

Stakeholder Group / Constituency / Input Template

Protection of IGO and INGO Identifiers in all gTLDs Working Group

PLEASE SUBMIT YOUR RESPONSE AT THE LATEST BY **15 January 2013** TO THE GNSO SECRETARIAT (gnso.secretariat@gnso.icann.org), which will forward your statement to the Working Group.

The GNSO Council has formed a Working Group of interested stakeholders and Stakeholder Group / Constituency representatives, to collaborate broadly with knowledgeable individuals and organizations, in order to consider recommendations in relation to the protection of names, designations and acronyms, hereinafter referred to as “identifiers”, of intergovernmental organizations (IGO’s) and international non-governmental organizations (INGO’s) receiving protections under treaties and statutes under multiple jurisdictions.

Part of the Working Group’s effort will be to incorporate ideas and suggestions gathered from Stakeholder Groups and Constituencies through this template Statement. Inserting your response in this form will make it much easier for the Working Group to summarize the responses for analysis. This information is helpful to the community in understanding the points of view of various stakeholders. However, you should feel free to add any information you deem important to inform the Working Group’s deliberations, even if this does not fit into any of the questions listed below.

For further information, please visit the WG Webpage and Workspace:

- <http://community.icann.org/display/GWGTCT/>
- <http://gnso.icann.org/en/group-activities/protection-igo-names.htm>

Process

- Please identify the member(s) of your Stakeholder Group / Constituency who is (are) participating in this Working Group:
 - B. Fausett, E. Finberg, R. Guilherme, C. Gomes, D. Maher, J. Neuman, K. Stubbs
- Please identify the members of your Stakeholder Group / Constituency who participated in developing the perspective(s) set forth below:
 - All the above members, plus D. Blumenthal, P. Diaz, K. Drazek, C. Hoover, R. Levy
- Please describe the process by which your Stakeholder Group / Constituency arrived at the perspective(s) set forth below:
 - A combination of teleconferences and email messages

Below are elements of the approved charter that the WG has been tasked to address:

As part of its deliberations on the first issue as to whether there is a need for special protections for IGO and INGO organizations at the top and second level in all gTLDs (existing and new), the PDP WG should, at a minimum, consider the following elements as detailed in the Final Issue Report:

- Quantifying the Entities whose names may be Considered for Special Protection
- Evaluating the Scope of Existing Protections under International Treaties/Laws for the IGO-INGO organizations concerned;
- Establishing Qualification Criteria for Special Protection of names of the IGO and INGO

organizations concerned;

- Distinguishing any Substantive Differences between the RCRC and IOC designations from those of other IGO-INGO Organizations.

Should the PDP WG reach consensus on a recommendation that there is a need for special protections at the top and second levels in all existing and new gTLDs for IGO and INGO organization identifiers, the PDP WG is expected to:

- Develop specific recommendations for appropriate special protections, if any, for the identifiers of any or all IGO and INGO organizations at the first and second levels.
- Determine the appropriate protections, if any, for RCRC and IOC names at the second level for the initial round of new gTLDs and make recommendations on the implementation of such protection.
- Determine whether the current special protections being provided to RCRC and IOC names at the top and second level of the initial round of new gTLDs should be made permanent for RCRC and IOC names in all gTLDs; if so, determine whether the existing protections are sufficient and comprehensive; if not, develop specific recommendations for appropriate special protections (if any) for these identifiers.

REGISTRIES STAKEHOLDER GROUP (RySG) RESPONSE

The RySG is pleased to present responses to the questions asked in the IGO-INGO PDP WG survey. One of the themes that can be seen in our answers is that we support the recommendations of the IOC/RCRC Drafting Team that preceded the current WG. In addition, we would like to preface our attached survey answers with information that we believe is important as the WG considers our answers as well as answers from other groups.

The RySG fully supports the bottom-up multi-stakeholder policy development process that led to the new gTLD policy recommendations that the GNSO Council and the Board approved. In that regard we strongly believe that there are two elements of those recommendations that should be preserved as much as possible in the work of the IGO-INGO PDP WG:

1. The intent of the Reserved Names Working Group (RSWG) recommendations that were incorporated in the overall new gTLD policy was to minimize the number of names that are reserved.
2. The new gTLD PDP recommendation that criteria used in the new gTLD process should be as objective as possible.

We strongly encourage the IGO-INGO PDP WG to keep these two recommendations in continuous view as it endeavors to do its work. Sincere efforts should be made to limit additional protections for domain names and, if any additional protections are considered, the criteria for doing so should be objectively measurable and avoid putting evaluators into the position of making subjective value judgments.

Questions to Consider:

1. What kinds of entities should be considered for Special Protections at the top and second level in all gTLDs (existing and new)?

Group View: The RySG supports the limited recommendations of the Drafting Team. Beyond those recommendations, “Special Protections” are inappropriate for any select group of entities, in light of the Rights Protection Mechanisms that are available (or could be made available with suitable amendments) to all users of the DNS. Special Protections would be an infringement of domain name registrants’ ability to use the recognized identifier capabilities of the DNS to express ideas and opinions.

2. What facts or law are you aware of which might form an objective basis for Special Protections under International Treaties/Domestic Laws for IGOs, INGOs as they may relate to gTLDs and the DNS?

Group View: The RySG is waiting for the advice of the ICANN General Counsel’s office on this question. While ICANN, like any corporation, is subject to International Treaties and Domestic Laws, the RySG is not aware of any demonstration of the applicability of such International Treaties or Domestic Laws to the DNS and the ICANN procedures governing registration of domain names. The protection afforded by the treaties and laws relates to trademark uses, as opposed to domain name registration. The RySG does not believe that the treaties or laws would form an objective basis for Special Protections.

3. Do you have opinions about what criteria should be used for Special Protection of the IGO and INGO identifiers?

Group View: In light of the answer to Question 1, the RySG is not aware of any such criteria.

4. Do you think there are substantive differences between the RCRC/IOC and IGOs and INGOs?

Group View: The RySG supports the recommendations of the Drafting Team.

5. Should appropriate Special Protections at the top and second level for the identifiers of IGOs and INGOs be made?

Group View: “Special Protections”, beyond the recommendations of the Drafting Team, are inappropriate for any select group of entities, in light of the Rights Protection Mechanisms that are available (or could be made available with suitable amendments) to all users of the DNS. As stated in the answer to Question 1, Special Protections would be an infringement of rights of expression that are recognized within the DNS.

6. In addition, should Special Protections for the identifiers of IGOs and INGOs at the second level be in place for the initial round of new gTLDs?

Group View: In light of the answers to Questions 1 and 5, and except for the recommendations of the Drafting Team, the answer to this question is No.

7. Should the current Special Protections provided to the RCRC and IOC names at the top and second level of the initial round for new gTLDs be made permanent in all gTLDs and if not, what specific recommendations for appropriate Special Protections (if any) do you have?

Group View: In light of the answers to Questions 1 and 5, and except for the recommendations of the Drafting Team, the answer to this question is No. The RySG does not believe that Special Protections are appropriate as a Rights Protection Mechanism for IGOs and INGOs.

8. Do you feel existing RPMs or proposed RPMs for the new gTLD program are adequate to offer protections to IGO and INGOs (understanding that UDRP and TMCH may not be eligible for all IGOs and INGOs)?

Group View: RySG believes the existing and proposed RPMs are adequate, provided that suitable amendments are made to the UDRP. It is not clear that amendments are required for the TMCH, but if further clarity is needed, amendments should be made.

MINORITY POSITION (submitted on behalf of the Universal Postal Union):

In the light of the RySG's "majority" approval of the response originally prepared by David Maher (with minor revisions) and submitted on behalf of the RySG (above), we hereby respectfully express our complete **opposition** to the considerations made in that document, which unfortunately seems to disregard, once more, a number of very basic matters of principle and legal aspects as described below (most of the considerations below were also conveyed to the IGO/INGO group on previous occasions). In summary, virtually every individual answer contained in the RySG response should have been revised to express exactly the opposite of what is being conveyed in that document, for the reasons expressed below:

- IGOs are indeed protected under international and domestic laws in a way which differs in many key respects from the protections afforded at law to non-IGO trademark owners. For example, the names and acronyms of IGOs benefit from certain forms of preventive protection under international law against unauthorized use and registration (i.e., **non-registrability** of their names and acronyms), which are then incorporated (either directly or through specific domestic statutes) into the national laws of countries. Such protection both recognizes the international intergovernmental nature of IGOs, and the fact that it is not practicable for such organizations to submit to the jurisdiction of any one national legal system for purposes of enforcing rights in IGO names and acronyms which may be subject to improper use or abuse - needless to say, cases of abuses of their names and acronyms on the Internet have already been widely reported and documented by IGOs). The legal and public policy foundations of this IGO protection are succinctly explained, for example, in the letter sent by legal counsel of several IGOs to ICANN as well as the common position paper from IGOs, copies of which are attached for reference.
- Moreover, IGOs have a **public** mission and are funded by public money, which is ultimately derived from taxpayers. Thus, any abuse of IGO names and acronyms within the domain name system which must be remedied via insufficient fee-based curative (rather than preventive) mechanisms comes at a cost to the public missions of IGOs, which is likely to be prohibitive in a vastly expanded domain name system. This was a point further explained in a presentation

given to the GAC by the OECD Legal Counsel and other IGO legal experts (on behalf of the wider IGO community) in Prague.

- The principal existing rights protection mechanism currently available to trademark owners within the Domain Name System to address abuse at the second level is the UDRP, which does not provide specific protection for IGOs (although IGOs have been seeking IGO-specific protection from the ICANN community for years). In fact, envisaged rights protection mechanisms for new gTLDs might provide some limited protection for IGOs (for example, a certain subset of IGOs would have standing to bring a Legal Rights Objection against a new gTLD applicant). However, the basic problem with all such mechanisms from an IGO perspective is that they are **curative** rather than preventive in nature (in contrast to the legal basis of IGO protection of names and acronyms, which is designed to be preventive). More importantly, they are fee-based (effectively requiring IGOs to divert public funds to access) and may infringe on the privileges and immunities of IGOs (particularly in terms of immunity from domestic jurisdiction and executive measures) as accorded by international treaties and domestic statutes (such as the International Organizations Immunities Act in the case of the US). The standing requirements for mechanisms such as the LRO are also problematic for many IGOs, because these are linked to satisfaction of existing criteria for registration of “.int” domains, and thus may exclude certain organizations (such as UNICEF or UNAIDS) as well as certain permanent programs established by IGOs, even if these also fall under the protective umbrella of the aforementioned international treaties and domestic statutes (this is similar to the arguments presented by the RCRC movement, in the sense that protection is not only limited to the names and acronyms of IGOs, but also to some of their permanent programs).
- Although the names and acronyms of IGOs are the subject of preventive protection under international and domestic laws, no equivalent protection for is provided for by ICANN as a matter of policy. This should be regarded as problematic for a not-for-profit, California-based company, which has just approved a massive expansion of the domain name system which it is charged to technically administer, in which expanded scope for domain name abuse is self-evident.
- It is important to bear in mind that ICANN does **not** operate in a legal vacuum, and that any policy ICANN might adopt on IGOs (or INGOs) must be established on an **objective and legally-consistent** basis. Needless to say, this obligation is enshrined in the ICANN Articles of Incorporation in the sense that it “shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of **international law and applicable international conventions and local law.**” Furthermore, the ICANN Bylaws also recognize, as part of the organization’s core values, that “governments and public authorities are responsible for public policy” and that it shall duly take into account governments’ or public authorities’ recommendations. To state that such international conventions are not applicable because they do not refer directly to the domain name system, or to imply that ICANN technical activities are not directly constrained by those international and domestic laws is both an uninformed and incorrect assertion (otherwise, one could simply ignore **everything** that has been done until now by ICANN, even if on an incomplete basis, in terms of its domain name policies or rights protection principles and mechanisms).
- Although the ICANN New gTLD Program Committee Board’s resolution 2012.11.26.NG02 (granting interim preventive protection for certain IGOs in connection with new gTLDs) does

envisage further consideration of this issue by the GNSO working group, it is also appropriate that the Board's stated reasons and precedent set by this resolution and its grant of interim protection for some IGOs be kept carefully in mind as a basis for the group's further discussion. This is especially so given the strong opposition apparently already voiced by some participants in the WG before they have even finished scoping. It is important that, in order for the GNSO WG's work to be appropriately informed and fruitful, that participants keep an open mind and an objective approach in line with existing binding international and domestic legal statutes.

- It is equally important for the RySG and the GNSO WG to give appropriate weight and regard to the information and advice already issued by the GAC on the issue of IGO protection, and to remain conscious of work which may be ongoing within the GAC on this issue (particularly bearing in mind that, as per the ICANN By-laws, the GAC's advice to the Board "on public policy matters shall be duly taken into account, both in the formulation and adoption of policies"). While the GNSO WG may naturally wish to make up its own collective mind about the weight to be attributed to such clear advice by the governments of the world as represented in the GAC, perhaps one useful and potentially efficient approach for the RySG and the GNSO WG could be to consider whether there are any valid reasons why the GAC advice itself should **not** form an useful baseline for further deliberations within these groups.
- In other words, what (if any) are the reasons why the RySG could not make its recommendations on the best way forward based on a considered analysis of the GAC's advice? If there would be valid reasons for not doing so, that would be one aspect to be studied; but if not, it would seem somewhat odd if the RySG and the GNSO WG were to somehow simply set such clear advice aside from the outset without considered reasons for doing so.
- On the other hand, and as far as international **non-governmental** organizations are concerned, we continue to be concerned by the fact that any discussion surrounding the protection of INGO names does not seem to follow strictly **objective** parameters for that whole category as such. Instead, the draft answer prepared for the RySG continues to refer to two specific organizations/movements as if they were **one and the same**, EVEN when we all know that the legal grounds for protection of one movement are **clearly** distinct from those allegedly relating to the other named organization (i.e., a number of designations protected by the Geneva Convention as opposed to **none** in the Nairobi Treaty). It is in this specific regard, where **NO** international or domestic legal statutes regulate/determine **already** the protection of certain names and acronyms, that the GNSO has the legitimacy to perhaps propose policy that may lead to certain additional protection applicable to **INGOs** on the basis of other objective criteria.
- Last but not least, it is absolutely improper for any RySG response to put forward subjective assertions and **value judgments** that not only question the humanitarian and public policy missions and activities of IGOs in general (something that is decided by member countries themselves), or that "the unique humanitarian considerations applicable to the protection of the RCRC could provide a substantive difference between it and the IOC, IGOs and INGOs." Again: the RySG is **not** in a position to discuss whether one organization is "more humanitarian" than another (especially knowing that all IGOs cover public policy issues, including without limitation vital causes such as public health, labor practices, food security, peace-keeping operations, containment of weapons proliferation, sustainable economic and social development and reconstruction, trade, postal and commerce standards, children's rights,

refugees, disaster relief and fundamental scientific research); to act differently just seems to give the impression that the RySG is trying to justify a discretionary political position in favor of two specific organizations that should never have been adopted in the first place.

- We must stress again that the considerations above are being made by the UPU not just as an IGO, but in order to ensure the establishment of legally-sound and objective policies as an essential factor for minimizing risk and guaranteeing the sustainable operation of all our registries (given the role of the RySG in fostering interoperability, technical reliability and **stable** operation of the Internet or domain name system).

In the light of the above, please find attached again the UPU's submission of September 2012 and other relevant documents, which in our view are absolutely necessary to clarify a great number of flawed considerations/conclusions contained in past ICANN reports, and to duly inform any advice to be provided by the RySG and the GNSO on this important matter, without prejudice to any further UPU and IGO positions that may have been expressed after such submission was circulated among the various ICANN bodies.