**USG Submission to the GAC Scorecard re New gTLDs**

***1. Objections Procedures***

Currently, the Proposed Final Applicant Guidebook contains a “Limited Public Interest Objection” meant to provide dispute resolution for proposed strings that could be considered contrary to general principles of international law for morality and public order. The GAC proposes that: 1) the “Limited Public Interest Objection” procedure be deleted; 2) the “Initial Evaluation” procedures be augmented to include a GAC review; and 3) the current “Community-Based” objection procedures be clarified to include those strings that purport to represent or that embody a particular group of people or interests based on historical components of identity as well as particular subject to national regulation. Specific details and explanations for each step are below.

**Limited Public Interest Objection:** The GAC advises the ICANN Board to instruct ICANN staff to delete the procedures related to “Limited Public Interest Objections” in Module 3.

 **Explanation:** Although the new heading has been renamed from “Morality and Public Order Objections”, the body of the text remains unchanged and contains the same fundamental flaws which can only be remedied through deletion.

Specifically, the requirement that governments pay fees and must be bound by determinations by the International Centre for Expertise of the International Chamber of Commerce, which will in turn be guided by the findings of “three experts recognized as eminent jurists of international reputation”, is contrary to the sovereign right of governments to interpret and apply principles of international law on a country-by-country basis. Governments cannot be bound by the determinations of private individuals or organizations on matters that pertain to national law.

The requirement is also inconsistent with the provisions in ICANN’s Bylaws that call for governments to provide public policy advice to the ICANN Board through the Governmental Advisory Committee.

Lastly, there are no “generally accepted legal norms relating to morality and public order that are recognized under international principles of law” (Module 3, Article 2, e, iii), nor is it feasible to expect that any panel of “experts” could reach a determination whether a particular proposed new gTLD string would be considered objectionable on such grounds.

**String Evaluation:** The GAC advises the ICANN Board to instruct ICANN staff to amend the following procedures related to the Initial Evaluation called for in Module 2 to include review by governments, via the GAC. Any GAC member may raise an objection to a proposed string for any reason. If it is the consensus position of the GAC not to oppose objection raised by a GAC member or members, ICANN shall reject the application.[[1]](#footnote-1) (Note that the application fees should be refunded to the applicant).

**Explanation:** This proposal meets a number of compelling goals. First it willdiminish the potential for blocking of top level domain strings considered objectionable by governments, which harms the architecture of the DNS and undermines the goal of universal resolvability. Second, affording governments the opportunity, through the GAC, to advise the ICANN Board that there is consensus GAC advice regarding particular proposed strings that should not be processed is supportive of ICANN’s commitment to ensure that its decision are in the global public interest.

**Categories of Community-based Strings:** The GAC advises the ICANN Board to instruct ICANN staff to amend the provisions and procedures contained in Modules 1 and 3 to clarify the following:

1. “Community-based strings” include those that purport to represent or that embody a particular group of people or interests based on historical components of identity (such as nationality, race or ethnicity, religion or religious affiliation, culture or particular social group, and/or a language or linguistic group). In addition, those strings that refer to particular sectors, in particular those subject to national regulation (such as .bank, .pharmacy) are also “community-based” strings.
2. Applicants seeking such strings should be required to affirmatively identify them as “community-based strings” and must demonstrate their affiliation with the affected community, the specific purpose of the proposed TLD, and evidence of support or non-objection from the relevant authority/ies that the applicant is the appropriate or agreed entity for purposes of managing the TLD.
3. In the event the proposed string is either too broad to effectively identify a single entity as the relevant authority or appropriate manager, or is sufficiently contentious that an appropriate manager cannot be identified and/or agreed, the application should be rejected.
4. Individual governments that choose to file objections to any proposed “community-based” string should not be required to pay fees.

**Explanation:** The proposed approach would remedy the failure in the draft Applicant Guidebook to incorporate the GAC’s previous advice that ICANN’s new gTLD process should respect the legitimate interests of governments regarding terms with national, cultural, geographic and religious significance. It also anticipates the strong possibility that there will be proposed new gTLD strings for which an appropriate manager cannot be identified and/or agreed, which should cause the application to be rejected. It also recognizes the right of governments to protect their perceived national interests through the Community objections process without the obligation to pay fees.

**2. *Market and Economic Impacts***

The GAC advises the ICANN Board to instruct ICANN staff to amend the final Draft Applicant Guidebook to incorporate the following:

1. Criteria to facilitate the weighing of the potential costs and benefits to the public in the evaluation and award of new gTLDs.
2. A requirement that new gTLD applicants provide information on the expected benefits of the proposed gTLD, as well as information and proposed operating terms to eliminate or minimize costs to registrants and consumers.
3. Due diligence or other operating restrictions to ensure that Community-based gTLDs will in fact serve their targeted communities and will not broaden their operations in a manner that makes it more likely for the registries to impose costs on existing domain owners in other TLDs.

**Explanation:** The economic studies conducted by Katz, Rosston and Sullivan contain important findings that the past introduction of new gTLDs provided minimal public benefits in terms of competition for existing gTLDs and relieving name scarcity. The studies further state clearly that the introduction of new gTLDs had imposed costs on intellectual property owners in diluted brand strength, defensive registrations, and other costs associated with protecting their brands.

1. ***Vertical Integration (Registry-Registrar Separation)***

The GAC advises the ICANN Board to instruct ICANN staff to amend the proposed new registry agreement to restrict cross-ownership between registries and registries, except in those cases where ICANN has determined that the registry does not have, or is unlikely to obtain, market power. The GAC further advises the ICANN Board that it considers the absence of a thorough and reasoned explanation of its decision, the rationale thereof and the sources of data and information on which the Board relied with respect to vertical integration to be inconsistent with its commitments under the Affirmation of Commitments.

**Explanation:** The CRA International report commissioned by ICANN noted that vertical integration between registries and registrars could foster both precompetitive and anticompetitive outcomes. As the key issue is whether a gTLD has market power, it would only be appropriate for ICANN to relax or lift restrictions on vertical integration in cases where ICANN determines that a gTLD faces or will face substantial competition.

Further, ICANN has committed to provide a thorough and reasoned explanation of ICANN decisions, the rationale thereof and the sources of data and information on which ICANN relies. This has not been done yet to explain how the Board moved from a position in March 2010, as articulated in a Board resolution, of no cross ownership, to the May 31, 2010 staff proposal contained in draft Applicant Guidebook, version 4 of de minimus (i.e., no more than 2%) cross ownership, to the November 5, 2010 decision allowing full cross ownership.

1. ***Intellectual Property Protection***

The GAC advises the ICANN Board to instruct ICANN staff to amend the provisions related to intellectual property protection as follows:

**Trademark Clearinghouse:**

1. Delete the definition of “substantive evaluation” to make it clear that any trademark registration, regardless of whether examined on substantive or relative grounds, can qualify for participation in the pre-launch sunrise mechanisms.
2. Expand the Trademark Clearinghouse to cover “trademark + keyword” or typographical variations specified by the rights holder.
3. Ensure that the Trademark Clearinghouse protection mechanism continues after initial launch.

**Uniform Rapid Suspension (URS):**

1. Shorten the time for filing an appeal in default cases from the current 2 year review period to a considerably shorter time.
2. Add a “loser pays” model applicable to domain name registrants.
3. Include the ability to transfer a domain name, so that the complainant is not forced to pursue a further UDRP proceeding to secure the transfer.

**Post-delegation Dispute Resolution Procedure (PDDRP):** Amend the standard of proof from “clear and convincing evidence” to a “preponderance of evidence”.

**Explanation:** These amendments would ensure that all trademark registrations could qualify for participation in the pre-launch sunrise mechanism, and would be consistent with existing best practices (see e.g. the policies for .eu, .tel, and .asia). They will also ensure that the URS provides an effective remedy, and that the PDDRP is consistent with requirements in a civil action for contributory trademark infringement action or unfair competition. Finally, these amendments are necessary to ameliorate the high costs for brand owners, as outlined in the economic analyses by Katz, Rosston and Sullivan.

**5*. LEA Recommendations***

The GAC advises the ICANN Board to instruct ICANN staff to amend the final Draft Applicant Guidebook as follows:

**Module 1:**

1. Include other criminal convictions as criteria for disqualification, such as Internet-related crimes (felony or misdemeanor) or drugs.
2. Assign higher weight to applicants offering the highest levels of security to minimize the potential for malicious activity, particularly for those strings that present a higher risk of serving as venues for criminal, fraudulent or illegal conduct (e.g. such as those related to children, health-care, financial services, etc.)

**Module 2:**

1. Add domestic screening services, local to the applicant, to the international screening services.
2. Add criminal background checks to the Initial Evaluation.
3. Amend the statement that the results of due diligence efforts will not be posted to a positive commitment to make such results publicly available
4. Maintain requirements that WHOIS data be accurate and publicly available.

**Explanation:** These amendments will improve the prospects for mitigating malicious conduct and ensuring that criminal elements are hindered from using the DNS for criminal and illegal activities. The GAC also strongly encourages, and will contribute LEA expertise to this activity, further work on the high level security zone requirements.

1. The GAC views consensus as a position voiced by one or more GAC member(s) not objected to by other GAC member(s). [↑](#footnote-ref-1)