

Comments of the ccNSO on ICANN Draft Applicant Guidebook Version 3: Implementing ICANN Board Direction on Module 2, Section 2.1.1.4, Geographical Names

The ccNSO has repeatedly expressed its concerns about the use of meaningful representations of country and territory names in the gTLD space. In ccNSO Council Resolution 24-04, adopted in October of 2007, and subsequently in December of 2008, April of 2009, and July of 2009, the ccNSO urged ICANN to prohibit the introduction of gTLDs consisting of the name of a territory listed in ISO 3166-1 or a meaningful abbreviation of it, whether represented in a non ASCII script or in any recognised language represented in that script. ICANN's Governmental Advisory Committee has taken the same position.¹ The position of the ccNSO and the GAC are consistent with RFC 1591 and ICP-1. *ICANN itself acknowledged that ccTLDs are distinguished from gTLDs by their association with a geographic or country designation:*

Top Level Domains (TLDs) are divided into classes based on rules that have evolved over time. Most TLDs have been delegated to individual country managers, whose codes are assigned from a table known as [ISO-3166-1](#), which is maintained by an agency of the United Nations. These are called country-code Top Level Domains, or ccTLDs. In addition, there are a limited number of "generic" Top Level Domains (gTLDs), which do not have a geographic or country designation.²

Accordingly, under longstanding IANA policy, country designations are not part of the generic top level domain space. It is incumbent upon ICANN to consider carefully the ramifications of eliminating this clear demarcation between ccTLDs and gTLDs.

ICANN's analysis of the comments received on its Draft Applicant Guidebook Version 2 (DAG 2) acknowledged the concerns of the ccNSO.³ Regrettably, however, the ICANN Board has apparently dismissed these concerns on the theory that some governments may want a .country name TLD, and – in the near term - the new gTLD process is the only mechanism for

¹ Indeed, the GAC went even further and added that it would be logical and reasonable to apply existing policy principles and processes for ccTLDs to any TLDs intended to service a specific community within a specific national jurisdiction. <http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>.

² INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS; INTERNET ASSIGNED NUMBERS AUTHORITY: *Internet Domain Name System Structure and Delegation* (ccTLD Administration and Delegation) (May 1999). <http://www.icann.org/en/icp/icp-1.htm>. (emphasis added).

³ Analysis of Public Comment of the New gTLD Application Guidebook Version 2 May 2009 at 112, (“The ccNSO and other ccTLD managers have raised concerns that allowing applications for country and territory names in the gTLD process will blur the distinction between ccTLDs and gTLDs. They have requested that applications for country and territory names not be allowed in the gTLD process, at least until the completion of the IDN ccTLD PDP, which will address this issue. The current timetable for the completion of this process is mid 2011.”) <http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>

delegating these strings.⁴ The ccNSO does not agree that an untested and wholly theoretical demand by governments for .country top level domains justifies the introduction of meaningful representations of countries or territories on the ISO 3166-1 list into the generic top level domain space. This is strengthened by the fact that the GAC, as the advisory council of ICANN dedicated to expressing the concerns of governments, explicitly states that country and territory names should be excluded from the gTLD space.⁵ Nor does the ccNSO agree that the requirement for government approval contained in ICANN's Draft Applicant Guidebook Version 3 (DAG 3) addresses or resolves the many legitimate concerns previously expressed.

The distinction between ccTLDs and gTLDs, as stated in RFC 1591 and acknowledged by ICANN in its own words, is that ccTLDs are *country or territory designations*, while gTLDs are not. The DNS has reflected and preserved this distinction from its earliest days. The ccNSO strongly opposes changing this fundamental policy on the basis of wholly unsubstantiated demand, particularly during the pendency of the ccTLD IDN Policy Development Process, which provides a mechanism to consider this issue (in respect to non ASCII characters) in a thorough and comprehensive manner in the relatively near term.⁶ The fact that a government must approve any application before a .country generic top level domain is approved does not in any way address the fact that ICANN proposes to make this change without addressing the significant legal and policy challenges that are certain to arise as a by-product of blurring the longstanding distinction between ccTLDs and gTLDs.

Moreover, while DAG 3 implements the Board's direction to staff to provide clearer guidance to applicants by adopting a bright line test of what is and is not covered, it fails to acknowledge that its proposal does not in any way address the ccNSO's view that restrictions should not be limited to strings on the specifically delineated list set forth in the DAG, but should apply to any *meaningful representation*, including abbreviations, of a country or territory on the ISO 3166-1 list.⁷ This is particularly inexplicable inasmuch as ICANN has accepted the concept

⁴ See, Letter from Peter Dengate Thrush to Janis Karklins dated 22 September 2009, available at: <http://www.icann.org/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf>

⁵“ The GAC therefore proposes the following amendments to be incorporated in version 3 of the Draft Applicant Guidebook (further in the text – DAG3): i. Strings that are a meaningful representation of a country name or territory name should not be allowed in the gTLD space” (GAC's letter to ICANN's Chair, Peter Dengate-Thrush regarding the DAG2:<http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>)

⁶ ICANN's Chair, Peter Dengate-Thrush has acknowledged that current constraints on the introduction of new country and territory name TLDs in Latin script may be only temporary. See, Letter to Janis Karklins from Peter Dengate-Thrush dated 22 September 2009. (“Meaningful representations of country and territory names in non-Latin scripts will be available under the IDN Fast Track process but country and territory names in Latin scripts are available in the gTLD program only, until the ccTLD policy development is complete”.) <http://www.icann.org/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf>

⁷ Under DAG 3, a string shall be considered to be a country or territory name if the string consists of: (a) An alpha-3 code listed in the ISO 3166-1 standard; (b) a short-form or long-form name listed in the ISO 3166-1 standard, or a translation of the long-form name in any language; (c) a short- or long-form name association with a code that has been designated as “exceptionally reserved” by the ISO 3166 Maintenance Agency; (e) a separable component of a country name designated on the “Separable Country Names List,” or is a translation of a name

of a meaningful representation of a country or territory in the context of the IDN ccTLD Fast Track.⁸

More importantly, the approach to country and territory names in DAG 3 also fails to address the multitude of post-delegation issues ICANN is likely to face in connection with the introduction of country/territory designations in the generic top level domain space. Notwithstanding more than 25 years of experience under RFC 1591, these issues can still become considerable points of contention in the existing ccTLD space. Yet we have seen no analysis suggesting that ICANN/IANA has adequate mechanisms for handling these complex issues in the context of country/territory designations as generic TLDs. In fact, however well intentioned, attempts to respond to concerns expressed by the Governmental Advisory Committee have only introduced greater uncertainty and the potential for increased contention in this space.

For example, in a letter to ICANN dated 24 April, 2009, the GAC expressed its view that “the rights of relevant governments or public authorities, as representatives of the sovereign state or territory, cannot be limited as such by ICANN or by any procedures introduced by ICANN for new gTLDs.” In responding to the GAC, Chairman Peter Dengate-Thrush asserted that applications for country and territory gTLDs will “require evidence of support or non-objection from the relevant government or public authority ... and that evidence must clearly indicate that the government or public authority understands the purpose of the TLD string and the process and obligations under which it is sought.” To paraphrase, the GAC believes that a government cannot be bound by a contract between ICANN and the operator of a “.country” gTLD, to which the ICANN Board responds that, a government should not endorse an application if it does not intend to be constrained by the agreement between ICANN and the operator of that gTLD.

Whether or not this response is conceptually sound, it does not take political realities into account. If it is possible to apply for a “.country” gTLD, the ICANN Board must assume that it will receive a qualified application, and must concede that an endorsing government may subsequently change its mind. This may for example happen if the registry breaks the conditions under which it has received the government support, acts in contradiction with the laws of the country etc. ICANN/IANA will inevitably be drawn into the conflict. For example, how will

appearing on the list, in any language; or (f) a permutation or transposition of any of the names included in those items derived by removing spaces, inserting punctuation, adding or removing grammatical articles, or changing the sequence of the long or short-form name.

⁸ Under the IDN ccTLD Fast Track Process, an IDN ccTLD string(s) must be a meaningful representation of the name of the corresponding country or territory, and a string is deemed to be meaningful if it is in the official language of the country or territory and if it is: (a) the name of the country or territory; (b) part of the name of the country or territory denoting the country or territory; or (c) a short-form designation for the name of the country or territory that is recognizable and denotes the country or territory in the selected language. The meaningfulness requirement is verified as follows: (a) if the requested string is listed in the UNGEGN Manual, then the string fulfills the meaningfulness requirement; or (b) if the requested string is not listed in the UNGEGN Manual, then the meaningfulness must be substantiated by the requester providing documentation from an internationally recognized expert or organization.

ICANN and/or IANA respond when a government that has endorsed a “.country” gTLD demands redelegation of the gTLD, citing its authority to do so under domestic law or even under a written agreement with the registry operator? What rights, if any, will ICANN have to evaluate the capacity of the government’s choice of an alternative operator? Is ICANN actually prepared to ignore a change of heart by a government whose rights and interests it has previously explicitly acknowledged by conditioning the delegation of the gTLD on its consent? Is it, alternatively, prepared to defer to a government request under any circumstances even, for example, in the (hopefully unusual) case where such deference creates legal liability for ICANN or raises stability and security concerns?

Over the past decade, in the course of handling dozens of contested and uncontested ccTLD delegations and redelegations, IANA has developed a body of precedent that guides its review of such requests in the ccTLD contexts.⁹ But notwithstanding IANA’s hands-on experience, these issues remain difficult and have resulted in ongoing efforts to clarify RFC 1591, particularly to clarify the role of the associated government in delegation of ccTLDs.¹⁰ In

⁹ IANA requires that significantly interested parties in the domain agree that the designated manager is the appropriate party. Contending parties are expected to reach agreement among themselves, and IANA policy, as stated in RFC 1591, it generally takes no action to change things unless all the contending parties agree. In cases where there are persistent problems (i.e., the designated manager has “substantially misbehaved”), the delegation may be revoked. Otherwise, parties contending for TLD delegations and/or redelegations are expected to reach agreement among themselves. Normally, IANA will redelegate a TLD where both parties to a transfer agree, though IANA will consider communications from “other parties that may be concerned or affected by the transfer.”

ccTLD operators are generally entitled to rely on the provisions of RFC 1591 in connection with a contested redelegation request. For example, IANA states: “The process of changing the designated manager(s) of a ccTLD is known as redelegation. This process is conducted according to the principles described in [ICP-1](#) and [RFC 1591](#).” <http://www.iana.org/domains/root/cctld/>. “It is important that all TLD administrators follow the guidelines of and ICP-1 and RFC 1591. TLD administrators should treat this stewardship responsibility as a service to the global Internet community.” Id.

While the question of whether RFC 1591 creates a “contract” has not been litigated, where a creditor sought to execute on a judgment against the Congolese government by levy against “.cg,” which the plaintiff characterized as government “property,” ICANN successfully fought the lien, describing RFC 1591, as codified by ICP-1, as the “universally – accepted Internet standard for the delegation and redelegation of TLDs, including ccTLDs.” See, Defendant’s Notice of Demurrer and Demurrer in *C. Itoh Middle East v ICANN et al*, Case No. SC090220 at p.4, (Superior Court, Los Angeles, CA 2006); available at <http://www.icann.org/en/legal/itoh-v-icann/ntc-of-demurrer.pdf>.

¹⁰ See, [ccTLD News Memo #1](#): In October of 1997, in partial response to growing disputes about ccTLD delegation issues, IANA issued “ccTLD News Memo #1.” The memo states: “An additional factor has become very important since RFC 1591 was written: the desires of the government of the country. The IANA takes the desires of the government of the country very seriously, and will take them as a major consideration in any transition discussion.” At the same time, IANA reiterated its preference for parties contesting a delegation or redelegation to work it out: “On a few occasions, the parties involved have not been able to reach an agreement and the IANA has been required to resolve the matter. This is usually a long drawn out process, leaving at least one party unhappy, so it is far better when the parties can reach an agreement among themselves.” <http://www.iana.org/reports/1997/cctld-news-oct1997.html>.

fact, in June of 2009, the ccNSO adopted a charter for a working group tasked with advising the ccNSO Council whether it should launch a policy development process to recommend changes to the current policy for delegation, re-delegation and retirement of ccTLDs. Inasmuch as ICANN has not developed policy on how it would handle the potentially competing interests of governments and country/territory TLD operators in the context of the new gTLD process, we believe it is profoundly unwise to proceed down this path at this time.

Further, the ccNSO has launched a policy development process for internationalized ccTLDs, and named a working group to report on and identify a feasible policy for the selection and delegation of IDN ccTLDs associated with the territories listed in the ISO 3166-1 (IDN ccTLDs). The draft topic paper, which has been posted for public comment, specifically asks a number of relevant questions including, (1) whether an IDN ccTLD string should be 'meaningful' in its representation of the name of a 'territory' and, if so, what is considered to be "meaningful", how is it determined and by whom or, if not, whether or not there should be another criteria for determining to demarcate a string as a ccTLD; (2) whether the policy being developed should be limited to languages/strings involving non-Latin scripts either in its basic form or with diacritics; (3) what rights, if any, should existing ccTLD managers have with respect to names introduced under the policy; and (4) how disputes relating to delegation and redelegation should be resolved.

Given the significant issues that have been identified by both the ccNSO and the GAC in relation to country/territory gTLDs, the extent to which these issues have not been addressed in a meaningful way to date, and the existence of an ongoing policy development process in which they can be considered, the ccNSO believes that it would be inappropriate and unwise at this time to introduce gTLDs that constitute meaningful representations of countries and/or territories on the ISO 3166-1 list.

Although the views of the relevant government are important, they are not definitive, and the IANA Principles cannot be modified without public notice and comment in accordance with the ICANN Bylaws. Indeed, ICP-1 carries the following header:

IMPORTANT NOTICE. The following document is being posted for the information of the Internet community. It contains a statement of the current policies being followed by the Internet Assigned Numbers Authority (IANA) in administering delegations of Top Level Domain Names of the Internet Domain Names System (DNS). At a future date, the ICANN Board may consider changes to these policies and will, at such time, notice proposed changes for public comment in accordance with the ICANN Bylaws. <http://www.nic.lv/DNS/docs/icp1.htm>.