[INSERT DATE}

Dr. Stephen D. Crocker, Chair

Board of Directors

ICANN

Dear Steve:

Thank you for your letter dated 4 October 2016, regarding the reconciliation of GNSO policy recommendations and GAC advice with respect to the protection of intergovernmental organizations (IGO) acronyms, and an accompanying proposal put forward by the “small group” of intergovernmental organizations (IGOs) within the GAC.

The GNSO Council appreciates the ongoing work by the small group, as well as the Board’s well-intentioned efforts to facilitate our consideration of the group’s proposal. The Council looks forward to a resolution of the longstanding IGO acronym issue.

The Council recognizes the two matters here that are in play:

1. The GNSO policy recommendation on IGO acronyms, and the existing conflict with GAC advice; and
2. Those components of the small group proposal that addresses the matters currently being considered by the IGO Curative Rights Protection Mechanisms PDP.

With regard to the first issue, the Council has no current plan to reconsider its standing recommendation to the Board. Indeed, in its final report,[[1]](#footnote-1) the working group demonstrates that much of what now constitutes the small group’s proposals were already thoroughly considered during the PDP. We have reviewed that report and the small group proposal, and accordingly, in deference to that previous work of the community and to preserve the integrity of the policy development process, the Council elects to allow the existing 2013 policy recommendations to stand.

On the second issue, the Council has referred the proposal to the existing working group for review and consideration, and we are informed that the WG already devoted the entirety of its call of 13 October and a significant portion of its call on 20 October to discussing the proposal. Furthermore, the WG has informed us that it intends to include a section in its preliminary report and recommendations that analyzes and discusses the proposal.

In this letter, the Council will address how it will receive and consider the small group proposal. First, however, we believe it is helpful to articulate our concerns about the processes employed to date.

**Procedural concerns**

Policy work on the matter of IGO names and acronyms date back nearly five years.[[2]](#footnote-2) Even as the community is accustomed to methodical and sometimes lengthy policy work, this is a remarkably long period for a seemingly straightforward matter.

On 20 November 2013—nearly three years ago—the GNSO Council unanimously recommended to the ICANN Board a comprehensive, duly considered and developed package of policy recommendations[[3]](#footnote-3) addressing IGO/INGO protections, and formally reported it to the Board on 23 January 2014.[[4]](#footnote-4) As noted in the report:

*Under the ICANN Bylaws, the Council’s unanimous (supermajority) support for the motion obligates the Board to adopt the recommendations unless by a vote of more than two thirds, the Board determines that the policy is not in the best interests of the ICANN community or ICANN.*

According to ICANN’s Bylaws, the Board is obligated to vote on such policy recommendations, preferably, no later than two meetings following receipt of the Board Report (ICANN Bylaws, Annex A, Section 9). The Council understands that the Board approved in a timely way all matters not in conflict with GAC advice, but requested additional time to consider the remaining unanimous recommendations. For a time, the Board and Council explored procedural options for amending the Council’s recommendations, but ultimately, the Council took no actions, and the Board seemingly tabled the matter. More than two years now having passed, this raises questions about how much time is appropriate for resolution of outstanding issues, and about the Board’s duty to adopt supermajority GNSO recommendations.

Once the matter was raised again to the Board—this time by Councilors and the IGO small group, working separately. While the Council sought Board-level resolution of its standing PDP recommendations, the small group pursued reintroduction of largely previously considered concepts, bypassing the GNSO and raising these directly with the Board. Additionally, their proposal included elements addressing post-registration curative rights, which is the subject of an ongoing GNSO PDP.

However well-meaning the Board has been in seeking to resolve these differences, we do not feel it would be appropriate for the Board to negotiate or broker compromises between the community and the GAC (particularly, in this case, without input of the GNSO). This effectively would amount to policy development at the Board level, and undermine bottom-up multistakeholder policy development.

We acknowledge that GNSO recommendations and GAC advice are not particularly fluid or negotiable, once arrived at. Attempting to harmonize these at the Board level sets a dangerous precedent, and the Council cautions the Board against pursuing such attempts.

The Council cannot reasonably be expected to reopen a PDP concluded three years ago under a contingency that, if it does not, the Board will reject a standing recommendation. Further, it would be ill advised for Councilors to report to their constituencies and stakeholder groups that it intended to revisit a unanimous policy decision that has neither been approved nor rejected by the ICANN Board.

We concur with the Board’s letter to the Council of 16 June 2014,[[5]](#footnote-5) stating that procedures are available to the Council to amend policy recommendations prior to the Board’s vote, and appreciate the reference to GNSO Operating Procedures. While we have elected not to amend the existing recommendation, the Council intends to operate in compliance with its procedures. We ask the Board to do the same, for the small group to respect the operating procedures meant to provide for fair and orderly consideration of issues of importance, and to ensure their legitimacy within the GNSO, particularly with regard to contracted parties.

**The IGO CRP PDP**

In forwarding the small group’s proposal to the Council, and with regard to the currently ongoing PDP on IGO/INGO access to curative rights processes, you note in your letter:

*We understand further that the Working Group is currently discussing preliminary recommendations that it intends to publish for public comment soon, in the form of an Initial Report. We therefore hope that the presentation of the attached proposal is timely, and will be fully considered by the Working Group…*

Your assessment is correct. The initial report is close to production; however, the WG will not produce a *complete* report or set of recommendations prior to the meeting in Hyderabad—it is instead anticipated be delivered prior to the end of this year. The WG will have a *draft* set of recommendations prepared for community discussion in Hyderabad.

The small group proposal, unfortunately, is not timely, and the small group is likely aware of that. Following the approximate two-year life of this PDP, the WG has reached most of its final conclusions and is nearing publication of its report. During that time, the WG continually urged members of the GAC, and IGOs, to participate in the WG.[[6]](#footnote-6) Regrettably, participation was sporadic; no IGO joined the WG as an active member, and the occasional input of IGO representatives was stressed as representing only individual positions and not those of the IGOs that employ them.

This history notwithstanding, the WG’s co-chairs advised the Council that the proposal’s untimely arrival did not present great difficulty for the WG, and it placed the proposal on its meeting agendas for 13 and 20 October and discussed it at length. However, we’ve been further advised by the co-chairs that, given that the tenets of the proposal are incongruent with the WG’s preliminary conclusions (as the IGOs are well aware, as they have made clear that they are closely monitoring the WG’s deliberations), and that IGOs did not participate in the WG in a way that sought to reconcile their positions with those adopted after extensive data analysis by the community volunteers in the WG, it is unlikely that the WG will abandon its conclusions and adopt those of the IGOs.

It is frustrating and unfortunate that, knowing this PDP was under way, these parties disregarded an opportunity to integrate their interests and knowledge into its ongoing work and instead reconstituted a proposal which was previously considered and declined by the community. Unfortunately, the fact that the Board permitted these IGOs to introduce the subject of an ongoing PDP into discussions directly with the Board may have encouraged this course of action.

By way of example of this incongruity, according to the small group proposal (emphasis added):

*The IGO-GAC-NGPC small group that has been discussing the topic of appropriate IGO protections, based on the NGPC’s initial proposal of March 2014, agree that the following general principles should underpin the framework for any permanent solution concerning the protection of the IGO names and acronyms in the domain name system:*

***(1) The basis for protection of IGO acronyms should not be founded in trademark law, as IGOs are created by governments under international law and are in an objectively different category of rights-holders;***

In fact, after consulting with a legal expert in this area,[[7]](#footnote-7) the WG found that many IGOs have already trademarked their organizational names and acronyms and have successfully utilized the UDRP. Further, and more relevant, Article 6ter of the Paris Convention provides IGOs with protection of their names and acronyms *within the trademark law systems of all Convention signatories, as well as all members of the World Trade Organization*, with such protection available through a simple registration procedure with WIPO. Therefore, contrary to the statement quoted above, while Article 6ter is not trademark law specifically, the basis for global IGO acronym protections has already been linked to trademark law protections in all nations that are signatories to the Paris Convention or members of the World Trade Organization. This will be further documented in the WG’s initial report.

Clearly, this and other matters considered by the WG will be more fully discussed in Hyderabad. The WG looks forward to discussing its draft recommendations, and encourages the community (**particularly, interested IGO representatives and members of the GAC**) to participate in these discussions, and to contribute to public comments upon publication of the WG’s initial report. The WG is of the opinion that the recommendations contained in its draft report will actually provide broader protections for IGO names and acronyms in the DNS while being more consistent with consensus views on relevant law.

We finally note here the second recommended next step in the small group proposal:

*2. Subject to advice from the GAC and the GNSO, the GDD will consider adopting the amended proposal and instructing staff to work up the relevant implementation details for subsequent discussion and (as appropriate) approval;*

GDD action on such matters should be undertaken only when the Board takes final action on relevant GNSO policy recommendations and related GAC advice. It would be improper, illegitimate, and unprecedented, for the GDD to consider adopting the small group proposal that is unexamined by the community and in conflict with recommendations of a GNSO PDP. The very existence of the now open curative rights PDP demonstrates that affording expanded curative rights protections to IGOs raises serious policy issues and cannot be considered an implementation detail of any prior matter.

The WG, as noted, will consider the small group proposal in the course of its work, and we anticipate a detailed analysis of the small group proposal from the WG. At the issuance of the initial report, the WG encourages anyone in the community, but particularly IGOs and the GAC, to provide their comments.

We do note and welcome the statement in the 4 October letter that “the Board will not take action with respect to GAC advice on curative rights protections for IGOs prior to the conclusion of the

GNSO’s PDP.” The Council interprets that statement to mean that the Board will take no action until the WG’s final report has been received by Council and Council has taken final action in regard to the acceptance of its findings and recommendations.

**Conclusion**

Less than one month ago, ICANN celebrated the long-planned transition away from oversight by the U.S. Government. A significant element of ICANN’s promised post-transition world was strict avoidance of inappropriate governmental influence. The GNSO notes it would send the wrong message if governments—or agencies of governments and IGOs— believe they have undue influence on ICANN policies by subverting the community processes they requested to participate in to address their concerns.

We request that the Board finally take up and vote on the policy recommendation before it. We further look forward to the conclusion of the CRM PDP and sharing the results with the community.

Thank you for your attention, and we look forward to our discussions in Hyderabad.

Best regards,

Donna Austin, GNSO Vice-Chair (Contracted Parties House)

James Bladel, GNSO Chair

Heather Forrest, GNSO Vice-Chair (Non-Contracted Parties House)

1. <https://gnso.icann.org/en/issues/igo-ingo-final-10nov13-en.pdf> [↑](#footnote-ref-1)
2. See initial letter from IGOs to you and then-CEO Rod Beckstrom: <https://www.icann.org/en/system/files/files/igo-counsels-to-beckstrom-et-al-13dec11-en.pdf> [↑](#footnote-ref-2)
3. <https://gnso.icann.org/en/council/resolutions#20131120-2> [↑](#footnote-ref-3)
4. <https://gnso.icann.org/en/issues/council-board-igo-ingo-23jan14-en.pdf> [↑](#footnote-ref-4)
5. <https://gnso.icann.org/en/correspondence/chalaby-to-robinson-16jun14-en.pdf> [↑](#footnote-ref-5)
6. Note that the GAC and GNSO convened the GAC-GNSO Consultation Group on GAC Early Engagement in GNSO Policy Development Processes in 2014 partly to satisfy **a GAC request** for opportunities to participate in GNSO deliberations. ([https://community.icann.org/display/gnsogcgogeeipdp/3.+Charter](https://community.icann.org/display/gnsogcgogeeipdp/3.%2BCharter)) The CG successfully created mechanisms for the GAC as a whole, individual GAC members, and other parties affiliated with governments (such as IGOs) to contribute to policy outcomes. Those parties have not employed these mechanisms to a significant extent, but instead, troublingly, appeal directly to the Board. [↑](#footnote-ref-6)
7. <https://community.icann.org/pages/viewpage.action?pageId=56131791&preview=/56131791/59649120/Swaine%20-%20Updated%20IGO%20Immunity%20Memo%20-%2017%20June%202016.pdf> [↑](#footnote-ref-7)