

Report of Public Comments

Title:	Preliminary GNSO Issue Report on the Protection of International Organization Names in New gTLDs		
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Prepared By:	Staff		
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Section I: General Overview and Next Steps			
<p>This Preliminary Issue Report was published in response to a request by the GNSO Council for an issue report as a required preliminary step before a PDP may be commenced on the topic of whether ICANN should provide additional protections to the names of certain international organizations (i.e., International Governmental Organizations (IGOs) and Non-Governmental Organizations such as the Red Cross/Red Crescent (RCRC) and the International Olympic Committee (IOC) at the top and second levels for names introduced through the New gTLD Program. In its motion¹ requesting this Issue Report, the GNSO Council specified that the Issue Report should:</p> <ul style="list-style-type: none">• Define the type of organizations that should be evaluated in any related PDP for any such special protection at the top and second level; and• Describe how the PDP could be structured to analyze whether ICANN should adopt policies to protect such organizations at the top and second level. <p>The Preliminary Issue Report will be updated to reflect the information submitted through this Public Comment Forum in the form of a Final Issue Report to be presented to the GNSO Council. The GNSO Council will then consider whether to commence a PDP on this issue following the publication of the Final Issue Report.</p>			

¹ The GNSO Motion requesting this Preliminary Issue Report is posted at:
<http://gns0.icann.org/meetings/minutes-council-12apr12-en.htm>

Section II: Contributors

At the time this report was prepared, a total of twelve (12) community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

International Government Organizations ("IGOs"):

Name	Submitted by	Initials
European Bank for Reconstruction and Development#	Emmanuel Maurice	EBRD
United Nations*#		UN
Organization for Economic Cooperation and Development*#		OECD
World Intellectual Property Organization*#		WIPO
World Bank Group*#		WB
World Health Organization*#		WHO
European Space Agency*#		ESA
North Atlantic Treaty Organization*#		NATO
Bank for International Settlements*#	Diego Devos	BIS
International Labor Organization*#		ILO
European Organization for Nuclear Research*#		CERN
International Institute for Unification of Private Law*#		UNIDROIT
Universal Postal Union+#	Ricardo Guilherme	UPU
International Organization for Migration +#	Johan Rautenbach	IOM
International Bureau of Weights and Measures+#	Sigred Arlen	BIPM
Nordic Investment Bank+#	Heikki Cantell	NIB
International Criminal Court+#`	Roeland Stouthart	ICC
Bank for International Settlements+#	Diego Devos	BIS

#Submission supporting IGO Common Position Paper proposing special protections at top and 2nd Levels

*IGO Commentator in 25 June 2012 "Joint Submission"

+Supports IGO 25 June 2012 Joint Submission

Groups and Individuals:

Name	Affiliation (if provided)	Initials
ALAC		ALAC
Philip Sheppard		PS
Roberto Gaetano		RG
Robin Gross	IP Justice	RobinG

Section III: Summary of Comments

General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

10 of the 12 public comment submissions supported the initiation of a PDP to consider the issue of whether International Organization names should be protected in new gTLDs; one commentator opposed

the initiation of a PDP. The ALAC supports protecting IGO internationally recognized names comparable to the protections of trademark owners, and additional protections for charitable organizations at the second level.

9 of the 12 public comment submissions were from International Government Organizations (“IGOs”), which unanimously called for additional special protections for IGO names and acronyms at the top and second levels of new gTLDs; and which also unanimously supported the initiation of a PDP. All the IGO Commentators² supported the 4 May 2012 “Common Position Paper Regarding Protection of IGO Names and Acronyms in the DNS In the Context of ICANN’s GTLD Expansion Plan” <http://forum.icann.org/lists/prelim-protection-io-names/pdfjrs5WYjSrI.pdf> and the accompanying Appendix which provides a non-exhaustive list of protections granted to IGOs under treaties and national laws <http://forum.icann.org/lists/prelim-protection-io-names/pdfD51IIsBKIL.pdf> (collectively referred to as “IGO Common Position Paper”). Key points and proposals raised in the Paper are incorporated in this Summary Report. In addition, all the IGO Commentators expressed several concerns over the Preliminary Issue Report which are further outlined below in this Summary Report.

Initiation of a PDP

All the IGO Commentators generally supported the initiation of a PDP, provided that such PDP would be completed in time for any additional protections to be properly in place for the designation of new gTLDs from the first round, and that the PDP “be carried out on a basis of fair, objective and justified criteria and a proper evaluation of fact and law.”

Philip Sheppard believes it is essential to initiate a PDP in order to serve the public interest to prevent fraud and the diversion of donations from IGOs.

Robin Gross, representing IP Justice, opposes the initiation of a PDP to protect the names of the Red Cross Movement, IOC and IGO’s. Ms. Gross stated in her submission that providing special protection for these names would be creating in effect, exclusive global licensing rights which cannot be justified given that “robust” mechanisms to protect these organizations’ interests and rights are already in place.

Protection on the First Level of New gTLDs

The IGO Common Position Paper presents a proposal to amend the Applicant Guidebook so that the IGO names and acronyms protected under Article 6^{ter} of the Paris Convention be treated as “Reserved Names,” with identical strings available exclusively to the respective IGOs. Similar gTLD strings would be subject to a string similarity review and an applicant for such string could apply for the string either by: 1) obtaining a letter of non-objection from the respective IGO; or 2) demonstrate that the applicant has a legitimate interest in the string.

² “IGO Commentators” consists of all the individual IGO’s which submitted comments during the public comment forum: please refer to the entire list of IGOs under Contributors in Section II.

ALAC “does not see any great need” for protection at the top level because of the various comment and objection mechanisms available. In addition, ALAC “strongly advocates” that all new TLDs be contractually required to adhere to the general use of the proposed TLD outlined in their application in future TLD rounds.

With regard to the first level, Ms. Gross points out that there were no applications containing the names of such international organizations and thus, the risk of abuse claimed by these organizations is “overblown and unsubstantiated.”

Protection on the Second Level of New gTLDs

The IGO Common Position Paper proposes to amend the Applicant Guidebook so that the IGO names and acronyms protected under Article 6ter of the Paris Convention be treated as reserved names at the second level, which can only be registered by the respective IGO. Under this proposal, these names would be treated as “forbidden names,” meaning that any registrar receiving a request for registration of a second-level domain containing an IGO name or acronym would have an automatic system that would raise a red flag, requiring the registry to automatically prevent the registration of such name by third parties.

ALAC is “particularly sympathetic” to granting additional protection to prevent the use of domain names to defraud unsuspecting consumers, phishing, or other illicit activities. The focus of ALAC’s concern is on charitable organizations such as the Red Cross and UNICEF; and it is also sympathetic to extend special protection for other charities, while acknowledging that implementing such protections “is unclear.” ALAC also “sees the benefit” to extend protection at the second level to include protections for similar strings to such organizations’ names. The ALAC notes the “potential difficulty” of implementing such protections and expressed its intent to work with any group which is formed to address this issue. In supporting such protection, the ALAC also expressed its concern over the impact that these protections would have on the fair use of names.

With regard to the second level, Ms. Gross states that creating special protections at this level would be departing from longstanding ICANN policy and would require serious consideration as it would be a “dramatic” shift in the burden and responsibility for the content of domain names onto third parties. In supporting this position Ms. Gross notes that the GNSO voted against special protections for IGOs in 2007, as did various reserved names working groups over the past several years. Ms. Gross also raises the concern over ICANN’s resources and believes that there are “far more important and pressing issues” that need attention rather than creating special privileges for these international organizations.

Comments on Preliminary Issue Report

All the IGO Commentators expressed concerns about the Preliminary Issue Report, specifically, their belief that the report “contains certain legal and factual inaccuracies, and is at times selective and inconsistent.” The specific concerns of the IGO Commentators are summarized below:

Failure to Incorporate the IGO Common Position Paper

The IGO Commentators noted that the Preliminary Issue Report did not include any discussion or reference to the IGO Common Position Paper and Appendix which was sent to both the Chair of the GAC and Chair of the GNSO Council on 4 May 2012. The IGO Common Position Paper provided an explanation of the existing legal protections for IGO names and acronyms, as well as the IGOs' proposal for special protections for IGO names and acronyms at both the top and second levels of the new gTLDs (which are summarized above under the relevant headings).

With regard to existing legal protections for IGO names and acronyms, the IGO Common Paper addresses the criteria utilized by the GAC to recommend special protection for the Red Cross Movement and International Olympic Committee names: 1) the names are protected by international treaty; 2) the names are also protected by domestic laws in multiple jurisdictions; and provides information which IGOs believe meet these two criteria established by the GAC. Specifically, the IGO Common Paper notes that the GAC and ICANN acknowledge that IGO names and acronyms enjoy treaty protection under Article 6*ter* of The Paris Convention for Protection of Industrial Property, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and the Trademark Law Treaty. In addition, the IGO Common Paper states its position that the second criteria is also met, because "it is safe to assume that States respect their treaty obligations, so as 181 States have undertaken by treaty to protect the names, acronyms and emblems of IGOs, then these are protected in 181 States." As further support for their position, the IGOs submitted as an Appendix to the IGO Common Paper a non-exhaustive list of specific national laws which demonstrate that at least 130 national laws expressly protect IGO names and acronyms.

Distinguishing The Red Cross Movement and International Olympic Committee from IGOs

While not taking any position regarding possible protections granted to the Red Cross/Red Crescent ("RCRC") and International Olympic Committee ("IOC") names, the IGO Commentators believe that the Preliminary Issue Report did not provide "a complete factual picture nor a fair assessment of the status and legal protection" enjoyed by the names of the IGOs, RCRC and IOC.

The IGO commentators stated their position that the Preliminary Issue Report "accepted a liberal" application of the GAC criteria to the RCRC and IOC names, while "disregarding" the specific status of IGO names under the international treaties identified in their submissions. With regard to the treatment of IOC names, the IGO commentators take issue with the Preliminary Issue Report's legal rationale that extends the scope of the Nairobi Treaty to cover not only the Olympic symbol, but also the Olympic names by affirming that "the practice among some Treaty Member States in protecting the Olympic symbol and names as inclusive of each other may demonstrate state recognition of the indicative value of the Olympic names and that state's belief in the necessity of protecting the Olympic names." With regard to the RCRC names, the IGO commentators take issue with the Preliminary Issue Report's suggestion that the mere fact that the Red Crescent, Red Crystal and Red Lion and Sun are offered protections in countries that recognize those terms is sufficient to justify their protection in new gTLDs, because the IGO commentators note that these terms are not universally protected under the Geneva Convention, and state that "national recognition does not equate to treaty protection and should not be considered as a substitute thereof."

The IGO commentators also counter the statement in the Preliminary Issue Report that "to date, there has been no information submitted to demonstrate that IGOs suffer the level of unauthorized or fraudulent

use of their names as the RCRC or IOC do, or to demonstrate the need for a time-sensitive remedy for the misuse or abuse of their names,” by citing the WIPO-2 Report (3 September 2001) and documents submitted by various IGOs to the Second Special Session of the Standing Committee on the Law of Trademarks which provide extensive examples of abuse of IGO names and acronyms.

In stating that the problems of cybersquatting and other domain name abuses of IGO names and acronyms have not diminished “and are likely to be exacerbated once the many new gTLDs become operational,” the IGO commentators also cite as support the Draft Final Report of ICANN’s Joint Working Group on the WIPO-2 Process – V3 (posted April 19, 2004), and the 15 June 2007 GNSO Issue Report on Dispute Handling for IGO Names and Abbreviations.

Suggested Criteria Under Which an Organization May Qualify for Special Protection

The IGO Commentators criticize most of the Preliminary Issue Report’s six proposed criteria to determine an organization’s qualification for special protection in new gTLDs as having legally and factually questionable relevance. In particular, the IGO Commentators believe that the specific criteria for the duration of an organization’s existence, the number of its member states, the number of countries in which the organization has offices and operations and the frequency at which its symbols and names are utilized in public media “would be near impossible to set a fair and objective standard and would be complicated and inefficient to implement.” The IGO Commentators also note that the relevance of popular recognition through the public media has never been considered for statutory protection of IGO names and acronyms under international treaties or even national jurisdictions. The IGO Commentators raise a concern that the acceptance of these criteria in conjunction with the GAC criteria “would surely lead to subjective value judgments which run completely counter to established principles and rules of international law” with regard to the protection of IGO names and acronyms, “not to mention similar subjective considerations on the ‘humanitarian’ character of IGOs (which, in line with their public common good mandates, are to be deemed as humanitarian by definition.)”

The IGO Commentators also express concern over criteria they believe are “noticeably” missing: the status of the organizations under public international law, privileges and immunities enjoyed by the organizations, the principle source of financing for those organizations, the protection of common goods including market principles, the rule of law, and freedom of expression. The IGO Commentators believe that these considerations “are arguably more important” than the criteria proposed in the Preliminary Issue Report.

In noting that the prohibitive cost of defense is one of the primary cited reasons to support special protection, the IGO Commentators raise the point that the question of an organization’s principle source of funding should be “quite pertinent;” and that IGOs are essentially funded with public funds, through contributions from member states, which are used to achieve “the important public interest missions of the IGOs.”³ The IGO Commentators also believe that the proposed rights protection mechanisms for the

³ The IGO Common Position Paper states that IGOs are fora that work towards cooperation between governments on vital issues and humanitarian causes, including public health, food security, labor practices peace-keeping operations, containment of weapons proliferation, sustainable economic and

new gTLD program “are inconsistent with the privileges and immunities and in particular the principle of immunity from legal process as enjoyed by IGOs,” and thus further highlights the need to provide special protections for IGO names and acronyms.

Other Comments

ALAC finds the estimated number of 5,000 IGOs and 35,000 other non-profits reported in the Preliminary Issue Report which might be considered for special protection eligibility to be “troubling,” and expressed its concern over the lack of resources and ability to judge eligibility or even list such groups.

Philip Sheppard in supporting the initiation of a PDP believes that the rationale for special protection for the names of IGOs refers only to protection at the top level; and suggests a possible objective rule to determine which IGOs would qualify for special protections: a treaty organization of sovereign member states; protection under international law such as the Paris Convention.

Roberto Gaetano’s main point in his submission is that there is a serious distinction between the Olympic symbol which is protected by the Nairobi Convention, and the “plain use” of the natural language word “olympic”. Mr. Gaetano believes that any infringement of the word Olympic should be determined on a case-by-case basis.

Section IV: Analysis of Comments

General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.

The Final Issue Report will take into account as appropriate the comments received during this public forum. The GNSO Council will be responsible for considering the Final Issue Report which will incorporate these comments in deciding on any next steps to address the issue of whether special protections should be provided for any international organization names at either the top and/or second level in the new gTLDs.

social development and reconstruction, trade and commerce standards, children’s rights, refugees disaster relief, fundamental scientific research and transportation.