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**Comment on "The protection of geographic names in the new gTLDs process"**

I am grateful for the opportunity presented by the Governmental Advisory Committee's request for community input on the proposal "The protection of geographic names in the new gTLDs process" (the "Proposal") and respectfully participate in this process by submitting these comments. The issues raised in the Proposal are ones of longstanding uncertainty in the ICANN environment, affecting the full complement of ICANN stakeholders. Reliable, consistent, workable and legitimate expansion of the top-level of the Internet DNS requires that these issues be resolved.

As a legal researcher and academic specialising in the recognition of legal rights in geographic names and as a participant in the ongoing Cross-community Working Group on the Use of Country/Territory Names as TLDs, I am grateful for the opportunity to raise the following concerns in relation to the Proposal and its recommendations:

1. The Proposal does not take into account relevant existing ICANN cross-community initiatives;
2. International law does not support the consent requirement recommended by the Proposal; and
3. The Proposal's recommendations are unworkable and inconsistent with foundational principles of ICANN.

**1. The Proposal does not take into account relevant existing ICANN cross-community initiatives**

Following on the recommendations of a Study Group on the Use of Country and Territory Names as TLDs,[1] a cross-community working group ("CWG") was chartered in March 2014 to "[pr]ovide advice regarding the feasibility of developing a consistent and uniform definitional framework that could be applicable across the respective SO's and AC's; and [s]hould such a framework be deemed feasible, provide detailed advice as to the content of the framework."[2] The CWG includes participants from the ccNSO, GNSO, ALAC and GAC.

The scope of the Proposal, covering "new gTLDs that are related with words, strings and expressions that refer to different names of geographic references like regions of countries, regions of continents, sub-regions of countries, rivers, mountains, among others," is notably significantly broader than the scope of the CWG, which is limited to country and territory names. The Proposal does not appear to take into consideration the work of either the Study Group or the CWG, both significant sources of information on past and current practice in relation to country and territory names and the complexities of developing a consistent and reliable framework on their future use in the DNS.

[1] ccNSO Study Group on the use of Country and Territory Names Final Report, September 2013, at http://ccnso.icann.org/workinggroups/unct-final-08sep12-en.pdf.
[2] Cross-community WG Framework for use of Country and Territory Names as TLDs Charter, March 2014, at http://ccnso.icann.org/workinggroups/unct-framework-charter-27mar14-en.pdf.

Further, two simultaneous initiatives within ICANN with different yet overlapping scopes gives rise to the risk of divergent recommendations and, as a result, greater - rather than less - uncertainty in this area. To the extent that the call for public comments on the Proposal can be leveraged as a bridge between these two parallel initiatives, this could only be beneficial for the development of a transparent, consistent, workable and reliable framework on the use of geographic names in the DNS going forward. Failure to seize this opportunity will hinder the development of such a framework and deepen existing miscommunication and misunderstanding at a time when the wider global community is critically evaluating the multi-stakeholder model against its cornerstone principles of transparency and accountability.

**2. International law does not support the consent requirement recommended by the Proposal**

At its heart, the Proposal recommends that "[g]overnments should keep the right to oppose the delegation of a top level domain … on the basis of its sensitivity to national interests. Furthermore, that right should be enhanced for future rounds." International law recognizes no such right, whether through principles of sovereignty and the inherent rights of nation States, intellectual property or unfair competition law. It misleads the ICANN community to purport that such a right exists and should therefore be retained through ICANN policy.

While it is not appropriate to provide here a comprehensive academic explanation of the bases of international law, a brief summary may be useful for context. Article 38(1) of the *Statute of the International Court of Justice*[3] identifies the accepted sources of international law. Across these sources, there are only two instances in which legal rights in geographic names are addressed. The first of these is in relation to names designating the geographic origin of a product; such names are but a very small subset of names implicated by the Proposal and the protection afforded to them under international treaties of global effect is insufficient to support a blanket restriction against their use in the DNS. The second instance is one in which geographic names are implicated by their absence from mention alongside other protected names of government interest in Article 6*ter* of the *Paris Convention for the Protection of Industrial Property*. The purpose of this Article is to identify names and symbols that, by reason of government interest, are excluded from becoming private property through trademark law. Country and territory names are *not* mentioned in Article 6*ter*, leading to the conclusion (reached by the World Intellectual Property Organization in 2001[4]) that member States are not required to exclude country names from registration as trademarks. The absence of country and territory names from the protection of Article 6*ter* signals the absence of exclusive or priority rights of governments in such names. Clearly this is also the case for other geographic names.

If international law is to recognize a right of governments in geographic names, new international law must be created; two previous unsuccessful attempts to revise Article 6*ter* (1)(a) to include country names are notable here.[5] In conclusion, the Proposal's recommended recognition of the "right" of governments to geographic names is inconsistent with international law and will remain so until such time as new international law is created. ICANN is not the appropriate or legitimate forum for this to

[3] *Statute of the International Court of Justice* (26 June 1945, entered into force 24 October 1945), 3 Bevans 1179; 59 Stat. 1031; T.S. No. 993; 39 A.J.I.L. Supp. 215.
[4] World Intellectual Property Organization, *The Recognition of Rights and the Use of Names in the Internet Domain Name System: Report of the Second WIPO Internet Domain Name Process*, 3 September 2001, at http://www.wipo.int/amc/en/processes/process2/report/html/report.html.
[5] Heather Ann Forrest, *Protection of Geographic Names in International Law and Domain Name System Policy* (Wolters Kluwer 2013).

take place and attempts to bypass the legitimate channels of international lawmaking through ICANN policy development compromise the organization's accountability and transparency.

**3. The Proposal's recommendations are unworkable and inconsistent with foundational principles of ICANN**

Expansion of the top-level of the DNS is integral to ICANN and its mission; when the non-profit public benefit corporation that is now ICANN was initially proposed, it was already then envisioned that the corporation would have the authority to "oversee policy for determining, based on objective criteria clearly established in the new organization's charter, the circumstances under which new top-level domains are added to the root system."[6] In subjecting all names of geographic, cultural and national relevance to a support or non-objection requirement, the Proposal imposes subjective - rather than objective - criteria on DNS expansion.

Relying upon the GAC 2007 Principles, the Proposal's recommendations extend to "words, strings and expressions that refer to different names of geographic references like regions of countries, regions of continents, sub-regions of countries, rivers, mountains, among others". Further, the Proposal calls for an expansion of the treatment of geographic names used as TLDs through "enhancing the ISO 3166-2 list". These are attempts to bring about the protection that has not been achieved through international lawmaking in relation to country names or attempted in relation to sub-national names in which more than one country may have an interest.

*Any string* can be found to have *some* geographic, cultural or national relevance in *some* location, somewhere, if one looks long and hard enough. It is unreasonable and unworkable to demand that new gTLD applicants comb the globe to identify any and all "relevant governments and public authorities". Fear of GAC objection on this basis will reduce future expansion rounds to applications made for meaningless strings applied for by applicants with zero risk aversion. This will not enhance "the functional, geographic, and cultural diversity of the Internet",[7] nor will it serve the public interest upon which the Proposal purports to rely.

In conclusion, I am of the view that the Proposal's recommendations will not contribute transparency, reliability, consistency or legitimacy to future ICANN policy on geographic names and their use in the DNS. I am hopeful that the Proposal and public comments received in response to it can foster a bridge between the GAC and existing CWG efforts on this important issue.

Respectfully submitted,

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[6] NTIA, *Improvement of Technical Management of Internet Names and Addresses,* 63 Fed. Reg. 8826-8833 (20 February 1998).

[7] Bylaws for Internet Corporation for Assigned Names and Numbers: A California Nonprofit Public-Benefit Corporation, as amended 30 July 2014, Clause 2(4), at https://www.icann.org/resources/pages/bylaws-2012-02-25-en#I.