ARBITRATION
AND
MEDIATION CENTER

WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

October 22, 2021

Re: WIPO Arbitration and Mediation Center observations on *Initial Report from the EPDP on Specific Curative Rights Protections for IGOs*

The following observations are submitted to assist the IGO EPDP Team's review of its Initial Report and in particular to assist where the Initial Report sets out different options for consideration.

The growing need for protection

The 2001 Report of the Second WIPO Internet Domain Name Process illustrates the underpinnings for this effort: "The registration and use of domain names to create misleading associations with the duly constituted international authorities for public health, labor practices, peace-keeping operations, nuclear test bans, the containment of the proliferation of chemical weapons, trade disciplines, children's rights, refugees, AIDS and so forth is unacceptable, offensive to numerous public policies established by the international community and conducive to undermining the credibility and reliability of the DNS."

It is therefore important that this work track recognizes that IGOs are unique institutions created by governments under international law to undertake global public missions, and that as such, IGO identifiers require tailored protection by ICANN in keeping with the public interest behind their causes.

As an example of such need, a 2007 ICANN Staff Report notes how abusive registrations of the names and acronyms of IGOs "were used in millions of fraudulent e-mail messages to solicit [tsunami relief] donations from unsuspecting individuals."

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In another example, IGO identifiers were abused during the Ebola crisis.[1]

More recently, in the context of a World Health Organization (WHO) Solidarity Response Fund for the COVID-19 crisis, a dedicated webpage has been set up to warn of the occurrence of phishing and malicious emails appearing to be from the WHO.[2]

In seeking protection from abuse, IGOs do not seek to hamper legitimate uses of the Internet Domain Name System. Illustrating a spirit of compromise, a 2016 letter from the United Nations Secretary-General stated (emphasis added):

> There is a sure way to address this issue: preliminarily blocking the *illicit* registration of domain names corresponding to IGO names and acronyms. The Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit corporation, administers the internet Domain Name System (DNS). IGOs have repeatedly appealed to ICANN to protect their names and acronyms in the DNS. Over the last four years, a coalition of IGOs has sought from the ICANN Board safeguards that reflect the protection that IGO names and acronyms enjoy under domestic and international laws. *At the same time, IGOs made it clear that they would not take issue with legitimately sought third-party domain name registrations which would not pose risks to IGO missions*.[3]

Recommendations and options presented in the Initial Report

We support the progress reflected in the proposed IGO definition, and the waiver or elimination of the mutual jurisdiction clause.

We submit however that the Initial Report has not adequately accounted for the reality that arbitration is a globally-accepted means of resolving disputes as an alternative to court litigation. This is not only a matter of the comparative efficiency of arbitration, but also of its suitability as a process designed to cover multi-jurisdictional disputes.

Indeed, ICANN itself employs arbitration in its Registry and Registrar Accreditation Agreements (Articles 5 and 5.8 respectively), whereby the former specifically accounts for IGO privileges and immunities. The ICANN Registry Agreement provides for arbitration (following mediation) as the exclusive means of resolving disputes. In the case of the Registrar Accreditation Agreement, while the option of going to court is left open, *either party may elect instead to have the dispute resolved by arbitration*.

As other examples within the DNS framework, registrar GoDaddy invokes arbitration in its Registration Agreement,[4] and websites such as those at “bobbleheads.com” and “peoplefinder.com” employ arbitration as a means of resolving disputes. In the case of the former,

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[1] https://bits.blogs.nytimes.com/2014/10/24/malicious-ebola-themed-emails-are-on-the-rise/?_r=0

[2] https://www.who.int/about/cyber-security

[3] https://mm.icann.org/pipermail/council/attachments/20181022/73dc1f76/UNSGIGOLetter-0001.pdf

[4] https://www.godaddy.com/legal/agreements

users agree to waive any rights to a trial by jury, and instead agree to submit any such dispute to binding arbitration.[5] In the case of the latter, the Terms of Service stipulate that arbitration is the default option for resolving disputes, but that the parties can opt out within 30 days.[6]

If the EPDP effort continues to fail to recognize the tailored efficiency and multi-jurisdictional functionality of arbitration as an alternative to court, at minimum an arbitration-as-a-default with an opt-out provision should be considered.

Such option could be complemented by providing information about the benefits of arbitration as a party-driven process compared to the potential time and cost implications of court litigation (all the more when questions of immunities would be involved).

Indeed, given their status under international law, IGOs are expected to invoke their recognized immunities when faced with attempts to involve them in national court litigation. The discussion of the issue of arbitration or courts in the context of the Initial Report should take account of the likelihood that IGOs prevail on this immunity defense.

It is furthermore difficult to understand how, especially if provided with information about the time and expense of court and the IGO immunities issues involved (as illustrated in the flow chart in the Initial Report), a registrant which nevertheless tries its hand in court and fails, should be still permitted to then invoke arbitration.

The EPDP team will recall that the ICANN-commissioned Swaine Memo (p. 28) observes that "[t]he way that IGOs typically resolve the tension between immunity and judicial processes is to establish a non-judicial dispute resolution process, usually consisting of some form of arbitration."

Privileges and immunities being at the core of their independence, IGOs have no room to abandon this internationally-recognized legal principle. Providing for arbitration respects IGOs' international status while striking a fair balance in resolving disputes.

Regarding the choice of law question, it is common that the arbitral tribunal would make a determination in the absence of party agreement. Examples are found in the Arbitration Rules of numerous established institutions, such as the ICC[7] and UNCITRAL.[8]

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[5] https://www.bobbleheads.com/terms-and-conditions

[6] https://www.intelius.com/terms-of-use/

[7] The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

[8] The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

In conclusion

Beyond these legal observations and suggestions, the overarching issue here is that were the EPDP to insist on jurisdiction of courts, this would seriously undermine the utility of the mechanism under consideration. As IGOs cannot afford to enter into court litigation with infringers, the serious abuses summarized in the first paragraphs above would continue unchecked. We know that this is not the intention of the EPDP and thus invite the EPDP team's serious reflection on this vital point.

Thank you for giving this longstanding file your effective consideration.

These observations are posted on the WIPO website at:
www.wipo.int/amc/en/domains/resources/icann.

Yours sincerely,

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