

United Nations  Nations Unies

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REFERENCE:

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Dear Members of the Board,

I write to you for the United Nations, on behalf of the Legal Counsels of the Organisation for Economic Co-operation and Development (OECD), the Universal Postal Union (UPU), the World Bank, the World Health Organization (WHO), and the World Intellectual Property Organization (WIPO). These international intergovernmental organisations form the core group of many such international intergovernmental organisations (IGOs) that have been working together closely for several years to seek protections for IGO identifiers in the domain name system (DNS). This core group of IGOs, therefore, is part of a broader collation of over 40 IGOs that are coordinating to seek such protections for the benefit of just under 200 IGOs globally.

We are disappointed that the final report of the policy development process on IGO-INGO access to curative rights protection mechanisms (PDP) fails to reflect the numerous comments from both IGOs and ICANN's Governmental Advisory Committee (GAC) on the draft report. The final report also fails to reflect the substantial inputs provided by the IGOs to the PDP working group at the latter's request. We are very concerned that if the final report were to become the formal policy of ICANN, IGOs would be left without meaningful recourse to counter abuses of their names and acronyms in the DNS.

IGOs are government-created entities subject to international law. As such, they benefit from immunity from the jurisdiction of national courts. These immunities have been granted by the international community to ensure the operational independence of IGOs by preventing individual States from interfering with an IGO's activities through its courts or other governmental bodies. They are recognised in hundreds of treaties and other international arrangements and have been upheld by national courts throughout the world; they should not be subject to arbitrary and inaccurate reinterpretations in the context of an ICANN PDP. However, in spite of substantial submissions to the Working Group articulating the nature of IGOs' immunities and the legal basis of such immunities under international and national laws, the Working Group has failed to accommodate adjustments to the existing UDRP that would take into account this important

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characteristic of IGOs and allow them to rely on UDRP-like dispute resolution proceedings, including arbitral appeal, as the full and final means of adjudicating domain name disputes. As the Working Group's own hand-picked expert, Mr. Edward Swaine, observed, the inclusion of an arbitration clause in contracts between IGOs and commercial suppliers is so commonplace that some major companies even go so far as to include a default provision for arbitration with IGOs in their boilerplate contracts<sup>1</sup>. Such clauses have long been accepted by IGO member States and private entities alike as adequately ensuring the due process rights of all parties in commercial disputes with IGOs. Notably, two members of the Working Group, including a member who was co-chair of the Working Group and resigned in protest, provided minority opinions harshly criticising the flawed process and bias of the Working Group.

We remain open to further dialogue so that the Board can resolve this long-foreseen conflict between the outcome of the PDP and longstanding – and still valid – GAC advice on the matter in a manner that effectively takes the status and immunities of IGOs into account. As you know, since 2012, the GAC has advised the Board to devise a mechanism to protect IGO identifiers in the DNS. This protection could take a number of forms, and IGOs have worked diligently to propose numerous possibilities in various ICANN fora. We note that protections afforded to the Red Cross provide one possible model to replace the temporary protections currently in place. We remain open to discussing others.

A DNS that minimises fraud is in the interest of everyone in the ICANN community, and not just IGOs. We remain at your disposal to collaborate with you in order to develop a legally-sound and common-sense approach to resolving this issue that has been left without a permanent resolution for far too long.

Yours sincerely,



Stephen Mathias  
Assistant Secretary-General  
in charge of the Office of Legal Affairs

cc: Ms. Manal Ismail, Chair of the ICANN Governmental Advisory Council

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<sup>1</sup> Edward Swaine, Memorandum on IGO Immunity addressed to Mary Wong and Steve Chan, 17 June 2016, p. 28 (also attached to the final report as Annex F).