



**Comment on GNSO Initial
Report on the IGO-INGO
Access to Curative Rights
Protection Mechanisms
Policy Development Process**

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Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter. The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. Promotes end-user confidence because it is a safe place to conduct business
2. Is competitive in the supply of registry and registrar and related services
3. Is technically stable, secure, and reliable.

Comment

The BC welcomes to opportunity to comment on the **GNSO Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanisms PDP**. (at <https://www.icann.org/public-comments/igo-ingo-crp-access-initial-2017-01-20-en>)

We thank the working group for their extremely thoughtful and comprehensive efforts, which are reflected in the lengthy initial report. With over 100 pages and more than 200 footnotes, the Initial Report is demonstrative of the level of effort and professionalism embodied within and by the WG, as was its decision to halt in place and seek the input of a recognized expert on international law in regard to the central issue of the recognized scope of IGO immunity in the context of domain name disputes. Moreover, such high quality outputs, developed in a bottom-up method reaffirm the effectiveness and legitimacy of the multi-stakeholder model.

In the Initial Report, the WG has laid out five specific recommendations. **The BC supports all five of the recommendations**, particularly because they recommend necessary adjustments and enhancements of existing UDRP and URS practice that will enable IGOs and INGOS to access these existing expedited and low-cost curative rights mechanisms to effectively respond to misuse of their names and acronyms in the DNS. Such an incremental approach is preferable, particularly for business users of the Internet, when compared to the alternative of developing a completely separate set of curative rights mechanism that would only be used by IGOs.

Creating additional rights protection schemes that apply to only an extremely small subset of Internet users is impractical and would only be justified if the mutual jurisdiction appeals clause of current DRPs would always offend the degree of judicial immunity that is generally recognized for IGOs.

However, based upon the input of its legal expert, the WG properly concluded that there is no such universal absolute immunity for IGOs, and that the proper forum for adjudicating an IGO's immunity claim is a national court. This cautious approach is consistent with the principle that, while ICANN policies should recognize and respect existing law, ICANN has no authority to grant legal rights that go beyond contemporary law.

Likewise, as both the UDRP and URS are supplements to and not substitutes for litigation, ICANN policy should never seek to deny the citizens of any jurisdiction access to courts in order to adjudicate their statutory rights unless such a result is required by other clear and universally recognized preemptive legal principles.

The specific WG recommendations that we support are:

1. Making no changes to the UDRP or URS to accommodate INGOS. INGOS are nongovernmental, private organizations and as such have no claim to any jurisdictional immunity; they presently

enjoy ready access to the UDRP and URS to protect their trademarked names and acronyms. After the WG reached its preliminary conclusion on this matter it requested a change in its Charter to eliminate the reference to INGOs, and the GNSO Council subsequently approved that narrowing.

2. Allowing an IGO to base its standing to file a UDRP or URS on either trademark rights, the same basis as for any other party, or in the alternative upon demonstration that it has complied with the simple communication and notification to WIPO prerequisite for gaining the protections for its names and acronyms in national trademark law systems in accordance with Article 6ter of the Paris Convention. This recommendation eliminates the need for IGOs to file national trademark applications before seeking UDRP/URS protection. More important, the list of IGOs that have asserted their Article 6ter rights is broader than the list for which the GAC has sought access to CRP, so this recommendation offers expanded access to CRP for IGOs. Finally, we note that Article 6ter protections are recognized not only by all nations that have signed the Paris Convention but also by all members of the World Trade Organization.
3. While not recommending any specific changes to the substantive grounds under the UDRP or URS upon which a complainant may file and succeed on a claim against a respondent, the WG nonetheless recommended that UDRP and URS panelists should take into account the limitation enshrined in Article 6ter (1) (c) of the Paris Convention in determining whether a registrant against whom an IGO has filed a complaint registered and used the domain name in bad faith. This recommendation will align the scope of Article 6ter protections with its use as a basis for IGO standing.
4. Clarifying that an IGO may avoid any concession on the matter of jurisdictional immunity by electing to file a UDRP or URS through an assignee, agent or licensee. This clarification respects the views of some IGOs in regard to the question of immunity. This recommendation also properly states that, in the rare circumstance in which a losing registrant elects to exercise its legal right to appeal to a court of mutual jurisdiction under applicable statutory law, any claims of jurisdictional immunity made by an IGO in respect of a particular jurisdiction will be determined by the applicable laws of that jurisdiction. Given that the determination of an immunity claim will depend on a wide variety of factors including the applicable laws of that jurisdiction, the treaty or charter basis of the IGO, the accepted analytical approach exercised by the jurisdiction's courts, and the particular facts and circumstances of the matter in dispute, determination of the immunity claim by the court is the only way to proceed as it would be impossible and improper for ICANN to assert a blanket rule that predetermines the outcome for every IGO in every potential dispute. (In regard to what should occur when an IGO successfully asserts its immunity claim we prefer Option 2, as discussed in more detail below).
5. In regard to GAC advice concerning alleviation of the cost burden upon IGOs that seek to utilize the UDRP or URS, the WG correctly determined that the propriety and creation of any subsidy mechanism was beyond the scope of its Charter and the GNSO's authority relating to budgetary matters. Therefore, it properly recommended that ICANN as corporate entity should investigate the feasibility of providing IGOs and INGOs with access to the UDRP and URS at no or nominal cost.

The BC acknowledges that IGOs generally and the "Small group" in particular have placed significant emphasis on the jurisdictional immunity issue in seeking creation of new and wholly separate curative rights processes that would deny registrants any appeal right to a national court with proper jurisdiction. However, given that the WG's legal expert provide no support for such sweeping immunity claims, we firmly believe that any solutions relating to this issue can be adequately addressed through narrow

enhancements to the existing mechanisms rather than through the unjustified creation of wholly new proceedings and assertions of unsupported legal principles. Overall, we believe that the WG recommendations will provide IGOs with ready access to the existing low-cost and expedited alternatives to litigation embodied in the UDRP and URS, and that their adoption will substantially enhance the ability of IGOs to protect their names and acronyms in the DNS.

As noted above, the BC is generally supportive of the attempts made by recommendation 4 to seek an acceptable resolution to the jurisdictional assertions of IGOs within the context of contemporary international law. In those rare instances in which a losing registrant seeks judicial appeal and the IGO subsequently successfully asserts its immunity to the court's jurisdiction, our preference is for Option 2 as set forth in recommendation 4; that is, the decision rendered against the registrant in the predecessor UDRP or URS may be brought before a to-be-determined arbitration forum for de novo review and determination.

It is important to note that it is only within this very narrow circumstance of a complainant IGO's successful assertion to a court of its judicial immunity in which we would countenance compelling a domain registrant to submit to arbitration as an appeals mechanism, and this position should not be viewed as setting a broader precedent. If the WG is swayed by public comment to adopt Option 2 then it will be extremely important that its eventual implementation rest upon carefully balanced selection of an arbitration forum and applicable rules for the de novo determination. The BC takes this position notwithstanding the legal expert's opinion that "it may seem more appropriate to force an IGO to abide by a judicial process, given that it has elected to initiate UDRP proceedings, than to force a domain-name registrant to accept any alternative" (p.89)

Nonetheless, Option 1 would effectively compel an IGO to waive its (potentially valid) claim of jurisdictional immunity after prevailing in a UDRP lest successful assertion of that claim result in a return to the status quo ante and leave it without any practical ability to halt the infringement and harmful misleading acts that had been found to exist in the initial decision, resulting in a right without a remedy. The BC remains open to the input of affected IGOs on this matter and hopes that they will take advantage of the comment period. In selecting an optimal way forward, we urge the WG to carefully review all comments and to be mindful of the potential impacts on time and cost to resolution, as well as the necessity to assure that the CRP provided to IGOs can be utilized in a practical matter that is respectful of valid immunity claims.

Although the GNSO Working Group put forth this Initial Report for public comment, we also feel compelled to comment on certain procedural concerns related to this matter. ICANN's Bylaws make clear that the GNSO is the gTLD policy development body for ICANN. ICANN policy staff support but do not direct the path and conclusions of GNSO-Chartered WGs. The GNSO Council considers a WG's final report and recommendations and then forwards those it approves to the ICANN Board for further action. The GAC has the ability to provide whatever advice it wishes to the Board concerning such recommendations, and the Board is required to respond if the GAC provides consensus advice. .

While these proper roles are clearly evident from review of ICANN's bylaws, the BC is aware of and remains concerned that ICANN's Board, in conjunction with the GAC and the IGO "small group", has engaged in non-transparent meetings relating to IGO policy issues in gTLDs for the past two years absent GNSO participation. More disturbingly, those discussions related not only to the matter of permanent protections for IGO names and acronyms in new gTLDs, which has been the subject of conflicting GNSO recommendations and GAC advice for some time, but also to the CRP issues that are the focus of the ongoing WG that produced the Initial Report we are presently commenting upon.

Those discussions did not reach any consensus agreement, and last October the Board forwarded the IGO “small group” recommendations (contained in Annex F of the Initial Report) for GNSO consideration absent any formal Board endorsement. While it was not obliged to, the WG gave respectful and detailed consideration to the Small Group Proposal (as discussed on pp.33-39 of its Report) and the BC endorses its treatment of that Proposal and its assertion that its “preliminary recommendations strike the necessary balance between accommodating IGOs’ needs and status, and the existing legal rights of registrants” (P. 39).

We note that the Board, Council, and GAC have now formed a new discussion group slated to engage in a facilitated discussion of outstanding IGO issues. The BC notes that the ultimate responsibility for resolving GNSO policy recommendations and conflicting GAC advice lies with the Board. Nonetheless, we are hopeful that the dialogue within that discussion group can illuminate issues and narrow differences and thereby lead to a successful resolution of longstanding disagreements regarding the matters of protections for the Red Cross/Red Crescent organizations and the permanent protections to be afforded IGO names and acronyms in new gTLDs.

However, as the matter of IGO access to CRP is still being considered by a GNSO-chartered WG it would be absolutely inappropriate, and at complete odds with ICANN’s Bylaws, to have that discussion group engage in any activity that might be characterized as an attempt to negotiate this matter separate and apart from the activities of the WG that has responsibility for it. We therefore urge concerned GAC members and IGOs to file their own comments with the WG as that is the proper way to provide input and seek acceptable resolution at this stage in an ongoing policy development process.

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This comment was drafted by Jay Sudowski and Andy Abrams.

It was approved in accord with our charter.