New gTLD Program		
Overarching Issues		
1.2.1	Continuing Subsequent Procedures	Overarching Issues
1.2.2	Predictability	Overarching Issues
1.2.1	*Community Engagement*	Overarching Issues
1.2.2	*Clarity of Application Process*	Work Track 1
1.2.3	Applications Assessed in Rounds	Overarching Issues
1.2.4	Different TLD Types	Overarching Issues
1.2.5	Applications Submission Limits	Overarching Issues
1.2.6	Accreditation Programs (e.g., RSP Pre-Approval)	Work Track 1
Foundational Issues		
1.3.1	Competition, Consumer Choice and Consumer Trust	Work Track 1
1.3.2	Global Public Interest	Work Track 2
1.3.3	Applicant Freedom of Expression	Work Track 3
1.3.4	Universal Acceptance	Work Track 4
Pre-Launch Activities		

1.4.1	Applicant Guidebook	Work Track 1
1.4.2	Communications	Work Track 1
1.4.3	Systems	Work Track 1
Application Submission		
1.5.1	Application Fees	Work Track 1
1.5.2	Variable Fees	Work Track 1
1.5.3	Application Submission Period	Work Track 1
1.5.4	Applicant Support	Work Track 1
1.5.5	Terms & Conditions	Work Track 2
Application Processing		
1.6.1	Application Queuing	Work Track 1
Application Evaluation/Criteria		
1.7.1	Reserved Names	Work Track 2
1.7.1.1	*IGO/INGO Protections*	*Work Track 2*
1.7.1.2	*Geographic Names*	*Work Track 5*
1.7.2	Registrant Protections	Work Track 2
1.7.3	Closed Generics	Work Track 2
1.7.4	String Similarity	Work Track 3
1.7.5	IDNs	Work Track 4

1.7.6	Security and Stability	Work Track 4
1.7.7	Applicant Reviews: Technical/Operational, Financial and Registry Services	Work Track 4
1.7.8	Name Collisions	Work Track 4
Dispute Proceedings		
1.8.1	Objections	Work Track 3
1.8.2	Accountability Mechanisms	Work Track 3
String Contention Resolution		
1.9.1	Community Applications	Work Track 3
Contracting		
1.10.1	Base Registry Agreement	Work Track 2
1.10.2	Registrar Non-Discrimination / Registry/Registrar Standardization	Work Track 2
Pre-Delegation		
1.11.1	Registry System Testing	Work Track 4
Post-Delegation		
1.12.1	TLD Rollout	Work Track 2
1.12.2	Second-level Rights Protection Mechanisms	Work Track 2
1.12.3	Contractual Compliance	Work Track 2

1.8 Dispute Proceedings

Dispute Proceedings		
1.8.1	Objections	
1.8.2	Accountability Mechanisms	

1.8.1 Deliberations and Recommendations: Objections

a. What is the relevant policy and/or implementation guidance (if any)?

Recommendation 2: “Strings must not be confusingly similar to an existing top-level domain.”
Recommendation 3: “Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industrial Property (in particular trademark rights), the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (in particular freedom of speech rights).”
Recommendation 6: “Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law. Examples of such limitations that are internationally recognized include, but are not limited to, restrictions defined in the Paris Convention for the Protection of Industrial Property (in particular restrictions on the use of some strings as trademarks), and the Universal Declaration of Human Rights (in particular, limitations to freedom of speech rights).”
Recommendation 12: “Dispute resolution and challenge processes must be established prior to the start of the process.”
Recommendation 20: “An application will be rejected if it is determined, based on public comments or otherwise, that there is substantial opposition to it from among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support.”

Implementation Guideline P: “The following process, definitions and guidelines refer to Recommendation 20.

Process

Opposition must be objection based.

Determination will be made by a dispute resolution panel constituted for the purpose.

The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).

Guidelines

The task of the panel is the determination of substantial opposition.

a) substantial – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment

b) significant portion – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.

c) community – community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted.

d) explicitly targeting – explicitly targeting means there is a description of the intended use of the TLD in the application.

e) implicitly targeting – implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.

f) established institution – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.

Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.

The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.

g) formal existence – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.

h) detriment – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely."

Implementation Guideline R: "Once formal objections or disputes are accepted for review there will be a cooling off period to allow parties to resolve the dispute or objection before review by the panel is initiated."

b. How was it implemented in the 2012 round of the New gTLD Program?

In the Final Report on the Introduction of New Generic Top-Level Domains,[1] the GNSO recommended that "Dispute resolution and challenge processes must be established prior to the start of the process." In the GAC Principles regarding New gTLDs,[2] Principle 3.3 states, "If individual GAC members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them."

In support of the guidance from the GNSO and the GAC, Module 3 of the 2012 Applicant Guidebook defines the following processes:

- Section 3.1 describes GAC Advice on New gTLDs, a process intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. It provides that the GAC Advice must be filed by the close of the Objection-Filing Period. According to the Guidebook, GAC Advice could take one of 3 forms:
    - I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.
    - II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.
    - III. The GAC advises ICANN that an application should not proceed unless remediated. This will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.[3]

- Section 3.2 describes the Public Objection and Dispute Resolution Process, through which parties with standing can file formal objections with designated third-party dispute

[1] https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm
[2] https://archive.icann.org/en/topics/new-gtlds/gac-principles-regarding-new-gtlds-28mar07-en.pdf
[3] See New gTLD Applicant Guidebook at p. 3-3.

resolution providers on specific applications based on the following grounds: (i) String Confusion Objection (ii) Existing Legal Rights Objection (iii) Limited Public Interest Objection (iv) Community Objection. In order to bring these Objections, Objectors not only had to meet the substantive requirements for the applicable Objection type, but they also had to satisfy certain standing requirements to have their objections considered. A description of the substantive as well as the Standing requirements are set forth in on pages 3-5 through 3-8 of the New gTLD Applicant Guidebook.

As a result of a number of discussions between the ICANN Board and the GAC in 2010-2011, a newly created role was created called the "Independent Objector" (IO). Section 3.2.5 describes the role of the Independent Objector, who is in a position to file objections when doing so serves the best interests on the public who use the global Internet. The IO was supposed to not act on behalf of any particular persons or entities, but solely in the best interests of the public who use the global Internet. The IO was to file objections against "highly objectionable" gTLD applications to which no objection has been filed and was limited to filing two types of objections: (1) Limited Public Interest Objections and (2) Community Objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections.

c. What are the preliminary recommendations and/or implementation guidelines?

The Work Track seeks input on the following preliminary recommendations:

- A transparent process for ensuring that panelists, evaluators, and independent objectors are free from conflicts of interest must be developed.
- For all types of objections, the parties to a proceeding should be given the opportunity to agree upon a single panelist or a three person panel - bearing the costs accordingly.
- ICANN must publish, for each type of objection, all supplemental rules as well as all criteria to be used by panelists for the filing of, response to, and evaluation of each objection. Such guidance for decision making by panelists must be more detailed than what was available prior to the 2012 round.
- Extension of the "quick look" mechanism, which currently applies to only the Limited Public Interest Objection, to all objection types. The "quick look" is designed to identify and eliminate frivolous and/or abusive objections.
- Provide applicants with the opportunity to amend an application or add Public Interest Commitments in response to concerns raised in an objection.

d. What are the options under consideration, along with the associated benefits / drawbacks?

The Work Track seeks community input on the following possible recommendations regarding GAC Advice and GAC Early Warnings:

- GAC Advice must include clearly articulated rationale, including the national or international law upon which it is based.
- Future GAC Advice, and Board action thereupon, for categories of gTLDs should be issued prior to the finalization of the next Applicant Guidebook. Any GAC Advice issued after the application period has begun must apply to individual strings only, based on the merits and details of the application, not on groups or classes of applications.
- Individual governments should not be allowed to use the GAC Advice mechanism absent full consensus support by the GAC. The objecting government should instead file a string objection utilizing the existing ICANN procedures (Community Objections/String Confusion Objections/Legal Rights Objections/Limited Public Interest Objections).
- The application process should define a specific time period during which GAC Early Warnings can be issued and require that the government(s) issuing such warning(s) include both a written rationale/basis and specific action requested of the applicant. The applicant should have an opportunity to engage in direct dialogue in response to such warning and amend the application during a specified time period. Another option might be the inclusion of Public Interest Commitments (PICs) to address any outstanding concerns about the application.

e. What specific questions are the PDP WG seeking feedback on?

- <u>Role of GAC Advice</u>
    - Some have stated that Section 3.1 of the Applicant Guidebook creates a "veto right" for the GAC to any new gTLD application or string. Is there any validity to this statement? Please explain.
    - Given the changes to the ICANN Bylaws with respect to the Board's consideration of GAC Advice, is it still necessary to maintain the presumption that if the GAC provides advice against a string (or an application) that such string or application should not proceed?
    - Does the presumption that a "string will not proceed" limit ICANN's ability to facilitate a solution that both accepts GAC advice but also allows for the delegation of a string if the underlying concerns that gave rise to the objection were addressed? Does that presumption unfairly prejudice other legitimate interests?

- <u>Role of the Independent Objector</u>
    - In the 2012 round, there was only one Independent Objector appointed by ICANN. For future rounds, should there be additional Independent Objectors appointed? If so, how would such Independent Objectors divide up their work? Should it be by various subject matter experts?
    - In the 2012 round, all funding for the Independent Objector came from ICANN. Should this continue to be the case? Should there be a limit to the number of objections filed by the Independent Objector?

- In the 2012 round there was a requirement that the IO could only object to a string if that string had no other objections filed against it based on the same grounds. Should that continue to be the case moving forward?
- Should the Independent Objector be limited to only filing objections based on the two grounds enumerated in the Applicant Guidebook?

- General Questions
  - Some members of the ICANN Community believe that some objections were filed with the specific intent to delay the processing of applications for a particular string. Do you believe that this was the case? If so, please provide specific details and what you believe can be done to address this issue.
  - How can the "quick look" mechanism be improved to eliminate frivolous objections?
  - ICANN agreed to fund any objections filed by the ALAC in the 2012 round. Should this continue to be the case moving forward? Please explain. If this does continue, what limits should be placed, if any, on such funding? Should ICANN continue to fund the ALAC or any party to file objections on behalf of others?
  - Should applicants have the opportunity to take remediation measures in response to objections about the application under certain circumstances? If so, under what circumstances? Should this apply to all types of objections or only certain types?

- Community Objections
  - In 2012, some applicants for community TLDs were also objectors to other applications by other parties for the same strings. Should the same entity be allowed to apply for a TLD as community and also file a Community Objection for the same string?
  - Many WT members and commenters believe that the costs involved in filing Community Objections were unpredictable and too high. What can be done to lower the fees and make them more predictable while at the same time ensuring that the evaluations are both fair and comprehensive?
  - In the Work Track, there was a proposal to allow those filing a Community Objection to specify Public Interest Commitments (PICs) they want to apply to the string. If the objector prevails, these PICs become mandatory for any applicant that wins the contention set. What is your view of this proposal?

- String Confusion Objections
  - The RySG put forward a proposal to allow a single String Confusion Objection to be filed against all applicants for a particular string, rather than requiring a unique objection to be filed against each application. Under the proposal:
    - An objector could file a single objection that would extend to all applications for an identical string.
    - Given that an objection that encompassed several applications would still require greater work to process and review, the string confusion panel

could introduce a tiered pricing structure for these sets. Each applicant for that identical string would still prepare a response to the objection.
        - The same panel would review all documentation associated with the objection. Each response would be reviewed on its own merits to determine whether it was confusingly similar.
        - The panel would issue a single determination that identified which applications would be in contention. Any outcome that resulted in an indirect contention would be explained as part of the response.
    - Do you support this proposal? Why or why not? Would this approach be an effective way to reduce the risk of inconsistent outcomes?

- Legal Rights Objections
    - Is it appropriate for the Legal Rights Objection to be based on an "infringement" analysis, as was the case in the 2012 round? Or do you believe it would be more appropriate to change the standard to one based on "bad faith"? Please explain.
        - A Work Track member submitted a strawman redline edit of AGB section 3.2.2.2, which proposed changing the standard from existing legal rights being "infringed" (a policy based on use) to being "abused" (a policy based on bad faith). The proposal is available here. What is your view of these proposed edits and why?

f. Deliberations

The Work Track divided discussions on objections into the following topic areas:

1. Process in General
2. Community Objections
3. String Confusion Objections
4. Legal Rights Objections
5. Limited Public Interest Objections
6. The Independent Objector
7. GAC Early Warnings & GAC Advice

The following summary of deliberations is similarly organized to reflect discussions in the Work Track, including resources and options considered.

1. Process in General

The Final Issue Report[4] provided a series of potential topics to consider with respect to Objections. The Work Track used this list as a starting point for discussions and identified several areas that required additional work.

[4] https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf

The Work Track considered that there was concern following the 2012 round about the the lack of consistency in the outcomes of objections and dispute resolutions processes. At the WT's request, staff provided a high-level analysis of reconsideration requests, which may be an indicator of dissatisfaction with objections processes or outcomes.[5] The Work Track reviewed this data and considered comments provided in CC2 but was was unable to come to a definitive conclusion about the cause of perceived inconsistencies or possible methods for mitigation. The Work Track agreed, however, that clear guidance should be provided to Dispute Resolution Service Providers and panelists to support consistent decision making and outcomes.

The Work Track noted that under the topic of Accountability Mechanisms, a recommendation was put forward to establish a limited appeals mechanism available to those dissatisfied with the outcomes of objections processes and other elements of the New gTLD Program. Details about this recommendation are included under the "Accountability Mechanisms" section of this report.

Work Track members noted that the high cost of filing objections was another area of concern following the 2012 round. Some Work Track members stated that that fees should be predictable and not prohibitive, but the Work Track does not have any specific recommendations at this time regarding the fee schedule. Some suggestions for reducing costs associated with objections were included in CC2 comments, for example a suggestion from the RySG to strictly enforce page limits to reduce costs and workload associated with objections.[6] Additional suggestions from the community on cost management are welcome.

The Work Track generally agreed that, where possible, it is desirable to avoid lengthy, expensive objections processes where other measures can resolve an issue. To this end, the Work Track considered a number of mechanisms discussed throughout this section that could reduce the number of objections while still reaching a satisfactory resolution.

The Work Track agreed that it could be beneficial to resolve frivolous objections before they result in significant expense for the applicant. Work Track members expressed support for having a distinct step in the objections process to evaluate an objector's standing prior to addressing the substance of an objection to reduce unnecessary expenditure of time and resources.

The Work Track also supported providing applicants with the opportunity to amend an application or add Public Interest Commitments in response to concerns raised by a potential objector. This would be an avenue for resolving issues with an application and allowing it to move forward while meeting the needs of those with concerns. The idea of permitting remediation of an application was put forward as a general proposal, but it was also discussed

[5] https://community.icann.org/download/attachments/58735959/Objections%20Statistics_17Jan2017.xlsx?version=1&modificationDate=1484692493000&api=v2

[6] See RySG response to question 3.1.9 here: See RySG response to question 3.1.8 here: https://docs.google.com/spreadsheets/d/1A5uaxBAgmg7QsFuqMdVvt1HxNZ4jKXnm3Hp0gZra7U0/edit#gid=845153891

specifically in the context of Community Objections (please see sub-section 2. Community Objections below for additional information).

The Work Track expressed general support for ensuring that objections mechanisms are accessible to impacted parties, including governments, communities, and other groups with limited resources for this type of action. The cost of objections is one potential barrier, but time, expertise, and awareness of the opportunity file and objection may also present challenges.

The Work Track noted that that the size of panels is one factor impacting costs, but that it may not always be desirable to limit decision making to a single expert panelist. The Work Track agreed that three expert panels may be more reliable and less likely to generate concerns around inconsistent application of objection procedures or outcomes. Consistent with a proposal from the RySG,[7] the Work Track recommends allowing parties to jointly determine whether to use a one or three expert panel for all objection types. The Work Track feels that the parties are in the best position to weigh the potential tradeoffs between cost and consistency and make this decision.

2. Community Objections

In the 2012 round, a Community Objection could be filed if there was substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted. Section 3.2.2.4 of the Applicant Guidebook describes this grounds for objection. The Work Track discussed a number of issues raised in the Final Issue Report and in CC2 comments and considered several proposals related to Community Objections, which are included in this section. The Work Track has not yet agreed on recommendations on this topic.

Costs were a significant concern for all types of objections, but Work Track members and CC2 comments raised that costs associated with Community Objections was a particular issue, because communities may have limited financial resources. Several CC2 comments suggested making the cost of community objections lower and more predictable. The Work Track also noted that the Council of Europe report "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and Challenges from a Human Rights Perspective" suggested lowering the costs for Community Objections.[8] The Work Track sees this as an area that deserves further attention.

Some Work Track members raised the concern that applicants were forced to spend money and time responding to frivolous objections that would not have passed an initial evaluation of standing. In order to prevent similar cases in the future, a proposal was made to include a

[7] See RySG response to CC2 question 3.1.2: https://docs.google.com/spreadsheets/d/1A5uaxBAgmg7QsFuqMdVvt1HxNZ4jKXnm3Hp0gZra7U0/edit#gid=845153891

[8] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14

distinct step early in the Community Objections process in which standing of the objector is substantiated before collecting fees from the applicant associated with the Objection.[9] Other Work Track members noted that it may be beneficial to extend the "quick look" mechanism not just to Community Objections, but to all types of Objections. Feedback is welcome on this proposal, which is included under the preliminary recommendations above.

Work Track members also discussed the process associated with Community Objections. The Work Track noted that in the 2012 round, panels had only two options for addressing Community Objections: they could allow the application to proceed or terminate the application. There was no option to consider remedies that would address the concerns raised in the objections. The RySG proposed allowing the applicant to take remediation measures in certain cases.[10] One suggestion raised in Work Track discussion was to allow the objector to specify Public Interest Commitments (PICs) they want to apply to the string. If the objector prevails, these PICs become mandatory for any applicant that wins the contention set. The Work Track did not reach agreement in support of this proposal.

The Work Track considered the relationship between the Community Objection and Community Priority Evaluation (CPE) processes. Several registries expressed concern that by having the the opportunity to participate in CPE and also file a Community Objection against another applicant, an entity may be able to "game" the system. They proposed that it should not be possible to participate in both a Community Objection and CPE for the same string. Other Work Track members noted that the Community Priority Evaluation and Community Objections processes serve different functions and should not be mutually exclusive. No agreement was reached on this proposal.

(3) String Confusion Objections

In the 2012 round, a String Confusion Objection (SCO) could be filed if the applied-for gTLD string was confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications. Section 3.2.2.1 of the Applicant Guidebook describes this grounds for objection. The String Confusion Objection is related to the String Similarity Review, described in section 1.7.4 of this report, though the scope of the respective processes is different (e.g., String Similarity Review only considers visual similarity versus the more expansive scope of the objection procedure).

Following the 2012 round, concern was raised about the perceived inconsistent outcomes of String Confusion Objections. The Work Track reviewed key developments regarding the String Confusion Objection in the 2012 round, including publication of the Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion

[9] See dotgay LLC's response to CC2 question 3.1.9: https://docs.google.com/spreadsheets/d/1A5uaxBAgmg7QsFuqMdVvt1HxNZ4jKXnm3Hp0gZra7U0/edit#gid=845153891

[10] See RySG response to CC2 question 3.1.2:

Objections[11] and the NGPC resolution identifying three String Confusion Objection Expert Determinations as not being in the best interest of the New gTLD Program and the Internet community.[12]

The Work Track also considered concerns regarding cases of singular and plural versions of the same string. The Work Track reviewed relevant documentation, including the NGPC resolution, determining that no changes were needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string.[13] Noting that some community members remain concerned that there is not sufficient guidance on this issue, Work Track members generally agreed that in subsequent procedures, there must be clear rules on the treatment of singulars and plurals.

The Work Track considered a proposal from the RySG for the consolidation of String Confusion Objections. The proposal seeks to reduce the risk of inconsistent outcomes by allowing an objector to file a single objection that would extend to all applications for an identical string.[14] A single panel would review all documentation associated with the objection and issue a single determination. The Work Track welcomes community input on this proposal.

In addition, the Work Track considered the suggestion to eliminate the use of the SWORD Tool, an algorithm used to support the String Similarity Review and String Confusion Objection Process. This suggestion was included in RySG proposal and has also been proposed and widely supported by others. The Work Track agreed that there was little correlation between the SWORD results and the actual outcomes of the String Confusion Objection Process, and therefore it should not be used in the future. Additional discussion of the SWORD Tool and a recommendation to eliminate the SWORD Tool is included in the String Similarity Review section on this report (section 1.7.4).

(4) Legal Rights Objections

In the 2012 round, a Legal Rights Objection (LRO) could be filed if the applied-for gTLD string infringed the existing legal rights of the objector. Section 3.2.2.2 of the Applicant Guidebook describes this grounds for objection.

The Work Track considered statistics on the outcomes of Legal Rights Objections filed in the 2012 round[15] and noted that applicants were overwhelmingly the prevailing party in these decisions. The Work Track further reviewed the WIPO Final Report on Legal Rights

[11] https://www.icann.org/public-comments/sco-framework-principles-2014-02-11-en
[12] https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b
[13] https://www.icann.org/resources/board-material/resolutions-new-gtld- 2013-06-25-en#2.d
[14] https://docs.google.com/document/d/13mNrOUrO2_KPa1xUXJ7Glxx_Ps5Aaczes2jEz8E-zeY/edit
[15] https://community.icann.org/download/attachments/58735959/Objections%20Statistics_17Jan2017.xlsx?version=1&modificationDate=1484692493000&api=v2

Objections[16] and The ICANN LRO: Statistics and Takeaways, produced by the the International Trademark Association.[17]

The Work Track discussed the fact that in the 2012 round, the Legal Rights Objections was based on an infringement analysis. Some Work Track members noted that infringement, which is typically demonstrated through use, is difficult to prove for an applied-for TLD still in the application stage. There was disagreement in the Work Track about whether the existing basis of the Legal Rights Objection remains appropriate for subsequent procedures. While some Work Track members considered the standard appropriately high, other Work Track members thought that it was too difficult for trademark owners to prevail in Legal Rights Objection cases where the string had more than one meaning.

The Work Track considered a strawman redline edit of AGB section 3.2.2.2, which proposed changing the standard from existing legal rights being "infringed" (a policy based on use) to being "abused" (a policy based on bad faith).[18] Work Track members expressed concern that the proposal would significantly expand the scope of the Legal Rights Objection and would constitute too significant a shift from the intent of the the original policy. The Work Track continues to accept feedback on the suggested revision.

(5) Limited Public Interest Objections

In the 2012 round, a Limited Public Interest (LPI) Objection could be filed if the applied-for gTLD string was contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law. Section 3.2.2.3 of the Applicant Guidebook describes this grounds for objection. As inputs to the discussion on this topic, the Work Track considered CC2 comments, the Final Report of the New gTLD Recommendation #6 Cross Community Working Group,[19] and Explanatory Memoranda on Morality and Public Order related to draft versions of the Applicant Guidebook.[20] Work Track members generally supported the idea that the existing policy recommendation and the Applicant Guidebook language remain appropriate and sufficient for subsequent procedures.

The Work Track discussions on Limited Public Interest Objections focused primarily on different perspectives about providing funding to the ALAC to file LPI Objections. In the 2012 round, financial resources were made available to the ALAC to file LPI Objections. The objective of providing this funding was to enable the ALAC to file LPI Objections on behalf of end users, because end users may not otherwise have the means to file these objections. Work Track members disagreed about whether this should continue to be the case in subsequent procedures.

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[16] https://www.icann.org/en/system/files/correspondence/wilbers-to-willett-11dec13-en.pdf
[17] http://www.inta.org/Advocacy/Documents/2015/The%20ICANN%20Legal%20Rights%20Objection.pdf
[18] https://community.icann.org/download/attachments/63157176/7.2.5%20Legal%20Rights%20Objection%20-%20Strawman%20Edits.pdf?version=1&modificationDate=1486402474000&api=v2
[19] https://gnso.icann.org/en/issues/new-gtlds/report-rec6-cwg-21sep10-en.pdf
[20] https://community.icann.org/display/NGSPP/4.4.3+Objections

Some Work Track members expressed concern that parties in the 2012 round could "lobby" ALAC to file an objection rather than filing an objection themselves. Some considered this type of advocacy a form of gaming that allowed parties to avoid costs associated with filing objections. Other Work Track members felt that it was appropriate for parties to reach out to the ALAC for assistance with filing objections on behalf of end users. While some suggested that additional mechanisms may be needed to ensure accountability in cases where the ALAC files LPI objections using ICANN funds, others stated that existing ALAC mechanisms already ensure accountability.

The Work Track discussed that the ALAC was not automatically granted standing to file LPI Objections. Some Work Track members expressed that this was a programmatic inconsistency - the ALAC should automatically have standing for the objection if it is receiving funds to file the objection. Other members disagreed with this assessment and felt that funding and standing should be considered separately.

Given diverging opinions on this topic, the Work Track is not making any recommendations at this time regarding ALAC funding to file LPI Objections or the issue of standing but welcomes input.

(6) The Independent Objector:

In the 2012 round, the Independent Objector (IO) was instituted to file Limited Public Interest and Community Objections with the goal of serving the best interests of the public who use the global Internet. To support discussions on the IO, the Work Track considered data on the outcomes of objections filed by the Independent Objector, as well as CC2 comments, and recommendations included in the IO's final activity report.[21]

The Work Track discussed whether the Independent Objector was effective in his role during the 2012 round. Some Work Track members pointed to the number of cases in which the IO prevailed and costs associated with the IO function as evidence that the IO was not a cost-effective mechanism. Other members noted that this data may not provide the full picture, and that it may be inherently useful to have someone serve in this function to promote and protect the public interest, regardless of the costs.

Some Work Track members questioned whether the Independent Objector in the 2012 round interpreted his mandate appropriately, leading to suggestions that checks must be put into place to ensure the IO's scope of work is narrowly tailored. Others raised concerns about possible conflicts of interest,[22] in response to which members suggested mechanisms to identify and mitigate potential conflicts of interest in subsequent procedures.

[21] https://www.independent-objector-newgtlds.org/home/final-activity-report/
[22] See for exaple https://www.icann.org/resources/correspondence/rosette-to-jeffrey-2013-05-17-en

Some Work Track track members advocated for retaining the Independent Objector function but changing the structure. Noting that a single person may be subjective and may have a real or perceived conflict of interest related to a case, some members suggested that there should instead be a standing panel, which could mitigate subjectivity and provide greater flexibility if one individual had a conflict of interest.

Work Track members also explored alternatives to the model used in the 2012 round, for example allowing the ICANN Board to file LPI Objections or investing resources instead into ensuring that those adversely impacted by applications were informed and in a position to object. These options did not gain significant traction.

While there are different perspectives on whether the Independent Objector role is permanently warranted and there are diverging opinions on the effectiveness of the Independent Objector in the 2012 round, the Work Track generally agreed that it is not appropriate to eliminate the role of Independent Objector at this time. The New gTLD environment is still continuing to mature and awareness about ICANN operations is far from universal. Therefore, the Work Track agreed that the Independent Objector still plays an important role the application process. The Work Track believes that further consideration should be given to the criteria under which the IO may file an objection and mechanisms to ensure that the IO remains within the intended remit.

(7) GAC Early Warnings & GAC Advice:

The Work Track has preliminarily discussed GAC advice and GAC Early Warning mechanisms, noting that some applicants in the 2012 round found both mechanisms to be a significant source of uncertainty. The Work Track agreed that it is important for the GAC to have a means to provide input, and considered possible guidelines that might satisfy the intention of the GAC Advice process while supporting greater predictability for applicants.

One concern raised in the Work Track and in CC2 was that GAC advice in the 2012 round was provided for whole categories of applications, whereas the Applicant Guidebook states that advice is to be provided for applications. Work Track members noted in the 2012 round, applicants experienced uncertainty when the GAC initially issued advice on categories of strings, because they were unclear if the lists provided were exhaustive and also unsure whether those applying for strings in related industries would be impacted.

Another concern raised in the Work Track and in CC2 was that GAC advice was provided about all applications for a contention set rather than an individual application, which appears to contradict the procedures defined in the Applicant Guidebook. Work Track members stated that this practice does not take into account that different members of a contention set may be proposing different business models, which should be an important consideration in the issuance of GAC advice. In this view, GAC advice should reference relevant applications individually to improve clarity for all parties.

A Work Track member suggested that all objections from the GAC should be handled through GAC advice or standard objections procedures, and that there should not be an additional Early Warning mechanism. From this perspective, the community holds the Board to a high standard when the Board decides to approve GAC advice about a string. These checks and balances are important, and they don't apply to Early Warning objections. By channeling GAC objections through GAC advice, the community can ensure that checks and balances apply and that all interests are taken into account.

Drawing on community feedback received in CC2,[23] the Work Track has begun to consider possible recommendations that could improve predictability associated with GAC advice and GAC Early Warnings. Please see section (d) for possible recommendations for which the Work Track is seeking input.

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

Outputs of the CCWG Accountability work to develop a framework of interpretation for the Human Rights clause in the Core Values[24] may impact the Limited Public Interest Objection.

1.8.2 Accountability Mechanisms & Post-Delegation Dispute Resolution Procedures

a. What is the relevant policy and/or implementation guidance (if any)?

Recommendation 12: Dispute resolution and challenge processes must be established prior to the start of the process.
Implementation Guideline R: Once formal objections or disputes are accepted for review there will be a cooling off period to allow parties to resolve the dispute or objection before review by the panel is initiated.

b. How was it implemented in the 2012 round of the New gTLD Program?

During the 2012 application round, the Accountability Mechanisms[25] utilized by applicants were the Reconsideration Process, the Independent Review Process and the Ombudsman. These were the same mechanisms generally available to the community and not specific to the New gTLD Program. It is also worth noting that the Accountability Mechanisms used during the 2012

[23] See responses to questions 3.1.10 and 3.1.11: https://docs.google.com/spreadsheets/d/1A5uaxBAgmg7QsFuqMdVvt1HxNZ4jKXnm3Hp0gZra7U0/edit#gid=845153891
[24] Draft framework: https://www.icann.org/public-comments/foi-hr-2017-05-05-en
[25] See Accountability Mechanisms here: https://www.icann.org/resources/pages/mechanisms-2014-03-20-en

New gTLD Process were those that were in the ICANN Bylaws prior to the completion of the IANA transition in 2016.

The post-delegation dispute resolution procedures, consisting of the Public Interest Commitment Dispute Resolution Procedure (PICDRP), the Registration Restrictions Dispute Resolution Procedure (RRDRP), and the Trademark Post-Delegation Dispute Resolution Procedure (Trademark PDDRP), were put into place after the launch of the program[26]. The Trademark PDDRP is within the remit of the Review of All Rights Protection Mechanisms in All gTLDs PDP WG.

c. What are the preliminary recommendations and/or implementation guidelines?

The Work Track has preliminarily agreed to very high level recommendations for a limited appeals mechanism, to supplement existing accountability mechanisms available in the ICANN Bylaws. The Work Track recognizes that additional work on these is needed:

- ICANN should create a new substantive appeal mechanism specific to the new gTLD Program. Such an appeals process will not only look into whether ICANN violated the Bylaws by making (or not making) a certain decision, but will also evaluate whether the original action or action was done in accordance with the Applicant Guidebook.
- The process must be transparent and ensure that panelists, evaluators, and independent objectors are free from conflicts of interest.

The Work Track preliminarily agreed to the following additional recommendations regarding the post-delegation dispute resolution procedures:

- The parties to a proceeding should be given the opportunity to agree upon a single panelist or a three person panel - bearing the costs accordingly.
- Clearer, more detailed, and better defined guidance on scope and adjudication process of proceedings and the role of all parties, must be available to participants and panelists prior to the initiation of any post-delegation dispute resolution procedures.

d. What are the options under consideration, along with the associated benefits / drawbacks?

None being considered at this time.

e. What specific questions are the PDP WG seeking feedback on?

Limited Appeal Process:

- What are the types of actions or inactions that should be subject to this new limited appeals process? Should it include both *substantive* and *procedural* appeals? Should all

[26] See PDDRP site here: https://www.icann.org/resources/pages/rpm-drp-2017-10-04-en

decisions made by ICANN, evaluators, dispute panels, etc. be subject to such an Appeals process. Please explain?
- Who should have standing to file an appeal? Does this depend on the particular action or inaction?
- What measures can be employed to ensure that frivolous appeals are not filed? What would be considered a frivolous appeal?
- If there is an Appeals process, how can we ensure that we do not have a system which allows multiple appeals?
- Who should bear the costs of an appeal? Should it be a "loser-pays" model?
- What are the possible remedies for a successful Appellant?
- Who would be the arbiter of such an appeal?
- Do you have any additional input regarding the details of such a mechanism?

f. Deliberations

Accountability Mechanisms / Appeals:

As stated in the Final Issue Report on New gTLD Subsequent Procedures, the WG was asked to *"Examine whether dispute resolution and challenge processes provide adequate redress options or if additional redress options specific to the program are needed."* In considering this issue, the Work Track considered whether the Accountability Mechanisms generally available were adequate in resolving issues that applicants or the wider community experienced during the 2012 round of the New gTLD Program.

It was noted that as a result of the Cross Community Working Group on Enhancing ICANN Accountability, and the resulting changes to the ICANN Bylaws, the scope of the Accountability Mechanisms was increased to include the substance of issues rather than just procedure. The Work Track considered whether this change might be sufficient to allow for proper redress of issues raised in the New gTLD Program.

David McAuley, Lead for the Independent Review Process (IRP) Implementation Oversight Team joined the Work Track on a call to provide details about the IRP, including the relevant Bylaws section, the purpose of the IRP, the standards for review, what is excluded from the scope of the mechanism, and other elements. There was general agreement that while the change was welcomed and it might make the IRP more viable to new gTLD applicants, it was not in fact sufficient to serve as the sole challenge to outcomes of New gTLD Program elements like evaluations, objections, and Community Priority Evaluation (CPE). There was also support from Community Comment 2 (CC2) that the existing accountability mechanisms by themselves were insufficient.

The Work Track considered what a reasonable alternative (or supplement) might be to the Accountability Mechanisms. The discussion focused on the ability to seek redress when the process and/or outcome of String Similarity evaluation, the Limited Public Interest objection, CPE, or other program mechanisms, are considered to be deficient in some manner. Some of

the issues identified were a perceived lack of panelist expertise, potential conflicts of interests for panelists, and a perceived lack of consistency in outcomes. The Work Track discussed a narrowly focused appeal mechanism as one possible way to allow for redress and asked the community for its input via CC2. Comments from CC2 were largely supportive of a limited appeals mechanism, with the Registries Stakeholder Group (RySG) providing a number of specific elements to such a mechanism. While the Work Track reviewed this and all other CC2 comments, it did not reach agreement on the details provided.

The Work Track considered whether the limited appeals mechanism should distinguish between process and substance, noting that the Accountability Mechanisms have historically focused more on process. At this point the Work Track believes that it is sensible to allow for substance to be considered in a limited appeals framework. There was also discussion about what party might make sense to perform an appeal, with some noting that simply substituting Panel A for Panel B from the same organization may not be effective. Two options that have been suggested are a panel of subject matter experts or a subset of the ICANN Board. No agreement has been reached.

The Work Track recognizes that a number of details for a limited appeals mechanism still need to be considered, such as:

- What elements of the program can be appealed (e.g., evaluation, objections, CPE, other)?
- What part of the those program elements can be challenged?
- How is a secondary review performed? Who performs it?
- Is there any chance to appeal the appeal itself?
- Is there cost associated with filing an appeal? What prevents parties from simply appealing everything that does not end up in their favor?

The Work Track very much welcomes input and assistance in filling in the details of such a mechanism.

Post-Delegation Dispute Resolution Procedures:

Two of the process under the post-delegation dispute resolution procedures fell under the remit of this Working Group: the Public Interest Commitment Dispute Resolution Procedure (PICDRP) and the Registration Restrictions Dispute Resolution Procedure (RRDRP). The post-delegation dispute resolution procedures mechanisms in general have seen very little usage and as a result, it is difficult to assess whether they are adequate measures and how effective they are.

The Work Track invited Kiran Malancharuvil, a Policy Counselor from MarkMonitor at the time, to discuss her experience with the PICDRP, which was the first to make it to the Standing Panel stage. A number of procedural issues were uncovered, such as the uneven sharing of documents (the complainant and respondent documentation was not equally shared), the lack of clarity around the mediation plan developed by ICANN Contractual Compliance and whether it was commensurate with the violations, and lack of clarity around the composition of the

Standing Panel (e.g., potential conflicts of interest). Of particular concern was the interaction between the Standing Panel and ICANN during deliberations, where it seemed that ICANN provided guidance on the scope of the PICDRP.

The Work Track also received input from two of the members of the PICDRP Standing Panel, David JA Cairns and Scott Austin. David noted that there may be a mismatch between the perception of what can be resolved via the PICDRP versus reality, which could lead to frustrations with the mechanism itself. While a Registry Operator may be engaging in objectionable behavior, the PICDRP will be ineffective if that behavior is not specified in Specification 11 of their Registry Agreement. For next steps, Scott suggested that, "It may be in the best interest of the PICDRP process and ICANN's effective and consistent implementation of same to open a dialogue with the full list of PICDRP panelists to identify best practices or policy element clarifications to meet the goals of the process from ICANN's perspective, and discuss whether expansion of the scope of Section 3a. to cover Registries or developing incentives for gTLD applicants to submit self-imposed PICS anticipated by Paragraph 2 of Specification 11 should be a matter of policy change and decision focus going forward."

The Work Track has not made any decisions regarding the PICDRP. Discussions around the RRDRP were minimal, as the mechanism has not yet been used and as such, no decisions were made there either.

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

- Cross Community Working Group on Enhancing ICANN Accountability Work Stream 2 (CCWG-Accountability WS2)