Final Report on the new gTLD
Subsequent Procedures PDP
- Consensus Call -

Christopher Wilkinson, 6 January 2021
DISSENTING

The Working Group members have been asked to indicate their agreement or otherwise, with the Report's many Recommendations. However, in this case, that is not possible because the principal points to which I would wish to respond are those that are NOT included among the Recommendations. These include on the one hand major contextual issues such as the conditions of competition, and several practical issues where the best that the authors of the Report can say is that since there was no agreement in the Working Group, consequently there is NO Recommendation, irrespective of the importance of the issue.

1. **The 2012 AGB 'Default'**

   The WG's Charter apparently presumed that in the absence of 'consensus', the terms and conditions of the 2012 AGB would prevail. This has had a grossly restricting effect on the scope to make necessary corrections and improvements to ICANN's policies. Indeed in a few cases, GNSO participants have even attempted to re-instate a 2007 GNSO 'Policy', ignoring corrections that had to be imposed during the implementation of the previous round.

   This '2012 Default' has had deleterious consequences:

   - the WG has lost any sense of neutrality or objectivity in its work. Long standing incumbents have felt no need to justify or rationalist their positions; it has been enough to block any inconvenient new arguments, claim 'no consensus' and simply revert to the 2012 Default.

   No agreement

   - GNSO work up to 2007 and 2012 was undertaken by an ICANN community that was far more narrowly constituted than it is today. Thus the Default had the effect of neutralizing new contributions. Today the 'Empowered Community', is more broadly constituted, but in practice, the 'Default' policy effectively protected established GNSO interests from a decade of progress in the ICANN community, including the 2016 Transition. So to speak “If you don't like something, no problem, just block it and the WG will be obliged to revert to the 2012 AGB.”

   - Certain facilities and options for Applicants contained in the 2012 AGB policies are particularly egregious. Notably regarding multiple 'portfolio' applications, reverse-Vertical Integration by Registrars and weak protection of geographical names. Problems arising from these policy failures have nevertheless been carried forward today, consequent on the 2012 Default policy.

   Thus, there are NO Recommendations in the Report that address these issues.

   No agreement

1. The conditions of competition

ICANN is uniquely responsible for maintaining and improving the conditions of competition in the DNS markets world-wide. This is denied by some. I have even heard it argued that on the one hand ICANN participants can do what they like as long as they are not taken to court, and on the other hand that national competition authorities are sufficient protection (notably in the US.). These arguments are false. DNS markets are global, only a few large entities (principally the US and the EU) have the competence and resources to address international competition cases. It is up to ICANN itself to do the job.

In any event, ICANN itself should watch over the conditions of competition in the DNS markets and never risk ignoring or creating situations that might be criticised or attacked externally.

Recently the CCT-RT has begun to address competition and consumer choice, but not so much the structure of the DNS industry itself.

The main issues today are the consequences of Vertical Integration (authorised - unwisely -.in 2012) and concentration of the Registry/Registrar businesses. (It may be recalled that these are precisely the same issues that US/NTIA had to address in the 1990's with Network Solutions (NSI) and which led to the creation of ICANN itself in 1998.)

These issues are not addressed at all by the PDP's report.

No agreement

2. **Conflicts of interest:** Related to the issue of the conditions of competition is the question of non-discrimination and conflict of interest.

By determining rules for new gTLDs in such detail (the report is 370 pages) the PDP is exercising a very significant regulatory function for the DNS as a whole. However, there has been a systematic bias favouring decisions that suit incumbent operators, and few attempts to facilitate new entrants. In short, *it is inappropriate that incumbent operators can determine the entry conditions for new entrant*s. However, the most active participants in this PDP have indeed been the pre-existing Registries and Registrars and their representatives such that what is already recognised as an unhealthy degree of 'capture' can very easily slide into regulation by a *de facto* cartel of incumbents, whereas the currently rather modest participation of the other SO/ACs serves but as window dressing for the locus of effective majority power which may or may not be effectively countervailed by forthcoming statements from GAC and ALAC.

Granted that to do otherwise – and better - would require that GNSO and ICANN.org conduct a basic review of how PDP's with regulatory responsibilities are constituted in today's multi-stakeholder environment. Meanwhile, all Recommendations in this PDP Report should be reviewed and corrected to ensure at least non-discrimination if not active support for new entrants.
Meanwhile, the position here is:

No agreement

3. **Geographical names:**

The PDP constituted (rather late in the day) a specific Work Track (WT5) on geographical

names. Its report (Annexe H) was adopted by the PDP– rather high handedly - as a whole without the slightest discussion or debate. Whereas WT5 on the one hand cleaved to the highly restrictive policy on protection of geo-names arising from the 2012 AGB and on the other hand failed in nearly all respects to address the repeated demands for a significant enhancement and reinforcement of protection . In short, the most unacceptable aspects of this report now are:

- Geographical names are still classified by GNSO as 'generic', whereas they are NOT generic in any meaning of the word. They are specific to locations, communities and languages.

- significant protections are still limited to those geo- names that can be linked to the ISO 3166 standard, a result that was essentially already achieved by ccNSO for the previous Round. Whereas many geo-names, world wide are NOT included in the ISO 3166 standard.

Many local communities and national authorities may well ask, in the future, what has been achieved by WT5?

- Experience shows that geographical names are highly sensitive politically and socially. The refusal by WT5 and the PDP plenary to consider significantly higher degrees of protection, world-wide, leaves ICANN exposed in years to come to multiple disputes associated with the ownership and use of TLDs (NOT 'gTLDs') using geographical names.

- taken together with the outcomes from other Work Tracks, and the 2012 AGB Default, geo-names could be applied for:

- by third parties from different jurisdictions,
- may be subject to auctions,
- may be the object of externally financed portfolio applications from incumbent Registrars, some of which apparently accept no obligation to give the local authorities concerned prior notice, nor to act on any objections.

ICANN should not be surprised if in due course such policies give rise to political complaints about cyber-colonialism, by any other name.

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These are not new issues. They have been raised in conference calls and on the Lists, but the Working Group has decided in its wisdom to ignore them. Consequently they have not been reported and discussed appropriately in the Report. The fact that there are no recommendations in the Report addressing these issues tells us more about the composition and interests in the Working Group than about the importance of these issues to the Internet in the world as a whole.

Christopher Wilkinson
In his personal capacity.