

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

Draft prepared by ICANN staff (updated 22 August 2017)

Original Text of Working Group Preliminary Recommendation #4 (as it appeared in the Initial Report, January 2017)¹:

“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 jurisdiction², 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 Note that the text of this recommendation is likely to change, possibly substantially, following the WG’s conclusion of its deliberations over the options noted in this document.

² 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 was generally considered more favorable by registrants/respondents and thus, the risks may be characterized as likely to be perceived as having a greater impact on 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 having a greater impact on registrants/respondents

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

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

Preliminary Note:

The contents of this document 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.

This document includes additional options, presented below, that emerged from WG deliberations in consideration of comments received on Options #1 & #2 during the public comment period for the Initial Report.

OPTION 1: “The decision rendered against the registrant in the predecessor UDRP or URS shall be vitiated.”

Benefits	Disadvantages	WG Discussion/Comments
<p>Preserves rights of registrants/respondents to fundamental rights of access to national courts</p>	<ol style="list-style-type: none"> 1. Not consistent with the requests from the GAC and the IGOs 2. Unclear if legally this option will be feasible, e.g. whether ICANN has legal authority to nullify a substantive decision rendered in an administrative proceeding (as distinct from either “staying” a proceeding or allowing remedies, i.e. cancellation or transfer) 3. Subsequent information provided to the WG indicates that a successful immunity plea would actually preserve the initial panel decision (i.e. this option seems to contradict the legal position) 	<ol style="list-style-type: none"> 1. While UDRP decisions can be mistaken and have been reversed in some instances by subsequent court review, vitiation of a correct UDRP determination of cybersquatting would permit it to continue.
<p>Court decides case on de novo basis, as this is not strictly speaking an “appeal” from a panel determination.</p>	<ol style="list-style-type: none"> 1. Unclear that vitiating the initial panel determination in such a case, as opposed to merely “staying” enforcement of the remedy, would provide greater benefits 2. Unclear also whether remedies that a court can/will order, if it finds in favor of the IGO, are limited to the original UDRP/URS remedies 	<ol style="list-style-type: none"> 1. 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>Creates certainty for a losing registrant in terms of the process</p>	<ol style="list-style-type: none"> 1. Subsequent information provided to the WG indicates that a successful 	

<p>expectations of filing a complaint in a national court.</p>	<p>immunity plea will preserve the initial UDRP panel decision, so it is unclear how vitiating will provide greater certainty</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>1. Since the Mutual Jurisdiction clause remains unchanged in this scenario, this option does not deal with the risk that 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>1. 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>1. 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>
<p>May discourage forum shopping by IGOs</p>	<p>1. Unclear how the possibility of vitiating will discourage forum shopping when weighed against the potential risk of losing the initial complaint by not choosing a UDRP/URS provider perceived as “complainant friendly”</p>	

IMPACT ANALYSIS – OPTION 1

ISSUE	Likelihood	Impact	Mitigation
1. This option seems to contradict what the WG is informed is the legal outcome (i.e. initial decision actually stands if the IGO succeeds in pleading immunity)			<ul style="list-style-type: none"> • None (?)
2. Vitiating the decision does not change access by 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
3. 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)
4. 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
5. The possibility of vitiation may encourage losing respondents to challenge the initial panel decision			
6. Vitiating the decision is potentially a worse outcome for IGOs than the currently understood status quo			
7. Quantity of complaints filed by IGOs could increase	2	1	

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.”

Note: As highlighted below, it may also be possible to combine this Option 2 with certain elements of Options 3 and/or 4.

Benefits	Disadvantages	WG Discussion/Comments
More consistent with the requests from the GAC and the IGOs	1. Inconsistent with current UDRP/URS provisions and will require amendment/augmentation of the existing processes	1. Need to discuss if a specific administering institution – as well as specific applicable arbitration rules (e.g. UNCITRAL) - should be recommended as part of the policy if this goes forward.
Familiar and commonly used in commercial transactions (including many IGO contracts)	1. Unclear at which point (e.g. registration or appeal, for the registrant; filing or other point, for IGO) agreement to arbitrate should be sought	1. WG to review WIPO Secretariat 2003 paper on minimum requirements designed to ensure adequate protection for registrants and a robust process, as well as Co-Chairs’ Elements paper (based on suggestions from Paul Keating) to ensure that specific guidance and safeguards are built into the arbitration 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.]
	1. Lack of full public scrutiny, transparency and accountability, due to lack of full access to arbitration pleadings/documents,	1. 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

	unlike courts which operate under the "open court principle." (GK)	<p>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)</p> <p>2. Could require high degree of transparency to ensure public availability and scrutiny. While not legally binding precedents, appeal panels could be urged to act consistently in any future cases.</p>
	1. 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)
	1. Potential divergence between arbitration decisions and those of the underlying national courts, with no opportunity to reconcile them. (GK)	As we've seen, courts routinely overturn UDRP decisions, demonstrating that access to the courts is essential to protect 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)
	1. The UDRP/URS "test" would become de facto law (as would the remedies, i.e. transfer or cancellation) (GK)	1. 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)

		2. If Option 2 is selected, appeals panel could be required to use national law and procedures of the mutual jurisdiction. Therefore, the UDRP/URS standard would not be replicated at the appeal level.
	1. 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)
May provide IGO domain holders with an additional recourse option after an IGO successfully asserts immunity, which does not appear to be the case currently.		1. Actually improves rights of DN registrants; assures availability of some appeals process, whereas successful assertion of immunity by an IGO today would reinstate prior decision without further appeal available.

IMPACT ANALYSIS – OPTION 2

ISSUE	Likelihood	Impact	Mitigation
1. Denies registrants access to national courts after an IGO successfully asserts immunity (noting that ICANN has no ability to influence a national court's determination of an IGO's immunity claim)	5		<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 • Not clear that this assertion is correct; need to check language of standard registrar-registrant agreement
5. Arbitration might be an additional step relative to what would occur if an IGO were to successfully assert its immunity under the current system			
6. Quantity of cases filed by IGOs could increase	2	1	
7. May establish precedent of creating exceptions for certain parties [this seems identical to #2 above and should probably be eliminated]			

OPTION 3: "Amend the Mutual Jurisdiction clause to clarify that, for IGOs, their agreement to submit to Mutual Jurisdiction is strictly and only in relation to the court's disposition of rights in relation to ownership of the domain name(s) in dispute, and not in relation to any other claim or remedy."

Note, this option could be a standalone element or added to option 2.

Benefits	Disadvantages	WG Discussion/Comments
Seeks to address what is perceived as a key concern from IGOs of having to agree to mutual jurisdiction	1. Unclear if this is legally feasible or if it will hold up in all courts	1. While ICANN cannot enforce this on national courts, judicial notice of such limitation might influence scope of any court decision in regard to immunity defense

IMPACT ANALYSIS – OPTION 3

ISSUE	Likelihood	Impact	Mitigation
1. Not all jurisdictions may recognize this limitation			
2. Will require amendment to the UDRP/URS			<ul style="list-style-type: none"> Recommendation of policy change is well within the scope and authority of this PDP. It is up to GNSO Council and ICANN Board to decide whether to implement such proposed change after review of all further public input, including GAC advice.
3. May establish precedent of creating exceptions for certain parties			<ul style="list-style-type: none"> Final Report can emphasize the narrow nature of this exception and the WG's view that it should not be the basis of any broader action for non-IGO parties

OPTION 4: “Try out” Option #2, just for newly created domains, while preserving full legal rights under Option #1 for grandfathered domains. Then we impose the obligation upon ICANN, the UDRP/URS providers, and the arbitration providers (via the mandated open court principle) to provide a future “review working group” the ability to go back and double check that there were no negative consequences in the decision to “try out” Option #2 as an experiment.”

Note, as this option contains elements of Options 1 and 2, it therefore has similar Benefits and Disadvantages as identified for Options 1 and 2. Please refer to the tables above for those lists; the following table lists only additional observations specific to this option.

Benefits	Disadvantages	WG Discussion/Comments
Seeks to allow for a conservative introduction of a new mechanism by building in contingencies	<ol style="list-style-type: none"> Contingency mechanism may disadvantage some registrants based on a somewhat arbitrary cut-off date Creates undesirable complexity and uncertainty, especially in regard to grandfathered DNS acquired by a new registrant after this policy was implemented. 	
Seeks to preserve judicial options for grandfathered domains	<ol style="list-style-type: none"> Unclear why grandfathered domains should have additional options not available to newer registrations 	<ol style="list-style-type: none"> Judicial option is not eliminated by Option 2. Rather, it addresses what should occur after an IGO successfully asserts immunity in a court of mutual jurisdiction, a scenario that can occur today. “Grandfathering” provides no certainty to DN registrants or IGOs in regard to that scenario. Registrants of grandfathered DNS would have no appeal mechanism if current rule for losing respondent is maintained (reinstatement of UDRP decision) in successful immunity assertion scenario.
Builds in data driven review of the new mechanism	<ol style="list-style-type: none"> May be perceived as creating inconsistencies in existing procedures 	<ol style="list-style-type: none"> This element could be integrated into other options (and review of the policy is envisioned as part of the GNSO PDP Manual actions)

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IMPACT ANALYSIS – OPTION 4 – *Note, as this is option contains both Options 1 and 2 as elements, some of the issues identified for Options 1 and 2 may also be applicable here.*

ISSUE	Likelihood	Impact	Mitigation
1. Different registrants are treated differently (e.g., by registration date)			
2. Consequences for IGOs in asserting its jurisdictional immunity in national courts differ based on registration date of the domain in question			
3. Creates inconsistencies within the UDRP/URS processes			

OPTION 5: “Do nothing since the current UDRP requires that complainants waive any claim as against the ADR provider, but there is no similar provision for respondents. The result is that Complainants waive claims against that ADR provider. Respondents do not.”

Benefits	Disadvantages	WG Discussion/Comments
Does not require any changes to existing mechanisms	1. Unclear that the fundamental premise for this option is correct (supplemental rules actually require that respondents also waive claims against the ADR provider)	

IMPACT ANALYSIS – OPTION 5

ISSUE	Likelihood	Impact	Mitigation
1. Fundamental premise is inaccurate			

OPTION 6: “Change the text of the UDRP Rules to clarify coverage of in rem, in personam, and quasi-in rem actions”

Benefits	Disadvantages	WG Discussion/Comments
For in rem or quasi in rem case, the only issue in dispute is the fate of the domain name	1. Limited evidence that courts internationally recognize in rem or quasi in rem actions	
Successful assertion of IGO immunity is assumed to only result in the dismissal of the in personam aspect of the lawsuit, allowing in rem portion to proceed in the courts	1. Could result in a policy where registrants whose domain name disputes are litigated in certain jurisdictions (i.e. those that permit in rem actions) have greater advantages than those elsewhere	

IMPACT ANALYSIS – OPTION 6 (note, issues appear similar, if not identical to Option 3)

ISSUE	Likelihood	Impact	Mitigation
1. Not all jurisdictions recognize in rem or quasi in rem actions			
2. Will require amendment to the UDRP/URS			
3. If so, could establish precedent of creating exceptions for certain parties			

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: Impacts that have 60-80% chances of occurrence.
- 3: Impacts which have a near 50/50 probability of occurrence.
- 2: Impacts that have a low probability of occurrence but still cannot be ruled out completely.
- 1: Impacts and exceptional risks which have a less than 10% chance of occurrence.

IMPACT:

- 5: Impacts that can lead to an extraordinary amount of damage.
- 4: Impacts with significantly large consequences which can lead to a great amount of loss and can be considered critical.
- 3: Impacts which do not impose a great threat, but present tangible damage and can be classified as moderate.
- 2: Impacts 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: Impacts that will cause a near negligible amount of damage to the impacted party(ies).

SAMPLE IMPACT ANALYSIS 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