



## **Intellectual Property Constituency (IPC) Comment on the Interim Paper of the Cross-Community Working Group on the Use of Country and Territory Names as Top Level Domains**

April 21, 2017

### A. Introduction

The GNSO Intellectual Property Constituency (“IPC”) hereby submits its comments regarding the conclusions and recommendations set out in the Interim Paper of the Cross-Community Working Group on the Use of Country and Territory Names as Top Level Domains (CWG-UCTN), hereafter referred to as the Interim Paper.<sup>1</sup>

### B. Treatment of Two-Letter Country Codes

The CWG-UCN recommends in the Interim Paper that “the existing ICANN policy of reserving 2-letter codes for ccTLDs should be maintained, primarily on the basis of this policy, consistent with RFC1591, on a standard established and maintained independently and external to ICANN and widely adopted in contexts external to the DNS (ISO 3166-1)”.

International law does not confer exclusivity upon governments relating to the use of geographic names in the DNS, trademark law, or any other context. Instead, international law expressly rejects government exclusivity by requiring the recognition of private parties’ rights in trademarks and service marks, and geographical indications. International and national law recognize the ability of any term, including terms such as 2-letter codes, that in certain contexts may have geographical significance, to serve as trademarks, and by extension serve the public interest functions of trademarks as new gTLDs. Numerous national and international companies use, and have acquired registered protection for, 2-letter words or acronyms as their trademarks. Examples would include GE (General Electric), BA (British Airways), and VW (Volkswagen). In many contexts, the primary significance of these terms will be their significance as trademarks and not any geographical significance.

Consequently, there is no right under international law which would grant priority for the use of 2-letter codes as country code TLDs over any other rights in the same term, such as the rights of trademark owners to operate a Brand gTLD.

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<sup>1</sup> <https://www.icann.org/public-comments/cwg-uctn-interim-paper-2017-02-24-en>

Notwithstanding the lack of a legal basis for affording primacy over the use of 2-letter codes to ccTLD operators and governments, the conclusion of the CWG-UCTN is that these terms should be reserved for use exclusively as ccTLDs. Members of the GNSO, including some IPC members, participated in the working group and supported this recommendation, notwithstanding the potential for conflict with existing trademark rights. This demonstrates a clear willingness to compromise on the part of the GNSO.

This conclusion by the CWG-UCTN has been reached on the basis of the longstanding practice, adopted from the DNS' inception and arising from RFC 1591, of using 2-letters exclusively to denote ccTLDs. RFC1591 acknowledges that "IANA is not in the business of deciding what is and what is not a country", and that use of the ISO 3166-1 provides an external standard for determining which terms should be included on the list.

The IPC's support of this recommendation is on the basis of this reasoning. The IPC would not support any restriction based on claims to sovereignty or other like rights to country codes, due to the lack of legal basis for such rights. Further, although the Interim Paper refers in section 5.1.5 to various potential disadvantages of altering the current policy, including alleged confusion with the ccTLDs if some 2-letter terms were released for use as gTLDs, the CWG-UCTN has no data which supports such a claim of actual or likely confusion. Consequently the IPC would not support any restriction based on claims of such confusion, and recommends that section 5.1.5 be amended to make it clear that the advantages and disadvantages referred to are merely a summary of the various competing views advanced within the working group and not (incorrectly) stated as "outcome[s] of the debate."

### C. Treatment of Three-Letter Country Codes

The CWG-UCTN was unable to reach agreement on the treatment of 3-letter ASCII codes, despite extensive discussion within the working group and seeking input from the wider community. Some who gave input to the working group favoured a return to the position pre-2012 new gTLD round, whereby ccTLDs were allocated 2-letter strings and gTLDs allocated strings comprised of 3-letters or more. Some favoured continuing the temporary restriction of the 2012 round, whereby strings matching the ISO 3166-1 alpha 3 codes would be reserved from registration and use by anyone. Finally, some favoured the allocation of those strings matching the ISO 3166-1 alpha 3 codes to the corresponding government or ccTLD operator to be run as additional ccTLDs.

The comments that we made earlier in this comment in relation to 2-letter terms – the lack of any basis under international law for governments to claim sovereignty and priority of use in those terms – apply equally in relation to the 3-letter terms. Any claims to such "sovereign" rights would conflict with existing trademark rights. In the case of 2-letters, such claims to sovereignty were not the basis for the CWG-UCTN's recommendation.

There is no rationale provided in the Interim Paper for not applying the same decision-making approach which was adopted for the 2-letters to the 3-letter codes. The recommendation of the CWG-UCTN in relation to 2-letter codes is based on the historical, standardized practice relating to the use in the DNS of the externally-managed ISO standard, and arising from the adoption of

RFC1591. There is no such practice, based on the reliance on an externally-managed standard adopted from the outset of the DNS, in relation to 3-letter codes. Consequently, there is nothing which supports reserving these terms, either entirely or for use only as ccTLDs.

Further, ISO 3166-1 alpha-3 codes are three-letter country codes defined in ISO 3166-1, to represent countries, dependent territories, and special areas of geographical interest based upon the alpha-2 codes. As such, the countries and geographic interests represented thereby are wholly represented in ISO 3166 alpha-2. Consequently, the continued reservation of these 3 letter codes would be completely duplicative, redundant and serve no apparent purpose.

Furthermore, insofar as there have been arguments for allocating these terms to be operated as ccTLDs, no perceived advantage or necessity has been identified by the technical or country code community for such an expansion, save that of providing additional revenue streams for existing ccTLD providers, who have already been allocated what would be considered to be prime internet real estate in the form of the 2-letter codes. The IPC has been unable to identify any advantage of such a policy, and sees numerous disadvantages in terms of restricting the availability of many potential 3-character strings as new gTLDs within the DNS, many of which are commonly used words or famous or well-known trademarks. This is inconsistent with many countries'/states' own national trademark laws and is a significant impediment to the ability of rights holders worldwide to participate in the DNS and engage in e-commerce.

The IPC does not support any restrictions on the use of 3-letter codes as gTLDs, save insofar as certain terms have been reserved for technical reasons, subject of course to any policies designed to protect against the infringement of legal rights and the avoidance of string confusion.

#### D. Next Steps

After approximately 4 years of work it seems clear that the CWG-UCTN will not be able to make further progress on its stated aims of providing advice regarding the feasibility of developing a consistent and uniform definitional framework that could be applicable across the respective SOs and ACs, nor to provide detailed advice as to the content of that framework. Consequently, the IPC supports the three recommendations on next steps, as follows:

1. Close this CWG in accordance with and as foreseen in the charter.
2. Recommend that the ICANN community consolidate all policy efforts relating to geographic names (as that term has traditionally very broadly been defined in the ICANN environment to this point) to enable in-depth analyses and discussions on all aspects related to all geographic-related names. This is the only way, in our view, to determine whether a harmonized framework is truly achievable.
3. Recommend that future policy development work must facilitate an all-inclusive dialogue to ensure that all members of the community have the opportunity to participate. Again, we believe that this is the only way to determine whether a harmonized framework is truly achievable.

On the question of how to organise this future work, i.e., how to effectuate recommendation 2 above, we note that the CWG-UCTN members were unable to agree and thus that three

alternative suggestions are offered, all of which garnered some support within the working group.

Some members of the CWG-UCTN appear to favour the convening of a further cross-community working group (CCWG). This is not an acceptable solution since a CCWG has no authority under the Bylaws to develop policy, and the GNSO is specifically tasked under the Bylaws with developing policy on gTLDs.

The only one of the proposed alternatives that is consistent with ICANN's Bylaws and recognises the GNSO's role in policy development work for gTLDs is Alternative A:

Future work should take place with the authority of a policy development process under ICANN's Bylaws, with a clearly drafted Charter or scope of work that sets out how conclusions and recommendations will inform that policy development process. This addresses a key deficiency of this CWG, as it has not been made clear how the group's work can or will be incorporated in policy-making pursuant to ICANN's Bylaws.

In meeting the recommendations of Alternative A, matters relating to all geographic names at the Top Level should be dealt with under the auspices of the existing GNSO PDP on New gTLD Subsequent Procedures. These issues are already, and quite properly, within the scope of the charter of the Subsequent Procedures PDP. Participation in GNSO PDPs is not limited to members of the GNSO. Participants from the all parts of the community are welcome to join a PDP working group and indeed the Subsequent Procedures PDP working group already does include participants who associate with the GAC, ALAC and ccNSO. To the extent that non-GNSO members who are only concerned about this specific issue may be concerned about joining the Subsequent Procedures PDP because of its wide scope of work, this could readily be addressed by creating an additional work track.

#### E. Conclusion

The IPC supports the recommendations of the Interim Paper in relation to 2-letter codes, on the basis of the reasoning expressed in this comment.

The IPC does not support the continued reservation of 3-letter codes. All 3-letter codes should be available for registration and use as gTLDs.

Regarding future work, the IPC supports recommendations 1, 2 and 3. Of the three alternatives proposed for how to effectuate the work of recommendation 2, the only one consistent with the ICANN Bylaws and the GNSO's role in policy development for gTLDs is Alternative A. Future work should be dealt with in the context of the GNSO PDP on New gTLD Subsequent Procedures.

Respectfully submitted,

Intellectual Property Constituency