

GNSO new TLDs Committee

Draft Final Report

Introduction of New Generic Top-Level Domains

Table of Contents

GLOSSARY & DEFINITIONS.....	2
EXECUTIVE SUMMARY	5
PRINCIPLES	8
RECOMMENDATIONS	10
IMPLEMENTATION GUIDELINES.....	14
TERM OF REFERENCE ONE – DISCUSSION.....	18
TERM OF REFERENCE TWO -- DISCUSSION.....	21
TERM OF REFERENCE THREE -- DISCUSSION	32
TERM OF REFERENCE FOUR -- DISCUSSION	35
ANNEX ONE -- POLICY DEVELOPMENT PROCESS INFORMATION	38
ANNEX TWO -- PARTICIPATION TABLE.....	44
ANNEX THREE -- REFERENCE MATERIALS.....	46

GLOSSARY & DEFINITIONS

Commercial & Business Users Constituency	CBUC http://www.bizconst.org/
Consensus Policy	A defined term in all ICANN registry contracts usually found in Article 3 (Covenants). See, for example, http://www.icann.org/tlds/agreements/biz/registry-agmt-08dec06.htm
Country Code Names Supporting Organization	ccNSO http://ccnso.icann.org/
Domain Names	The term domain name has multiple related meanings: A name that identifies a computer or computers on the internet. These names appear as a component of a Web site's URL , e.g. www.wikipedia.org . This type of domain name is also called a hostname . The product that Domain name registrars provide to their customers. These names are often called registered domain names . Names used for other purposes in the Domain Name System (DNS) , for example the special name which follows the @ sign in an email address, or the Top-level domains like .com, or the names used by the Session Initiation Protocol (VoIP) , or DomainKeys . http://en.wikipedia.org/wiki/Domain_names
Domain Name System	On the Internet , the domain name system (DNS) stores and associates many types of information with domain names ; most importantly, it translates domain names (computer hostnames) to IP addresses . It also lists mail exchange servers accepting e-mail for each domain. In providing a worldwide keyword -based redirection service, DNS is an essential component of contemporary Internet use. http://en.wikipedia.org/wiki/Domain_name_system
Governmental Advisory Committee	GAC http://gac.icann.org/web/index.shtml http://gac.icann.org/web/index.shtml
Intellectual Property Constituency	IPC http://www.ipconstituency.org/
Internet Service & Connection Providers Constituency	ISPCP
Internationalized Domain Names Working Group	IDN-WG
Nominating Committee	NomCom
Non-Commercial Users	NCUC

Constituency	http://www.ncdnhc.org/
Policy Development Process	PDP See http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#AnnexA
Protecting the Rights of Others Working Group	PRO-WG See the mailing list archive at http://forum.icann.org/lists/gnso-pro-wg/
Registrar Constituency	RC http://www.icann-registrars.org/
Registry Constituency	RyC http://www.gtldregistries.org/
Request for Comment A full list of all Requests for Comment http://www.rfc-editor.org/rfcxx00.html Specific references used in this report are shown in the next column. This document uses language, for example, "should", "must" and "may", consistent with RFC2119.	RFC ftp://ftp.rfc-editor.org/in-notes/rfc2119.txt ftp://ftp.rfc-editor.org/in-notes/rfc2606.txt
Reserved Names	All ICANN's registry agreements have Reserved Names provisions. See, for example, the .aero agreement http://www.icann.org/tlds/agreements/sponsored/sponsorship-agmt-att11-20aug01.htm
Reserved Names Working Group	RN-WG See the mailing list archive at http://forum.icann.org/lists/gnso-rn-wg/
Root server	<p>A root nameserver is a DNS server that answers requests for the root namespace domain, and redirects requests for a particular top-level domain to that TLD's nameservers. Although any local implementation of DNS can implement its own private root nameservers, the term "root nameserver" is generally used to describe the thirteen well-known root nameservers that implement the root namespace domain for the Internet's official global implementation of the Domain Name System.</p> <p>All domain names on the Internet can be regarded as ending in a full stop character e.g. "en.wikipedia.org.". This final dot is generally implied rather than explicit, as modern DNS software does not actually require that the final dot be included when attempting to translate a domain name to an IP address. The empty string after the final dot is called the root domain, and all other domains (i.e. .com, .org, .net, etc.) are contained within the root domain. http://en.wikipedia.org/wiki/Root_server</p>

EXECUTIVE SUMMARY

1. The section sets out the principles¹, policy recommendations and implementation guidelines the GNSO Council's Committee on the introduction of new top-level domains has developed through its policy development process. The development of all elements of the Committee's work has been done in close consultation with an ICANN staff team who have provided advice on policy, operational and legal matters for the Committee. This version of the draft *Final Report* reflects the updated work of the Committee at its 23 & 24 February 2007 Los Angeles meetings².
2. The *Report* is now structured around four main areas. This includes an explanation of the principles that have guided the work; a comprehensive set of draft recommendations which have majority Committee support; a set of implementation guidelines and a detailed record of the Committee's work which can be found in Annexes One and Two of the *Report*. Annex Three is a list of reference material on which the Committee have relied.
3. The Committee is expected to discuss its recommendations in a public forum at the 26 – 30 March 2007 ICANN meeting in Lisbon, Portugal. At the same time, a number of face-to-face consultations will take place with a variety of organisations and working groups including the Governmental Advisory Committee (GAC), the Country Code Names Supporting Organization (ccNSO), the Internationalised Names Working Group (IDN-WG), the Reserved Names Working Group (RN-WG) and the Protecting

¹ In this document, the use of the terms "must", "must not", "should" and "should not", are used in the same way as RFC 2119 (<http://www.ietf.org/rfc/rfc2119>)

² The MP3 recordings of the meetings can be found at <http://forum.icann.org/lists/gtld-council/msg00352.html>

the Rights of Others Working Group (PRO-WG).

4. The major changes captured in this version of the *Report* are to re-emphasise the Committee's key principles that reflect ICANN's Mission and Core Values; clarification of the Committee's draft policy recommendations and the further explanation of the Committee's implementation guidelines which are designed to assist ICANN staff to implement the policy recommendations in a transparent and cohesive manner.
5. The *Report* sets out the key findings from a multi-phase, multi-stakeholder policy development process that has taken place during 2006 and which will continue through 2007. The Committee has been guided by the GNSO's policy development process requirements which are part of ICANN's ByLaws³.
6. In each of the sections below the Committee's recommendations are discussed in more detail with an explanation of the rationale for the decisions. The recommendations have been the subject of numerous public comment periods and intensive discussion across a range of stakeholders including ICANN's GNSO Constituencies, ICANN Supporting Organisations and Advisory Committees and members of the broader Internet-using public that is interested in ICANN's work⁴. In particular, detailed work has been conducted through the Internationalised Domain Names Working Group (IDN-WG)⁵ and the Reserved Names Working Group (RN-WG)⁶ to comprehensively examine important elements of new TLDs. A working group to examine the protection of the rights of others

³ <http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#AnnexA>.

⁴ A full list of the working materials of the new TLDs Committee can be found at <http://gns0.icann.org/issues/new-gtlds/>.

⁵ The mailing list archive for the IDN-WG is found at <http://forum.icann.org/lists/gns0-idn-wg/>. A full set of resources which the WG is using is found at <http://gns0.icann.org/issues/idn-tlds/>.

⁶ The mailing list archive for the RN-WG is found at <http://forum.icann.org/lists/gns0-rn-wg/>

(PRO-WG) has been formed and work has begun on its Statement of Work⁷.

7. The GNSO Committee has conducted five separate face-to-face consultations, in Washington DC, Wellington, Brussels, Amsterdam and Los Angeles to discuss each of the Terms of Reference in the context of ICANN's Bylaws, Mission and Core Values.

⁷ <http://gns0.icann.org/mailling-lists/archives/council/msg03197.html>

PRINCIPLES

1. This set of principles relates to the introduction of new top-level domains. The full listing of existing top-level domains, for example, .com, .org and .info, can be found on ICANN's website⁸. There are also two letter country code top-level domains such as .de, .cc and .at⁹. The addition of new gTLDs will be done in accordance with ICANN's primary mission which is to ensure the security and stability of the Domain Name System (DNS) and, in particular, the Internet's root server system¹⁰.
2. The principles are a combination of Committee priorities and ICANN staff implementation principles which have been developed in tandem with the Committee¹¹.

⁸ <http://www.icann.org/registries/listing.html>

⁹ <http://www.iana.org/root-whois/index.html>

¹⁰ The root server system is explained here <http://en.wikipedia.org/wiki/Rootserver>

¹¹ The Governmental Advisory Committee (GAC) is also developing a set of public policy principles that relate to the introduction of new top-level domains. These principles are not yet complete.

Principle 1	New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.
Principle 2	Some new generic top-level domains may be internationalised domain names (IDNs) subject to the approval of IDNs being available in the root. ¹²
Principle 3	The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats and that the new TLD process promotes competition, consumer choice and geographical and service-provider diversity.
Principle 4	A set of technical criteria must be used for assessing a new gTLD registry applicant to minimise the risk of harming the operational stability, security and global interoperability of the Internet.
Principle 5	A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meet its obligations under the terms of ICANN's registry agreement.
Principle 6	A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.

Table 0-1: new gTLDs principles

¹² Internationalised Domain Names guidelines are found at <http://www.icann.org/topics/idn/implementation-guidelines.htm> and the results of the current technical trials are found at <http://www.icann.org/announcements/announcement-4-07mar07.htm>

RECOMMENDATIONS¹³

1. This set of recommendations is the result of widespread consultation with a variety of interested stakeholders, ICANN Supporting Organizations and interested observers. A full record of the Committee's work can be found on the GNSO's website¹⁴.
2. The recommendations have majority support from a range of GNSO Committee representatives and have been subjected to detailed discussion through a series of ICANN meetings in addition to five face-to-face meetings of the Committee. In addition, detailed meetings have taken place between Committee members and ICANN staff on a wide range of implementation issues. The sections below relating to each Term of Reference show how the Committee has reached its decisions.

¹³ In the Recommendations, the use of the terms "must", "must not", "should" and "should not", are used in the same way as RFC 2119 (<http://www.ietf.org/rfc/rfc2119>)

¹⁴ <http://gns0.icann.org/issues/new-gtlds/>

Recommendation 1	ICANN must implement a process that allows the introduction of new top-level domains.
Recommendation 2	Strings must not be confusingly similar ¹⁵ to an existing top-level domain.
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.
Recommendation 4	Strings must not cause any technical instability.
Recommendation 5	Strings must not be a Reserved Word.
Recommendation 6	Strings must not be contrary to generally accepted legal norms relating to morality and public order.
Recommendation 7	Applicants must be able to demonstrate their technical capability to run a registry operation.
Recommendation 8	Applicants must be able to demonstrate their financial and organisational operational capability.
Recommendation 9	There must be a clear and pre-published application process using objective and measurable criteria.
Recommendation 10	There must be a base contract provided to applicants at the beginning of the application process.
Recommendation 11	Staff Evaluators will be used to make preliminary determinations about applications as part of a process which includes the use of expert panels to make decisions.
Recommendation 12	Dispute resolution and challenge processes must be established prior to the start of the process.
Recommendation 13	Applications must initially be assessed in rounds until the scale of demand is clear and there is a reduction to zero of applications for the same string.
Recommendation 14A	If there is contention for strings, applicants may: <ul style="list-style-type: none"> 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

¹⁵ See UDRP rules, in particular, 4a -- <http://www.icann.org/udrp/udrp-policy-24oct99.htm>.

	<p>resolution of contention and;</p> <p>iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.</p>
Recommendation 14B	<p>Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exception:</p> <p>i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application</p> <p>Under this exception, Staff Evaluators will devise criteria and procedures to investigate the claim.</p>
Recommendation 14C	<p>An application will be rejected or otherwise deferred 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. Staff Evaluators will develop criteria and procedures for making this determination.</p>
Recommendation 15	<p>The initial registry agreement term must be of a commercially reasonable length.</p>
Recommendation 16	<p>There must be renewal expectancy.</p>
Recommendation 17	<p>Registries must apply existing Consensus Policies¹⁶ and adopt new Consensus Polices as they are approved.</p>
Recommendation 18	<p>A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.</p>
Recommendation 19	<p>If an applicant offers an IDN service, then ICANN's IDN guidelines¹⁷ must be followed.</p>

¹⁶ Consensus Policies has a particular meaning within the ICANN environment. Refer to <http://www.icann.org/general/consensus-policies.htm> for the full list of ICANN's Consensus Policies.

¹⁷ <http://www.icann.org/general/idn-guidelines-22feb06.htm>

Recommendation 20	Registries must use ICANN accredited registrars.
-------------------	--

Table 0-1: new gTLDs recommendations

IMPLEMENTATION GUIDELINES

1. This set of implementation guidelines is the result of detailed discussion, particularly with respect to the *ICANN Staff Discussion Points*¹⁸ document which was prepared to facilitate consultation with the GNSO Committee prior to the 2006 Sao Paulo meeting and used again at the February 2007 Los Angeles meeting.
2. Since that meeting, the ICANN staff has met weekly to discuss ongoing implementation planning and have had further consultations with members of the Committee. Many additional implementation comments were received from the Committee and observers at the Los Angeles meeting. These have been incorporated into a list of questions for the implementation team
3. The draft Implementation Flowchart was developed through discussion at the Los Angeles meeting and as part of the ongoing internal implementation discussions which have focused on ensuring that draft recommendations proposed by the Committee are implementable in an efficient and transparent manner¹⁹.

Implementation Guideline 1	The application process will provide a pre-defined roadmap for applicants that encourages the submission of applications for new top-level domains.
Implementation Guideline 2	Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process. Application fees may differ for applicants.

¹⁸ <http://gnso.icann.org/drafts/GNSO-PDP-Dec05-StaffMemo-14Nov06.pdf>

¹⁹ Consistent with ICANN's commitments to accountability and transparency found at <http://www.icann.org/announcements/announcement-26jan07b.htm>

Implementation Guideline 3	ICANN will provide frequent communications with applicants and the public including comment forums which will be used to inform evaluation panels.
Implementation Guideline 4	A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary. Applications will be time and date stamped on receipt.
Implementation Guideline 5	The application submission date will be at least four months after the issue of the Request for Proposal and ICANN will promote the opening of the application round.
Implementation Guideline 6	ICANN will provide for the ability to settle conflicts between applicants (such as string contention) at any time. A defined mechanism and a certain period for resolution of identified conflicts will be provided.
Implementation Guideline 7	Evaluation panels established by ICANN will be used to make decisions relating to technical criteria consistent with ICANN's mission.
Implementation Guideline 8	External dispute providers will give decisions on complaints.
Implementation Guideline 9	An applicant granted a TLD string must use it within an appropriate timeframe.
Implementation Guideline 10	The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing market place.
Implementation Guideline 11	ICANN should take a consistent approach to the establishment of registry fees.
Implementation Guideline 12	The use of personal data is limited to the purpose for which it is collected.
Implementation Guideline 12B	Procedures related to Recommendations 14B and 14C could be based on ICANN's existing procedures to examine sponsored TLD applications.
Implementation Guideline 13 (NCUC suggestions)	ICANN may establish a capacity building and support mechanism aiming at

	<p>facilitating effective communication on important and technical Internet governance functions in a way which no longer requires all participants in the conversation to be able to read and write English.</p> <p>ICANN may put in place a fee reduction scheme for gTLD applicants from developing economies, and make the financial and the operational threshold for market entry easier for those from less developed economies.</p> <p>ICANN may put in place systems that could provide information about the gTLD process in major languages other than English, for example, in the six working languages of the United Nations.</p>
--	---

Table 0-1: new gTLDs implementation guidelines

QuickTime™ and a
TIFF (Uncompressed) decompressor
are needed to see this picture.

Table 0-1: DRAFT new TLDs Implementation Plan

TERM OF REFERENCE ONE – DISCUSSION

1. The GNSO Committee on new top-level domains was asked to answer the question of whether to introduce new top-level domains. The Committee recommends that ICANN should implement a process that allows the introduction of new top level domains and that work should proceed to develop policies that will enable the introduction of new generic top-level domains, taking into account the recommendations found in the latter sections of the Report concerning Selection Criteria (Term of Reference 2), Allocation Methods (Term of Reference 3) and Policies for Contractual Conditions (Term of Reference 4).
2. ICANN's work on the introduction of new top-level domains has been ongoing since 1999. The early work included the 2000 Working Group C Report²⁰ that also asked the question of "whether there should be new TLDs". By mid-1999, the Working Group had quickly reached consensus on two issues, namely that "...ICANN should add new gTLDs to the root. The second is that ICANN should begin the deployment of new gTLDs with an initial rollout of six to ten new gTLDs, followed by an evaluation period". This work was undertaken throughout 2000 and saw the introduction of, for example, .coop, .aero and .biz.
3. After an evaluation period, a further round of sponsored TLDs was introduced during 2003 and 2004 which included, amongst others, .mobi and .travel.
4. In addressing Term of Reference One, the Committee arrived at its recommendation by reviewing and analysing a wide variety of materials including Working Group C's findings; the evaluation reports from the 2003 & 2004 round of sponsored top-level domains and full range of

²⁰ Found at <http://www.icann.org/dnsso/wgc-report-21mar00.htm>

other historic materials which are posted at

<http://gns0.icann.org/issues/new-gtlds/>

5. In addition, the Committee considered the responses to a Call for Expert Papers which was issued at the beginning of the policy development process²¹. These papers augmented a full set of GNSO Constituency Statements²².
6. The Committee was asked, at its February 2007 Los Angeles meeting, to confirm its rationale for recommending that ICANN introduce new top-level domains. In summary, there are five threads which have emerged:
 - a. It is consistent with the reasons articulated in 1999 when the first proof-of-concept round was initiated
 - b. There are no technical impediments to the introduction of new top-level domains as evidenced by the two previous rounds
 - c. Expanding the domain name space to accommodate the introduction of both new ASC-II and internationalised domain name (IDN) top-level domains will give end users more choice about the nature of their presence on the Internet. In addition, users will be able to communicate in their language of choice and in a way which meets community needs.
 - d. There is evidence of demand for additional top-level domains as a business opportunity. The opportunity for adding new top-level domain names stimulates competition for both registry service providers and registrars which is consistent with ICANN's Core Value 6

²¹ The announcement is here <http://icann.org/announcements/announcement-03jan06.htm> and the results are here <http://gns0.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

²² Found here <http://gns0.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

- e. No compelling reason has been articulated to not proceed with accepting applications for new top-level domains.

TERM OF REFERENCE TWO -- DISCUSSION

1. The Committee was asked to develop policy recommendations about string criteria for new top-level domain applications. Three main elements have emerged in relation to string criteria -- “string” criteria, “applicant” criteria and “process” criteria.
2. **Recommendation 2 Discussion** -- Strings must not be confusingly similar²³ to an existing top-level domain²⁴.
 - i) The Committee spent many hours on discussing the nature of confusingly similar to determine if and how its current recommendation could be implemented. There were many diverging points of view; many differing perspectives and many different interpretations.
 - ii) The Committee looked in detail at the existing provisions of ICANN’s Registrar Accreditation Agreement, particularly Section 3.7.7.9²⁵ which says that “...The Registered Name Holder shall represent that, to the best of the Registered Name Holder's knowledge and belief, neither the registration of the Registered Name nor the manner in which it is directly or indirectly used infringes the legal rights of any third party.”
 - iii) In addition, the concept of “confusingly similar” is used to mean that there is a likelihood of confusion on the part of the relevant public²⁶. In international trade mark law, confusion may be visual, phonetic or conceptual. The Committee used a wide

²³ See section 4A -- <http://www.icann.org/udrp/udrp-policy-24oct99.htm>.

²⁴ The arrangement and appearance of typography is a defined term which may assist readers with understanding the importance of typography in the use of domain names. More information can be found at <http://en.wikipedia.org/wiki/Typography>.

²⁵ Found at <http://www.icann.org/registrars/ra-agreement-17may01.htm#3>

²⁶ Detailed discussion took place about “the relevant public” including the provision of examples about .cat (for Catalan users) and .cat (for those interested in cats). The “relevant public should be taken into account when thinking about the context in which a name would be used and in light of relevant registration policies.

variety of existing law to come to some agreement that strings should not be confusingly similar either to existing top-level domains like .com and .net or to existing trademark and famous names²⁷.

- iv) In broader international treaty, the concept of creating confusion is contained in the 1883 Paris Convention and says “to create confusion by any means whatever” {Article 10bis (3) (1)} and, further, being “liable to mislead the public” {Article 10bis (3) (3)}. The treatment of confusingly similar is also contained in European Union law and is structured as follows -- “because of its identity with or similarity to...there exists a likelihood of confusion on the part of the public...; the likelihood of confusion includes the likelihood of association...” {Article 4 (1) (b) of the 1988 EU Trade Mark directive 89/104/EEC}. Article 8 (1) (b) of the 1993 European Union Trade Mark regulation 40/94 is also relevant.
- v) In the United States, existing trade mark law states that “...to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive...” which is contained in Section 1051 (3) (d) of the US Trademark Act 2005 (found at <http://www.bitlaw.com/source/15usc/1051.html>.)
- vi) In Australia, the Australian Trade Marks Act 1995 Section 10 says that “...For the purposes of this Act, a trade mark is taken to be deceptively similar to another trade mark if it so nearly resembles that other trade mark that it is likely to deceive or

²⁷ In addition, advice was sought from experts within WIPO who continue to provide guidance on this and other elements of dispute resolution procedures.

cause confusion” (found at

http://www.ipaustralia.gov.au/resources/legislation_index.shtml)

vii) A number of different trademark offices provide guidance on how to interpret confusion. For example, the European Union Trade Mark Office provides guidance on how to interpret confusion.

“...confusion may be visual, phonetic or conceptual. A mere aural similarity may create a likelihood of confusion. A mere visual similarity may create a likelihood of confusion. Confusion is based on the fact that the relevant public does not tend to analyse a word in detail but pays more attention to the distinctive and dominant components. Similarities are more significant than dissimilarities. The visual comparison is based on an analysis of the number and sequence of the letters, the number of words and the structure of the signs. Further particularities may be of relevance, such as the existence of special letters or accents that may be perceived as an indication of a specific language. For words, the visual comparison coincides with the phonetic comparison unless in the relevant language the word is not pronounced as it is written. It should be assumed that the relevant public is either unfamiliar with that foreign language, or even if it understands the meaning in that foreign language, will still tend to pronounce it in accordance with the phonetic rules of their native language. The length of a name may influence the effect of differences. The shorter a name, the more easily the public is able to perceive all its single elements. Thus, small differences may frequently lead in short words to a different overall impression. In contrast, the public is less aware of differences between long names. The overall phonetic impression is particularly influenced by the number and sequence of syllables.” (found at

<http://oami.europa.eu/en/mark/marque/direc.htm>).

viii) An extract from the United Kingdom's Trade Mark Office's Examiner's Guidance Manual is useful in explaining further the Committee's approach to developing its Recommendation. *"For likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average consumer. Likelihood of association is not an alternative to likelihood of confusion, "but serves to define its scope". Mere association, in the sense that the later mark brings the earlier mark to mind is insufficient to find a likelihood of confusion, unless the average consumer, in bringing the earlier mark to mind, is led to expect the goods or services of both marks to be under the control of one single trade source. "The risk that the public might believe that the goods/services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion..."* (found at <http://www.patent.gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm>)

ix) The proposed implementation plan deals with a comprehensive range of potentially controversial (for whatever reason) string applications which balances the need for reasonable protection of existing legal rights and the capacity to innovate with new uses for top level domains that may be attractive to a wide range of users²⁸.

3. Recommendation 3 Discussion -- Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law²⁹.

²⁸ The 2003 correspondence between ICANN's then General Counsel and the then GAC Chairman is also useful <http://www.icann.org/correspondence/touton-letter-to-tarmizi-10feb03.htm>.

²⁹ Updated text provided by David Maher (RyC).

- i. The Committee engaged in comprehensive discussion about this recommendation and took advice from a number of experts within the group³⁰. The original text of the recommendation has been modified to recognised that an applicant will be bound by the laws of the country where they are located, and an applicant may be bound by another country that has jurisdiction over them.
- ii. An application may be rejected or deferred if it is determined, based on public comments or otherwise, that there is substantial opposition to it from significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support. ICANN staff will develop criteria and procedures for making this determination, which may be based upon ICANN's procedures which were used to examine the 2003 round of sponsored TLD applications³¹.
- iii. There are a number of ways in which ICANN could approach the resolution of this type of problem which includes the full range of "ICANN saying nothing; ICANN identifies a possible issue and ICANN files a complaint; ICANN identifies a possible issue but relies on a complainant to file it formally; ICANN identifies an issue, makes a decision and the applicant can appeal."
- iv. The final approach to this set of potentially controversial problems will be resolved through ongoing discussions with members of the Committee and ICANN's implementation team.

4. Recommendation 4 Discussion – Strings must not cause any technical instability.

- i. It was agreed by the Committee that the string should not cause any technical that threatened the stability and security of the Internet. As the policy development process proceeds, further

³⁰ For example, David Maher, Jon Bing, Steve Metalitz, Philip Shepherd and Michael Palage.

³¹ Amended text provided by Steve Metalitz (IPC) and Philip Shepherd (CBUC).

detailed technical assistance will be sought from both ICANN expert committees and advisors.

5. Recommendation 5 Discussion -- Strings must not be a Reserved Word.³²

- i. The notion of Reserved Words has a specific meaning within the ICANN context. Each of the existing ICANN registry contracts have provisions within them that govern the use of reserved words.
- ii. The Reserved Names Working Group (RN-WG) Statement of Work was developed to enable a small group to examine a wide variety of reserved names issues. The Group is due to report to the Committee at the Lisbon meeting with a series of recommendations on the treatment of reserved names for new top-level domains.

6. Recommendation 6 Discussion - Strings must not be contrary to generally accepted legal norms relating to morality and public order.

- i. There was detailed discussion about a general category of potential strings which may have public policy impacts of interest to national governments. In response to correspondence from the GNSO Council Chair, the Governmental Advisory Committee³³ has responded to a request to provide guidance on public policy issues. It is expected that these principles will be finalised shortly. After those guidelines are formalised, the ICANN staff proposed implementation plan may be modified to take into account ways to address the public policy concerns of governments in relation to the introduction of new top level domains.

³² Reserved Word has a specific meaning in the ICANN context and includes, for example, the reserved word provisions in ICANN's existing registry contracts. See <http://www.icann.org/registries/agreements.htm>.

³³ <http://www.gnso.icann.org/correspondence/advice-new-gtlds-20nov06.pdf>.

- ii. The Committee spent considerable time considering the public policy aspects of new top-level domains. In particular, concerns about “public policy and morality” were raised. This phrasing is consistent with international laws including Article 3 (1) (f) of the 1988 European Union Trade Mark Directive 89/104/EEC and within Article 7 (1) (f) of the 1993 European Union Trade Mark Regulation 40/94. In addition, the phrasing “contrary to morality or public order and in particular of such a nature as to deceive the public” comes from Article 6quinques (B)(3) of the 1883 Paris Convention. The reference to the Paris Convention remains relevant to domain names even though, when it was drafted, domain names were completely unheard of.
- iii. The concept of “morality” is captured in Article 19 United Nations Convention on Human Rights (<http://www.unhchr.ch/udhr/lang/eng.htm>) says “...Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Article 29 continues by saying that “...In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.
- iv. The EU Trade Mark Office’s Examiner’s guidelines provides assistance on how to interpret morality and deceit. “...Contrary to morality or public order. Words or images which are offensive, such as swear words or racially derogatory images, or which are blasphemous are not acceptable. There is a dividing line between this and words which might be considered in poor taste.

The latter do not offend against this provision.” The further element is deception of the public which is treated in the following way. “...Deceive the public. To deceive the public, is for instance as to the nature, quality or geographical origin. For example, a word may give rise to a real expectation of a particular locality which is untrue.” For more information, see Sections 8.7 and 8.8 at

<http://oami.europa.eu/en/mark/marque/direc.htm>

- v. The UK Trade Mark office provides similar guidance in its Examiner’s Guidance Manual. “Marks which offend fall broadly into three types: those with criminal connotations, those with religious connotations and explicit/taboo signs. Marks offending public policy are likely to offend accepted principles of morality, e.g. illegal drug terminology, although the question of public policy may not arise against marks offending accepted principles of morality, for example, taboo swear words. If a mark is merely distasteful, an objection is unlikely to be justified, whereas if it would cause outrage or would be likely significantly to undermine religious, family or social values, then an objection will be appropriate. Offence may be caused on matters of race, sex, religious belief or general matters of taste and decency. Care should be taken when words have a religious significance and which may provoke greater offence than mere distaste, or even outrage, if used to parody a religion or its values. Where a sign has a very sacred status to members of a religion, mere use may be enough to cause outrage.” For more information, see <http://www.patent.gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm>)
- vi. In summary, the development of selection criteria for new top-level domains has been the subject of intense discussion

throughout the Committee's work. This work will be clarified further when the GAC public policy principles are completed.

7. **Recommendation 7 Discussion** - Applicants must be able to demonstrate their technical capability to run a registry operation.
- i. The Committee agreed that the technical requirements for applicants would include compliance with a minimum set of technical standards and that this requirement would be part of the new registry operator's contractual conditions included in the proposed base contract. The more detailed discussion about technical requirements has been moved to the contractual conditions section.
 - ii. Reference was made numerous Requests for Comment (RFCs) and other technical standards which apply to existing registry operators. For example, Appendix 7 of the June 2005 .net agreement³⁴ provides a comprehensive listing of technical requirements in addition to other technical specifications in other parts of the agreement. These requirements are consistent with that which is expected of all current registry operators. These standards would form the basis of any new top-level domain operator requirements.
8. **Recommendation 8 Discussion** - Applicants must be able to demonstrate their financial and organisational operational capability.
- i. The Committee discussed this requirement in detail and determined that it was both reasonable to request this information from potential applicants and it was consistent with past practices including the prior new TLD rounds; the .net and .org rebids and the conditions associated with ICANN registrar accreditation.

³⁴ <http://www.icann.org/tlds/agreements/net/appendix7.html>

- ii. The challenging aspect of this recommendation is to develop robust and objective criteria against which applicants can be measured, recognising a vast array of business conditions and models. This will be an important element of the ongoing development of the Implementation Plan.

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

- i. This recommendation has been made consistent with ICANN's previous TLD rounds in 2000 and 2003/2004 and with its re-bid of both the .net and .org registry contracts.
- ii. It is also consistent with ICANN's Mission and Core Values especially 7, 8 and 9 which address openness in decision making processes and the timeliness of those process.
- iii. The Committee decided that the "process" criteria for introducing new top-level domains would follow a pre-published application system including the levying of an application fee to recover the costs of the application process. This is consistent with ICANN's approach to the introduction of new TLDs in the previous 2000 and 2004 round for new top level domains.

10. Recommendation 10 Discussion - There must be a base contract provided to applicants at the beginning of the process.

- i. The General Counsel's office has been involved in discussions about the provision of a base contract which would assist applicants both during the application process and in any contract negotiation phase.
- ii. Whilst a framework for this base contract has been developed, it would be prudent to complete the policy recommendations prior to the draft of the base contract being distributed.

11. Recommendation 11 Discussion – Staff Evaluators will be used to make preliminary determinations about applications as part of a process which includes the use of expert panels to make decisions.³⁵

- i. ICANN would, to implement the policy, develop an implementation plan that included Staff Evaluators being able to make preliminary determinations on whether the application complies with the string requirements and that ICANN may engage appropriate expert advice in order to make a determinations about string contention.
- ii. It was clear from Committee discussions and from staff input that ICANN would continue to conduct public comment processes including input from the full range of ICANN Advisory Committees.

12. Recommendation 12 Discussion -- Dispute resolution and challenge processes must be established prior to the start of the process.

- i. The draft Implementation Plan found at the beginning of the document sets out, in a high level form, the points in the process which may need dispute resolution and challenge processes.
- ii. The Committee has provided clear direction on its expectations that all the dispute resolution and challenge process would be established prior to the opening of the application round.
- iii. Further input will be sought from ICANN's other Supporting Organizations and Advisory Committees. Adjustment to the proposals may need to be made to take into account the recommendations of, for example, the RN-WG and the PRO-WG.

³⁵ Refer to the draft Implementation Plan above which provides an overview of the proposed application evaluation methods.

TERM OF REFERENCE THREE -- DISCUSSION

13. Recommendation 13 Discussion – Applications must be assessed in rounds.

- i. This is straightforward recommendation which suggests an application round would be opened on Day 1 and closed on Day x with an unspecified number of applications to be processed within that round.
- ii. This recommendation may be amended, after an evaluation period and report which may suggest modifications to this system.

14. Recommendation 14 Discussion - 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

- i. Allocation methods for new top level domains have been the subject of detailed discussion within the Committee and with ICANN operational staff.
- ii. The discussion about allocation methods has taken place through analysis of the formal Constituency Statements; public comments and email discussions which were used to modify and clarify the language of the Recommendations.
- iii. Comparative evaluations have been a consistent theme throughout the policy development process with some discussants suggesting that auctions were a more suitable method of resolving conflict between applicants with similar string ideas. On balance, a comparative evaluation system will be used to analyse all applications and, where there is string contention between

applicants for the same string, a different process may be necessary.

- iv. ICANN staff has received some detailed advice about the utility and practicality of using auctions to resolve string contention at particular points in the application process. The key features of auctions³⁶ are, properly designed, they are objective and stand up well to challenge; they are administratively efficient; they assign resources to the highest valued use and they generate revenue.
- v. The draft Recommendations recognize past experiences with comparative evaluations in the ICANN environment, particularly those relating to sponsored top-level domains where measures of “community” support needed to be determined. The evaluations, for example in the case of the .net and .org rebids and the introduction of new sTLDs like .jobs and .travel, show that the Internet-using community takes a keen interest in ICANN’s decision making process. In addition, ICANN’s Supporting Organisations and Advisory Committees outside the GNSO play a key role in determining the success of potential applications.
- vi. Further work is required on two key elements – the question of support and the absence of relevant opposition. The use of public comments also needs to be further defined in terms of their utility in

³⁶ Committee members can refer to a wide range of materials on auctions but the following references may prove most useful.

Klemperer, Paul. Auctions: Theory and Practice. The Toulouse Lectures in Economics. (2004). <http://www.nuff.ox.ac.uk/users/klemperer/VirtualBook/VirtualBookCoverSheet.asp>

Mannheim, Karl and Lawrence Solum. “The Case for gTLD Auctions.” Research Paper #2003-11, Loyola Law School. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=515183

Mueller, Milton and Lee McKnight. “The Post-.com Internet: Toward Regular and Objective Procedures for Internet Governance.” *Telecommunications Policy* 28 (7/8), 487-502 (2004) <http://dcc.syr.edu/miscarticles/NewTLDs2-MM-LM.pdf>

National Research Council. Signposts in Cyberspace: the Domain Name System and Internet Navigation. Washington, DC: National Academies Press. (2005).

assisting evaluation panels. These questions have been raised in the context of the RN-WG and the PRO-WG and potential recommendations are expected from those two groups for the Committee to consider.

- vii. In addition, questions were raised about establishing incentives for applicants to reach agreement about contention. These could be in the form of fees for the next stage of the evaluation process and/or demonstrating the attractiveness of a “fast path” to avoid a “slow and expensive path”. Committee members suggested at the LA meetings that applicants could choose an auction model to resolve the contention or applicants could choose an arbitration model and pay the appropriate fee. ICANN staff will consider these options and other suggestions in the ongoing development of the Implementation Plan as it was clear that there was no agreement on which particular model to use. There is, however, strong support to create an environment to resolve contention which could include internal mediation, enforced mediation, auctions or comparative evaluations³⁷.

³⁷ For example, refer to the .net rebid materials which sets out in detail comparative evaluation process. <http://www.icann.org/announcements/announcement-28mar05.htm>

TERM OF REFERENCE FOUR -- DISCUSSION

15. **Recommendation 15** -- The initial registry agreement term must be of a commercially reasonable length.

16. **Recommendation 16** -- There must be renewal expectancy.

17. **Recommendation 17** -- Registries must apply existing Consensus Policies³⁸ and adopt new Consensus Policies as they are approved.

18. **Recommendation 18** -- A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.

- i. Referring to all four recommendations above, this section sets out the discussion of the policies for contractual conditions for new top-level domain registry operators. The recommendations are consistent with the existing provisions for registry operators which were the subject of detailed community input throughout 2006³⁹.
- ii. The Committee developed its recommendations during the Brussels and Amsterdam face-to-face consultations, with particular assistance from the ICANN General Counsel's office. The Committee has focused on the key principles of consistency, openness and transparency. It was also determined that a scalable and predictable process is consistent with industry best practice standards for services procurement. The Committee referred in particular to standards within the broadcasting, telecommunications and Internet services industries to examine how regulatory agencies in those environments conducted, for

38 Consensus Policies has a particular meaning within the ICANN environment. Refer to <http://www.icann.org/general/consensus-policies.htm> for the full list of ICANN's Consensus Policies.

³⁹ <http://www.icann.org/registries/agreements.htm>

example, spectrum auctions, broadcasting licence distribution and media ownership frameworks.

- iii. The Committee found a number of expert reports⁴⁰ beneficial. In particular, the World Bank report on mobile licensing conditions provides some guidance on best practice principles for considering broader market investment conditions. "...A major challenge facing regulators in developed and developing countries alike is the need to strike the right balance between ensuring certainty for market players and preserving flexibility of the regulatory process to accommodate the rapidly changing market, technological and policy conditions. As much as possible, policy makers and regulators should strive to promote investors' confidence and give incentives for long-term investment. They can do this by favoring the principle of 'renewal expectancy', but also by promoting regulatory certainty and predictability through a fair, transparent and participatory renewal process. For example, by providing details for license renewal or reissue, clearly establishing what is the discretion offered to the licensing body, or ensuring sufficient lead-times and transitional arrangements in the event of non-renewal or changes in licensing conditions. Public consultation procedures and guaranteeing the right to appeal regulatory decisions maximizes the prospects for a successful renewal process. As technological changes and convergence and technologically neutral approaches gain importance, regulators and policy makers need to be ready to adapt and evolve licensing procedures and practices to the new environment."

⁴⁰ The full list of reports are found in the Reference section at the end of the document.

- iv. The Recommendations which the Committee has developed with respect to the introduction of new TLDs are consistent with the World Bank principles.

19. Recommendation 19 Discussion -- If an applicant offers an IDN service, then ICANN's IDN guidelines must be followed

- i. The introduction of internationalised domain names at the root presents ICANN with a series of implementation challenges. The initial technical testing⁴¹ has been completed and a series of live root tests will take place shortly.
- ii. The Committee recognises that there is ongoing work in other parts of the ICANN organisation that needs to be factored into the application process that will apply to IDN applications. The work includes the President's Committee on IDNs, the GAC and ccNSO joint working group on IDNs in addition to the GNSO IDN WG. Further consultation will take place at the upcoming ICANN meeting in Lisbon which will provide additional clarity on IDN related policy issues.

20. Recommendation 20 Discussion – Registries must use ICANN accredited registrars.

- i. In order to facilitate the stable and secure operation of the DNS, the Committee agreed that it was prudent to continue the current requirement that registry operators be obliged to use ICANN accredited registrars.

⁴¹ <http://www.icann.org/announcements/announcement-4-07mar07.htm>

ANNEX ONE -- POLICY DEVELOPMENT PROCESS INFORMATION

1. This section provides detailed information about the progress of the policy development process and the documentation produced throughout the series of teleconferences and face-to-face consultations that have taken place during 2006 and 2007. All of the meetings were open to observers and many different stakeholders attended the meetings taking an active part in the discussion. In addition, all meetings were open to remote participation by teleconference and through the use of the Shinkuro (www.shinkuro.com) file-sharing technology. A full table found at Annex Two illustrates participation by GNSO Constituencies and other observers. This table will be included in full for the Board Report which is part of the PDP requirements.
2. The *Issues Report* was released on 5 December 2005. The *Report* sets out an early collation of issues that the GNSO wished to take into account in developing the Terms of Reference for future rounds. For example, the selection criteria used in previous application rounds for new top-level domains were used to guide the development of Term of Reference Two in this PDP. An evaluation of the selection criteria and methods used in the re-bidding of the .org and .net registry contracts was also conducted. The *Issues Report* contained Staff Recommendations about potential terms of reference and, in the majority, those Recommendations were adopted by the GNSO Council. The *Report* is found at <http://gns0.icann.org/issues/new-gtlds/gns0-issues-rpt-gtlds-05dec05.pdf>.
3. A Public Comment Period was launched on 6 December 2005 to solicit input from the ICANN community about the proposed Terms of Reference (found at <http://www.icann.org/announcements/announcement-06dec05.htm>). The Public Comment Period ran until 31 January 2006. For this PDP public comment periods have been used in different ways