

REFERENCE:

20 August 2019

Re: ICANN-GNSO: Final Report on the IGO-INGO Access to Curative Rights
Protection Mechanisms

Comments by the Under-Secretary-General for Legal Affairs and
United Nations Legal Counsel

1. The United Nations takes note that the final report of the policy development process (PDP) on IGO-INGO access to curative rights protection mechanisms fails to reflect the numerous comments from both international, intergovernmental organizations (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.
2. Our concern is that if the final report, including its recommendations, 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.
3. 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. 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 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. Rather, in order to seek protection for their names and acronyms in the DNS, IGOs would continue to be required under the UDRP to agree to be subject to the jurisdiction of the courts of their member states.

3. As the Working Group's own 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. 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.

4. We take note of the GAC advice on the matter in a manner that effectively takes the status and immunities of IGOs into account. As the Board is aware, 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 that have already been afforded to the Red Cross provide one possible model to replace the temporary protections currently in place.

5. A DNS that minimises fraud and abuse is in the interest of everyone in the ICANN community, and not just IGOs. Most importantly, however, it is to protect the beneficiaries of the IGO's programmes, often vulnerable populations.

6. We call on the ICANN Board to resolve this long-standing matter, with a view to adequately protecting IGOs, their status and privileges and immunities, and ensuring their ability to effectively discharge their mandates.

7. We remain available to collaborate with ICANN, including the ICANN Board, in an effort to resolve this issue in the very near future.