

BRAZIL'S COMMENTS

ON THE "SUPPLEMENTAL REPORT ON THE NEW GTLD SUBSEQUENT PROCEDURES POLICY DEVELOPMENT PROCESS (WORK TRACK 5 ON GEOGRAPHIC NAMES AT THE TOP LEVEL)"

January 2019

Brazil would like to thank Work Track 5 members for the opportunity to provide comments on the above-mentioned supplemental report. We hope that our input will contribute to ensuring that the outcome of this policy development process is respectful of countries' sensitivities and of the applicable laws, in particular governments' rights and responsibilities for Internet-related public policy issues.

GENERAL COMMENTS

Brazil would like to recall, as expressed in the 15 March 2018 San Juan Communiqué of the Governmental Advisory Committee, that "...discussions [regarding Geographic Names at the Top Level within ICANN] should take into account any material available or being produced outside the ICANN context relating to names with geographical significance".

Brazil considers that the Final Report of the Amazon Cooperation Treaty Organization (ACTO)'s Working Group, established pursuant to paragraph 28 of the 2017 Tena Declaration, contains relevant information for Work Track 5, and that it constitutes material publicly available that Work Track 5 shall take into account.

In particular, Brazil would like to draw Work Track 5 members' attention to the following findings and statements from ACTO's report, which Brazil endorses:

"23. Sovereign States and international organizations have been repeatedly declaring that top-level domain names with geographical and cultural significance shall not be assigned to private companies without the consent of the countries concerned.

24. *These declarations are an expression of State practice and opinion, which have the effect of recognising or establishing limits under public international law on the freedom of public and private actors, including ICANN, to delegate or own names with a geographical and cultural significance as TLD, unless otherwise accepted by the relevant Governments.*

25. *These declarations are also an expression of States' "[p]olicy authority for Internet-related public policy issues", pursuant to paragraph 35 (a) of the Tunis Agenda for the Information Society. They recognise or reinforce the public policy principle forbidding the delegation and appropriation of names with geographical and cultural significance as TLD, without the consent of the relevant Governments.*

[...]

29. *The international practice and opinion identified above [which can be consulted at pp. 10-16 of the report] support the existence of public policy reasons and principle prohibiting the appropriation of names with geographical, cultural or national significance as TLDs, unless otherwise agreed by the relevant States. They also reveal the acceptance of this principle as law by the most directly affected countries.*

30. *In this context, claims by governments over these TLDs need not be subsumed under any specific or context-limited regime of trademark protection or, more generally, intellectual property law. They are grounded, independently and self-sufficiently, on both public policy and general international law principles, which States may identify and develop [...].*

[...]

38. *Specifically, with regard to TLDs having a geographical and cultural significance, in addition to the international practice and opinion identified previously, the objection by States to their delegation for use by another party is further justifiable in the broader context where the objected delegation has the potential of subverting the structure of the DNS.*

39. *Thus, for example, public policy would justify that no party should appropriate, to the exclusion of others, names publicly available for use worldwide, as a TLD with geographical, cultural or national significance, unless otherwise agreed by the relevant States. The appropriation of a unique name in the DNS as a TLD having such peculiar significances, without the agreement of the relevant States, would amount to the recognition of a space in the Internet associated to countries and populations, but where these countries or populations or public representatives can neither participate in, nor benefit from, the TLD freely.*

40. *Furthermore, the entitlement of States to oppose the delegation of TLD names by which they, their regions, or their peoples are known may be understood in light of the peculiarities of the DNS more generally. Any*

delegation by ICANN of any TLD would necessarily produce effects within the jurisdiction of all States, including the monopolisation of the name as a TLD, with all its functional and operational peculiarities in the DNS, within physical territories subject to national jurisdictions. This monopolisation, imposed from abroad, unless otherwise agreed by the relevant States, would collide with their authority to decide which regime to accord to their names within their borders.”

In view of the above, Brazil reiterates the principle that, in the absence of a permissive rule under international law allowing ICANN to delegate TLD names with geographical and cultural significance, the interested applicant should seek and obtain the approval of the relevant public authorities in order to be entitled to register and use the TLD in question.

Brazil considers that an objection procedure based on GAC advice against the delegation of TLDs should be maintained, insofar as it provides a useful tool for ensuring respect of the above principle where there is no express protection within ICANN of certain names with a geographical and cultural significance.

Brazil also considers that requiring letters of support from the relevant public authorities for the delegation of TLD names associated with identifiable relevant communities, e.g. cities, provinces, states, countries, recognizable regions from individual countries or a group of countries, will contribute to avoiding breaches of the above principle. Requiring such letters of support, regardless of the intended use of the TLD, will also avoid the monopolisation, particularly by businesses unrelated and bringing no benefit to the local populations and their lives, of TLD names inextricably associated with these communities.

Brazil considers that a clearly articulated requirement of obtaining the consent of the relevant public authorities for these TLD names, prior to the applicant's applying for the TLD in question, would most likely have avoided problems that the 2012 round gave rise.

SPECIFIC COMMENTS

“Question e2.

The definition of the term “geographic name” could impact development of policy and implementation guidance, as well as program implementation details, such as guidance for the Geographic Names Panel in the New gTLD application process. In your view, how should the term “geographic name” be defined for the purposes of the New gTLD Program?

Should there be any special requirements or implications for a term that is considered a “geographic name”? Is “geographic name” the appropriate term to use in this context, as opposed to, for example, “term with geographic meaning”? Why or why not? Please see deliberations section f.1.2.4 on pages 34-36 for context on this question.”

Brazil considers that any guidance developed within ICANN on specific protections for names with geographical significance, whatever the terminology used, shall be flexible enough as not to arbitrarily exclude from protection names clearly associated with identifiable places under the authority of countries, individually or collectively, particularly if inhabited by communities that are traditionally associated with these places, e.g. cities, provinces, states, countries, regions, river basins, etc.

Additionally, the fact that countries, collectively, bind themselves by treaty to develop policy for a specific geographical area, under the umbrella of an international organization set up for the sustainable development of that very geographical area and its populations, should constitute enough proof that this geographical areas’ name shall not be arbitrarily left without protection within ICANN.

Finally, any definition of names with geographical significance for the purposes of specific protection according to ICANN rules shall be without prejudice to the rights and interests over names with geographical significance countries may have nationally or internationally, as well as to these countries’ ability to identify and develop public policy for the Internet with regard to these names.

“Question e9.

In the 2012 round, applicants were required to obtain letters of support or non-objection from the relevant governments or public authorities for “An application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name.” The requirement applied if: “(a) It is clear from applicant statements within the application that the applicant will use the TLD primarily for purposes associated with the city name; and (b) The applied-for string is a city name as listed on official city documents.” Do you think that this requirement should be kept, eliminated, or modified in subsequent procedures? Please explain. Please see deliberations section f.2.3.2 on pages 59-69 for context on this question.”

The criteria of “intended geographical use of the TLD” as a prerequisite for the requirement of a letter of support/non-objection should be withdrawn, insofar as the regime for delegated TLDs – regardless of their use – leads to the monopolization of that TLD. This would deprive the relevant communities of the benefits of using a unique TLD name inextricably associated with their identity, without their being consulted through the appropriate public authorities. Another problem with the “intended use” criteria is that it requires monitoring or may be circumvented subsequently to a delegation.

“Question e5.

To what extent should the following serve as a basis for the development of policies regarding geographic names?

- International law*
- National/local law and policy*
- Norms and values (please specify)*
- Another basis not categorized above (please specify)”*

See general comments above.

ICANN is expressly bound by its Articles of Incorporation and Bylaws to respect international and applicable domestic laws.

Furthermore, ICANN shall consider the public policy advice from Governments. As declared in Paragraph 35 (a) of the Tunis Agenda for the Information Society, ‘Policy authority for Internet-related public policy issues is the sovereign right of States’. Under ICANN’s Bylaws, ‘[t]he Governmental Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements *or where they may affect public policy issues.*’

Hence, international and national laws, and the public policy input from Governments should be considered.

“Question e11.

[...]

Should additional types of strings have special treatment or rules in the Applicant Guidebook? If so, which ones and on what basis? Can the scope of the category be effectively established and limited? What are the boundaries of the category? If not, why not? As opposed to preventative restrictions, would any changes to objections, post-delegation mechanisms, or contractual provisions mitigate concerns related to these strings?”

See general comments and the specific comments on question e2 above.
