The ICANN GNSO "Business Constituency"

Comment on the Supplemental Report on the New gTLD Subsequent Procedures Policy Development Process (Work Track 5 on Geographic Names at the Top Level)

Status: FINAL

Version: 4.0

22-Jan-2018

Business Constituency Submission

GNSO//CSG//BC

BACKGROUND

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants. As defined in our Charter, the mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business

2. is competitive in the supply of registry and registrar and related services

3. is technically stable, secure and reliable.

BC COMMENT

On 12-Dec-2018, the Supplemental Report on the new gTLD Subsequent Procedures Policy Development Process (Work Track 5 on Geographic Names at the Top Level) was posted for public comment[1].

The Business Constituency thanks the members of the Working Group for their efforts in developing this Supplemental Report. As was the case in the BC's earlier comments on Subsequent Procedures Policy Development (Work Tracks 1-4), the BC welcomes the progress being made in the examination of necessary procedures for a new round of applications[2].

These BC comments are offered under the assumption that ICANN Org will fulfill its commitment to complete reviews and evaluations of the last round.

This comment includes principles that the BC believes the Working Group should apply during its further deliberations.

RECOGNITION OF THE IMPORTANCE OF GEOGRAPHIC NAMES

As a preliminary matter, the BC wishes to recognize the significance geographic names have for nations, communities and citizens who identify with, and live within, specific geographic regions. People have a strong sense of "place" and an individual's home geography shapes his or her culture, identity, language, customs, philosophy and system of beliefs. For this reason, it is important that geographic names be respected.

However, protections for geographic names in the context of trademark use and the Internet name space should be reasonable and appropriate. Trademark laws throughout the world recognize that words that match a geographic name or term can be registered by individuals unaffiliated with a geographic region and that trademark or brand holders may also use these terms as bona fide trademarks in connection with goods or services they provide so long as certain requirements are met.

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[1] See ICANN public comments page at https://www.icann.org/public-comments/geo-names-wt5-initial-2018-12-05-en.

[2] 21-Dec-2018, BC comment on Supplemental Initial Report on New gTLD Subsequent Procedures PDP (Overarching Issues & Work Tracks 1-4), at https://www.bizconst.org/assets/docs/positions-statements/2018/2018_12Dec_21%20BC%20comment%20on%20supplemental%20report%20on%20Subsequent%20Procedures%20for%20new%20gTLDs.pdf

Certain national and regional treaties also define the interests of countries, and even of certain cultures, as with the Navajo Nation in the USA.

The BC recognizes there are different, legitimate interests in a string of letters which make up a generic top level domain name (gTLD) and that a brand company seeking to manage a gTLD that matches their registered trademark and a geographic term should not face unreasonable challenge or undue prejudice in the application process.

DO NOT CREATE ADDITIONAL RESTRICTIONS, BEYOND WHAT WAS IN 2012 AGB

The BC reiterates its views made in October 2015 as part of our comment on the Preliminary Issues Report on New gTLD Subsequent Procedures[3]. In that comment the BC wrote:

> *The BC believes that the Applicant Guide Book provides sufficient procedures for addressing the use of geographic names. Any PDP examination of this section should focus on strengthening the existing procedures rather than attempting to review the entire framework, which was the result of four years of development and public comment, and several consultations between the Board and GAC. In reviewing the existing procedures, the PDP should make clear that while GAC advice on geographic names is welcome, that advice must be consistent with national and international law.*

Consistent with this view, the BC believes that no additional categories of terms should be protected or restricted beyond those included in the 2012 Applicant Guidebook. This would include: geographic features (rivers, mountains, etc.), names of additional sub-national and regional places not included in the 2012 Applicant Guidebook, non-ASCII geographic terms, nor any term that can be considered geographic in nature, or geographical indications.

The BC supports the use of full country and territory names as new gTLDs, including removing any moratorium on the ability to apply for such names generally and not requiring any form of governmental pre-approval or non-objection.

The BC has previously voiced strong objection to any proposal to restrict use of such names as TLDs, such as the "Argentina Proposal" that remains in development within the Governmental Advisory Committee Geographic Names Working Group.[3] Again, such a proposal is not consistent with accepted principles of international and national law. There is no generally accepted legal principle granting governmental priority over country and territory names in the context of the DNS.

That being said, the BC respects the perspectives of GAC members in the Geographic Names Working Group, and looks forward to further engagement on this issue in the context of policy development on the use of full country and territory names at the Top Level. In particular, where certain geographic

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[3] 30-Oct-2015, BC comment on Preliminary Issue Report on New gTLD Subsequent Procedures, at https://www.bizconst.org/assets/docs/positions-statements/bc-comment-on-gtld-subsequent-procedures.pdf; and https://www.bizconst.org/assets/docs/positions-statements/2017/2017_04april_21%20bc%20comment%20on%20using%20names%20of%20countries%20and%20territories%20as%20tlds.pdf

regions are under collective administration by multiple state actors, it may be useful for the process to incorporate an early means for such entities to voice their concerns regarding TLDs corresponding to such regions. While applicants should not be prohibited from using such strings, this would allow them to be aware of the relevant concerns and to engage with the state actors, if the applicant so chooses, at an earlier stage in the application process.

PREFERRED USE OF CURATIVE NOT PREVENTIVE MECHANISMS

The BC supports a focus on curative mechanisms to address rights of governments that have jurisdiction over geographic names rather than preventive mechanisms that would restrict the application and use of geographic names. ICANN policy making has traditionally favoured curative over preventative rights and therefore the BC urges the Working Group to focus on curative mechanisms rather than restrictive policies that would deprive brand applicants of the opportunity to reach their consumers. For example, in the 2012 application round, several curative dispute mechanisms were developed and implemented to resolve objections and disagreements. The BC supports the continued use of these mechanisms. Additionally, the BC supports the adoption of negotiated public interest commitments.

Today, it is possible to create an automated process for monitoring TLD applications making it possible for governments and other entities to effectively use curative mechanisms to track and evaluate applications and use of geographic names at the top level. Therefore, overly prescriptive mechanisms are not necessary.

LETTERS OF SUPPORT

The BC supports the requirement for letters of support or non-objection from the relevant governments or public authorities for the following strings at the top level -- *if the intended use is geographical*:

1) Capital city names of any countries or territories listed in the ISO 3166-1 standard

2) city names, where the applicant declares that it intends to use the gTLD for purposes associated with the city name

3) Applications for any string that is an exact match of a sub-national place name, such as a county, province, or state, listed in the ISO 3166-2 standard.

4) Applications for a string listed as a UNESCO region or appearing on the "Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" list.

5) Applications for a string where there is an existing governmental treaty, such as a sub-regional treaty.

6) Applications for a string that is identified with a tribal or cultural identity that is specific to a country or group of countries.

CORPORATE BRANDS MATCHING GEOGRAPHIC TERMS

A government having jurisdiction over a geographic name should not have the ability to prevent a company, having a brand or trademark in a similar term, from applying for a new gTLD. If a string is

being used in a generic or brand context, the geographic meaning should not automatically block the use of the string in that other context.

As we have witnessed in the 2012 application round, it is possible to establish intended use in the application process. In the 2012 round we saw creative ways to ensure that a non-geographic TLD does not mislead end-users or imply that it is an "official" TLD associated with a geographic place. Applicants should be held accountable to uphold their commitments on how the registry will operate and how names will be allocated.

To our knowledge, no government has put forward any evidence to suggest that the use of a geographic term at the top level by a trademark owner creates any risk or confusion to users. In fact, in many cases, the trademark owner is creating a trusted brand TLD space where registrants are limited to the registry operator thus making confusion extremely unlikely.

To the extent that there is risk of user or registrant confusion, we should develop a standard against which to manage these risks. For example, we can ensure that an applicant does not represent that it is endorsed by a city or is the "official" TLD of a city when this is not the case. Dot-Brands operate in such a manner that there should not be any confusion between a brand and a TLD that is being operated in a geographic context.

ROLE OF GAC ADVICE

The BC notes that the GAC played a large role in the 2012 gTLD expansion, through use of advice processes created in the AGB, such as Module 3.1.

The BC is concerned that AGB Module 3.1 could be used to block geographic related TLDs in the next round, even after developing new consensus around procedures and rules for geo-names.

The GAC should not have veto power over the use of geographic terms and should not be provided additional power via this PDP. The AGB (and the curative rights therein) is all that should ultimately determine whether or not geographic terms can be delegated.

SPECIFIC COMMENTS TO RECOMMENDATIONS, PROPOSALS AND QUESTIONS FOLLOW ON NEXT PAGE

This comment was drafted by Statton Hammock, Vivek Goyal, Andrew Mack, Chris Wilson, Marilyn Cade, and Steve DelBianco. It was approved in accord with the Charter of the Business Constituency.

SPECIFIC COMMENTS ON ANNEX B – PRELIMINARY RECOMMENDATIONS, QUESTIONS AND OPTIONS

Item	BC POSITION OR COMMENT
Recommendation 1	The BC supports this preliminary recommendation, which matches policies applied to geo-names in the 2012 AGB
Recommendation 2	The BC supports this preliminary recommendation, which matches policies applied to geo-names in the 2012 AGB
Recommendation 3	The BC supports this preliminary recommendation, which matches policies applied to geo-names in the 2012 AGB
Recommendation 4	The BC supports this preliminary recommendation, which matches policies applied to geo-names in the 2012 AGB
Recommendation 5	The BC supports this preliminary recommendation, which matches policies applied to geo-names in the 2012 AGB
Recommendation 6	The BC supports this preliminary recommendation, which matches policies applied to geo-names in the 2012 AGB
Recommendation 7	The BC supports this preliminary recommendation, which matches policies applied to geo-names in the 2012 AGB
Recommendation 8	The BC does not support. Permutations and transpositions expand create other terms that are not necessarily geographic and therefore may prevent brands with trademarks from applying for these terms.
Recommendation 9	The BC does not support
Recommendation 10	The BC does not support
Recommendation 11	The BC supports
Recommendation 12	BC does not support the need for letters if the applicant declares that it intends not to use the gTLD for purposes associated with the county, province, or state, listed in the ISO 3166-2 standard. but if letters are ultimately needed, then this proposal should be supported.

Item	BC POSITION OR COMMENT
Recommendation 13	BC does not support the need for letters if the applicant declares that it intends not to use the gTLD for purposes associated with the UNESCO Region 4. but if letters are ultimately needed, then this proposal should be supported.
Question e1: Applicants who applied for terms not defined as geographic names in the 2012 Applicant Guidebook but who had experiences in the process related to the geographic connotations of the applied-for string.	BC Member Amazon applied for .AMAZON and encountered a GAC consensus objection based on geographical connotations. This experience was highly visible to the ICANN community, so we do not believe it is necessary to describe further at this time. Reliance Industries applied for ".Indians" which was objected by the Indian representative to GAC. The aim of the string was to provide a unique identity for fans of the cricket team Mumbai Indians to showcase their support. The uncertainty of the process, without a formal objection from GAC and no clear direction from ICANN, forced the applicant to withdraw.
Question e2	"Geographic names" should include just the specific categories of strings that are described by this PDP in Preliminary Recommendations 4 through 13.
Question e3	The BC favors curative measures over preventative measures as explained in this BC comment.
Question e4	The BC supports these principles
Question e5	As the basis for Preventative Measures, the BC supports reliance on international law, national law, and multinational treaties. Any other basis could be used to design Curative Measures and policies.
Question e6: In developing recommendations for future treatment of country and territory names, Work Track 5 has considered several alternatives related to translation	The alternative favored by the BC is: reserve as unavailable translations in official and commonly used languages
Question e7: Design a process to delegate 3-letter codes and/or other country and territory names to specific parties, such as relevant governments and public authorities or other entities	If Work Track 5 believes that it can achieve consensus recommendation on this item, then by all means proceed.

Item	BC POSITION OR COMMENT
Question e8	The alternative favored by the BC is: reserve as unavailable translations in official and commonly used languages
Question e9: require letters of support or non-objection from the relevant governments or public authorities for "An application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name."	The BC supports retaining this requirement from the 2012 round of gTLD expansion, again, so long as the applicant has declared that it intends to use the gTLD for purposes associated with the city name.
Question e10	If the intended use of the non-capital city name TLD is not to be associated with the geographic location, it should be treated as a regular string. In case there is contention for that string, preference should be given to applicants who will use the TLD for geographic purposes.
Question e11	The BC supports this position: no additional types of terms should be protected/restricted beyond those included in the 2012 Applicant Guidebook.
Proposal 1	The BC supports this proposal
Proposal 2	BC does not support the need for letters so long as the applicant has declared not to use the TLD in connection with a geographic place name, but if letters are ultimately needed, then this proposal should be supported.
Proposal 3	On its face, this proposal is reasonable. But in practice, it will likely not result in success, as governments have generally not demonstrated an interest in negotiating or mediating outside its own jurisdiction.
Proposal 4	The BC generally supports improved communications and any plans which foster communication with governments.
Proposal 5	The BC supports this proposal

Item	BC POSITION OR COMMENT
Proposal 6	The BC does not support. The alternative favored by the BC is: reserve as unavailable translations in official and commonly used languages
Proposal 7	This recommendation needs further clarification. As currently written, it could become overly burdensome for an applicant depending on the specific term in question and the number of governmental entities that may be implicated. The BC supports this notification requirement only for "Geographic names" that are among the specific categories of strings that are described by this PDP in Preliminary Recommendations 4 through 7.
Proposal 8	BC does not support. Curative rights mechanisms are available. If the government is not using the TLD, then confusion is not an issue
Proposal 9	BC does not support. Involving third parties into contracts is a bad precedent and could lead to commercial unpredictability.
Proposal 10	BC does not support. Existing choice of law provisions are sufficient.
Proposal 11	BC does not support. The BC believes governments should not have the freedom to veto applications on the basis that they match an existing country code. Three-character strings may have a variety of meanings and purposes, beyond simply a code to represent a country. Three-character strings should be delegated through the new gTLD process in accordance with GNSO policy.
Proposal 12	BC does not support. The BC believes governments should not have the freedom to veto applications on the basis that they match an existing country code. Three-character strings may have a variety of meanings and purposes, beyond simply a code to represent a country. Three-character strings should be delegated through the new gTLD process in accordance with GNSO policy.
Proposal 13	BC does not support. The BC believes governments should not have the freedom to veto applications on the basis that they match an existing country code. Three-character strings may have a variety of meanings and purposes, beyond simply a code to represent a country. Three-character strings should be delegated through the new gTLD process in accordance with GNSO policy.
Proposal 14	BC does not support. Provides governments too much deference and discretion.

Item	BC POSITION OR COMMENT
Proposal 15	BC supports
Proposal 16	BC does not support. See comments on Questions e6 and e8
Proposal 17	BC supports
Proposal 18	BC supports elimination of non-objection requirements for city names if the applicant declares that it intends not to use the gTLD for purposes associated with the capital city name.
Proposal 19	BC supports
Proposal 20	BC supports
Proposal 21	BC does not support. See comment on Proposal 18.
Proposal 22	BC does not support. Especially where the names of geographic communities match a registered trademark of the applicant.
Proposal 23	BC does not support
Proposal 24	BC does not support
Proposal 25	BC does not support
Proposal 26	BC supports
Proposal 27	BC supports. BC supports elimination of non-objection requirements for city names if the applicant declares that it intends not to use the gTLD for purposes associated with the capital city name.
Proposal 28	BC supports
Proposal 29	BC supports
Proposal 30	BC supports
Proposal 31	BC prefers Proposal 30 but could support
Proposal 32	BC prefers Proposal 30 but could support

Item	BC POSITION OR COMMENT
Proposal 33	BC supports, provided that the list of what's protected ends up being clear and reasonable and not over-reaching.
Proposal 34	BC supports
Proposal 35	BC does not support. If there is no rule for adding names to the repository, it will quickly become overly expansive.
Proposal 36	BC does not support
Proposal 37	BC does not support. If the applicant alone determines "any outreach deemed necessary", their outreach efforts would not necessarily be respected by those entitled to object to the application.
Proposal 38	BC does not support. Terms can have multiple meanings, both geographic, commercial or match a bona fide trademark term. The ability to apply should not be restricted solely by geographic name as this may deter brand applicants and others with bona fide registered trademarks.