7 January 2011

Mr. Peter Dengate-Thrush
Chairman
ICANN Board of Directors
cc: John Jeffrey, ICANN Secretary

Re: Rec6 CWG Revised Recommendations and Clarifications

Dear Peter:

This is in response to the ICANN Board's Cartagena Resolution (2010.12.10.21) requesting that the Rec6 CWG provide its final written proposal with regard to three specific issues by 7 January 2011.

The Rec6 CWG hereby submits the following revisions and clarifications for the Board's consideration.

(1) <u>The Roles of the Board, GAC, and ALAC in the Objection Process</u>

With regard to the first issue (the roles of the Board, GAC, and ALAC in the objection process), we need to provide clarification regarding the circumstances under which the CWG suggests that the Board would vote regarding an application that is subject to a Rec6 Objection:

- clarify the circumstances under which the Board would vote with regard to an Rec6 objection and/or with gTLD applications generally,

Based on the written responses to the pre-Cartagena questions from the ICANN staff, as well as the various discussions during the Cartagena meeting, the CWG has recommended that the Board would have to specifically approve any recommendations from third party experts to reject a TLD application based on a Recommendation 6 objection. The CWG has not suggested, however, that the Board be required to take a vote on specific Recommendation 6 objections where the third party experts reject such an objection. Nor did the CWG suggest that the Board be required to approve every new gTLD string.

and

- if there is consensus on it, clarify the intended role of the expert panel (i.e., dispute resolution provider, mediator, advisor or other).

A consensus of the CWG recommended that the ICANN Board may "contract appropriate expert resources capable of providing objective advice." The CWG did not recommend that the Board should be a trier of fact or should hear in the first instance

every Rec6 objection with a requirement that it make a determination on the merits in every case.

The CWG did not reach consensus over the actual form or weight of the expert advice (e.g. whether the expert panel should be a dispute resolution provider, mediator or advisor). Some members of the CWG take a broader definition of dispute resolution panel than others. Some members think that the experts should not hear from the objector and the applicant at all – whether in a trial setting or written advocacy – others disagree and support an adversarial process. There was Strong Support, but not Consensus, that the experts should be able to look at the context of the application or applicant in evaluating a Recommendation 6 objection – others disagree and believe that the experts should conduct their analysis on the basis of only the string.

While the CWG did not reach consensus on these issues, it did explicitly remove all reference to the specific term "dispute resolution" in its recommendations, and made no requirement that the experts engage in an adversarial process between applicant and objector. Furthermore, the CWG did achieve Strong Support (though not Consensus) for not calling the evaluation process one of "dispute resolution," and requiring that the experts' skills be in legal interpretation of instruments of international law.

(2) The Incitement to Discrimination Criterion

With regard to the incitement to discrimination criterion, we need to confirm the specific language revisions the CWG requests with regard to the "incitement to or promotion of" portion of the criterion. After the discussion in Cartagena, does the CWG continue to request that the standard be "incitement and instigation" or is some other language preferable? In addition, the CWG could also state whether it still believes that the standard should be expanded to include the list of additional discrimination grounds that were referenced in the CWG Report:-

- ***CWG to confirm the specific language requested with regard to the "incitement to or promotion of" term in the original standard. After the discussion in Cartagena, does the CWG continue to request that the term be "incitement and instigation" or is some other language preferable?***

In its report dated 21 September, 2010, the CWG recommended that "incitement and instigation" be used in the criteria for discrimination. In ICANN's explanatory memorandum on this issue dated 12 November 2010, it provided a rationale of why "incitement to or promotion of" is a more appropriate standard. Based on the ICANN response, the discussions in Cartagena during which several CWG members stated that they no longer agree with the recommendation, and some admitted confusion over the legal impact of the word choice, the CWG may no longer have a consensus on this issue [NOTE \-\- confirm \-\- do we want to do a straw poll on the call?]. With that said, many members of the CWG still argue that a higher standard than "incitement to or promotion of" would be appropriate.

· ***the CWG needs to reiterate consensus on the standard including an expanded list of additional discrimination grounds that were referenced in the CWG Report.***

Two consensus recommendations of the CWG were to extend the list of potential discriminations also to include discrimination based on age, disability, actual or perceived sexual orientation or gender identity, or political or other opinion. The CWG also suggested by a full consensus that such discriminations must rise to the level of violating generally accepted legal norms recognized under "principles of international law." As such, any additional discriminations listed in the second prong still must be found to be in violation of principles of international law.

We do not believe that recognizing additional discriminations would significantly broaden the types of objections brought. The CWG does not believe that any additional research needs to be conducted on whether such additional classes are protected under international law today. It has been brought to the CWG's attention that these additional discriminations have some protection under international law. If they are recognized today, then the Board and the experts would rely on them. If they are not at that level yet, then they won't. Importantly, such additional discriminations might become more recognized at some future date and the process should be fluid enough to take them into account at such time. The suggestion in Cartagena of a catch-all discrimination criteria – such as "any other discriminations that are generally recognized under international law" – seems to be acceptable to many of the CWG members.

(3) The Fees for GAC and ALAC-instigated Objections

With regard to the fees for GAC and ALAC-instigated objections, we need to identify what (if any) fees should be charged and where the funds should come from, and any other restrictions or additional steps that the CWG suggests for dealing with GAC and ALAC-instigated objection:-

· ***what fees should be paid by ALAC and GAC (if filing and dispute resolution fees are waived, are the number of free objections limited)***

· ***by what process is an ALAC and GAC objection formed and approved?***

A full consensus of the CWG recommended that fees be lowered or removed for objections from the GAC or ALAC. In the CWG clarifying document filed just prior to the Cartagena meeting, the CWG felt that it was outside its scope to comment on the process for the GAC or ALAC to lodge objections. The CWG assumed that any Rec6 objections put forth by the GAC or ALAC would be approved according their own internal processes.

There was considerable discussion of this issue during the Cartagena meeting. At this stage -- subject to ratification as a formal process of the ALAC -- it is envisaged that ALAC would take recommendations of any of it's At-Large organizations ALSes (which may either hold a Community based objection view themselves or be passing such a

concern on from the local Internet Community that they are engages with or are representative of) up through the RALOs and then for ALAC consideration an ALAC vote to formally raise such an objection would require a super-majority vote to pass. The GAC also would develop a consensus-based process.

In addition to the above use of the "Community Objection" process by the ALAC and GAC and assuming that the Independent Objector (IO) function is maintained in the processing of new gTLD Applications, then an alternate pathway for AC objections to be considered would be for the IO to take up such formally prepared objections from the ALAC and/or GAC and subject to the same standards of check and balances, and transparency and accountability criteria, as any other IO instigated objection process as if they were self instigated by an AC.

(4) Other CWG Recommendations Not Specified by the Board

Finally, the CWG would like to make another recommendation related to the IO mentioned above. It is a key principle that the IO should operate in a transparent and accountable manner, and that appropriate safeguards are in place to ensure that it operates in the public interest. For example, the IO should facilitate legitimate objections, not create objections entirely on its own that cannot be traced back to any party. At a minimum, there should be at least one party that has claimed during the public comment period that it would be harmed by the creation of a TLD before the IO can object to it in an effort to reject such an application. The IO should be a tool for those who cannot maneuver the difficult objection procedures or for those who are not in a position to fund such objections, rather than an opaque means to kill a proposed-TLD that otherwise isn't subject to public objection.

Sincerely,

Rec6 Community Working Group