

## Summary: Final Activity Report of the Independent Objector

- Regarding funding of the IO, the report states: “The IO has a dedicated budget to cover the necessary cost of the objection proceedings, including filing fees and panel fees as required. In addition, he had the opportunity to use a portion of the dedicated budget for administrative assistance as needed” (p 3).
- Outlines the role of the IO, including scope and mandate and reflects on the IO’s experience applying key concepts in the role. Role of the IO is described in this Explanatory Memo:  
<https://archive.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf>
  - In discussing the concept of “highly objectionable” content, the IO recommends that **“it should be explicitly stated in the AGB that the IO has a discretionary power in deciding if an application is “highly objectionable” or not”** (p 6).
  - The IO also makes a recommendation with respect to the concept of “extraordinary circumstances,” **stating that “the AGB should follow its reasoning through, develop the concept of “extraordinary circumstances” and explicitly grant the IO access to other objections within reasonable time, prior to making the decision to withdraw his own objections”** (p 7).
  - Noting that it would be helpful and logical for the IO to be aware of objections filed by other parties before taking a final decision on his own objection, he recommends that **“the IO should have an additional period of two months after publication of the objection list for filing his objections”** (p 7-8).
  - Regarding independence of the role, the IO reports that he “sometimes had the feeling that they respected my independence with some excess,” and cites examples of ICANN refusing to provide clarification of provisions of the

AGB or publish the IO's final activity report on the ICANN website (p 8).

- The IO defends his commitment to transparency and integrity and refutes accusations of conflicts of interest. He states that concerns about integrity of the IO should be raised before the Panel handling the application and not the ICC (p 9-10). He cites specific cases where parties raised the issue of integrity. He also states that "it is certainly not for ICANN to take any position on the issue of independence or to remedy any alleged concerns in any way" (p 14).
  - The section concludes with two recommendations. First, **"ICANN should envisage to expressly state in the rules applicable in the future that if the independence and integrity of the IO is challenged, the issue should be decided by the Experts Panels in the cases in which it is raised. Moreover, the public posting on ICANN's website of a declaration of independence and impartiality by the IO should be envisaged."** Second, where there is a conflict of interest, **"ICANN should maybe provide for the appointment of an alternate IO. Another solution would be the provision of a list of substitutes, to which the IO, or the Expert Panel could refer to in case they deem it necessary"** (p 15).
- Outlines the phases of the IO's work, strategy, and specific tasks associated with these phases (p 16-20).
- Discusses the IO's commitment to transparency and the website he launched to promote transparency, concluding with the recommendation that **"ICANN should keep the IO's website which is still widely consulted by Internet users"** (p 21).
- Provides bios for the members of the legal team (p 22).

- Provides an overview of the dispute resolution process, highlighting that the IO “established the “Initial Notice Procedure” in order to give applicants the opportunity to react to my concerns following my first assessment of applications” and discusses the outcome of this procedure in different cases (p 23).
  - Regarding the Initial Notice Procedures, the IO provides the opinion that **“it would be appropriate to formally consecrate it in the Guidebook in view of the future rounds of the New gTLD Program. It is indeed a good alternative to the mediation and negotiation strongly encouraged by ICANN, which better corresponds to the specificities of the IO’s mission and mandate” (p 26).**
- Provides an overview of cases filed by the IO, including outcomes (p 27-29).
- Explains why the IO requested Panels to authorize a second round and the submission of an additional written statement in all cases where he filed an objection (p 30).
- Reflects on the fact that New gTLD Dispute Resolution Procedure makes no specific provisions for an appeal process and expresses disappointment that some applicants used the reconsideration request process as a substitute for an appeal process. The IO concludes that he is not “ideologically” opposed to an appeal process in the framework of the ICANN New gTLDs Dispute Resolution Procedure but believes that the process should be expressly provided by the AGB and held before arbitrators who have the last say (p 31-33).
- Discusses the IO’s interpretation of the framework for objecting on Limited Public Interest grounds (p 33-35), concluding with the recommendation that **only the fourth ground should be retained in a future version of the AGB** (p 35). The fourth ground is “A

Commented [SC1]: So, it’s interesting that a lot of his feedback is on the objection grounds themselves, not specifically how they pertain to the IO. But of course, his conclusion is much more firmly rooted to the remit of the IO.

determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.”

- Discusses the rationale for using the LPO in specific cases and the outcomes (p 36-38).
  - Raises concern about inconsistent interpretations of the AGB by Expert Panels, recommending that the “**AGB should explicitly mention that the Expert Panel will conduct its analysis on the basis of the applied-for gTLD string itself and its intended purpose as stated and described in the application**” (p 38).
- Outlines the IO’s interpretation of the framework for objecting on Community Grounds (p 39-40) and suggests that the “**Guidebook should further develop. . . the four tests to be conducted in case of a community objection**” (p 41). The IO provides a detailed analysis describing ways to further develop the test (p 42-48).
- Provides an overview of the issue of closed generics and describes reasons why the IO considers “closed generic” gTLDs outside the scope of his limited functions (p 49-53).
- Concludes with a series of recommendations (p 54-56):
  1. There is a need to clarify the definitions of key terms in the Applicant Guidebook. Law attaches great importance to its wording and so does the parties to the objection proceedings, their lawyers as well as the Expert Panels. To ensure a certain stability and consistency in the proceedings, words used by the Applicant Guidebook should be precisely defined. This applies both to the Procedure itself and to the IO’s mandate. By way of example, I have always had difficulties understanding why a “Limited Public Interest Objection” was not a “Public Interest(s) Objection”.

Indeed, the interests protected by this Program and its procedure are many, varied and anything but limited.

2. This need for clarification also applies to the community objection ground which should be defined more precisely as I have sketched in the present report. The main goal of the Applicant Guidebook is to provide with a clear and complete overview of the Program. The Expert Panels' mission will be more consistent and facilitated if the AGB and its Procedure leaves only small room for interpretation.
3. Another crucial clarification should be for the AGB to explicitly mention that the Expert Panel will conduct its analysis on the basis of the applied-for gTLD string itself and its intended purpose as stated and described in the application (as finally agreed to by the Applicant in case of changes accepted in the course of the Initial Notice Procedure) since an analysis based on the sole gTLD string does not make any sense.
4. In the same vein, the AGB states that the IO can only file an objection against "highly objectionable" applications. If it is not specifically defined, this term will be systematically discussed in future rounds. It should be explicitly stated in the AGB that the IO has a discretionary power in deciding if an application is "highly objectionable" or not, even if it must also be made clear that the IO will have to explain its choices.
5. The IO is also limited to filing objections where no objection has been filed against the same string, on the same ground and where there are no extraordinary circumstances. It implies that the IO has to withdraw his objection in case there is another objector to the same gTLD string. The AGB should however follow its reasoning through, develop the concept of "extraordinary circumstances" and explicitly grant the IO access to other objections within reasonable time, prior to making the decision to withdraw his own objections. It is indeed the only way the IO can make sure there are no extraordinary circumstances at hand. Based on the same reasoning, this provision would be even more effective if the IO is granted a different deadline to file his objections. I believe he should have an

additional period of 2 months after the publication of the list of objections to finalize his own list of objections.

6. ICANN encourages applicants and objectors to enter into mediation or negotiation prior to or during the objection process. As explained in the present report, such alternatives do not always correspond to the IO's mission. I have however created the Initial Notice Procedure, which took place before the objection proceedings. This procedure was a success, welcomed by all applicants. I therefore suggest that ICANN should formalize this new Procedure in the AGB.
7. As for the issue of conflict of interests, I suggest that ICANN should envisage to expressly state in the rules applicable in the future that if the independence and integrity of the IO is challenged, the issue should be decided by the Expert Panel in the case in which it is raised. Moreover, the public posting on ICANN's website of a declaration of independence and impartiality by the IO should be envisaged. Also, ICANN should reflect on the possibility to provide for the appointment of an alternate IO. Another solution would be the establishment of a list of substitutes, to which the IO, or the Expert Panel could refer to in case they deem it necessary.
8. It is certainly appropriate to reflect on possible appeals following a determination upon an IO's objection, but the reconsideration process as it exists is clearly not a suitable option.
9. The question of the maintenance of the IO's website should arise now that his mission for the first round is terminated. I believe that ICANN should decide to keep the website I created online. Indeed, it has been and is still widely consulted. It is also an important source of information on the IO's functions for future rounds and future applicants, as well as internet users, might have a particular interest in consulting this website.