

## Excerpts from Draft Final Report – Recommendations and Policy Options

### FINAL RECOMMENDATIONS:

The Working Group Charter specifically directed the Working Group to examine the following questions: *“whether to amend the UDRP and URS to allow access to and use of these mechanisms by IGOs and INGOs and, if so in what respects; or whether a separate, narrowly-tailored dispute resolution procedure at the second level modeled on the UDRP and URS that takes into account the particular needs and specific circumstances of IGOs and INGOs should be developed.”* Following its analysis of each of the questions outlined in its Charter, the Working Group arrived at a set of preliminary recommendations for which it sought community input in January 2017. Following its review of all feedback received to that Initial Report, the Working Group completed its discussions on any resulting modifications that it believed needed to be made to its original recommendations and discussed various options it identified for resolving the remaining open issues. This Final Report reflects the group’s consensus recommendations as well as documents those proposals discussed by the Working Group but for which it did not achieve consensus. This Final Report is being submitted to the GNSO Council in its entirety for the Council’s review and action.

#### **Recommendation #1:**

**No changes to the UDRP and URS are to be made, and no specific new process created, for INGOs (including the Red Cross movement and the International Olympic Committee).**

Note on Recommendation #1: This recommendation is substantively identical to the original recommendation on this point in the Working Group’s Initial Report, with only textual changes made to clarify its scope.

#### **Recommendation #2:**

**An IGO that has complied with the requisite communication and notification procedure in accordance with Article 6ter of the Paris Convention for the Protection of Industrial Property<sup>1</sup> may choose to rely on such compliance to demonstrate that it has the requisite standing to file a complaint under the UDRP or URS. This may be an option where an IGO does not have trademark rights in its name or acronym (as applicable) but believes it has certain unregistered rights for which it must adduce factual evidence to show that it nevertheless has substantive legal rights in the name and/or acronym in question. For the avoidance of doubt, the Working Group emphasizes that:**

**(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 modify or affect any of the existing grounds which UDRP and/or URS panelists have previously found sufficient for IGO standing (e.g. based on statutes and treaties).**

Note on Recommendation #2: This recommendation is significantly different from the Working Group’s preliminary recommendation in its Initial Report, where it had recommended that compliance with Article 6ter can, in and of itself, satisfy the standing requirement. For a full discussion of the Working Group’s deliberations on the changes to the original recommendation as a result of community input received, see the discussion at [insert relevant Section/Page].

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<sup>1</sup> The full text of Article 6ter of the Paris Convention can be found here: [http://www.wipo.int/article6ter/en/legal\\_texts/article\\_6ter.html](http://www.wipo.int/article6ter/en/legal_texts/article_6ter.html) and in Annex D of this report.

**Recommendation #3:**

ICANN Organization shall create and issue a Policy Guidance document 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 any claim of jurisdictional immunity made by an IGO in respect of a particular jurisdiction will be determined by the applicable laws of that jurisdiction. In addition, ICANN Organization shall ensure that this Policy Guidance document is brought to the notice of the Governmental Advisory Committee (GAC) for its and its members' and observers' information, and published along with the procedures and rules applicable to the UDRP and URS on the ICANN website.

Note on Recommendation #3: This recommendation is based on part of an original recommendation in the Working Group's Initial Report. Although significant discussion has subsequently occurred on the topic of IGO jurisdictional immunity, the Working Group remains in agreement that the existence of these procedural filing options should be noted for the GAC and the community.

**Recommendation #4:**

In accordance with GAC advice concerning access to curative rights processes for IGOs, the Working Group recommends that ICANN investigate the feasibility of providing IGOs with access to the UDRP and URS at no or nominal cost to the IGOs.

Note on Recommendation #4: This recommendation is substantively identical to the original recommendation on this point in the Working Group's Initial Report, with only textual changes made to clarify its scope.

**Recommendation #5:**

In relation to the issue of jurisdictional immunity, which IGOs (but not INGOs) may claim successfully in certain circumstances, the Working Group recommends that: *[TBD depending on whether the Working Group reaches consensus. If it does not, there will not be a Recommendation #5 but the report will reflect all the proposals and options that were considered.]*

**Note on Recommendation #5:**

As published originally (as Recommendation #4 in the Initial Report) for public comment, the recommendation included two options for which the Working Group specifically requested community input. The Working Group subsequently developed an additional four options, based on public comments received and suggestions from Working Group members. In October 2017, an informal poll was conducted on three of these options and discussed at ICANN60 in Abu Dhabi. Following its review of feedback received to these options and further deliberations, the final list of options to be considered for possible resolution of the issue of IGO jurisdictional immunity became a total of six options. For the text of the six options and a description of the Working Group's deliberations on these options, see the discussion at [insert relevant Section/Page].

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**POLICY OPTIONS ON IGO JURISDICTIONAL IMMUNITY ISSUE:**

Option 1 (unchanged from the text included in the October 2017 poll):

- ***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 (i.e. set aside).***

Option 2 (unchanged from the text included in the October 2017 poll):

- ***In relation to domain names with a CREATION DATE before the (Policy Effective Date), then Option [1] applies. In relation to domain names with a CREATION DATE on or after the (Policy Effective Date), Option [3] shall apply. After five (5) years or 10 instances of Option [3] being utilized, whichever occurs first, ICANN and the various dispute resolution providers (including any who have administered arbitration proceedings under the new Option [3]) will conduct a review to determine the impact, both positive and negative, as a result of “trying out” Option [3].***

Option 3 (unchanged from the text included in the October 2017 poll):

- ***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. 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.***

Option 4 (proposed by Zak Muscovitch and presented on the Working Group’s 14 December 2017 call):

- ***Our initial report and recommendation (that no change is required) remains valid and should be reflected in the published report of this WG. Our report should advise that even if a change were advisable or appropriate, such would necessarily require modifications to the UDRP and its accompanying rules. As such changes are within the ambit of the RPM WG, we feel it inappropriate to inject our proposals in that regard. Accordingly, the IGO WG strongly recommends that any changes to how the UDRP procedure is drafted and employed for IGO’s, if any, should be referred to the RPM WG for consideration within its broader mandate to review the UDRP.***

Option 5 (proposed by George Kirikos, modified from an earlier proposal and also noted as a proposal that can be included in Option 4 in the event of a referral to the RPM Working Group):

- ***The text of both the UDRP and URS rules and policies shall be modified so that, in the event a domain name dispute (UDRP or URS) is initiated by an IGO as complainant and a registrant commences an “in rem” action in a court of mutual jurisdiction concerning that domain name, the registrar shall treat that court action in the same manner as if an “in personam” action had been brought directly against the IGO.***

Option 6 (proposed by Paul Tattersfield, with a slight amendment to the text following discussion on the Working Group’s 14 December 2017 call):

- *We should arrange for the UDRP providers [to] provide [mediation] at no cost to the parties. The UDRP already permits the resolution of disputes through arbitration - I would bind the IGOs to arbitration in the same way the Mutual Jurisdiction clause binds complainants to the registrant's judicial system. Where an IGO refuses to take part in a judicial proceeding or judicial or arbitral proceedings, or successfully asserts immunity in a judicial proceeding, any prior UDRP determination would be quashed.*