

Submission by the ICANN Governmental Advisory Committee on the *GNSO's Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process*

Public policy rationale for the present submission

The GAC recalls that IGOs – unique treaty-based institutions created by governments under international law – undertake global public service missions, and that protecting their names and acronyms in the DNS serves the global public interest.

The GAC further recalls that IGOs have recognized that policies seeking to protect their identities in the Domain Name System should accommodate legitimate third-party co-existence.

The GAC affirms its position, expressed in the Hyderabad Communiqué and elsewhere, and articulated in more detail below, that the small-group compromise proposal should be duly taken into account by ICANN and the GNSO (at both the Working Group, and Council, levels).

The GAC also notes that ICANN's Bylaws and Core Values specify that the concerns and interests of entities most affected, here IGOs, should be taken into account in policy development processes.

Set out below are the GAC's specific concerns and interests regarding the Working Group's Initial Report, relating principally to Recommendations #2 and #4. The GAC does not take exception to the Working Group Recommendation #1, which notes that the Initial Report recommendations do not apply to international non-governmental organizations (INGOs) particularly insofar as two such INGOs, the Red Cross and International Olympic Committee, are the subject of separate, GAC advice.

Substantive considerations regarding curative rights protection¹

ICANN should establish a dispute resolution mechanism *modeled on but separate from the UDRP*, which provides:

- Standing for IGOs which need not be expressly grounded in trademark law as such, as IGOs are created by governments under international law and are in an objectively different category of rights-holders.

There are two issues with Working Group Recommendation #2 which suggests issuing "Policy Guidance" on UDRP standing:

First, insofar as the Recommendation itself would effectively alter an existing Consensus Policy (no amendment of the UDRP), it improperly bypasses the ordinary Bylaws-prescribed Policy Development Process (it should not therefore be described merely as some form of policy "implementation" guidance).

¹ Given the narrow remit of the IGO-INGO Access to Curative Rights Protection Mechanisms Working Group, the present submission does not address still operative GAC Advice concerning (a) a procedure to notify IGOs of third-party registration of their acronyms, and (b) an emergency relief (e.g., 24-48 hours) domain name suspension mechanism to combat risk of imminent harm – both of which form integral parts of a more holistic suite of protection sought.

Second, aside from failing to adequately account for GAC Advice on this subject, this Recommendation disregards the plain language of the UDRP which requires trademark rights for standing to file a case.²

For these same reasons, the GAC cannot agree to Recommendation #3, which provides that the Policy Guidance document in Recommendation #2, should reference Article 6*ter* (1)(c).³ Such dispute resolution mechanism should also provide for:

- Appeal to an arbitral tribunal instead of national courts, in conformity with relevant principles of international law concerning recognized privileges and immunities conferred by governments on IGOs.⁴

Working Group Recommendation #4 (jurisdictional immunity), which suggests a form of workaround, is incompatible with the position conveyed by the Legal Counsels of IGOs which was provided to the Working Group at its request.

Again for the same reason, Working Group Recommendation #4 does not adequately account for GAC Advice on this subject which recognizes international norms regarding IGOs' status as treaty-based organizations.

More fundamentally, as noted above, Working Group Recommendations #2 and #4 which suggest various adjustments to the UDRP plainly fail to account for GAC Advice (see, e.g., the Los Angeles and Hyderabad Communiqués) which calls for a separate standalone IGO-specific dispute resolution mechanism.

The GAC notes that Recommendation #5 is the one Working Group recommendation that takes the GAC's advice into account, i.e., that any curative rights protection mechanisms be provided at no or nominal cost.

Noting in particular ongoing work in regard to a GAC-GNSO Consultation Group on Early Engagement, the Working Group is invited to reconsider the policy recommendations in this Initial Report to more adequately account for GAC Advice (and in particular requested IGO input). Notably, this concerns the creation of a standalone dispute resolution mechanism, which adequately addresses jurisdictional concerns raised.

² We note that the GAC would be unable to reach consensus that, as set forth in this Recommendation #2, Article 6*ter* of the Paris Convention is a basis for standing to file a complaint under the UDRP/URS. The GAC does not believe that agreement on this specific point is necessary, however, to implement the small group compromise proposal.

³ Article 6*ter* 1(c) provides, in relevant part: "The countries of the Union shall not be required to apply the said provisions when the use or registration...is not of such a nature as to suggest to the public that a connection exists between the organization concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization."

⁴ Immunity from national court jurisdiction is a distinguishing characteristic of IGOs which allows them to independently carry out their public policy mandates.

See in particular the attached Memorandum dated October 31, 2016 from Legal Counsels of IGOs to the GNSO.

See also the attached *IGO small-group response to the GNSO PDP Working Group questions* dated January 16, 2015.

Noting the importance of protecting IGOs' beneficiaries from bad actors, we welcome the Working Group's implementation of these observations in revising the Recommendations of the IGO-INGO Access to Curative Rights Protection Mechanisms Working Group.

Submitted by and on behalf of the ICANN Governmental Advisory Committee,

Thomas Schneider
GAC Chair