

NOTES FOR FOLLOW UP DISCUSSION – IGO-INGO ACCESS TO CURATIVE RIGHTS PROTECTION
MECHANISMS PDP WORKING GROUP

Updated 2 August 2016

Background:

- Several policy options have been identified – the WG agreed to discuss all the options before deciding on whether to amend or tweak the UDRP and/or the URS.
- While there was some support as a result of a straw poll amongst WG members on the call for either amending or tweaking the UDRP and/or the URS, there was no support for creating a new and separate dispute resolution procedure. Several WG members also supported not changing the policies and procedures at all.
- The WG members also recognized the possible implications of there being a resolution of the outstanding issue concerning IGO acronym protections as a result of ongoing discussions between the GNSO Council, the GAC and the ICANN Board – however, it is not clear at this point in time what the timeline or result of that discussion will be.
- The WG will aim to complete its preliminary recommendations for publication in its Initial Report for public comment before ICANN57 – a draft skeletal outline will be produced for the WG to review before the full text of a draft Initial Report is developed.

Policy Options:

- A. No change to Mutual Jurisdiction clause in current procedures, but add ability for IGO to assign its [substantive legal \(e.g. trademark\) rights to another party \(but note attendant risk of assignment being ineffective\), or assign its right to sue \(i.e. file a complaint\), or appoint an agent to file on its behalf, or have a licensee do so](#)
- B. Amend current procedures by adding an arbitral appeal mechanism for IGO domain disputes – [will need to discuss whether the UNCITRAL Rules are appropriate for this purpose](#)
- C. No change to Mutual Jurisdiction clause in current procedures, but add ability only for particular IGOs to opt for arbitral appeal instead – most likely, the UN and its specialized agencies – [this would be based on the international conventions applicable to the UN and absolute immunity in at least some jurisdictions](#)
- D. Rewrite Mutual Jurisdiction clause
e.g. “In the event the action depends on the adjudication of the rights of an IGO that would, but for [the Mutual Jurisdiction] provision, be entitled to immunity from such judicial process according to the law applicable in that jurisdiction, [as established by a decision of a court in that jurisdiction,] the challenge must be submitted instead for determination [by UNCITRAL in accordance with its rules].”
– [need to discuss the applicability of the bracketed language](#)

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- E. No change to Mutual Jurisdiction clause in current procedures, but clarify that standing to file for IGOs must be that the requisite notification to WIPO has been made pursuant to Article 6ter of the Paris Convention – [will need nevertheless to discuss the separate issue of what substantive legal rights \(Trademarks? Other?\) would form the legal grounds for complaint](#)

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Discussion:

The basic issue on the advisability of introducing an arbitral appeal mechanism:

- Would an arbitral appeal process be an effective and fair alternative to the ability to file in national court?

Considerations:

- A substantial number of UDRP decisions are overturned by subsequent adjudication, so any changes proposed cannot leave the respondent with no additional avenue of redress
- WG may need to consider if changing immunity rules for IGOs in UDRP/URS would have ramifications elsewhere e.g. TM-PDDRP (consult with RPM Review PDP Working Group?)
- The pool of likely cases is probably very small – what, really, are the likely harms of providing some sort of avenue of administrative appeal?
- Some domain names are extremely valuable – unless we get rid of the UDRP, why would a registrant agree to give up rights to seek protection in a national court in favor of binding arbitration or other non-judicial process?

Additional Suggestions:

1. Consider a tweak to the procedures rather than replacing the right to appeal to a national court – if a winning IGO (in a UDRP/URS process) is brought to court by the losing respondent, allow for the result of the IGO's successfully winning a claim of immunity in that court to be the nullification of the UDRP decision (i.e. result would be if UDRP/URS proceeding was never initiated).
 - a. But would this preclude the IGO from then proceeding to file a claim against the respondent in court itself?
 - b. [May need to consider legal implications of nullification on procedural rather than substantive grounds \(so to speak\)?](#)
2. Would it be better to create a Policy Guidance Framework (e.g. to clarify issues relating to standing, ability to file through an agent/assignment, etc.) rather than change the underlying policy?

- a. But note that a guidance document would not be enough to address the “trademark rights” substantive basis for the UDRP/URS – this may require actually amending the policy/procedure [and so may need to be decided only after the “substantive grounds” discussion has taken place](#)