

4. Deliberations of the PDP Working Group

4.1 Review of Existing Materials

The WG began its work with a review of the historical documentation and related materials on the topic. This included both the records of prior ICANN community work as well as materials from other sources (such as treaty texts and reports from international organizations, in particular, WIPO¹). To review these materials, the WG formed three Sub Groups – Sub Group A focused on the current state of the UDRP and URS², Sub Group B on the number of IGOs and INGOs that could come under consideration as well as the scope of their existing legal protections³, and Sub Group C on ICANN’s historic treatment of these two groups of organizations⁴. ICANN staff also conducted research on the existence of national trademark registrations in a number of jurisdictions for selected IGO and INGO names and acronyms⁵.

A partial list of the more significant documents and materials that were reviewed includes:

- The 2001 Final Report on the Second WIPO Internet Domain Name Process (also known as the “WIPO-2 Process”)⁶
- The 2003 WIPO Secretariat Paper on a Possible De Novo Appeal Mechanism for Country Names⁷
- The 2004 Final Report of ICANN’s Joint Working Group on the WIPO-2 Process
- The 2005 WIPO Paper on Legal and Administrative Aspects of Article 6ter⁸
- The 2007 GNSO Issue Report on Dispute Handling for IGO Names and Abbreviations⁹
- The 2007 ICANN Staff Report and Draft Text for a Dispute Resolution Process for IGO Domain Names¹⁰
- The 2013 Final Report of the PDP Working Group on Protection of IGO and INGO Identifiers in All gTLDs¹¹

In addition, the WG reviewed the GAC Communiqués and other GAC advice and correspondence that had been published concerning the issue of protection for IGO names and acronyms¹². ICANN staff also prepared several Briefing Papers and background notes on a number of external sources and reports to assist with the WG’s review and deliberations.

¹ See the WG’s wiki page at <https://community.icann.org/x/DrvhAg> for a compilation of these sources.

² Sub Group A has a wiki page at <https://community.icann.org/x/mRbxAg> showing its task list and status updates.

³ Sub Group B has a wiki page at <https://community.icann.org/x/mxbxAg> showing its task list and status updates.

⁴ Sub Group C has a wiki page at <https://community.icann.org/x/nRbxAg> showing its task list and status updates.

⁵ The scope of this limited initial research and lists of organizations can be viewed on the WG’s wiki page at <https://community.icann.org/x/wl4QAw>.

⁶ <http://www.wipo.int/export/sites/www/amc/en/docs/report-final2.pdf>.

⁷ http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=18680.

⁸ http://www.wipo.int/edocs/mdocs/sct/en/sct_15/sct_15_3.doc.

⁹ <https://gns0.icann.org/en/issues/igo-names/issues-report-igo-drp-15jun07.pdf>.

¹⁰ <https://gns0.icann.org/drafts/gns0-igo-drp-report-v2-28sep07.pdf>.

¹¹ <https://gns0.icann.org/en/issues/igo-ingo-final-10nov13-en.pdf>.

¹² These have been collated and can be viewed at <https://gacweb.icann.org/display/GACADV/IGO+and+INGO+Names>.

4.2 Status of Previous ICANN Work

The WG's review of the historical materials confirmed that the issue of appropriate handling of domain name disputes relating to IGO names and, especially, acronyms, has been a long standing one in both the ICANN and international multilateral community. For example, in 2003, an ICANN Joint Working Group comprising community members from the At Large Advisory Committee (ALAC), the Government Advisory Committee (GAC) and the GNSO had discussed options for handling domain name disputes involving IGOs, following the WIPO-2 Process. The Joint Working Group failed to reach consensus on any recommendations, and as a consequence no formal action was taken by the GNSO Council or ICANN on the matter. Subsequently, in 2007, a GNSO Issue Report on Dispute Handling for IGO Names & Abbreviations noted a number of possible methods for handling domain name disputes concerning IGO names and abbreviations. A PDP was, however, not initiated on the topic at the time, as the requisite number of GNSO Council votes for launching a PDP was not attained.

The topic of IGO names and acronyms, and more specifically, the question of appropriate protection for such identifiers in the domain name system, arose again during the development of the 2012 New gTLD Program expansion round. The Applicant Guidebook (AGB) for the Program did not initially contain specific protections for IGOs, although it provided for the ability of organizations meeting the existing criteria for a .int registration to file objections under the prescribed legal rights objection process. The AGB also contained provisions allowing organizations that owned trademark and other intellectual property rights in their names and/or acronyms to enter those identifiers into the new Trademark Clearinghouse and as a result participate in the Sunrise Registrations and Trademark Claims Notice protections offered through the Clearinghouse. These organizations could also access and use the new Uniform Rapid Suspension (URS) procedure, on the basis of their having ownership of a relevant trademark.

In June 2011, the ICANN Board directed that top-level protections for certain Red Cross and International Olympic Committee identifiers be included in the final AGB. In November 2012, second-level protections for certain Red Cross and International Olympic Committee identifiers were added. These protections were intended to be interim measures, applicable while the GAC and GNSO continued to develop policy advice concerning appropriate protections for these two INGOs at the top and second level. Subsequently, the Board granted temporary protection for a specific list of IGO names and acronyms provided by the GAC¹³, in response to advice from the GAC, again on an interim basis, to allow gTLDs approved under the 2012 New gTLD Program to begin launching while policy development work continued.

4.3 Review of Legal Instruments, Legal Expert Opinion and Other External Source Materials

Assisted by the reports of its three Sub Groups that reviewed the historical documentation on the topic, the WG came to the preliminary conclusion early on in its deliberations that there was no substantive

¹³ The GAC's list of IGOs was provided to ICANN in March 2013: <https://www.icann.org/en/news/correspondence/dryden-to-crocker-chalaby-annex2-22mar13-en.pdf>; the criteria for inclusion on the GAC list was noted here: <https://www.icann.org/en/news/correspondence/dryden-to-crocker-chalaby-annex1-22mar13-en.pdf>.

principled reason to accord any special treatment to INGOs in relation to either amendment of existing, or development of a new, dispute resolution process (including the international Red Cross movement and the International Olympic Committee, which had been specific subjects of analysis under a previous GNSO PDP). The Working Group's rationale for this decision was set out in detail in an annex to the Working Group's initial solicitation of input from all ICANN Supporting Organizations and Advisory Committees (SO/ACs), sent in December 2014¹⁴. The Working Group also presented this preliminary conclusion to the GNSO Council and the community, and received no objections from the Council, any SO/AC or the community generally. **The Working Group's agreed text for this preliminary recommendation, and its accompanying rationale, is set out in full as Recommendation #1 in Section 6, below.**

Following its decision to focus further discussions on IGOs, the Working Group moved on to consider the question of how to deal with the fact that not all IGOs possess national or common law trademark rights in their names or acronyms – in which case the IGO would not then have standing to file a complaint under the UDRP or URS. As further described in Section 6 (below), the Working Group determined, after substantial discussion, that standing to file can be demonstrated by those IGOs which have invoked the protections provided by Article 6ter of the Paris Convention on Industrial Property.

The Working Group notes that the potential applicability of Article 6ter was first raised by the IGOs in their initial request to ICANN for protection of their names and acronyms in the top and second level of the domain name system¹⁵. In their letter, the various IGO legal counsel that signed on to it had stated that international legal norms such as Article 6ter supported the targeted exclusion from registration by third parties of IGO names and acronyms (i.e. preventative protections). While this Working Group is concerned solely with the topic of curative protections for IGO names and acronyms, it nevertheless considered the applicability and relevance of Article 6ter to the issue.

The Working Group acknowledges that Article 6ter does not confer substantive legal rights, whether as trademarks or in other forms. Rather, it provides protection to IGO names and acronyms by requiring contracting States that are party to the treaty to prohibit third party use of those identifiers as trademarks in industrial or commercial activities, on the basis that such exclusion reflects the public status of IGOs and prevents confusion that would interfere with such status¹⁶. The Working Group considered, after substantial discussion, that for the limited purpose of demonstrating standing to file a UDRP or URS complaint, the protections afforded to IGO names and acronyms by Article 6ter can be viewed as sufficient for that specific purpose. **The Working Group's agreed text for this preliminary recommendation, the scope of Article 6ter and the requisite communication and notification procedure that must be followed to invoke its protections, are set out in full as Recommendation #2 in Section 6, below.**

¹⁴ See Annex A of the Working Group's letter to all ICANN SO/ACs, which can be found at <https://community.icann.org/x/T5gQAw>.

¹⁵ See the 13 December 2011 letter sent by the legal counsel of twenty-eight IGOs: <https://www.icann.org/en/system/files/files/igo-counsels-to-beckstrom-et-al-13dec11-en.pdf>.

¹⁶ See, e.g., http://www.wipo.int/edocs/pubdocs/en/intproperty/611/wipo_pub_611.pdf (BIRPI Guide to the Application of the Paris Convention, Bodenhausen (1968)); <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf> (WIPO Intellectual Property Handbook: Policy, Law, and Use, chapter 5); and <http://archive.icann.org/en/committees/JWGW2/WIPO2-note.pdf> (WIPO Briefing Note to ICANN, 2005).

Following from its conclusion on standing, the Working Group discussed the applicability of the other, substantive grounds of the UDRP and the URS to IGO complaints filed on the basis that standing is conferred by Article 6*ter*. The Working Group concluded that the main problem faced by IGOs in terms of the legal requirements of the UDRP and URS was essentially one of standing. The Working Group's analysis revealed no obstacle to an IGO's having to prove the other, substantive grounds under both procedures (i.e. that the respondent-registrant has no rights or legitimate interests in respect of the domain name at issue, and that the domain name has been registered and is being used in bad faith). Rather, the conduct that the UDRP and URS were designed to address included the type of abuse that IGOs had stated previously needed to be stopped. **The Working Group's agreed text for this preliminary recommendation and its observations on the scope of the UDRP and URS are set out in full as Recommendation #3 in Section 6, below.**

The Working Group's conclusions on the issues of standing and substantive grounds under the UDRP and URS also meant that, in relation to these questions, there was no compelling reason to create a separate dispute resolution process applicable only to IGOs.

The Working Group also considered at length a further challenge that may be faced by IGOs – the risk that agreeing to submit to the Mutual Jurisdiction clause of the UDRP and URS by filing a complaint will strip an IGO of any jurisdictional immunity it may enjoy in a particular national court. ICANN staff, assisted by several Working Group members, conducted research on the scope of IGO jurisdictional immunity in selected jurisdictions and under applicable international treaties. The Working Group also initially consulted Mr. Hans Corell, an international law expert, in relation to several preliminary questions on the matter¹⁷. As this initial consultation did not provide the Working Group with substantive conclusions, the Working Group requested that ICANN engage an external legal expert to provide it with a more detailed analysis. Following consideration of several candidates nominated by Working Group members in the legal community, the Working Group agreed that Professor Edward Swaine of George Washington University, USA, should be engaged as the external legal expert¹⁸.

The Working Group developed several detailed questions for Professor Swaine to respond to, focusing on a determination of the scope of international law concerning the jurisdictional immunity of IGOs (as distinct from the sovereign immunity of States). The Working Group believed that, in order for it to properly evaluate the need to either amend the UDRP or URS, or develop a new mechanism, to address the question of immunity, it needed to more fully understand whether there is a single universal rule in international law (whether through treaty or customary law) on the topic and its scope.

Professor Swaine delivered a preliminary synopsis to the Working Group at the end of January 2016. Following review of this document and Working Group discussion, including at the ICANN meeting in Marrakech in March 2016, Professor Swaine updated his report and provided a Final Memo to the Working Group in June 2016¹⁹. Subsequently, representatives from various IGOs sent a letter to the GNSO Council commenting on Professor Swaine's memo in October 2016²⁰.

¹⁷ For the research conducted by ICANN staff, questions sent to Mr. Corell and his response, see <https://community.icann.org/x/wl4QAw>.

¹⁸ A list of the various experts under consideration by the Working Group can be found at <https://community.icann.org/x/z4BYAw>.

¹⁹ Professor Swaine's preliminary synopsis and Final Memo can be found at <https://community.icann.org/x/z4BYAw>.

²⁰ See <https://gns0.icann.org/en/correspondence/igo-note-wg-swaine-memo-12jul16-en.pdf>.

Based on Professor Swaine’s opinion, as documented in his Final Memo, that there is not a uniform rule in international law governing IGO jurisdictional immunity and that the extent and success of an immunity claim in different national courts can vary depending on a number of factors, the Working Group preliminarily agreed that no change should be made to the Mutual Jurisdiction clause of either the UDRP or the URS. As the Working Group nevertheless recognized that IGOs may in some circumstances be able to successfully plead immunity, it went on to consider two options that might address this situation and supplement the UDRP and URS. **The Working Group’s agreed text for its preliminary recommendation, the two options under consideration, and further elaboration on the nature of Professor Swaine’s expert views, are set out in fuller detail under Recommendation #4 in Section 6, below.**

The Working Group’s conclusions on the issue of jurisdictional immunity further bolsters its view that there seems to be no reason to develop a separate dispute resolution process applicable only to IGOs. On the related question of whether or not appeals from initial panel decisions should be determined by arbitration rather than subject to appeal to a national court, the Working Group’s analysis of the available options, including previous documentation on this specific possibility²¹, and its impact on a registrant’s legal rights led it to conclude that its recommendations provide sufficient protection to IGOs while preserving the right to judicial appeal.

Finally, the Working Group considered the GAC advice from its Buenos Aires Communique of November 2015 that IGO access to and use of curative rights processes should be at low or nominal cost. The Working Group agreed that the question of cost was one more appropriately referred to ICANN and is outside the remit of the Working Group Charter. **This preliminary conclusion is further detailed as Recommendation #5 in Section 6, below.**

The Working Group notes that its recommendations that the UDRP should not be amended is in line with previous GAC advice, as provided by the GAC in its October 2014 Communique from the Los Angeles meeting. The Working Group also believes that, while its preliminary recommendations differ on specific details with other aspects of GAC advice on the topic²² and with the IGO Small Group Proposal (discussed further in Section 4.4), overall they address the needs and concerns of IGOs that have been raised with ICANN while preserving the benefits and certainty of the existing curative rights processes and protecting the legal rights of legitimate registrants.

4.4 Working Group Interaction with IGOs and Consideration of the IGO Small Group Proposal

Process Background

As noted in Section [] above, this PDP was initiated to consider the specific topic of curative rights protections for IGOs and INGOs, which was a topic that had been noted by the previous GNSO PDP on IGO-INGO Protections in All gTLDs as needing to be scoped by an Issue Report preparatory to a separate,

²¹ See, e.g., a paper prepared by the WIPO Secretariat for the Standing Committee on Trademarks in August 2003: www.wipo.int/edocs/mdocs/sct/en/sct_11/sct_11_5.doc.

²² For a list of relevant GAC advice on appropriate protections for IGO names and acronyms, see Section [], above.

Commented [MW1]: Some of the text here may change or be moved depending on the extent that other Sections in the report deal with the previous PDP. Note that a different Section (to be finalized) will list the SO/AC input received – it may be appropriate to list the relevant GAC advice concerning IGOs in that Section rather than here.

new PDP. The previous PDP Working Group had reached consensus on a number of recommendations pertaining to preventative protections for certain IGO and INGO names and acronyms²³. While some of the policy recommendations have since been approved by the ICANN Board²⁴, several remain under Board consideration as the GNSO's recommendations on those points are inconsistent with GAC advice provided to the Board on the same topics²⁵, and the Board had requested additional time to consider them. The Board had previously also requested that its New gTLD Program Committee (NGPC) develop a proposal for Board consideration that would take into account the GAC advice as well as the GNSO's recommendations²⁶.

To provide a procedural path forward for resolution of the matter, the NGPC facilitated the creation of an IGO Small Group, comprising representatives from the NGPC, the GAC and IGOs. The formation of the group was highlighted by the GAC Chair during the joint GAC-GNSO meeting at ICANN51 in Los Angeles in October 2014, where it was noted that the group would "provide inputs or maybe some guidance to the GNSO so that it's clear, or as clear as possible, for [the GNSO about what are the issues there that are really remaining]"²⁷. The starting point for the IGO Small Group's deliberations was the initial NGPC proposal that had been sent to the GAC and the GNSO in March 2014²⁸. Although the NGPC proposal focused on the topic of preventative protections for IGO acronyms, it also contained suggestions for modifying the URS (specifically, removing the need to consent to jurisdiction and the possibility of appeal) and the setting up of an arbitration process to resolve claims of abuse of IGO acronyms.

In June 2014, the NGPC wrote to the GNSO Council requesting that the GNSO consider modifying its original PDP recommendations in accordance with the GNSO's documented processes for such amendment²⁹. In the letter, the NGPC acknowledged the then-recent initiation of this current PDP on curative rights, and noted that the Board would not take any action on GAC advice concerning curative rights protections for IGOs until the conclusion of this PDP. The GNSO Council took no further action in relation to IGO acronyms following additional discussions with the NGPC later that year, pending further

²³ See the PDP Working Group's Final Report at <https://gns0.icann.org/en/issues/igo-ingo-final-10nov13-en.pdf>, with Minority Statements (including from participating IGOs) at <https://gns0.icann.org/en/issues/igo-ingo-final-minority-positions-10nov13-en.pdf>.

²⁴ The Board resolution approving the consistent recommendations and requesting more time to consider the remaining recommendations while facilitating discussions on reconciliation of the inconsistencies can be viewed at <http://www.icann.org/en/groups/board/documents/resolutions-30apr14-en.htm#2.a>.

²⁵ The GAC had issued advice to the ICANN Board via several Communiqués between 2013 and the present time concerning IGO protections, especially for IGO acronyms. For a listing of all the GAC advice on this point, see <https://gacweb.icann.org/display/GACADV/IGO+Names+and+Acronyms>.

²⁶ See <http://www.icann.org/en/groups/board/documents/resolutions-07feb14-en.htm#2.a>.

²⁷ See Page 27 of the transcript from this meeting: <https://la51.icann.org/en/schedule/sun-gac-gns0/transcript-gac-gns0-12oct14-en.pdf>.

²⁸ See <https://gns0.icann.org/en/correspondence/chalaby-to-robinson-20mar14-en.pdf> for a brief description of the scope of the original proposal, and <https://gns0.icann.org/mailling-lists/archives/council/msg15906.html> for the full text of the proposal.

²⁹ See <https://gns0.icann.org/en/correspondence/chalaby-to-robinson-16jun14-en.pdf>. Further correspondence followed between the GNSO Council and the NGPC, in July 2014 (<https://gns0.icann.org/en/correspondence/chalaby-to-robinson-24jul14-en.pdf>), October 2014 (<https://gns0.icann.org/en/correspondence/robinson-to-chalaby-disspain-07oct14-en.pdf>) and January 2015 (<https://gns0.icann.org/en/correspondence/chalaby-to-robinson-15jan15-en.pdf>). The GNSO Council also wrote to the GAC Chair in July 2014, noting that it had already initiated a new PDP that would, among other things, consider modifications to the URS in relation to IGO protections (<https://gns0.icann.org/en/correspondence/robinson-to-dryden-25jun14-en.pdf>).

Board/NGPC input on possible modifications to the GNSO's adopted policy recommendations that might be appropriate and acceptable to all parties.

In December 2014, pursuant to a mandatory requirement for all GNSO PDPs, this PDP Working Group had sought input from all ICANN Supporting Organizations and Advisory Committees. In addition to a response from the GAC³⁰, IGO representatives also provided responses to the Working Group in January 2015, following which the Working Group sent a few additional questions to the IGOs to which the group did not receive a further response. However, representatives of various IGOs who were participants in the IGO Small Group attended and participated in the Working Group's open sessions at ICANN53 in Buenos Aires (June 2015)³¹ and at ICANN56 in Helsinki (June 2016)³².

In June 2015, the co-chairs of this Working Group met with the GAC Chair and two GAC vice-chairs at the ICANN meeting in Buenos Aires to discuss the progress of work on IGO curative rights protections. In July 2015, representatives of the IGO Small Group held a face to face meeting to further discuss the proposal that would ultimately be shared with the GAC and the GNSO³³. In October 2015, the GAC Chair and Chris Disspain (the Board "shepherd" for this topic) held a teleconference with the Working Group co-chairs and other GNSO representatives regarding the various work tracks within the GNSO on IGO protections and the IGO Small Group work. In June 2016, at the ICANN meeting in Helsinki, the topic of IGO acronyms protection was discussed between the GNSO Council and the ICANN Board³⁴, where the Council raised its concern that it had not had much visibility into the IGO Small Group discussions, and Working Group co-chair Philip Corwin provided an update on the PDP work, including noting the limited extent of GAC and IGO participation in the Working Group.

The final proposal from the IGO Small Group was circulated to the GAC and the GNSO on 4 October 2016³⁵ via letter from the ICANN Board. The Board noted that those aspects of the proposal that related to curative rights would likely be referred to this PDP Working Group, and requested that the Working Group fully consider the proposal. On 31 October, legal counsel from various IGOs sent a letter to the GNSO Council stating that IGO immunity is incompatible with the Mutual Jurisdiction requirements of the UDRP and URS, and noting that the IGO Small Group Proposal represents a compromise on the part of the IGOs in relation to their initial request that their acronyms (which are the terms by which they are most commonly known) be reserved permanently³⁶.

The IGO Small Group Proposal and the Working Group's Review of the Proposal

The IGO Small Group Proposal included proposals touching on curative rights processes as a complement to meaningful preventative protections for IGO acronyms. It outlined the basis for the specific proposals it contained as follows:

³⁰ For a copy of the original Working Group request and copies of all the responses received, see <https://community.icann.org/x/T5gQAw>.

³¹ See <https://buenosaires53.icann.org/en/schedule/wed-igo-ingo-crp-access/transcript-igo-ingo-crp-access-24jun15-en.pdf>.

³² See <https://gns0.icann.org/en/meetings/transcript-igo-ingo-crp-access-28jun16-en.pdf>.

³³ See letter from the Secretary General of the OECD (which hosted the meeting) to the ICANN CEO: <https://www.icann.org/en/system/files/correspondence/gurria-to-chehade-20jul15-en.pdf>.

³⁴ See <https://gns0.icann.org/en/meetings/transcript-gns0-board-27jun16-en.pdf>.

³⁵ See <https://gns0.icann.org/en/correspondence/crocker-icann-board-to-council-chairs-04oct16-en.pdf>.

³⁶ See <https://gns0.icann.org/en/correspondence/igos-to-gns0-31oct16-en.pdf>.

“(1) The basis for protection of IGO acronyms should not be founded in trademark law, as IGOs are created by governments under international law and are in an objectively different category of rights-holders;
(2) As IGOs perform important global missions with public funds, the implementation of appropriate protections for IGO names and acronyms is in the public interest; and
(3) The Eligible IGOs that would qualify for protections under this proposal are those that are named on the GAC List of IGOs (initially submitted to ICANN in March 2013) as may be updated from time to time in accordance with GAC advice issued on 22 March 2013.”

On curative rights, one proposal was the creation of a separate dispute resolution process for IGOs, as follows:

“ICANN will facilitate the development of rules and procedures for a separate (i.e., separate from the existing UDRP) dispute resolution mechanism to resolve claims of abuse of domain names that are registered and being used in situations where the registrant is pretending to be the IGO or that are otherwise likely to result in fraud or deception, and (a) are identical to an IGO acronym; or (b) are confusingly similar to an IGO acronym; or (c) contain the IGO acronym. Decisions resulting from this mechanism shall be “appealable” through an arbitral process to be agreed.”

A further proposal was for a rapid relief mechanism, separate from the URS, to address clear-cut cases of abuse. Under this proposal, an eligible IGO may obtain a rapid temporary suspension of a domain name in situations where it would not be reasonable for it to use the above-mentioned dispute resolution mechanism, if certain conditions are met. These are:

“(1) The subject domain name is
(a) identical or confusingly similar to an IGO acronym; and
(b) registered and used in situations where the registrant is pretending to be the IGO or that are otherwise likely to result in fraud or deception; and
(2) there is an obvious risk of imminent harm from the claimed abuse of such domain name, (e.g. such as fraudulently soliciting donations in the wake of a humanitarian disaster).”

Relief under this new rapid relief mechanism would be the same as under the URS, i.e. suspension and not transfer or cancellation of the domain name in question.

The IGO Small Group Proposal also included a proposal for ICANN to “work with the IGOs and the mechanism providers to ensure that IGOs are not required to pay filing or any other ICANN-defined fees to access and use those mechanisms unless the examiner finds the case to have been brought in bad faith. Three or more findings of cases brought in bad faith by the same IGO may lead to that IGO being suspended from using the mechanism for a period of one year.”

The PDP Working Group reviewed and discussed the IGO Small Group Proposal at its meetings on 13 October³⁷ and 20 October³⁸. It should be noted that, by the time of receipt of the IGO Small Group Proposal, the Working Group had already reached preliminary agreement on a number of potential recommendations concerning curative rights protections for IGOs. The Working Group’s review of the IGO Small Group Proposal thus focused on whether the Working Group believed that the proposals contained therein warranted modifications or updates to the Working Group’s preliminary conclusions.

³⁷ See <https://community.icann.org/x/-hi4Aw>.

³⁸ See <https://community.icann.org/x/wSC4Aw>.

During the two meetings where it focused on the IGO Small Group Proposal, the Working Group reviewed all the aspects that pertained to curative rights. It concluded that, while IGOs may be in an objectively different category than trademark holders (as had been noted several times by the GAC), the Working Group's agreed preliminary recommendations not only provide sufficient protection for IGO names and acronyms, in some cases its recommendations are broader than and thus provide potentially greater protection for IGOs than what is in the IGO Small Group Proposal. The Working Group also noted that the IGO Small Group Proposal continued to be based on the assumption that IGOs are able to claim broad jurisdictional immunity in multiple national courts, which the Working Group concluded is at odds with the expert opinion provided by Professor Swaine. The Working Group therefore believes that there is little or no basis for stripping a losing registrant of his right to appeal to a national court, as is called for by the IGO Small Group Proposal. Finally, the Working Group noted that the elements of the separate mechanisms outlined in the IGO Small Group Proposal are already within the scope of the existing URS and UDRP. There therefore did not seem to be a substantive rationale for creating separate dispute resolution processes as proposed by the IGO Small Group.

The following is a comparative table showing the differences between the specific details of the IGO Small Group Proposal concerning curative rights and the Working Group's agreed preliminary recommendations following its review of the Proposal, as well as notes on the Working Group's rationale for its decisions. **The community is invited to comment on the recommendations and notes, and all input provided will be taken into account by the Working Group in preparing its final recommendations.**

IGO Small Group Proposal	Working Group Preliminary Recommendations ³⁹	Notes
<p>Separate dispute resolution process for domains registered and used in situations where registrant is pretending to be the IGO or otherwise likely to result in fraud or deception, <i>and</i> (a) are identical to an IGO acronym; or (b) are confusingly similar to an IGO acronym; or (c) contain the IGO acronym.</p> <p>Decisions to be "appealable" through an arbitral process</p>	<p>No separate dispute resolution process:</p> <p>Standing to file under the UDRP or URS can be demonstrated by an IGO's having filed the requisite notification to WIPO under Article 6<i>ter</i> of the Paris Convention for the Protection of Industrial Property</p> <p>The requirement of "bad faith" under the UDRP & URS may be shown if the limitation in Article 6<i>ter</i> (indicating a connection to the IGO or misleading the public) is present</p>	<p>The Working Group notes the IGO Small Group clarification that IGO protections should not be based on the possession of national trademark rights. The Working Group believes that its recommendation to allow an IGO to file under the UDRP and URS on the basis of its having Article 6<i>ter</i> protection provides adequate protection to a broader group of IGOs than those covered by the IGO Small Group Proposal.</p> <p>The Working Group also believes that the substantive scope of the UDRP already covers the situations</p>

³⁹ See Section 6, below, for the full set of recommendations and rationales.

	<p>Right to appeal to national court preserved (but an arbitration option can be created for cases where an IGO has successfully argued that it has jurisdictional immunity in a national court)</p>	<p>described in the IGO Small Group Proposal and in some cases may provide broader protection.</p> <p>The Working Group notes that the external legal expert report confirms that the state of international law on IGO jurisdictional immunity is not uniform, and can depend on a number of factors, including the existence of a bilateral treaty and whether the national court in question applies the principles of absolute, functional or restrictive immunity to the IGO. As such, the disadvantages (especially to a registrant) of removing the right to appeal to a national court in favor of binding arbitration outweighed the benefits.</p>
<p>Rapid relief mechanism where domain is: (a) identical or confusingly similar to an IGO acronym; and (b) registered and used in situations where the registrant is pretending to be the IGO or that are otherwise likely to result in fraud or deception; and (c) there is obvious risk of imminent harm from the claimed abuse of the domain</p>	<p>No separate rapid relief mechanism and no change to the URS (with accompanying clarification that standing to file a complaint, as under the UDRP, can be satisfied with an IGO's filing an Article 6ter notification)</p> <p>Policy Guidance document to be developed and issued clarifying that IGOs have the option to file through an assignee, licensee, or agent</p>	<p>The Working Group believes that the Article 6ter notification process is relatively straightforward and that once an IGO has filed the requisite notice with WIPO it should possess the necessary standing to file a complaint.</p> <p>The Working Group believes that the substantive scope of the URS already covers the situations described in the IGO Small Group Proposal and may in some cases provide broader protection.</p> <p>The Working Group notes that the external legal expert report confirms that the state of international law on</p>

		<p>IGO jurisdictional immunity is not uniform, and can depend on a number of factors, including the existence of a bilateral treaty and whether the national court in question applies the principles of absolute, functional or restrictive immunity to the IGO. As such, the disadvantages (especially to a registrant) of removing or changing the need to submit to Mutual Jurisdiction under the URS or UDRP outweighed the benefits.</p>
<p>“Eligible IGOs” are IGOs who are on the GAC List from March 2013 (as updated from time to time by the GAC)</p>	<p>“Eligible IGOs” are IGOs who have fulfilled the requisite notification procedure under Article 6ter of the Paris Convention for its name and/or acronym, or who have trademarked same</p>	<p>The Working Group recognizes that the number of eligible IGOs under its preliminary recommendations is likely to be higher than those on the GAC List. The Working Group is aware that not all IGOs on the GAC List may have sought, or be eligible for, Article 6ter protection, and that there are IGOs who have sought such protection but are not on the GAC List.</p>
<p>Mechanisms to be available to IGOs at no cost unless case is brought in bad faith</p> <p>A finding of three or more filings in bad faith to result in an IGO not being permitted to use the mechanism for one year</p>	<p>ICANN to investigate the feasibility of providing IGOs with access to the UDRP and URS at low or nominal cost</p>	<p>The Working Group does not believe it has the remit or authority to compel ICANN to create a subsidy or other cost relief measures for IGOs.</p>

At ICANN57 in Hyderabad in November, the Working Group held an open community session where it presented a comparative overview of the differences between the Working Group’s agreed preliminary recommendations and the specific proposals contained in the IGO Small Group Proposal.

The GAC Communiqué issued at the conclusion of the Hyderabad meeting contained GAC consensus advice on IGO protections⁴⁰. The GAC advice included a request that this Working Group take the IGO Small Group Proposal into account in its deliberations. The rationale that was provided by the GAC was that

- “IGOs undertake global public service missions, and protecting their names and acronyms in the [domain name system] is in the global public interest.
- IGOs are unique treaty-based institutions created by governments under international law.
- The small group compromise strikes a reasonable balance between rights and concerns of both IGOs and legitimate third parties.
- ICANN’s Bylaws and Core Values indicate that the concerns and interests of entities most affected, here IGOs, should be taken into account in policy development processes.”

The Working Group appreciates and acknowledges the GAC advice, and believes that it has given thorough consideration to the IGO Small Group Proposal. As representatives of some IGOs had previously attended and spoken at two open meetings held by the Working Group (in June 2015 and July 2016 respectively), the Working Group also believes that it has devoted a substantial amount of time to considering the IGOs’ requests, positions and concerns. It further believes that its preliminary recommendations strike the necessary balance between accommodating IGOs’ needs and status, and the rights of legitimate registrants. It welcomes and will thoroughly consider all community input on its recommendations and rationale as stated in this Initial Report.

⁴⁰ See

<https://gacweb.icann.org/download/attachments/27132037/GAC%20ICANN%2057%20Communique.pdf?version=6&modificationDate=1478668059355&api=v2>.