NCSG Statement on GAC Scorecard RE New GTLDs

NON-COMMERCIAL STAKEHOLDER GROUP (NCSG) COMMENT ON U.S. GOVERNMENT PROPOSAL REGARDING SCORECARD ON NEW GTLDS

9 February 2011

ICANN's Non-Commercial Stakeholder Group ("NCSG") represents academic, individual consumer, non-profit and other non-commercial Internet users in GNSO policy development at ICANN and represents more than 200 noncommercial organizations and individuals including academics, consumers, development and human rights groups, religions, and educational institutions.[1|#_ftn1] In consultation with its membership, NCSG has prepared the following response to the recent proposal made by the US Government to ICANN's Government Advisory Committee ("GAC") on the Scorecard for new gTLDs ("USG Proposal"[2|#_ftn2]). As the USG Proposal is presented in the form of a proposal to be adopted by the full GAC, this response outlines the flaws inherent in the proposal and presents reasons why it should not be adopted. This response focuses on proposals #1 (Objections Procedures), #2 (Vertical Integration) and #4 (Intellectual Property Protection) of the USG Proposal.

The NCSG believes that many aspects of the USG Proposal are sufficiently alarming that, if adopted, they would threaten the fundamental human right of freedom of expression, and set a dangerous precedent for governmental dominance in the multi-stakeholder arena of Internet governance. Specifically, the USG Proposal **ignores and completely overturns both the process and result of carefully-negotiated community consensus** that led to the latest version of ICANN's Draft Applicant Guidebook ("AGB") for new generic top-level domains ("gTLDs"), and is a clear attempt to wrest control over the assignment of new gTLDs away from the multi-stakeholder process at ICANN and vest it in the hands of individual governments.

We wish to emphasize that an appeal to the "universal resolvability of DNS" cannot possibly justify giving any individual government the power to prevent the creation of a TLD "for any reason." One does not advance the cause of a globally interconnected Internet by encouraging any individual government to exercise a global authority to prevent the creation of top+-+level domain applications. The only effect of such a policy would be to multiply one country's controls and regulations to all countries. There are in fact no technical harms to the Internet as a whole caused by the blocking of a single TLD by one or a few countries.

We further wish to remind the Board of the importance of **Principle G** to the GNSO New GTLD Recommendations that the applicant's freedom of expression rights must be respected in the string evaluation process. The USG Proposal also contradicts GNSO New GTLD **Recommendation #1**, which requires all applicants to "be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process." Obviously there can be no transparent and predictable criteria under the USG Proposal, which places no limits or restrictions on what could be objected to, and thus prohibited from the DNS.

General Note:

Although the NCSG has raised issues with ICANN's accountability and transparency practices in the past, the ICANN model is based on multi-stakeholder participation involving not just governments, but also industry participants+,+ and noncommercial and individual Internet users. In this model, and as enacted in ICANN's Bylaws, individual national governments – through the GAC – may be influential participants and are entitled to offer advice to the ICANN Board on Internet domain name policy, but do not override the voices of businesses large and small, non-profit organizations and individual consumers. We believe that this community-based model of bottom-up consensus decision-making is currently the most appropriate framework for Internet domain name management and governance, in light of the fact that the Internet is a global network whose evolution, maintenance and growth has depended, and continues to depend, on the participation of each of the stakeholders who are represented in the ICANN model.

Our Reasons for Rejecting USG Proposal #1

The USG Proposal recommends eliminating the current Limited Public Interest Objection procedure entirely, and adding to the Initial Evaluation phase for a proposed new gTLD the ability for "any GAC member" to object "for any reason" (which objection must result in a denial of that gTLD application by ICANN if no other GAC member opposes the GAC's support of that objection). In addition to the general reasons we stated above, this particular proposal is troubling because:

(1) It ignores the recommendations made by a cross-community working group ("CWG") that carefully considered and proposed refinements to the Limited Public Interest Objection procedure. The CWG reached a series of significant compromises among all participants in the ICANN community to reach mutually agreeable solutions.

The CWG, which included several participants from GAC member countries in their individual capacities[3|#_ftn3], made recommendations to modify the AGB-prescribed procedure that were responsive to GAC's concerns. The CWG recommendations are still under consideration by the ICANN Board and have been publicly available for some time[4|#_ftn4]. It would have been far more helpful – and a welcome acknowledgment of the role of each stakeholder (including governments) in ICANN decision-making – if the USG Proposal had addressed the CWG's concerns and recommendations so as to arrive at an improved objections process rather than simply reject it when it has been subject to community comment and suggestions.

(2) The USG proposal states, incorrectly, that the objection procedure would result in an erosion of national sovereignty as governments would be bound by the decision of a private entity (the International Center for Expertise ("ICE") of the International Chamber of Commerce ("ICC")), "guided by" only the opinion of three international law experts.

The objection procedure, particularly as refined and further explained by the CWG, has never precluded governments from enacting, amending or repealing their respective national laws as an exercise of national sovereignty and interpreting and applying applicable principles of international law. Rather, it provides a mechanism by which any party with standing (whether individual, corporate or government) can raise an objection to a new gTLD application based on the specific issue of whether that gTLD string will contravene recognized principles of international law (e.g. as found in numerous international treaties). Determination of that specific issue – in the form of a legal opinion – is made not by the ICE or the ICC, but by an appointed panel of jurists. The CWG recommended that the ICANN Board decide whether or not to reject a particular string based on

the jurists' legal opinion+. This policy in no way impacts national sovereignty rights+ -- governments can (and regularly do) block access information on the Internet of which they disapprove. The CWG's recommendation does not change that ability or practice of governments.

It would have been more helpful if the USG Proposal had recommended a better way for conducting the objection procedure (e.g. by recommending an alternative forum), or a specific means through which the GAC can provide formal assistance to the Board where such objections are concerned. The USG Proposal fails to adequately explain why paying a fee to participate in this objection procedure abrogates national sovereignty, why it believes that it would not be "feasible" for a panel of three eminent jurists to determine questions of international law, and why the only remedy possible is deletion of the procedure[5|#_ftn5].

As to the possibility that certain national governments may block certain strings because they consider these to be broadly "objectionable" or, more specifically, contrary to a particular national law (but not to international law[6|#_ftn6]), the USG Proposal fails to demonstrate how the likely few, isolated instances of such blocking would directly lead to a problem with Internet stability or substantially detract from universal resolvability[7 |#_ftn7]. These necessary - but missing - components to the USG Proposal severely undermine its own credibility and persuasiveness to over-turn community consensus policy.

(3) Its recommendation that the Initial Evaluation process be amended to allow the GAC to decide whether or not a particular gTLD is acceptable subverts the basis upon which ICANN functions, renders an applicant vulnerable to internal GAC politics and lobbying, and arrogates only to the GAC the right to decide what is in the "global public interest".

A better, more balanced and less high-handed way to address the apparent concern here that strings that would ultimately be rejected through the Limited Public Interest objection process be dealt with much earlier in the process would have been a recommendation to amend, improve and/or speed up either the objection process or the related "Quick Look" procedure. While we agree that the blocking of numerous strings by individual governments is not a desirable outcome, we note that the USG Proposal does not provide ICANN any leeway or discretion at all, as the outcome depends entirely on whether the GAC fails to oppose – a different concept from whether the GAC actually supports - an objection raised by any single GAC member[8|#_ftn8]. While we do not doubt the good faith of the GAC, it is possible that reasons such as national comity might make a GAC member decide not to oppose an objection raised by a GAC colleague.

This proposal allows what governments consider "objectionable" – a standard unmoored to any specific criteria or international legal framework – to form the basis upon which certain gTLD applications are denied. Given the broad subjectivity that this proposal would permit and the consequent threat to free expression – a fundamental human right long recognized by international law --this proposal in fact plainly contracts "the global public interest".

(4) The proposal that the concept of community-based strings be expanded to include "strings that refer to particular sectors, in particular those subject to national regulation (such as .bank, .pharmacy)" over-reaches and introduces unnecessary subjectivity, breadth and uncertainty into the new gTLD application process.

The USG Proposal would subject these strings to the need to document support or non-objection from a relevant authority. It also goes further, suggesting that if deemed "too broad" or "sufficiently contentious", the application be rejected. It is not clear who will make this decision, or on what basis. This recommendation invites arbitrariness, subjectivity and unpredictability in the string evaluation process.

It is also difficult to see how a string such as ".bank" would necessarily be one purely of "national, cultural, geographic [or] religious significance". While banks and pharmacies are subject to some regulation, these relate largely to licensing and operational practices. Such matters, as well as legitimate concerns relating to, e.g., fraudulent practices, should not be summarily dealt with by denying the gTLD altogether, particularly as these issues may be content-related and thus an issue beyond ICANN's mandate. A better approach – in relation to operation of the gTLD string rather than the content of a domain – would have been to recommend improvements to either ICANN registry contracts or post-delegation procedures.

Our Reasons for Rejecting USG Proposal #3

The USG's rejection of liberalized cross-ownership rules completely ignores two of the three expert reports commissioned as well as the extensive analysis and discussion carried out in the Vertical Integration Working Group. In particular, the ICANN policy roughly corresponds to that recommended by the Salop and Wright report and by several sizable groups within the Vertical Integration Working Group. When the USG asserts that ICANN had no reason for changing its position between March and November 2010, it ignores the fact that an entire working group process had been conducted, with extensive development of alternative proposals by experts in the industry and among ICANN stakeholder groups. The USG analysis is flawed in a more fundamental manner: it seems to not understand that a new TLD, which is the only group to which the new regulations would apply, cannot possibly have "market power" because it has no market share and no individual or organization is required to register within a new TLD. The USG also ignores the extensive evidence demonstrating that current separation requirements act as a barrier to entry and obstacle to the success of many small prospective TLDs.

Our Reasons for Rejecting USG Proposal #4

We note that the USG Proposal in relation to intellectual property protection would resuscitate proposals previously rejected by community-wide consensus through the Special Trademark Interests review team formed by the GNSO at the ICANN Board's request[9|#_ftn9], and introduce mechanisms rejected even earlier, by the Implementation Recommendations Team that was formed by the Intellectual Property Constituency.

We note, further, that the ICANN Board has done the following:

- Considered the various mechanisms put forward for addressing trademark issues in new gTLDs[10|#_ftn10];
- Put forward the possibility that additional or emerging issues in this regard be further addressed through policy development by the GNSO[11|#_ftn11]; and
- Indicated on several occasions over a period of time that in its view trademark issues have been sufficiently addressed by a consultative and inclusive community-wide consensus process[12|#_ftn12].

With respect particularly to the possibility of GNSO policy development, we note that the GNSO Council has recently called for an Issues Report to be prepared on the Uniform Dispute Resolution Policy, as a necessary preliminary step towards a full policy development process. This reflects the GNSO community consensus, as evidenced by the reports made by the GNSO's Registration Abuse Policies Working Group and the

Registration Abuse Policies Implementation Drafting Team. The GNSO is also in the process of evaluating the value of and developing guidelines for the establishment of cross-community working groups, which would include participants from other ICANN stakeholders, including the Advisory Councils.

In addition, we believe that the effectiveness of these rights protection mechanisms is best measured after they have been tested in practice. It may be that they need to be refined further, or even that additional and balanced mechanisms should be considered for future launches and existing gTLDs. In light of the delay that has already attached to the introduction of new gTLDs, the ongoing work in the GNSO and the process through which the community has arrived at a consensus position on a contentious over-arching issue, a more constructive and thoughtful approach would be to review these consensus-based mechanisms as a community post-launch, instead of following the USG Proposal+,+ which would effectively and essentially mean restarting the entire process all over again.

Conclusion

For the reasons stated above, we urge members of the GAC and the ICANN Board to reject the USG Proposal. We support the ICANN Board's resolution to meet with the GAC in Brussels, and to take into account all community input, as it completes its deliberations regarding the launch and implementation of new gTLDs. What we do not support is any attempt – whether by a government, a group of governments, or non-governmental actors – to engage in a run-around of a thoughtful and good-faith community process of engagement, discussion, negotiation and compromise that took place over a long period of time and that has resulted in consensus positions on once-contentious issues. Such a process would circumvent ICANN's multi-stakeholder policy development process and take the Internet in the direction of the "digital" Dark Ages, handing governments greater power to censor the Internet and use it as a political tool. ICANN has a responsibility to protect the Internet from such a governmental power grab and discourage the domain name system's use as a political tool by governments.

In light of the upcoming ICANN meeting in San Francisco, we invite the GAC, individual governments and everyone in the ICANN community to work with us to resolve any remaining implementation issues with new gTLDs, and to engage in timely, collaborative reviews of policy and practices going forward.

[1|#_ftnref1] See http://www.icann.org/en/about/ and the relevant associated webpages.

[2|#_ftnref2] The USG Proposal can be viewed in full at http://blog.internetgovernance.org/pdf/USGmonstrosity.pdf.

[3|#_ftnref3] The GAC did not participate formally in the CWG. Participants from GAC member countries, although participating in their individual capacities, were helpful in providing general government perspectives to the rest of the group. The group also received information from the international law firm that ICANN engaged to help craft the procedure.

[4|#_ftnref4] See http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm (inviting public comments on the group's August 2010 report, available via the link); and the relevant Board resolutions from September 2010: http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.9, and December 2010: http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2 (stating, in relevant part, that the CWG has "clarified [its] recommendations in a series of consultations with ICANN staff and Board members" that discussions "will continue on (1) the roles of the Board, GAC, and ALAC in the objection process, (2) the incitement to discrimination criterion, and (3) fees for GAC and ALAC-instigated objections', and requesting the CWG to provide final responses on these issues by 7 January 2011. The CWG's responses were filed and are available publicly at http://forum.icann.org/lists/soac-mapo/pdfbMwNTSi4MW.pdf.)

[5|#_ftnref5] While certain NCSG members do not support the current AGB procedure for determining objections under this category, the NCSG unanimously believes that the USG Proposal represents a worse alternative.

[6|#_ftnref6] This is a critical distinction, and one clarified by the CWG. Allowing national law variants to determine whether a gTLD string is approved or not would facilitate repression of free expression by certain governments where those variants themselves are not reflected in principles of international law.

[7|#_ftnref7] We note that blocked domains are, in fact, universally resolvable architecturally; it is simply that a network operator may elect not to do so. This does not affect the Internet's architecture: see, e.g. http://blog.internetgovernance.org/blog/_archives/2011/1/29/4737705.html. Note also that thousands of second-level domains are already blocked by national governments, and will continue to be blocked regardless of whether ICANN adopts the USG proposal.

[8|#_ftnref8] This distinction – between "support for" and "opposition to" an objection (which objection may be made by just one GAC member) is particularly important given the GAC's concept of "consensus" (see Footnote 1 of the USG Proposal).

[9|#_ftnref9] The STI's recommendations, based in part on the IRT's proposals, were the basis for the mechanisms eventually introduced into the AGB. All of the groups' various reports as well as each iteration of the AGB have been subjected to public comment: see http://www.icann.org/en/announcements/announcement-4-29may09-en.htm (inviting public comment on the IRT's Final Report) and http://www.icann.org/en/announcements/announcement-2-17dec09-en.htm (inviting public comment on the STI team's recommendations of December 2009).

[10|#_ftnref10] See, e.g., the Board's resolution on this question from its Trondheim retreat in September 2010: http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.9.

[11|#ftnref11] This was specifically included in the Trondheim resolution, _ibid. We note that the language expressly considers the possibility of "*further mechanisms* for *enhanced protection* of trademarks" (emphasis added.)

[12|#_ftnref12] The Board's resolution in Cartagena in December 2010 on this issue stated that the over-arching issue of trademark protection has been addressed though implementation issues (with regard also to other over-arching issues) may remain: http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2.