



31 January 2013

Heather Dryden
Chair, ICANN GAC

Dear Heather,

I am writing in response to your letter dated 28 November 2012, seeking information about the GNSO Council's determination to initiate a Policy Development Process (PDP) on the protection of the names of international organizations "in all gTLDs."

First, we feel that it is important to note that we are not aware of a currently available bright line test to distinguish "policy" from "implementation" in general, or in the ICANN context, and believe that this question will benefit from further review and consideration within ICANN's multi-stakeholder processes. Indeed, for a number of reasons, we fully expect that this will be an area which attracts attention and effort in the near future. In addition, we note that the ICANN Board has begun to use a process of soliciting "policy advice" *i.e.* advice on whether specific implementation ideas are in-line with the principles stated in policies. This has been an area of some confusion for the community and moreover, causes the GNSO Council some challenges, since we do not have existing, standard mechanisms in place to provide formal policy advice other than through a PDP.

For the purposes of responding to your letter, however, we understand that the term "policy development" has traditionally applied to ICANN's consideration of an issue that is within the scope of ICANN's mission statement and involves developing an approach that is (a) is broadly applicable to multiple situations or organizations; (b) is likely to have lasting value of applicability; (c) will establish a guide or framework for future decision-making; and/or (d) implicates or affects an existing ICANN policy. The ICANN Board, the ICANN staff, and the GNSO has each concluded at different points that the question of enhanced protections for international governmental organizations ("IGO's") and non-governmental organizations ("NGO's") at the top and second level meets the criteria described above.

We do not dispute the validity of the GAC's advice to the ICANN Board in May 2011 regarding protections for the International Olympic Committee ("IOC") and the Red Cross/Red Crescent ("RC/RC") names, nor do we dispute the fact that ICANN received preliminary legal advice that some 60 countries protect certain intellectual properties of the IOC and RC/RC. We note, however, that several such laws – like the Nairobi Treaty on the Protection of the Olympic Symbol itself - provide exceptions for non-commercial uses, pre-existing commercial uses, and certain geographic references, among other things. In any case, the majority of the Council believes that policy development work is needed to determine what, if any, exceptions (*i.e.* for pre-existing, non-commercial, and/or geographic use) should apply in the domain name context – particularly at the second level and in both new and existing TLDs. Importantly, we recognize that the potential expansion of protection to existing TLDs was not originally part of the May 2011 GAC advice and would create new obligations on contracted parties, thus necessitating a full Policy Development Process.

Likewise, we do not dispute the validity of the GAC's advice in Toronto with respect to the use of the current .int registration requirements as a starting basis for protection of IGO names and acronyms. We also appreciate your point that this advice is "complementary" to the provision of the Applicant Guidebook permitting use of the .int registration criteria as the basis for IGOs to file a Legal Rights Objection to a new gTLD application. We do not understand, however, how a prohibition of even non-infringing uses of an IGO's acronym at the first or second level is merely an implementation of the Legal Rights Objection policy, which provides for an independent panel to determine whether an applicant's potential use of the applied-for gTLD would be likely to infringe the objector's existing IGO name or acronym. The views and perspectives of various participants in this discussion, including those of the Governmental Advisory Committee, have evolved over time – including quite recently. Critically, we wish to emphasize that it was not the intent of the Council to challenge GAC advice on these issues, although that appearance may have been created by our initiating the work of the IGO-INGO PDP. Rather, the Council thought it best to adopt a holistic approach to the issue of special protection for IGOs and NGOs.

The GNSO Council believes that the issues identified above fall within the definition of "policy" used by ICANN.¹ We understand, of course, that the policy development process can be time consuming. We also understand that some may view formal policy development as a delaying or blocking tactic. With respect to the question of enhanced protections for international governmental organizations, however, the GNSO Council has attempted to find practical solutions to ensure that reasonable protections are in place during the pendency of the policy discussions. That approach is reflected in the ICANN Board's recent resolutions to create a moratorium on registration of certain names at the second level pending this policy work.

We are cognizant that we may be misunderstanding the distinction between "policy" and "implementation" drawn by the GAC, and, as previously stated, the GNSO Council would very much welcome further dialogue on this point. Meanwhile, we do take seriously our obligation to respond in a collaborative, timely and transparent way when policy development is necessary. With this in mind, we have provided two appendices to this letter. Appendix 1 is a note from the chair of the PDP Working Group to evaluate possible protections and Appendix 2 provides a link to the GNSO website which contains more complete background information for readers of this correspondence that may be less familiar with the detail and history.

I would like to take this opportunity to re-iterate the GNSO Council's appreciation of the critical role played by the GAC within the ICANN multi-stakeholder model. If there is anything that we can do to improve mutual understanding of our respective roles and effective working together within the multi-stakeholder framework, we are very receptive to this.

Yours sincerely,

Jonathan Robinson
Chair, ICANN GNSO Council

¹ We note here the minority position, held by the IPC, that IOC/Red Cross protection should not be subject to a PDP.

Appendix 1 – From Thomas Rickert – Chair of the PDP Working Group to evaluate possible protections for certain international organization names in all gTLDs

The PDP Working Group (called WG hereinafter) is dealing with a multitude of questions and issues that have an impact on the question of whether protections should be granted, the qualification criteria which need to be place for eligibility and how such protections could be made operational. Below are two examples that illustrate some of the complexities:

Example 1:

Several organizations requesting special protection have asked for certain designations to be added to a reserved names list. At the same time they have asked to be able to use such designations in case they should wish to use them.

At present, there is no such mechanism to both prevent third party registrations of certain designations from taking place and at the same time allowing for easy access upon request. Hence, new types of protection mechanisms are being considered as part of the deliberations of the WG.

Example 2:

The Red Cross/Red Crescent Movement, the IOC and the IGOs have each stated that their organization's names are protected by international treaties, specifically: The Treaties of the Geneva Conventions, The Nairobi Treaty and Article 6ter of the Paris Convention respectively. The PDP WG members have noted that (and as highlighted on pages 35-42 in the Final Issue Report which preceded the PDP (<http://gnso.icann.org/en/issues/protection-igo-names-final-issue-report-01oct12-en.pdf>) there are both disagreements in constructing the scope of protection provided to each of these organization's names as well as limitations to the protections within these treaties. To illustrate:

- a. The Nairobi Treaty specifically extends protection to the Olympic emblem but not to the Olympic name. While the GAC has acknowledged that this treaty protection for the Olympic emblem extends to the Olympic name, some members of the PDP WG have provided submissions disagreeing with this interpretation.
- b. Although the protection of the Red Cross name has been widely accepted under the Treaties of the Geneva Conventions, the "Red Crescent," "Red Crystal" and "Red Lion and Sun" names are not universally protected under the Geneva Conventions.
- c. With regard to the scope of protection which Article 6ter of the Paris Convention provides for IGO names and acronyms, not all countries agree that Article 6ter provides automatic protection of IGO names at least in respect to protecting such names from third party domain name registration. The PDP WG has noted that the GAC's advice to protect IGO names at the second level of the first round of new gTLDs should include IGOs that qualify under the .int domain name registration criteria, rather than under Article 6ter protection. In addition, Article 6ter has limitations on such protection. For example, under Article 6ter 1(c) protection of IGO names is not required "when the use or registration ... is not of such a nature as to suggest to the public that a connection exists between the organization concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization.

Appendix 2 – Summary of policy and related work on the protection of IOC / RC Names

<http://gns0.icann.org/en/group-activities/red-cross-ioc.htm>

The ICANN Board had requested policy advice from the GNSO Council and the GAC on whether special protections should be afforded to the RCRC, IOC and/or IGOs. Specifically, in its Singapore resolution, the Board authorized the President and CEO to implement the New gTLD Program "which includes the following elements: "the 30 May 2011 version of the Applicant Guidebook, subject to the revisions agreed to with the GAC on 19 June 2011, including: ...(b) incorporation of text concerning protection for specific requested Red Cross and IOC names for the top level only during the initial application round, until the GNSO and GAC develop policy advice based on the global public interest....."

During September 2011, the GAC also sent advice to the GNSO with a proposal for granting second level protections based upon the protections afforded to IOC/RCRC at the first level. In the same month, section 2.2.1.2.3 was added to the latest version of the new gTLD Applicant Guidebook dated 19 September 2011.

As a result of the GAC proposal submitted to the GNSO, the GNSO Council created a call for volunteers to form a drafting team about creating a response to the GAC. The IOC/RCRC Drafting Team was formed has since created a set of recommendations for protecting the IOC/RCRC names at the second level and includes an outline for a response to the GAC from the GNSO.