GISELLA GRUBER: Good morning, good afternoon, and good evening to everyone. Welcome to the At-Large Consolidated Policy Working Group call on Wednesday the 23rd of September, 2020. Due to the increased number of attendees, and in order to save time, we won’t be doing a rollcall. However, all attendees, both on the Zoom room as well as on the phone bridge, will be noted after the call today.

I would, however, like to note the apologies today from Cheryl Langdon-Orr, Bill Jouris, Matthias Hudobnik, and Alberto Soto. From staff on today’s call, we have Evin Erdoğdu and myself, Gisella Gruber, on call management.

Our interpreters today on the Spanish channel are David and Marina, and on the French channel we have Isabelle and Camilla. I would also like to note that we have real-time transcribing provided for today’s call. I will be sharing the link in the chat in a moment.

A friendly reminder to please state your name before speaking, not only for transcription purposes but also for the interpreters to identify you on the other language channels. Please keep your lines muted when not speaking to prevent any background noise. Also, please speak at a reasonable speed to allow for accurate interpretation. With this, I will hand the meeting over to Olivier Crépin-Leblond. Olivier, please begin. Thank you.

OLIVIER CRÉPIN-LEBLOND: Thank you very much, Gisella. Welcome to this week’s Consolidated Policy Working Group call, which, after looking through our action items, will be focusing, essentially, on the Subsequent Procedures work that Justine Chew, and her small group, and Jonathan Zuck will take us through. 70 minutes of Subsequent Procedures.

There is a statement coming up and the deadline is at the end of this month, so we have about ten days. Less than ten days! Eight days until this is to be taken to the GNSO, the Generic Names Supporting Organization.

After this, we will have policy comment updates with Jonathan Zuck and Evin Erdoğdu, and any people that have been drafting comments, such as Bill Jouris, for example, and after that any other business.

So, at this present moment, are there any amendments/additions to the agenda? I am not seeing any hands up, so this looks as though the agenda is adopted as it currently is displayed on your screen. I should just mention at this point in time the close captioning, which is in place, and I would like to ask staff, if they haven’t done so already, to put the …

Oh, no. There you go. Screen text. There you go. Staff has put in the chat the connection for this closed captioning, which is always—online transcription of our call—very helpful. Right.

Let’s go, then, to our action items from last week. There were two of them, both of them relating to today’s call, both of them being done. I can’t imagine very much feedback on these. It’s all about the At-Large scorecards regarding the Subsequent Procedures work. Therefore, we can now swiftly move onto the next agenda item, and that’s, as I had mentioned a moment ago, the work group updates with Justine Chew and Jonathan Zuck. Over to you. You have 70 minutes, which is plenty of time. Hopefully.

JUSTINE CHEW: Thank you, Olivier. Okay. Today, you have me and Jonathan Zuck to take you through what we hope would be the last three topics on Subsequent Procedures, noting that the deadline for submitting public comments is on the 30th of September, so we were aiming to get something over to the ALAC to consider—for ratification purposes, anyway—by, hopefully, the 25th of September, which is the end of this week. Okay.

So, moving swiftly along, today we’re going to talk about registry commitments first, and then Jonathan will take you through some of the metrics that we have been thinking about for the program, and then I will try to finish off with auctions and private resolutions of contention sets. So, Gisella, can we have the first slide, please? That’s registry commitments. Yes. Thank you very much.

Okay. So, this set of slides is a little bit updated. I mean, I have presented on registry commitments before—Registry Voluntary Commitments, RVCs, and Public Interest Commitments. So, I have kind of touched on this topic before, many months ago. Also, if I’m not … Anyway, I’ve touched on it before.

But today, we’re going to wrap up by presenting the actual recommendations in the draft final report. So earlier, when I touched on … Some of the recommendations weren’t finalized yet, weren’t concrete-ized yet, so there were still questions around, for example, the category one safeguards. Okay. Moving onto slide number two, please.

So, the important things to note from slide number two is, as a reminder, PICs, meaning Public Interest Commitments. So, the concept of Public Interest Commitments weren’t actually a feature as part of the program, Consensus Policy.

PICs was a result of implementation coming via GAC advice, basically. So, GAC issued an advice to say that you need some sort of a mechanism to safeguard certain interests. So, that’s how the formulation of PICs came about, basically, if I can put it very simply that way.

We have different kinds of PICs. So now, it’s clearer. We are now talking about mandatory PICs. So, the mandatory ones will continue to be called PICs, Public Interest Commitments, because they are deemed to be for public interest, whereas a Registry Voluntary Commitment, or RVC, would be voluntary.

So, non-mandatory/voluntary. They come from the registries themselves and they may not be, necessarily, in the public’s interest. Of course, we hope that they will all be, but that’s the differentiation between the mandatory PICs and the registry voluntary commitments.

But insofar as commitments are concerned, both PICs and RVCs are supposed to be included in the Registry Agreement and, therefore, contractually enforceable. Moving to slide number three.

The issues, basically, are to consider or to look for the codification of commitments and to recognize them as part of consensus policy, moving forward, and also their enforceability. And in terms of enforceability, there are two channels: enforceability, which is … Well, the first one is the dispute resolution procedure, which is the public interest … There are two avenues there. One is the Public Interest Commitment dispute resolution process, or procedure, and the other one is the registry restrictions dispute resolution procedure. So, that’s what PICDRP and RRDRP stands for.

And obviously, the second channel would be Contractual Compliance. So, people can still submit the complaint to ICANN Contractual Compliance, and they need to look into it. So, this aspect, the work that’s undertaken by Contractual Compliance, we think that that needs ongoing research and monitoring.

Okay. Moving along. Slide number four. This basically touches on what ALAC statements have said in the past. I’m not going to go through everything, per se. I think it’s quite clear. The thing that I would like to point out here is CCT Recommendations 12, 14, 15, 16, 23, and 25. All these six CCT recommendations have some bearing in the topic of registry commitments. So, just bear that in mind. We will delve into it a little bit more within the recommendations and implementation guidance still, okay?

So, now we come to the SubPro recommendations and implementation guidelines. So, we first focus on the ones to do with mandatory PICs. Recommendation 9.1, basically, is the recommendation to codify mandatory PICs as how it was implemented via Specification 11 of the Registry Agreement in the 2012 round.

So, this recommendation purports to say that we should continue the implementation that was done for the 2012 round; continue that and include mandatory PICs within Specification 11 of the Registry Agreement, with one exception, which is to do with single-registrant TLDs or registry operators.

So, this recommendation essentially puts into practice what happened in the 2012 round. Sorry—yeah. Puts that practice into policy now. So, Recommendation 9.2 deals with the single-registrant TLD exception. Basically, if you look at Spec 11.3(a) and Spec 11.3(b), these are specs that are supposed to be either handed down to a registrar, and so forth, and further down to a registrant. That’s Spec 11.3(a).

Spec 11.3(b) deals with threat monitoring and reporting requirements. So, if you pick the context of that, that only really applies if you’re looking at the normal reselling of second-level domains business model. If you’re talking about a single-registrant, then there is no reselling, so there aren’t multiple subscribers of second-level domains. It’s just a single registrant.

So, in that respect, there is no passing down to anybody, because there is no registrar and there is no registrant in terms of the second-level multiple registrants. It’s only the RO, the party that applies for the TLD, is the single registrant. Therefore, they are held responsible for any security measures relevant to the TLD. So, in this respect, Spec 11.3(a) and Spec 11.3(b) don’t really apply to single-registrant TLDs.

I believe some exceptions have been granted for the 2012 round, so this is, basically, also keeping in line with practical aspects of how you handle the contracts. So, unless anyone sees any concerns here, I’m going to move on. I don’t see any hands up. If you do have questions or have comments, please put your hands up. Otherwise, I will just keep going because we want to get through a lot of stuff in 70 minutes.

Okay. So, moving onto the SubPro recommendations and implementation guidance on highly sensitive and regulated strings. Now, this portion of it was the one area that was not firmed up when we discussed this topic earlier on, many months ago, as I said.

So, it would be SubPro PDP Working Group was still grappling with how to handle GAC category one safeguards. So now, the SubPro PDP Working Group has confirmed that they are recommending the practice of what happened with the 2012 round in terms of category one safeguards, to also put that practice into policy now.

So, what is category one safeguards? There are a huge number of strings—I think it was [445], or something like that—that were picked up by GAC in the 2012 round that required some kind of safeguard to be put in place.

So, the safeguards, you’re talking about three levels encompassing four groups of safeguards, and there are ten safeguards altogether. So, as you see in the orange diagram on the left, what SubPro is recommending now is affirmation 9.3, Recommendation 9.4, implementation guidance 9.5, 9.6, 9.7, and Recommendation 9.8 all have to do with highly sensitive and regulated strings under the umbrella of GAC category one safeguards.

So, affirmation 9.3 is, basically, what I said. It’s just putting what happened in the 2012 round practice into policy. So, they’re affirming that that is good practice. It’s affirming that we should follow the four groups of category one safeguards, and they should be integrated into the RA.

So, Recommendation 9.4 says that, basically … Well, the thing is, the … Well, if an applied-for string is determined to fall into one of the four groups of strings requiring safeguards, then the safeguards should be included in the AGB, and information about the ramification of this happening should be given to the applicant. So, that’s basically what 9/4 says.

Implementation guidance 9.5 says that, basically, applicants, if they look at this information, they can choose to self-identify if they believe their string falls into any of these four groups of strings requiring safeguards. They’re not required to but they are more than welcome to.

But insofar as whether that happens or does not happen, implementation guidance 9.6 says that, basically, all strings will still go through evaluation to determine if they fall into one of the four groups. If any of the four groups apply, then they are subject to applicable safeguards.

The evaluation will be done by an evaluation panel. The panel is still yet to be established. We don’t know who that is going to be yet. The actual mechanics of it will be considered under implementation phases, but we did say that it should comprise experts in regulated industries and they are also in power to draw input from other experts in the relevant fields.

Implementation 9.7 basically says that this expert panel work only begins after the application comment period is complete. So, basically, you have the applications open, the window open, then closes, and then you have application comment period. So, anyone and everyone will be invited to make comments.

After that period of comment closes, then only the expert panel will look into whether any of the strings fall into any of these groups or safeguards. Okay. And I suppose they want to be able to draw on any comments that people have posted during the application comment period.

Recommendation 9.8 basically says that, if any of the strings fall into one of the four groups, then, obviously, the safeguards must apply and it should be integrated into the Registry Agreement as a mandatory PIC.

So, the overall impact of these sets of affirmation recommendations and implementation guidance is good results because it codifies the GAC advice given through the Beijing Communique. It codifies, basically, the 2012 implementation into policy. Okay.

The second bullet point under the impact is meant to indicate that … Well, what I’m trying to say is, because the concept of PICs wasn’t in the consensus policy for 2007, the implementation of it was a bit haphazard.

So you had … Basically, they came in after the 2012 application round had closed. So, a lot of the applicants were basically saying that, “Well, no, it’s unfair on us. You didn’t insist or provide all these conditions during the application process. You didn’t tell us in advance, and now you want to impose all these other things on us. It’s unfair. We can try to do certain things but …”

Therefore, the implementation was a little bit haphazard. There was pushback in terms of adoption of PICs into RAs. But now, because this concept has been proposed to be codified into policy, then all of it would appear in the AGB. It will be clear-cut/up-front, so people will know about it. they will have to comply with it. Okay.

Slide number seven basically gives you an indication of the strings. I mentioned there are 145 strings that were identified by GAC in the 2012 round. So, you see the categories of strings and the categories of safeguards that are meant to apply to these kinds of strings.

So, the idea is that, if an applicant applies for a string that could fall into any of these, or similar, kind of views of this table, then they could self-identify as being an applicant for a string that, possibly, a safeguard could apply, or they may not. It doesn’t really matter because, as I said, all the strings will go through evaluation.

And slide number eight gives you an idea of what the actual ten safeguards are. So, I’ll leave you to read those, then we’re going to go through. I still see no hands. Great. Moving along.

Now, we look at the group of recommendations and implementation guidance that apply to Registry Voluntary Commitments. So, early on, we talked about mandatory PICs. Now, we talk about Registry Voluntary Commitments.

So here, we have a bunch of recommendations and implementation guidance. Recommendations 9.9, 9.10, and 9.12, and then we have implementation guidance 9.11 and 9.14. Sorry about the order being not in sequence, because I wanted to tie the two … The ones that are grouped together are meant to be applicable to the same reasoning. Anyway, okay.

So, Recommendation 9.9. Let’s see. Basically, it says that applicants will be allowed to submit Registry Voluntary Commitments, RVCs, in subsequent rounds, in an application, or to respond to public comments, GAC early warnings, or GAC advice.

So, the idea is the applicant can come up with their own voluntary commitments when they submit their applications, of course, but they can also formulate and present commitments, voluntary commitments, which are in response to any, say, concerns raised or negative public comments submitted—a result of objections being filed or a result of GAC early warnings or GAC consensus advice being issued.

On top of that, applicants will be allowed to submit RVCs at any time prior to the execution of the RA, provided that, if such submissions or RVCs are submitted after the application submission date has closed, then they have to go through this thing called the “application change request procedure.”

Now, that is important because the application change request procedure is subject to, or includes, a period of public comment, which is in accordance with ICANN standard procedure and timeframes.

So, anything that comes after the submission period closes will trigger a change request. It will be considered a change request, application change request, and will trigger the processes included under “application change requests.” And as I said, it has been put public comment for a period.

So, that’s good. And that, I think, kind of meets CCT Recommendation 25, which is that voluntary commitments must allow sufficient opportunity for community review for limited public interest objection deadlines to be filed. So, I think that falls, Recommendation 9.9, in line with CCT Recommendation 25.

Now, Recommendation 9.12 basically says that, if any RVCs [make them], it must include an intended goal because it the intended goal is meant to help whoever is looking at it, be it an objector, an evaluator, or a public commenter who has raised concerns, they should be able to look at the intended goal of the RVC to see whether the goal actually addresses the concern to begin with. So, that’s a good thing.

Recommendation 9.13 and implementation 9.14 sort of goes together, as I said. It basically says that all the RVCs that are submitted must be readily accessible and presented in a manner that is useable. Basically, it’s supposed to be organized and searchable. It will be an organized and searchable online database. So, that addresses the CCT Recommendation 25, also.

Recommendation 9.10 and implementation 9.11 goes together. It basically says that RVCs must be included in the applicant’s Registry Agreement. The PICDRP and associated processes should apply equally to RVCs, meaning to say that, because “RVC” is actually a new term that hasn’t appeared in the AGB before, and we have only talked about the concept of PICs in reference to the AGB, and therefore it’s called Public Interest Commitment Dispute Resolution Process, that’s why it’s PICs.

So we’re saying that, because now we have introduced this concept of RVCs, then PICDRP should also equally apply to both PICs and RVCs. So, that’s essentially what the last two recommendations/implementation guidance covers. Okay. Cool. Moving along.

Okay. There are two … Slide number ten. This digresses a little bit into two related topics, which are the DRPs and the base Registry Agreement. I bring these up now because, as I said, they are sort of related. Okay.

So, looking at the first topic, 33, under Subsequent Procedures, the dispute resolution procedures that are relevant are the RRDRP and the PICDRP. There are a few more, namely the Trademarks Dispute Resolution Procedure. That is being handled through a separate PDP, which is the rights protection mechanisms, a separate GNSO PDP.

So, under SubPro, we only look at RRDRP and PICDRP. Affirmation 33.1 basically says that we should continue to use PICDRP and RRDRP for purposes of addressing any complaints that relate to any harm done by a new gTLD registry operator’s conduct in operating a new gTLD.

And Recommendation 33.2 says that clearer, more detailed, better define guidance on the scope of the two DRPs, the role of the parties, and the adjudication process must be publicly available. Okay.

So, the question I have for Recommendation 33.2 is, does this recommendation sufficiently provide for the promotion and/or understanding of the two DRPs? And to note that the SubPro PDP Working Group did not actually do an exhaustive review of the PICDRP because, insofar as since it was launched, there have only been two cases filed and the working group felt that two was too few to actually do an intensive review on. So, therefore, it didn’t do it.

So, back to this question of Recommendation 32.3. Do you think that this is sufficient? Does it sufficiently provide for the promotion or understanding of the PICDRPs and the RRDRPs? Jonathan, go ahead.

JONATHAN ZUCK: Thanks, Justine. I think it’s a good question. I think one of the things that might come into play here, as we have begun to toil around PICs and PICDRP, is just the understanding that it exists in the first place. It’s not quite the word I was looking for.

So, it seems like the expansion on this is some kind of outreach around it, or a publication of it, or something like that, so that folks that are looking for a more formalized way to complain about the behavior of a particular registry realize that this is a viable option. I don’t know if that’s sufficiently addressed in the recommendation in its current form. It’s just a thought.

JUSTINE CHEW: Thank you, Jonathan. I actually agree with you, which is why I asked the question to begin with. Okay. So, we will have to … Unless anyone is in violent disagreement, I think we should pass some language to advocate for what Jonathan has just said. Basically, to do some outreach and to do some promotion so that people are publicly aware that these two DRPs exist.

I’m not sure about RRDRP, but we did a preliminary research on PICDRPs, and I understand that there is no filing fee involved on PICDRPs. So, that kind of makes it accessible, also. It’s just a question of the process. So, there is no actual cost of filing involved, but there could be costs involving mounting the complaint and the complexity of the process. Okay. Yes, we definitely did not plan this. Okay.

So, in terms of moving onto topic 36, Base Registry Agreement, there was a question put in the draft final report for community consideration, which is why I’m bringing it up here now, which is to do with Recommendation 36.4.

I think we should go through this because I would like some input on what we think. So, the context of this is that one of the PICDRPs, if I remember correct, was mounted or was filed by a party obviously unhappy with the conduct of the particular registry operator.

But what I was going to say is, the legal team that helped the party to file it and did the conduct of the dispute resolution procedure, one of them—that was a team—basically said that, looking at the situation that they were involved with with the case, they came to the conclusion that there was no policy around preventing a registry operator from engaging in fraudulent or deceptive practices. And they brought that to the attention of SubPro PDP Working Group, which is why Recommendation 36.4 came about.

So, it’s saying that it recommends that ICANN acts a contractual provision that states, “Registry operator will not engage in fraudulent and deceptive practice.” That is not the issue. I think that is important. That is good. We should support that.

The question now is there are two options in doing this. One is whether we allow it in such a way that a PIC be a new Public Interest Commitment that will allow third parties to file a complaint, in which case, then, ICANN would have the discretion to initiate a PICDRP on that.

Or the second option is, do we want a provision regarding this undesired practice to be included in the RA? In which case, enforcement would take place through ICANN exclusively.

A question from Jonathan is, “Are they mutually exclusive?” That’s a good question. I can’t imagine why they would be because, unless we say that it’s mutually exclusive, I don’t see why one or the other can’t happen. But yeah, that is a good question. Maybe we should address that, too, in our response. The question is, do we have a preference for either option? I see Alan’s hand up. Alan, please go ahead.

ALAN GREENBERG: Thank you very much. First, a question. Refresh my memory. PICDRPs used to be, and I presume are still, in this new round, in this new recommendation, but tell me if I’m right or wrong: PICDRP requires that the person filing it can show significant harm that has been done. Is that still the case?

JUSTINE CHEW: I would imagine so. I think that would be one of the grounds by which a PICDRP is mounted.

ALAN GREENBERG: Okay.

JUSTINE CHEW: As to the burden of proof, I’ll have to look into it. I can’t give you an answer right now.

ALAN GREENBERG: Yeah. No, no. But—

JUSTINE CHEW: Yeah. But the basis of the complaint is harm done.

ALAN GREENBERG: Okay. Originally, when we talked about PICs, the only remedy—this is going back to the first round—was the PICDRP. ICANN Org had said, “Compliance can’t enforce. All they can do is start a PICDRP.” Then they said, “But Compliance can take action because it’s words in the contract and Compliance can take action on words in a contract not being followed.”

As it has evolved, and as the first option here implies, if all that happens [by starting the] complaint is you go to a PICDRP and you still have to show harm, an individual may not be able to show significant harm. So, what that says is you can commit fraud and have deceptive practices as long as you don’t harm any one entity enough to cause a PICDRP to be triggered and found in their favor. Unless you have the equivalent of a class-action suit, which I don’t even know if that exists in this concept.

So, the short answer is, if a DRP requires you show harm to get a remedy, then no, it’s not sufficient. You’ve got to be able to say you can’t do deceptive things, you can’t be fraudulent, and it doesn’t matter whether someone has been harmed to date in enough of a way to trigger a PICDRP remedy. That’s wrong, and you’re not supposed to do it. So, I think a DRP is not sufficient if the harm issue is still there. Thank you.

JUSTINE CHEW: Okay. Jonathan, go ahead, please.

JONATHAN ZUCK: Thanks. I think what I was going to say is similar to what Alan said. I think part of the language that’s confusing in this particular slide is that option two seems to suggest that that’s when enforcement would take place. And as Holly mentioned in the chat, enforcement in both instances is done by Contract Compliance.

And so, this is really about findings of facts, or findings of non-compliance with a commitment, and that’s whether that’s done exclusively by Contract Compliance or whether it’s done through a DRP process.

But in either case, it still comes back to Contract Compliance to do the enforcement once that’s determined. I think the reason that I’d like to see both is that the things that would allow us to file a complaint I think are things that are in the contract.

And so, the simple inclusion of “you can’t mislead/engage in misleading practices and fraudulent activities …” I’m trying to find it on your slide, but whatever that language was should be in the contract because then, the mere—and I think this is what Alan was arguing—existence of that behavior is sufficient to generate a complaint to Contract Compliance.

And so, if it’s explicit in the contract, I think that’s important. But also, as Alan mentioned and we’ve mentioned before, I think the At-Large community is most interested in standing on this issue, and the ability for the At-Large, or even, maybe, a consumer protection agency, for example, to bring a PICDRP has to be established.

JUSTINE CHEW: Okay. So, I’m hearing that the second bullet, this phrase of prohibition of fraudulent and deceptive practices, must be included in the RA, but there should also be an option for a PICDRP to happen. Okay. Anyone in violent objection?

ALAN GREENBERG: I have my hand up.

JUSTINE CHEW: Yeah, sorry.

ALAN GREENBERG: Alan.

JUSTINE CHEW: Jonathan, I … Yeah, okay. Alan, go ahead, please.

ALAN GREENBERG: I’m not objecting but, let’s remember, if Compliance will only take action on PIC-related items, if a DRP finds for the complainant, then the harm … Yes, the remedy is done by Compliance but, if they will only do it because a PICDRP finds for it and the PICDRP still requires harm to be shown, it’s not an issue of standing, it’s an issue of being able to demonstrate to the DRP that harm has been done, and it may not have been done.

So, we have got to be able to have enforcement without a PICDRP “finding” something, if the requirement is still that harm is done for the DRP. Maybe it’s a bit late to be introducing this but, one way or another, we have to be able to get remedies if contracts aren’t being followed. Thank you.

JUSTINE CHEW: So, if we stick to the second bullet where you have this prohibition in the RA, would that cover the situation that you’re talking about?

ALAN GREENBERG: My understanding—

JUSTINE CHEW: I’m just trying to understand what you want to get at.

ALAN GREENBERG: The problem is it comes down to what Compliance does. My understanding of the current provision—which is not the way I believed it was written originally—of the current interpretation is that, if Compliance gets a complaint, a DRP will be initiated, and that’s the only way that they will ultimately take action. If that’s still the case, then we have a problem.

So, I think I need to go back and do a bit of homework and make sure that what we’re talking about is relevant and, if so, we may have a problem here. But let me take that as an action item, I reluctantly say, and look into it.

JUSTINE CHEW: Please do, please do. Please do.

ALAN GREENBERG: Okay.

JUSTINE CHEW: Thank you. Okay. Cool. So, no more hands up? Cool. Let’s go to DNS abuse. Okay. This is a “biggie,” but let’s move to slide number 11. Okay. This is not a surprise. I think this has been talked about in circles, anyway.

So, the SubPro recommendation on DNS abuse mitigation. The recommendation is, basically, saying that there is no real recommendation. It’s stating that any effort to do with fighting DNS abuse should take place in a comprehensive and holistic matter and should address both existing TLDs and the new TLDs that will be delegated. Yeah. So, it is deferring. SubPro PDP Working Group is deferring any policy recommendation or policy works around DNS abuse mitigation to the broader community efforts on this topic.

I just want to point out one thing before I go to Jonathan, which is that GAC did say in May 2020 that they would still want CCT recommendations regarding DNS abuse to be addressed prior to the beginning of the next round. Although it’s not consensus, some input did say that. Okay. Jonathan, go ahead, please.

JONATHAN ZUCK: Thanks, Justine. This is a difficult one because I think I agree in principle but not in practice. The idea that this is a global issue and should apply to existing TLDs and new TLDs I think is absolutely correct. And so, at that level, what we want to do is reiterate the suggestion by the GAC that new policy should be put in place prior to the initiation of a new round because there is a high motivation to have a new round, and that’s what will bring people to the table.

The part that this kicking the can down the road, so to speak, ignores is the practical implication of … I don’t know the right word, but contract modernization that’s associated with a new gTLD round.

What we found in the 2012 round is that a lot of new obligations were taken on and a lot of new permissions were given. And so, those new permissions that were given to new gTLDs became an incentive for legacy TLDs to take on additional obligations.

And so, the fact that there is an incremental level of obligation along with an incremental level of permission in these new contracts means that this modern contract becomes alluring to legacy TLDs. And so, as a practical matter, since so many of these require coming back to the table to renegotiate a contract, creating a contract that feels like it’s better for people to have, but also carries a number of obligations, I think is beneficial.

My concern about providing no guidance here is that there certainly shouldn’t be a new contract, new gTLD contract, created until the DNS abuse recommendations are actually implemented. I don’t know if that was clear. But that’s my one concern, just pushing it off, is that the new gTLD program has an opportunity to create an incentive for legacy TLDs, and that now includes the new gTLDs that will become legacy at the moment a new round is open to come back to the negotiating table.

JUSTINE CHEW: Okay. I think I got the gist of that. So, what we want to do is express concern/express the missed opportunity. And I would add that the thing about what you said about responsibilities is that a lot of it has also got to do with data collection, because we need to have data in order to monitor to see whether abuse has happened, how abuses are happening, and how they are being addressed.

So, the data collection aspect of it has to be included in the contracts. Some of it is already because, by way of the mandatory PICs, the issue is, is that sufficient? Correct. So, I don’t know the answer to that. I have a feeling that it is not, and data collection is an obligation.

So, if we don’t address that, then we don’t have data, basically, or enough data, or sufficient data, or the right sort of data. Okay. Anyone else have concerns about this? Okay. Cool. Moving along. Okay. I’m going to skip over 12 because slide 12 isn’t addressed, per se, and the outcome of it is … With verified TLDs, basically, the working group is saying that, now that we have adopted the category-one safeguards, we may not necessarily need to specifically look at verified TLDs.

Verified TLDs could happen. They may not happen. They’re not mandatory, therefore, if they do happen, then it’s up to the registry to volunteer commitments to make sure that their TLDs are verified, or the second-level registrations that they accept under that TLD are verified. Okay.

And the last slide is Contractual Compliance. This is topic 41. Again, this is sort of like a bit of a neither-here-nor-there situation—to me, anyway—because it kind of states the obvious. The question is, is there anything that we can [possibly] do in addition to what’s stated in Recommendation 41.2?

So, 41.2 says that Contractual Compliance should publish more detailed data on the department’s activities and the nature of the complaints handled, provided that ICANN should not publish specific info about any Compliance action against [ARO], unless the alleged violation amounts to a clear breach of contract.

So, again, it’s questions around thresholds. What is the threshold that ICANN is using to establish whether a clear breach has happened or not? I don’t know. I can’t answer that question. We have to delve a little bit more into how Contractual Compliance actually does its work, really.

The second bullet is, to date, ICANN Compliance provides summary statistics on the numbers of cases open, the types of cases, and how long it takes to close. On this point, I can say that, over the years, especially since 2017, ICANN Compliance has taken the effort to publish more data/more specifics.

So, if you go into the new ITI portal, they do have what they suggest here. They do have statistics on the numbers of cases open, and the types of cases, and how long it takes to close.

Again, the fuzzy bits that are not specified is, as I said before, the threshold. What is the threshold to reach a clear breach? How does Contractual Compliance actually categorize complaints under the different types?

And what is the satisfactory level of whether something, a complaint, is addressed at the registry level, or the registrar level, or by Contractual Compliance? So, those are the information that is not published to the granularity that we need to say whether this is working or not. Comments? Any comments? No comments?

JONATHAN ZUCK: I’ve got my hand up again, Justine.

JUSTINE CHEW: Oh, sorry. Go ahead, please.

JONATHAN ZUCK: Okay. I want to agree completely that more granular data is what’s critical out of Contractual Compliance. The perennial problem that I think we face with ICANN Contractual Compliance and, frankly, with this new Subsequent Procedures Working Group is that it’s very applicant- and contracted-party-focused. The real objective of this group was to increase predictability for applicants and make it easier to be an applicant, etc. And so, it feels like some of the other aspects of this are afterthoughts as a result.

One of the problems with the sort of trade association nature of ICANN is that Contractual Compliance doesn’t want to … Would rather try to work with contracted parties, rather than tell on them.

And so, when they say that a clear breach of contract has been determined, what they really mean is that they have issued a notice of breach. But there can be many violations of the contract prior to the issuance of a notice of breach if they are remedied by the contracted party.

And so, one of the problems I think that we face, and that Contractual Compliance faces with how it’s structured and the expectations that are set for it, is that they are meant to try and work things out and get them to correct something, but a culture of constant breach and correction isn’t really what we’re after.

And so, when you speak of thresholds, I think there has to be a threshold other than a breach notice, which is really a failure to remedy/results from a failure to remedy, because even an excess of remedied breaches of contract should still be something that becomes public. I hope that made sense.

JUSTINE CHEW: Yes, I believe I understood you quite well. Alan, go ahead, please.

ALAN GREENBERG: Yeah. Thank you very much. I think the publication of information about the kinds of things that Jonathan is talking about becomes all the more important when you factor in something that came out in spades during the ePDP discussions, and that is Contractual Compliance is not going to make value judgments.

It has to be black and white. It has to be something that, if the contracted party takes them to court, or afterward they have a slam-dunk win—there is just no way that anyone would question it.

There have been a few exceptions over the years, but very few, and that’s a cultural issue and an issue of legal concerns that say, “Don’t take any action unless you can document it up and down the ways and make sure that there is no question about it,” and many things do end up being value judgment and, therefore, they’re not addressed.

So, I would go even farther than what Jonathan said of documenting the problems which are rectified. It’s documenting the complaints even when the Compliance chooses not to take action. Because if a registry, or a registrar for that matter, gets continuous complaints which ICANN says don’t have merit, there is a message there.

Yes, some of them are going to be spurious, and some of them are going to be irrelevant, and some of them are going to be ones that ICANN has chosen not to take any action on. You need more granular data and you need all the data, not just the ones that end up going to infractions. Thank you.

JUSTINE CHEW: Thank you very much. Agree completely. Any other comments? Okay. Seeing no hands, I will hand the floor to—

JONATHAN ZUCK: Justine?

JUSTINE CHEW: Yes?

JONATHAN ZUCK: Sorry. One of the recommendations the CCTRT made and that we have since made, and even had a session about at ICANN68, is this notion of thresholds as a possible definition of what constitutes a “bad apple,” as Holly put it.

I think it became clear that that’s an enormously sensitive issue and that the contracted parties don’t want any definition of “bad apple” in place, other than they’ve already been removed or dis-accredited.

The only definition of a bad apple is that whatever process resulted in them being removed, we can now call them a bad apple, but until that takes place, we can’t. I think that that’s going to be one of the fundamental disagreements between the At-Large and the contracted parties, that we’re looking for some sort of objective measure of a generally non-compliant contracted party, and they are vociferous in trying to resist that.

JUSTINE CHEW: Absolutely. Okay. Seeing no other hands up, I’m going to hand the floor over to Jonathan to talk about metrics.

JONATHAN ZUCK: Thanks, Justine. Thanks, everyone. I remember when Fadi Chehadé nicknamed me “metrics man,” because I have certainly blathered on about metrics quite a bit for the last 15 years inside of ICANN.

So, it feels like it has, over time, become a more significant conversation than it had in the past, and it is certainly a part of what is in the Subsequent Procedures report. I think—and Christopher Wilkinson noted this in the Google Doc and has brought it up on calls—that pushing this out to the implementation process is a little bit complex because of the last of objectives being set.

And so I think, if there is an overall point that we’re going to want to make about metrics, it’s that what is in fact policy are the objectives of the program, and that what would be implementation is the best way to measure on whether those objectives are being met and make changes to policy as a result.

And so, I feel like what our mantra needs to be to some extent is that the organization needs to actually establish not just new measures of success but determine what success looks like so that these metrics can be measured against something as the program is moving along.

And I think that’s something that’s also going to cause a lot of pushback and resistance, but something that we might want to try and advocate for. But let’s talk about the metrics in the Subsequent Procedures generally and have kind of a framework discussion. So, next slide, please.

So, what I wanted to do is talk about priorities, and then metrics themselves, and I think priorities is an increasingly important thing for the At-Large community and the ALAC specifically. It’s to focus in like a laser on the things that matter most to individual Internet users and not be focused on things that are specifically important to applicants, or even registrants generally. Next slide.

So, I was part of a review team that was created by the affirmation of commitments to the United States Government. And so, it was the Review of Competition, Choice, and Trust, and it was a strange collection of things to group together into a review, but the reason why this came into existence, just to give you a sense, is that these were words that were thrown out as a rationale for opening up the DNS to more TLDs.

And so, one of the things that we’re going to continue to face is this question of, was it worth it? Was there a cost-benefit analysis? If you have an increase in DNS abuse, was it worth it in order to get more competition between registries or more choice for registrants?

And that’s a difficult question to answer, and one that I think we’re going to find ourselves confronted with quite a bit: are these metrics being used to justify a program any longer? I would suggest they aren’t.

I think the concept of justifying a new gTLD program is gone and that there is just this sense that it’s inevitable and that we should just go on, and move on, and have more names added. And so, whether or not we want to bring back this kind of cost-benefit analysis is an overarching point for the At-Large that I think that we’re going to need to address. So, next slide.

So I think, for our purposes, we’re less interested in the competition metrics than the choice metrics, because they’re applicant-centric and registrant-centric, and we’re going to focus primarily on the trust component of the old CCT Review. Next slide, please.

And so, if I were to look at what our priorities were that have come out of the CCWG calls as we have discussed this ad nauseum in so many different ways, that the two priorities for the At-Large community with respect to registries and domain names are trust, consumer trust, and localization, for lack of a better word. That’s the word I was able to come up with to bring a bunch of concerns together. Next slide.

So, if we think about how these translate, it might be that we want to look at measures of trust. And then, the term that was kind of coined by the CCT Review, because it’s so difficult to measure trust, was “trustworthiness.”

And then, finally, again, trying to find an umbrella term, “participation diversity” in the new gTLD program. I think that these are probably the primary objectives of the At-Large for any new expansion of the namespace. Next slide.

So, when we talk about trust, you could sort of put the metrics that we’re trying to suggest into three buckets. One is just surveys asking users, “Do you trust these domains?” and seeing how they react to that.

It’s difficult because, just like political surveys, people don’t always know how to answer questions in the abstract. And so, the extent to which you can get specific data about their behavior and then extrapolate from that their level of trust, that’s sometimes more valuable.

And so, those two areas would be usage frequency, in other words, the degree to which there is traffic going to these new gTLDs: are they being used? Are they being typed explicitly or are they only being gotten to unknowingly, be it through redirects or QR codes or something like that? But, are people using them?

And the other is trust transactions, and this is something that Laureen Kapin of the Public Safety Working Group brought up on the CCT. If there is a way to track whether or not people are voluntarily sharing data or engaging in commercial transactions within particular TLDs, that’s somewhat of an evidence of trust, a more objective measure, a behavioral measure of trust, and that we might want to focus-in on metrics that look as though consumers are behaving as if they trust a domain, rather than just asking them about it. Feel free to stop me at any point if you’ve got questions, or need me to slow down, or something like that. Next slide.

So then, there’s this other sort of a little bit amorphous concept, but maybe easier to measure, which is this notion of trustworthiness. That’s what we sort of fell back on in the CCT Review, because trust was so difficult to measure. And so, that’s where we have these discussions about DNS abuse, Universal Acceptance, and then an understanding of the complaint. It sounds like the noise is coming from the [inaudible] operator. Is that right? Okay.

So, here in trustworthiness, we’re looking at rates of DNS abuse. Again, I think that the program setting an objective to having a new round that does not become the place that the DNS abuse moves to, which is what happened in the 2012 round, would be a good objective for the Subsequent Procedures Working Group to specify for the implementation teams.

In other words, we will judge this program a success if DNS abuse rates are lower in these new strings than they are in the legacy strings. And so, again, that’s part of our objection to this notion of just waiting and letting DNS abuse be dealt with globally. Hadia, you have a question. Go ahead, please.

HADIA ELMINIAWI: Thank you, Jonathan. This is actually a great presentation. So, my question was with regard to not changing the choice part. To me, for example, Universal Acceptance would actually fall under choice and not under trust. So, that was just an observation. Thank you.

JONATHAN ZUCK: Oh. Thanks, Hadia. I guess I could do that, too. The reason I put it here is whether or not it’s available. But the choice question is, as it’s framed for the CCT, about a choice available to registrants. In other words, if I’m looking to register a domain and it’s not universally accepted, then that means it’s not a legitimate choice to me, as a registrant.

In other words—and I bring this up all the time—I talked my wife into getting a .gallery domain name as her primary domain, and then she spent years struggling with websites that wouldn’t accept .gallery as an e-mail address, for example.

But to me, that feels like a registrant-centric view of this. And so, the reason I have it here is more about whether or not these domains are real from the standpoint of browser availability and things like that, so that they are legitimately able to be used by end-users. So, that’s sort of the distinction that I’m making. I hope that makes sense.

And then complaints is another issue that we have talked about quite a bit: complaints to ICANN. And then I guess I would ask, because a lot of people don’t know that ICANN exists, should we be seeking data from consumer protection agencies or other types of organizations about various TLDs?

I think, more often than not, they will be about a particular domain and not about an overall TLD, but we could start to see if there are quantities of complaints about a high-level domain, a global TLD, and then use that as some of our metrics of trustworthiness, so that it’s not just about ICANN complaints, because ICANN is such an obscure place to file complaints from the standpoint of an individual user. So, that’s something to think about. Next slide, please.

So, the next piece of this is participation. Again, any time you try to categorize something, it’s imperfect. But I was trying to look at some of the concerns that have come up over the course of these discussions. For us, it had to do with whether or not TLDs/registries are beginnings to be something that are a reality in the global south, or other under-served regions, even under-served regions in the global north, so to speak. Are those registries coming into existence and are they succeeding? That starts to become important to us, and we’re looking at policies that promote that.

So again, as we come back to this notion of “objectives,” I think, as the At-Large, we’d be interested in Subsequent Procedures as a matter of policy—not a matter of implementation, but a matter of policy—setting a policy that one of the purposes of a new gTLD program is, in fact, to expand the geographic, economic, and substantive nature of applicants: are they communities versus portfolio applicants?

And so, looking at applicant diversity and looking at applicant distribution—in other words, quantities across these different types of diversity—I think would be important metrics to the At-Large in terms of measuring whether or not there has been a real increase in participation in this process around the world.

So finally, as I said, setting specific success factors for the program that say that, for example, we would like to see a minimum of two new registries that are in each underserved region, or each region of the globe. And I don’t yet know—I haven’t thought through what that should look like specifically. But something that is a set of objectives, because that’s something to measure again.

So, unfortunately, some of the metrics that have been suggested are, “How many outreach programs were there?” and things like that, and that’s probably not going to be sufficient to meet the objectives, or to even measure the objectives, of actually expanding the participation in the gTLD program.

So, next slide. And so, that was the next thing I wanted to talk about, was this notion of metrics and objectives. If we have objectives associated with the metrics, those should be a matter of policy and, therefore, under the purview of Subsequent Procedures and not implementation.

And objectives become critical because they help determine which metrics are going to be most useful in measuring a path toward those objectives, and objectives also allow you to evaluate the program as it progresses and, potentially, make course changes throughout the life of a project because you have set objectives that you’re trying to reach.

And so, I think that the At-Large response to the Subsequent Procedures document should push back on delegating the notion of metrics, etc., to the implementation teams, but instead, as a matter of policy, set some firm objectives, other than just increase predictability, for any subsequent rounds. Next slide.

And so, those objectives can be absolute or they can be relative. In other words, we could just set numbers, that these are some numbers we’re looking at. These could be thresholds for DNS abuse that are set explicitly.

They could also just be that one of the objectives of the program would be to see a lower rate of DNS abuse in the new gTLDs than in the legacy gTLDs. And so, either one of those types of objectives can be set and could be very powerful for evaluation and ongoing modification of the program as we move forward. Next slide.

And then, finally, there is this question of culture. And so, the number one recommendation of the CCTRT was actually initially to identify a chief data officer inside of the organization so that, in fact, data became a high-level part of ICANN’s culture.

It kind of got watered-down at the request of the board to be something along the lines of formalized and expand the collection of data, but the underlying objective was to say that, any time a recommendation is being made, there should be data associated with justifying that reform and data associated with measuring the success of that reform, in whatever form it takes, whether it’s part of the new gTLD program or not.

And so, that recommendation, Recommendation 1, was in fact accepted by the board, and the board recently published a blog about their progress in implementing the recommendations from the CCT Review Team, and I just thought, with the next slide—and I apologize, it’s a bunch of text—that I would share what they said about Recommendation 1, one of their accepted ones.

So, our recommendation was to formalize and promote data collection, but you’ll see that there is a lot of scurrying around this issue. It will require a multi-phased approach. We can rely on existing resources but there might be an increase in cost associated with it, and the staff are looking into that.

And so, ICANN Org is conducting preliminary work for the definition phase. So, if you think about that and how they have broken that down into phases, it’s not necessarily illogical, but it does suggest that progress along the lines to create a data-driven culture for the evaluation of various programs and reform objectives is still quite a ways away.

And so, another area that I think that we might want to focus on when discussing metrics in the context of the new gTLD program is that Recommendation 1 needs to be through all of its phases and fully implemented prior to the start of an additional round.

So, that’s the last part of my notion about metrics. I’m happy to open it up for discussion. There is a document on metrics that’s available for review. I didn’t want to go through them one-by-one or anything like that.

But that was the framework I was planning to use, and encourage the small team to use, in looking at the metrics that we recommend or consider sufficient from the Subsequent Procedures Working Group. Are there any questions, or statements, or comments on that? Holly, please go ahead.

HOLLY RAICHE: Can we borrow from some of the recommendations coming out of the CCT report? Because, in fact, there were some good metrics—I think DNS abuse, for a start, is getting stuff from Compliance. But also following up, because, from the CCT report, we didn’t have metrics on trust that we could have. Could we work on that again and try to come up with some more?

JONATHAN ZUCK: I think that’s what we’re doing.

HOLLY RAICHE: Okay, yeah.

JONATHAN ZUCK: I mean, what Justine and the small team have done, to a very large extent throughout this process, is created a comparison, if you will, to the recommendations that were coming out of Subsequent Procedures and the recommendations from the CCT Review. And so, I think that Justine has been using the CCTRT recommendations as a kind of ruler throughout the Subsequent Procedures work. And so, I think that’s already embedded.

And so, this is more seeing what we can do as the At-Large to crystallize our own objectives for the program, and our own objectives for ICANN generally, and somehow get those formalized into policy via the Subsequent Procedures Working Group, and I think that’s the goal. It’s actually a narrowing. In other words, I don’t know that we care about increased competition between registries as much as we do about DNS abuse.

HOLLY RAICHE: Yeah. Okay. Thank you.

JONATHAN ZUCK: All right. Any other questions about that? I guess, maybe, staff can put a link to the current Google Doc on metrics as a reminder to people to look at the metrics that have been identified with Subsequent Procedures, and then, in the right column, some of the comments that have been made so far about how that effort should be expanded. Olivier, please go ahead.

OLIVIER CRÉPIN-LEBLOND: Thank you very much, Jonathan. You mention, here, those metrics. What about the DNS [health] technical reports that are also published by ICANN? Not just the ICANN Compliance team. Are you interested in including those, as well?

JONATHAN ZUCK: Well, I guess the question is, what is it that needs to be done to include them? Because they exist now. I was on the group that was formed to create those metrics. I will suggest that they are largely the metrics that came out of a pre-CCTRT effort to identify a list of data points that ended up becoming less valuable to the review team itself when we really got down to work.

And so, those are still tough metrics to use for real evaluative purposes. But the other problem with those metrics is that they still lack objectives, and I think that objectives and goals associated with those metrics are really the key to the usefulness of metrics.

All right. Justine, I don’t see anybody else speaking up on this topic. I’m hoping that … I guess I can do it if staff don’t have it handy. I’ll post a link to the Google Doc here while you’re onto the next topic. But I hand the talking stick back to you.

OLIVIER CRÉPIN-LEBLOND: Jonathan? Sorry.

JONATHAN ZUCK: Go ahead.

OLIVIER CRÉPIN-LEBLOND: Yeah. I was just going to add a little link, just to show you where the Internet Technical Health Indicators are. They’re on ihti.research.icann.org. I wasn’t quite sure whether many people were aware of these, but these are updated.

And so, it might be interesting to look at these because, if there are no targets for these, I guess that, from what we have here, from what we can see here, there definitely could be some target that we see there.

Certainly, some of this stuff regarding DNS abuse that we’re seeing here as being measured is quite atrocious. I think that … When you mention “targets,” do you mean that the next round should not proceed forward until the targets are met, or do you mean that we should publish targets and just let them float around?

JONATHAN ZUCK: Olivier, I guess my answer to your question might be both. I think that the value of the Subsequent Procedures Work Group setting objectives is to talk about how this new program is an improvement over the old program, not just from the perspective of applicants but from the perspective of individual Internet users.

In other words, they have thrown some things out there, some new metrics on, for example, applicant support. But without setting an objective associated with applicants from under-served regions, then that’s just something else we’re trying, as opposed to it is our objective to have X-number, or more than, or something like that, associated with that program for applicant support.

It shouldn’t just be window dressing. It should be objectives-based so that the success of it can be measured against a target. And so, I think that’s true for the Subsequent Procedures Working Group.

To answer your broader question, I definitely believe that the organization itself should be setting metrics associated with things like DNS abuse that are time-based. In other words, by this time next year, this metric will read this number instead of the number it reads now.

And so those, I think, are ongoing issues for us, and DNS abuse is something that we’re going to have to continue to discuss, or find a way to discuss that’s less incendiary, because ICANN68 was pretty rough from the standpoint of the trolling by contracted parties that just regarded any suggestion that any reform was an intrusion …

And I think we need to find a way to have a more cooperative discussion in the community. I think we did a little better during ICANN67. And so, they may just feel like, “Wow, you’re just pounding on us,” and they’re just reacting to the volume of that, but I think that that conversation about DNS abuse and establishing organizational or community-wide metrics around it is something that should happen completely in parallel to Subsequent Procedures.

OLIVIER CRÉPIN-LEBLOND: I’m not sure … Just to mention one thing. When it comes down to DNS abuse, if you’re looking at the metrics that are in that Internet technical Health Indicators, the working group had a long discussion as to whether there should be naming and shaming included in there because, obviously, if the data is there to show what the abuse is, everyone … Well, the people doing the research have, of course, the details of who the abusers are.

But there is a great reticence within ICANN itself to do something like this. You’ll find third-party sites that will publish the name, but my understanding is there has been a huge discussion, behind closed doors, as to whether the name-and-shaming could take place.

And obviously, legally speaking, it might open ICANN up to litigation of names are given. And therefore, the path forward that has been taken so far—and believe me, it’s already going pretty far, because something like this would have never been even supported a few years ago—basically has taken it pretty far to take it to this. Going that extra mile will be difficult. Thanks.

JONATHAN ZUCK: Olivier, I agree completely. I think it’s a very difficult issue, and one that we probably need to keep pushing on. It’s obviously a very sensitive issue and why, I think, we were trying, in our thresholds discussion during ICANN68, to set a sufficiently high threshold that any kind of numbers above that would be obvious malfeasance.

Then they began suggesting, “Well, then people will just try to create DNS abuse in a registry in order to blackmail them into …” And so, it just became a circular argument that, while, “There’s nothing that we can do about this,” and, “let us just keep doing what we’re doing,” and I think we need to find a way around that.

And again, I don’t think we need to name and shame on every single complaint or anything like that, but developing some kind of threshold short of “we’ve issued a breach notice” is something that I think we should probably continue to push for. Justine, I want to pass it back to you. I don’t know … Sorry.

JUSTINE CHEW: Yep, sure. Thanks, Jonathan. Thanks for that. Yeah, we’ll have to work a bit more on the Google Doc with the metric suggestions. Anyway, I’m hoping that most people on the call will be able to stay a little bit later. I note that it’s one minute to half-past, but I would really like about ten minutes to get through auctions and private resolutions of contention sets, if I may. I’m going to carry on until somebody cuts me off. Okay.

So, moving onto slide number two, you just need to have a context of how severe or how not-severe this topic is. Okay. I’ll leave it to you to make your own judgment. But the background is that, in the 2012 round, there were 1,930 applications, which resulted in 234 contention sets, of which 16 were resolved by ICANN auction, which means … And 215 of the 234, which constitutes about 91%, were resolved privately.

So, based on the 2012 applicants’ input, private resolution through various means, including private auction … So, we’re not talking about ICANN-conducted auctions, we’re talking about private auctions among parties themselves. So, private resolution was common but there were no public sets available, so we don’t know exactly what the private resolutions constitute, per se.

The con-set private resolution wasn’t a formal part of the PDP for 2012 round, so there weren’t any preliminary recommendations or policy guidance. The process of private auctions wasn’t created until after the applications were submitted in the last round.

Now, what had happened is … We’re talking about unintended consequences, now. So, in terms of private auctions, for example—and I repeat again, it’s the auctions that are not conducted by ICANN, so it’s purely between the parties concerned, the applicants who are in the contention set—with the private auctions, a majority of the proceeds actually went to the losing parties.

So, what they said was, basically, if we had three parties that were in the contention set, they would have a private auction and have a resolution where the party who wins will pay the proceeds of that auction to the losing parties.

So, that, obviously, leads to a possibility of gaming because there could be people, knowing that that has happened, who now go ahead and apply for a TLD—or invest 185,000 U.S. Dollars, or whatever it is—in the hope of applying for a popular string in the hope of getting into a contention set, a private auction, so that they can lose purposely and get proceeds.

So, they gain money that way. Or even if applicants, who apply for multiple strings and a few of them get into auctions, get proceeds from one auction, they can apply their proceeds to the other auction and, therefore, they benefit as well.

So, in that respect, there is definitely a possibility of gaming and abuse for private auction. The board has recognized this. It has expressed a concern. So did ALAC. We still didn’t have an answer to the legality of private auctions. So the question now is, how do we mitigate against these unintended consequences? That is the key issue for auctions and private resolutions. Okay.

So, in terms of—moving to slide number three—what ALAC’s existing position is, yes, we have gone into proposing a multiplier/enhancer [we create] option. That’s still on the table. But what I wanted to say is it did not support a total ban of all forms of private resolutions because we do accept that it’s possible and it should be allowable for parties who, say, form a joint venture or have some kind of business combination, to get out of a contention set. So, that is still a private resolution and that should be allowed.

What we did say is we would strongly be against private auctions, or any form of private resolutions that result in someone being paid off to withdraw their application in order to get out of the contention set. So, that typically covers private auctions, as well.

So, moving onto slide number four. Slide number four and slide number five; just a recap of the discussion that we had with Jim Prendergast two weeks ago. So, these two slides are important to note.

So, firstly, there is no consensus to ban private resolutions. So, I don’t think there is any way we can get through advocating that there should be a private resolution ban, or a ban on private resolutions. Because of that, there is no fool-proof way of implementing private auctions, as well. So, we have to consider the fact that private auctions is a real possibility, a real feasibility, and, instead, it should be more feasible to focus on [inaudible] and the need for reporting so that, if there is some abuse that happens, then at least we have data and we can say, for the next round, or for the next PDP, in order to derive policy, “Hey, look. We have exact data, or actual data, that this happened, so we need to guard against that or prevent it from happening again.”

The second point being that it is said that applications must be submitted with a bona fide good-faith intention to operate the TLD, and that is through an affirmative attestation. But the question raised is then, how do you determine what is real good faith or lack of good faith, just from the attestation?

If I was an … Not to say that … Well, an applicant can attest to having good faith when it applies. Two years down the track, circumstances change: “Oh, you know? That good faith sort of lapses. It doesn’t apply, now. I can’t do this anymore.” There is just no way to pin someone down on a good-faith attestation. And then, what happens if there is a lack of good faith? There is no penalty against a lack of good faith.

The third point being that ICANN must collect data on all forms of private resolution. So, as I said before, we need that to be able to enable data-driven policy recommendations for the subsequent round. Moving onto slide number five. So, this is when we talk about adaptation of the Vickrey auction. So, as we mentioned before, the pure definition of “Vickrey auction” is that a bid must be submitted when the application takes place.

There was a little bit of pushback, so now we’re just talking about sealed-bid auctions. So, if you disregard the point where you have to submit a bid with your application, just hold onto that thought. Now, move the timeline a little bit. We’re saying that to allow a little bit of flexibility on when the bids are submitted.

So, possibly, say, for example, when the first round of string similarity evaluation has happened and the contention sets have been established, then we tell the parties that are identified to have a string in the contention set, “Hey, you are in a contention set with X number of parties,” but we don’t reveal the identity of all the parties.

We just tell them, “You are in a contention set of this string and you are up against X number of [inaudible]. Put in a bid now.” So, that happens not during application, but it’s post-application, after the application period has closed, because we have to go through string similarity evaluation.

But the point is, we need to be able to get parties who are in contention to submit a bid before the identities of all the parties in contention are revealed. The concept of the winner paying the second-highest bid amount would stay. So, that concept of Vickrey auctions will presumably, be retained.

The evaluation process must somehow prioritize string similarity evaluation first. We need to go through that process in order to establish whether at least the first batch of direct contention sets arise, and then allow an applicant to be informed of contention set.

If they want to withdraw, they can withdraw. If they want to submit a bid, they submit a bid at that point in time. The idea is to also limit a need for further lengthy, costly evaluations for all, and limit that to only applications that wish to proceed.

So, if I put in an application and I find out that I’m in a contention set, I’m thinking, “okay. Maybe I don’t have a chance in the auction,” or, “I’m not too keen on private resolution,” so I withdraw my bid. Then, I am at least entitled to some portion of fee refund.

Now, the next point is the benefit of the multiplier for the bids, or what Jim referred to as “bid credits,” submitted by applicants that qualify for applicant support. That would stay, somehow. But again, details are not concretized. They are to be fleshed out in implementation.

The proviso about withholding identities of the applicants who are in contention sets may be pierced in the context of applicant support, applicants who apply for applicant support, because we need to establish whether they get applicant support or not first, in order to determine whether they are entitled to the multiplier.

So, that process has to happen, and that process, you can’t really keep the identities of those parties concealed. They have to at least be revealed to the [sub], at least, but it may be reviewed further. We’re saying that it shouldn’t matter because they are getting, if they succeed in applicant support, the benefit of a multiplier. So, they’re not prejudiced that way.

That also might lead to people not simply applying for applicant support. You shouldn’t be applying for applicant support if you qualify in other ways. So, we’re trying to also establish that the folks who apply for applicant support are the ones, the genuine applicants, who really need applicant support. And again, ICANN must monitor and must collect data on all auctions, whether it’s ICANN auctions or private auctions, in order to enable data-driven policy recommendations for subsequent rounds.

So, these were the notes that I derived from the discussion with Jim. So, bear this in mind when we look at the actual recommendations. All right. So, moving to slide number six. Okay.

The affirmation with modification 35.1, if I can simplify, just means that we’re going to adopt ICANN auctions on last resort. We’re going to adopt community priority evaluations as two means of resolving contentions.

Recommendation 35.2 pertains specifically to private resolution. Okay. So, this says that, consistent with the application change request, the Applicant Guidebook must reflect that applicants be permitted to creatively resolve contention sets via business combination, or JV, or private resolutions. Okay. So, that means that we are allowing private resolution, and private resolutions could include business combinations, JV, or auctions—private auctions.

Any of these resolutions which result in the withdrawal of one or more applications are subjected to application change process. Therefore, public comment period will kick in. So, we’ll have the opportunity to comment.

And also, any materially modified applications resulting from the above will be subject to pre-evaluation. There is a new public comment period and a new objection period. And also, contention sets that resolve through private resolution will have to adhere to the contention resolution transparency requirement.

So, this touches upon what needs to be reported. Okay. I’ll come to that in a little bit. Yeah. 35.3 says that this transparency requirement has to apply, but there are also protections for applicants.

So, what are these contention resolution transparency requirements? Moving onto slide number seven. In terms of private resolutions—so not ICANN auctions of last resort, but private resolutions, which include private auctions—these are the things that the parties are expected to discuss: the names of the parties involved; which application is being withdrawn, which are being maintained; will there be change in ownership, and so forth, with changes in directors, officers, so forth and so forth; material information regarding changes to the info contained in the original application.

And subject to protections. Basically, this is something that was pushed for by contracted parties. No participant in a private resolution process shall be required to disclose any proprietary information that is, for example, a trade secret, business plan, financial record, personal information, and so forth, unless it is already part of the requirements for a normal TLD application.

So, the concern was that some folks say, “Well, we don’t want to reveal how much we actually value the TLD,” because they consider that as proprietary information. It’s a trade secret. We’re like, “Okay, but there still needs to be disclosure to the extent possible in order to determine whether funny business has happened.” Okay. I use that term loosely, “funny business.”

And the idea is that a lot of this information needs to be disclosed in order for evaluation to happen. So, if we can limit to anything … That we can say that, if the information is required through the normal application process, then it has to be disclosed.

Anything else, you can put a stamp on it that says it’s a trade secret/business plan, then we consider it as sensitive information. Maybe it’s only revealed to the evaluators. So, some kind of a non-disclosure obligation will have to apply, or something of that kind. So, that is the context of the transparency requirements.

Moving on to slide number eight. Okay. So, this is the one where it says “bona fide intention,” Recommendation 35.3. “Applications must be submitted with a bona fide or good-faith intention to operate the TLD, confirmed via affirmative attestation.”

It goes on to say that evaluators can ask clarifying questions if they think that there is no bona fide intention, and they will look at certain factors in order to establish whether there was a bona fide intention or not.

And as I said before, applicants can mark certain responses as confidential if they think that it includes proprietary business information, in which case the evaluator will look at it, treat it as sensitive information, and take care not to disclose it publicly, or something to that effect.

Now, look at some of the factors that have been identified to decipher whether a bona fide intention exists or not. Now, what I consider [and resolve] is that these factors are necessarily subjective, but there will possibly be no way around it, because a lot of the evaluations are based on substantive determinations anyway.

But the one I found difficult before, what I find difficult with this “bona fide intentions” concept is something that I alluded to before. Number one, there is no punitive measure against an applicant who is found to have lacked bona fide intent.

So, we did discuss possible punitive measures, such as potential loss of registry, barring the participation in future rounds, and also financial penalties, but there was a lot of pushback and we couldn’t come to an agreement. So, therefore, they have not been suggested.

And the timing of these factors when they are considered may impact the potential punitive measures, meaning to say that, for example, an applicant is not … The second factor … The applicant string is not delegated into the root within two years of the RA being effective.

So, you have to wait two years before we can decipher whether the applicant was considered to have had good faith when they applied two years ago, or two-plus years ago, when the application period actually opened and closed. So, there are issues around these, which I find difficult. Yeah.

So, what is it about bona fide intention to operate? What use is it? I mean, the concept is good, but if there is no way to nail it down, or to enforce it, or to have punitive measures against it, then why have it? I don’t know. I’ll leave that for input. Okay. Jonathan, I see your hand up. Go ahead, please.

JONATHAN ZUCK: Oh, thanks, Justine. I thought, if nothing else, I should give you a chance to catch your breath because you’ve had to go through a lot of stuff. On your last question about intentions, I guess one of the problems is that it’s in sort of direct competition with the notion that they shouldn’t have to reveal anything about their plans.

And so, I think part of how we could make some evaluation of their intentions is having greater specificity about their plans and what they have put in place to manage the TLD. And if they don’t have a real business plan to share, etc., then it could be an indication that they don’t have an intention to actually delegate the string, but that ends up falling under proprietary information. So, I guess that’s one of the challenges. So, to make it useful, we would need real information that they might not be willing to share.

JUSTINE CHEW: True. I don’t really know how to get around that. If you have some ideas, I would be all ears. The other thing is also, not be sinister or mischievous, but if, say, a party intends to game the system, they have no intention of operating the TLD. They have to submit this bona fide intention to operate as [affirmative] [inaudible]. They say, “Okay, fine. I attest that I have good faith in operating TLD—but actually, I don’t.” They go into a private resolution of some sort, they get a benefit out of it, and that’s the end of the story.

So, in order that the good faith … It doesn’t appear [put it on the track], so there is no real use of it, per se. So, there is nothing to say that a party that has declared good faith does actually have good faith.

JONATHAN ZUCK: Well, right. And I think what we have also discovered in the past is that good faith doesn’t necessarily lead to good behavior because market conditions change people’s intentions fairly quickly: “I have this desire, I have this PIC spec, but now, suddenly, I want to open up the TLD to more people because not enough people are buying it or registering under its restrictive nature, so I’m going to loosen the restrictions.”

So it’s difficult, because there’s always a timeline associated with it, as well. I mean, one of the things that … And again, everything eventually becomes difficult to enforce, unless they’re publicly traded companies.

But when we were talking about domainers before … I don’t know what the top-level-string version of a domainer is, necessarily, but one of the things that folks were concerned about is kind of ransoming, and this came up in the GeoNames discussion quite a bit, that an investor might just get a TLD with an intention of, somehow, ultimately licensing it or selling it at a profit when that geographic entity finally woke up to the need for a domain.

I wonder if … I don’t know. ICANN doesn’t want to get involved in price controls, but I wonder if there is some way to simply say that resale of these domains has to be at their original price, or something like that, to eliminate the scalping of top-level domains. But again, it might be tough to enforce, unless it’s a publicly traded company. Sorry, it’s not a very clear thought. I’m just thinking out loud.

JUSTINE CHEW: Okay. Alan, go ahead, please.

ALAN GREENBERG: Yeah, thank you. I’ve participated heavily in the discussions on this, and it’s a really difficult one, and I don’t think we’re going to find a really good resolution. There is pretty strong conviction that there were enough people who made a pile of money on this and now, potentially, see this as a business that is making applications and then taking the best offer, or selling out, or whatever, and this is an attempt to try to stop it from working.

To be honest, I don’t think it’s going to work very well, but I’m not quite sure how one can do it. How do you tell the difference between someone who goes into it with that intent and someone who goes into it with a full intent of operating a TLD, and then someone offers them five million dollars for it, which is a good return on investment, and they say, “Fine, I’m going to take it”?

It’s less risky than operating the TLD, where TLDs don't have a real strong track record of making money. “Someone else wants it more than I do. I’ll let them run with it.” There is an old saying that you make money in the stock market by selling too soon. You don’t make as much as you might have made, but you make more than you would have if you wait too long and the price goes down.

So, it’s a difficult question. It’s not addressed to my satisfaction, but I don’t see a solution that we can sell that will … And I think we’ll probably learn something in these next rounds, and maybe there will be a desire to try to fix it. Maybe not. Thank you.

JUSTINE CHEW: Sure, yeah. I agree. And I think we should approach it from the point of disclosure, just basically collecting as much information as we can in order to see whether abuse has happened, and then address it that way. Olivier, I see your hand up. Go ahead, please.

OLIVIER CRÉPIN-LEBLOND: Thank you very much, Justine. It’s just briefly. I can think of a hundred ways to go around any such rules of not being able to assign or sell the gTLD and so on, starting from the fact that, if you remember, in the last round, there were lots of LLCs, Limited Liability Corporations, created for each application, and then no one can bar you from selling the LLC further down. In fact, I think that is against World Trade Organization rules.

So, it’s a real tough one, here, to go for. I understand it’s annoying for many others because there is some form of speculation going on regarding these. But like any commodity, it’s pretty hard to stop it from being sold. Thank you.

JUSTINE CHEW: Thank you for that. “Do we care in general?” Good question. From my perspective, if there is a bona fide intention this recommendation goes through, it goes through. I mean, to me, there is no harm, but it just doesn’t mean anything to me, really. It’s just there. It doesn’t do anything for me. Olivier, your hand is still up. Is that an old hand or a new hand? Okay. Old hand. So, if I can just get through the last bit, which is Recommendation 35.4, this is to do specifically with ICANN auctions.

OLIVIER CRÉPIN-LEBLOND: Justine?

JUSTINE CHEW: Yes?

OLIVIER CRÉPIN-LEBLOND: I was going to say it’s the last few minutes so, yes, please go quickly, because we do have a hard stop at the top of the hour. Thank you.

JUSTINE CHEW: Yep, yep. Okay. So, Recommendation 35.4 deals specifically with ICANN auctions. So, we’re moving away from private auctions. We’re talking about ICANN-conducted auctions, which is called “ICANN Auctions of Last resort.”

They will use the second-price auction method, which means that the winner of the auction will pay the second-highest bid amount. So, some of the elements around these ICANN auctions, as already touched upon earlier … So, meaning to say that, [for the first], I could just go quickly through.

Application closes, then we have the string evaluation to identify the direct contention sets. So, the identities of those parties who are involved in that direct contention set will be kept private. They will not be revealed to anyone, except that the evaluators need to know, obviously, because they are evaluating the contention to begin with, and ICANN Org, obviously, because they are processing their applications.

So, after the string similarity evaluation period ends, you get the contention sets. Then, applicants who are involved in those contention sets will be informed. As I said before, only the number of applications that their string is involved in a contention set, the number of applications that are competing for that string, but no other information. So, the identities are not revealed.

It is at that point they’ll be asked to submit a bid, which is called the “last resort sealed bid,” for each relevant application. They can choose not to do so. If they choose not to do so, that means it’s a bid of zero, so they’re obviously not going to win. They can also withdraw at that point in time, as well.

Then reveal day happens, which means that everybody gets to know who are the applicants for every single string. And then, obviously, the parties will then know who they’re competing against on that string. Okay.

And at that point in time, after review, they can go into private resolutions if they want to. So, they can go into JVs, or business combinations, or whatnot, to get out of the contention set/to resolve the contention set.

And all applications will still be evaluated. They go through the rest of the evaluation process within the initial evaluation. Also, objections, GAC early warning, and GAC advice, if there is any. And eventually, CPE.

So, there are rules around whether a party can adjust their bids or not. So, I’m not going to go into that, but it makes sense. And then, the actual auction will take place after all the evaluation procedures/objections have taken place, and it will not happen if any application in a contention set is still involved in an active appeal, or if there is a pending accountability mechanism, or is still in a new public comment period, or a reevaluation due to private resolution.

The last five bullets there will tell you what are the requirements to complete the auction. So, cut short, that’s it. Any comments? Okay. Seeing as there are none, I will hand the floor back to Olivier. Thank you very much.

OLIVIER CRÉPIN-LEBLOND: Thank you very much, Justine. As per usual, fantastic work, so thanks so much for all this. We are completely out of time on today’s call. Having spoken to Evin Erdoğdu and Jonathan Zuck, we’ll move the policy comment updates to next week.

There only is one, in addition to the current one, which is the label generation rulesets for the second level, but still some time to finish this. We are now into any other business, agenda item number five. Not seeing any hands up, I’m relieved.

So we can end, I would say, on time, on the top of the hour. The next meeting will take place next week, Wednesday the 30th of September, at 19:00 UTC. Until then, have a very good morning, afternoon, evening, or night, and keep on working on these Subsequent Procedures. Thank you., and goodbye.

JONATHAN ZUCK: Yeah. Check out those scorecards. Thanks.

MICHELLE DESMYTER: Thank you, everyone. Meeting has been adjourned.

**[END OF TRANSCRIPTION]**