U.S. Chamber of Commerce Comment on
"The Protection of Geographic Names in the New gTLDs Process"

The U.S. Chamber of Commerce (Chamber) is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. We greatly appreciate the opportunity to comment on the "The Protection of Geographic Names in the New gTLDs Process," developed by the Governmental Advisory Committee (GAC) Sub-group on Geographic Names.

Chamber members include businesses actively engaged with ICANN and on Internet governance issues in a variety of fora, along with all the businesses both big and small, across all sectors that actively relying on the Internet every day to create growth and jobs. Our members operate globally, and thus our interest and perspective are not confined to the United States. Given our scope, the Chamber is uniquely positioned to offer viewpoints from a diverse group of stakeholders, representing various roles within the existing multistakeholder system.

Background

The GAC proposes that "Geographic names should not be allowed to be registered as gTLDs, unless requested by the relevant communities where they belong or after a specific authorization given by the government or community to the applicant." Moreover, "ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities." And, "New gTLDs should respect national sensitivities regarding terms with national, cultural, geographic and religious significance."

Comment

The Chamber has several concerns with the GAC's draft document. We note that our concerns are consistent with the issues raised in the comments from the GNSO Business Constituency (BC), the Brand Registry Group (BRG), and the Technology Policy Institute.

I. Creates Burden and Uncertainty for Business

The draft document proposes an ambiguous and unworkable process, which creates an environment of unacceptably burdensome risks and vague standards for potential gTLD applicants.

1. <u>Limitless Searches</u>: the draft document encourages applicants to do a "thorough search" to "determine whether the string is a geographical name" using, in effect, any resources that exist, without regard to what is practical, reasonable or fair. As the BC explains in their comments:

   > Requiring business users applying for new gTLDs to search for geographic meanings of requested strings beyond the list of prohibited strings in the Applicant Guidebook is an impractical proposal. The draft document does not give a complete list of where the applicant is required to search, which makes it impossible for a business user to know when it has fulfilled the requirement. The best practices also do not include a definite standard for which names will be considered geographic, which makes the process unpredictable and inconsistent for business users.

We agree; it is improper to expect applicants to screen for potential conflicts based on undefined parameters in categories that could potentially be expanded arbitrarily at a government's whim. Moreover, expecting searches to be conducted in multiple languages creates an indefinite scope of possibilities. Applicants' fate should not be determined, in part, on their ability to conduct limitless research. Not only is such a process burdensome and impractical, it fundamentally disadvantages small and medium-sized enterprises that may not be able to finance such massive up-front, and possibly endless, research.

2. <u>Unreliable Approval Process</u>: As drafted, the proposal imposes a huge burden on non-governmental applicants interested in geographic/cultural strings. As a best practice, the draft document says that when a string is related to a country, city, region, subregion, or other geographic related spaces, "the relevant authorities related with these denominations should be contacted." However, it is unclear which or how many relevant authorities the business user is required to contact, or even who the relevant authorities are in any given scenario. This creates an untenable situation: applicants are supposed to get "support or non-objection" from unidentified "relevant authorities" but, as is often the case in bureaucracies, even where one authority says "yes," another official, division or agency might say "no," whether up-front or later during the evaluation process. Such uncertainty is bad for business and, ultimately will, curtail innovation as potential applicants will rightly be reluctant to invest in pursuing strings that could possibly be considered geographically or culturally related.

   The proposal also fails to take into account that names and terms can connote different significances to different people and regions in the world. It is unclear whether multiple parties can claim a term has a "cultural significance" or whether such a significance even has to be balanced against what a majority of stakeholders commonly understand a term to mean.

   Moreover, the proposed expectations for obtaining government "support or non-objection"[1] not only adds complexity and cost to applicants, it also inserts governments – and therefore politics – even more directly into ICANN functions. Disrupting a well-established, thriving multistakeholder model to give governments more control in ICANN, especially over something that is so well-suited for market-based solutions – as originally contemplated by the Applicant Guidebook and its auction rules – is unhelpful both to the Community and to the viability of the multistakeholder model long term.

3. <u>Skewed Notions of "Public Interest"</u>: In the event an agreement between the relevant governments and applicants cannot be reached, the draft document states, "the public interest should be a priority." While that may be true, we cannot comment on the merits as the draft document does not define "public interest," nor state how such interest will be evaluated. Here we agree with the BC's comments:

   > The draft seems to presume that the public interest will generally be the same as the interest of the objecting government. Such a presumption neglects to consider the situation. However, public interest is not defined, and the document does not say what entity will make such a decision in the event of a disagreement.

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[1] We also note the concept of a "non-objection" is vague, will likely lead to confusion and contains no basis in current internationally accepted best practices.

Furthermore, as the BC also notes, the scope of public interests referenced by the draft document is incredibly broad, giving the GAC the authority to intervene in areas besides geographically-related names. Terms like "religious significance," and "cultural significance" are both vague, as a person cannot reasonably know whether a name will be interpreted as "significant," and overbroad, as such terms could capture names related to race, gender, sexual orientation, lifestyle, demographics or any number of other elements that may be argued to be "religious" or "cultural." This, again, creates unacceptable risk and uncertainty for business.

The GAC proposal seems to imply that in all cases the public interest should be *not* granting the use of the new gTLD, but fails to provide any reasoning as to why this should be considered the case. In many cases, the use of a requested gTLD can be tied directly to enhancing rights of freedoms of speech and expression. By creating a seemingly endless possibility for objections the proposal directly conflicts goals to support of human rights and development as often enumerated by ICANN at meetings and other international multistakeholder fora.

II.   Devalues Existing Legal Rights and Forums

As proposed, trademarks would take a backseat to any geographically or culturally related name, as determined by the GAC. There are three problems with this approach.

1. The draft document devalues the importance of trademarks as critical element for Internet innovation and growth. Trademarks are a tool for consumer protection; they allow consumers to know with whom they are doing business. Trademarks also enhance commerce, facilitating purchasing and investment decisions both online and offline. By encumbering potentially countless trademarks that could be found to have geographic or cultural significance, the GAC proposal hinders innovation and thus the value of the Internet itself.

2. International law does not protect sovereign names and geographic identifiers outside of a sovereign's borders, as pointed out by the BC. Therefore, there is no basis in international law to give governments priority on the use of geographic names in the Internet Domain Name System. This is especially true in cases where internationally-recognized trademarks already exist.

3. The GAC is not the right arbiter for issues involving conflicts with trademarks. As pointed out by the BRG, trademarks are legal rights governed by existing domestic and international law, including through treaty organizations such as the World Intellectual Property Organization (WIPO) as the administer of the 1883 Paris Convention, the 1989 Madrid Protocol, and the 1994 Trademark Law Treaty; and the World Trade Organization (WTO) as the administer of the 1994 TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights). These forums – not ICANN and not the GAC – are the appropriate place for resolving conflicts between geographically and culturally sensitive terms and trademarks. We agree with the BRG's comment that ICANN should not be used as a vehicle to change established principles of international law.

III. Undermines the Multistakeholder System

The multistakeholder system depends on, in Fadi's Chehadé's words, governing the Internet "on an equal footing."[2] As proposed, however, the draft gives governments and, in cases where "public interest" is the deciding factor, the GAC itself, more power than others in the Community. This is inconsistent with the multistakeholder system. Especially at a time when ICANN's multistakeholder system for governance is being debated the world over, it is unwise to adopt a policy that could be used by opponents of multistakeholderism to argue for greater government control of Internet governance.

The Chamber thanks the GAC for inviting public comments on the draft document. We stand ready to engage further with the GAC on this matter. Please don't hesitate to contact me directly for further discussion.

Sincerely

Adam Schlosser
Director, Center for Global Regulatory Cooperation
U.S. Chamber of Commerce

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[2] Fade Chehadé, Opening Statement, Internet Governance Forum 2013. Available at
https://www.icann.org/en/system/files/files/chehade-speech-igf-bali-21oct13-en.pdf