

Christopher Wilkinson

The following comments, suggestions and recommendations refer to the draft working document presented to the GNSO PDP, Work Track 5, as of 30 May 2018.

1. The authors of this draft (29pp) have clearly made an effort to report on the positions and perspectives of WT5 participants, for which I thank them. The following is aimed towards improving the balance of the arguments, improving the credibility and acceptability of the overall proposals from the perspective of the Internet users communities world-wide, including political considerations. I shall also take the liberty of making a few additions and corrections.

2. HEADLINE ISSUES

2.1 **The 2007 experience:** The references to the so-called 2007 'policy' appear today to be a distraction and could usefully be dispensed with entirely. There is clearly no question of going back to that situation in the light of the extensive amendments and corrections that were made in the 2012 AGB. The references to 2007 also leave the impression of a certain naïveté on the part of the GNSO in those days, a decade ago, which did not benefit - at the time - from the cross community participation that is the norm today.

2.2 **Protection of Geographical Names:** In spite of the authors' efforts to present a balanced argument, one gains the distinct impression that the 'default' is no protection of geographical names, and that one is seeking (sometimes rather reluctantly) to justify the unavoidable exceptions. I venture to suggest that such an approach would be inviting rejection, even repudiation, whenever such an argument would reach a wider international audience.

On the contrary, I consider that the default for ICANN should be a basic degree of protection or reservation for all geographical terms 'for policy reasons' (p.8). We could then discuss the best ways of releasing such names for appropriate and agreed uses.

Specifically, most members of the public and Internet users would more readily identify their own interests in a pertinent geographical name, rather than any other moniker, including brands and trademarks.

2.3 **Geographical Indications:** WT5 has not yet begun to discuss Geographical Indications. They should not be bundled into Section 5.4 (p.28) with other terms 'not included in the 2012 AGB'.

Geographical Indications are an important component of the local economy in many regions. Their protection and use affects the livelihoods of many Internet users. They are generally protected by applicable local laws. ICANN should protect them in the DNS on a par, *mutatis mutandis*, with trademarks and brands.

2.4 **Curative Rights vs. Preventative Rights (p.15):** The Work Track has discussed the idea that 'ICANN policy making has traditionally favored curative rights over preventative rights.' I suggest that this approach will not be workable with geographical names. ICANN cannot expect that all the governments and local authorities world-wide would have the resources to monitor the whole new gTLD process in order to 'catch' each and every application that might concern their interests and eventual rights.

'Curative rights' may have been a valid solution in the past and notably for trademarks where

monitoring has been of limited scope, professionally organized and financed. That will never be the case for the next gTLD programme, notably for geo-TLDs. (Bearing in mind that other Work Tracks envisages an application rate of about 1,000 cases per year.)

It would be better to qualify the necessary protections as 'a priori rights' as opposed to 'ex post rights'.

3. Specific Comments on the draft Text

3.1 Intended use: It is perhaps necessary to clearly reconfirm that letters of support or non-objection should be necessary for all geo-TLD applications irrespective of intended use. The rationale for this position has already been extensively discussed on the List and in conference calls.

3.2 Predictability: Naturally, one would seek solutions that are as predictable as possible, but not at the expense of denying the right – or even the opportunity – for interested parties to participate in the application process. Applicants for geo-TLDs will find themselves *willy nilly* in the midst of political processes in the countries and communities concerned. Should that not suit them, then the obvious alternative would be to apply for something else, of which there would still appear to be quite a large pool.

The draft refers to a 'de-facto requirement to obtain support...' (p.5) In future, it would be more predictable if that would become the norm.

3.3 Competition and consumer choice: Reference should be made to the forthcoming CCT-RT report (Section 2.2. p.6)

3.4 Law and policy: (Section 2.5, p.7 refers.) *Pour memoire*, the reference to applicable local law in the ICANN Articles of Incorporation, was introduced specifically to refer to ICANN as a whole, including the DNS. The references in the draft to the idea that local law is only applicable within the jurisdictions concerned are not relevant.

3.5 Freedom of expression: (p.8) The primary right is the freedom of expression 'of the people connected to the geographic place'. The freedom of expression of the applicant is secondary, notably because she has so many alternatives which do not infringe the freedom of expression of third parties.

3.6 Registry selection and Business models: WT5 has not yet begun to discuss the business models of eventual Geo-TLDs. However the question is touched upon under Alternative structures for consultations (p.16, second bullet) where concern is expressed that 'governments will try to extract payments in exchange for the right to be the registry of the TLD'. This, rather tendentious formulation, is not appropriate for a public ICANN document. In fact it is quite normal for the responsible public authority to receive payment from the Registry (for example part of the operating surplus, if any) .

Regarding **Registry selection** the draft raises the question of competition for the same Geo-Name. (P.25, last bullet). On the contrary, the issue can be readily resolved through a Request for Proposals (RFP) by the responsible authority.

3.7 Reserved Names at the second level: This has not yet been discussed by WT5. However, other Work Tracks have picked up on the AGB provision that any new gTLD Registry could reserve up to 100 names at the second level, and provisionally an additional number provided the latter were released for registration by ICANN accredited Registrars. There would be some

problems with these parameters as applied to new Geo-TLDs.

3.7.1 In the case of a large Geo-TLD such as a small US State, a large English county or a Spanish Provincia, reservation of only 100 names is most likely to prove inadequate. The authority concerned and the Registry should be able to decide how many reserved names are required.

3.7.2 Granted that provision for reservation of additional names is a relief, but the requirement to release them only through ICANN accredited Registrars is a potential problem. (1) The original purpose of the 'vertical integration' proposal was that startup Registries could register new second level domains directly, at least up to a certain threshold. Many new Geo-TLDs will be startups. (2) One would need to look into the contemporary geographical scope of ICANN accredited registrars, bearing in mind that some new Geo-TLDs will be from currently under-served regions. (3) Some of the larger ICANN Registrars are themselves now Registries, including likely candidates for some new GTLDs. This situation gives rise to competition concerns as to the neutrality of such accredited Registrars.

3.8 **Objection -Based Systems: (p.26)** This paragraph contains the remarkable suggestion that 'Objectors pay to make the objection ... ' Needless to say that would be widely regarded as an extraordinary restriction on the legitimate concerns of third parties regarding the application.

3.9 **Interaction with other Work Tracks** (p. 17, final paragraph). Needless to say that the question of which entities can apply for Geo-TLDs is relevant to some WT5 participants. More generally, if any particular matter is 'outside the scope' of WT5, it becomes quite important to state which WT and which documents address those other questions of concern to WT5.

4. **A few corrections:**

4.1 **Disputed sovereignty and disputed names:** There are at least a dozen parts of the world where such disputes might impinge on the geo-TLD application process. It would be appropriate not to cite any one of them in particular (p.15).

4.2 **Multiple use of the same name** (p.23): Without prejudice to the general issue, I would point out that the original city of Perth is indeed in Scotland, but there is neither a Brisbane nor a Sydney in Great Britain ('England/Scotland/Wales'). N.B. I am working from the Gazetteer of the Times Atlas of the World which contains 100k.+ geographical names.) BTW, Brisbane and Sydney were not places, they were people.

4.3 **Consultations with Governments** (p.14) GAC is comprised of governmental representatives. Some GAC member and most GAC Observers are not 'individual governments'.



Christopher Wilkinson

7 June 2018

