

This is the Constituency Statement of the Intellectual Property Interests Constituency (IPC) on the Terms of Reference for the Policy Development Process on **Policies for Contractual Conditions – Existing gTLDs** (see (<http://gnso.icann.org/issues/gtld-policies/tor-pdp-28feb06.html>)). Pursuant to requirements of the GSNO policy development process, outlined by the ICANN bylaws, see Annex A, Sec. 7(d), available at <http://www.icann.org/general/archive-bylaws/bylaws-19apr04.htm>, the IPC came to the following conclusion.

I. Constituency Statement

IPC General Approach:

- (1) *IPC presents the following position statement on elements of the Terms of Reference for this PDP as our initial views. We look forward to considering the views of other constituencies and working toward a mutually acceptable recommendation.*
- (2) *IPC recognizes the value of consistency and even uniformity among the agreements entered into by ICANN with the various gTLD registries. However, it is a fact that not all gTLD registries are comparably situated, with regard to size or dominance, and it is not always appropriate to treat them as if they were. Consistency is only one of several factors that should be taken into account in fashioning a policy regarding registry agreements.*

1. Registry agreement renewal

- 1a. Examine whether or not there should be a policy guiding renewal, and if so, what the elements of that policy should be.

There should be a general presumption that a registry operator that performed competently during the initial term of the agreement should have a preferential status in any review that occurs prior to renewal. This will promote continuity and encourage long-term investment. However, the presumption can be overcome if there have been significant problems with the operator's performance (including non-compliance with terms of the registry agreement) or if there have been significant intervening changes in circumstance.

- 1b. Recognizing that not all existing registry agreements share the same Rights of Renewal, use the findings from above to determine whether or not these conditions should be standardized across all future agreements.

See comment (2) under "General Approach" above regarding standardization.

2. Relationship between registry agreements and consensus policies

2a. Examine whether consensus policy limitations in registry agreements are appropriate and how these limitations should be determined.

To the extent feasible, the terms of registry agreements should be aligned with policies adopted by the GNSO Council and approved by the Board for gTLD registries generally. The necessity for any deviations should be explicitly stated and justified in the agreement.

2b. Examine whether the delegation of certain policy making responsibility to sponsored TLD operators is appropriate, and if so, what if any changes are needed.

Such delegation is appropriate only to the extent it does not conflict with ICANN policies (or is explicitly justified, see preceding answer). The gatekeeping /charter enforcement role of sponsored TLD operators should be given paramount importance.

3. Policy for price controls for registry services

3a. Examine whether or not there should be a policy regarding price controls, and if so, what the elements of that policy should be. (note examples of price controls include price caps, and the same pricing for all registrars)

There should be a general presumption against price caps in registry agreements. Exceptions to this presumption should be explicitly justified. There should be a general presumption in favor of “price controls” aimed at preventing discrimination among registrars; exceptions should be explicitly justified. Also favored should be “price controls” aimed at providing transparency and equal access to information about pricing policies.

3b. Examine objective measures (cost calculation method, cost elements, reasonable profit margin) for approving an application for a price increase when a price cap exists.

This should be handled on a case by case basis in situations in which the presumption against price caps is overcome.

4. ICANN fees

4a. Examine whether or not there should be a policy guiding registry fees to ICANN, and if so, what the elements of that policy should be.

The presumption should be that registry fees paid to ICANN (above a modest base amount related to ICANN’s costs) should be proportional to the size of the registry; deviations from this presumption should be explicitly justified.

4b. Determine how ICANN's public budgeting process should relate to the negotiation of ICANN fees.

Safeguards should be introduced to minimize the risk that registries contributing disproportionately large fees to ICANN's budget will be able to exercise disproportionate control over budgeting decisions. ICANN's budgeting process should give priority to input from GNSO and its constituencies (at least so long as fees derived from gTLD registrations provide the bulk of ICANN's funding), and particularly to user constituencies as the ultimate source of ICANN's funds (i.e., gTLD registrants).

5. Uses of registry data

Registry data is available to the registry as a consequence of registry operation. Examples of registry data could include information on domain name registrants, information in domain name records, and traffic data associated with providing the DNS resolution services associated with the registry.

5a Examine whether or not there should be a policy regarding the use of registry data for purposes other than for which it was collected, and if so, what the elements of that policy should be.

The general rule should be that gTLD registry data may be used for any lawful purpose. For registry data that consists of personally identifiable information, a modified rule may be required, which permits its use for purposes not incompatible with the purpose for which it was collected, and which takes into account other public policy interests in use of the data. Use of gTLD registry data by the registry itself for the development or support of new registry services should generally be subject as well to the procedures for new registry services adopted by the GNSO Council and approved by the Board for gTLD registries. Deviations from the above general principles should be explicitly justified.

5b. Determine whether any policy is necessary to ensure non-discriminatory access to registry data that is made available to third parties.

There should be a mechanism for distinguishing between proprietary and non-proprietary registry data, and non-discriminatory access should be guaranteed to the latter but not the former. This mechanism could take the form of a policy spelled out in the agreement; a procedural step in the consideration of proposed new registry services pursuant to ICANN policies; or both. Deviations from this general rule should be explicitly justified.

6. Investments in development and infrastructure

6a. Examine whether or not there should be a policy guiding investments in development and infrastructure, and if so, what the elements of that policy should be.

A general policy on this topic may not be needed. Commitments regarding such investment will generally be an appropriate factor in the selection of registry operators. Contractual commitments to such investment should be considered on a case-by-case basis. Any commitment entered into should be transparently disclosed, and effectively enforced.

II. Methodology for Reaching Agreement

The issues in the Terms of Reference were discussed within the IPC on several occasions, including the meeting of the IPC held in conjunction with the Wellington ICANN meeting on March 27, 2006. A draft constituency statement was circulated to IPC officers and leadership on April 27, 2006, and was discussed on a teleconference of IPC officers and GNSO council representatives on May 2. A revised version, reflecting edits and additions proposed by officers, was circulated to the full IPC membership on May 2. IPC members suggested no additional substantive changes.

III. Impact on Constituency

The impact of the PDP on the IPC depends upon the answers ultimately adopted to the questions posed by the Terms of Reference. In general, however, IPC members, as registrants of domain names in the gTLDs and as entities seeking to protect their intellectual property rights against abusive registration and use of domain names in the gTLDs, will be affected by changes to the registry agreements for existing gTLD registries.

IV. Time Period Necessary to Complete Implementation

This depends upon the outcome of the PDP.

Respectfully submitted,

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and

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Primary IPC Contact Person for the PDP (Feb06) on **Policies for Contractual Conditions – Existing gTLDs**

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