

# Understanding ICANN's Trilateral Model

A layman's guide to ICANN's proposal for ccTLD administration.

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Author: Garth Miller

Director, Christmas Island Internet Administration Limited – [www.nic.cx](http://www.nic.cx)  
Director, Council of Country Code Administrators limited – [www.cocca.cx](http://www.cocca.cx)  
Administrative Contact, Cocos (Keeling) Islands ccTLD - <http://www.iana.org/root-whois/cc.htm>

A paper reflecting solely the views of the author. – Comments welcome, [garth.miller@nic.cx](mailto:garth.miller@nic.cx)

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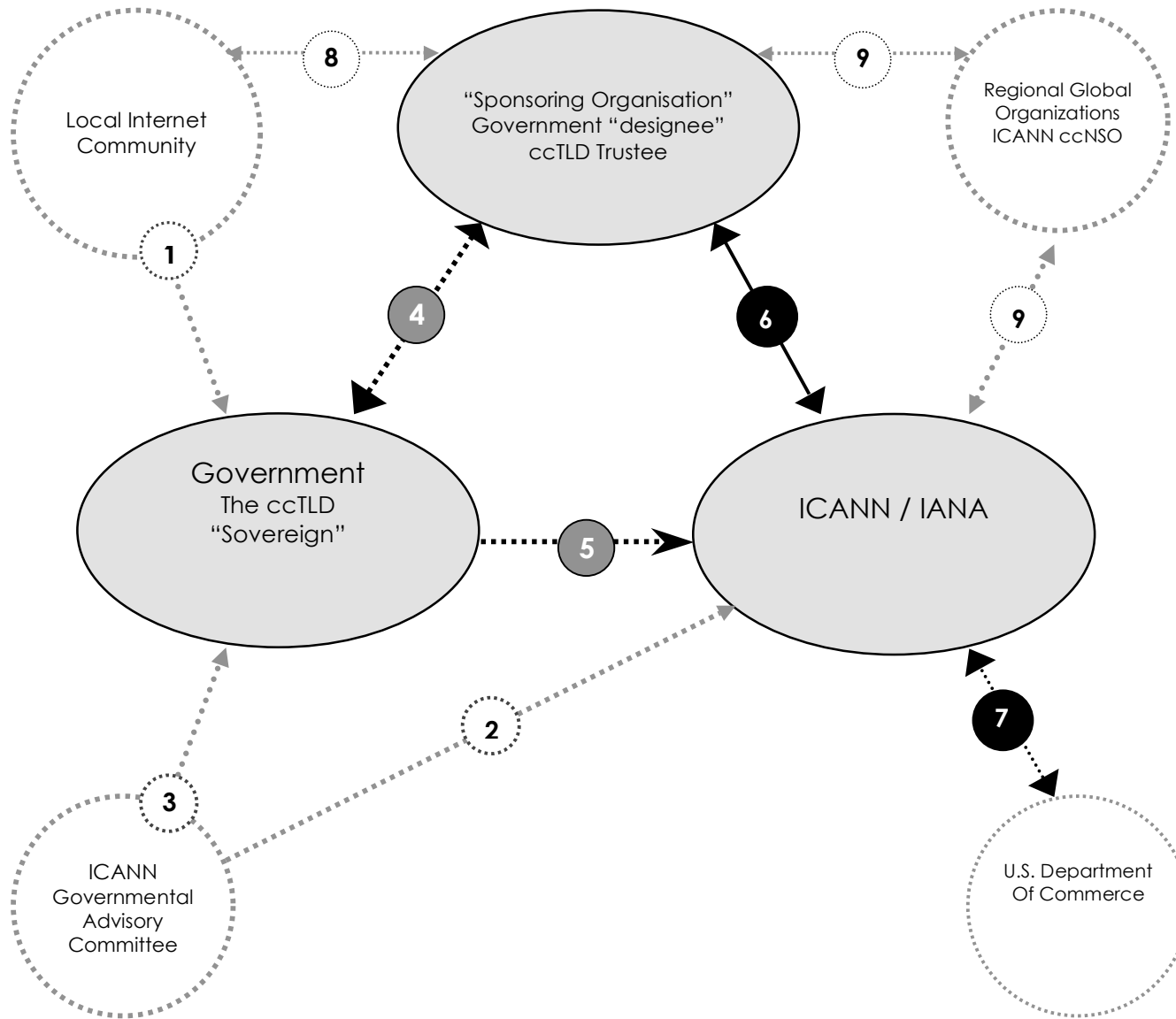
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This guide is intended as a basic navigation aid for governments and administrators considering application of the current ICANN ccTLD administration model.

# The "Communications Based Regime" – ICANN's proposal for administration of ccTLD's



- 1 Input from stakeholders in the local Internet community.
- 2 ICANN GAC recommendations on ccTLD administrative "best practices".
- 3 GAC – ccTLD Sovereign consultation and informal recommendations, policy development.
- 4 Conditional endorsement based on policy recommendations developed in (1), (2) and (3).
- 5 Government informs ICANN of their preferred designee, and the terms of the endorsement.
- 6 Sponsorship Agreement – "management rights" exchanged for responsibilities.
- 7 Formal recognition of nominee based on the Sponsor and the governments commitments to the ICANN process.
- 8 Ongoing consultation with stakeholders in the Local Internet Community`
- 9 Ongoing consultation with other Trustees / Sponsors on ICANN policy and other matters of mutual concern.

## THE BIG PICTURE

At a basic level, the ICANN trilateral model is generally consistent with the spirit and philosophy of legacy IANA ccTLD policy (RFC1591). The Agreement gives ICANN (and to a limited extent, government) the teeth to exercise powers, which IANA asserts that it possesses - but does not have effective tools to exercise. Execution of the Sponsorship agreement formally establishes ICANN's oversight and policy setting role and checks and balances on the authority exercised by a "Governmental Authority" and their "Designee" are been implemented. Both the Designee and Government are provided limited protections against the abuse of ICANN's administrative oversight and policy development powers.

Increasing transparency and accountability in ccTLD administration is desirable for many reasons, a few of the more obvious ones...

- the *public interest* cannot always be expected to prevail when inevitable conflicts arise between *public* and *corporate interests*. This criticism is often leveled against ICANN but applies equally to private sector ccTLD trustees - operating under either a profit or non-profit model.
- administration of a ccTLD should rely on the rule of local law and exclude ill-defined notions of extra legislative or discretionary authority as exercised by private entities (or for that matter government).
- democracy, constitutionalism, liberalism, and civil rights are undermined when private bodies determine the rights of citizens in public life - to the extent that these concerns are valid they are magnified substantially when the private body is a foreign corporation and not subject to oversight or governmental review.
- the proposition that the ccTLD naming system is a public resource and therefore should be subject solely to the authority of the sovereign is convenient, but not factually based<sup>i</sup>. Government, like any private entity cannot always be relied on to exercise authority within the rule of law, transparently, or in the public interest.

- even when governmental authority is exercised appropriately and in the public interest, implementation of a specific policy may negatively impact the entire network - not just entities in the geographic region represented by the ccTLD due to the globalized nature of the internet.
- legacy IANA policy cleverly introduced the notion of the delegee as a "trustee" - an entity conditionally granted management rights but not property rights. This works in theory, but is problematic when no clear mechanisms are in place to balance the "trustee's" ultimate authority that (for all practical purposes) control over additions, modifications and deletions to a ccTLD database grants.
- practical tools should be available to protect the public interest and those of registrants and internet users inside and outside of the ccTLD when stability is threatened, a ccTLD becomes insolvent, the "trustee" loses the support of the local Internet community, or a ccTLD's management contradicts national law or the public interest.
- the IANA's reliance on administrators who can "carry out the necessary responsibilities, and have the ability to do a equitable, just, honest, and competent job"<sup>iii</sup> often conflicts with commercial interests especially where there is no transparent separation of policy development from commercial exploitation.

The IANA has always asserted a far-reaching authority to intervene in the administration of a ccTLD. These assertions were thought to be appropriate as the "old" IANA's core interest was stability. As IANA was not actively asserting rights, advancing interests, or seeking to protect or advance the interests of others, conflicts, suspicion and mistrust are unlikely to result.

The ICANN trilateral administrative model is **not** a single three-way agreement, but rather three separately negotiated documents, a **Communication**, an **Endorsement** and a **Sponsorship Agreement** between a Governmental Authority's designee and ICANN. ICANN seeks support to assume rights (by way of contract) that will enable it to balance and protect interests of network users and governments. ICANN's model is more evolution of IANA policy than a radical overhaul.

## ICANN SPONSORSHIP AGREEMENT – OVERVIEW

### ISSUE

**“Rights”, “Authority”.** By executing the Sponsorship Agreement<sup>iv</sup> the government’s designee confirms that all authority or rights (real or otherwise asserted) that resulted from the original delegation under RFC1591 or subsequent contracts or agreements, are to be superceded by the Sponsorship Agreement. The effect of the agreement is the perpetual and irrevocable assignment of “administrative oversight” of the ccTLD to ICANN. *As drafted the Sponsorship Agreement does not provide for remedies other than arbitration if ICANN breaches the agreement.* The Sponsor (or Governmental Authority) does not have a right to require specific performance in the event of a breach by ICANN.

**Role of Government.** The Agreement formally defines a role for a Governmental Authority. The trilateral model does **not** grant government “unconstrained rights” or “ultimate authority”. The Governmental Authority’s powers are exercised by ICANN’s granting of, a.) the conditional right to *nominate*, not *designate*, an entity responsible for development of local policy and the implementation of ICANN policy, and b.) a right to terminate the mandate of their designee - but not unilaterally cause the replacement of a successor.

ICANN policy supercedes local policy except where the government has specifically legislated against a policy or instructs the Sponsoring Organisation not to implement an ICANN policy (applies only to ICANN policy developed under Section 5 of the Agreement).

### REFERENCE

**4.5 Conformity to ICANN Policies.** The Sponsoring Organization shall abide by ICANN policies developed in accordance to Section 5, that concern:

**4.5.2** other topics, in the circumstance that the registration policies for the Delegated ccTLD encourage or promote registrations from entities or individuals residing outside the territory of the Governmental Authority, to the extent those policies are applicable to the Delegated ccTLD, except where **(a) the Sponsoring Organization is prohibited by law from implementing such other ICANN policy or (b) the Governmental Authority instructs the Sponsoring Organization in writing to refrain from implementing such other ICANN policy,** with three months written notice to ICANN and the ICANN Governmental Advisory Committee.

#### Termination.

**“6.2.4** After ICANN is notified by the Governmental Authority that the Sponsoring Organization has contravened the terms of the Governmental Communication, or the Term of the Governmental Authority’s designation of the Sponsoring Organization as manager of the Delegated ccTLD has expired, ICANN gives notice of its intent to terminate to the Sponsoring Organization.”

### AUTHOR’S VIEW / COMMENTS

**“Rights”, “Authority”.** ICANN’s proposed model is consistent with the spirit, policies and philosophy of IANA RFC1591<sup>v</sup>, the description of an administrator as a “trustee”, the notion of a third party (the IANA) with authority to intervene when irreconcilable disputes arise (or a ccTLDs stability is threatened), and confirmation of the view that no foreign government “owns” a ccTLD or can order ICANN or the US Department of Commerce to take specific actions with respect to a ccTLD.<sup>vi</sup>

**Role of Government.** Inferred in RFC1591 was the notion that governments be allowed limited discretion to define the level of oversight exercised over a ccTLD *“if the administrative contact in country rule was strictly observed... and if a government really wanted to assert itself, it could pressure the administrative contact into requesting the changes it wanted, using whatever would pass for due process in that country”.*<sup>vii</sup>

Continuation of this legacy IANA model is desirable provided the “fine print” respects the legitimate interests of the Sponsor, the local Internet community, includes protections from arbitrary or capricious decisions by ICANN or the designated Governmental Authority, and ICANN “mission creep” is contained.

An equitable Sponsorship Agreement should not undermine rights under applicable legislation, give any entity unchecked extra-legislative authority, or diminish the access to due process.

**The “Communication”** The ICANN trilateral model is sometimes referred to as a “communications based regime”, this is because ICANN’s view is that a government cannot offer an entity an agreement that designates them as the delegee of a ccTLD.<sup>viii</sup> Under existing policy, governments may nominate but not *designate* an entity to carry out the responsibilities of a Sponsoring Organization.<sup>x</sup> Formal designation is a matter left to the Department of Commerce - who can generally be expected to act on ICANN’s advice on the matter.

The Communication can take a variety of forms, an MOU, an exchange of letters, an agreement etcetera. Regardless of the form, the underlying nature of the Communication is that of a binding “**conditional endorsement**”. If the Sponsoring Organisation agrees to the conditions set out by the government, the government agrees to put their name forward to ICANN as their preferred / recommended designee or “Sponsor” for the ccTLD.

The conditions agreed to in the Communication are a matter between the government and the Sponsoring Organization. However, the ICANN Governmental Advisory Committee recommends that “to give effect to governments’ or public authorities’ public policy interests, governments or public authorities should ensure that the terms outlined in Clause... are included in their Communication”. ICANN is not directly involved as a party to the communication, as a practical matter it would be optimistic to expect ICANN will act on a government’s advice if the communication does not contain certain key provisions. There have been some ccTLDs exempted from the trilateral model and these provisions<sup>xi</sup> but most can reasonably expect to have to have complied with very basic ICANN “recommendations” in the Government – Designee Communication.

The best place to find “recommended” content for the Communication is in a document entitled the “Principles for Delegation and Administration of ccTLDs”<sup>xii</sup>, prepared by the Governmental Advisory Committee<sup>xiii</sup> to ICANN in early 2000. The “GAC Principals” are not formal ICANN policy in the sense that they were not the result of the formal ICANN policy development process and have not been formally accepted by the board.

As a practical matter ICANN’s unstated “suggestions” that government bind their designee to key provisions of the document, makes the GAC document defacto ICANN policy, the “glue” in the trilateral model and essential reading for administrators and government.

The process by which the GAC Principals became informal ICANN policy has been a source of (not unwarranted) skepticism, but the document itself is generally consistent with legacy policy and contains some useful advice and common sense guidelines. Not unexpectedly a little “horse-trading” seems to have been involved in their drafting.

#### **Things to keep in mind for current administrators:**

ICANN’s Sponsorship Agreement (as currently drafted) may be terminated by ICANN *immediately* if the “Governmental Authority” notifies ICANN that the Sponsoring Organization is in breach of the designee-governmental Communication. Theoretically the notice of breach could be as simple as a phone call a re-delegation. The Sponsor is not granted the opportunity to remedy, appeal or send to arbitration. Where applicable, basic securities (remedy / appeal) should be sought by the trustee in both the Communication with government and in the Sponsorship Agreement.

The notion of authority is generally defined constitutionally, legislatively, under contract, if in your communication you agree to define an entity as the Governmental Authority; they become that for the purpose of the model - regardless of whether or not the authority asserted is clearly defined legislatively / constitutionally elsewhere.

Governments generally can, and often ultimately do, whatever they want. Governments should be encouraged to both adhere to basic principals of fairness and to operate within powers that are legislatively or constitutionally derived. The more difficult it is for the designee or the governmental authority to act arbitrarily or capriciously in exercising authority the more likely they are to responsibly negotiate through the issues.

The Governmental Authority – ICANN Communication is essentially an endorsement letter. The GAC Principles recommend that “The relevant government or public authority should communicate to ICANN how it will require the delegee to abide by the terms and conditions outlined in Clause 9....”.

It is not clear how ICANN would respond to an endorsement letter that did not include details of how the government would require the designee to comply with Clause 9 of the GAC principles. The most likely scenario would be some sort of dialog between the government and ICANN to modify and align the Communication and Endorsement with ICANN policy and the concerns of the day.

ICANN's agreement with the US Department of Commerce (DoC) grants ICANN authority to “receive delegation and redelegation requests, investigate the circumstances pertinent to those requests, and make its recommendations ... in connection with processing such requests”. ICANN, does not currently have authority to modify, the root zone file or associated information that constitutes delegation or redelegation of top level domains.<sup>xiv</sup>

The extent to which ICANN moderates, influences or dictates the terms of the Communication and Endorsement to government could become an issue for some governments. Some “guidance” is appropriate and acceptable and more often than not would probably be appreciated. The DoC's purchase order to ICANN “does not authorize the Contractor to make material changes in established methods associated with the performance of the IANA functions.” – these established methods are to encourage people to “work it out between themselves,” but leave room for little education. Jon Postel's, traditional view was that people are basically reasonable and will do the right thing - if told what it is.<sup>xv</sup>

This section of the tri-lateral model involves the relationship between ICANN and Government. The author has very little appreciation of the conflicts here and is certainly not abreast of all the issues.

#### NOTES:

“For any transfer of the designated manager trusteeship from one organization to another, the higher-level domain manager (the IANA in the case of top-level domains) must receive communications from both the old organization and the new organization that assure the IANA that the transfer is mutually agreed, and that the new organization understands its responsibilities.”

“It is also very helpful for the IANA to receive communications from other parties that may be concerned or affected by the transfer.”

“The IANA tries to have any contending parties reach agreement among themselves, and generally takes no action to change things unless all the contending parties agree; only in cases where the designated manager has substantially mis-behaved would the IANA step in.”

IANA RFC1591 <ftp://ftp.rfc-editor.org/in-notes/rfc1591.txt>

“Delegation of a New Top Level Domain. Delegation of a new top level domain requires the completion of a number of procedures, including the identification of a TLD manager with the requisite skills and authority to operate the TLD appropriately. The desires of the government of a country with regard to delegation of a ccTLD are taken very seriously. The IANA will make them a major consideration in any TLD delegation/transfer discussions. Significantly interested parties in the domain should agree that the proposed TLD manager is the appropriate party.”

The interesting issue here is who decides what constitutes “appropriate” administration of ccTLDs. ICANN's undertaking to the DoC has been to engage in “bottom up consensus policy development”. It would be a stretch to assert the nature of, and the mechanisms for implementing the tri-lateral model were the results of bottom up consensus policy development. The above criticism aside, the tri-lateral model seems to offer a sensible way forward.

ICP-1 <http://www.icann.org/icp/icp-1.htm>

## 6 ICANN SPONSORSHIP AGREEMENT – KEY ISSUES

### ISSUE

**“Performance”, “Suitability”** The underlying aim of the trilateral model is to ensure that minimum “performance standards” developed by ICANN are applied to the administration of a ccTLD – both in the day-to-day administration of a ccTLD by a Sponsoring Organisation, and by the Governmental Authority.

Adherence to ICANN standards is required of the Sponsoring Organisation under the Agreement, and more subtly in the general “requirement” that governments commit to joint ICANN - government “supervision” as a prerequisite to lodging a request for formal designation of a government’s nominee to the Department of Commerce.

The suitability of a particular entity to act, as the Sponsoring Organisation is not of concern to ICANN. Selection is left as purely a local matter (provided performance standards are met and the Sponsorship Agreement adopted).

### REFERENCE

**4.5 Conformity to ICANN Policies.** The Sponsoring Organization shall abide by ICANN policies developed in accordance to Section 5, that concern:...

**6.2 Termination by ICANN.** This Agreement may be terminated by ICANN in any of the following circumstances:

**6.2.3** The Sponsoring Organization acts or continues acting in a manner that ICANN has reasonably determined endangers the operational stability of the DNS or the Internet after the Sponsoring Organization receives seven days notice of that determination.

**6.11.1** The Sponsoring Organization may subcontract part or all of the technical operations of the registry for the Delegated ccTLD only under terms that ensure that the subcontractor has the technical qualifications required by ICANN.

### AUTHORS VIEW / COMMENTS

The requirement that the Sponsoring Organization be subject to performance requirements is not new. RFC1591 introduced requirements that are generally consistent with the stated objectives of the tri-lateral model;

*“Significantly interested parties in the domain should agree that the designated manager is the appropriate party...”*

*“In cases when there are persistent problems with the proper operation of a domain, the delegation may be revoked, and possibly delegated to another designated manager.”*

*“The designated manager must do a satisfactory job of operating the DNS service for the domain...”*

*“For top-level domains that are country codes at least the administrative contact must reside in the country involved...”*

*“The designated manager must be equitable to all groups in the domain that request domain names...”*

The ICANN trilateral model is an evolution of RFC1591 in that processes for arbitration are more clearly defined, ambiguity over the role and authority government is removed and termination and succession procedures are more clearly defined. It moves the IANA from a “complaints based” model to a “directive based” model.

ISSUE

**Termination – section 6.2.4 / 6.3** The Sponsorship Agreement may be terminated by ICANN on the advice of the Governmental Authority at any time; *termination is immediate and the Sponsoring Organisation is deprived of any avenue of appeal or an opportunity to remedy.* The Sponsorship Agreement is between ICANN and the Sponsoring Organisation, as a technical, contractual matter termination under 6.2.4 is a termination by ICANN on the advice of Government, not a termination by government. As the Agreement specifically excludes appeal for termination under 6.2.4 no injunctive relief or other remedy is available to the Sponsoring Organisation. On execution of the Agreement the Sponsoring Organisation must voluntarily extinguish all rights to appeal termination under 6.2.4.

This is most likely a response to horse-trading during the development of the GAC Principles.

“7.1 Where a communication between the relevant government or public authority and the delegee is in place, when ICANN is notified by the relevant government or public authority that the delegee has contravened the terms of the communication, or the term of the designation has expired, ICANN should act with the utmost promptness to reassign the delegation in coordination with the relevant government or public authority.”

REFERENCE

**6.2** “... This Agreement may be terminated immediately upon notice to the Sponsoring Organisation in the circumstances described in 6.2.4 ...”

“**6.2.4** After ICANN is notified by the Governmental Authority that the Sponsoring Organization has contravened the terms of the Governmental Communication, or the Term of the Governmental Authority’s designation of the Sponsoring Organization as manager of the Delegated ccTLD has expired, ICANN gives notice of its intent to terminate to the Sponsoring Organization.”

**6.2** “... This Agreement may be terminated in the circumstances described in Sections 6.2.1 through 6.2.3 above only upon thirty days notice to the Sponsoring Organization and the Governmental ... with the Sponsoring Organization being given an opportunity during thirty-day notice period to initiate arbitration under Section 6.5 to determine the appropriateness of termination under this Agreement. ...”

**6.3** “... (The manner or result of selection of the successor shall not be subject to challenge by the Sponsoring Organization.) ...”

**6.3** “... The Sponsoring Organization agrees to the reassignment of the Delegated ccTLD under the conditions and in the manner described in Section 6.2 ...”

AUTHORS VIEW / COMMENTS

The ICANN – DoC contract<sup>xvi</sup> prohibits ICANN from acting “*unjustifiably or arbitrarily to injure particular persons or entities or particular categories of persons or entities in the “DNS Project or in any act related to the DNS Project”* likewise, the G.A.C.<sup>xvii</sup> principles state that “*Delegees should enjoy, in the execution of their responsibilities, the appropriate rights under applicable law, and should not be subject to discriminatory or arbitrary practices, policies or procedures from ICANN or the relevant government or public authority.*”

**PROPOSED AMENDMENT** “This Agreement may be terminated in the circumstances described in Sections 6.2.1 through 6.2.4 above only upon thirty days prior notice to the Sponsoring Organization and the Governmental Authority (occurring after the Sponsoring Organization’s failure to cure any contravention during the stated notice period), with the Sponsoring Organization being given an opportunity during the thirty day notice period to initiate litigation or arbitration proceedings to determine whether there is any un-cured contravention or to determine the appropriateness of any termination or re-delegation of the delegation of the Sponsoring Organization. In the event the Sponsoring Organization initiates arbitration concerning the appropriateness of termination by ICANN, the Sponsoring Organization may request that the court or the arbitration panel stay any termination or re-delegation until the court’s decision or the arbitration decision is rendered”



ISSUE

**Effect of Termination** Section 6.3 states that the Sponsoring Organization is to be reimbursed the "actual and reasonable costs of assisting in the transfer". Section 6.3 also explicitly states that ICANN is to be indemnified by the Sponsoring Organization "from and against any and all ... costs, and expenses, ... arising out of termination of this Agreement ...". It is unclear therefore who is responsible for paying the cost of the transfer, who will determine what the "actual and reasonable" costs are, if contracts for technical services such as maintaining the shared registry survive the termination or if costs associated with ICANN's cancellation of a registry services contract or other contract are considered "actual and reasonable" costs.

Where there are legacy endorsements from the local Internet community that outline the guiding principles of a ccTLD's administration any successor Sponsoring Organisation should be compelled to take on these commitments provided they do not conflict with ICANN policy or applicable legislation or public policy.

REFERENCE

**"6.3 Effect of Termination.** Upon termination of this Agreement, ICANN shall notify the Sponsoring Organization of the successor to which the management of the Delegated ccTLD has been reassigned in coordination with the Governmental Authority. (The manner or result of selection of the successor shall not be subject to challenge by the Sponsoring Organization.) The parties shall then cooperate to transfer operation of the Delegated ccTLD to that successor, with the Sponsoring Organization being reimbursed its actual and reasonable costs of assisting in the transfer. In particular, the Sponsoring Organization shall ensure the transfer of all relevant DNS and registry data to the successor, subject only to the successor's commitment to use the data in a manner consistent with the Sponsoring Organization's prior written commitments made to data subjects regarding the use of their personal data. The Sponsoring Organization acknowledges that upon termination of this Agreement it will cease to be the recognized manager of the Delegated ccTLD. The Sponsoring Organization agrees to the reassignment of the Delegated ccTLD under the conditions and in the manner described in Section 6.2 and shall indemnify, defend, and hold harmless ICANN (including its directors, officers, employees, and agents) from and against any and all claims, damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising out of termination of this Agreement according to that Section."

AUTHORS VIEW / COMMENTS

Additional Clarification required on costs.

**PROPOSED AMENDMENT:** As a condition of any transfer, any successor to the Sponsoring Organization must agree to do and perform the following: [in the case of the CX ccTLD]

1) Operate the CX ccTLD within the legislative and policy framework applicable to Christmas Island.

2.) Develop a consultation process with the stakeholders in the Christmas Island community with the objective of:

developing policies which reflect the values and customs of the Christmas Island community; and

utilizing funds from registrations in the CX ccTLD to underwrite the participation in, and development of, the information economy in the Christmas Island Territory.

Where localized conditions are desirable inclusion by way of a side letter is probably best.

## ISSUE

**Transparency.** Transparency is central to accountability, and access to information is an essential component in the protection of rights.

Access to information regarding any advice given by third parties to ICANN, or by ICANN to third parties with regards to the delegation, is important to avoid and resolve disputes.

Stability is important technically but also in administration. The Sponsoring Organization should have information made available to it in order to respond to claims or assertions made against it *prior* to action being taken by ICANN.

## REFERENCE

**3.8 Maintenance of Authoritative Records and Audit Trail.** ICANN shall maintain, or cause to be maintained, authoritative records and an audit trail regarding ccTLD delegations and records related to these delegations.

## AUTHORS VIEW / COMMENTS

**PROPOSED AMENDMENT:** 3.11 Availability of Information. ICANN shall make available to the Sponsoring Organization and to the Governmental Authority following formal request by either of those parties or bodies, a copy of all material communications between ICANN and the Sponsoring Organization and/or the relevant Governmental Authority, subject to any reasonable requirements of confidentiality or any restrictions on use or disclosure of such communications as may be agreed between the parties to this Agreement or imposed by order of any relevant court, PROVIDED HOWEVER THAT the parties may provide copies of such communications to their directors, their board of advisers and to their legal advisors, subject to any reasonable requirements of confidentiality.

## ISSUE

**ICANN collection and use of Registrant Data**

The Agreement requires that the Sponsoring Organisation provide ICANN with “accurate and up-to-date registration data”. This section contains no description of what constitutes “registration data”. It notes that the information is requested for the purposes of “ensuring and verifying” the operational stability of the ccTLD.

Detailed personal information on registrants is not required for verification of operational stability. As ICANN does not propose any sort of data escrow -escrow provision in case of insolvency or other catastrophic system failure is covered in 4.3. Privacy is a major area of concern to CIIA, governments and registrants, the Agreement should not contain vague undertakings on collection and transfer of registration data to ICANN without reasonable prohibitions on its use or distribution by ICANN.

Government may instruct the Sponsoring Organisation not to implement ICANN policy developed under Section 5, but government may not exempt the Sponsoring Organisation from other undertakings in the Agreement. It is not clear if the Governmental Authority can exempt the Sponsor from this undertaking.

ICANN can agree to perform its obligations in a certain way but the Sponsoring Organisation has no recourse in the event that data is misused by ICANN.

## REFERENCE

**4.2 ICANN Access to Zone Files and Registration Data for the Delegated ccTLD.**

The Sponsoring Organization shall ensure that the zone file and accurate and up-to-date registration data for the Delegated ccTLD is continuously available to ICANN, in a manner which ICANN may from time to time reasonably specify, for purposes of verifying and ensuring the operational stability of the Delegated ccTLD only.

## AUTHORS VIEW / COMMENTS

**PROPOSED AMENDMENT:** “ICANN shall not disclose to any third party any registrant data provided by the Sponsoring Organization to ICANN or otherwise available to ICANN under section 4.2 of this Agreement (the “Registrant Data”), except as provided herein:

Under no circumstances shall ICANN provide the Registrant Data to any third party in bulk without the prior written consent of the Sponsoring Organization.

Nothing in this section shall be construed to prohibit ICANN from disclosing the Registrant Data in response to valid process of law, namely, a subpoena or order from a court of competent jurisdiction.

Nothing in this section shall be construed to prohibit ICANN from disclosing the Registrant Data when such disclosure is necessary to take actions or steps or authorize others to take actions or steps to maintain the technical stability or interoperability with the Internet of the .CX ccTLD.

Notwithstanding anything to the contrary herein, ICANN shall not make any disclosure of the Registrant Data otherwise permitted by this section unless the Sponsoring Organization has been requested to provide such data directly and is unable to comply with such request within a reasonable time after being notified of such request...”

## ISSUE

**Financial Contributions.** This is an area of considerable concern to many ccTLD operators. A foreign corporation that asserts the authority to effectively levy a “tax” on the activities of other entities is not likely to win over many converts. On a practical level if private sector co-ordination/administration of the DNS is to succeed, the costs of co-ordination should be funded by participants in the industry, which benefit from co-ordination.

A system of “user pays” is not unreasonable, users should however be paying for costs related to the services they receive, and not the cross-subsidization of unrelated ICANN expenses.

The system to date for ccTLDs has been based on voluntary “performance based” funding. Under the existing system the beneficiaries of ICANN’s work fund in relation to the real or perceived value of services received from ICANN.

## REFERENCE

**4.6 Financial Contributions to ICANN.**

Throughout the Term of this Agreement, the Sponsoring Organization shall contribute to ICANN’s cost of operation in accordance with an equitable scale, based on ICANN’s total funding requirements (including reserves), developed by ICANN on the basis of consensus, as described in Attachment F. At ICANN’s request, the Sponsoring Organization shall provide ICANN with the information reasonably necessary to calculate the amount of the Sponsoring Organization’s contribution (e.g., the number of Registered Names in the ccTLD) in time for periodic calculation of that amount.

**6.4 No Monetary Liability.** No breach of an obligation arising under this Agreement shall give rise to monetary liability by one party to another, provided that a party’s failure to make financial contributions as required by this Agreement shall constitute a material breach of this Agreement.

## AUTHORS VIEW / COMMENTS

**PROPOSED AMENDMENT:** “The Sponsoring Organization shall be entitled to adjust the amount of the calculated contribution in consultation with the Governmental Authority. The Governmental Authority shall then provide advice of the adjustment with three months written notice to ICANN and the ICANN Governmental Advisory Committee in the same manner and with the same effect as required under section 4.2. In the event of any dispute as to the amount of any such calculated contribution requested by ICANN, the Sponsoring Organization may make an application for arbitration in accordance with the provisions of clause 6.5 in order to determine the reasonableness of the amount and calculation of any such contribution calculated by ICANN and to determine whether any such costs claimed by ICANN have actually been incurred or expended by ICANN...”

## 6 ICANN SPONSORSHIP AGREEMENT – KEY ISSUES

### ISSUE

**Subcontracting.** The evolving “best practice” model of ccTLD administration separates the *policy development process* from the maintenance of a single *shared registry* and the commercial activities of *accredited registrars*.

Under this model the “subcontracting” of technical operations has been a key element. Section 6.11 requires advance notice to ICANN on sub-contracts and an acknowledgement that registry contracts lawfully executed prior to entering into the Agreement are subject to termination, without compensation by ICANN even if there is no breach of the existing registry contract by the registry operator.

Section 6.11.1 also introduces the concept of “ICANN technical qualifications”. ICANN is not a technical standards body nor is it clear if the process of developing “ICANN technical standards” differs from, or is subject to the rigors of ICANN policy development process.

Provisions in the Agreement (Section 6.2 ) already covers termination if interoperability and stability cannot be maintained, thus the requirement seems a bit redundant.

### REFERENCE

**6.11.1** The Sponsoring Organization may sub-contract part or all of the technical operations of the registry for the Delegated ccTLD only under terms that ensure that the subcontractor has the technical qualifications required by ICANN. Prior to entering into the sub-contracting relationship, the Sponsoring Organization shall provide ICANN with written notice of the proposed subcontractor, a written description of the subcontractor's qualifications and proposed role, and a written acknowledgement signed by the subcontractor that its rights under the subcontract are subject to termination upon termination of this Agreement.

**6.11.2** In any sub-contracting of the technical operations of the registry or administrative and management functions of the Delegated ccTLD, the sub-contract must state that the delegation itself is an exercise of a public right, not an item of property, and cannot be reassigned to a new manager except by ICANN. The Sponsoring Organization's obligations to ICANN under this Agreement shall not be diminished or affected by the fact it has sub-contracted some operations or functions with respect to the Delegated ccTLD.

### AUTHORS VIEW / COMMENTS

**PROPOSED AMENDMENTS:** To remove ambiguity, the following **Definition** should be added;

**2.9** “ICANN policies” means the specifications and policies set forth in Attachment G and any new or revised ICANN specifications and policies that may be established during the Term of this Agreement in accordance with the requirements set out in clause 5.

and 6.11.1 modified as below.

**6.11.1** The Sponsoring Organization may subcontract part or all of the technical operations of the registry for the Delegated ccTLD provided that the subcontractor is able to maintain overall stability and interoperability required in order to comply with ICANN policies...

ISSUE

**Modification.** From a practical point of view ICANN should not be expected to negotiate 245 separate - and vastly different Agreements. To the greatest extent possible ICANN should have a single "generic" ccTLD Agreement.

ICANNs' public commitment to bottom up consensus policy development would seem to preclude the notion of ICANN staff presenting and ccTLD administrators with a "take-it or leave it" Agreement.

Such an agreement has should be subject to the rigors of the ICANN policy development process. Expediency and necessity have probably resulted in the current draft, which is a useful template.

The current Sponsorship Agreement, is over 3 years old and could do with a little "fine tuning" to reflect concerns over transparency, privacy, funding, avenues of appeal and continuity.

Any recommendation that modification of the agreement be achieved by way of a Side Letter is of questionable value. Section 6.15 explicitly states that modifications are not binding unless signed by both parties. A Side Letter - if only signed by one party (ICANN) and if omitted, as an attachment, does not constitute part of the agreement; therefore any assurance or clarification provided in such a side letter is not binding on ICANN.

REFERENCE

**6.15** Amendments and Waivers. No amendment, supplement, or modification of this Agreement or any provision hereof shall be binding unless executed in writing by all parties. No waiver of any provision of this Agreement shall be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provision hereof, nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided.

**6.13** Entire Agreement. This Agreement (including its Attachments, which form a part of it, but not its Annexes, which are not part of the Agreement) constitutes the entire agreement of the parties hereto pertaining to the matters covered in this Agreement and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on those matters. In the event of a conflict between the provisions in the body of this Agreement (Sections 1 to 6) and any provision in its Attachments, the provisions in the body of the Agreement shall control.

AUTHORS VIEW / COMMENTS

**PROPOSED AMENDMENT** The Sponsorship Agreement should have a provision incorporating any side letters or agreements by reference into the Sponsorship Agreement and thus making them binding on the parties.

Modifications to the standard Sponsorship Agreement that are "generic in nature" should preferably be incorporated directly into the body of the Agreement to remove any ambiguity as to applicability and assist in future interpretation in the event of disputes.

The following pages highlight some of the concerns of the author, and offer suggested amendments.

## SUMMARY

The idea of a tri-lateral model is not without its detractors; in the opinion of the author it is generally consistent with legacy IANA administrative practices that enabled the internet to become what it is. The Sponsorship Agreement gives real powers and authority to ICANN - authority which the IANA asserted it had but lacked mechanisms to implement. ICANN also removes any ambiguity that the DNS policy is to be increasingly driven by government and ICANN directives.

Signing impacts not only the signatory, and the ccTLD's Internet community but also the mechanisms government will use to implement public policy in this area (and to the extent it sets precedent if may damage the interests of others).

As a general observation signing agreements one does not understand is never a great idea. The impact and the implications of the tri-lateral model may not be readily apparent and will differ from ccTLD to ccTLD. Therefore, it is best not to sign (or avoid signing) in the hopes of protecting or advancing commercial interests.

### **Transition issues.**

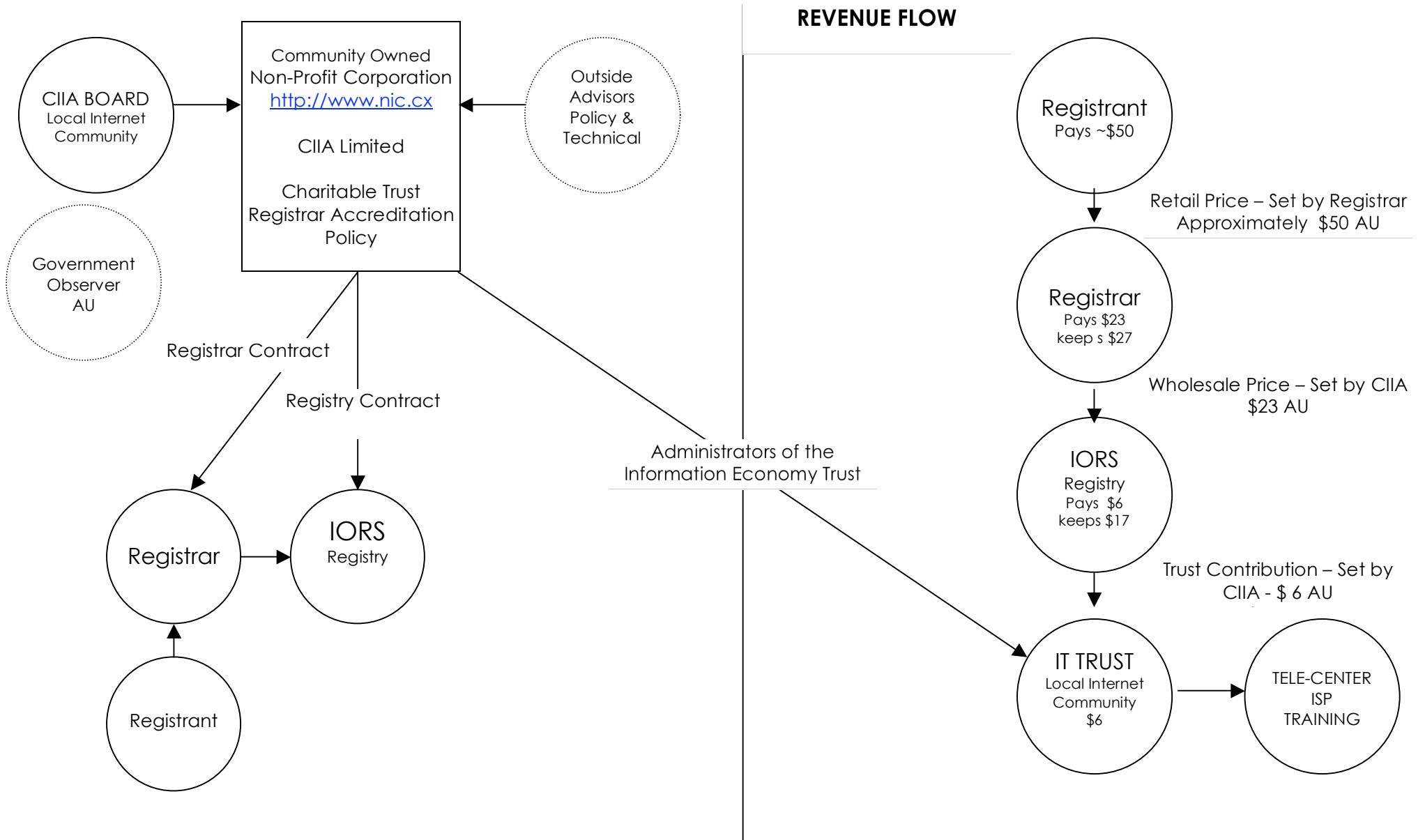
On practical level commercial interests are substantial components in the administration of any ccTLD. In many ccTLD's policy development, technical administration of the registry, and commercial exploitation of the name space are inter-related or done by a single entity. The trilateral model may be "less threatening" to an existing administrator if commercial functions are separated ahead in advance.

To the extent that it is possible or desirable current administrators should move to separate policy development from technical administration and commercial exploitation. Common sense would dictate that the best outcome for current administrators is more likely if they drive the process.

The following page has a simple chart that illustrates the administrative and commercial model adopted in the Christmas Island ccTLD. For many small ccTLD's such a model may be appropriate.

The implementation of policy often requires developing or acquiring appropriate technology to implement policy. Open Source Shared Registry Systems are available from a variety of sources. The Council of Country Code Administrators <http://www.cocca.cx> has a free registry system one as well as generic policy templates (modify to suit) which and comply with best practice recommendations of WIPO and others..

# Christmas Island Internet Administration Limited (CIIA)





## ICANN SPONSORSHIP AGREEMENT – endnotes

### endnotes

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- i Brief of the Internet Rights Coalition to ICANN <http://www.nic.cx/irc.pdf>
- iii RFC1591 <ftp://ftp.rfc-editor.org/in-notes/rfc1591.txt>
- iv <http://www.icann.org/cctlds/model-tscsa-31jan02.htm>
- v RFC1591 <ftp://ftp.rfc-editor.org/in-notes/rfc1591.txt>
- vi United States District Court Eastern District of Missouri No. 4:00CV1785-DJS Declaration of Louis Touton
- vii RFC 3071 <ftp://ftp.rfc-editor.org/in-notes/rfc3071.txt>
- viii \*In the absence of a pre-existing Sponsorship Agreement granting authority to do so.
- x <http://www.icann.org/icp/icp-1.htm>
- xi <http://www.icann.org/announcements/announcement-19nov01.htm>
- xii <http://www.icann.org/committees/gac/gac-cctldprinciples-23feb00.htm>
- xiii <http://www.icann.org/committees/gac/>
- xiv <http://www.icann.org/general/iana-contract-17mar03.htm>
- xv RFC 3071 <ftp://ftp.rfc-editor.org/in-notes/rfc3071.txt>
- xvi <http://www.icann.org/general/icann-mou-25nov98.htm>
- xvii <http://www.icann.org/committees/gac/gac-cctldprinciples-23feb00.htm>