

**DISCUSSION OF BENEFITS/DISADVANTAGES OF THE TWO OPTIONS NOTED BY THE WORKING GROUP IN RELATION TO RECOMMENDATION #4
OF ITS INITIAL REPORT**

Draft prepared by ICANN staff (updated 13 June 2017)

Text of Recommendation #4:

“In relation to the issue of jurisdictional immunity, which IGOs (but not INGOs) may claim successfully in certain circumstances, the WG recommends that:

(a) no change be made to the Mutual Jurisdiction clause of the UDRP and URS;

(b) the Policy Guidance document initially described in Recommendation #2 (above) also include a section that outlines the various procedural filing options available to IGOs, e.g. they have the ability to elect to have a complaint filed under the UDRP and/or URS on their behalf by an assignee, agent or licensee; such that

(c) claims of jurisdictional immunity made by an IGO in respect of a particular jurisdiction will be determined by the applicable laws of that jurisdiction.

Where an IGO succeeds in asserting its claim of jurisdictional immunity in a court of mutual jurisdiction¹, the Working Group recommends that in that case:

Option 1 - the decision rendered against the registrant in the predecessor UDRP or URS shall be vitiated; or

Option 2 – the decision rendered against the registrant in the predecessor UDRP or URS may be brought before the [name of arbitration entity] for de novo review and determination.

The WG recommends, further, that the Policy Guidance document referred to in Recommendation #2 (above) be brought to the notice of the Governmental Advisory Committee (GAC) for its and its members’ and observers’ information.”

¹ The WG notes that the determination in each case as to whether or not the IGO in question may successfully plead immunity is a question that each court decides according to its own law. It is not within the purview of ICANN to make any recommendations in respect of a judicial determination of this legal issue.

Assumptions

- The number of qualifying IGOs is finite
- Option 1 is generally considered more favorable by registrants/respondents and thus, the risks may be characterized as likely to be perceived as impacting IGOs
- Option 2 received some support from IGOs in the public comment period to the Initial Report and thus, the risks may be characterized as likely to be perceived as impacting registrants/respondents

These assumptions are taken into account when conducting the impact analysis.

Suggested definitions of Likelihood and Impact, and elements of the impact analysis, are presented below. **Note that the assignment of Likelihood and Impact scores should be independent of envisioned mitigation strategies.**

PRELIMINARY NOTE:

The contents of this document are were prepared by ICANN staff to serve as a “starter draft” for the sole purpose of facilitating Working Group discussions of these options. It was not intended as, nor should it be interpreted as indicating, a staff view on any of the topics outlined below.

Summary of Benefits & Disadvantages of Options 1 & 2:

OPTION 1 -

Benefits	Disadvantages	WG Discussion/Comments
Preserves rights of registrants/respondents to fundamental rights of access to national courts	Not consistent with the requests from the GAC and the IGOs	
Court decides case on de novo basis, as this is not strictly speaking an “appeal” from a panel determination.	What would be the advantage of vitiating the initial panel determination in such a case? Does this mean that the registrant can transfer the domain once the lawsuit results in a finding in favor of the registrant?	Vitiating the UDRP decision only takes place if the IGO successfully asserts immunity (thereby terminating the lawsuit). Vitiating the UDRP decision thus maintains the "status quo" as if the UDRP had never been filed. The IGO can then decide whether to pursue other kinds of actions (e.g. voluntary arbitration, voluntary mediation, or intervention by national authorities). (GK)

		<p>Second sentence doesn't make sense. Filing the lawsuit preserved the status quo (registrar lock/hold) with the registrar, and kept the registrant the same (i.e. that of the original domain name registrant, who was the respondent of the UDRP, and complainant in the lawsuit). Nothing happens until the lawsuit is concluded (and any/all available appeals). (GK) [NOTE FROM STAFF: Original second sentence amended and rephrased.]</p>
<p>Creates certainty for a losing registrant in terms of the consequences of filing a complaint in a national court.</p>	<p>What are the implications of saying that a court complaint upholding an IGO's immunity claim automatically means an otherwise legally-valid panel determination is now void and has no legal effect? What can/must the registrar do in such an instance?</p>	<p>The mere filing of a court complaint doesn't do anything. IGO has to make a decision as to whether to assert immunity, and await the court's determination as to whether to accept that defense to the court action. Registrars must wait until the court has made a final determination. i.e. only the court can order a transfer of the domain name (i.e. which is what one would expect, if the UDRP didn't exist), as well as any/all available appeals. (GK) [NOTE FROM STAFF: Original text rephrased to clarify that it is not the filing but the determination by the court that triggers the vitiation.]</p>
<p>The same UDRP/URS process applies all the way through the initial administrative proceeding – no special treatment or process just because it is an IGO name/acronym at issue.</p>	<p>Risk that since the Mutual Jurisdiction clause remains unchanged, a court could rule that an IGO has already waived its immunity by agreeing to the Mutual Jurisdiction clause in the first place.</p>	<p>This "risk" exists for both scenarios. i.e. for both options 1 and 2, they only discuss what happens after successfully asserting immunity. If immunity is not asserted, or the immunity defense is asserted but fails, neither alternative is in play. Neither option proposes to touch the existing mutual jurisdiction clause. (GK)</p>
<p>Ensures that applicable national laws (including applicable case law precedents) are interpreted by judges qualified and experienced in those laws.</p>		<p>ICANN has to follow the law, and not make up its own laws that replace the courts. Choosing anything but option 1 creates a dangerous precedent which will encourage others to come to ICANN to create policies inconsistent with, and that override, national laws. (GK)</p>

May discourage forum shopping by IGOs		
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IMPACT ANALYSIS – OPTION 1

ISSUE	Likelihood	Impact	Mitigation
1. Vitiating the decision does not improve access for IGOS to the UDRP/URS			<ul style="list-style-type: none"> • IGOs may be able to use an assignee/licensee • IGOs can selectively waive immunity in certain circumstances
2. IGO must assert its jurisdictional immunity in national courts, possibly establishing a precedent for waiving immunity.			<ul style="list-style-type: none"> • IGOs can selectively waive immunity in certain circumstances (there is evidence of this occurring)
3. May establish precedent of UDRP/URS decisions being vitiated without a court decision on the merits of the case (e.g., relying on finding of jurisdictional immunity).			<ul style="list-style-type: none"> • Could make the carve-out provisions here narrow in scope and very specially targeted
4. Vitiating the decision may encourages losing respondents to challenge the decision			<ul style="list-style-type: none"> • ??

OPTION 2 –

Benefits	Disadvantages	WG Discussion/Comments
More consistent with the requests from the GAC and the IGOs	Inconsistent with current UDRP/URS	Need to discuss if a specific administering institution – as well as specific applicable arbitration rules (e.g. UNCITRAL) - should be recommended if this goes forward.

Familiar and commonly used in commercial transactions (including many IGO contracts)	Does recommending binding arbitration (as a final decision from an initial panel determination) effectively remove a registrant's right to have a national court determine the issue? Or is this equivalent?	Need to review WIPO Secretariat 2003 paper on minimum requirements designed to ensure adequate protection for registrants and a robust process. I disagree that this is a "benefit". Lawsuits are also "familiar" and "commonly used" in commercial transactions. (GK)
Does not trigger difficult legal questions about the legal implications of vitiating a panel decision (per Option 1).		I don't understand this point at all. There are no "difficult legal implications" of vitiating a panel decision. It simply preserves the status quo, as if the UDRP didn't exist. The order of the UDRP panel is set aside, and both sides can consider their options from a blank slate. (GK) [STAFF NOTE: We are merely raising the question as to whether disposition of a preliminary (procedural?) matter (i.e. immunity) can, under law, substantively have the effect that an otherwise-valid UDRP/URS determination is automatically void.]
	Lack of full public scrutiny, transparency and accountability, due to lack of full access to arbitration pleadings/documents, unlike courts which operate under the "open court principle." (GK)	Decisions under Option 2 create no "precedents" that can be cited in national courts, unlike real court cases. This is important, given that any disputes that trigger either Option 1 or Option 2 are going to be over high value domain names, the ones most likely to be vigorously contested, and thus the ones that have the greatest potential in creating precedents for others if they are contested in courts. (GK)
	Lack of multiple appeal privileges, as exist in national courts. (GK)	e.g. with court cases in Canada, the first court level might be the Ontario provincial courts, the second level might be the Ontario Court of Appeal, and the third level would be Supreme Court of Canada. With option 2, there is just 1 level, the binding arbitration. Multiple appeals help ensure the correct decision is ultimately realized. (GK)
	Potential divergence between arbitration decisions and those of the underlying national	As we've seen, courts routinely overturn UDRP decisions, demonstrating that access to the courts is essential to protect

	courts, with no opportunity to reconcile them. (GK)	registrants from the whims of arbitrators who ignore national laws and precedents. With option 2, rogue/extremist panelists would be emboldened to persistently and permanently deviate in their rulings from the relevant national laws, since there would be no mechanism of having their decisions circumscribed by those laws. (GK)
	The UDRP/URS "test" would become de facto law (as would the remedies, i.e. transfer or cancellation) (GK)	Whereas a court is free to award money damages, grant injunctive relief to stop a particular confusing usage (but allow one to retain the domain name for other uses), etc. or find a different legal test, according to its own national laws. This is a crucial point, since the UDRP/URS were not designed to replace the national laws. (GK)
	Take away rights for existing domain name registrants (GK)	Which can be reduced somewhat, if Option 2 only applied to new gTLDs, or to domains with a creation date after the implementation of any new policy changes (GK)

IMPACT ANALYSIS – OPTION 2

ISSUE	Likelihood	Impact	Mitigation
1. Denies registrants access to national courts			<ul style="list-style-type: none"> De novo arbitration could require elements of mutual agreement (e.g., that the mechanism be used, jurisdiction, forum, etc.)
2. May set precedent to create special cases in the UDRP/URS for other parties			<ul style="list-style-type: none"> Could emphasize the unique nature of IGOs and their place in international treaties Could make the carve-out provisions here narrow in scope and very specially targeted
3. Inconsistent with the UDRP/URS			<ul style="list-style-type: none"> Could establish a separate, narrowly targeted DRP mechanism, either based on the UDRP or (more narrowly) the URS in relation to remedies, burden of proof, etc.

4. Requires agreement by the respondent to the adjusted terms of the UDRP/URS			<ul style="list-style-type: none"> • Could require agreement by the respondent only upon initiation by an IGO.INGO

Suggested Definitions for Likelihood and Impact Scoring

LIKELIHOOD:

- 5: A risk that is almost certain to show-up. A risk that is more than 80% likely to cause problems.
- 4: Risks that have 60-80% chances of occurrence.
- 3: Risks which have a near 50/50 probability of occurrence.
- 2: Risks that have a low probability of occurrence but still cannot be ruled out completely.
- 1: Rare and exceptional risks which have a less than 10% chance of occurrence.

IMPACT:

- 5: Risks that can lead to an extraordinary amount of damage.
- 4: Risks with significantly large consequences which can lead to a great amount of loss and can be considered critical.
- 3: Risks which do not impose a great threat, but present tangible damage and can be classified as moderate.
- 2: Risks that will result in some damage, but the extent of damage is not too significant and is not likely to make much of a difference to the impacted party(ies).
- 1: Risks that will cause a near negligible amount of damage to the to the impacted party(ies).

SAMPLE RISK MATRIX:

	<u>IMPACT</u>				
<u>LIKELIHOOD</u>	<u>H</u>	<u>H</u>	<u>E</u>	<u>E</u>	<u>E</u>
	<u>M</u>	<u>H</u>	<u>H</u>	<u>E</u>	<u>E</u>
	<u>L</u>	<u>M</u>	<u>H</u>	<u>E</u>	<u>E</u>
	<u>L</u>	<u>L</u>	<u>M</u>	<u>H</u>	<u>E</u>
	<u>L</u>	<u>L</u>	<u>M</u>	<u>H</u>	<u>H</u>

Exceptional (E) – Critical, must be resolved

High (H) – High priority, must be resolved

Medium (M) – Medium priority, should be resolved, at least in part

Low (L) – Low priority, some measures could be taken