Comments of the International Bank for Reconstruction and Development ('World Bank") on the Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process.

The GNSO should reconsider its initial advice regarding IGOs. The World Bank supports the comments filed by other IGOs, including the OECD, and adds the following comments on its own behalf.

The International Bank for Reconstruction and Development, known as the World Bank, is a public Intergovernmental Organization (IGO) dedicated to funding and encouraging development activity in its member states. Its twin goals are eliminating severe poverty and boosting global prosperity by 2020. The World Bank is owned and controlled by its 189 member nations, who contribute public funds to its development work. Because the World Bank operates across international borders in its member nations, its member states have agreed to allow it certain privileges and immunities from the application of their national laws in its operations. These immunities are often interpreted and applied by local courts, and may be waived expressly or impliedly by the World Bank.

The World Bank's name is often misused in frauds and scams, as are the names of other IGOs. These scams can be perpetrated, or assisted, by the misleading registration of domain names with similar or identical names and acronyms to an IGO. Any resources that the World Bank has to expend to address such fraudulent domain name abuse must be diverted from the development assistance the Bank is able to offer to the world's poorest nations. As a result, the World Bank, along with 196 other IGOs, has long been requesting that ICANN grant to IGOs some basic protections for their names and acronyms under the gTLD program. A list of the advice provided to the ICANN Board by ICANN's Governmental Advisory Council can be found on ICANN's website here.

The GNSO Initial Report refuses to make any accommodations for IGOs, and seeks to force the IGOs to choose between protecting their acronyms or protecting the immunities that allow them to operate internationally without the constant threat of lawsuits in every member country. The GNSO obtained a legal opinion that explains the special nature of IGOs and the consequences of their status, which is attached to the GNSO Initial Report as Annex 14, Annex 14 to Initial Report, but the GNSO largely rejects or contradicts the analysis and recommendations of its own legal expert. Similarly, the GNSO appears to have rejected the input it received from the IGO Small Group on this topic.

Recommendation #1:

The World Bank is not an INGO, and has no comments on this recommendation concerning INGOs.

Recommendation #2:

The World Bank believes that the GNSO seeks to require too legalistic and technical a test before many IGOs would be able to even access the Uniform Dispute Resolution Procedure or Uniform Rapid Suspension Process. The UDRP and URS generally require a claimant to prove that it has the right to assert protection for a name or acronym. A convenient shorthand is to require evidence of a valid trademark or service mark in the name or acronym a claimant seeks to protect. For corporations organized under national law, this test makes sense. For IGOs, however, such a requirement is often

disqualifying, since IGOs often choose not to register their names as trademarks in all of the nations in which they operate. The World Bank, for example, has 189 member countries. The cost of registering and monitoring trademark applications across 189 countries would consume resources better spent on development assistance. The World Bank, like the OECD, urges the GNSO to allow arbitrators in the URDP and URS systems to apply international law, which may include Article 6ter of the Paris Convention, to evaluate whether an IGO has standing to file a claim. No special restrictions are justified for IGO claims.

Recommendation #3:

The GNSO attempts to mandate a second technical, legalistic limitation on the ability of an IGO to file a UDRP or URS complaint. The GNSO proposes that "UDRP and URS Panelists should take into account the limitation enshrined in Article 6ter(1)(c) of the Paris Convention in determining whether a registrant against whom an IGO has filed a complained registered and used the domain name in bad faith." It is not clear that this recommendation even makes sense. Article 6ter(1)(c) states:

> (c) No country of the Union shall be required to apply the provisions of subparagraph (b), above, to the prejudice of the owners of rights acquired in good faith before the entry into force, in that country, of this Convention. The countries of the Union shall not be required to apply the said provisions when the use or registration referred to in subparagraph (a), above, 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

The GNSO apparently desires to limit an IGO's ability to argue that a fraudulent website is fraudulent unless the IGO proves that the website is "of such a nature as to mislead the public as to the existence of a connection between the user and the organization." Such a formalistic preliminary determination is not currently required for any commercial claimant before the UDRP or the URS, and none should be imposed on IGOs. There is no reasonable or legal basis to attempt to use the Paris Convention for something that it was never designed to do – the provision above applies to the "countries of the Union," not to ICANN. Article 6ter(1)(c) was not drafted with ICANN or the UDRP in mind, and the attempt to use it to limit an IGO's claim that its acronym is being used in bad faith is unwarranted. An IGO should have the same ability to argue and prove bad faith as a commercial claimant.

Recommendation #4

The World Bank adopts the OECD's comments in their entirety on this point. The World Bank admits that the privileges and immunities of IGOs are not a simple topic. This is why some deference should be accorded to the IGOs on this issue, who are experts, or at least to the GAC, whose membership consists of government representatives. The GAC's advice on the IGO issue was long in favor of allowing IGOs to

have completely preventative protections for their acronyms, which would have avoided complex immunity issues altogether. Ultimately, in an effort to reach a resolution on this issue, the GAC has accepted and recommended a curative mechanism for IGOs to defend their acronyms, but the GAC's recommendation still avoids use of national courts altogether.

The World Bank believes that the ICANN Board was correct when it agreed that this issue could be resolved according to the October 4, 2016 Policy Recommendations presented to the GNSO and the Board by the IGO "Small Group." Annex 12 to the GNSO report contains a copy of these recommendations, which include an arbitral appeal process from any UDRP determination of an allegation of domain name abuse. That method would avoid concerns about immunity waivers completely. Instead of following these recommendations, however, the GNSO's Interim Report departs from that advice in several key ways, apparently mostly based on a reluctance to make any changes to the existing UDRP and URS process.

The GNSO dismisses the conclusions and opinions of GNSO's own legal expert, and attempts to force IGOs to choose between compromising their right to prevent fraud using their acronyms, or to compromise the immunities granted to IGOs by their member states. The World Bank believes the GNSO should acknowledge and apply the legal opinions expressed in Annex 14 to the GNSO's own Interim Report.[1]

Professor Swaine concludes that "granting Mutual Jurisdiction – via initiation of a complaint, or, for that matter, registration – would likely be understood as a waiver of any immunity the IGO might otherwise assert". The GNSO has no reasonable basis to ignore this advice, so only by departing from Professor Swain's analysis and conclusions can the GNSO justify its preliminary recommendations on this issue. The GNSO falsely envisions a world in which IGOs avail themselves of the current UDRP process, including the Mutual Jurisdiction clause, but then will somehow still be able to claim immunity in an appeal of that decision to a national court. This is extremely unlikely, and this counterfactual assumption should not form the basis for any serious recommendations.

Alternatively, the GNSO suggests that an IGO could sidestep any immunity issue by simply filing "through an assignee, licensee or agent." This suggestion is of course impossible to implement if a third party brings a case, well founded or not, directly against an IGO, which would be left to defend itself in the UDRP proceeding at the risk of having waived its immunity in any later appeal. In addition, even where an IGO is considering filing a claim itself, the GSNO completely fails to explain how this assignment trick would work in practice. The difficulty and complexity inherent in an attempt to assign name rights are explained in detail by Professor Swaine. For one thing, the assignment may well be rejected by the UDRP or a court. In addition, the assignment might also be ineffective in protecting the

[1] . This opinion is necessarily broad stroke and generalized, since it attempts to deal with the different immunities granted to IGOs by their member governments under international and national law. The judicial immunity granted to the World Bank by the World Bank by its member states is unique, and has been applied in different ways in different courts around the world. Overall, the World Bank is not agreeing that Professor Swain's opinion is in any way specifically binding on the World Bank, and is not agreeing that it would waive any immunity in any way by engaging in any action relating to its acronym, including in the UDRP or the URS.

IGO's immunity. The GNSO's recommendation that an IGO should routinely give control of its name to a third party in order to file a UDRP proceeding to protect its name makes very little sense, and continues to threaten the immunities of the IGO.

Overall, the World Bank does not accept the GNSO's statement that its present recommendations "will result in substantial improvement and clarity regarding IGOs' access to curative rights protections mechanisms." Instead, the GNSO's preliminary recommendations simply defend the status quo and the existing URDP and URS process, and seek to avoid making any accommodations for IGOs. The GNSO does not adequately consider the actual threat posed to IGOs by being forced to waive their immunities in order to participate in the UDRP, and provides no reasonable options. In fact, the GNSO has not even fully completed its deliberation process on this difficult point, but instead offers two contradictory "options," between which it may yet decide, and even acknowledges that it may recommend some unnamed third option. Perhaps acknowledging that this recommendation is not completely thought out, the GNSO strongly requests specific input on this item, "to aid it in developing its final recommendations." Since the GNSO is unable to come up with any viable alternative recommendation on this issue, the October 4, 2016 Small Group recommendations should simply be adopted by the ICANN Board.

Recommendation #5

The World Bank agrees with Recommendation 5, which is in line with prior GAC advice on this issue. IGOs rely on public funds from their member countries, and should be allowed to spend those funds on the public missions for which they are established. IGOs should not have to divert those funds to protect their acronyms against fraud and abuse in ICANN's domain name system.