can you hear me?

JEFF NEUMAN: Yes.

KATHY KLEIMAN: Two things happened. We got .brands after and also the ban on closed generics. As you know, and as I know everyone in the group has heard, when we found out on Reveal Day that dozens of applications had been applied for in 2012 as closed generics, there was a massive response that said that, for many people, that was not what the rules had allowed and that the only situation … The ICANN Board held what became a massive public comment with over 250 – I think it was 264 – comments, the vast majority of which came from far outside the ICANN community. So it's an issue we've heard a lot about from the world, frankly.

So I think we have to consider that as go through. To the extent that we've accepted mandatory public interest comment, of which the ban on closed generics is one of them, I think we have to consider that, too. Again, the massive outpouring from the world on closed generics … I've put some of that – if we want to remove it later, [we can] – into the

comments so people can see a sample of the wide and diverse group that responded to us in 2013 when the ICANN Board held its public comment. The default is to do what we did in the first round. There was a ban on closed generics. Thanks, Jeff.

JEFF NEUMAN: Thanks, Kathy. We're certainly going to get into that, but you'll see why this is a little bit unique. Even the Board says this is a little bit unique. So I appreciate that. We'll certainly get into it.

Heather was in the queue. Are you not in the queue anymore?

HEATHER FORREST: Sorry, Jeff. Given that you've said we're going to get into it in more detail, I think there's some points in Kathy's comment that need to be clarified. But I'm happy to push forward, Jeff, and we'll get to it when it's most relevant.

JEFF NEUMAN: Okay. Thanks, Heather. Let's go back to the beginning. You'll see I inserted some historical context in here. The issue was first raised with GAC-issued advice to the Board in the Beijing communique that was dated April 11th, 2013, in which the GAC advised the Board, "For strings representing generic terms, exclusive registry access should serve a public interest goal." That was called later on the Category 2.2 safeguard advice. The GAC identified a non-exhaustive list of strings in that current round (2012 round) that it considered to be generic and where the applicant proposed to provide exclusive registry access. What

exclusive registry access meant was that the TLD would be exclusively used by the applicant and/or its affiliates. So that is what was considered exclusive registry access.

The ICANN Board, after it got that advice, as Kathy said, initiated a public comment period on the topic of what later became known as closed generics. But whether we talk about exclusive registry access or closed generics, they are synonymous in this context, so we can use either term. Then the staff issued a report on the comments that they received. Kathy is right. There was a very large number of comments that were submitted.

If you look at the staff report, the staff report had a wide diversity of views. Certainly there were those that opposed the closed generics. There were those that were applicants that had proposed closed generics that were supporting closed generics. We'll get more into that – who took which side – a little bit later because the comments that we got recently on this issue mirror those comments as well. So we'll get into the specific comments.

Kathy has inserted some language. Again, all this is actually in the public comments summary from Sub-Group B. While I appreciate the fact that Kathy put this in, if we actually went in and basically put every comment in from every side, I think it would defeat the purpose of this summary document. So, Kathy, we'll certainly talk about this issue or this point of view, but, at the end of the day, I think it'll be taken out of this summary document. But certainly we should definitely talk about this position.

Kathy, I'll get to you in a second. I just want to finish with historical context. Then we'll get comments.

If we scroll down a little bit here to the next part. At the same time as public comments were being solicited, ICANN forwarded the GAC advice to each of the 186 applicants for the strings that were identified by the GAC as being potentially closed generic TLDs, asking whether they plan to continue to operate it, as was in their proposal, as an exclusive access registry. There's the definition that the ICANN staff have used.

Of the 186 applicants, all but 5 of them agreed to either withdraw their applications or change their TLDs to being open. After that happened, the Board, in June of 2015, determined that remaining applicants from the 2012 round we had applied for non-contested strings and were seeking to operate non-generic TLDs would have the following options. Then, if a proposed exclusive-use TLD actually prevailed in their contention set, it would also have one of these three options: to either submit a change request, to no longer be an exclusive generic TLD, and to sign the form of the new gTLD registry agreement. That current form, as Kathy said, has a PIC that says that they won't be an exclusive use registry if they have a generic term.

The second choice was to maintain their plan to operate an exclusive generic, but if they did and elected that, then their application would be deferred to the next round of new gTLDs, subject to the rules that the GNSO community develops for the next round.

The third option was that they would withdraw their application for a refund, consistent with the refund schedule that as in the Applicant Guidebook.

In effect, through this resolution, the ICANN Board banned exclusive generic closed TLDs in the 2012 round. However – this is where it gets a little bit tricky – if they had stopped there, then it would be easy to say that the default situation was this band, and that's it. But the Board then did make it clear that they wanted to the GNSO to consider this topic in future policy development work for Subsequent Procedures. So it was very specific in saying that it was trying not to set policy but rather was just a temporary solution until the GNSO community could consider this issue in more detail and the GNSO Council, in the charter, had assigned us this, the Subsequent Procedures PDP, with considering this issue.

One of the things I had asked ICANN staff to look into is what happened to those five outstanding applications that told ICANN they still wanted to use it for exclusive use registries. Well, it turns out that those five then did eventually submit change requests and did eventually commit to operating an open registry or at least signing the registry agreement that had the PIC in there, where they would have more open top-level domains. It's interesting to note, if you go through these five applications [or] registries, that I don't believe any of them are being used any further than having a [NIC] page, although actually I didn't check the data in phone. I know I checked hotels, grocery, and DVR.

So that's where it stood historically. Now, after we get past historical (what happened historically), what we're seeking to accomplish was

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that the GNSO Council has charged our PDP working group with analyzing the impact of closed generics and considering future policy. The working group generally agrees that some form of policy guidance should be drafted on this topic if it's possibly to reach consensus on the path forward.

At this stage, however, there continue to be different and strongly-held views on the specific policy goals. That is certainly something that we gleaned from the different comments that were received through the public comment process. So that is why, when we get to high-level agreement, there is none at this point. So this discussion is actually critical to see if we can get to a high-level agreement on something.

Let me go to the chat because I think there's been a bunch of things typed in. Rubens says, "The RA commitments are very narrow, not a wholesale ban on what's usually called closed generics. Actually, there was no decision on closed generics by the Board. They punted the decision to this PDP." I think that's right. I know, Kathy, you said that there was a decision. That would be true if the Board didn't go on and say that they're looking for guidance from the GNSO. So what is the default situation is not as clear as it is in probably every other case because the Board had added that to their resolution.

Steve is saying, "Jeff, I believe the text Kathy added is actually from the closed generic public comment." Okay. So that's even a little bit different. That's not even from our public comments summary. That's from the staff public comments summary from 2013.

Jim is saying, "Do we have a breakdown on how many withdrew and how many changed he application? What happened to the gang of five?" I think I went through that.

Let's see. Sorry . Ugh. It keeps jumping on me because people keep typing in, which is a good thing, but it's hard to read them all. Kathy says, "The vast majority agreed to change their application to agree to be open generic and move forward with their applications." That is true.

Heather says, "What a mess when the Board wades into policy making while saying, "We're not making policy. It's just temporary until the GNSO does so."" Yeah, I think that's an interesting dilemma that we have.

Paul has said, "Innovation, so long as innovative happens." Kathy said, ".cloud has large and small businesses." Let's see. Paul McGrady says, "Kathy, so does .net. Nothing new here." Jim says, "Do we know how many withdrew as a result of this change? I didn't see that in any of the material above." Jim, I think that's a good question. Of the 168 applications – I think that may be addressed because I think it says all had … But I don't think that's right. I think there were some that withdrew. So we'll double-check on that statistic of how any actually withdrew just from being asked the question.

Jim is saying, "I think the baseline is the rules, including the AGB, that governed the round." Christine Farley says, "Paul, AGB clearly allowed. Do you mean it didn't clearly ban?" I think, Christine, that's the age-old question. Do we take the view that anything not banned in the AGB is allowed, or do we go the opposite way: anything not banned in the AGB

is … I think I just said the same thing. Anyways, there's two ways to look at it: what's not expressly allowed in the AGB is therefore not allowed, or do you say what's expressly not banned is … Shoot. I'm not saying this right because it's late at night. But I think you got it. There's always two ways to look at a situation.

Paul's view is that whatever is not banned should be allowed. I think others take the opposite view. So it's definitely an age-old question.

Kathy has got her hand up. Kathy, please?

KATHY KLEIMAN: Coming off mute. Thanks, Jeff. Thanks, everyone. This is a very important discussion. It's too bad it's so late at night.

Jeff, the reason I posted material from the 2013 comment is to show and share and remind everybody of the breadth and depth of organizations that participated in the first round of public comment on this issue, which I think we have to take into account because the world had really galvanized on this. So I just want to summarize briefly and I put a little bit in – can you hear me, guys? I see things floating around here. Can you still hear me?

UNIDENTIFIED FEMALE: We can hear you.

KATHY KLEIMAN:	Okay. I'll summarize quickly. One is – this is ICANN staff summaries – under anti-competitive and not in the public interest: the closed gTLDs for generic industry terms; e.g., .book, .security. They're not in the public interest and should not be allowed. We have dozens of companies from the Retail Council of Canada to Prudential Insurance, Michelin, and the Consumer Watchdog. Since when do consumer groups and trade associations agree on anything at ICANN? Here they agreed in force.
	Another area in which dozens of commenters participated – again, the staff summary is closed gTLDs have to be invalidated when submitted by commercial entities operating in a sector of activity related to the closed generic gTLD. So, competition.
	Then ICANN should only approve generic gTLDs on the condition that they are open to any company that seeks to register therein or in special cases restricted to entities on a mutual basis; e.g., to allow .bank to be limited to certified banks, but all certified banks. That last was an editorial comment (the "all certified banks").
	So I think it's very much within the scope and a partner to our comments, which were loudly responded to within the ICANN community and by potential registrants to remind us what the rest of the world said on then issue because it's very important. Thanks.
JEFF NEUMAN:	Thanks, Kathy. Does anyone have any comments on that? Just trying to see if there's anything on the chat.

I'm going to take off my chair hat on this one and put ourselves back into the 2013 timeframe. Kathy is right. There certainly were a lot of comments, but the ICANN Board I think also realized that a lot of those comments were from competitors and trade associations which represented competitors of those that applied because they didn't their competitors to have that exclusive use. That was pointed out also in the staff summaries.

But, Kathy, what I don't want to turn this into is an advocacy piece. I think should recognize, as a working group, that there definitely were strong arguments on both sides. I don't want it to sound like it was clear-cut. It wasn't. if you go back and read the breadth and depth of all of those comments, which I actually did before we discussed this issue when it was discussed by Work Track 2, you really get to see … If you think about as well who had the incentive to file the comments, really the comments against did outweigh the comments for. But it's understandable because those that would file comments for would be the ones that applied, which was a lot less in number than those that did not apply.

So I just want to say that there's certainly arguments on both sides. I think we as a working group need to recognize there are good and valid arguments from both sides. Using that, we need to then try to forge a path forward, again, trying to agree on a solution. Maybe that's not possible, but that's what today's call and moving forward is about.

Let's actually get into the breakdown of the comments that we received to what we had in the initial report. What we did in the initial report was to try to summarize the arguments for, summarize the arguments

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against, and then present three potential options of how we could move forward.

You'll see from the comments that we received that, again, it's split. Again, strong arguments for, strong arguments against. But the options that were presented in the initial report where that we could formalize as GNSO policy, making it consistent with the base registry agreement. So, essentially, we could formalize the policy that closed generics should not be allowed. That was Option 1.

The second option – sorry. Before we get into the pros and cons – whoops. Yeah, there we go. The second option was we could allow closed generics but require that applicants demonstrate that the closed generic serves a public interest goal in the application. This would put it in line with what then GAC actually advised. If you look back at the GAC advice, it didn't say, "Ban all closed generics completely." It said that any closed generics should serve a public interest purpose. So that could be an option.

The third option is to allow closed generics but require the applicant to commit to some sort of code of conduct that would address the concerns raised by those that were not in favor of closed generics. Essentially, that third option is, is there any way to allow some of these to go forward but also try to minimize any of the harms that were feared by those that oppose closed generics?

It's unfortunate – again, we … Actually, never mind. I'm not going to … sorry. Kathy, you have your hand raised. So those are the three options.

I'll go to Kathy. Or, Kathy, do you want to just – oh, Kathy's hand is down.

Let's actually go into what was said about each of the options. I'm going to ask Cheryl, as well as ICANN staff … I know there's a lot of comments on the chat, and I don't want to miss them. So, if there are ones that are on point and we should mention, please to point them out to me because they're fast and furious and I don't want to miss any of the important points.

Option 1 was, should we formalize as GNSO policy what is in the base registry agreement? Those that were in support of doing that include some commenters that called themselves the public interest community. .xyz, Christopher Wilkinson, and Vanda expressed support for this, which opposed closed generics. .xyz went on to state that it creates unfair monopolies on generic terms that will benefit only existing large industry players at the expense of all others. This is against competition and choice. It says the closed generics go against internationally-recognized trademark principles, which do not allow exclusive rights in generic names without acquired distinctiveness.

The public interest community's comments supported the ban as well and opposes allowing a single company to own the generic description of a business or industry.

I think we covered the other rationale. I'm just looking in here if there's something that wasn't covered. They cite principles of trademark law. By design, it would be next to impossible for common words like the proposed closed generics to be dedicated the exclusive use of a single

company. The world clearly told the ICANN Board and ICANN community in 2013 that closed generics should be banned. The ICANN Board did that. A comment cites Michele Neylon's five reasons why closed generics should be opposed. That was an article in Circle ID. Christopher Wilkinson and Vanda state that the Board decision from the last round is a sufficient basis to prohibit closed generics.

The BRG (Brand Registry Group), the International Trademark Association, the Registry Stakeholder Group, Neustar, and the Intellectual Property Constituency expressed opposition to this option. INTA opposed formalizing a no-generics GNSO policy because the definition of a closed generic as defined in Spec 11 3[D] is overly broad and potentially captures brand owners and captures TLDs that would not be used for a purpose that would otherwise be considered descriptive. Therefore, a prohibition on closed generics as currently drafted potentially harms brand owners and consumers. It's difficult to determine what's generic, and terms or words over time may acquire distinctiveness or lose it. Requiring public availability of second-level names within a TLD reflecting a generic industry can add to the cost of maintaining a portfolio of defensive registrations by those within the industry.

The Registry Stakeholder Group opposes that option as well. The existing objection procedures provide adequate protections for consumers, brands, and the public. gTLDs are not required to index the Internet and do not serve this function. There are not security or stability concerns. Closed generics should allow registry operators to use the DNS and innovative and experimental ways promoting competition. Forbidding closed generics creates a protectionist-like

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rubric around a status-quo to the benefit of those who follow the same class model. Furthermore, the RySG doesn't believe there is any GNSO policy against closed generics. Registry operators should be permitted to operate under the business model of their choosing, so long as security and stability are not compromised.

The BC (Business Constituency) says that this option may do more harm than good by not allowing those domains that may be quite beneficial to the Internet community.

On that last one, in the initial report there was an example of something that may be in the public interest. That was like a .disaster for use by the Red Cross. That in theory could be more beneficial to the users of the Internet, especially if that was done in some sort of validated fashion, where, let's say, the international Red Cross could, for each disaster that happens, establish a formal page dedicated to fundraising for that. The example that was pointed out in the subgroup that worked on this said that that could have, in many ways, more benefits than allowing .disaster to just be registered by anyone that wants it in the community. So that was one example of potentially something that they viewed as something that could have more benefit.

I'm asking for help now from Cheryl and some others. If they want to just say some of the comments that are in the chat, that would be great. In the meantime, I see Heather is in the queue. I'll also look back at the chat to make sure this stuff is covered.

Heather, please?

HEATHER FORREST: Thanks, Jeff. Now that we've had a chance to get into the substantive comments, I want to return to the point that I think you were driving at, Jeff, at the beginning of the call, which is to say, as we look at this document – sometimes I find it helpful just to back and look at the whole section as opposed to what's on that Zoom screen, which really only gives you a little fishbowl of something – I have a real issue with the included text that Kathy has added to closed generics under the heading of Background Documentation. It strikes me that the background documentation isn't the place for advocating one position or another.

I think it's entirely appropriate that we say the Council sent the letter to the Board in response to the public comment period and provided its perspective. We can give the [link] to that. That's fine. But isolating out particular responses that were given? I just don't think that that's appropriate. Really, where the substance sits, and in the comments that you've just been reading out, Jeff, is this idea of auctions and where various parties sit in relation to auctions.

So I have a real problem with presenting the background in a way that isn't just the facts, and the facts in regards to what happened and when that happened. So I just wanted to put that out there. Thanks, Jeff.

JEFF NEUMAN: Thanks, Heather. I appreciate that. In going back through the chat as well, I think there's some interesting discussions going on about different views of trademark law. I think certainly, while trademark law protections are limited to classes of goods, and services and multiple

different entities could in theory use trademarks for different classes and services, unfortunately in the DNS there can only be one organization that is delegated a top-level domain.   So we don't necessarily have the option of delegating a TLD to multiple entities, although, in theory, I suppose that could also be an option. But that's not one, certainly, that has been discussed in detail. I think it was discussed by the subgroup and didn't rise to the level of being included as an option going forward.

Christopher Wilkinson, please?

CHRISTOPHER WILKINSON: Hi. Good morning. Thank you, Jeff, for giving me the floor. Very briefly, first of all, having listened to these arguments, I maintain the comments that I made previously, essentially for the reasons that have already been evoked: that trademark law does not cover this option and this situation. Secondly, there are serious concerns across the Board, not just in this particular area, of deliberately or inadvertently creating monopoly opportunities, which should not be ICANN's role.

Secondly, this is not the online case where, frankly, the ICANN community and, with due respect to Heather and her colleagues, particularly the Intellectual Property Community, tweak of trademark law to their advantage. Trademark law is primarily there to protect consumers and to protect competition. We should never forget that.

That'll do for now. But as one final point, all this is in English. "Mutatis mutandis", if we're allowed these Latinisms still nowadays. When this

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issue hits other languages and other scripts, I'm quite sure that the balloon will go up and the world will say no. Thank you.

JEFF NEUMAN: Thanks, Christopher. And thanks for keeping it to two minutes. I believe that – well, we can actually look into it because I don't want to just say my belief. But we should check. I think there may have been some internationalized strings that were considered closed generics and had to choose one of the options from the Board. Not 100% of that. I don't know why my gut is telling me that there were, but we'll actually do, as an action item, a double-check on that.

Cheryl is saying we're okay to move on. Okay. Option 2. Again, you'll not be surprised that there were certainly those in favor and those against. Option 2 was, yes, you can allow closed generics, but require the applicants to demonstrate that the closed generic serves a public interest goal in the application. You could have a potential objection process similar to the community-based objections.

On this one, you had the ALAC, IPC, and the INTA express support for this option. The International Trademark Association recognized that it's difficult to evaluate whether a particular closed generic serves the public interest. They suggest focusing instead on a challenge objection process, whereby a party who think the particular closed generic is against the public interest could object. The applicant would have the option but not the obligation of trying to head this off in advance by giving assurances in the application, which could be incorporated as

contractual commitments. Applicants could offer contractual commitments in response to an objection.

The registries, Neustar, and the Brand Registry Group also objection to this proposal – I think for similar reasons -- as they were in in favor of the first, talking about being given freedom to innovate in order to build a competitive DNS. Under the proposal, each registry operator must have already engaged in extensive research and development and testing without the certainty they have a TLD to use. Each registry operator must be willing to publicly disclose without protection what may be confidential business information or possibly trade secrets. Three, I can determines which innovative ideas are worth exploring. A suggested alternative would be to provide the opportunity to use a TLD for beta testing for a period of time instead of trying to work within multiple limited registration periods before the registry operator opens the TLD up to an open or restricted TLD.

Neustar states that the proposal requires applicants to disclose confidential business plans. So that was similar to the Registry Stakeholder Group comment.

In the comments, I think I see that Steve Chan does confirm that there were some IDNs in that list of closed generics. Great. That was in the communique.

Option 2, which again would be in line with what the GAC had advised, has its supported and opposition. My assumption would be that those that supported Option 1 would not support Option 2, although they did not specifically comment in that area.

Any questions or comments?

Okay. Option 3 is that we allow closed generics but require the applicant to commit to some of code of conduct that would address the concerns by those not in favor of closed generics. An objective process for closed generics could be modified on community objections.

Neustar had – actually, there were some entities that supported this. I shouldn't say "a bunch." Neustar has some qualified support. Mark Monitor, IPC, ALAC, participants of the Asia-Pacific Internet Governance Academy … The Registry Stakeholder Group classified these support as cautious.

The reasons why those expressed support or lack of opposition to this option. Neustar does not oppose, providing the option doesn't exceed the scope of ICANN's remit. Participants of the Asia-Pacific Internet Governance Academy suggested establishing criteria to assess if the application concerns the matter of public safety, security, intellectual property protection, etc. They suggest establishing a standing committee to periodically review the terms of the code of conduct and a vote on each applied-for TLD and establish a reporting mechanism for code-of-conduct violations.

The Registry Stakeholder Group believes the new code of conduct should ensure that the operator of a closed generics [base] observes the security and stability recommendations of the SSAC.

The INTA expressed concern. The proposed process could be overly burdensome on a registry operator, and it may be unworkable to have a different code of conduct for those operators. Benefits are unclear

compared to the incorporation of contractual commitments through PICs. So I think that was more of calling it a code of conduct as opposed to adding additional PICs.

Again, I think it would be safe to assume that those that supposed Option 1 would also be considered to oppose Option 3 without … So I think that would be logical.

There was an Option 4 I forgot to summarize a little bit earlier. Sorry about that. Option 4 was basically to allow closed generics with – or maybe I did say – no additional conditions but you establish an objections process modeled on community objections. This was supported by the IPC, the BC, INTA, and the U.S. Postal Service.

INTA says, "Unless a clear definition of a closed generic is developed, INTA believes this solution is then most workable." The postal service said, "If closed generics are allowed, objections should be established." Neustar, the Registry Stakeholder Group, and ALAC oppose this option because of the additional objection process.

The Registry Stakeholder Group thinks that a code of conduct would provide the necessary oversight. The current objections process and post-delegation dispute resolution option should be sufficient. Community members can also submit compliance complaints. Additional objections procedures are unlikely to significantly increase protections and may implicate complaints about content or standard registry operations.

Again, with each of those options, there is support and opposition.

There was some comments for Options 2 and 3 on the so-called public interest tests. In other words, do applications serve a public interest goal, which is what the GAC advised. Neustar, the Registry Stakeholder Group, and IPC agree that the proper test is whether applications harm public interest rather than whether it serves the public interest. Neustar says the standard should demonstrate likelihood of material detriment. The Registry Stakeholder Group states, "The harm should be more than a theoretical harm." The IPC: "What is laid out as criteria of not serving the public interest must be in line with ICANN's bylaws. Assessment should be on a case-by-case basis and should be overwhelmingly apparent of not serving the public interest."

Let me give a second for some comments, if anybody has got any. Also, I'm going to ask if those that put things in the chat would like – actually, there's only a couple added, so I could probably read them – oh, no. Okay. Christine Farley has got her hand raised. Thank you, Christine. I'd much rather than someone present than me having to read. Christine, please?

CHRISTINE FARLEY: Okay. Can you hear me?

JEFF NEUMAN: Yes. Thank you.

CHRISTINE FARLEY: Okay, great. I just wanted to, I guess, respond to something that was summarized here. But unless I was watching the chat too closely, I

didn't hear you mention that there were some comments to the effect that there was concern that the definition of generic was overly broad and therefore not readily applied or not easily applied by ICANN.

I found those comments very curious because the definition of generic that's used in the Applicant Guidebook is really consistent with all the definitions of what generic is in trademark law. So we could look at U.S. trademark law. We could look at the Paris Convention. I looked at what INTA has had to say about what generic means before. It's all entirely consistent. It's not an easy, tight category, but neither is distinctiveness. Distinctiveness and generic-ness are two sides of the coin, and this is the world that ICANN has gotten itself into.

I don't understand what the specific objection is. I think, if anything, the definition is too narrow because something can be generic, which is a string of words, and the definition speaks of words. But other than that, I think conceptually it's entirely consistent with the static meaning of generic from trademark law for decades the world over.

JEFF NEUMAN: Thank you, Christine. It certainly is a difficult issue. I apologize if I didn't read it. I thought I did, but maybe not. But thank you for bringing that in.

Any other comments? Let me see in the chat. Let's see. Again, just some trademark law arguments. Ugh, people are typing in. There's a site from Kathy on uspto.gov of what generic is, in line with what Christine just mentioned. Paul says, "Kathy, understand ICANN isn't registering any

trademarks." Then there's an example. So it's just a lot of back and forth on this discussion and trademark law.

Christine, your hand is still up but it's maybe just left over. Or is it something new?

Okay. Let's go onto the next thing that's mentioned. This is under the code of conduct under Option 3. INTA, Neustar, the Registry Stakeholder Group, and IPC state that, if this option is selected, they favor a separate code of conduct rather than adding provisions in the existing code of conduct. As a reminder, the existing code of conduct is really intended to address registry/registrar separation as opposed to anything like this.

Other positions regarding closed generics that were not tied to the specific proposals above. Mike [Rotenbog], in his support for closed generics, states, "The Board decision was made in complete top-down fashion without real community input and contrary to the GNSO policy and AGB, which allowed closed generics. No public interest has ever been identified for treating TLDs different from generic .com names, for example. Google expressed general support for allowing closed generics without stating a preference for specific options listed."

I guess the Registrar Stakeholder Group can be classified as mixed opposition and support. The majority of registrars opposed allowing closed generics, but a few supported allowing them if they provided a tangible benefit to end users and provided tightly-bound restrictions.

Specific conditions under which closed generics should be allowed/prohibited. Under this category, the ALAC stated that closed

generics should be prohibited unless coupled with a public interest application. They go on to say, "The closed generics allow an applicant to have a potentially unfair influence over registration priority in a generic term such as "app." Additionally, closed generics lead to a slippery slope that would enable significant security risks for this particular strings, particularly for .list domains, as the SSAC found. Closed generics can exist but may introduce unintended security and stability issues, which the SSAC should weigh in on. Thus, to completely eliminate this competitive and security threat, ICANN must prohibit their use."

Let me direct a question to staff because I don't recall. Did the SSAC weigh in on this closed generic issue? Did they file any comments? I don't remember if they did or did not.

While they're looking at that, let me go to the IPC. It stated that it allows supporting closed generics if 1) a substantive public interest is served, and 2) unintended security and stability issues are not introduced, which may be identified by the SSAC. It noted that it is impossible to evaluate aligned harms without first seeking their effect. By allowing closed generics in the public interest, a positive outlook can be observed. Then it may be assessed whether or not there are drawbacks.

The GAC says closed generics should serve a public interest, which is what their advice was in 2013.

There's still some more back and forth in the chat about interpretations and understanding. Paul says – I'm trying not to read the subjective

statements and just getting to the crux of the argument – "There were some folks that were unhappy that creative competitors applied and those folks were able to get to the GAC on board with shutting it down. But let's not confuse being savvy …" All right. I don't want to cast that – let's make sure we are … As mentioned before, the publics on this are all over the place, so there can be no deducible global position. Kristine Dorrain supports that. Rubens: "These comments regarding closed generics, dotless domains, are …" I'll say it in a different way: that they're unrelated. "Any problem a dotless domain might bring happens regardless of a string type." Steve confirms that there were no comments from the SSAC on closed generics. Kathy cites the staff report from 2013.

Guys, I'm trying to read these comments without the back and forth, so, if I miss something, let me know. Let's see if there's anything new that wasn't stated before. Cheryl states that, "@Rubens, I am confident that the ALAC was reflecting to the best of their ability in understanding what they learned in discussions with the SSAC." Paul – okay, sorry. "The ALAC and SSAC share regular briefings." Tom says, "The GAC was directly lobbied about several applications: salon, beauty, hair and skin." Thanks, Tom. Kristine says, "I'd like to raise my hand, but I'm mobile."

Kristine, I'm going to give you the floor.

Oh, Kristine is asking what the magic code is to … yeah. *6 mutes and unmutes. All right. Let me just give you a second to get in, Kristine –

KRISTINE DORRAIN: Can you hear me?

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JEFF NEUMAN: Yes. Thank you, Kristine.

KRISTINE DORRAIN: Yay! That took a minute. All right. Thank you, everybody. I've been on for quite a while. I just was driving and now I'm here at home and I'm still on my mobile.

There's been a lot of back and forth in the chat about everyone's recollections of history and who thought about what six years ago and what people's concerns were back then. People might have the same concerns now, and that's fine. But one topic that I have not heard addressed yet – I asked it a couple of times in the chat – is, back in 2013, the only thing people could do was speculate. They saw that a company is applying for a TLD and they wanted to do it closed. They must be doing it in a way to be anti-competitive. Their competitors should be able to use any domain names in their TLD.

But we haven't seen that. We haven't seen companies going out and using domain names in these new gTLDs, getting multiple domains and multiple TLDs to use them. They're either got a .brand or they're sticking with their .com. So we haven't these sort of big companies going around and trying to stick their fingers of lots of different points and having spaces that everybody wants to be a part of and the indexing of the Internet. .ninja is not only for karate organizations.

So I think one of the things we have to talk about is, did the scary things happen? Whatever people were afraid of, what's the chance of that

happening? Obviously we didn't get to try it because we didn't get to try any closed generics. But some TLDs are experimenting with being more restrictive. Maybe we can take a look at what communities or what geos are doing as far as restricting who can get in and play. But let's think about how it is that we can use this space to innovate. If you tell registry operators, "You have to use the same business model that everybody else is using," you don't ever [innovate]. We would never have the Apples and the Microsofts and the Amazons and the people that did something wild and crazy and different in the world if we were constrained and told, "You have to do it the same as everyone has always done it for the last 20 or 30 years."

So I am encouraging people to think about what it is that people were afraid of back then and how can we work around it. Other people said, "We consider a code of conduct." What are the rules by which you should play if you're going to have closed generics? But we're not going to get anywhere by rehashing all of the old terrified, "the sky is falling," Chicken Little arguments from 2013.

I'm sure my two minutes are up, and I appreciate your patience. Thank you.

JEFF NEUMAN: Thank you, Kristine. I think you're getting to the overall question that I want to ask. For those that are opposed to closed generics, are there any conditions, are there any circumstances, where you could see allowing closed generics if, as Kristine said, there is a code of conduct, if

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there was some way to handle the potential negative things that could occur? I think that's the important question.

By the same token, for those that support an unfettered allowance of closed generics, are there conditions and things that you think you could live with that could address some of the fears that those that oppose closed generics have?

I think that is really the only way that we are going to have any chance of coming out with any kind of policy on this. Unfortunately, as I said before, the default for this is not as easily determined as in all of the other subjects because of what the Board did and how the Board punted the issue and really didn't make a decision on this issue. It just temporarily punted the issue.

So, as Jim says, we have to put the question to list and not just ask on this call which is at a tough time. Jim, that's exactly what you're foreshadowing. One of the things I do want to is to continue this is an e-mail discussion. Potentially I think we would create a separate e-mail list because I'm not sure all 180 or however many members there are in this working group want to be flooded because I can definitely see a lot of e-mails on this subject.

Really, let's put our heads together. If everyone is open to it, I think we could reach compromised positions. But, again, it's going to call for everyone to get out of their comfort zone and just really think about it and try to compromise.

Before we do that, let me just make sure we cover – as Kristine said, we really want to nail down what the concerns are. Then I think it might be

easier, or maybe even harder, to have that compromise discussion. In the additional proposals category, going back to the chat, Neustar stated that any new policy should be available to existing registry operators as well as future applicants. That one is a little bit tough for us as a group because our scope is only on a going-forward basis, so it would have to be – let's say we did come up with some new policy. The GNSO Council would have to expand our scope for us to consider how it could be or whether it could be applied retroactively.

[Marks] states that – [Marks] is a trademark association in the European area – if the ICANN community decides that closed generics should be allowed – it's probably the same thing right? Oh, no – then the applicant should be required to submit a public interest commitment that the use of the TLD will not be used in an anti-competitive manner.

Then there's some discussion below about the definition of closed generics. Let me see if there's anything that is new. INTA – oh, this gets to Christine Farley's point – states that certain strings, including words or terms, that denominate a general class of goods and services when used in association with unrelated goods or services would potentially qualify as non-generic terms or .brands under Spec 13. For example, the term "Internet" is association with a global computer network is generic, but an association with food, for example, or the example would be given by INTA, could be a strong trademark. Therefore, a prohibition on closed generics as currently drafted potentially harms brand owners and the consumers.

Kathy has got her hand up. Let me just first, Kathy, ask Christine if that addresses her question or not, because I know Christine asked this earlier.

CHRISTINE FARLEY: Can I speak?

JEFF NEUMAN: Yes, please.

CHRISTINE FARLEY: Okay. No, it doesn't. I saw exactly that comment in the report, and it doesn't. I think the definition is adequate because I think it captures this timeless concept in trademark law of generics. I think, if you take the example of Amazon applying for .books as a closed generic, had Amazon applied for .books as a trademark for that purpose, it would have been refused.

So maybe, to use a real example – that Internet for food example – we think of Walmart's application for .groceries. Walmart sells lots of things, including groceries. Does that mean that that wouldn't be a generic use of .groceries? No. They sell groceries.

I think we can all see the anti-competitive nature of having these huge companies, like Walmart and Google and Amazon, swallowing up these really attractive generic words and completely controlling what kind of "innovation" is happening in that space. I really feel some of the comments are really tone deaf about what's going on in the world right

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now. We're in the gilded age. People are really concerned about the powers that these companies have now wielded. And ICANN is contemplating giving them more? I just don't get it.

JEFF NEUMAN: Thanks, Christine. I think you may have addressed a similar point to Kathy because I don't see her hand up at this point.

One example that was discussed within Work Track 2 when discussing this issue was interesting one: that the Food Network operates .food. They got that because it's a Spec 13. It made it through. I guess we could ask if ICANN has received any complaints about the use of that TLD. Perhaps that could be an action item.

Kathy has got her hand raised, so maybe Kathy knows more about that situation. Kathy, please?

KATHY KLEIMAN: To your point – then I'll raise a different point – I think the Food Network, strangely enough, has a trademark in food, probably in media services. But I'm not sure. So I think that's where it fit within an exception. That's what I wanted to say: in a lot of ways, the compromises were already tasked in the first round and after the first round. If we're looking for compromises, we banned closed generics because it allowed one competitor of an industry or business to own all the second-level domains of the generic name of the business or industry. We banned that, and we banned that with a lot of support around the world. But we allowed brands to do that. So, if it's a brand

or even a trademark, good, or service – it looks like both our .brands have been both company names as well as well-known services and products – then you're allowed to own all the second-level domains. So that was the compromise there.

When we got to the mandatory public interest commitments, we had a public interest commitment planning closed generics. But then there was another public interest expanding intellectual property protection. We did a lot of this compromising in the first round and a lot of the balancing in the first round and, again, after the first round. So I think a lot of the work has already been built into the framework of what we have and what we're looking at now: the rules of the first round and those implemented during and just after.

So a lot of the balance is there. A lot of the compromises were struck there, Jeff. I think we should talk about the holistic whole on this. Thank you.

JEFF NEUMAN: Thanks, Kathy. You made a statement that said that the Board balanced this and the Board decision was – sorry, I'm going to screw up the exact words you used – something like the Board decided to ban generics because it was afraid of one company monopolizing.

I just have to say that the rationale of the Board's decision I don't believe provides any kind of explanation of why it chose to ban it for that current round. I just want to be clear that, yes, the ones you mentioned were certainly arguments that were presented, but the Board did not post that as rationale for its decision. We really need to

be careful as to what we say. The rationale is at the link where their resolution is. So I encourage everyone to read the rationale from the Board and make its own assessment as to why they did what they did.

But I think that – I'm just trying to read the chat, so that's where I'm slowing down here. There's some exclamation-point things that are ongoing here, but I don't want to disrupt Paul McGrady's intellectual property rights. So I won't read those.

Anyway, let's see what else. Sorry. Kristine Dorrain says, in response to Christine Farley, "Competing for the same pool of domain name registrants is not new or exciting." Sorry, I might have missed what that's in reference to. Cheryl states that perhaps some of the creative energies here in this call could be out towards some potential drafting of text as requested by Heather above.

Paul is in the queue. Paul, please?

PAUL MCGRADY: Thanks, Jeff. Great job dealing with chat tonight, which has been an unusual mixture of substantial discussion about the difference between contractual frameworks in trademark law on one hand and then complete silliness on the other. I blame the lateness of the hour here in North America, at least for my part of the silliness.

I do think the big takeaway tonight, though, was that you asked the question – I think it's worth asking again – which is, is there any possibility for a way forward here? There are four or five different scenarios in the public comment which have suggested possible ways

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forward, including PICs, including other things, that might make the so-called closed generic a possibility with safeguards built in.

So I don't want us to lose sight of that, and I'm glad it's going out to the list. I wonder if this – again, I don't want to preempt anything or jump ahead. Maybe this needs to percolate on the list or we need to have another call on this. But at some point, it might be nice to see if there are people who are interested in drafting something for consideration: a strawman on this. I would suggest that we people it with folks who have the strongest disagreement in the chat and in comments because I think that that kind of back and forth between those folks might actually yield something that is acceptable to a whole bunch of people.

Anyways, this has been a great call in terms of the discussion. I do think that we have done something really important, which is that we've asked a really important question, which is, is there a way forward? Thanks.

JEFF NEUMAN: Thanks, Paul. I think that is main question. But I think that should be assessed at the outset. It would be a shame to have lengthy e-mail discussions in others if those on one side or the other side are just not willing to move in or move. So I think that needs to be assessed at the outset. I can't assess that right now. But I think that that's the important question. If it turns out that those that favor complete openness and complete allowing of TLDs to be applied for with no restrictions whatsoever are not willing to move, or if those that are in favor of a band no matter what are not willing to move off of that position, then

I'm not sure what spending potentially weeks or months on an e-mail list is going to serve. So let's see if we can make that assessment. Kathy and I have been going back and forth as to rationale for ICANN's resolution, so that's important as well. Make sure [we] read that.

Is there anything else anyone wants to cover on this particular subject that has not been covered? One area I think is just for us to review … There was some reference made to security concerns and tying it to .list domains. I knew that Rubens has an opinion on that, which he expressed. I think we need to delve a little bit into that to make sure of whether there are security/stability issues or not so that we can close out that issue if there's not or if there are. Also, we can establish this e-mail list after this call. I will tell you that the first question that will be asked is, is there a willingness to move?

With that said, let me just see if there's any last comments on this issue.

Great. Let's have someone post the next call time, which I know is on Monday, I guess? But I'm not 100% sure of the time. The subjects will be to cover what we didn't. we're not going to talk about closed generics on the next call. We will move to the next section, but we will establish an e-mail list to talk about the closed generic issue.

Thank you, everyone, for a very interesting discussion and for showing up at this very late hour for some, early hour for others, or perfect hour in some regions in the world. So thank you again. I look forward to talking to you all on – it's actually Tuesday, August 27th, because it's another 03:00 call. I'm not sure how that ended up being the case for two calls in a row, but I guess what that means is it will be a little bit

longer to have another 03:00 call. Thank you, everyone. Have a great day, night, morning, or whatever it is. Thanks. We can end the recording.

[END OF TRANSCRIPTION]