

# The ICANN GNSO “Business Constituency”



## ICANN Business Constituency Comment

on

### Final Report from the EPDP on Specific Curative Rights Protections for IGOs

28-Jan-2023

#### 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 BC 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; and
3. Is technically stable, secure and reliable.

#### General Comment on Final Report from the EPDP on Specific Curative Rights Protections for IGOs<sup>1</sup>

The BC is pleased to submit its comment on the 5 policy recommendations from the GNSO’s EPDP on Specific Curative Rights Protections for IGOs.

#### Important and Complex Questions

In considering the policy recommendations, the ICANN Board’s deliberations should be conducted against the backdrop of the complex and important question that was originally asked of the EPDP by the GNSO<sup>2</sup>, namely;

*“Whether an appropriate policy solution can be developed that is generally consistent with the first four recommendations from the GNSO IGO-INGO Access to Curative Rights PDP and:*

- *accounts for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances;*
- *does not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction;*
- *preserves registrants’ rights to judicial review of an initial [Uniform Domain Name Dispute Resolution Policy or Uniform Rapid Suspension] decision; and*
- *recognizes that the existence and scope of IGO jurisdictional immunity in any particular situation is a legal issue to be determined by a court of competent jurisdiction.”*

---

<sup>1</sup> ICANN Public comment page at <https://www.icann.org/en/public-comment/proceeding/final-report-from-the-epdp-on-specific-curative-rights-protections-for-igos-28-11-2022>

<sup>2</sup> <https://gns0.icann.org/en/council/resolutions/2020-current#202001>

### The BC Continues to Support the Current and Successful UDRP Framework for IGOs

As previously stated in the BC's Comment on IGO-INGO Access to Curative Rights Protection Mechanisms Policy Recommendations for ICANN Board Consideration,<sup>3</sup> the UDRP recently celebrated its 20th anniversary and has been widely credited as an effective tool for dealing with clear cases of cybersquatting. Also as previously stated by the BC in its Comment, the original IGO Working Group considered IGO and INGO access to the UDRP and URS and determined that "the UDRP and URS could be satisfactorily used by IGOs and INGOs to address clear cases of cybersquatting" and that some had even "done so to-date", although such cases are extremely rare. Accordingly, the BC wishes to re-emphasize its original Comment that it continues to "support the existing UDRP and URS framework for IGOs" without the need "to conceive, develop, and implement a separate rights protection mechanism for IGOs."

### Phase 2 of the RPM Working Group Should Examine the Proposed Polices

Given that the UDRP has successfully dealt with tens of thousands of abusive domain name registrations over the course of its 22+ year history, any adjustments to the UDRP to address participation by IGOs as recommended by this EPDP, should nonetheless undergo further expert review and consideration within the Phase 2 RPM Working Group, as that is the body with contemplating how any such adjustments can and should work within an already successful RPM regime.

The BC previously stated in its Comment<sup>4</sup> that "examination of the [access to UDRP and immunity of IGOs issue] should be addressed within a dedicated small group under the umbrella of the RPM Working Group where hopefully a solution may be found which satisfies all stakeholders". Notwithstanding the August 2021 procedural decision of the GNSO Council to continue IGO curative rights work via this EPDP, the BC continues to see value in subsequent expert review and consideration of EPDP recommendations within the RPM Working Group in Phase 2. Otherwise, there is risk that well-intentioned revisions to the UDRP to address the discrete issue of IGO participation, could inadvertently result in destabilization of the to-date successful practice, procedure, and case law of the UDRP. Therefore, the BC recommends that the RPM Working Group during Phase 2, review and consider how the current Proposed Recommendations or any subsequent Final Recommendations work along with the existing UDRP for overall internal consistency.

### **Final Recommendation #1: Definition of IGO Complainant**

Subject to expert review and consideration within the Phase 2 RPM Working Group as aforesaid, the BC **supports** Final Recommendation #1 as it is consistent with our previous position in favor of further "assist[ing] IGOs in accessing their existing rights under the existing UDRP and URS" and that "IGOs should be able to access the UDRP even without a registered trademark". The BC therefore

---

<sup>3</sup>[https://www.icannbc.org/assets/docs/positionsstatements/2019/2019\\_08August\\_20%20BC%20comment%20on%20IGO-INGO%20access%20to%20curative%20RPMs.pdf](https://www.icannbc.org/assets/docs/positionsstatements/2019/2019_08August_20%20BC%20comment%20on%20IGO-INGO%20access%20to%20curative%20RPMs.pdf)

<sup>4</sup>[https://www.icannbc.org/assets/docs/positionsstatements/2019/2019\\_08August\\_20%20BC%20comment%20on%20IGO-INGO%20access%20to%20curative%20RPMs.pdf](https://www.icannbc.org/assets/docs/positionsstatements/2019/2019_08August_20%20BC%20comment%20on%20IGO-INGO%20access%20to%20curative%20RPMs.pdf)

supports the proposed inclusion of a definition of “IGO Complainant” and the accompanying proposed explanatory text regarding how an IGO may show rights in a mark.

### **Final Recommendation #2: Exemption from Submission to Submit to “Mutual Jurisdiction”**

The BC **supports** Recommendation #2, which exempts IGO Complainants from Mutual Jurisdiction, but also alerts Respondents to their right to either challenge a decision in court or to agree to binding arbitration.

The BC originally proposed in its previous Comment on the Initial Report<sup>5</sup>, that Section 3(b)(xii) of the UDRP Rules could be amended as follows:

*“State that Complainant, without prejudice to an IGO Complainant’s privileges and sovereign immunity, will submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction.”*

In other words, under the BC’s proposal the IGO would make it clear that it submits to a specific Mutual Jurisdiction, but only subject to its arguments regarding privileges and immunities which it can raise in court. This is an important distinction from the current proposal. The BC understands that IGOs may be reluctant to expressly submit in advance to a court in the event that their arguments regarding privileges and immunities are dismissed. Nevertheless, that is an unavoidable reality given that if a court determines that an IGO is subject to the court’s jurisdiction, then the matter will proceed in that court.

### **Final Recommendation #3: Arbitral Review following a UDRP Proceeding**

The BC **qualifiedly supports** Final Recommendation 3, subject however, to the caveat that the final structure of the arbitration system must be determined before the BC can agree to it. The principles set out at Annex A to the Final Report appear promising and generally agreeable, but the precise details of the arbitration system must be finalized in a satisfactory manner for all parties before arbitration can be fully supported.

As previously stated by the BC in its Comments on the Initial Report, “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...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.”

Nevertheless, the features and characteristics of an arbitration system are not mere details but add up to whether the system is fair and can be trusted by both registrants and IGOs. If not, then arbitration cannot be considered an adequate substitute for court.

---

<sup>5</sup><https://itp.cdn.icann.org/forms/publiccomment/submission/BC%20comment%20on%20IGO%20Initial%20Report.pdf>

#### **Final Recommendation #4: Arbitral Review following a URS Proceeding**

The BC **qualifiedly supports** Final Recommendation 4. The BC repeats and relies upon its above comment on Recommendation #3 with regard to the UDRP, as applied to the URS.

#### **Final Recommendation #5: Applicable Law for Arbitration Proceedings**

The BC **supports** the reasonable approach to selection of applicable law in the event of arbitration. The BC firmly believes that choice of law and forum selection under both the UDRP and URS generally need not remain subject to gaming by bad actors who intentionally use registrars or proxies in, and/or false registration data reflecting, jurisdictions that lack any meaningful anti-cybersquatting legislation. For that reason, and subject to subsequent recommendations from Phase 2 of the RPM Working Group to help prevent such gaming, the BC specifically supports the recommendation that, “[i]n all cases, where neither law provides for a suitable cause of action, the arbitral tribunal shall make a determination as to the law to be applied in accordance with the applicable rules.”

---

This comment was drafted by Zak Muscovitch, Jay Chapman, and Andy Abrams.

It was approved in accord with our Charter.