Aide Mémoire

At Large Community, Marrakech, June 2019

Geographical Names in the Top Level of the DNS.
- proposed new gTLD programme. (Bullet points.)

Antecedents

Geographical names are not a new issue. ICANN already has plenty of experience with the sensitivity of geo-names, particularly when there is a risk that they could be taken by Registries with no location or other relation with those places. In that context, I have clearly stated that whatever compromise, or not, is reached between Amazon the Board and the amazonian countries concerned, that cannot be a precedent for future cases. For all that the 2012 AGB is still extolled by some incumbents as the gold standard, it is nothing of the sort.

The following notes, focus on a few of the key questions that have not been resolved in the PDP/WT5 negotiations, to date.
It would be helpful if At Large could discuss our orientations as to suitable policies for ICANN in this context. At Large needs to bring into this discussion the ALS and other particiopant that haved not particiopated to date, and certainly did not participate in the 2007-2010 GNSO discussions that gave rise to the largely flawed document in the form of the 2012 AGB.

1. **Jurisdiction of Incorporation**: Registries applying for and operating geo-TLDs should normally be incorporated in the corresponding jurisdiction. Otherwise, however independent the Registry, relations with their local authorities and the target market are likely to suffer.[2]

In the 2012 Round, significant numbers of new gTLD Registries were incorporated in tax-havens. In general, that is not in the public interest. In the case of geo-names, it would be particularly unadvisable and potentially disadvantageous for the users of the TLD in the places concerned.

2. Business models: ICANN has no current policy regarding the business models of gTLD Registries. This in itself, is rather odd, since the Registry is carrying out a public service, employing a public asset in the public interest. Be that as it may, for present purposes, there is one specific issue that could come to the fore with geo-names: premium pricing of second level names. The economic 'rent' arising from a 'good' name should accrue, if to anyone, to the Registrants. The Registry may be allowed to choose between a not-for-profit and for profit model, but should not be allowed to discriminate between Registrants through its pricing policy. Notably when these are the names of geographical communities. The Registry has no prior rights to any of those names.

Related to the issue of jurisdiction and business models there is the current policy of allowing Registries (some of them are re-branded Registrars) to apply for as many new gTLDs as they wish

1. These notes are based on twenty years of exposure to these issues in ICANN and summarise the positions that I have developed in my personal capacity in the new gTLD PDP and in Work Track 5.
2. There are still examples of ccTLDs incorporated outside the relevant jurisdiction.

or can afford. This policy at best flies in the face of several ICANN objectives, notably diversity, competition and global relevance. In the case of geo-names, at worst it could facilitate cyber-colonialism of the DNS by any other name.

It requires little imagination to foresee the reaction of countries should they discover that not only do they not have locally incorporated Registries but that many of their names have been applied for by well funded Registries in third countries.

3. **Languages**: There has been a lot of discussion about the protection of city names in various languages (National, local or international) but hardly any discussion about the corresponding scripts.

I would expect that as soon as geo-names rise above the horizon of public perception, the question of scripts will become paramount in vast areas of the globe. At Large members are in a position to develop policies in that area.

4. Legal 'rights' to geo-names: The PDP is currently confronted by two opposing propositions: either there are no legal rights to geo-names and that therefore they can be applied for and registered just like any other 'generic' string of latin characters; or the traditional use of geo-names by the communities concerned infer rights to maintain the geo-name in the public domain, and not to allow the name to be acquired by any third party without prior agreement, particularly by an applicant from outside the country or the community concerned.

This is a complicated area that cannot be resolved in detail here. However it is clear that the At Large responsibility for the interests of the final users, make it quite clear on which side of the argument ALAC should stand.

5. Non-geographical use: some applicants will assert that their proposed use of a geo-TLD has nothing to do with the place concerned and that consequently they should not be required to seek and obtain prior agreement from the local authorities in that place. Needless to say this approach could be extremely disadvantageous for many places, including well into the future. At Large should be prepared to speak now for the future interests of Internet users,even if they do not yet have the resources or the market to have their own geo-TLD. Conversely they should not be put in the position of discovering in due course that their geo-name has already been taken for 'non-geographical' use.

In this context, policy will have to address the case of pre-existing trademarks that mirror geographical names. First, all those trademarks reside in and are exploited quite happily in the second level (SLDs) of various existing gTLDs. Second, international trademark law has been quite careful to delimit the monopoly of a trademark to specific markets and jurisdictions. There is nothing that I am aware of in trademark law which would allow the creation of a single global monopoly in a term – geographical or otherwise – that would arise from a Top Level gTLD[3].

Thus there should be NO conflict between a geo-TLD used for the public purposes of the place concerned and the use of the same name as a trademark at the Second Level.

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3. Note that Registering a gTLD and subsequently applying for a trademark should not be allowed. We are talking about the standing of pre-existing trademarks that mirror geo-names.

6. Different places with the same name: Insofar as some problems may arise in this area – usually deriving from the widespread post-colonial history of many parts of the world – I would rely in the first instance on cooperative consultation between the parties concerned, and on available techniques for allowing Registrants to share the domain.
It is however quite clear that simply putting shared names up for open competitive application – indeed, even for auction – would not resolve the issue, and would rather politicize the problem unnecessarily.

7**. ¿Freedom of speech?** The 2012 AGB apparently tried to create a 'right' for the applicant for a gTLD to choose whatever name they preferred, including geographical names, in the name of the 'freedom of speech' of the applicant!

Several participants in the current PDP and WT5 find this construct quite curious if not bizarre. First, a DNS TLD confers a degree of on-line monopoly in the use of the term that was undoubtedly not contemplated in the context of currently applicable international human rights texts; Second, if there is a right to freedom of speech, that of a sole applicant would have to be balanced by the rights of the population of the place concerned, including that of many future Registrants;. Third, reverting to the point about languages and scripts, how far is such a right – if it exists at all, – going to extend?

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The discussions to date in the PDP and WT5 have reached an impasse, largely because of the lack of consensus around any of the above issues.

At Large needs to decide to participate more extensively and more effectively. Also to decide on the protection in principle of the future interests of Internet users who have not yet come fully on-line.