4.2.2 Predictability

- *4.2.2.1 Explanation of Subject*

  For potential applicants, the wider ICANN community, observers of the New gTLD Program, and ICANN staff, predictability is critical for planning and decision-making. The AGB was established as the vehicle to implement the policy recommendations of the GNSO, and to serve as the application submission and evaluation roadmap for the community. The AGB was developed in an iterative manner, with each version published for public comment to encourage participation of community stakeholders in the finalization of the AGB. This iterative and inclusive nature of efforts to develop the AGB was in part to adhere to Recommendation 1:

  > *ICANN must implement a process that allows the introduction of new top-level domains.*

  > *The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.*

  > *All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.*

  Recommendation 9:

  > *There must be a clear and pre-published application process using objective and measurable criteria.*

  Principle A:

  > *New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way*

  Although in June 2011, ICANN's Board of Directors approved the final AGB and authorized the launch of the New gTLD Program, subsequent revised versions of the Final Applicant Guidebook were released by ICANN staff, including the final New gTLD Applicant Guidebook dated June 4, 2012, a few months after the application window closed, though changes were focused on providing guidance on objections in advance of the opening of the objection filing period[1].

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[1] See announcement: https://www.icann.org/news/announcement-4-2012-06-04-en

- *4.2.2.2 Questions and Concerns Related to Subject*

While it was in the best interest of presumably all parties to have every detail of the New gTLD Program established at a minimum, prior to program launch, it proved a difficult task to finalize all facets of the AGB and the New gTLD Program. As noted above, the AGB was updated after the application window closed and the base registry agreement went through numerous changes to include changes such as Public Interest Commitments (PICs), Specification 13, etc. The difficulty in developing an absolute and predictable roadmap can be traced to a number of issues, although it should be acknowledged that identifying and mitigating every circumstance is a nearly impossible task. This difficulty in fact served as one driving factor in the establishment of the Non-PDP Policy and Implementation Working Group[2], which developed three new GNSO processes to better account for diverging opinions that may arise during the implementation of GNSO policy recommendations as well as a set of policy and implementation principles, which are expected to be adhered to. These mechanisms and principles did not exist during the implementation of the recommendations from 2007 Final Report, making it far more difficult to course correct when the community determined that guidance was lacking, missing, or otherwise inadequate.

Some specific elements or areas contributing to the lack of predictability include:

Lack of specificity in the 2007 Final Report

During the deliberations of the New gTLD Subsequent Procedures Discussion Group (DG), it became apparent that there was general support for the principles, recommendations, and implementation guidelines, but there were circumstances where the DG felt they could be refined or made more specific, requiring less interpretation when eventually implemented by ICANN staff.

More specific and actionable recommendations could reduce the potential for anything being lost in translation from the policy handoff to implementation. Some examples of elements contained within the AGB that were not discussed specifically in the 2007 Final Report include Uniform Rapid Suspension (URS), Trademark Clearinghouse (TMCH), and objections procedures, though the GNSO was consulted to ensure proposals were consistent with existing policy recommendations.

In circumstances where the policy language may have lacked specificity, it may warrant the drafting of additional, supplemental policy language to existing recommendations. In other circumstances, where it appears that ICANN implementation may not have stemmed directly from policy or implementation guidance, it may be beneficial to confirm the implementation

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[2] The Non-PDP Policy and Implementation Working Group project page is available here: http://gnso.icann.org/en/group-activities/active/policy-implementation

in policy language where the implementation is deemed satisfactory, or provide specificity to course correct where the implementation may be deemed inadequate[3].

<u>Transition from implementation to execution</u>

It is important to distinguish between policy implementation, which took the form of the iteratively and community developed AGB, and execution, which is effectively ICANN operationalization and operating of the New gTLD Program. The DG identified a number of execution phase elements of the program that it felt were drastic deviations from or not detailed within the AGB, including digital archery/application draw, name collisions, changes to the base agreement, auction rules, community priority evaluation (CPE) rules, and public interest commitments (PICs). It should be noted that although some of these execution related changes were not enshrined in policy or the AGB, they were generally debated in the public eye of the community.

The New gTLD Program was developed in a sequential fashion, first the implementation of the policy recommendations in the form of the AGB, then subsequently the execution, which involved the operationalization and operating of the program. Minimizing this sequential nature of implementation and execution may help avoid surprises to the community during the operation of the program, though it may be prove impractical to develop the program in this fashion. However, having operationalization complete prior to the launch of program as opposed to developing in a sort of chronological fashion as the need arose (e.g., change requests, CPE, auction, contracting, etc.) may improve predictability.

<u>Late arriving program feedback</u>

Some changes to the program were the result of feedback delivered or only considered after the New gTLD Program had launched, such as GAC Advice on Safeguards (and the resultant Public Interest Commitments) and name collisions identified by the Security and Stability Advisory Committee (SSAC). These issues could be attributable to some degree, to a lack of early engagement, as discussed in section 4.2.4 on Community Engagement, or are simply issues not identified during the policy development, or perhaps even during the implementation stage. However, there were some issues identified prior to program launch, such as the aforementioned name collisions, which were in fact identified by the SSAC, though all issues may not have been adequately resolved, for reasons a PDP-WG may want to investigate and seek to rectify.

- *4.2.2.3 Relevant Guidance*

    o Recommendation 1

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[3] In this context it might be worth noting the recommendations of the Policy & Implementation Working Group, which were recently adopted by the ICANN Board (see https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#2.f).

- o   Recommendation 9
- o   Principle A

- *4.2.2.4 Rationale for Policy Development*

  In regards to the issues identified by the DG regarding predictability, the DG did not anticipate any changes to or the development of new policy, though this may change during the course of deliberations by a potential PDP-WG on New gTLD Subsequent Procedures.

  It should be noted and taken into account that there have been measures taken in the wider ICANN community that may help address some of the issues related to the subject of predictability, including the advent of new liaisons between Supporting Organizations (SOs) and Advisory Committees (ACs) and the GNSO actively seeking early engagement with other SOs and ACs, particularly with the GAC. In addition, the new GNSO processes developed by the Non-PDP Policy and Implementation Working Group should help to resolve problems that are only identified at a later stage, in a more consistent, predictable, and transparent manner, for not only this PDP-WG, but future GNSO efforts.