ODP Policy Questions and GNSO Council Answers

Overarching

1. Is it the Council's view that affirmations of 2007 policy in the SubPro Final Report be treated by the Board in the same way as new policy recommendations? (see, e.g., Rec 6.1).

Response

As a preliminary matter, the SubPro Final Report states:

> *In the event the Working Group was unable to recommend an alternate course of action, the Working Group operated on the basis that the "status quo" should remain in place as a default position. This status quo consists of the 2007 policy, the final Applicant Guidebook, and any implementation elements that were put into practice in the 2012 application round.*

Further, according to the SubPro Final Report, "Affirmations indicate that the Working Group believes that an element of the 2012 New gTLD Program was, and continues to be, appropriate, or at a minimum acceptable, to continue in subsequent procedures.

Affirmations may apply to one or more of the following:

- *Policy Recommendation, Implementation Guideline or Principle from the 2007 Policy*
- *Existing provisions of the 2012 Applicant Guidebook; or*
- *Other elements of implementation introduced after the release of the final Applicant Guidebook but applied to the 2012 application round."*

1. *With respect to your question, it would depend on the Affirmation. An Affirmation of a policy from the 2007 Policy is not a new policy.*
2. *An Affirmation of an implementation guideline or principle from the 2007 Policy is not new policy either since they relate to elements that were not policy to begin with, but rather guidelines or principles.*
3. *An Affirmation of an existing provision of the 2012 Applicant Guidebook or other elements introduced after the release of the final Applicant Guidebook but applied to the 2012 application round may be new policy, new implementation guidelines or new principles depending on the nature of the implementation guidelines and the context of the affirmation.*

For example, Affirmation 6.1 is not a new policy in that it just affirms a Principle underlying the 2007 policy. Affirmation 5.1, on the other hand, may be a new policy since it is affirming what happened during the 2012 round, namely that there should be no limits placed on the number of applications in total or from 2 any particular entity. This is because it was not a policy from the original 2007 Policy, but it was what was done during the 2012 round which the Working Group agreed with and which the working group intended to become a new policy for subsequent rounds. We are happy to discuss specific Affirmations should you have questions.

Topic 2: Predictability (WT2) & Topic 3: Applications Assessed in Rounds (WT3)

These two questions focus on the role policy development can or cannot play during future rounds of new gTLDs. Specifically it is about the interaction of Topic 3 (Applications Assessed in Rounds), specifically Recommendation 3.7, and Topic 2 (Predictability Framework), specifically Annex E.

Annex E

Annex E, Sections 2 and 3 detail the SPIRT's role if a policy-level issue arises during an ongoing new gTLD round; Annex E assigns to the SPIRT the role of recommending to the GNSO Council whether to initiate a policy development process to address such a policy-level issue.

Recommendation 3.7

"If the outputs of any reviews and/or policy development processes has, or could reasonably have, a material impact on the manner in which application procedures are conducted, such changes must only apply to the opening of the application procedure subsequent to the adoption of the relevant recommendations by the ICANN Board."

1. If an issue occurs that requires a policy-level solution during an ongoing round, does the Council agree with the ODP team's interpretation that even if the SPIRT recommends to the Council to initiate a policy development process and the GNSO Council decides to follow that recommendation, as a result of Recommendation 3.7, any policy recommendations that result from such a process will not apply to the ongoing but only to future rounds?

Response

Yes. The GNSO and ICANN communities have been working for over a decade on reviewing the policies, procedures and implementation of the 2012 New gTLD Round and making recommendations based on the many lessons learned from the application round that introduced more than 1200 new gTLDs. Thus, the emergence of a (a) truly new policy issue that has not already been discussed or considered with respect to the application, evaluation, objection processes, AND (b) which requires a policy-level solution during an ongoing round, should be rare (if at all).

This is a very different consideration than whether the issue is important to certain persons or groups within the ICANN community, including a Review Team which has no mandate to develop ICANN consensus policy. Rather the community must ask itself whether: (a) it is truly a new issue that was not, nor could not have been, discussed and considered over the past

decade of policy development work, and (b) it is absolutely necessary to have a solution to such issue apply in the then-current round. These must also be balanced against the potential harm to applicants that have spent tremendous amounts of time, resources and money on their applications under the premise that no new policy would emerge, between the final approval of the Applicant Guidebook and delegation of new TLDs, impacting their proposed TLD and business model.

It is also important to consider the above question with Implementation Guidance 2.6 as well that acknowledges there may be emergency circumstances which will require ICANN org to take an action that may impact the New gTLD Program. In such a case, the action should be narrowly tailored to address only the emergency situation. The ICANN Board should notify all impacted applicants (if any) and the SPIRT within 24 hours after the emergency situation. The notification should include the nature of the emergency, the action taken (or anticipated action) in response to the emergency, as well as expected impacts on the New gTLD Program. That notification will be considered a referral to the SPIRT of an issue if the SPIRT elects to address that issue.

Therefore, there are mechanisms in place in cases of true emergencies for the ICANN Board to act if absolutely necessary.

2. Does the GNSO Council agree with the ODP team's understanding that in such an instance, where a policy-level solution is required to overcome an issue during an ongoing round, and the GNSO Council decides to initiate a policy development process (the outcome of which will apply to future rounds per Question A above), ICANN org will, if needed, develop a temporary operational solution that ensures the issue is addressed for the ongoing round? In such a scenario and consistent with Annex E Section 1b and 1c, the SPIRT "will have the option to collaborate with ICANN org as a solution is developed".

Response

As stated above, the likelihood of a policy-level solution being required to overcome a truly new issue during subsequent rounds should be rare if at all. And when read in conjunction with Implementation Guidance 2.6, ICANN Org does have the ability in emergencies to take an action that may impact the new gTLD Program provided that the action is narrowly tailored to address only that emergency situation.

However, the Council wants to also highlight Affirmation 1.2 which states that "The Working Group affirms Principle A from the 2007 policy and recommends that the New gTLD Program must continue to be administered "in an ongoing, orderly, timely and predictable way." In its rationale, the SubPro PDP Working Group also explained, "A major theme that was repeatedly raised throughout the life cycle of this PDP was the need for balanced predictability for all parties involved. It is on this basis that the desire for an "orderly, timely and predictable" New gTLD Program is universally supported."

The Council also notes Recommendation 1 from the 2007 policy that states: "The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process."

Therefore, in the unlikely event that a specific issue arises that must be resolved during that then-current round, but does not amount to an emergency, ICANN should collaborate with the SPIRT on a temporary operational solution for that round. The solution must be narrowly tailored to address only that specific issue and must also allow an impacted applicant to withdraw its application (pursuant to Recommendation 2.7) and receive a refund (under Implementation Guidance 2.8).

Topic 3: Applications Assessed in Rounds (WT3)

Implementation Guidance 3.4

1. ICANN org would like to confirm its assumption that the particular terms used [regarding application status] can potentially be changed based upon need during implementation and remain consistent with the Implementation Guidance.

Response

Confirmed. One of the reasons these were classified as "Implementation Guidance" as opposed to a "Recommendation" by the Working Group was to give flexibility to ICANN Org in the implementation of this concept in order to best achieve the purpose behind the recommended action. Thus, regardless of what the statuses are called in subsequent rounds, the purpose of the Implementation Guidance should be achieved.

[For Reference: 3.4 states: "Implementation Guidance 3.4: Where a TLD has already been delegated, no application for that string will be allowed for a string in a subsequent round." It then goes on to indicate what should happen if applications are in certain statuses - as those statuses were defined in the last round.]

Recommendation 3.6

2. Recommendation 3.6 appears to envision that ICANN org would open an application round, process the applications, and then open another round, while a Competition, Consumer Trust & Consumer Choice (CCT) review on the former would take place concurrently with the latter. Is this assumption correct? If so, how is this intended to interact with the Bylaws provision 4.6(d) which indicates that the CCT Review Team

identifies recommendations that “must be implemented before opening subsequent rounds”?

Response

The Working Group discussed at length the inter-relationship between all reviews (including the CCT-RT) and Subsequent Rounds. Recommendation 3.7 states: If the outputs of any reviews and/or policy development processes has, or could reasonably have, a material impact on the manner in which application procedures are conducted, such changes must only apply to the opening of the application procedure subsequent to the adoption of the relevant recommendations by the ICANN Board.

The Working Group also placed a priority on predictability of the timing of subsequent rounds and avoiding indeterminate periods of reviews and delays. This was discussed extensively in the Working Group Initial Report1 in Section 2.2.3 (f). For brevity, not all of the deliberations were reproduced in the Final Report, but they remain relevant here

The Working Group therefore believed that Recommendations 3.6 and 3.7 combined were consistent with the Bylaws since any recommendations approved by the Board as a result of a CCT-RT would in fact be implemented prior to the opening up the next subsequent round after the round in which the recommendations were adopted

Topic 4: TLD Types (WT2)

Recommendation 4.1

The Working Group recommends differential treatment for certain applications based on either the application type, the string type, or the applicant type. Such differential treatment may apply in one or more of the following elements of the new gTLD Program: Applicant eligibility 20; Application evaluation process/requirements21; Order of processing; String contention22; Objections23; Contractual provisions.

- Different application types:
    - Standard
    - Community-Based (for different application questions, Community Priority Evaluation, and contractual requirements)
    - Geographic Names (for different application questions)
    - Specification 13 (.Brand TLDs) (for different application questions and contractual requirements)
- Different string types:
    - Geographic Names (for different application questions)
    - IDN TLDs (priority in order of processing)
    - Variant TLDs

    - Strings subject to Category 1 Safeguards
- Different Applicant Types:
    - Intergovernmental organizations or governmental entities (for different contractual requirements)
    - Applicants eligible for Applicant Support

Recommendation 4.2

Other than the types listed in Recommendation 4.1, creating additional application types must only be done under exceptional circumstances. Creating additional application types, string types, or applicant types must be done solely when differential treatment is warranted and is NOT intended to validate or invalidate any other differences in applications.

Implementation Guidance 4.3

To the extent that in the future, the then-current application process and/or base Registry Agreement unduly impedes an otherwise allowable TLD application by application type, string type, or applicant type, there should be a predictable community process by which potential changes can be considered. This process should follow the Predictability Framework discussed under Topic 2. See also the recommendation under 3 Topic 36: Base Registry Agreement regarding processes for obtaining exemptions to certain provisions of the base Registry Agreement.

1. Question on 4.1, 4.2, and 4.3: Can the Council provide clarity on what the recommended differences are relative to the 2012 round with respect to the types of TLDs mentioned in Recommendation 4.1?

Response

The SubPro PDP Working Group wanted to codify the certain types of TLDs that may not have been formally identified in the Applicant Guidebook at the start of the 2012 application round as well as those categories of TLDs that may have been recognized, but were not called out in the original 2007 Policy. For example, prior to the 2012 Round there was no formal construct for a Brand TLD nor was there any prohibition on Brand TLDs. However, based on the 2012 Round, the further work on Specification 13, and the subsequent amendment to Specification 13 (as part of the first Global Amendment to the Registry Agreement), we now have a formal category of Brand TLDs. The SubPro Final Report describes what the Working Group foresaw as the recommended differences, but did not set forth all the ways in which those differences could be facilitated in the implementation of subsequent rounds. For example, in the 2012 Round, designations of Specification 13 .Brand TLDs were done after all the evaluations, objections, contention resolution, but prior to transitions to delegation.

2. Question on 4.1, 4.2, and 4.3: Does the Council agree that the lists of application types and string types listed in 4.1 are not exhaustive and that some other applicant types

already exist - wording in Rec 4.2 notwithstanding? Otherwise, for example, applicants requesting a Code of Conduct exemption might be grouped with Spec 13 applicants despite not being exactly the same; similarly, IDNs do not just differ in prioritization, such strings will require different technical reviews.

Response

Yes. Members of the SubPro PDP Working Group also wanted to ensure that there would be flexibility in the future to create new types of TLDs should that be deemed necessary and appropriate by the community. As stated in the SubPro Initial Report, members of the PDP Working Group were frustrated at the length of time and amount of resources it took to recognize the "Brand TLD type and to recognize that certain terms of the Base Registry Agreement, for example, were not appropriate for Brand TLDs. Therefore, they wanted to retain the possibility of new categories of TLDs in the future that may require differential treatment in one of the manners set forth in the Section 4 Recommendations and make it easier to accommodate such new categories. It should be noted that the SubPro PDP Working Group did not intend in any way to limit the differences in treatment of TLD categories to those specified in the SubPro Final Report, but rather referred to the example of Brand TLDs merely as an illustration.

Topic 8: Conflicts of Interest (WT2)

Recommendation 8.1

"ICANN must develop a transparent process to ensure that dispute resolution service provider panelists, Independent Objectors, and application evaluators are free from conflicts of interest. This process must serve as a supplement to the existing Code of Conduct Guidelines for Panelists, Conflict of Interest Guidelines for Panelists, and ICANN Board Conflicts of Interest Policy."

1. Does the Council have additional input on the Working Group's position that provisions in the 2012 round were insufficient to effectively guard against conflicts of interest among dispute resolution service provider panelists, the Independent Objector, and application evaluators, as detailed in the Rationale for Recommendation 8.1?

Response

The recommendation for a transparent process for ensuring that panelists, evaluators, and Independent Objectors are free from conflicts of interest has been put forward by the SubPro PDP Working Group since the Initial Report published in 2018. This topic was discussed at length by the SubPro PDP Working Group's Work Track 3 in response to a review of

Reconsideration Requests as well as the results from the objections and dispute resolution process.[1]

The recommendations were also in response to the comments submitted in Community Comment 2 and to ICANN's own Program Implementation Review Report ("PIRR") which found that "Regarding expert panelist selection criteria and process, ICANN received comments citing the lack of transparency in the expert panelist selection process and in the experts' qualifications as they related to the dispute resolution proceedings. To provide greater transparency in the process in future rounds, ICANN could ask the [Dispute Providers] to provide more information on their selection processes before Objections are filed."[2]

Further, Work Track 3 noted that the community perceived that the application of the objection process led to inconsistent results. In addition, in its review of reconsideration requests, Work Track 3 also noted that one of the issues frequently brought up in these reconsideration requests was that the requestor believed that one or more of the panelists or even the Independent Objector (as they sat for the 2012 Round), had a conflict of interest. Although Work Track 3 was unable to come to a definitive conclusion about the cause of these inconsistencies, its recommendations (which were contained in the SubPro Initial Report, Draft Final Report and the Final Report) essentially mirrored some of the recommendations in the ICANN Org PIRR, centering around providing more transparency in the process.

In the SubPro Final Report, the SubPro PDP Working Group noted in the deliberations section, that some comments to the draft Final Report "suggested drawing on best practice resources for the implementation of this recommendation, such as the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration"[3]

Topic 9: Registry Voluntary Commitments / Public Interest Commitments (WT2)

Recommendation 9.1

1. The recommendation notes that "Mandatory Public Interest Commitments (PICs) currently captured in Specification 11 3(a)-(d) of the Registry Agreement must continue to be included in Registry Agreements for gTLDs in subsequent procedures. [...] this recommendation puts existing practice into policy."

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[1] See https://gnso.icann.org/sites/default/files/file/field-file-attach/subsequent-procedures-initial-overarchingissues-work-tracks-1-4-03jul18-en.pdf at Section 2.8.1 at p. 172.
[2] See Program Implementation Review Report Section 3.2.4 p. 110.
[3] See Final Report at p. 37.

Maintaining Spec 11.3 (d) would prohibit closed generics during the immediate next round. Therefore, this recommendation seems to be in contradiction with the outcome of no-agreement that was reached by the SubPro PDP WG on Topic 23: Closed Generics.

This appears to be an oversight as the text for Topic 23 states that "Although the Working Group had numerous discussions about this topic, and received extensive comments from the community, including members of the Governmental Advisory Committee, the Working Group was not able to agree on 'policy advice concerning exclusive generic TLDs." Is this a correct assumption?

Response

Yes, this does appear to be an oversight and your assumption is correct. In reviewing the previous drafts, at one point of time there was a placeholder comment to come back to Specification 11 3(d) once we had completed the Closed Generic discussion. But at some point in the many drafts that comment got deleted and the Working Group inadvertently forgot to address..

Recommendation 9.2

Provide single-registrant TLDs with exemptions and/or waivers to mandatory PICs included in Specification 11 3(a) and Specification 11 3(b).

2. Can the Council provide guidance on the following: Recommendation 9.2 requires providing single-registrant TLDs with exemptions to Specification 11.3(a) and (b). Single registrant TLD is not defined among the TLD types under topic 4. Single registrant TLD does not appear to be defined in the report. Should this be considered an "additional application type" under Recommendation 4.2? What criteria are expected to be used to determine when this exemption applies?

Response

The Council notes that the SubPro PDP Working Group used the term "Single Registrant TLD" as shorthand for those TLDs that qualified for an exemption under section 6 of Specification 9 of the Registry Agreement. Namely, Section 6 states: "Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for the exclusive use of Registry Operator or its Affiliates, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest."

The Council does not have an opinion as to whether being granted this exemption under the Code of Conduct denotes a separate category of TLD.

3. ICANN org notes that Spec 13 and CoC exemptions are not only single registrant scenarios, as both include affiliates, too. Does this the Council agree that 9.2 applies to those type of TLD operators, too.

Response

Yes. The Council believes that the SubPro PDP Working Group understood the definitions of Specification 13 TLDs and those TLDs granted an exemption under the Code of Conduct.

4. Can the Council provide guidance on the following: The rationale for Recommendation 9.2 notes that security threat monitoring should not apply for single-registrant TLDs because the threat profile is much lower compared to TLDs that sell second-level domains. Given that single-registrant TLD is not defined, how can the level of risk be known?

Response

As stated above, the definition of a single-registrant TLD, as used by the SubPro PDP Working Group includes those TLDs that qualify for Specification 13 as well as those that meet the definition contained in Section 6 of Specification 9 (Code of Conduct) of the 9 Registry Agreement.

Recommendation 9.9

"ICANN must allow applicants to submit Registry Voluntary Commitments (RVCs) (previously called voluntary PICs) in subsequent rounds in their applications or to respond to public comment, objections, whether formal or informal, GAC Early Warnings, GAC Consensus Advice, and/or other comments from the GAC. Applicants must be able to submit RVCs at any time prior to the execution of a Registry Agreement; provided, however, that all RVCs submitted after the application submission date shall be considered Application Changes and be subject to the recommendation set Application Changes Requests, including, but not limited to, an operational comment period in accordance with ICANN's standard procedures and timeframes."

5. Does the Council agree that there should be no other reasons than those listed in 9.9 because of which an applicant can submit a revised RVC?

Response

The GNSO Council is not in a position to agree or disagree with the notion that these are the only reasons for which an applicant can submit an RVC. Council is also unable to comment on "revised RVC" which is undefined.

6. Does the Council agree that an applicant can amend an RVC?

Response

The Council refers to the Rationale set forth in Recommendation 9.9 which states that: "The Working Group emphasizes the importance of transparency and accountability in the implementation of RVCs. By requiring an operational comment period on any changes to RVCs, the New gTLD Program will ensure that the community has an opportunity to provide input on any changes being proposed. These types of changes should be considered application change requests, which includes an operational comment period."[4]

7. If the Council's answer is 'yes' to question 9.9 B, then the ODP team notes that allowing the change up until the execution of a Registry Agreement could lead to less predictability for stakeholders and added operational complexity for ICANN org, both of which may lead to additional processing time. This also provides an opportunity for applicants to resolve a contention set via the introduction or revision of the RVC, then submit another change request to revert back to its original RVC afterwards as a way to "cheat the system." Does the Council have any concerns about the reduced predictability and transparency under such a scenario?

Response

The Council notes that this question posed by the ICANN SubPro ODP Team appears to track closely with comments by ICANN Org in response to the Draft Final Report[5]*. Council also notes that the SubPro PDP Working Group had carefully considered each and every comment it received through the Public Comment Proceedings for its Draft Final Report, and respectfully disagrees with the ICANN ODP team's statement that this process will lead to "reduced predictability and transparency." RVCs were conceived (and expanded upon) to provide a transparent and predictable process by which applicants/registries could respond to concerns expressed by the Community. During the 2012 round, there was a lack of transparency and predictability as to the process by which applicants could respond to such concerns and how those responses could be codified and enforced. The Council, which unanimously adopted this recommendation, does not believe the ODP Team's assessment is correct.*

8. Does the Council agree that if an RVC is utilized to address GAC Advice, prevailing objections, it will be up to the applicant and the objector or the GAC to mutually agree that the RVC addresses the original concern and to communicate to ICANN how the RVC addresses the original objection or GAC advice?

Response

[4] See Final Report at p. 46.
[5] See Letter from Theresa Swinehart to SubPro Working Group dated September 2020

The Council is not in a position to agree or disagree with whether an RVC that is proposed to address GAC Advice or prevailing objections requires mutual agreement. The Council notes that "voluntary" PICs (now called RVCs) for the 2012 Round were the result of the ICANN Board's adoption of resolutions that it believed addressed the applicable GAC Advice. Thus, they did not require the GAC to "agree", but rather, what was required was that the Advice was addressed.

With respect to "prevailing objections", we do not know what that term refers to as it does not appear in the SubPro Final Report. If you are referring to GAC Early warnings, such warnings cannot interfere with contracting the TLD, so it does not appear that any mutual agreement with any individual GAC member is required. If you are referring to other objections such as a legal rights objection, an applicant could attempt to negotiate a withdrawal of such an objection prior to a decision, but if the objector prevailed that would end the application process for that applicant.

9. Does the Council agree with ICANN org's interpretation that in such a scenario, when no mutual agreement is reached, the application will not be able to proceed. If not, what is the way forward for the applicant according to the Council?

Response

The SubPro Final Report recommended striking the language from the 2012 Applicant Guidebook stating that where there was GAC Advice on a particular string that this would be a presumption that the string will not proceed. Rather, the ICANN Board would treat GAC Advice in accordance with its Bylaws. Therefore, if there is no "mutual agreement", the ICANN Board would have to consider the GAC Advice in accordance with its Bylaws.

Recommendation 9.10

RVCs must continue to be included in the applicant's Registry Agreement.

10. Does the Council agree that this means that RVCs must continue to be in the Registry Agreement after contract renewal or assignment and cannot be modified or removed from the Registry Agreement in the future.

Response

The Council is not in a position to state that these RVCs once incorporated in a contract must always remain in a contract. This issue was not addressed by the SubPro PDP Working Group because its mandate was limited to addressing issues involving the New gTLD Program processes up to delegation of the TLD for a successful applicant. The issue of whether contractual obligations such as PICs / RVCs may be changed, and if so, under what conditions those changes should be allowed, is outside the scope of this SubPro ODP . .

Recommendation 9.12

“At the time an RVC is made, the applicant must set forth whether such commitment is limited in time, duration and/or scope. Further, an applicant must include its reasons and purposes for making such RVCs such that the commitments can adequately be considered by any entity or panel (e.g., a party providing a relevant public comment (if applicable), an existing objector (if applicable) and/or the GAC (if the RVC was in response to a GAC Early Warning, GAC Consensus Advice, or other comments from the GAC)) to understand if the RVC addresses the underlying concern(s).”

11. Is it expected that the RO cannot terminate a RVC mid-operation unless that was explicitly set forth at the time the RVC was made?

Response

Please see Response above under Section 9.10

12. Are there any scenarios under which an RVC can be changed?

Response

Please see Response above under Section 9.10.

Recommendation 9.15

13. The recommendation noted that “the Working Group acknowledges ongoing important work in the community on the topic of DNS abuse and believes that a holistic solution is needed to account for DNS abuse in all gTLDs as opposed to dealing with these recommendations with respect to only the introduction of subsequent new gTLDs. In addition, recommending new requirements that would only apply to the new gTLDs added to the root in subsequent rounds could result in singling out those new gTLDs for disparate treatment in contravention of the ICANN Bylaws. Therefore, this PDP Working Group is not making any recommendations with respect to mitigating domain name abuse other than stating that any such future effort must apply to both existing and new gTLDs (and potentially ccTLDs).”

    The GNSO Council review of the ICANN71 GAC communique noted that “the Subsequent Procedures and RPM PDPs have addressed many of the issues raised in the CCT Review Team (CCT-RT) Final Report that were referred from the ICANN Board to the GNSO. For the DNS abuse recommendations contained within the CCT-RT Final Report, the GNSO Council is still in the process of determining whether any policy work is needed, and if so, how that work will be carried out.”

> Are there any further considerations from the GNSO on handling GAC advice on DNS abuse in the next round, or updates on whether such work is planned or will be carried out during the Operational Design Phase, so that this can be factored into our planning and assessment?

Response

At this point in time there are no applicable updates on this issue. It may be worth noting Resolved Clause 2 of the resolution by the GNSO adopting the SubPro Final Report which states, "Recognizing that nearly a decade has passed since the opening of the 2012 round of new gTLDs, the GNSO Council requests that the ICANN Board consider and direct the implementation of the Outputs adopted by the GNSO Council without waiting for any other proposed or ongoing policy work unspecific to New gTLD Subsequent Procedures to conclude, while acknowledging the importance of such work."

Topic 17: Applicant Support (WT9)

Concern

While ultimately a decision for the Board, ICANN org's ODP team wants to highlight a possible concern that the envisaged scope for a dedicate implementation review team (IRT), as detailed in Implementation Guidance 17.5, 17.8, and 17.10, may be out of scope for the role envisaged for an IRT per PDP Manual and Consensus Policy Implementation Framework (CPIF).

Documented Role of an Implementation Review Team

The Consensus Policy Implementation Framework states:

> *"[An IRT] will serve as a resource to implementation staff on policy and technical questions that arise. An IRT will typically consist of, but will not be limited to, volunteers who were also involved in the development of the policy recommendations. As such, the IRT is expected to serve as a resource to staff on the background and rationale of the policy recommendations and return to the GNSO Council for additional guidance as required. Where relevant, the IRT should also include technical or subject-matter experts and contracted parties who can assist staff in the planning for the technical implementation of a policy change."*

The PDP Manual states that the role of the IRT is: "to assist staff in developing the implementation details for the policy."

The IRT Guidelines and Principles state: "the IRT is convened to assist staff in developing the implementation details for the policy to ensure that the implementation conforms to the intent of the policy recommendations," and "the IRT is not a forum for opening or revisiting policy discussions."

Envisaged scope for a dedicated IRT, per Topic 17 of the Final Report

Implementation Guidance 17.5

"A dedicated Implementation Review Team should be established and charged with developing implementation elements of the Applicant Support Program. In conducting its work, the Implementation Review Team should revisit the 2011 Final Report of the Joint Applicant Support Working Group as well as the 2012 implementation of the Applicant Support program."

Implementation Guidance 17.8

"In implementing the Applicant Support Program for subsequent rounds, the dedicated Implementation Review Team should draw on experts with relevant knowledge, including from the targeted regions, to develop appropriate program elements related to outreach, education, business case development, and application evaluation."

Implementation Guidance 17.10

"The dedicated Implementation Review Team should consider how to allocate financial support in the case that available funding cannot provide fee reductions to all applicants that meet the scoring requirement threshold."

1. Does the Council share ICANN org's concern that the envisaged role of the dedicated IRT, as detailed in Topic 17 of the Final Report, amounts to policy development? If not, why not?

Response

The Council believes the intent of the Implementation Guidance as stated in the Report was that a group of people that were knowledgeable about financial assistance programs should address the specific elements of the Applicant Support Program. The Council does not opine on whether those elements are truly policy, implementation or both. It is essential that the dedicated team that works on these issues is both representative of the community, but also that it possesses the required skills and knowledge to develop such an important program.

The Council discussed this issue at the Council meeting on February 17, 2022 and continued this discussion during ICANN 73.

Rather than going down the path of classifying any of the work as "policy development", "implementation", or something else, the GNSO Council is considering whether there are mechanisms other than through a formal Implementation Review Team, where discussions can take place within the broader committee, to start doing some of the work envisaged by the SubPro Final Report GNSO-Council approved recommendations. This would include Applicant

Support, but may include other distinct topics such as the Registry Service Provider (RSP) Pre-Evaluation Program, Challenges/Appeals from evaluation results and/or disputes, Metrics and the Standing Implementation Implementation Review Team (SPIRT).

At ICANN73, the GNSO Council discussed this approach with the ICANN Board which seemingly welcomed work beginning on these topics to inform the ICANN Board's consideration of the SubPro Final Report recommendations. One of the goals of such discussions taking place in the near future would be to inform the work of the ODP in assessing the costs of the new gTLD Program.

The GNSO Council takes note of the concerns expressed by the ICANN CEO to take care that we do not do work which may impede or delay the work of the ODP. In addition, 2 the GNSO Council acknowledges that this work would have to: (a) be narrowly focused on only the specific tasks set forth in the SubPro Final Report recommendations, (b) have clearly delineated milestones and timelines, (c) allow for representation from the entire community, including the ACs, and (d) not be used to "relitigate" any issues handled during the SubPro PDP.

2. According to the Council, which specific implementation elements should a dedicated IRT develop versus ICANN org, and how can we ensure that such implementation discussions follow the IRT Guidelines and Principles noted above?

Response

See Answer above.

Topic 20: Application Change Request (WT2)

Recommendation 20.8

"The Working Group recommends allowing .Brand TLDs to change the applied-for string as a result of a contention set where (a) the change adds descriptive word to the string, (b) the descriptive word is in the description of goods and services of the Trademark Registration, (c) such a change does not create a new contention set or expand an existing contention set, (d) the change triggers a new operational comment period and opportunity for objection and, (e) the new string complies with all New gTLD Program requirements"

1. Does the Council agree that the intent of 20.8 is that only one single descriptive word - and not multiple descriptive words - can be added to the string? For example, .deltafaucets would be acceptable, whereas .delta-kitchen-faucets would not be acceptable.

Response

The Council does not believe that the SubPro recommendation was intended to be limited to "one word" per se. The intent is to allow the change to resolve a contention set or an objection. For example, if the descriptive term is "lawn mowers", and the addition of that term (comprised of two words) as .deltalawnmowers, or .delta-lawn-mowers resolves an objection or contention set (and meets (c), (d) and (e) in Recommendation 20.8, that would be in line with the intent of the Recommendation.

2. Does the Council agree that the descriptive word must be in the language of the relevant trademark registration and cannot be a translation or transliteration thereof? For example, if said company had its trademark registered only in Germany, .deltawasserhahn* would be acceptable, whereas .delta-faucet would not be. Similarly, if Delta had a trademark registration in German and English, then both those examples would be acceptable.
   *wasserhahn being the German translation of faucet.

Response

The Council notes that this is a matter for implementation, but it seems consistent with the recommendation that the descriptive term be contained in the trademark registration.

Topic 22: Registrant Protections (WT2)

Recommendation 22.7

"TLDs that have exemptions from the Code of Conduct (Specification 9), including .Brand TLDs qualified for Specification 13, must also receive an exemption from Continued Operations 10 Instrument (COI) requirements or requirements for the successor to the COI."

1. This Recommendation is based on the rationale that an EBERO event would not be necessary "in business models where there are no registrants in need of such protections in the event of a TLD failure." ICANN org notes a concern that the inclusion of Specification 9 exemption or Specification 13 in a Registry Agreement does not ensure there are no registrants or other end users in need of protection. For example, a car manufacturer with a Specification 13 may allow individual/independent car dealerships and/or their customers to use registrations in that TLD.

Response

The Council understands the comments made by the ICANN SubPro ODP Team but believes that the recommendation speaks for itself. The SubPro PDP Working Group perhaps used shorthand in its rationale because of the length of the Final Report. The operative term is "registrants needing protection". Because all of the registrants for a Specification 13 Brand TLD must have an affiliation with the Registry Operator (either a corporate affiliation or trademark

license), the SubPro PDP Working Group did not believe that this was a scenario which necessitated an EBERO since those "affiliations" all related to the services/products of the Registry Operator as opposed to completely unaffiliated registrants.

2. ICANN org notes the potentially significant impact on end users should any gTLD fail without failover or continuity mechanisms in place. Is the Council comfortable that the broader risks, i.e., that such a failure might not reflect only on the specific brand/gTLD but also potentially undermines confidence in the stability of the DNS and the Internet, has been fully considered in the context of this recommendation? In this context, the Council may wish to provide further guidance on whether EBERO protections would be appropriate in some instances of TLDs with a Specification 9 exemption or Specification 13.

Response
The Council notes that these comments by the ICANN SubPro ODP Team were raised by ICANN Org in ICANN Org's comments to the Draft Final Report6[6]. As before, Council notes that the SubPro PDP Working Group had carefully considered and addressed all comments received by the Working Group. and does not believe there is a need to re-consider these comments since the Council cannot substitute its own views for that of the SubPro PDP Working Group, which is a multi-stakeholder policy development process.

The Council, which unanimously approved the recommendation, believes that the SubPro PDP Working Group did consider all of the risks mentioned above and believes that the failure of a single Brand TLD would unlikely "undermine confidence in the Stability of the DNS and the Internet." As noted by the SubPro PDP Working Group in its deliberations after Community Comment 2, single entities fail every day on the Internet. The failure of one of these entities has never undermined the confidence in the stability of the Internet.

Topic 24: String Similarity (WT2)

Affirmation 24.1

"The Working Group affirms Recommendation 2 from the 2007 policy, which states "Strings must not be confusingly similar to an existing top-level domain or a Reserved Name."

1. Recommendation 2 from 2007 does not allow for exceptions to the 'confusingly similar' requirement. In light of the outputs of Topic 24, the ODP will assume 24.1 is an affirmation with modification because **the working group is adding new elements to the standard of confusing similarity**. Does the Council agree with this assumption?

[6] See https://www.icann.org/en/system/files/correspondence/swinehart-to-langdon-orr-neuman-30sep20-en.pdf at p. 25-26.

Response

It is true that the 2007 Recommendation does state simply that "Strings must not be confusingly similar to an existing top-level domain or a Reserved Name." That said, a lot of work was done during the development of the Applicant Guidebook to figure out how to implement that Recommendation. It did so by creating a String Similarity review process as well as an String Confusion Objection. Those were not considered new elements to the 2007 principle, but rather just implementation mechanisms. The final SubPro Recommendations further refined the interpretation of what it means to be confusingly similar to an existing top-level domain or a Reserved Name. Thus, the SubPro Working Group did not believe that these refinements to implementation constituted a modification to the original 2007 Recommendation.

The Council agrees with the SubPro Working Group classification of this as an Affirmation of the policy. The Council believes that the policy itself is not being modified; only the interpretation from the 2012 Applicant Guidebook is being modified.

Affirmation 24.2

Affirmation 24.2 states: Subject to the recommendations below, the Working Group affirms the standard used in the String Similarity Review from the 2012 round to determine whether an applied-for string is "similar" to any existing TLD, any other applied-for strings, Reserved Names, and in the case of 2-character IDNs, any single character or any 2- character ASCII string. According to Section 2.2.1 of the 2012 Applicant Guidebook, "similar" means "strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone." In the 2012 round, the String Similarity Panel was tasked with identifying "visual string similarities that would create a probability of user confusion. "The Working Group affirms the visual standard for determining similarity with the updates included in the recommendations below.

2. Recommendation 24.3 introduces the concept of singular and plural to string similarity, meaning "mouse" and "mice" would now be considered confusingly similar. Therefore, **does the Council agree** with the ODP's assumption that Affirmation of 24.2 is an affirmation with modification, meaning **that the standard for determining string similarly is visual and, in light of Recommendation 24.3, also grammatical for subsequent rounds of new gTLDs?**

Response

Although we understand what you are getting at with the question, we just want to note that for future reference "grammatical" implies a broader scope to what the policy relates to which really just involves singulars/plurals.

As stated above, the policy itself is not being modified. The policy is that strings must not be confusingly similar…. The implementation of the 2012 round as set forth in the Applicant Guidebook defined confusingly similar as being purely visual. However, that was a choice that was made by the community at that point in time of how to implement the Recommendation. The SubPro Working Group affirmed the 2007 Policy Recommendation, but focused on the selected implementation mechanisms from 2012. Because the SubPro Recommendations focused on refinements to the implementation as opposed to the policy, it was properly classified as an Affirmation.

Recommendation 24.3

Recommendation 24.3 states "Applications will not automatically be placed in the same contention set because they appear visually to be a single and plural of one another but have different intended uses."

3. **Does the Council agree** with the ODP Team that based on this recommendation, **all applications must provide an intended-use RVC?** This will allow during subsequent rounds that the intended use of an applied-for string can be compared to the intended use of an existing string to determine whether it passes the string similarity review.

Response

The SubPro Working Group Recommendations do require that all applications must state the intended purpose of its application. This is no different than Question 18(a) from the 2012 New gTLD Round which asked all applicants to describe the "mission/purpose of your proposed gTLD." That said, SubPro did not recommend that all applicants must have an intended use Registry Voluntary Commitment (RVC). SubPro only recommended that a Public Interest 3 Commitment (which could be in the form of an RVC) be agreed to where (a) there are two strings applied for that appeared visually as the plural/singular of each other, but where the application for those strings had different intended purposes or (b) there is an application for a string that represents a plural/singular or an existing gTLD or a Reserved Name, but where the intended purpose of that applications was different than the plain meaning of the reserved name or existing gTLD.

SubPro did not recommend that the responses to Question 18(a) be codified as PICs or RVCs for all applicants.

Recommendation 24.3 states "Applications will not automatically be placed in the same contention set because they appear visually to be a single and plural of one another but have different intended uses."

4. **Does the Council agree** that based on the wording of 24.3, the **intended-use test is only applicable to the possible delegation of singulars/plurals** not other visual or grammatical similarities? **Meaning** that applied for strings **.example and .examples**

might both be delegated if they provide an RVC that indicates different intended use. However, **.example** (english) and **.exemple** (french), if determined to be visually similar, **will never both be delegated**.

Response

The SubPro Working Group has only addressed the situation in which there are singular/plural applications of an existing gTLD, Reserved Name or another application in the same language. In the example provided by SubPro, .spring and .springs could both be delegated if they provide a PIC or RVC committing to different intended uses. If they are a singular/plural but in another language, then this recommendation would not apply. Thus if they were deemed visually similar, then the normal visual similarity rules apply.

Recommendation 24.3 states "The Working Group recommends using a dictionary to determine the singular and plural version of the string for the specific language."

5. **Does the Council agree** that for each round **dictionaries should be updated to the most recently published version and it is only that version that is authoritative for the purposes of accessing string similarity?**

Response

The SubPro Working Group did not specifically address this particular question and therefore the Council is not in a position to answer this question. That said, the Council believes that the ODP's question should be addressed during the implementation phase.

Recommendation 24.3 speaks only about singular/plural versions of the same word in the same language, not of other grammatical variations of the same word such as gender or conjugation.

6. **Does the Council agree with the ODP assumption that only singular/plural versions can both be delegated if the intended use is different, not any other grammatical forms?**

Response

The Council agrees that the SubPro WG Final Recommendation only addresses the issue of singular/plural versions of the same string. It did not make any recommendations with respect to other types of grammatical variations of an applied for string.

If the Council agrees, the ODP team believes the following example of .hand below will be applicable for subsequent rounds:

.hand and .hands

IF .hand and .hands are both applied-for strings in English THEN they both can be delegated if their intended use is different because they are singular/plural versions of one another.

- IF .hand and .hands are both applied for strings in German THEN they would be placed in a contention set ONLY IF they deemed to be visually confusingly similar, and one may be delegated subject to the outcome of the contention set resolution.
- IF .hand and .hände are both applied for strings in German THEN they can be delegated if their intended use is different because they are singular/plural of one another.
- IF .hand is an applied for English string and .hands is an applied for German string then they would be placed in a contention set ONLY IF they deemed to be visually confusingly similar, and one may be delegated subject to the outcome of the contention set resolution.

7. In light of this, **does the Council agree** that **this will likely require each application to indicate which languages/scripts they intend to use via an RVC and that those languages must always be offered for the life of the TLD?** And to allow for future intended use determination, **these RVCs will have to be submitted by all strings not just those in contention sets** so that applications in future rounds can be assessed against existing RVCs.

Response

The Council believes that these questions involve issues that should be resolved during the implementation phase.

That said:

- IF .hand and .hands are both applied-for strings in English THEN they both can be delegated if their intended use is different because they are singular/plural versions of one another.
    - GNSO Council Response:
        - *This appears to be consistent with the SubPro recommendation.*
- IF .hand and .hands are both applied for strings in German THEN they would be placed in a contention set ONLY IF they deemed to be visually confusingly similar, and one may be delegated subject to the outcome of the contention set resolution.
    - GNSO Council Response:
        - *We are interpreting this question to be asking that if the German word for Hand is applied for (.hand) by one applicant and the German word for Hands (.hände) by another applicant, what would happen?*
        - *It is our interpretation of the SubPro recommendations that if the applied for strings are the plural/singular of each other then they would be placed in the same contention set regardless of whether they were determined to be "visually confusingly similar."*

        - *Stated differently, plurals/singulars of each other in the same language are deemed to be confusingly similar regardless of whether they are deemed to be visually similar.*
- IF .hand and .hände are both applied for strings in German THEN they can be delegated if their intended use is different because they are singular/plural of one another.
    - GNSO Council Response:
        - *The Council interprets this question to be asking if .hand (the German word for hand) and .hände are applied for, can they both be delegated?*
        - *In that case the SubPro Recommendation applies whereby they can both be delegated if they have different intended uses.*
- IF .hand is an applied for English string and .hands is an applied for German string then they would be placed in a contention set ONLY IF they deemed to be visually confusingly similar, and one may be delegated subject to the outcome of the contention set resolution.
    - GNSO Council Response:
        - *The Council believes that the SubPro Recommendations on Singular/Plural only apply if they are in the same language.*
        - *If they are not in the same language, then the other rules set forth in the Applicant Guidebook would be applied to determine whether they would be placed in the same contention set. This would include the visually similar test as in the question, but may also include strings that are determined to be confusingly similar as a result of a string confusion objection.*

Clarification on the Previous Question by ICANN ODP Team
It's a similar question to and follows from the previous question – only there may be impact for the second level when it comes to their registration policies. For example, if we have a German application for hand [Which also means "hand" in German]] and hands [which only has an english meaning since the plural of hands in German is ".hände]", and they are allowed because the applicants are considering those strings as different uses because of different meanings in different languages – part of their RVC might be limiting or allowing registrations according to IDN tables for the relevant scripts/languages that will be in use for the registry. If that is the case, would an RVC be a mechanism to memorialize that commitment? And if so, would that be needed from all applicants in the event that a later round produced an application for a TLD found to be similar but intended to be used differently – or, as it seems from some of the other responses – would it only be up to the later applicant to demonstrate how the intended use is different and propose the appropriate RVC?

<u>Response</u>

In a string similarity review, the two applications if filed in the same round would be flagged for a potential violation of the plural/singular rule because they appear to be the plural/singular version of the other. However, under the exception if they can show that they are for different purposes (and commit to being used for different purposes) they can be allowed to coexist.

If the way to do that in this example is for the applicant for .hand to commit to only allowing German registrations and the applicant for .hands to only allow English registrations and they have a way to enforce that, then yes they can coexist. But if either one of the applicants refuses 7 to commit to that, then they would be placed in the same contention set and not allowed to coexist.

If .hands existed and there was an application in a subsequent round for .hand, then Council believes it would be only the applicant's burden to differentiate itself from the existing registry and ICANN would not go back to the original registry to limit its scope. Council does not believe the SubPro recommendations intended for ICANN to reach back into the existing TLD and force that registry to change to allow for a new registry to exist.

The example ICANN has provided is not the most likely scenario as discussed by SubPro. The SubPro Working Group discussed the more likely scenario where one of the applicants is a brand that looks like the plural/singular of an existing TLD or applicant, but where they have different meanings:

Examples

1. *.apple exists (as a brand TLD), but someone wants .apples to use its dictionary sense*
2. *.fire exists (as a brand TLD), but someone want .fires in its dictionary sense*
3. *2 applications are filed, one for .slack (as a brand), the other for .slacks (for pants) -*
4. *2 applications are filed, one for .ring (to use as the brand for alarms), and .rings (in the jewelry sense).*

Topic 27: Applicant Reviews (WT2)

Implementation Guidance 27.8

A mechanism(s) should be established to meet the spirit of the goals embodied within Q30b - Security Policy without requiring applicants to provide their full security policy. The Applicant Guidebook should clearly explain how the mechanism meets these goals and may draw on explanatory text included in the Attachment to Module 2: Evaluation Questions and Criteria from the 2012 Applicant Guidebook.

1. Does the Council agree that, because there is no additional guidance on meeting the spirit of the goals embodied within Q30b, it is up to ICANN org to develop this as part of designing the evaluation process?

Response

The Council does not understand the statement "it is up to ICANN org to develop this as part of designing the evaluation process." The design of the evaluation process is developed during the

implementation phase and reflected in the Guidebook which is subject to comment and review by the Community.

Implementation Guidance 27.16/27.17

2. Implementation Guidance items 27.16 and 27.17 appear to be inconsistent with one another. The guidance that ICANN "should not evaluate proposed business models" is difficult to reconcile with Implementation Guidance 27.17, which states, "the evaluation should determine whether an applicant will be able to withstand missing revenue goals, exceeding expenses, funding shortfalls, or the inability to manage multiple TLDs in the case of registries that are dependent upon the sale of registrations." To carry out IG 27.17, which also notes for instance that "....determining the financial wherewithal of an applicant to sustain the maintenance of a TLD may require different criteria for different types of registries; criteria should not be established in a 'one-size-fits-all' manner," there seems to be a need to identify and consider the relevant business model as part of the evaluation. Is this a possible oversight and if not, can you provide additional insight to how these two items should be read?

Response

The Working Group did not believe this was a conflict.

For Implementation Guidance 27.16, the Working Group was making a recommendation that ICANN not evaluate a proposed business model from a qualitative perspective. In other words, it believed that ICANN should not be making a qualitative judgement on whether the business model being proposed was likely to be successful or not, or whether an independent evaluator believed in the model being proposed. But that did not mean that the applicant should not be required to state what its business model will be and to indicate both a "worst case possible scenario" and "likely case scenario" as they had to in the original application process.

This information combined with the financial information provided about the entity and how it intends to fund the registry should enable evaluators to provide an evaluation as to whether the applicant would be able to withstand its worst case scenario (for Recommendation 27.17.

Implementation Guidance 27.20

The following is a tentative but exhaustive set of financial questions:

- "Identify whether this financial information is shared with another application(s)" (not scored).
- "Provide financial statements (audited and self-certified by an officer where applicable or audited and independently certified if unable to meet the requirements for self-certification)" (0-1 scoring) (certification posted).
- "Provide a declaration, self-certified by an officer where applicable or independently certified if unable to meet the requirements for self-certification, that the applicant will be

able to withstand missing revenue goals, exceeding expenses, funding shortfalls, and will have the ability to manage multiple TLDs where the registries are dependent upon the sale of registrations" (0-1 scoring) (publicly posted).

3. Can the Council provide clarity on how "tentative but exhaustive," is defined as noted in IG 27.20?

Response

The Council notes that without context the language can appear to be contradictory. But the SubPro PDP Working Group labeled this as "Implementation Guidance." Thus, it understood that like all "implementation guidance" the precise wording of the financial requirements could change from that presented in the Implementation Guidance described in this 27.20. That said, the Working Group, which initially addressed this issue in Work Track 4, wanted to make it clear that the Implementation Review Team did not add additional requirements (or questions) other than the three bullet points above.

In other words, although it recommended that ICANN provide guidance to applicants about what resources are required to operate a registry, it did not want ICANN to evaluate specific business models.

Topic 28: Role of Application Comment (WT2)

Implementation Guidance 28.5

"In addition, each commenter should be asked whether they are employed by, are under contract with, have a financial interest in, or are submitting the comment on behalf of an applicant. If so, they must reveal that relationship and whether their comment is being filed on behalf of that applicant."

1. Does the Council have any input on how the information obtained through the questions detailed in 28.5 would be used during the evaluation?

Response

In the Rationale for Implementation Guidance 28.5, the SubPro PDP Working Group stated the following:

> *The Working Group noted commenters could potentially misrepresent who they were or who they represented and "game" the system to disadvantage certain applicants. Recognizing that evaluation panelists perform due diligence in considering application comment, and the challenge of confirming the true identity of all contributors to public comment, the Working Group nevertheless encourages ICANN to seek opportunities to verify the identity of commenters in a meaningful way to reduce the risk of gaming and*

further to require commenters to disclose any relationship with an applicant for the sake of transparency. The Working Group notes that further consideration may need to be given to specific implementation elements, for example whether there should be consequences to the applicant if a commenter does not disclose a relationship with that applicant.

This IG is tied closely with Recommendation 28.9 and Implementation Guidance 28.10 which ask the Implementation Review Team to develop guidelines about how application comments are to be utilized or taken into account by the relevant evaluators and panels. The problem that the SubPro PDP Working Group had is that it did not know how, or even if, application comments were considered during the evaluations, objections, etc. That is why it recommended that ICANN provide more clarity on the role of application comments in such processes. When it provides such clarity, it should also include information as to how it would consider comments submitted by competitors or those that would have an interest in either pushing the application forward, or that would have an interest in seeing the application fail.

The Council believes that this should be worked out by the Implementation Review Team. That said, ICANN has had hundreds, perhaps thousands, of public comment periods throughout its nearly 25 year history. Comments are submitted all the time by those that have an interest in the outcome of those comment periods and we believe that ICANN Org has likely developed guidelines for the organization to evaluate those comments with that context in mind. Therefore, it believes that ICANN in connection with the IRT should be able to provide more clarity to IG 28.5.

Topic 31: Objections (WT2)

Affirmation with Modification 31.3

For full text see Final Report pp.145-147

1. Does the Council agree with the assumption that, once notified, the dispute resolution provider is not involved in any communication between the objecting party and applicant during the cooling off period?

Response

When read in connection with each of the other recommendations, IG and Affirmations in Section 31, the parties are encouraged to attempt to resolve their disputes / objections outside of the formal process during the cooling off period. The dispute resolution provider is not intended to get involved in the substance of the dispute/objection during the cooling off period unless mutually agreed by the parties. That said, the parties should have the ability to communicate with ICANN to provide guidance should the dispute be settled. Guidance should be provided on a) what steps to follow in the event a settlement is reached, (b) what would be

needed to effectuate the settlement if that settlement may result in a change to one or more applications, (c) what changes to an application (or applications) would be acceptable, (d) the process to follow in terms of comment periods, etc.

Other than such guidance, the Council does not believe that the SubPro Final 14 Report addresses other forms of communication. The Council notes also that the SubPro Final Report does not state whether or not there should be a ban on other communications with the dispute provider.

Implementation Guidance 31.6

"Information about fees that were charged by dispute resolution service providers in previously filed formal objections should be accessible for future review."

2. Does the Council have further guidance on to whom, by whom, for what purpose the information "should be accessible for review"?

Response

The SubPro PDP Working Group noted in its Initial Report that it was unable to evaluate whether the fees charged for disputes/objections were excessive or not. It noted many commenters and members of the Working Group had the perception that the fees for all objections (other than perhaps the Legal Rights Objections whose fees were fixed and published) were excessive. However, the SubPro PDP Working Group had no information as to the amount of fees that were charged for each of the objections filed in the 2012 Round.

Many of the recommendations/Implementation Guidance in Section 31 center around increasing transparency in the process both to provide more predictability, but also to enable future review teams to be able to assess what this PDP was unable to do because of a lack of information. Therefore, the recommendation is that future review teams have access to information on the fees that were actually paid for objections, disputes, etc.

3. Does the Council agree that the "previously filed formal objections" will not include objections from previous rounds nor any other type of objections administered by the dispute resolution provider in the past - but only apply to objections filed during each respective round of new gTLDs?

Response

The Council believes that the term "previously filed" should be interpreted using its plain meeting. If and when there is a review of the objection/dispute processes, that review team should be able to collect the data from all objections and disputes that have taken place prior to that review. If, for example, a review is done in 10 years, and there have been three application

rounds prior to the review, then yes, the fee amounts from the 3 rounds that spanned those 10 years should be reviewable to assist that review team in its evaluation.

The SubPro PDP Working Group recommended that there be continuous rounds without an indeterminate break to conduct reviews. Therefore, if a review is being 15 conducted while Round 4 was going on (assuming Round 1 was 2012), then it should be able to review the fees charged by dispute providers for Rounds 2, 3 and any disputes/objections already conducted during that current Round 4. Obviously, data/information is not available for Round 1.

Implementation Guidance 31.12

"All criteria and/or processes to be used by panelists for the filing of, response to, and evaluation of each formal objection should be included in the Applicant Guidebook."

4. The ODP team believes that the provider documentation is the best source for applicants, not the AGB: Implementing 31.12 will require ICANN to contract with the dispute resolution vendors prior to finalizing the AGB to collaboratively create and finalize such criteria and/or process, in advance of the commencement of the application submission window. The ODP team notes that this will likely result in significantly higher costs for the program and may have additional resourcing impacts, too. Updating this information would also mean updating the AGB, which would invoke the Predictability Framework, leading to timing implications. For the ease of participants in any objection process, dispute resolution providers are the best source of information, as long as all relevant information is available in a timely manner. Does the Council agree that this would meet the intention of 31.12?

Response

The Council notes that these beliefs and comments from the SubPro ODP team are nearly identical to the comments filed by Theresa Swinehart to the Draft Final Report. As before, Council also notes that the SubPro PDP Working Group had carefully considered each and every comment it received through the Public Comment Proceedings for its Draft Final Report, and is not in the position to qualify Recommendation 31.12 as it reads.

Topic 33: Dispute Resolution Procedures After Delegation (WT2)

Recommendation 33.2

"For the Public Interest Commitment Dispute Resolution Procedure (PICDRP) and the Registration Restrictions Dispute Resolution Procedure (RRDRP), clearer, more detailed, and

better-defined guidance on the scope of the procedure, the role of all parties, and the adjudication process must be publicly available."

1. Does the Council agree that publishing all relevant guidance on the scope will be sufficient to implement this recommendation?

Response

No. The Council notes that the recommendation states that "clearer, more detailed, and better defined guidance on the scope of the procedure, the role of all parties, and the adjudication process must be publicly available.

2. If not, can the Council provide guidance on any particular deficiencies or areas that the org should consider in developing "clearer, more detailed, and better-defined" in the context of this recommendation?

Response

As noted in ICANN Org's comments to the Draft Final Report, the SubPro PDP Working Group was only able to assess the PICDRP process prior to the February 2020 updates. The Council acknowledges that ICANN Org's February 2020 update did include more details on the PICDRP process. However, the IRT should assess whether the February 2020 updates satisfies this recommendation.

Topic 35: Auctions: Mechanisms of Last Resort / Private Resolution of Contention Sets (WT2)

Recommendation 35.3

1. The recommendation states that applications must be submitted with bona fide intention to operate, noting that if a string is not delegated within two (2) years of the effective date of the registry agreement, this may be a factor considered by ICANN in determining lack of bona fide intention to operate the gTLD for that applicant. Affirmation 40.2, on TLD Rollout, supports maintaining the timeframes for delegation and contracting used in the 2012 round, namely, 9 months to enter a registry agreement and entry of the TLD into the root zone within 12 months of the effective date of the registry agreement. Our assumption is that the two years is a maximum, such that extensions exceeding that time may be a factor in determining lack of bona fide intention to operate the gTLD, and not that the delegation timeline for all applicants should be extended from one to two years. Is this assumption correct?

Response

Yes and No. Yes the working group was not proposing that the delegation timeline be changed, but it also recognized that there MAY be a good reason why a registry needs a longer period to delegate. So, it is not really a maximum in that sense, but one factor that can be considered.