

INTRODUCTION OF NEW TOP-LEVEL DOMAINS

ICANN STAFF DISCUSSION POINTS

1 Introduction

- 1.1. This second ICANN staff implementation team *Discussion Points* document addresses the updated work of the Committee on the recommendations for the new top-level domain policy development process (PDP).
- 1.2. The purpose of this document is to provide staff comments to the current set of draft recommendations, with a view toward how each of the recommendations might be implemented. The points listed are to call to the attention of the GNSO some issues it may wish to take into consideration in its remaining discussions. Staff's intent is to support the bottom-up policy development process by ensuring that staff will be able to implement the committee's final recommendations in a fair, transparent, and non-discriminatory way.
- 1.3. Staff appreciates the ongoing work of the members of the Committee and their commitment to a successful policy development process.
- 1.4. In the November 2006 version of this document (<http://gns0.icann.org/drafts/GNSO-PDP-Dec05-StaffMemo-14Nov06.pdf>), staff identified a series of implementation questions. Some of the original staff discussion points that will require significant consideration during the implementation of the policy include:
 - 1.4.1. The desire for a predictable, objective, timely process, along with elements of subjective criteria, and the need for flexibility to allow for innovation and changing circumstances (7.2 in Nov06 document).

- 1.4.2. Applying standards of morality and public order to globally diverse applications (7.3 in Nov06 document).
 - 1.4.3. In certain cases, integrating a comparative evaluation procedure to resolve some instances of contention for strings in an otherwise predictable and objective process (7.5 in Nov06 document). Thus far, the Council has suggested that some instances of contention would be resolved through a comparative evaluation rather than an auction (in cases where the string is “related” to a community), but it will be difficult, at an early stage of the evaluation process, to objectively and predictably identify the strings that should be subject to this contention resolution process.
- 1.5 For purposes of this document, we are interpreting GNSO’s use of the terms “dispute resolution” and “challenge processes” to refer to the processes that will be established to decide upon the objections filed on the basis of certain specified grounds.

2 Implementation Plan

2.1 In preparation for the adoption and implementation of the GNSO’s policy recommendations, staff is working on a parallel track to put resources and procedures in place to ensure a smooth and efficient process for the introduction of new gTLDs. The process under development contains two main phases:

- 2.1.1 Initial Evaluation Period. The evaluation process that staff is designing assumes that each application will be initially reviewed to determine whether it meets the pre-defined criteria. If an applicant is found to be

qualified, and there have been no formal objections submitted through the appropriate objection resolution channels, and there are no competing applications for the same TLD string, the application can be approved at the end of the initial evaluation period.

2.1.2 Extended Evaluation Period. If an application presents complexities requiring further evaluation, or if there have been objections raised in connection with the application, or if there are competing applications for the new TLD string, there will be an extended evaluation period during which these issues can be resolved.

2.2 Based on the GNSO recommendations, staff proposes to implement an objection-based process. The default action will be that an application found to be qualified will proceed through the process toward approval. Parties wishing to object to an application for a certain TLD string may do so by paying a fee and filing a formal objection which would be heard by an expert panel (note: these objections would be resolved using a process analogous to ICANN's UDRP).

2.3 Based on staff's understanding of the policy recommendations, there appear to be five grounds on which an objection may be filed:

2.3.1 The proposed TLD string infringes the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.

2.3.2 The proposed TLD string is confusingly similar to an existing top-level domain.

2.3.3 The proposed TLD string is contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law.

2.3.4 The proposed TLD string relates to a defined community that is represented by an established institution.

2.3.5 The proposed TLD string is the name of a country, territory, or region, or its language or people.¹

3 Notes on Policy Recommendations

The below are staff discussion points pertinent to the individual policy recommendations of the GNSO. Only those recommendations that are the subject of a staff comment are included.

3.1 Recommendation 1: ICANN must implement a process that allows the introduction of new top-level domains. The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency, and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

3.1.1. Staff's inference is that the criteria to be used in the evaluation process will be developed with public input, for further transparency of the process. Staff's implementation plans also assume that the complete Request for Proposals (RFP) containing the criteria and describing the application process will be publicly available for a period of time prior to the actual start date for the application process. The RFP will define

¹ This is based on GAC Principle 2.2, "ICANN should avoid country, territory, or place names, and country, territory, or regional language or people descriptions, unless in agreement with the relevant governments or public authorities." See http://gac.icann.org/web/home/gTLD_principles.pdf. Further notes on this topic are included in section 4.1, below.

in detail: a) the criteria against which applicants will be assessed, and b) the possible paths an application may follow, along with the expected timelines and costs involved.

- 3.1.2. Predictability of process should be certain. Predictability of outcome is desirable to the greatest extent possible, but in a number of areas will be difficult to attain. Decisions in cases of contention (i.e., when two or more applicants have applied for the same TLD string) which may lead to a comparative evaluation process are a particular example.
- 3.1.3. Additionally, the tension between the goal of predictability and the need for the process to allow innovation and accommodate evolving circumstances should be considered.

3.2 Recommendation 2: Strings must not be confusingly similar to an existing top-level domain.

- 3.2.1 Staff is undertaking legal research on the concept of “confusing similarity.” This term might be interpreted in a number of ways.
- 3.2.2 As such, an assessment process for confusing similarity needs to be designed to determine whether two or more TLD strings fall into this category.
- 3.2.3 In staff’s proposed implementation, any interested party would be able to file a formal objection to a proposed TLD string on the grounds that it was confusingly similar to an existing top-level domain. Standing to file an objection on this basis would not be limited to existing TLD operators, as there are other parties who might be harmed by the insertion of confusingly similar top-level domains into the root. An expert panel qualified to determine

matters of confusing similarity would review the objection submitted and render a decision using established criteria.

3.2.4 Additionally, there needs to be a process available for determining whether there are two or more confusingly similar TLDs in a group of applications submitted simultaneously, for which a contention resolution process would be necessary.

3.2.5 In all cases, the consideration of confusing similarity must enable assessments on confusing similarity between two or more ASCII TLD strings, between two or more IDN TLD strings, and between IDN and ASCII TLD strings.

3.3 Recommendation 3: Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industrial Property (in particular trademark rights), the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (in particular freedom of speech rights).

3.3.1. Staff is undertaking legal research on the concept of infringement suggested here to ensure that implementation would be consistent with any rights that “are recognized or enforceable under generally accepted and internationally recognized principles of law.”

3.3.2. Staff recognises the GNSO intends this recommendation to allow for objections to TLD applications based on alleged infringement of famous and well-known marks or intergovernmental organization (IGO) names/abbreviations.

- 3.3.3. Staff recognises the GNSO's inclusion of references to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights to be possible bases for defenses to claims of infringement.
- 3.3.4. Based on the multiplicity of jurisdictions and classes of registered and unregistered trademark and service mark rights, there does not appear to be any workable means of allowing every trademark owner worldwide to have preference for corresponding TLD strings.
- 3.3.5.** In staff's proposed implementation of this recommendation, any party alleging that its famous and well-known mark (or IGO name/acronym) would be infringed by a proposed TLD string upon would be eligible to file a formal objection. An expert panel qualified to determine such issues would review the objection submitted and render a decision using established criteria.

3.4 Recommendation 4: Strings must not cause any technical instability.

- 3.4.1 Ensuring the security and stability of the DNS is central to ICANN's mission. Staff will consult with technical experts (e.g., SSAC) as needed to ensure that the introduction of new gTLDs does not adversely affect the stability of the DNS.
- 3.4.2 In order to avoid any undue negative impact on security or stability, staff envisions examination of the following considerations relating to proposed TLD strings and applications:
 - 3.4.2.1 whether the applicant meets the established technical qualifications for operating a TLD;
 - 3.4.2.2 whether the allocation of the string as a top-level domain might result in user confusion;

- 3.4.2.3 whether the allocation of the string as a top-level domain might result in unexpected application responses;
- 3.4.2.4 whether the allocation of the string as a top-level domain might violate Internet architecture principles; and
- 3.4.2.5 whether the applicant's use of the string might cause technical instability (for example, if an applicant applied for an otherwise unobjectionable string but planned to use it for malicious purposes).

3.5 Recommendation 5: Strings must not be a Reserved Word.

- 3.5.1 Staff expects that this would be an unambiguous classification since a string would either be reserved or not, in accordance with the GNSO's Reserved Names Working Group recommendation on this: (0, 1, 2, 3, 4, 5, 6, 7, 8, 9, A, AFRINIC, APNIC, ARIN, ASO, B, C, CCNSO, D, E, EXAMPLE, F, G, GNSO, GTLD-SERVERS, H, I, IAB, IANA, IANA-SERVERS, ICANN, IESG, IETF, INTERNIC, IRTF, ISTF, J, K, L, LACNIC, LATNIC, M, N, NIC, O, P, Q, R, RFC-EDITOR, RIPE, ROOT-SERVERS, S, T, U, V, W, WHOIS, WWW, X, Y, Z).
- 3.5.2 Staff notes that there may be a need for a process for releasing strings from reservation, according to appropriate guidelines to be developed.

3.6 Recommendation 6: Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law. Examples of such limitations that are internationally recognized include, but are not limited to, restrictions defined in the Paris Convention for the Protection of

Industrial Property (in particular restrictions on the use of some strings as trademarks), and the Universal Declaration of Human Rights (in particular limitations to freedom of speech rights).

- 3.6.1 The recommendation should refer to “morality *or* public order.”
- 3.6.2 Staff notes that the language in GAC principle 2.1 frames the concept of this recommendation somewhat differently: “New gTLDs should respect: a) the provisions of the Universal Declaration of Human Rights which affirm ‘*fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women;*’ b) the sensitivities regarding terms with national, cultural, geographic, and religious significance.” (See http://gac.icann.org/web/home/gTLD_principles.pdf). Further harmonization of the GAC principle and the GNSO recommendation could be helpful.
- 3.6.3 Staff is undertaking legal research on ways in which the terms “morality” and “public order” in the documents identified in the GNSO recommendations have been interpreted by different jurisdictions and in different contexts.
- 3.6.4 Based on the GNSO recommendations and subject to legal research, staff would propose to implement this recommendation as one of the enumerated grounds for objection to a proposed TLD string. Any party paying a fee and filing a formal objection would be entitled to a hearing by an expert panel qualified to determine whether or not the proposed string would violate morality or public order, as that phrase has been interpreted in an established body of law applying the principles identified by the GNSO.

3.6.5 Staff has considered a number of alternatives for creating a global approach to this recommendation. Article 29 of the Universal Declaration of Human Rights recognizes that meeting the requirements of “morality” and “public order” may limit rights of expression.² Governments have established procedures and precedents for meeting the requirements of morality and public order within their own jurisdictions, but there is no universal understanding of how these terms should be applied on a global medium such as the Internet.

3.6.6 One possible method for making determinations on morality and public order as applied to TLD string applications would be to identify and select one jurisdiction with an established body of law interpreting and applying these terms, and use this as the basis for expert determinations to resolve objections based on morality and public order.

3.7 Recommendation 7: Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.

3.7.1 ICANN understands a requirement for objective tests. Purely objective tests may serve to exclude applications from some regions. Also, as demonstrated in the sTLD round, innovative business models may pose technical issues not considered by the criteria so there may be some iteration of questions and answers between the applicant and the evaluation panel.

² <http://www.un.org/Overview/rights.html>

3.7.2 In cases where the applicant relies on an existing registry operator, ICANN can rely on descriptions of existing capability; in cases where the applicant will start registry operations, ICANN will rely on plans for equipment or staff.

3.7.3 The phrase “for the purpose that the applicant sets out” might be problematic, in that it might be difficult to apply different standards to applicants in the same round, or an applicant might change “the purpose” after delegation.

3.8 Recommendation 8: Applicants must be able to demonstrate their financial and organisational operational capabilities.

3.8.1 ICANN understands a requirement for objective tests. Purely objective tests may serve to exclude applications from some regions. Also, as demonstrated in the sTLD round, innovative business models may pose business issues not considered by the criteria so there may be some iteration of questions and answers between the applicant and the evaluation panel.

3.9 Recommendation 9: There must be a clear and pre-published application process using objective and measurable criteria.

3.9.1 This recommendation is similar to the call for “transparent and predictable criteria” included in Recommendation 1.

3.9.2 Staff supports this recommendation, but as discussed above, innovative models may make the evaluation more difficult than straightforward objective evaluation.

3.10 Recommendation 10: There must be a base contract provided to applicants at the beginning of the application process.

3.10.1 Staff will post a base contract along with the posting of the RFP.

3.10.2 The base contract is being developed and will be modified to take into account the recommendations of the various policy development processes continuing in the GNSO. The base contract will include the recommendations from the committee (14 through 18) on contractual conditions.

3.10.3 A draft version of the contract will be circulated to the GNSO and posted for public comment along with the draft RFP prior to start of the application process.

3.11 Recommendation 12: Dispute resolution and challenge processes must be established prior to the start of the application process.

3.11.1 Staff has engaged an expert consultant to recommend qualified providers and develop criteria for how the string contention and objection processes necessary to the new gTLD process will work. ICANN will work with prospective providers to establish the necessary criteria and processes.

3.11.2 We are interpreting GNSO's use of the term "dispute resolution" and "challenge processes" to refer to the processes that will be established to decide upon the objections filed. As noted above, it remains to be decided how string contention will be addressed.

3.11.3 The RFP, when published, will include complete descriptions of the processes for resolving string contention and objections, as well as any appeal process.

3.12 Recommendation 19: Registries must use ICANN accredited registrars.

3.12.1 Staff interprets this recommendation to mean that registries must use *only* ICANN-accredited registrars.

3.12.2 Staff also understands this recommendation to mean that registry operators would be required to provide nondiscriminatory access to all ICANN-accredited registrars that agree to comply with the registry's requirements, terms, and conditions.

3.13 Recommendation 20: An application will be rejected if it is determined, based on public comments or otherwise, that there is substantial opposition to it from among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support.

3.13.1 The phrase “public comments or otherwise” is possibly inconsistent with the objection-based model outlined in section 2. In the objection-based model, public comments could be used to flag issues relevant to the applicant's qualifications, but would not in themselves constitute a formal objection.

3.13.2 The use of the phrases “substantial opposition” and “significant established institutions” will be highly subjective in practice and conflicts with goals of using predictable, objective, and measurable criteria. Alternatively, substantial opposition should trigger a formal objection.

3.13.3 The terms “targeted” and “intended” could be problematic because the applicant's statement of intent, either intentionally or unintentionally, might not accurately reflect the degree to which a string is related to a “community.”

3.13.4 The term “community” can be difficult to interpret and apply in an objective, predictable way. One way to implement this concept would be establishing the following as one of the enumerated grounds for objection to a proposed TLD string: *The proposed TLD string relates to a defined community that is represented primarily by an established institution.* Relevant support or opposition for the application, and whether the applicant also represents an established institution are factors that might be considered in evaluating objections made on this basis.

3.13.5 As noted above, Recommendation 20 could be highly subjective to implement in practice and may conflict with goals of using predictable, objective, and measurable criteria.

4 Other Issues

4.1 Country, territory, and place names

4.1.1 As noted in 2.5.5 above, the GAC has recommended that: “ICANN should avoid country, territory, or place names, and country, territory, or regional language or people descriptions, unless certain types of geographical and geopolitical names as TLDs, unless in agreement with the relevant governments or public authorities.”

4.1.2 The GNSO’s Reserved Names Working Group recommended that “geographical and geopolitical names” not be reserved, but that governments make use of the objection process in cases where they oppose a proposed TLD string.

4.1.3 Accordingly, staff has contemplated an objection process for geographical and geopolitical names. However, staff notes that this area does not appear anywhere in the GNSO's current set of policy recommendations.

4.2 Eligibility for objection process

4.2.1 The GNSO's Reserved Names Working Group stated, in its recommendations regarding controversial names: "Within the dispute process, disputes would be initiated [solely] by the ICANN Advisory Committees (e.g., ALAC or GAC) or supporting organizations (e.g., GNSO or ccNSO)."³ This recommendation is inconsistent with staff's current conception of the objection resolution process.

4.2.2 Staff has based its proposed procedures on the principle that standing to object will vary depending on the nature of the objection. Staff urges the Council to consider this recommendation carefully, as it may limit the effectiveness of the objection-based model, as well as subjecting the advisory committees and supporting organizations to lobbying efforts by interested parties.

4.3 String contention

4.3.1 An earlier version of the GNSO's policy recommendations contained a recommendation that: "If there is contention for strings, applicants may: i) resolve contention between them within a pre-established timeframe; ii) if there is no mutual agreement, a process will be put in place to enable efficient resolution of contention; and iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels."⁴

³ <http://gns0.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.pdf>

⁴ <http://gns0.icann.org/drafts/pdp-dec05-draft-fr.htm>

4.3.2 Staff has begun to design draft procedures for resolving string contention. As the current set of recommendations does not include any language addressing contention, staff would appreciate confirmation whether this is intentional or whether the GNSO may wish to provide any recommendations on issues relating to string contention.

5 Conclusion

5.1 ICANN staff again gratefully acknowledges the Committee's conscientious engagement in the complex analysis and discussion required to arrive at its recommendations. In raising these points, ICANN staff seeks to continue the constructive dialogue it has sustained with the Committee throughout the process.

5.2 Following the conclusion of the policy development process on new gTLDs, staff expects to continue to provide the GNSO with regular updates on its implementation of the policy, and to actively seek and encourage the GNSO's input.