

Status Report on Implementation of GNSO New GTLD Recommendation #6

STATUS OF THIS DOCUMENT

This Status Report published on 15 Sept. 2010 from the New gTLD Recommendation #6 Cross-Community Working Group (“Rec6 CWG”) addresses implementation of the GNSO Council’s New gTLD Recommendation # 6.

SUMMARY

This Status report is submitted to the ICANN Staff implementation team and the ICANN Board for their consideration in finalizing the implementation of the GNSO Council’s New gTLD Recommendation #6 (“Rec6”). This Status Report describes recommendations under consideration by the Rec6 CWG for improving the proposed implementation plan for Rec6 as described in the Draft Applicant Guidebook-v4.

1. Executive Summary

1.1 Background

The Rec6 CWG arose out of cross-community discussions stemming from the ICANN Brussels meeting. At Brussels, the Government Advisory Committee suggested that a cross-community effort be commenced to identify improvements to the implementation of the GNSO New GTLD Recommendation # 6. The Rec6 CWG conducted its review and analysis of Rec6 on an expedited basis in order to produce recommendations in time for the ICANN Board's retreat scheduled for 24-25 September 2010. Since the Board retreat goal is to attempt to resolve any outstanding issues related to the New gTLD Program, the CWG endeavored to conclude its work on an expedited basis in order to provide timely guidance to the ICANN board.

Rec6 states that:

Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.

The Rec6 CWG did not attempt to revisit the intended aim of Rec6, nor to revisit other established recommendations. Instead, it sought to develop implementation guidelines to address the concerns expressed by the Governmental Advisory Committee (GAC) and the At-Large Advisory Committee (ALAC).

This Status Report describes the results of this bottom-up process, and includes recommendations under consideration by the Rec6 CWG for improving the implementation plan proposed by Staff in the Draft Applicant Guidebook-v4 ("AGv4 Proposal") related to procedures for addressing objectionable strings, while protecting internationally recognized freedom of expression rights. The Rec6 CWG expects to issue its Report (expected

publication date on or before Sept 21) when it completes its analysis and has finalized the recommendations that have the support of its members.

1.2 Proposals for Improving the Implementation of Recommendation 6.

There is consensus among the members of the Rec6 CWG that the proposed implementation model for Rec6 is flawed in certain respects and can be improved. The Rec6 CWG believes that the recommendations described in this Report, as summarized in Section 3 of this Report, and described in detail in **Annex 3**, would improve the implementation of Rec6.

1.3 Next Steps.

The Rec6 CWG recommends that the GAC, GNSO and ALAC provide comments, as appropriate, by each organization on the recommendations contained in this Report.

2. Background and Process followed by the Rec6 CWG.

2.1 Background on the GNSO's New gTLD Policy

ICANN is in the implementation planning stage of defining the processes for adding new generic top-level domain names (TLDs) to the Domain Name System. The policy recommendations to guide the introduction of new gTLDs were created by the GNSO over a two year effort through its bottom-up, multi-stakeholder policy development process. The policy¹ was completed by the GNSO in 2007, and adopted by ICANN's Board in June, 2008. The GNSO's policy advice is described in the GNSO Final Report on the Introduction of New Top Level Domains (the "GNSO Final Report") and in its Summary of Implementation Principles and Guidelines on 22 October 2009 (the "GNSO Implementation Guidelines").

¹ For more information on the details of the policy approved by the GNSO, please refer to the documents posted at ICANN's website at <http://gns0.icann.org/issues/new-gtlds/>.

ICANN is currently in the process of finalizing the implementation details² for the launch of new gTLDs. ICANN has posted four draft applicant guidebooks (the fourth is commonly referred to as the “AGv4”), for public comment describing the manner in which ICANN proposes to implement this program. In addition, ICANN has released a series of topic papers to help the Internet community to understand in depth several processes. The Community has been provided numerous opportunities to participate and comment on the New GTLD Program. This public consultation process has resulted in a series of important questions being raised by the global Internet community in its efforts to identify the best path to implement this effort to liberalize the gTLD marketplace. One of these questions relates to the issue to be addressed in this Report - the procedures for addressing culturally objectionable and/or sensitive strings for the New gTLD Program.

2.2 Background on Rec6.

Rec6 is one of the recommendations included in the GNSO Final Report. Specifically, it states that:

Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.

The GNSO Final Report further explains that:

Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention of the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

² For information on the details of the implementation planning activities for new gTLDs, please refer to the documents posted at <http://icann.org/en/topics/new-gtld-program.htm>.

The GNSO Final Report notes that Rec6 received support from all GNSO Constituencies except the NCUC, which submitted a minority statement objecting to Rec6.³

The ICANN Board approved Rec6 along with the other recommendations contained in the GNSO Final Report at the ICANN Paris meeting in June 2008. The Board directed Staff to continue to further develop and complete its detailed implementation plan, continue communication with the community on such work, and provide the Board with a final version of the implementation proposals for the Board to approve before the new gTLD introduction process is launched.⁴

2.3 Cross-Community Concerns Regarding the Implementation of Rec6.

A number of concerns have surfaced from the ICANN Community regarding the proposed implementation of Rec6. For example, the Final Declaration published during the At-Large Summit in March 2009 describes the objections of the At-Large Community to Rec6. With regard to Rec6, the Declaration⁵ states that:

“We emphatically call for the complete abolition of the class of objections based on morality and public order. We assert that ICANN has no business being in (or delegating) the role of comparing relative morality and conflicting human rights.”

“Abolishing the morality and public order class of objection will eliminate the risk to ICANN of bearing responsibility for delegating morality judgment to an inadequate DSRP.”

“Certain extreme forms of objectionable strings may be addressed through minor modifications to the "Community" class of objection. While we fully appreciate the motivation behind this class of objection, we cannot envision any application of it that will result in fewer problems than its abolition.”

³ The NCUC Minority Statement is posted at: http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm#_Toc48210873

⁴ The ICANN Board Resolution from Paris Approving the New gTLD Program is posted at http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171

⁵ The At-Large Declaration is posted at: <http://www.atlarge.icann.org/files/atlarge/correspondence-05mar09-en.pdf>.

The Government Advisory Committee (GAC) has also expressed concerns regarding the proposed implementation of Rec6. In a letter to Peter Dengate Thrush dated 4 Aug 2010⁶, the GAC stated:

“...[T]he GAC believes that procedures to identify strings that could raise national, cultural, geographic, religious and/or linguistic sensitivities or objections are warranted so as to mitigate the risks of fragmenting the DNS that could result from the introduction of controversial strings.”

“While the GAC appreciates that the proposed objection procedures on ‘Morality and Public Order’ grounds included in DAGv4 was intended to satisfy the concern noted above, the GAC strongly advises the Board to replace the proposed approach to addressing objections to new gTLD applicants based on “Morality and Public Order” concerns with an alternative mechanism for addressing concerns related to objectionable strings. The terms “morality and public order” are used in various international instruments, such as the Paris Convention for the Protection of Industrial Property, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights (ICCPR). Generally, these terms are used to provide the basis for countries to either take an exemption from a treaty obligation or to establish by law limitations on rights and freedoms at the national level. Judicial decisions taken on these grounds are based on national law and vary from country to country. Accordingly, the GAC advises that using these terms as the premise for the proposed approach is flawed as it suggests that there is an internationally agreed definition of “Morality and Public Order.” This is clearly not the case.”

2.4 The AGv4 Proposal for Implementing Rec6.

ICANN Staff conducted legal research in numerous jurisdictions prior to developing standards for the implementation of Rec6. In order to provide some insight into ICANN’s reflections on this issue an Explanatory Memorandum⁷ was published by ICANN Staff in May 2009.

⁶ The GAC Letter is posted at: http://gac.icann.org/system/files/GAC_on_MoPo_August_4_2010_0.pdf.

⁷ The Explanatory Memorandum on Morality and Public Order is posted at: <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>.

A Dispute Resolution Process, as described in Module 3 to the AGv4, describes the proposed process for implementing Rec6. Excerpts of the relevant portions of the AGv4 Proposal are included in the terms of reference for the Rec6 CWG (TOR) described on **Annex 1**. Appendix B to the TOR includes a diagram illustrating the proposed Dispute Resolution Process for Rec6.

2.5 Approach Taken by the Rec6 CWG Drafting Team.

The Rec6 CWG adopted a terms of reference document (TOR) as described in **Annex A** to guide its activities.⁸ Chuck Gomes, Cheryl Langdon-Orr, and Frank March served as Co- Coordinators of the Rec6 CWG, representing each of the supporting organizations and advisory committees participating in this cross-community effort.

The Rec6 CWG did not attempt to revisit the intended aim of Rec6, nor to revisit other established recommendations. Instead, it sought to develop implementation guidelines to address the concerns expressed by the Governmental Advisory Committee (GAC) and the At-Large Advisory Committee (ALAC). Rec6 CWG aimed to develop recommendations for an effective objections procedure that both recognizes the relevance of national laws, including laws protecting freedom of expression, and effectively addresses strings that raise national, cultural, geographic, religious and/or linguistic sensitivities to the extent possible.

The Rec6 CWG commenced its activities by reviewing and analyzing the proposed implementation of Rec6 as described in the Draft Applicant Guidebook v.4 (“AGv4 Proposal”). To facilitate its work, CWG members identified a list of 16 concerns with the implementation plan in AGv4 and discussed them in an effort to identify alternative

⁸ The TOR was approved by the GNSO Council on 8 September 2010.

approaches that might serve as a better implementation model for Rec6. (See Section 3 and **Annex 3** below for a list of the 16 concerns.) The Rec6 CWG polled its members to determine initial consensus levels for the statements and recommendations pertaining to these 16 issues from 12-13 September 2010. Because the Rec6 CWG has not completed the process of assessing support levels for the proposed recommendations, the purpose of this report is to inform the ICANN community on the current status and initial observations of the Rec6 CWG. As of the date of this Status Report, the Rec6 CWG has determined the initial support levels for the recommendations and statements described in **Annex 3** for the first three issues plus 4.3. The Rec6 CWG Report will be published once the levels of support are determined for the remaining issues.

2.6 Presentation by ICANN's Legal Expert.

The Rec6 CWG invited ICANN Staff to arrange for its legal expert, Carroll Dorgan, from the global law firm Jones Day, to provide an overview of the principles that were incorporated into the AGv4 Proposal. On 7 Sept. 2010, Carroll Dorgan shared his perspective with the Rec6 CWG and answered CWG member questions.⁹

Mr. Dorgan noted that the starting point for the analysis and implementation of Recommendation 6 is the text itself. It would be preferable to use the term “principles of international law” – a term of art – rather than “international principles of law”. In addition to Recommendation 6, one should consider other relevant elements of the GNSO Report, including Principle G, the GAC Public Policy Principles, ¶ 2.1, and the NCUC Minority Statement on Recommendation 6. The issue, then, is: What generally accepted legal norms relating to morality and public order are recognized under principles of international law as the basis for limiting freedom of expression?

⁹ A transcript of Mr. Dorgan's remarks are available for review at:
<http://gns0.icann.org/meetings/transcript-cwg-07sep10-en.pdf>

Mr. Dorgan explained that treaties and other international instruments establish as general principles of international law that (a) everyone has the right to freedom of expression, and (b) freedom of expression may be subject to certain limits that are necessary to protect other important rights and interests.¹⁰ These principles are consistent with GNSO Principle G.

He further explained that morality and/or public order may be the basis for certain limits upon freedom of expression, in accordance with principles of international law that are stipulated in the international instruments mentioned above. One could refer instead to public policy (*ordre public*), a well-established legal concept. Public policy is more precise and grounded in law than “public interest”, but it remains a somewhat subjective or variable concept.

Mr. Dorgan clarified that research and consultations, as described in ICANN’s explanatory memoranda, identified certain categories of expression that are prohibited across a broad spectrum of jurisdictions (*i.e.*, that qualify as “generally accepted legal norms”). These are the standards for morality and public order objections that were included in DAGv4, § 3.4.3, along with a fourth, general category which permits the exercise of discretion within the framework of Recommendation 6.

Mr. Dorgan noted that some criticize the standards from the point of view that ICANN should not bar any string on any MAPO or public policy basis. The GAC’s criticism appears to come from another direction: The standards are insufficient to block some strings that – while falling short of the incitement standards – nonetheless offend certain protected “sensitivities”.

¹⁰ See, for example, Universal Declaration of Human Rights, Articles 19 & 29(2); International Covenant on Civil and Political Rights, Articles 19 & 20; European Convention on Human Rights, Article 10; American Convention on Human Rights, Article 13.

2.7 Members of the Rec6 CWG

The Rec6 CWG consisted of individuals representing a broad range of interests within the GNSO, GAC and At-Large Communities. The members of the Rec6 CWG are listed on **Annex 2** to this Report. Unless otherwise noted, each member of the Rec6 CWG participated in his or her personal capacity and not as a representative of any stakeholder group, constituency or stakeholder group.

The statements of interest of the Drafting Team members can be found at:

<http://gns0.icann.org/issues/new-gtlds/soi-swg-10sep10-en.htm>.

The email archives can be found at

<http://forum.icann.org/lists/soac-mapo/index.html>.

3. Description of Concerns and Recommendations for Improvements

This Section describes a summary of the issues evaluated by the Rec6 CWG and, where appropriate, the proposed recommendations to address such issues. These recommendations are supported by the members of the Rec6 CWG with various levels of support or consensus¹¹, as described below. The determinations of consensus were based on several polls that were conducted on 12-15 September 2010, involving up to 21 participants. Where no consensus was reached (as described below), instead of recommending specific changes, the Rec6 CWG offers its views and asks for the current language to be re-assessed in light of those views. The chart below includes a brief

¹¹ The Rec6 CWG has adopted the following classifications of consensus: Full consensus – a position where no minority disagrees· Consensus - a position where a small minority disagrees but most agree· No consensus but strong support for a specific position/recommendation but significant opposition· Divergence – no strong support for a specific position/recommendation.

summary of the recommendations from the Rec6 CWG. A detailed description of the issues and the full text of the recommendations are described **in Annex 2.**

| Rec. No. and Level of Support | Issue | Recommendation |
|------------------------------------|--|--|
| 1 | Definition of the 'Morality' & 'Public Order Objection' in AGv4 | |
| 1.1 Full Consensus | Change Name of Objection | ICANN should remove the references to Morality & Public Order in the Draft Applicant Guidebook as far as these are being used as an international standard and replace them with a new term. Further details about what is meant with the new term would need to be worked out to ensure that it does not create any confusion or contravene other existing principles such as GNSO New gTLD's Principle G and Recommendation 1. |
| 1.2 Full Consensus | New Name | The name of the Rec6 objection should not be "Morality and Public Order." The Rec6 CWG identified the following alternative names for consideration, with varying levels of support: |
| No Consensus-Strong Support | | "Objections Based on General Principles of International Law" |
| Divergence | | "Objections based on the General Principles of Ordre Public or International Law" |
| Divergence | | "Public Interest Objections" |
| Divergence | | "Objections Based on the Principles of Ordre Public" |
| 2 | International Principles of Law | |
| 2.1 Full Consensus | Other treaties | ICANN should seriously consider adding other treaties as examples in the Draft Applicant Guidebook, noting that these should serve as examples and not be interpreted as an exhaustive list. For example, the following treaties could be referenced: |
| | | <ul style="list-style-type: none"> • Universal Declaration of Human Rights (1948) |
| | | <ul style="list-style-type: none"> • Declaration on the Elimination of Violence against Women |
| | | <ul style="list-style-type: none"> • International Covenant on Economic, Social and Cultural Rights (1966) |

| Rec. No. and Level of Support | Issue | Recommendation |
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| | | <ul style="list-style-type: none"> • International Covenant on Civil and Political Rights (1966) |
| | | <ul style="list-style-type: none"> • Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) |
| | | <ul style="list-style-type: none"> • International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990) |
| | | <ul style="list-style-type: none"> • Convention on the Elimination of all Forms of Discrimination against Women (1979) |
| | | <ul style="list-style-type: none"> • Slavery Convention |
| | | <ul style="list-style-type: none"> • Convention on the Prevention and Punishment of the Crime of Genocide |
| | | <ul style="list-style-type: none"> • International Convention on the Elimination of All Forms of Racial Discrimination (1966) |
| | | <ul style="list-style-type: none"> • Convention on the Rights of the Child (1989) |
| <p>2.2 Full Consensus</p> | <p>AGB Revision</p> | <p>The AGB should refer to “principles of international law” instead of “international principles of law.”</p> |

| Rec. No. and Level of Support | Issue | Recommendation |
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| 2.3 No Consensus – Strong Support | Gov't Objection for National Law (alternative) | The Applicant Guidebook should allow individual governments to file a notification (not an objection) that a proposed TLD string is contrary to their national law. The intention is that an "objection" indicates an intent to block, but a "notification" is not an attempt to block, but a notification to the applicant and the public that the proposed string is contrary to the government's perceived national interest. However, a national law objection by itself should not provide sufficient basis for a decision to deny a TLD application. |
| 2.4 No Consensus- Strong Support | Gov't Objection for National Law (alternative) | The Applicant Guidebook should not include as a valid ground for a Rec6 objection, an objection by an individual government based on national public interest concerns that are specified by the objection government as being contrary to national laws that are not based on international principles. |
| 2.5 Divergence | Gov't Objection for National Law | If individual governments have objections based on contradiction with specific national laws, such objections should be submitted through the Community Objections procedure. |

| Rec. No. and Level of Support | Issue | Recommendation |
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| 3 | Quick Look Procedure | |
| 3.1 No Consensus- Strong Support | Explicit Guidelines | Further and more explicit guidelines needed, such as common examples from a substantial number of jurisdictions where the term “manifestly” has been defined through judicial decisions, and in particular where such analysis was in the context of disputes relating to Principles of Ordre Public (or whatever term is used per Rec. 1.2), be added to the Quick Look Procedure. |
| 3.2 Consensus | Standards for an Abusive Objection | Further guidance as to the standards to determine what constitutes an abusive objection is needed and consideration of possible sanctions or other safeguards for discouraging such abuses.. |
| 3.3 Consensus | National Law not a valid ground for an objection | In determining whether an objection passes the quick look test, there should be an evaluation of the grounds for the objection to see if they are valid. National law not based on international principles should not be a valid ground for an objection. |

| Rec. No. and Level of Support | Issue | Recommendation |
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| 4 | Outsourcing of Dispute Resolution Process | |
| 4.1 [New language is being explored for this item.] | Role of Dispute Provider | In addition to the Board's ability to seek external expert advice under Article XI.A of the Bylaws, it may appoint a third party entity to administer the purely procedural aspects of an objection that has been filed. Such a provider shall be appointed under contract for a fixed period of time appropriate for the application timetable. It shall not provide expert advice nor recommendations regarding the outcome of an objection, although it may, if requested by the Board, assist in seeking appropriate international law experts for particular objections. As in all other areas of ICANN policy, the Board will ultimately decide whether to adopt or reject the advice of any external experts it consults in relation to an objection. |
| 4.2 [New language is being explored for this item.] | Board Consultation with Experts | Ultimate decision on the admissibility of a TLD subject to a Rec6 objection rests with the Board alone and may not be delegated to a third party. Under its authority to obtain independent expertise as stated in Article XI-A of the ICANN Bylaws, the Rec6 WG encourages the Board to contract or assemble appropriate resources capable of providing objective advice on the applicability of principles of international law, in regard to objections received through this process. |
| 4.3 No Consensus-Strong Support | Name of Process | This process for Rec6 objections should not be referred to as a Dispute Resolution Process. |

| Rec. No. and Level of Support | Issue | Recommendation |
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| 5 | Threshold for Board decisions to reject an application based on objections | |
| 5.1 (4/21) | Supermajority vote | A supermajority board approval should be required in instances where the Board votes against the advice of the experts with respect to Rec6 issues. |
| 5.2 (14/21) | Supermajority vote (alternative) | A supermajority board approval should be required in instances where the Board votes to reject a new gTLD application due to Rec6 issues. The normal voting thresholds should otherwise apply to Board decisions related to Rec6. |
| 6. | Expertise of the ICC as DRSP | |
| 6.1 (13/21) | Objection to ICC | The Centre of Expertise of the ICC is not the appropriate body to act as the Dispute Resolution Provider (DRSP) for the resolution of disputes relating to ‘morality and public order’, due to its historically commercial connotation and association. |
| 6.2 (2/21) | Acceptability of ICC | The International Centre of Expertise is part of the ICC but not necessarily affiliated with the types of disputes that the ICC is mandated to decide. |
| 6.3 (14/21) | PCA as an Alternative | One entity that could be assigned to hear disputes arising out of ‘morality and public order’ could be the Permanent Court of Arbitration, which is a Treaty-established organization. |

| Rec. No. and Level of Support | Issue | Recommendation |
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| 6.4 (20/21) | Expertise | Where objections relating to ‘morality and public order’ are raised and require a dispute resolution process, these should be carried by adjudicators and entities that have an expertise in interpreting law instruments of public international law and relating to human right and/or civil liberties. |
| 7. Incitement to discrimination criterion | | |
| 7.1 (21/21) | Revision to Criteria | This criteria should be retained, but rephrased as follows: “Incitement to and instigation of discrimination based upon race, age, color, disability, gender, actual or perceived sexual orientation or gender identity, political or other opinion, ethnicity, religion, or national origin.” |
| 8. The use of ‘incitement’ as a term for the determination of morality and public order. | | |
| 8.1 (7/21) | "Incitement" is acceptable | The use of the phrase “incitement to” is acceptable because it is used in international treaties to address Rec6 concerns and so can provide guidance as to the meaning of the term in application. However, using “promotion of” should be eliminated. |
| 8.2 (17/21) | "Incitement" is not acceptable (alternative) | The use of the word “incitement” should be supplemented with the term “instigation.” Although the term ‘incitement’ is used in international law treaties, its interpretation invites the application of a variety of criteria, which are impossible to be addressed when evaluating gTLD strings. |
| 8.3 (20/21) | Replace "incitement" | The new proposed language could read: |
| | | <ul style="list-style-type: none"> • Incitement and instigation to violent lawless action; |

| Rec. No. and Level of Support | Issue | Recommendation |
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| | | <ul style="list-style-type: none"> • Incitement and instigation to discrimination, based upon ... |
| | | <ul style="list-style-type: none"> • Incitement and instigation to child pornography or other sexual abuse of children. |
| 9. String only? | | |
| 9.1 (18/21) | Analysis based only on string | The DRSP should conduct its analysis on the basis of the string itself only. It could, if needed, use as additional context the intended purpose of the TLD as stated in the application. |
| 10. Universal Accessibility Objective with Limited Exceptions | | |
| 10.1 (20/21) | Limiting Blocking of TLDS | The Rec6 CWB hopes that the mechanisms it proposes in this Report will help limit blocking of whole TLDs at the national level. Blocking of TLDS should remain exceptional and be established by due legal process. The group also recognized that reduced blocking of TLDs is of little value if the result is that the opportunity to create new TLDs is unduly constrained by an objection process. The absence of blocking is of little value if it creates a name space that does not reflect the true diversity of ideas, cultures and views on the Internet. |

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| 11. Independent Objector | | |
| 11.1 (17/21) | Modifications to role of IO | <p>The Rec6 CWG proposes modifications to the mandate and function of the Independent Objector as described in section 3.1.5, without changing its scope. Unlike the current intention as expressed in the AGv4, it is suggested that the Independent Objector may not initiate an objection against a string if no community or government entity has expressed an interest in doing so. A valid Independent Objector objection must be tied to a specific party who claims it will be harmed if the gTLD is approved. The Independent Objector must not encourage communities or governments to file objections, however the Independent Objector should be mandated to:</p> |
| | | 1. Provide procedural assistance to groups unfamiliar with ICANN or its processes that wish to register an objection; |
| | | 2. Receive, register and publish all objections submitted to it by bonafide communities and governments of all levels (which can demonstrate direct impact by the proposed application); |
| | | 3. Perform a "Quick look" evaluation on objections against a specific set of criteria of what is globally objectionable, to determine which ones are to be forwarded to the Board for consideration as legitimate challenges to applications; |
| | | 4. Be given standing for objections which survive "Quick Look" evaluation, but whose backers lack the financial resources and/or administrative skills necessary to process their objections; |

| Rec. No. and Level of Support | Issue | Recommendation |
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| | | <p>The scope of the Independent Objector -- limited to filing objections based only on Community and Public Policy grounds -- is unchanged from the current AGB. Applications processed by/through ALAC or the GAC are not required to use this process. Organizations using this process will be expected to pay a fee to register objections, though this may be waived for small groups without sufficient financial means.</p> |
| | | <p>As the potential exists for the position of Independent Objector to be misused to harass or impede a legitimate applicant, special attention must be given to the transparency of the Independent Objector's actions. All correspondence is by default open and public unless required otherwise to protect privacy or other rights.</p> |
| | | <p>The "independence" of the Independent Objector relates to the role's unaffiliation with any applicant or contracted party. The Independent Objector role remains accountable to ICANN with regards to its integrity and fairness.</p> |
| <p>12. Timing of Rec6 Dispute Resolution</p> | | |
| <p>12.1 (10/21)</p> | <p>Early Resolutions</p> | <p>Applicants should be encouraged to attempt to identify possible sensitivities before applying and where possible try to consult with interested parties that might be concerned about those sensitivities to see how serious the concerns are and to possibly mitigate them in advance.</p> |
| <p>12.2 (21/21)</p> | | <p>The dispute resolution process for Rec. 6 objections should be resolved sooner in the process to minimize costs.</p> |
| <p>12.3 (21/21)</p> | | <p>Applicants should be informed of Rec6 complaints as early as possible to allow applicants to decide whether they want to pursue the string.</p> |

| Rec. No. and Level of Support | Issue | Recommendation |
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| 13. Standing of Governments to file objections | | |
| 13.1 (15/21) | Gov'ts to use same Process | Governments should be granted the opportunity to file community objections to any type of application (community or otherwise). Any country (as well as any province, state or city) may file an objection, but that must go through the same process as any other community objection. |
| 13.2 (13/21) | Gov'ts to use same Process and Standards (alternative) | Governments should be granted the opportunity to file community objections to any type of application (community or otherwise). Any country (as well as any province, state or city) may file an objection, but that must go through the same process as any other community objection, and meet the same standard for eligibility and same criteria for validity as any other objector. |
| 14. Expanded use of the Community Objections. | | |
| 14.1 (17/21) | Clarification of Fees | The fee structure for governments to file community objections should be clarified, for both the objector and the responder. |
| 14.2 (17/21) | Available to At-Large and GAC | In addition to, or instead of, an 'Objection Based on General Principles of International Law' (note: or whatever new title is chosen per Recommendation 1.2) ICANN GAC and At-Large Advisory Committees or their individual governments in the case of the GAC have the possibility to use the 'Community Objection' procedure. A "Community Objection" can be filed if there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted. The CWG recommends that the fees for such objections by the GAC or the At-Large Advisory Committees be lowered or removed. |

| Rec. No. and Level of Support | Issue | Recommendation |
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| 14.2 (9/21) | Lower Threshold for At-Large and GAC | ICANN should consider looking into a slight lowering of this threshold for Objections from the GAC or At-Large Advisory Committees. Staff should explore ways to reasonably lower the required standard for a successful At-Large or GAC Advisory Committee objection in the areas of standing (3.1.2.4), level of community opposition (3.4.4) or likelihood of detriment (3.4.4). |
| 14.3 (19/21) | No Fees for At-Large and GAC | ICANN Advisory Committees should be able to file an objection based on Rec 6 without paying a fee and any responses to such objection would also be allowed without fees. Any other governmental objection should be accompanied with the same filing/responding fees as applicable to other objections. |
| 15. Guidebook Criterion 4. | | |
| 15.1 (14/21) | Necessary | Criterion 4 is needed in addition to the Community Objection. However, the current language should be revised to read: "A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international treaties." |
| 15.2 (14/21) | Not Necessary (alternative) | Criterion 4 is no longer needed. |
| 16 Next Steps for Rec6. | | |
| 16.1 (19/21) | | The Rec6 CWG recommends that the ICANN New gTLD Implementation Team form a Recommendation 6 Community Implementation Support Team (Rec6 CIST) to provide input to ICANN Implementation Staff as they further refine implementation details for Recommendation 6. |

4. Recommended Next Steps.

Given the short duration of the Rec6 CWG's existence, the participating supporting organizations and advisory organizations have not been provided with the opportunity to review and comment on this Status Report. Once the Rec6 CWG has published its Report upon the conclusion of its work, each participating organization should follow its procedures as described in the ICANN Bylaws as may be necessary or appropriate to comment on and communicate to the ICANN Board the opinion of its members with regard to the recommendations contained in that Report. The CWG may recommend that a public comment period be opened after submission of its Report.

Annex 1

Terms of Reference for the Rec6 CWG

References

1. GNSO Final Report – Introduction of New gTLDs: <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (Note recommendation 6 in the section titled ‘SUMMARY -- PRINCIPLES, RECOMMENDATIONS & IMPLEMENTATION GUIDELINES’ as well as the ‘Recommendation 6 Discussion’ found later in the section titled ‘TERM OF REFERENCE -- SELECTION CRITERIA’.
2. New gTLDs Draft Applicant Guidebook, version 4: <http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm> (Note the portions of Module 3, Dispute Resolution Procedures, relating to new gTLD recommendation 6.)
3. Letter from Heather Dryden, GAC Chair, to Peter Dengate Thrush dated 4 August 2010 regarding Procedures for Addressing Culturally Objectionable and/or Sensitive Strings: <http://www.icann.org/correspondence/gac-to-dengate-thrush-04aug10-en.pdf>
4. GAC Principles Regarding New gTLDs, March 2007: <http://gac.icann.org/gac-documents>
5. ICANN’s Articles of Incorporation: <http://www.icann.org/en/general/articles.htm>
6. ALAC Statement (Objection) on Morality and Public Order, 4 March 2009 (p. 14): <http://www.atlarge.icann.org/files/atlarge/correspondence-05mar09-en.pdf>
7. NCUC Minority Statement on Recommendation 6 of the New gTLD Report: http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc48210873
8. The explanatory memorandum: <http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>
9. The description of research performed: <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>

Name of the Group

The name of the group shall be 'New gTLD Recommendation 6 Community Working Group' or 'Rec6 CWG' for short.

Purpose of the Working Group

The purpose of the Rec6 CWG is to provide guidance to the ICANN new gTLD Implementation Team and the ICANN Board with regard to the implementation of recommendation 6 regarding procedures for addressing culturally objectionable and/or sensitive strings, while protecting internationally recognized freedom of expression rights. The purpose is not to revisit the intended aim of recommendation 6 nor to revisit other established recommendations, but rather to develop implementation guidelines that will address the concerns expressed by the Governmental Advisory Committee (GAC), including the objective of universal resolvability of the DNS; and the At Large Advisory Committee (ALAC), without affecting the objectivity of the evaluation process (as noted in Principle 1 of Reference Document 1 above, the GNSO Final Report on the Introduction of new gTLDs), established rights (as noted in Principle G, Reference Document 1), and the stability and integrity of the DNS (as noted in Recommendation 4, reference document 1).

Working Group Tasks

The Rec6 CWG is asked to attempt to perform the following tasks:

The overall objective of the Rec6 CWG is to develop recommendations for an effective objections procedure that both recognizes the relevance of national laws, including laws protecting freedom of expression, and effectively addresses strings that raise national, cultural, geographic, religious and/or linguistic sensitivities to the extent possible. Specific tasks are to:

1. Review the terminology and the dispute resolution procedures related to recommendation 6 in the new gTLD Draft Applicant Guidebook, version 4. (For convenience, relevant excerpts of the guidebook are included in Appendix A and a flow chart of the dispute process is included in Appendix B.)
2. Deliver a report with any recommendations to the ICANN Board.

Key Assumptions

The following assumptions should guide the work of the Rec6 CWG:

- i. Recommendation 6 raises public policy issues.
- ii. No one solution may satisfy all stakeholders because there are strongly divergent views on the underlying issues that recommendation 6 seeks to address.
- iii. This is not a policy development process as defined in the ICANN Bylaws but rather an effort to explore ways of improving the implementation plan of recommendation 6 in response to GAC and ALAC concerns.
- iv. There is no internationally agreed definition of "Morality and Public Order", nor of national, cultural, geographic, religious and linguistic sensitivities.
- v. ICANN should conduct its activities in conformity with relevant principles of international law and applicable international conventions.

Rules of Engagement

The following rule should guide the operation of the Rec6 CWG: Exchanges should be focused on identifying common objectives and seeking effective solutions rather than repeating previous exchanges or revisiting the initial rationale for Recommendation 6, taking into account any relevant element identified since Rec6 was passed.

Group Membership & Leadership

The Rec6 CWG will be open to volunteers from all ICANN Supporting Organizations (SOs) and Advisory Committees (ACs) who are willing to constructively contribute to the tasks of the group including individuals. Participants will engage in their individual capacities unless

otherwise stated. The chairs of the ALAC, GAC and GNSO Council or their designees will serve as co-chairs of the Rec6 CWG.

ICANN will provide:

- A designated staff support person to assist the group
- A representative from the ICANN new gTLD implementation team
- Administrative support
- A publicly archived email list
- A public wiki site and/or other tools as needed

The ALAC, GAC and GNSO Council must identify at least one person who will serve as a primary liaison between the Rec6 CWG and their respective organizations. Other SO's and AC's may also identify a liaison if desired.

Operational Guidelines & Timeline

In general, the working group should operate using a rough consensus approach. Every effort should be made to arrive at positions that most or all of the group members are willing to support. The final report should accommodate minority positions if some actors cannot accept the rough consensus position. To the extent possible any recommendations produced should be commented on by the ALAC, GAC and GNSO Council.

The Rec6 CWG should deliver a report with comments from the ALAC, GAC and GNSO Council not later than 13 September 2010 to meet the 11-day advance publication that the Board requests for its retreat on new gTLDs.

After submission of the report, the CWG will review what, if anything, remains to be done on the defined tasks and will communicate that to the ALAC, GAC and GNSO Council.

Appendix A

Relevant Excerpts from New gTLD Applicant Guidebook, v.4, Module 3

The following excerpts related to recommendation 6 are taken from the New gTLDs Draft Applicant Guidebook, version 4, module 3.

3.1.1 Grounds for Objection

An objection may be filed on any one of the following four grounds:

. . .

Morality and Public Order Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law.

. . .

3.1.2.3 Morality and Public Order Objection

Anyone may file a Morality and Public Order Objection. Due to the inclusive standing base, however, objectors are subject to a “quick look” procedure designed to identify and eliminate frivolous and/or abusive objections. An objection found to be manifestly unfounded and/or an abuse of the right to object may be dismissed at any time. For more information on the “Quick Look” procedure, refer to the accompanying Explanatory Memorandum.

. . .

3.1.3 Dispute Resolution Service Providers

To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date, directly with the appropriate DRSP for each objection ground.

. . .

- The International Center of Expertise of the International Chamber of Commerce has agreed in principle to administer disputes brought pursuant to Morality and Public Order and Community Objections.

. . .

3.1.5 Independent Objector

A formal objection to a gTLD application may also be filed by the Independent Objector (IO). The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet. In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Morality and Public Order and Community. Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.

Mandate and Scope - The IO may file objections against “highly objectionable” gTLD applications to which no objection has been filed. The IO is limited to filing two types of objections: (1) Morality and Public Order objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections (see subsection 3.1.2). The IO may file a Morality and Public Order objection against an application even if a Community objection has been filed, and vice versa. The IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed. Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground. The IO may consider public comment when making an independent assessment whether an objection is warranted. The IO will have access to comments from the appropriate time period, running through the Initial Evaluation period until the close of the deadline for the IO to submit an objection.

Selection – The IO will be selected by ICANN, through an open and transparent process, and retained as an independent consultant. The Independent Objector will be an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant. Although recommendations for IO candidates from the community are welcomed, the IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence. The IO’s (renewable) tenure is limited to the time necessary to carry out his/her duties in connection with a single round of gTLD applications.

. . .

For a Morality and Public Order Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce.

. . .

3.4.3 Morality and Public Order Objection

An expert panel hearing a morality and public order objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order, as reflected in relevant international agreements. Under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply. The grounds upon which an applied-for gTLD string may be considered contrary to morality and public order according to internationally recognized standards are:

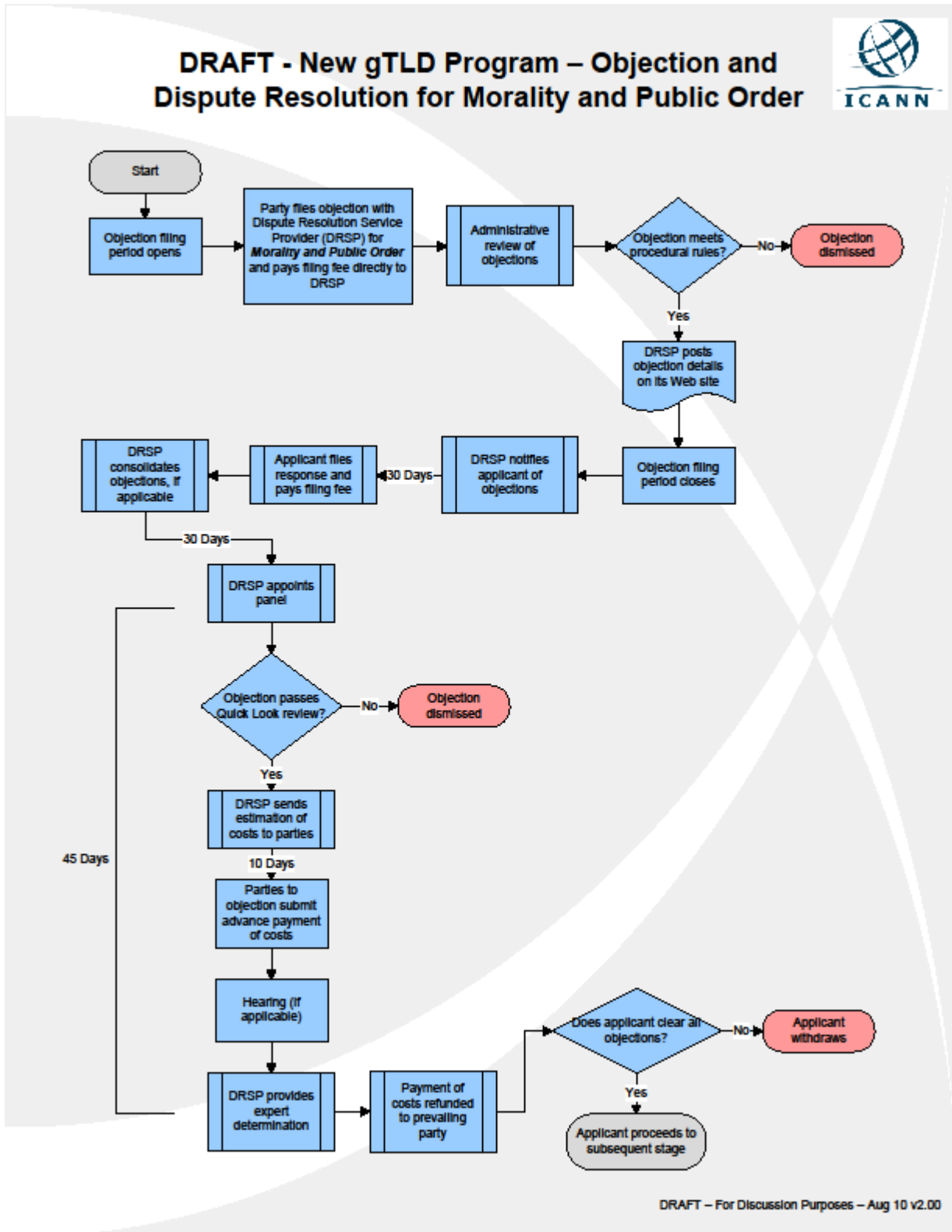
- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin;

- Incitement to or promotion of child pornography or other sexual abuse of children; or
- A determination that an applied-for gTLD string would be contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law.

GNSO New gTLD Recommendations Principle G:

“The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.”

Appendix B



Annex 2

Members of the Rec6 CWG

ALAC

Cheryl Langdon Orr - ALAC chair
Alan Greenberg - ALAC
Sebastien Bachollet - ALAC
Olivier Crépin-Leblond – At Large
Dave Kissoondoyal – At Large
Carlton Samuels – At Large
Evan Leibovitch – ALAC
Sivasubramanian Muthusamy – At Large

Commercial Stakeholder Group

Marilyn Cade - CBUC
Zahid Jamil - CBUC
Jon Nevett - CBUC
Philip Sheppard - CBUC
Jaime Wagner – ISPCP
Tony Harris - ISPCP

Non Commercial Stakeholder group

Avri Doria
William Drake
Mary Wong
Milton Mueller
Konstantinus Komaitis
Robin Gross

Registrars Stakeholder Group

Stephane van Gelder - RrSG GNSO Council vice chair
Graham Chynoweth - RrSG
Michele Neylon - RrSG
Tony Kirsch – RrSG
Krista Papac - RrSG

Registries Stakeholder Group

Chuck Gomes – GNSO Council chair
Edmon Chung
Caroline Greer
David Maher
Ken Stubbs

Nominating Committee Appointees

Olga Cavalli - GNSO Council vice chair
Terry Davis
Andrei Kolesnikov

Individuals

Richard Tindal
Anthony van Couvering
Dirk Krischenowski
Jothan Frakes
Steve Pinkos
Stuart Lawly
Paul Stahura
Daniel Schindler
Elaine Pruis – MindsandMachines
Jim Galway
Iren Borisssova - Verisign

Vanda Scartezini - ICANN Board

GAC

Heather Dryden - Interim GAC Chair - Canada
Bertrand de la Chapelle – GAC – French representative
Frank March – GAC – New Zealand Representative

Suzanne Sene – GAC – USA Representative

Tamara Sone – GAC - Canada

*Liang Wang – GAC - China

*Mark Carvell – GAC – UK Representative

*Syed Iftikhar Hussain – GAC - Analyst, Ministry of Information Technology
Government of Pakistan

Annex 3

Detailed Description of the Issues/Recommendations

This Annex describes the issues evaluated by the Rec6 CWG and, where appropriate, the proposed recommendations to address such issues. These recommendations are supported by the members of the Rec6 CWG with various levels of support or consensus¹², as described in the Chart included in Section 3 of the Report. A detailed description of the issues and the full text of the issues, recommendations, and statements analyzed by the Rec5 CWG are described below.

1. Definition of the ‘Morality’ & ‘Public Order Objection’ in AGv4.

Issue: The Rec6 CWG objects to definition of the phrase “Morality and Public Order Objection.” In AGv4, this is defined as follows:

“Morality and Public Order Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law.”

This proposal incorrectly implies that there are generally accepted legal norms that are recognized under international law.

Recommendation 1.1: ICANN should remove the references to Morality & Public Order in the Draft Applicant Guidebook as far as these are being used as an international standard and replace them with a new term. Further details about what is meant with the new term

¹² The Rec6 CWG has adopted the following classifications of consensus: Full consensus – a position where no minority disagrees· Consensus - a position where a small minority disagrees but most agree· No consensus but strong support for a specific position/recommendation but significant opposition· Divergence – no strong support for a specific position/recommendation.

would need to be worked out to ensure that it does not create any confusion or contravene other existing principles such as GNSO New gTLD's Principle G and Recommendation 1.

Recommendation 1.2: The name of the Rec6 objection should not be "Morality and Public Order." The Rec6 CWG identified the following alternative names for consideration, with varying levels of support:

- a. "Objections Based on the Principles of Ordre Public"
- b. "Objections Based on General Principles of International Law"
- c. "Objections based on the General Principles of Ordre Public or International Law"
- d. "Public Interest Objections"

Explanation of Divergence: Some Rec6 CWG members prefer "Objections Based on the Principles of Ordre Public" because this term used within various jurisdictions, including, but not limited, to the European Union and the Anglo-Saxon systems. Since the English translations of this term do not appropriately capture the nature of 'ordre public', the full meaning of this term is lost in translation. Others prefer the English translations, noting that legal training should not be necessary to understand the requirements of the Applicant Guidebook. Since the Applicant Guidebook is an English language document, using the English language may be preferable.

2. International Principles of Law.

Issue: The phrase "international principles of law" is nebulous and ill-defined.

Recommendation No. 2.1: ICANN should seriously consider adding other treaties as examples in the Draft Applicant Guidebook, noting that these should serve as examples and not be interpreted as an exhaustive list. For example, the following treaties could be referenced:

- Universal Declaration of Human Rights (1948)
- Declaration on the Elimination of Violence against Women

- International Covenant on Economic, Social and Cultural Rights (1966)
- International Covenant on Civil and Political Rights (1966)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990)
- Convention on the Elimination of all Forms of Discrimination against Women (1979)
- Slavery Convention
- Convention on the Prevention and Punishment of the Crime of Genocide
- International Convention on the Elimination of All Forms of Racial Discrimination (1966)
- Convention on the Rights of the Child (1989)

Recommendation No 2.2: The Applicant Guidebook should refer to “principles of international law” instead of “international principles of law.”

Recommendation No. 2.3: The Applicant Guidebook should allow individual governments to file a notification (not an objection) that a proposed TLD string is contrary to their national law. The intention is that an "objection" indicates an intent to block, but a "notification" is not an attempt to block, but a notification to the applicant and the public that the proposed string is contrary to the government's perceived national interest. However, a national law objection by itself should not provide sufficient basis for a decision to deny a TLD application. .

Recommendation No. 2.4: The Applicant Guidebook should **not** include as a valid ground for a Rec6 objection, an objection by an individual government based on national public interest concerns that are specified by the objection government as being contrary to national laws that are not based on international principles.

Recommendation No. 2.5: If individual governments have objections based on contradiction with specific national laws, such objections should be submitted through the Community Objections procedure.

Explanation for Divergence: Some Rec CWG members disagree with Recommendation 2.5. They point out that it may contravene some national laws to deny an application based on criteria that are not illegal in the TLD applicant's (or target market's) country. Those that disagree with Recommendation 2.5 point out the fact that national laws conflict. Allowing Recommendation 2.5 may give 220 different entities veto power and the right to contravene the freedoms guaranteed by law in other countries.

3. Quick Look Procedure.

Issue: The current Quick Look Procedure in AGv4 is intended to enable the “expeditious review of objections and, where appropriate, the dismissal of objections that are frivolous or abusive¹³.” While the Rec 6 CWG believes the existence of a Quick Look Procedure can be useful, the concerns outlined below were raised by some members and relate to the use of the terms “manifestly” and “abusive.”

While the dictionary use of the term “manifestly” may be generally understood¹⁴, there are currently no guidelines other than some illustrative examples for a panel to determine the standard that would apply in order for an objection to be declared manifestly frivolous or abusive (or otherwise). This can create uncertainty for potential applicants for controversial strings, especially where such strings can be considered objectionable only to certain groups.

¹³Explanatory Memorandum on the Quick Look Procedure issued by ICANN staff, dated 28 May 2010.

¹⁴E.g. the Merriam-Webster Dictionary defines “manifest” as that which is “readily perceived by the senses and especially by the sight”, or “easily understood or recognized by the mind” (and thus synonymous with the word “obvious”).

Concerns were also expressed by some members of the Rec 6 CWG over the possibility of certain objectors “outspending” applicants in filing multiple objections, and whether such acts would constitute “abuse of the right to object”¹⁵.

Recommendation 3.1: The Rec 6 CWG recommends that further and more explicit guidelines, such as common examples from a substantial number of jurisdictions where the term “manifestly” has been defined through judicial decisions, and in particular where such analysis was in the context of disputes relating to Principles of Ordre Public (or whatever term is used per Rec. 1.2), be added to the Quick Look Procedure.

Recommendation 3.2: Further guidance as to the standards to determine what constitutes an abusive objection is needed, and consideration of possible sanctions or other safeguards for discouraging such abuses.

Recommendation 3.3: In determining whether an objection passes the quick look test, there should be an evaluation of the grounds for the objection to see if they are valid. National law not based on international principles should not be a valid ground for an objection.

4. Outsourcing of Dispute Resolution Process

¹⁵ For example, if the application is for a controversial string and numerous groups, after consultation with one another, each file objections to it, would this constitute harassment of the applicant (as envisaged under the current Quick Look Procedure)? If not, would these objections be consolidated pursuant to Section 3.3.2 of AGv4, and, if so, does this mean that the applicant would either not have to pay, or would pay only a single, lower, fee to respond to the consolidated objections? Under Section 3.3.2 of AGv4, it is the DRSP which determines whether to consolidate and as such this is done prior to the appointment of a Panel and thus before the Quick Look Procedure applies.

Issue: Outsourcing the dispute resolution process for objections to a third party provider raises the concern that the third party may be viewed as unaccountable and as circumventing the ICANN Board's ultimate responsibility for the decisions to approve/reject a new gTLD.

Recommendation 4.1: In addition to the Board's ability to seek external expert advice under Article XI.A of the Bylaws, it may appoint a third party entity to administer the purely procedural aspects of an objection that has been filed. Such a provider shall be appointed under contract for a fixed period of time appropriate for the application timetable. It shall not provide expert advice nor recommendations regarding the outcome of an objection, although it may, if requested by the Board, assist in seeking appropriate international law experts for particular objections. As in all other areas of ICANN policy, the Board will ultimately decide whether to adopt or reject the advice of any external experts it consults in relation to an objection.

Recommendation 4.2: Ultimate decision on the admissibility of a TLD subject to a Rec6 objection rests with the Board alone and may not be delegated to a third party. Under its authority to obtain independent expertise as stated in Article XI-A of the ICANN Bylaws, the WG encourages the Board to contract or assemble appropriate resources capable of providing objective advice on the applicability of principles of international law, in regard to objections received through this process.

Recommendation 4.3: This process for Rec6 objections should not be referred to as a Dispute Resolution Process.

5. Threshold for Board decisions to reject an application based on objections.

Issue: Should there be a higher threshold for approving or rejecting third party objections to TLD applications?

Recommendation 5.1: A supermajority board approval should be required in instances where the Board votes against the advice of the experts with respect to Rec6 issues.

Recommendation 5.2: A supermajority board approval should be required in instances where the Board votes to reject a new gTLD application due to Rec6 issues. The normal voting thresholds should otherwise apply to Board decisions related to Rec6.

6. Expertise of the ICC as DRSP

Issue: The Rec6 CWG debated whether the International Centre of Expertise of the ICC is the appropriate entity to serve as the third party provider to provide dispute resolution services for Rec6 issues.

Statement 6.1: The Centre of Expertise of the ICC is not the appropriate body to act as the Dispute Resolution Provider (DRSP) for the resolution of disputes relating to ‘morality and public order’, due to its historically commercial connotation and association.

Statement 6.2: The International Centre of Expertise is part of the ICC but not necessarily affiliated with the types of disputes that the ICC is mandate to decide.

Statement 6.3: One entity that could be assigned to hear disputes arising out of ‘morality and public order’ could be the Permanent Court of Arbitration, which is a Treaty-established organization.

Recommendation 6.4: Where objections relating to ‘morality and public order’ are raised and require a dispute resolution process, these should be carried by adjudicators and entities that have an expertise in interpreting law instruments of public international law and relating to human right and/or civil liberties.

Explanation of Divergence:

The main fear expressed has been that the Centre of Expertise of the ICC has a limited mandate to resolve disputes that are commercial in nature. (“Created in 1976, the ICC

International Centre for Expertise has built up unique access to experts in every conceivable subject relevant to business operations.”

<http://www.uscib.org/index.asp?documentID=3261#Created>). Various views were expressed that freedom of expression and ‘morality and public order’ are not forms of commercial arbitration; therefore, the ICC is not the appropriate venue. The PCA’s “caseload reflects the breadth of PCA involvement in international dispute resolution, encompassing territorial, treaty, and human rights disputes between states, as well as commercial and investment disputes, including disputes arising under bilateral and multilateral investment treaties - http://www.pca-cpa.org/showpage.asp?pag_id=1027” .

However, some Rec6 CWG members expressed discomfort with making statements about the capacity of a specific service provider, without first engaging in a dialogue with the provider. It may be preferable to provide guidance as to what qualities ICANN should seek when selecting the DRSP. This could serve to guide the Board in its choice of DRSP and guide the DRSP in its implementation.

7. Incitement to discrimination criterion.

Issue: The Rec6 CWG explored whether incitement to discriminate should be a criteria to be evaluated with respect to a new gTLD string. The AGv4 provides:

“Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin;”

Recommendation 7.1: This criterion should be retained, but rephrased as follows:

“Incitement to and instigation of discrimination based upon race, age, color, disability, gender, actual or perceived sexual orientation or gender identity, political or other opinion, ethnicity, religion, or national origin.”

8. The use of ‘incitement’ as a term for the determination of morality and public order.

Issue: The Rec6 CWG explored whether the existence of new gTLD string can ever lead to incitement that should trigger a Rec6 objection. As a result, replacement of the word “incite” or “incitement” was examined.

Statement 8.1: The use of the phrase “incitement to” is acceptable because it is used in international treaties to address Rec6 concerns and so can provide guidance as to the meaning of the term in application. However, using “promotion of” should be eliminated.

Statement 8.2: The use of the word “incitement” should be supplemented with the term “instigation.” Although the term ‘incitement’ is used in international law treaties, its interpretation invites the application of a variety of criteria, which are impossible to be addressed when evaluating gTLD strings.

Statement 8.3: The current language for ‘incitement’ states:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin;
- Incitement to or promotion of child pornography or other sexual abuse of children;
or

The new proposed language could read:

- **Incitement and instigation to** violent lawless action;
- **Incitement and instigation to** discrimination based upon.....
- **Incitement and instigation to** child pornography or other sexual abuse of children.

9. String only?

Issue: The Rec6 CWG evaluated whether Rec6 objections should be judged only on the basis of the string proposed, not on other factors such as who the applicant is, how they are

proposing to use the string (content), etc. In order to do so, the Rec6 CWG is concerned that ICANN may be delving into issues of content of the websites. Evaluating content may be outside the scope of ICANN's technical mandate.

Recommendation 9.1: The DRSP should conduct its analysis on the basis of the string itself only. It could, if needed, use as additional context the intended purpose of the TLD as stated in the application.

10. Universal Accessibility Objective with Limited Exceptions.

Issue: The Rec6 CWG evaluated whether selective blocking by countries that object to a string due to morality and public order concerns would lead to new gTLDs not being universally accessible.

Statement 10.1: The Rec6 CWB hopes that the mechanisms it proposes in this report will help limit blocking of whole TLDs at the national level. Blocking of TLDs should remain exceptional and be established by due legal process. The group also recognized that reduced blocking of TLDs is of little value if the result is that the opportunity to create new TLDs is unduly constrained by an objection process. The absence of blocking is of little value if it creates a name space that does not reflect the true diversity of ideas, cultures and views on the Internet.

11. Independent Objector.

Issue: Should ICANN allow the use of an independent objector to bring objections based upon concerns of morality and public order? Members of the Rec6 CWG are concerned that use of an independent objector may create a process that is ripe for abuse, with the independent objector being accountable to no one for its actions.

Recommendation 11.1: The Rec6 CWG proposes modifications to the mandate and function of the Independent Objector as described in section 3.1.5, without changing its scope. Unlike the current intention as expressed in the AGB, it is suggested that the Independent Objector may not initiate an objection against a string if no community or government entity has expressed an interest in doing so. A valid Independent Objector objection must be tied to a specific party who claims it will be harmed if the gTLD is approved. The Independent Objector must not encourage communities or governments to file objections, however the Independent Objector should be mandated to:

- 1) Provide procedural assistance to groups unfamiliar with ICANN or its processes that wish to register an objection;
- 2) Receive, register and publish all objections submitted to it by bonafide communities and governments of all levels (which can demonstrate direct impact by the proposed application);
- 3) Perform a "Quick look" evaluation on objections against a specific set of criteria of what is globally objectionable, to determine which ones are to be forwarded to the Board for consideration as legitimate challenges to applications;
- 4) Be given standing for objections which survive "Quick Look" evaluation, but whose backers lack the financial resources and/or administrative skills necessary to process their objections;

The scope of the Independent Objector -- limited to filing objections based only on Community and Public Policy grounds -- is unchanged from the current DAG. Applications processed by/through ALAC or the GAC are not required to use this process. Organizations using this process will be expected to pay a fee to register objections, though this may be waived for small groups without sufficient financial means.

As the potential exists for the position of Independent Objector to be misused to harass or impede a legitimate applicant, special attention must be given to the transparency of the Independent Objector's actions. All correspondence is by default open and public unless required otherwise to protect privacy or other rights.

The "independence" of the Independent Objector relates to the role's unaffiliation with any applicant or contracted party. The Independent Objector role remains accountable to ICANN with regards to its integrity and fairness.

12. Timing of Rec6 Dispute Resolution.

Issue: The Rec6 CWG explored whether the dispute resolution process for Rec. 6 objections should be resolved sooner in the process to minimize costs.

Recommendation 12.1: Applicants should be encouraged to attempt to identify possible sensitivities before applying and where possible try to consult with interested parties that

might be concerned about those sensitivities to see how serious the concerns are and to possibly mitigate them in advance.

Recommendation 12.2: The dispute resolution process for Rec. 6 objections should be resolved sooner in the process to minimize costs.

Recommendation 12.3: Applicants should be informed of Rec6 complaints as early as possible to allow applicants to decide whether they want to pursue the string.

Explanation for Divergence: Some Rec6 CWG members noted that there may be reason to delay bringing an objection until later in the process. Delaying the filing of an objection could result in eliminating fees for applicants that are not likely to pass the evaluation phase or otherwise withdraw their application.

13. Standing of Governments to file objections.

Issue: Initially, there was uncertainty in the CWG whether governments are allowed to assert community objections to any type of application. It was clarified that this is the case in AGv4.

Recommendation 13.1: Governments should be granted the opportunity to file community objections to any type of application (community or otherwise). Any country (as well as any province, state or city) may file an objection, but that must go through the same process as any other community objection.

Recommendation 13.2: Governments should be granted the opportunity to file community objections to any type of application (community or otherwise). Any country (as well as any province, state or city) may file an objection, but that must go through the same process as any other community objection, and meet the same standard for eligibility and same criteria for validity as any other objector.

14. Expanded use of the Community Objections.

Issue: The Rec6 CWG considered whether government community objections based on national law/interests should trigger a full dispute resolution process, lead to blocking or trigger alternative procedures.

Recommendation 14.1: The fee structure for governments to file community objections should be clarified, for both the objector and the responder.

In addition to, or instead of, an 'Objection Based on General Principles of International Law' (note: or whatever new title is chosen per Recommendation 1.2) ICANN GAC and At-Large Advisory Committees or their individual governments in the case of the GAC have the possibility to use the 'Community Objection' procedure. A "Community Objection" can be filed if there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted. The CWG recommends that the fees for such objections by the GAC or the At-Large Advisory Committees be lowered or removed

Recommendation 14.2: ICANN should consider looking into a slight lowering of this threshold for Objections from the GAC or At-Large Advisory Committees. Staff should explore ways to reasonably lower the required standard for a successful At-Large or GAC Advisory Committee objection in the areas of standing (3.1.2.4), level of community opposition (3.4.4) or likelihood of detriment (3.4.4).

Explanation of Divergence on Recommendation 14.2: Currently, there is a fairly high threshold to achieve a successful Community Objection. Some Rec6 CWG members believe that ICANN could consider looking into a slight lowering of this threshold for Objections from Advisory Committees. For example, the current detriment standard is -- 'There is a likelihood of detriment to the community named by the objector if the gTLD application is approved'. For Advisory Committee Objections, this could be lowered to 'possibility of detriment' (just an example). This would obviously give some more weight to Advisory

Committee objections, versus those from other Objectors. The rationale would be that Advisory Committees have a slightly stronger voice in the process -- for communities they represent.

Some Rec6 CWG members believe that while Advisory Committees should be allowed to object in instances where they would not otherwise qualify as a Community Objection, the standard should not change. Instead, the intent should be merely to allow a class of potentially legitimate objections that may not qualify under any of the other recognized objections in the AGv4 .

Recommendation 14.3:

ICANN Advisory Committees should be able to file an objection based on Rec 6 without paying a fee and any responses to such objection would also be allowed without fees. Any other governmental objection should be accompanied with the same filing/responding fees as applicable to other objections.

15. Guidebook Criterion 4.

Issue: The CWG questioned whether Criterion 4 was necessary in light of the expanded use of the Community Objection as described above.

Recommendation 15.1: Criterion 4 is needed in addition to the Community Objection. However, the current language should be revised to read: "A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international treaties."

Recommendation 15.2: Criterion 4 is no longer needed.

Reason for Divergence: Although there was full consensus for the deletion of the phrase: generally accepted legal norms of morality and public order, the concern remains among

some Rec6 CWG members that the remaining phrase as suggested in Rec. 15.1 results in an overly broad standard.

16. Next Steps for Rec6.

Issue: The Rec6 CWG did not have sufficient time to reach consensus or even rough consensus on several details related to the issues discussed in this Initial Report.

Recommendation 16.1: The Rec6 CWG recommends that the ICANN New gTLD Implementation Team form a Recommendation 6 Community Implementation Support Team (Rec6 CIST) to provide input to ICANN Implementation Staff as they further refine implementation details for Rec6.