

4. NOTICE OF OBJECTION SYSTEM AS A NEW SOLUTION

At a very late stage of the prior IGO PDP, in June 2018, too late for the working group to really consider it, I discovered that an elegant solution exists which completely eliminates the role reversal flaw discussed above. This was posted to the mailing list on June 7, 2018:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001226.html>

which documented a procedure within the rules of the "Civil Resolution Tribunal" an online tribunal that handles small claims and strata (condominium) disputes in the British Columbia, Canada.

In particular, they have a "Notice of Objection" system as their appeal mechanism:

<https://civilresolutionbc.ca/how-the-crt-works/how-the-process-ends/#what-if-i-dont-agree-with-a-final-decision>

If you disagree with the CRT's final decision on a small claims matter, including a default decision, you can pay a fee and file a Notice of Objection with the CRT. The Notice of Objection must be filed within 28 days after a party receives a CRT decision. The CRT cannot issue an order in a small claims dispute until the deadline for filing a Notice of Objection expires. **If a Notice of Objection is filed, the CRT decision is not enforceable. If any party wants to continue any of the claims that were included in the dispute, that party must file a Notice of CRT Claim in the BC Provincial Court.** [emphasis added]

Essentially, if one pays the appropriate fees and files a "Notice of Objection", the decision is not enforceable, and further court action (in an established offline court) would be required.

Note that **I did not invent this procedure**, but immediately recognized that it eliminated the "role reversal" in its entirety! It's a real process designed by a real jurisdiction in the world.

In a UDRP/URS context, this means that there'd be no reversal of the roles of plaintiff/defendant in the court, compared with the complainant/respondent in the UDRP/URS procedure. Thus, the "quirk of process" involving IGOs discussed in prior section, where an IGO can become a defendant in the courts due to the role reversal and attempt to assert immunity, simply doesn't exist under the Notice of Objection system. Instead, the IGO would continue to have their "natural role" as Complainant in the courts, as is the case had the UDRP/URS never existed.

The UK lack of "cause of action" issue mentioned in the prior section, caused by the role reversal, also doesn't arise, as the trademark holder would be the complainant in the court case (if the UDRP/URS decision became not enforceable).

To see this in tabular form, it would look like this:

SCENARIO AT COURT AFTER "NOTICE OF OBJECTION"	
Trademark Holders (or IGOs) with a Dispute	Domain Name Registrant
Plaintiff in Court	Defendant in Court
<ul style="list-style-type: none"> • has lost the UDRP/URS but has exercised a "Notice of Objection", and decided to "appeal" the result, OR has won the UDRP/URS, but the domain name registrant raised a "Notice of Objection", setting the decision aside as not enforceable [regardless, the TM holder or IGO is always going to be the Plaintiff in court] • asserts that the domain name owner is a cybersquatter, and seeks damages and/or transfer of the domain and/or other remedies • as plaintiff, naturally submits to the jurisdiction of the court • if an IGO, the IGO naturally must give up its immunity, as the initiator of the dispute in court • plaintiff has chosen the specific court (country, state, etc.), but must pick one that has jurisdiction over the domain name and/or defendant 	<ul style="list-style-type: none"> • has won the UDRP/URS but the other side has exercised a "Notice of Objection" OR has lost the UDRP/URS, but has itself raised a "Notice of Objection" setting the decision aside as not enforceable [is generally going to be the defendant] • denies that they are cybersquatting, and has all the defences in law available to it to counter any statement of claim • possesses the domain name at the start of the case • can potentially counterclaim, if there is a larger dispute than just the domain name

It's essentially the same as the "Baseline Scenario"!! What's truly **magical**, though, is that you **don't require any mutual jurisdiction clause when invoking the UDRP/URS**!! That clause can be taken out in its entirety, because it'll be the Trademark Holder (or IGO) filing the dispute in court (it would make no sense for the domain name owner to file in court as plaintiff, as they can simply set the adverse decision aside by invoking the Notice of Objection, making the loss not enforceable).

Furthermore, to prevent "gaming" of the notice of objections, various court costs can be assessed in the courts later on, if the party who filed the notice of objection did no better in the courts:

If the **person who filed the Notice of Objection does not have a better outcome** in the BC Provincial Court than in the CRT's decision, the BC Provincial Court may **order that party to pay a penalty to the other party** [emphasis added]

What happens when you eliminate the mutual jurisdiction clause, and instead replace it with a "Notice of Objection" system"? Besides solving the quirk of process and cause of action issues, **it means that an IGO can invoke the UDRP/URS process without first having to give up its immunity!**

This is huge, because for the **99% of domain disputes** where the UDRP/URS results are accepted by both sides, and there's no further court action or "appeal" desired, the IGO has **protected and preserved its immunity**. But, the domain name owner is protected too, because in the rare cases that court action is needed, the results can be set aside via the Notice of Objection, and further court action can proceed (with the IGO or TM holder as plaintiff, and the domain name owner as defendant). Indeed, what's great for IGOs is that they can **decide at that later date**, after the "Notice of Objection" has been exercised, whether or not to go any further. They might choose to waive their immunity and go to the courts. Or they might decide that it's not important enough to them (after weighing their options having seen the domain owner's defence of the domain), and cease the dispute at that point.

As someone who went through all the transcripts of the calls carefully, this is actually something expressly desired by the IGOs! On pages 19-20 of the very first meeting (February 22, 2021), Alexandra Excoffier of the OECD said:

https://gns0.icann.org/sites/default/files/policy/2021/transcript/transcript-igo-work-track-22Feb.en_.pdf

Maybe two little points on small ways. It says that we cannot create a specific new dispute resolution procedure, but from my understanding we can tweak, a little bit, the UDRP. And one of the things ... In terms of immunities, there's one thing to say that after the process is over and if there's an appeal to national courts, the IGO will

have to essentially decide whether or not to waive immunities, or a court decides if we insist in our immunities.

But there's something preemptive, as well. **And the way that UDRP is phrased currently, it's [that] we have to decide this not at the time of the appeal, but at the time of actually deciding whether or not to launch a process because we have to actually decide to waive immunities in order to do the process.** And I think this is a small tweak that can be done which would allow the losing party to appeal; at the same time not require the IGO to waive its immunities at that outstart.

...

That's all I wanted to say. A suggestion I hope that we can discuss around not having to waive immunities from the star[**sic; start**]. That will be already a good start for us. Thank you so much. [emphasis added]

Ms. Excoffier is describing the **exact feature** that the "Notice of Objection" has, namely that they can file the UDRP/URS without giving up their immunity at the start (because there's no mutual jurisdiction clause needed at all in a Notice of Objection based system, given that it's the TM holder or IGO that is always going to be the plaintiff in court when rulings of the UDRP/URS are not enforceable through invocation of the Notice of Objection). With a Notice of Objection system, the IGO can defer the decision as to waiver of immunity to such a time that the Notice of Objection has been exercised. And for 99% of cases, pragmatically it means they'll have gone through the UDRP/URS and not have had to waive immunity at all. In the 1% of cases where Notice of Objection is raised, the IGO can make a choice at that point whether or not to waive immunity (if the domain name is important enough, and the benefits outweigh the legal risks, they might decide to waive it -- it's their choice).

I personally put out an olive branch directly by email to Mr. Passaro of the OECD at the time of the first working group was active in 2018 to raise this as a possible solution, and we did have fruitful discussions. I strongly believe that this could form the basis for a global solution, and I didn't invent it --- it's modeled on a procedure created by others in an established legal system. While IGOs are obviously trying to convince ICANN to tilt the scales in their favour by creating an uneven playing field that advantages them via arbitration, this "Notice of Objection" system keeps things entirely neutral for all sides, and recognizes that ICANN isn't the place to create "new law", but instead it is the national courts that have supremacy. For IGOs, there's a particular advantage in that there would not need to be a "mutual jurisdiction" clause at the time of the filing of a UDRP/URS, because it's no longer necessary. i.e. the Notice of Objection means the decision is unenforceable, so then it's entirely up to the IGO to decide whether they wish to pursue the dispute in court (as the initiator of the court action). IGOs wouldn't have to risk others dragging them into a court via the

inherent waiver of immunity from the current mutual jurisdiction clause, in other words.

Mr. Passaro's main concern appeared to be the potential "gaming" by a malevolent domain owner (i.e. a true fraudster), if the cost of the "Notice of Objection" was too small. But, I believe a suitable figure could be determined that would fully address his concerns (on the order of several thousand dollars at risk -- it cannot be free, to ensure that potential legal costs are also covered if the objector simply doesn't show up to defend in court).

I think to be fair, the minimum level of the Notice of Objection fee should be the level of court costs to file a case in the domain owner's country (or an average globally, to simplify). So, that would be on the order of a few hundred dollars. At a maximum level, it should reflect the greater of the costs of the UDRP/URS procedure and the legal costs of filing a case (i.e. paying for lawyers to draft a statement of claim), so perhaps a few thousand dollars. Advocates on both sides of the debate (on one side, who want to ensure court access for the poorest domain name registrants who still have a legitimate case, but on the other side want to make sure that notice of objections are not used too often to force court action) can find a number that everyone can live with. Since the domain owner would be punished through costs orders if they don't have a better outcome in the courts, it would not be a decision taken lightly to invoke the Notice of Objection, having seen the decision in the UDRP/URS.

Indeed, one would expect mainly the most egregious decisions (like the ADO.com case) or the highest value domain names to be fought over in courts via a Notice of Objection. And if you go back to the chart in Figure A above, **those are exactly the kinds of cases that belong in the courts!**

On a pragmatic level, if IGOs limit their UDRP/URS disputes to the "criminals" they claim to be after (i.e. phishers, true cybersquatters, etc.), they have little fear that those domain name owners would ever invoke a notice of objection, as it would mean that authorities would be "on to them". (i.e. they'd have to show up in real court to defend the case, and the police could nab them; if they didn't show up, they'd lose by default, including losing any fees/security deposit they put up when invoking the notice of objection).

To see that this system is robust, suppose that, despite exercising the "Notice of Objection", the domain owner still tries to sue the IGO in court?

(Or they even try to sue in court before the UDRP/URS is decided) What would happen? Since the IGO hasn't agreed to mutual jurisdiction, the IGO can fully attempt to assert any immunities it might have in court, if the IGO was ever a defendant. The Notice of Objection system has not prejudiced the IGO's legal rights and in particular any claimed immunity.

All in all, this is an elegant solution that is a win-win for both IGOs and domain name registrants, and I hope that it will be seriously considered by the working group. Potentially, it is best suited for phase 2 of the RPM PDP (and can be adopted for the URS too simultaneously), but it can be accepted within this working group and be forwarded to the new working group as an acceptable outcome.