

DRAFT Domain Name Association Comment on:

*“The protection of geographic names in the new gTLDs process
(V3 – August 29 2014)*

*Prepared by [GAC] Sub-working group for protection of geographic names in next
rounds of new gTLDs”*

Background

This public comment period is intended to inform the deliberations of the GAC Working Group on Future New gTLDs.

The GAC Sub-group on Geographic Names (a sub-group of the GAC Working Group on Future New gTLDs) has developed a draft document for future New gTLD rounds outlining several public policy aspects related to geographic names. The Working Group on Future New gTLDs believes the receipt of community input on the current draft document would be beneficial and have opened a public comment period.

Summary

The GAC sub-group proposal is not ready for implementation:

- the treatment of geographic names in gTLDs must also be developed through the GNSO Policy Development Process,
- geographic names merit protections that can be developed through policy development discussions and should include specifically enumerated lists and effective post-delegation protections.

The premise of the GAC proposal is to attach claimed rights by governments to all geographic, cultural and place names to potential top-level domain names, however:

- It is well established as a matter of international law that no such rights exist,
- The Applicant Guidebook, which protected enumerated geographical names as a matter of policy, did not create any such rights,
- The proposal is unworkable and will stifle Internet growth; the consequence is that future new gTLD applicants will be required to undertake an impractical search to establish if a TLD name is also a geographic, cultural or place name (the potential list is in the millions of possible names) and then undertake multiple, costly, and impractical negotiations with relevant (possibly multiple) authorities to obtain approval to apply for the TLD.

A predictable, fair TLD allocations process must balance the legitimate, domain-name related interests of individuals, entities and governments in domain names by: including a definitive list of protected names developed through a consensus-based, multi-

stakeholder process; providing protections against abuses; and then allowing all those with a legitimate interest to apply for top-level domain names.

Governments have no rights to geographic names

The GAC sub-group proposal considers that the list of prohibited strings provided in the Applicant Guidebook should be considered a general reference and states, “Governments should keep the right to oppose the delegation of a top level domain (even if it is not included on that list) on the basis of its sensitivity to national interests. Furthermore, that right should be enhanced for future rounds.”¹

However, it is well established as a matter of international law that there are no governmental or sovereignty rights attached to geographical names (and as such there also is no basis for enhancement of any rights). This has been debated through the World Intellectual Property Organization an international treaty organization, and other fora without affording any rights to governments for geographical or place names.

In support of its position, the GAC subgroup relies on a document prepared by Dr. Jerome Pasa, which cites a specific application of trademark law. However it is our opinion that Dr. Pasa’s document does not support for the GAC proposal. While Dr. Pasa correctly indicates that property rights holders do not have an exclusionary right to the name in their trademark, that fact does not grant governments any right or dominion over domain names.

The GAC sub-group asserts that allowing private companies to register geographic names limit “the possibility of utilizing them in the public interest of the affected communities.” But private companies, through competition, innovation and the development of beneficial services also benefit the public interest. The benefits of reserving a name for a geographical place or cultural name should not always trump the benefits of use by private enterprise. In fact, given the millions and millions of names for which the GAC sub-group seeks protection, the opposite should be the case: domain names are meant for public use in the broadest possible sense.

ICANN has created as a matter of policy, protections for thousands of important place names, but this is not precedent for the automatic protection of millions of additional names. That would deprive the public of the benefits promised by the development of the Internet.

¹ See announcements, <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>; quoted throughout as the “GAC sub-group proposal.”

The Applicant Guidebook did not create rights in geographical names

The Applicant Guidebook (“Guidebook”) offered protection for a specific list of geographic names. However, in doing so, it did not create any rights that governments can retain or use in other processes: it simply identified the rules under which geographic names, as defined in the Guidebook, could be applied for under the new gTLD program. The Guidebook enumerated names on ISO and U.N. lists that would be afforded protections. Those protections were created through an extensive negotiation with the GAC.

Neither ICANN nor its policies (e.g., as implemented in the Guidebook) can create rights. Internationally recognized rights can only be created through treaty organizations such as WIPO or the creation of laws across multiple jurisdictions.

Prior to the negotiation with the GAC, it was ICANN’s policy (approved by a GNSO super-majority and the ICANN Board) that there should be no list of protected geographic names.² (The Reserved Names Working Group stated that the Community, Trademark and Limited Public Interest Objection Processes offered sufficient protections.)

The 5000+ geographic name list derived through the GAC negotiation and included in the Guidebook represented a significant compromise in ICANN’s policy.

The GAC proposal, as currently drafted, is not workable

The GAC proposal to revert to the 2007 GAC Principles on New gTLDs³ is unworkable for the same reasons it was considered unworkable in 2010 and outlined in a letter from the then Chair of the ICANN Board to the GAC.⁴

By leaving the description place names and country, territory or regional language or people descriptions open-ended, such names could be barred from registration *after* a gTLD applicant applied for those names in good faith and in accordance with the rules and would deter applicants who otherwise would have a legitimate interest in the names.

² <http://gnso.icann.org/en/issues/new-gtlds/final-report-rn-wg-23may07.htm>

³ <http://archive.icann.org/en/topics/new-gtlds/gac-principles-regarding-new-gtlds-28mar07-en.pdf>

⁴ <https://www.icann.org/en/system/files/files/dengate-thrush-to-dryden-05aug10-en.pdf>

Even the current form the Guidebook is problematic in the area of geographic names, where it states, "It is in the applicant's interest to consult with relevant governments and public authorities and enlist their support or non-objection prior to submission of the application, in order to preclude possible objections and pre-address any ambiguities concerning the string and applicable requirements."⁵

Noting this, the GAC sub-group proposal states that, "these consultations did not happen with some geographic names requested by applicants in the first round of new gTLDs." (This is, it should be noted, because the applied-for names did not qualify as geographical names as defined by the Guidebook.)

To conduct these consultations using the GAC sub-group definition of geographic names is problematic and impracticable.

Take the example of the .bar application, which is held out as an example of how the GAC proposal should work. When the applicant applied for .bar, it was reported they visited the municipality of Bar, Montenegro to work out an agreement and permission for operation of the TLD. For a full set of consultations to take place, this applicant would also be required to visit and secure support from the municipalities of Bar, Afghanistan; Bar, Chad; Bar, China; Bar, France; Bar, Germany; Bar, Hungary; Bar, Iceland; Bar, India; Bar, Indonesia; Bar, Iran; Bar, Italy; Bar, Kenya; Bar, Liberia; Bar, Nigeria; Bar, Norway; Bar, Pakistan; Bar, Russia; Bar, Senegal; Bar, Sierra Leone; Bar, South Sudan; Bar, Sweden; Bar, Turkey; Bar, Uganda; and Bar, Ukraine. All are listed as different types of geographical place names in the United States Geological Survey (USGS) Geographical Names Information System.⁶

This extensive list for just one of the applied-for TLDs demonstrates the current Guidebook does not work *if* applicants are to be expected to obtain or are reliant on governmental approval.

The GAC sub-group proposal points out that the Guidebook "definitions of what is a geo name include approx. 5.000 names, it does not cover all the possible geo names in the world."

The USGS includes over 2.2 million U.S. place names in its database⁷ and the US Geospatial Intelligence Agency database⁸ includes over 8 million global designations. Further, by comparing the number of names in the two databases it is obvious that the number of geographical names outside the U.S. is significantly understated. In addition,

⁵ <http://newgtlds.icann.org/en/applicants/agb>

⁶ <http://geonames.usgs.gov/>

⁷ <http://geonames.usgs.gov/domestic/index.html>

⁸ <http://earth-info.nga.mil/gns/html/index.html>

these lists do not include language or people descriptions, which would multiply these numbers several fold.

Recognizing that the GAC Principles would potentially involve millions of names, ICANN and the GAC conducted a set of negotiations during the Guidebook formulation. That negotiation resulted in protection for the thousands of names on definitive UN and ISO lists: over 5000 names. These lists are the negotiated implementation of the 2007 GAC Principles.

This agreement was upset when the provisions for accepting GAC advice for sensitive strings were inserted in the final versions of the Guidebook, eliminating the utility of the carefully drawn lists and reopening possible objections to all geographical names.

This reliance on ISO and UN authoritative lists is in concert with ICANN's historical reliance on the work of recognized standards and treaty organizations to create, without overreach, rules for the Internet. Country-code assignments are settled by the ISO, ICANN merely uses them. As new country-codes are created by this international standards organization, ICANN permits the delegation of that two-letter code into the root zone. This reliance has enabled ICANN to effectively defend delegation decisions through the years, thus enforcing existing rights, never creating them.

Acceptance of the GAC sub-group proposal would abandon the policy of a predictable, clear new gTLD process. The GAC sub-group requirement that, "The national community and geographic meaning of the requested strings as new gTLDs must prevail above any other interest," essentially eliminates from legitimate consideration millions and millions of names that would otherwise serve the public interest.

To meet the stated goals of ICANN's new gTLD policy, a negotiated, enumerated list of geographical names should be afforded protections. Other names should be available to those having a legitimate interest in them.

Geographical and cultural names do deserve protection but barring millions of names (and the societal benefit accruing from them) is heavy handed. Post-delegation and post-registration protections are in place (and can be strengthened) to ensure that TLD operators and registrants do not abuse geographical names. Procedures can address abusers who hold themselves out as government or geographical place representatives when they are not.