

# IGO-INGO Access to Curative Rights Mechanisms Policy Development Process (PDP)

Webinar: Status Update on preparations for the Final PDP  
Report

12 October 2017



# OVERVIEW: Project Timeline & Major Milestones



**PDP work running in parallel to ongoing efforts to reconcile inconsistent GAC advice & GNSO policy on other aspects of IGO/INGO issues (i.e. Red Cross names; preventative (not curative) protections for IGO acronyms)**

- ⦿ **The Working Group recommends that no changes to the UDRP and URS be made, and no specific new process be created, for INGOs (including the Red Cross movement and the International Olympic Committee). To the extent that the Policy Guidance document referred to elsewhere in this set of recommendations is compiled, the Working Group recommends that this clarification as regards INGOs be included in that document.**

CO-CHAIRS' EVALUATION OF LIKELY CONSENSUS ON RETAINING THIS INITIAL RECOMMENDATION IN THE FINAL REPORT: **HIGH**

## Preliminary Recommendation #2 – CHANGE RECOMMENDED

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### Original Recommendation:

- ⊙ **For IGOs, in order to demonstrate standing to file a complaint under the UDRP and URS, it should be sufficient for an IGO (as an alternative and separately from an IGO holding trademark rights in its name and/or acronym) to demonstrate that they have complied with the requisite communication and notification procedure in accordance with Article 6*ter* of the Paris Convention for the Protection of Industrial Property.**

### Recommended Change:

- ⊙ **An IGO may elect to fulfil the requirement that a complainant must have standing to file a complaint under the UDRP and URS by demonstrating that it has complied with the requisite communication and notification procedure pursuant to Article 6*ter* of the Paris Convention for the Protection of Industrial Property.**
- ⊙ **This may be an option in a case where an IGO has certain unregistered rights in its name and/or acronym and must adduce factual evidence to show that it has the requisite substantive legal rights in the name and/or acronym in question.**

### Recommended Change (cont'd):

#### ⦿ **For the avoidance of doubt:**

**(a) this alternative mechanism for standing will not be needed in a situation where an IGO already holds trademark rights in its name and/or acronym, as the IGO would in such a case proceed in the same way as a non-IGO trademark owner;**

**(b) whether or not compliance with Article 6ter will be considered determinative of standing is a decision to be made by the UDRP or URS panelist(s) based on the facts of each case; and**

**(c) this recommendation is not intended to amend or affect any of the existing grounds upon which UDRP and/or URS panelists have previously found sufficient for IGO standing (e.g. based on statutes and treaties).**

CO-CHAIRS' EVALUATION OF LIKELY CONSENSUS TO MAKE THIS CHANGE FOR THE FINAL REPORT: **HIGH**

- ⦿ **The Working Group does not recommend that any specific changes be made to the substantive grounds under the UDRP or URS upon which a complainant may file and succeed on a claim against a respondent (Section 4(a)(i) – (iii) of the UDRP) as the WG believes that bad faith registration and use concept covers a very broad range of offensive activities, including those covered by scope of Article 6ter protections.**
- ⦿ **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 complaint registered and used the domain name in bad faith.**

CO-CHAIRS' EVALUATION OF LIKELY CONSENSUS IN FAVOR OF DELETION: **HIGH**

### **NO CHANGE RECOMMENDED TO THE INITIAL GENERAL RECOMMENDATION:**

- ⦿ **On the issue of jurisdictional immunity, which IGOs may claim successfully in certain circumstances (but not INGOs), the Working Group recommends that:**
  - (a) no change be made to the Mutual Jurisdiction clause of the UDRP and URS, as ICANN curative rights processes are in addition to, and not a substitute for, existing statutory rights and ICANN has no power to extinguish registrant rights to seek judicial redress;**
  - (b) [Policy Guidance document to be prepared, to] 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.**

### Two options were published for public comment:

- ⦿ **Where a losing registrant appeals to a court of mutual jurisdiction and an IGO succeeds in asserting its claim of jurisdictional immunity in a court of mutual jurisdiction, WG 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.***
- ⦿ Both options garnered some support from various commentators, with the IGOs favoring Option 2
- ⦿ Working Group reviewed all comments and conducted an Impact Analysis
- ⦿ Working Group also considered additional alternative options, some built on certain elements in either Option 1 or 2



### **CURRENTLY PENDING WORKING GROUP DECISION:**

Option A:

- ⦿ **Where a losing registrant challenges the initial UDRP/URS decision by filing suit in a national court of mutual jurisdiction and the IGO that succeeded in its initial UDRP/URS complaint also succeeds in asserting jurisdictional immunity in that court, the decision rendered against the registrant in the predecessor UDRP or URS shall be vitiated.**

Option B:

- ⦿ **In relation to domain names with a CREATION DATE before the [Policy Effective Date), then Option A applies. In relation to domain names with a CREATION DATE on or after the [Policy Effective Date), Option C shall apply. After five (5) years or 10 instances of Option C being utilized, whichever occurs first, ICANN and the various dispute resolution providers (including any who have administered arbitration proceedings under the new Option C) will conduct a review to determine the impact, both positive and negative, as a result of “trying out” Option C.**

Option C:

- ◉ **Where a complainant IGO succeeds in a UDRP/URS proceeding, the losing registrant proceeds to file suit in a court of mutual jurisdiction, and the IGO subsequently succeeds in asserting jurisdictional immunity, the registrant shall have the option to transfer the dispute to an arbitration forum meeting certain pre-established criteria for determination under the national law that the original appeal was based upon, with such action limited to deciding the ownership of the domain name. The respondent shall be given 10 days (or a longer period of time if able to cite a national statute or procedure that grants a period longer than 10 days) to either: (1) inform the UDRP/URS provider [and the registrar] that it intends to seek arbitration under this limited mechanism; or (2) request that the UDRP/URS decision continue to be stayed, as the respondent has filed, or intends to file, a judicial appeal against the IGO's successful assertion of immunity.**

NOTE: The Working Group discussed some fundamental elements that would need to be included in any arbitration option (e.g. applicable substantive law and procedural rules; venue; panelist selection; language of proceedings; availability of discovery; available remedies; awarding of costs; enforcement considerations)

### Further Notes on Option C:

- ⦿ An IGO which files a complaint under the UDRP/URS shall be required to agree to this limited arbitration mechanism when filing the complaint. If, subsequently, it refuses to participate in the arbitration, the enforcement of the underlying UDRP/URS decision will be permanently stayed.
- ⦿ The parties shall have the option to mutually agree to limit the original judicial proceedings to solely determining the ownership of the domain name. Subject to agreement by the registrant concerned, the parties shall also be free to utilize the limited arbitration mechanism described above at any time prior to the registrant filing suit in a court of mutual jurisdiction.
- ⦿ In agreeing to utilize the limited arbitration mechanism, both the complainant and respondent are required to inform ICANN.

CO-CHAIRS' EVALUATION OF LIKELY CONSENSUS ON OPTION A, B OR C: **TBD**

- ⊙ **In respect of GAC advice concerning access to curative rights processes for IGOs, the Working Group recommends that ICANN investigate the feasibility of providing IGOs and INGOs with access to the UDRP and URS (in line with the recommendations for accompanying Policy Guidance as noted in this report), at no or nominal cost, in accordance with GAC advice on the subject.**

CO-CHAIRS' EVALUATION OF LIKELY CONSENSUS ON RETAINING THIS RECOMMENDATION IN THE FINAL REPORT: **HIGH**

# Open Community Session at ICANN60 and Further Information

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- ICANN60 Open Working Group community session on **Wednesday, 1 November 2017, 1700-1830**
- Background information:  
<https://gns0.icann.org/en/group-activities/active/igo-ingo-crp-access>
- Latest GNSO Policy Brief:  
<https://gns0.icann.org/en/issues/pdp-update-igo-ingo-crp-access-15aug17-en.pdf>
- Working Group online wiki space (with meeting transcripts, call recordings, draft documents and background materials):  
<https://community.icann.org/x/37rhAg>

A world map where the continents are defined by a complex network of white dots and lines, resembling a social or data network. The background is a solid dark blue color. The text "Questions / Discussion" is centered over the map in a white, bold, sans-serif font.

**Questions / Discussion**