

# Report of Public Comments

## GNSO Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process

**Publication Date:** 5 May 2017

**Prepared By:** Mary Wong

### Comment Period:

Comment Open 20 January 2017

Comment Close 30 March 2017

### Important Information Links

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**Staff Contact:** Mary Wong

**Email:** [policy-staff@icann.org](mailto:policy-staff@icann.org)

### Section I: General Overview and Next Steps

This public comment sought to obtain community input on the Initial Report from the GNSO's Policy Development Process Working Group that is evaluating the access by International Governmental Organizations (IGOs) and International Non-Governmental Organizations (INGOs) to curative rights protection mechanisms, i.e. the Uniform Dispute Resolution Policy (UDRP) and the Uniform Rapid Suspension process (URS).

The Working Group (WG) was tasked with developing policy recommendations regarding 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. In the WG's Initial Report, the WG has provided preliminary recommendations that seek to improve IGOs' access to these existing curative rights protection mechanisms.

The WG has received 46 comments, which the WG will review and based on which it may revise its Report as deemed appropriate. The Final Report will be submitted to the GNSO Council for its discussion and possible adoption.

### Section II: Contributors

*At the time this report was prepared, a total of forty-six (46) community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.*

#### Organizations and Groups:

Name	Submitted by	Initials
WIPO	Brian Beckham	WIPO
Organisation for Economic Co-Operation and Development	Jonathan Passaro	OECD
The North Atlantic Treaty Organization	Antoaneta Boeva	NATO
The International Federation of Intellectual Property Attorneys	Roberto Pistoiesi	FICPI
The International Civil Aviation Organization	Arie Jacobs	ICAO

The Inter-American Development Bank	Alessandro Macrì	IADB
The United Nations	Noam Wiener	UN
United States Government	Ashley Heineman	USG
Inter-American Investment Corporation	Andres Consuegra	IIC
Internet Commerce Association	Phil Corwin	ICA
GNSO Business Constituency	Steve DelBianco	BC
ICANN Governmental Advisory Committee	Tom Dale	GAC
i2Coalition	Jay Sudowski	i2c
International Atomic Energy Agency	Peri Lynne Johnson	IAEA
World Bank	Ingo Burghardt	WB
GNSO Registries Stakeholder Group	Stephane van Gelder	RySG
UNESCO	Garcia Marquez	UNESCO
Universal Postal Union	Ricardo Guilherme	UPU
International Finance Corporation	Gordon Myers	IFC
GNSO Intellectual Property Constituency	Greg Shatan	IPC
GNSO Registrars Stakeholder Group	Zoe Boynton	RrSG

**Individuals:**

<b>Name</b>	<b>Affiliation (if provided)</b>	<b>Initials</b>
Richard Hill		RH
George Kirikos	Leap of Faith Financial Services Inc.	GK
Jordan Evens		JE
Patrick Quinn	Allegheny Internet, LLC	PQ
Mike Anderson		MA
Russ Smith		RS
Jay Chapman		JC
John Pepin		JP
Ronald Edge		RE
Paul Tattersfield		PT

**Section III: Summary of Comments**

***General Disclaimer:** This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).*

**General Comment Statistics**

A total of forty-six (46) comments were received as of the closing date of the public comment.

- Ten (10) were from individual commentators, twenty-one (21) from IGOs, and one (1) from a national government (the United States)
- One (1) comment was received from an ICANN Supporting Organization – the Governmental Advisory Committee (GAC)
- Four (4) comments were received from GNSO Stakeholder Groups/Constituencies – the Registries SG, Registrars SG, Business Constituency and Intellectual Property Constituency

One individual commentator (Richard Hill) and ten (10) IGOs specifically supported the comment submitted by WIPO. The IGOs who signed on were:

- ICAO, IADB, IAIC, WTO, Council of Europe, WHO, UNIDO, EPO, CERN, and UPU.

Fifteen (15) IGOs specifically supported the comment submitted by the OECD:

- NATO, ICAO, IADB, UN, IAIC, EBRD, WTO, WHO, UNIDO, MIGA, WB, EPO, IFC, CERN, UPU

Five (5) IGOs specifically supported the comment submitted by the UN:

- WHO, UNIDO, MIGA, EPO, UPU (5 IGOs)

Four (4) IGOs specifically supported the comment submitted by the World Bank:

- MIGA, IFC, CERN, UPU

## **General Comments on the WG's Recommendations**

### Recommendations do not address the problems for which the WG was chartered

To assess whether a particular policy would in fact "address the specific needs and circumstances of IGOs", that question would naturally be put to IGOs themselves. In fact, on numerous occasions in the history of this file, it was. Nevertheless, the Initial Report does not take proper account of IGOs' feedback.

*WIPO (21 February 2017)*

### Support for all five recommendations

The ICA supports all five of the recommendations, particularly because they recommend necessary adjustments and enhancements of existing UDRP and URS practice that will enable IGOs and INGOs to more readily access these existing expedited and low-cost curative rights mechanisms to effectively respond to misuse of their names and acronyms in the DNS. Such an incremental approach is preferable when compared to the uncertainty and implementation-related difficulty of the alternative of developing a completely separate set of curative rights mechanism that would only be used by a small number of IGOs.

*ICA (7 March 2017)*

The BC supports all five of the recommendations, particularly because they recommend necessary adjustments and enhancements of existing UDRP and URS practice that will enable IGOs and INGOs to access these existing expedited and low-cost curative rights mechanisms to effectively respond to misuse of their names and acronyms in the DNS. Such an incremental approach is preferable, particularly for business users of the Internet, when compared to the alternative of developing a completely separate set of curative rights mechanism that would only be used by IGOs.

*BC (7 March 2017)*

I generally support all five recommendations, and also echo the comments made by the ICA and the "ICANN Ecosystem Process Concerns" section of i2Coalition's comment.

*JC (27 March 2017)*

The Proposal describes reasonable adjustments to the Uniform Domain-Name Dispute Resolution Policy (UDRP) and Uniform Rapid Suspension (URS) that will address gaps in the ability for International Governmental Organizations (IGOs) to access these curative RPMs to protect their names, and maintains the ability for International Non-Governmental Organizations (INGOs) to use the mechanisms in their current form. The Proposal wisely avoids the creation of additional process and bureaucracy where none are needed. We believe that this approach, tailored to fit a limited and finite set of qualified entities, is preferable to the creation of wholly new mechanisms, given that the same basic substantive grounds for the URS and UDRP should apply regardless of the complainant, as established by Recommendation 3.

*RrSG (31 March 2017)*

The i2Coalition is looking forward to supporting all five of the recommendations at the completion of the PDP process. From our perspective, they largely provide for minor enhancements that enable to IGOs and INGOs to access existing curative rights mechanisms, in particular the UDRP and URS. Such an approach is preferable, when compared to the alternative of developing a completely separate set curative rights mechanism that would only be used by IGOs and INGOs. We are, however, withholding full support from each recommendation until the completion of the PDP process. This is because we await the input of affected IGOs and INGOs, as well as the GAC and representatives of government. We understand that these are complex issues, and that the input of affected parties is an essential component of the process. We simply want to ensure that the final work product, and final recommendations, lead to implementable policy.

*i2c (21 March 2017)*

As a participant in the PDP working group, I generally agree with the findings in the report, although my own comments here are independent of those of the working group itself or other participants. It's a well-researched and detailed report, with numerous footnotes that support its conclusions with relevant facts and law. Indeed, an external independent legal expert (an experienced law professor) was commissioned to support the research effort with regards to international law and immunity.  
*GK (27 February 2017)*

Generally, FICPI supports the Working Group's suggestion to use the existing dispute resolution procedures to the extent possible to resolve the concerns of INGOs and IGOs. It is considered best to avoid changes to the Uniform Rapid Suspension System (URS) and/or UDRP, other than for clarification purposes in respect of, for example, administrative or information issues.  
*FICPI (28 February 2017)*

#### Opposition to separate dispute resolution mechanism

[in response to WIPO] - I personally believe a separate, narrowly tailored dispute resolution mechanism isn't the best way forward especially given better alternative non UDRP/URS mechanisms already exist to deal with the vast majority of the cited bad behaviour. It would be far better to improve the existing protection mechanisms which would also help other non-IGO organizations which currently experience in excess of 99.9% of these kinds of problems.  
*PT (30 March 2017)*

### **Comments on Recommendation 1**

#### Support for recommendation 1

In concordance with the Initial Report, and as confirmed through the experiences of FICPI members, including those who have represented INGOs involved in domain name disputes, the current dispute resolution policies are effective and there is therefore no need for change.  
*FICPI (28 February 2017)*

INGOs are nongovernmental, private organizations and as such have no claim to any jurisdictional immunity; they presently enjoy ready access to the UDRP and URS to protect their trademarked names and acronyms.  
*ICA (7 March 2017)*

The UDRP and URS, as drafted, adequately serve the proposal to provide certain curative rights. As the WG found, INGOs are not readily differentiated from other private parties and are in fact perfectly capable of enforcing their trademark rights under these policies. Further, changes would present uncertainty and any expansion could lead to a slippery slope that would embolden others to attempt to alter well-established and -defined procedures to accommodate their own interests that are appropriately addressed elsewhere.  
*RySG (29 March 2017)*

#### Qualified support for recommendation 1

IPC supports the first sentence of Recommendation #1. [T]he current dispute resolution policies are already useful and functional for INGOs without any need of changes.

IPC does not support the second sentence of Recommendation #1. As discussed below, IPC does not support preparing and issuing a "Policy Guidance" document.  
*IPC (31 March 2017)*

#### No Position or No Objection

The first recommendation deals with INGOs. The OECD takes no position on this issue.  
*OECD (27 March 2017)*

The GAC does not take exception to the Working Group Recommendation #1, which notes that the Initial Report recommendations do not apply to international non-governmental organizations (INGOs) particularly insofar as two such INGOs, the Red Cross and International Olympic Committee, are the subject of separate, GAC advice.  
*GAC (12 March 2017)*

The World Bank is not an INGO, and has no comments on this recommendation concerning INGOs.  
*WB (29 March 2017)*

### **Comments on Recommendation 2**

## Supports Recommendation 2

Given the non-commercial nature of IGOs and the unique protection their marks enjoy under international law, we agree that standing to file a complaint under the UDRP and URS should be based on international law rather than national trademark law.

*OECD (27 March 2017)*

Although Article 6ter of the Paris Convention does not cover trademark rights, but rather "state emblems, official hallmarks, and emblems of Intergovernmental Organizations", the protection is similar to the identification of trademark rights when it comes to Paragraph 4 a (i) of the UDRP, as well as Article 1.2.6.1. of the URS.

*FICPI (28 February 2017)*

This recommendation eliminates the need for IGOs to trademark their names and acronyms as a prerequisite for seeking UDRP/URS protection. More importantly, the list of IGOs that have asserted their Article 6ter rights is broader than the list of IGOs for which the GAC has sought access to CRP, so this recommendation offers access to CRP for an expanded group of IGOs. Finally, we note that Article 6ter protections are recognized not only by all nations that have signed the Paris Convention but also by all members of the World Trade Organization (WTO); these two groups comprise the vast majority of national governments

*ICA (7 March 2017); BC (7 March 2017)*

Recommendation #2 is a welcome step forward in this regard, as it formally recognizes the legal reality that IGOs derive the protection of their names and acronyms from Article 6ter of the Paris Convention.

*IAEA (23 March 2017)*

### Does not support Policy Guidance Document, recommends separate DRP process

The Working Group's suggestion to issue "Policy Guidance" on UDRP standing, and to apply agency principles to avoid jurisdictional questions, is misguided in two respects.

First, such "alternative guidance" would contravene the plain language of the UDRP itself. We strongly feel that ICANN should see this as inadvisable for a number of reasons.

Second, given that fair resolution of disputes involving IGOs more generally through independent and impartial arbitration is already widely accepted (see Swaine Memo page 28), the application of agency principles would be an artifice creating unnecessary legal hurdles.

*WIPO (21 February 2017)*

ICANN should establish a dispute resolution mechanism *modeled on but separate from the UDRP*, which provides:

- Standing for IGOs which need not be expressly grounded in trademark law as such, as IGOs are created by governments under international law and are in an objectively different category of rights-holders. ...

... First, insofar as the Recommendation itself would effectively alter an existing Consensus Policy (no amendment of the UDRP), it improperly bypasses the ordinary Bylaws-prescribed Policy Development Process (it should not therefore be described merely as some form of policy "implementation" guidance).

Second, aside from failing to adequately account for GAC Advice on this subject, this Recommendation disregards the plain language of the UDRP which requires trademark rights for standing to file a case.

*GAC (12 March 2017)*

IPC is still of the position that there is no need for changing/modifying the current UDRP or URS in order to make it possible for IGO's to use these dispute resolution procedures. Instead, the IPC continues to support the creation of a separate, narrowly-tailored UDRP or URS-like process solely for IGOs to protect their identifiers.

*IPC (31 March 2017)*

### Does not support Article 6ter for standing

The U.S. disagrees with this recommendation because it incorrectly concludes that an IGO has standing, and therefore a right that is equivalent or similar to trademark rights, based on completion of the communication and notification under Article 6ter. This procedure does not have any legal effect under the terms of the treaty itself and therefore, there is no international right. Further, there is no harmonized approach among treaty members in implementation of Article 6ter.

*USG (1 March 2017)*

First, IPC does not support using 6ter notifications as an independent basis for standing under the UDRP or URS. The mere notification to WIPO that an entity is claiming 6ter rights does not provide a sufficient basis for standing to bring a claim. It might be possible to consider whether (a) a 6ter notification has been actively accepted by any national trademark office and (b) conversely, whether a 6ter notification has been rejected by any national trademark office, in considering whether to allow standing. However, this seems both complex and uncertain.

*IPC (31 March 2017)*

#### Supports consideration beyond trademarks

In that regard, we would once more emphasize the fact that the protection afforded to IGO names and abbreviations under international law and various domestic statutes stems from public policy considerations and goes beyond the mere concept of "trademarks", especially since such IGO designations are, as a matter of principle, not subject to the trademark registration requirements outlined in ordinary national, regional and international intellectual property frameworks (without prejudice to the possibility for an IGO to voluntarily register its name and abbreviation as a trademark, or to register any other trademark within the scope of its activities and projects).

*UPU (31 March 2017)*

The World Bank, like the OECD, urges the GNSO to allow arbitrators in the UDRP 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.

*WB (29 March 2017)*

#### General comments, neither support or against

The RySG has neither a pro nor con comment on this recommendation, as no case has yet been presented. However, this seems like a reasonable threshold for an IGO to meet, and is reasonable for the protection of registrant interests. The RySG sees little need to invent a new process specifically for IGOs.

The RySG supports no changes to the UDRP or URS process for either party in disputes involving IGOs. The RySG further supports an appropriate policy guidance document that clearly explains the limitations of any rights under Article 6ter of the Paris Convention.

*RySG (29 March 2017)*

It seems to me that the United States has missed the key point regarding consumer protection in its learned disquisition on the intricacies of implementing (or not) Article 6ter of the Paris Convention, particularly because it seems to me that subparagraph (c) of that article implies (read a contrario) that the purpose of Article 6ter includes protecting the public from misleading use of IGO names and acronyms.

*RH (4 March 2017)*

### **Comments on Recommendation 3**

#### Supports Recommendation 3

FICPI further notes that both the URS and the UDRP have Rules and Supplemental Rules wherein references to rights of IGO under Article 6ter can be included without changing current policies. WIPO also provides "a Model Complaint and Filing Guidelines" for UDRP cases, wherein a further clarification related to IGO protection can easily be made, again without revising the policies.

*FICPI (28 February 2017)*

This recommendation will align the scope of Article 6ter protections with its use as a basis for IGO standing.

*ICA (7 March 2017); BC (7 March 2017)*

The RySG supports no changes to the UDRP or URS process for either party in disputes involving IGOs. The RySG further supports an appropriate policy guidance document that clearly explains the limitations of any rights under Article 6ter of the Paris Convention.

*RySG (29 March 2017)*

#### Does not support Recommendation 3

... Recommendation #3 unduly interferes with panellists' decision-making and proposes an interpretation of Article 6ter(1)(c) which does not enjoy consensus. Panellists should adjudicate the cases before them based on their interpretation of the applicable legal principles in the context of the facts at hand. The proposed recommendation would unduly increase the burden on IGOs bringing cases in the UDRP.

*OECD (27 March 2017)*

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.

*WB (29 March 2017)*

For these same reasons [as noted for Recommendation #2], the GAC cannot agree to Recommendation #3.

Such dispute resolution mechanism should also provide for:

- Appeal to an arbitral tribunal instead of national courts, in conformity with relevant principles of international law concerning recognized privileges and immunities conferred by governments on IGOs.

*GAC (12 March 2017)*

The IPC is also concerned by the suggestion that the “limitation enshrined in Article 6ter (1)(c)”<sup>4</sup> should be imported into UDRP/URS jurisprudence. This would introduce an additional hurdle for IGO Complainants not currently found in UDRP/URS cases. Not only does this appear to be yet another instance where the Initial Report has created a UDRP that is “designed to fail,” this would open the door to importing this limitation into UDRP/URS cases that do not involve IGOs.

*IPC (31 March 2017)*

## **Comments on Recommendation 4**

### Support for Recommendation 4

FICPI notes from the Working Group report (especially from Professor Swaine’s legal conclusion in relation to an IGO’s jurisdictional immunity) that there is no international clear praxis, and that claims of jurisdictional immunity made by an IGO in respect of a particular jurisdiction will have to be determined by the applicable laws of that jurisdiction. FICPI therefore also support the Working Group’s conclusion on this topic.

*FICPI (28 February 2017)*

Clarifying that an IGO may avoid any concession on the matter of jurisdictional immunity by electing to file a UDRP or URS through an assignee, agent or licensee ... greatly respects the views of some IGOs in regard to the question of immunity. This recommendation also properly states that, in the rare circumstance in which a losing registrant elects to exercise its legal right to appeal to a court of mutual jurisdiction under applicable statutory law, any claims of jurisdictional immunity made by an IGO in respect of a particular jurisdiction will be determined by the applicable laws of that jurisdiction.

*ICA (7 March 2017)*

This clarification respects the views of some IGOs in regard to the question of immunity. This recommendation also properly states that, in the rare circumstance in which a losing registrant elects to exercise its legal right to appeal to a court of mutual jurisdiction under applicable statutory law, any claims of jurisdictional immunity made by an IGO in respect of a particular jurisdiction will be determined by the applicable laws of that jurisdiction. Given that the determination of an immunity claim will depend on a wide variety of factors ... determination of the immunity claim by the court is the only way to proceed as it would be impossible and improper for ICANN to assert a blanket rule that predetermines the outcome for every IGO in every potential dispute.

*BC (7 March 2017)*

The RySG supports Recommendation 4(a) [Mutual Jurisdiction clauses of UDRP and URS remain unchanged]

Recommendation 4(b) [Policy Guidance]: The RySG does not believe ICANN or the WG should provide any sort of legal advice to an IGO filing a UDRP or URS complaint. Furthermore, the locale of the agency or assignee filing the complaint is completely unrelated to the Mutual Jurisdiction of UDRP or URS (which are both limited to the location of the registrar or registrant, as elected by the complainant).

The RySG supports Recommendation 4(c) [claims of jurisdictional immunity determined by the applicable laws of that jurisdiction]

*RySG (29 March 2017)*

### Does not Support Recommendation 4

[The WG’s conclusion that it] “is not able to say for certain that a third party’s infringing registration of a domain name would necessarily impede an IGO in carrying out its core mission within the scope of a functional immunity inquiry” is not supported by the findings of the PDP for three main reasons. First, the WG incorrectly restates the immunity test

proposed by its own legal expert, Prof. Edward Swaine. Second, the WG misapplies this incorrect test by applying an inappropriate legal standard. Third, the WG's proposed remedy for IGOs concerned about their immunities entails a complicated legal workaround which could undermine both an IGO's immunities and its ability to defend its rights in its own name. ...

... In light of the uncertainty surrounding the effectiveness of assignment from both an immunities and intellectual property perspective, the conclusion that such a complicated legal workaround is a viable remedy for the problem at hand is unsupported by the facts presented in the WG's report.  
*OECD (27 March 2017)*

This recommendation fails to address both the status of IGOs as organizations of sovereign member states and the basic premise of forum selection clauses such as the Mutual Jurisdiction Clause in the UDRP and URS.  
*UN (8 March 2017)*

[The WG's suggestion of] a form of workaround, is incompatible with the position conveyed by the Legal Counsels of IGOs which was provided to the Working Group at its request.

... Working Group Recommendation #4 does not adequately account for GAC Advice on this subject which recognizes international norms regarding IGOs' status as treaty-based organizations.

More fundamentally, as noted above, Working Group Recommendations #2 and #4 which suggest various adjustments to the UDRP plainly fail to account for GAC Advice (see, e.g., the Los Angeles and Hyderabad Communiqués) which calls for a separate standalone IGO-specific dispute resolution mechanism.  
*GAC (12 March 2017)*

Second, we note (without waiver or agreement) Professor Swaine's counsel 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 WG's assertion that its proposed outcome "respects and preserves an IGO's assertion of jurisdictional immunity", or indeed any immunity, is therefore incorrect on the WG's own terms.

Finally, we note that whatever the substantive concerns, by declining to consider the accommodations supported by the Small IGO Group, the GAC, or apparently, the ICANN Board, the WG is recommending an approach that impedes rapid or efficient resolution of domain name disputes by registrants. To the contrary, it is effectively proposing that where IGOs are complainants, they pursue actions outside ICANN mechanisms, at considerable burden to both IGOs and registrants, in order to preserve legal rights well established and recognized under international and national laws. ...  
*IFC (30 March 2017)*

[Despite Recommendation #2] IAEA would still not be in a position to use the current or the proposed URS and UDRP mechanisms because of their "Mutual Jurisdiction" provisions. Acceptance of these clauses would likely require the IAEA to waive the immunity it enjoys under international law. ...

... IAEA is in general agreement with the comments of the OECD that raise concerns that such an assignment might not be effective and may weaken an IGO's rights in its name or acronym.  
*IAEA (23 March 2017)*

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.  
*WB (29 March 2017)*

UNESCO submits that this recommendation deprives [IGOs] of their access to an effective curative rights protection mechanism because it fails to account for IGOs' immunities. ...

... Contrary to what the Working Group stated, IGOs are not "able to file complaints through an assignee, licensee or agent" without waiving their immunity. An assignee, licensee or agent would lodge a complaint on behalf of the IGO, and thus even an assignment could be construed as a waiver of immunity.

[P]recisely because IGOs are immune from jurisdiction by international treaty, the extent of this immunity cannot be determined by a national court. In fact, IGOs' immunity from legal process prevents IGOs from appearing before a national court at all, even if it is to raise a so-called "immunity claim." This is because the mere fact that an IGO appears before a court could be construed as a waiver of immunity. Therefore, the Working Group based Recommendation #4 on the wrong assumption... IGOs' immunity is not a mere jurisdictional objection that has to be



raised during the proceedings by the IGO and that is ultimately decided by the Court ... the mere fact that an IGO agrees to a Mutual Jurisdiction under the UDRP or URS could likely be interpreted as an implicit waiver of immunity.  
*UNESCO (30 March 2017)*

Specifically, the IPC does not support maintaining the "Mutual Jurisdiction" clause with regard to IGO cases, nor does IPC support the creation of a "Policy Guidance" document. The IPC does support (c): "claims of jurisdictional immunity ... will be determined by the applicable laws of that jurisdiction."

The separate IGO DRP [supported by IPC] could include explicit instructions that any decisions under the DRP would be appealable to any court of competent jurisdiction on an in rem basis where the domain name is located (via the registry or registrar). ...  
*IPC (31 March 2017)*

#### Support for Option 1

The only reasonable option in this situation is to vitiate or set aside the UDRP/URS ruling, in order to preserve the status quo and the legal rights of all parties and to ensure that the UDRP/URS does not interfere with those legal rights. It would put all parties in the same situation as if the UDRP/URS did not exist, and only the national laws existed.

The UDRP/URS was not designed to replace the law, but was instead put forth as a fast low-cost alternative procedure for clear cut cases of cybersquatting that fully preserved the rights of all parties to pursue their dispute in the courts, before, during, or after a UDRP/URS decision. Depriving a domain name registrant recourse to the courts through compulsory arbitration represents a denial of due process to those domain name registrants.  
*GK (27 February 2017); PQ (1 March 2017)*

It is common knowledge that UDRP/URS panelists are financial incentivized to find in favor of complainants to get repeat business. The biased panelists should never be allowed to have the last word. They have given away very common single word domains that have been overturned in court. The panelists are helping complainants commit flat out theft in order to get repeat business, and there just be an option to stop the theft, like going to court.  
*JE (28 February 2017)*

Given the failure to properly manage the UDRP the court challenge should remain in place. As it is currently it could be argued that an IGO-INGO waives their right to immunity when they agree to the arbitration agreement. That should be changed so any entity who files a UDRP explicitly waves their right to any immunity. The respondent should have the matter reviewed in a legitimate legal forum rather than some kangaroo court run by NAF and INTA members.  
*RS (1 March 2017)*

Given that the determination of an immunity claim will depend on a wide variety of factors - - including the applicable laws of that jurisdiction, the treaty or charter basis of the IGO, the accepted analytical approach exercised by the jurisdiction's courts, and the particular facts and circumstances of the matter in dispute -- determination of the immunity claim by the court is the only responsible way to proceed, as it would be impossible and improper for ICANN to assert a blanket rule that predetermines the outcome for every IGO in every potential domain-related dispute.  
*ICA (7 March 2017)*

One of the worst goals of the current efforts of corporations is to destroy access to their national courts by litigants ... arbitration panels always end up selected by and controlled by the corporations. The result is a further erosion of the protection of the rights of individuals, and access to determination of ownership and rights through a due process in courts under law established in their nation of residence.

I am totally against this movement which erodes legal rights of owners of domains, and removes their access to due process under legal structures in the courts of their nation of residence.  
*RE (10 March 2017)*

#### Opposition to Option 1

Where a court finds that the relevant IGO had already waived its immunity by submitting to the UDRP, the IGO would likely be estopped from subsequently raising jurisdictional immunity as a procedural defence.

Implementing [Option 1] would curtail any rights the IGO does have to its immunities. Any losing registrant would know that one means of sweeping aside an unfavourable UDRP decision would be to lodge an appeal in a court of mutual jurisdiction. Even if that appeal is baseless, the IGO will be prevented from asserting the immunities granted to it under national and international law because the decision in its favour will simply be swept aside if the immunities claim succeeds. ...

*OECD (27 March 2017)*

Option 1 would effectively compel an IGO to waive its (potentially valid) claim of jurisdictional immunity after prevailing in a UDRP ... The BC remains open to the input of affected IGOs on this matter ... we urge the WG to carefully review all comments and to be mindful of the potential impacts on time and cost to resolution, as well as the necessity to assure that the CRP provided to IGOs can be utilized in a practical matter that is respectful of valid immunity claims.

*BC (7 March 2017)*

Option 1 seems harsh and draconian, and puts an IGO complainant in an appeal in an untenable position. On the other hand, it offers a “free pass” to the losing respondent.

*IPC (31 March 2017)*

### Support for Option 2

The reason why an arbitration court, rather than a national court, is appropriate in the case of a claim made by an IGO regarding its name have been exposed many times: basically, it is not appropriate for IGOs to litigate matters in national courts. Litigation regarding IGOs normally takes place in arbitration courts for what concerns commercial matters.

*RH (20 Jan 2017)*

But the fact remain that, as shown by the present round of comments, IGOs do not agree with that position and maintain that they should be able to have access to a UDRP-like process without having to waive immunity ... As a consequence, abusive registrations using IGO names and acronyms are not challenged ... If there aren't many such abusive registrations, then what's the harm in creating a UDRP-like process that the IGOs can use without waiving immunity? Conversely, if there are a significant number of such abusive registrations, then surely consumers should be protected and a UDRP-like process that the IGOs can and will use should be created.

*RH (4 March 2017)*

Finally, it is worth noting that an arbitration clause in a contract between a private party and an IGO typically protects the private party, because it ensures that the IGO will not invoke immunity, as it might if the private party took the IGO to court in a national jurisdiction.

*RH (19 March 2017)*

The OECD strongly supports [Option 2] as the only viable proposal, which would preserve the due process rights of both parties. In fact, as stated above, providing for the possibility of appeal to an arbitral tribunal from the outset of proceedings would resolve many of the issues raised in this PDP by eliminating the need for the mutual jurisdiction provision.

We disagree with the WG's claim that arbitration is a “mechanism ... unfamiliar to registrants”. Arbitration is a common means of resolving commercial contractual disputes. ...

*OECD (27 March 2017)*

[Disagree] that arbitration may not be a proper alternative to national courts as a means to appeal an UDRP or URS finding because the arbitration mechanism is not familiar to registrants. Arbitration is a common method for dispute resolution and especially popular between entities that come from different national jurisdictions, since the awards are valid in any country, regardless of where the decision was made.

*UN (1 March 2017)*

In those rare instances in which a losing registrant seeks judicial appeal and the IGO subsequently successfully asserts its immunity to the court's jurisdiction, our preference is for Option 2 as set forth in recommendation 4 ... It is important to note that it is only within this very narrow circumstance of a complainant IGO's successful assertion to a court of its judicial immunity in which we would countenance compelling a domain registrant to submit to arbitration as an appeals mechanism, and this position should not be viewed as setting a broader precedent.

*BC (7 March 2017)*

In fact, it is evident from the relevant international law provisions applicable to IGOs that each organization shall make provision for appropriate modes of settlement (i.e. arbitration) in the light of their immunity from every form of domestic legal process. Such allegations also seem to ignore the fact that, even in a hypothetical scenario where an IGO expressly decides to waive its immunity, such a waiver shall never extend to any measure of execution.

*UPU (31 March 2017)*

The dispute resolution and rapid relief mechanisms proposed under points 2 and 3 of the IGO “Small Group” Proposal (Annex E to the Initial Report) would allow IGOs like the IAEA to participate in ICANN curative mechanisms because final recourse to a national court would be replaced by arbitration. ...

... All IAEA contracts with outside parties include an arbitration clause. Its inclusion in a narrowly tailored curative mechanism for IGOs would not represent a departure from standard legal practice and would instead facilitate the rapid and cost-effective settlement of IGO DNS disputes in a manner that preserves the rights of all stakeholders.  
*IAEA (23 March 2017)*

[T]he Mutual Jurisdiction clause could be amended by adding the following paragraph: *"in the event that the complainant is an IGO enjoying privileges and immunities under relevant treaties, challenges to a decision in the administrative proceeding cancelling or transferring a domain name shall be referred to final and binding arbitration."*  
*UNESCO (30 March 2017)*

Option 2 is consistent with the general practice for appeals of UDRP cases, as registrants on the losing side of a UDRP are entitled to a de novo review upon appeal, except that the appeal goes to an arbitrator rather than a court. IPC especially supports and notes the importance that the arbitration entity handles such case for de novo review and determination. Option 2 is easily transferrable to an IGO-DRP as recommended by IPC.  
*IPC (31 March 2017)*

#### Opposition to Option 2

These are not trivial concerns, given that arbitration panels are not constituted in the same independent manner as the national courts, are not more expert with regards to national laws than the judges of those nations, and are often subject to forum shopping by complainants.

Given the choice of proceeding in the courts (which IGOs are free to do) or proceeding with a UDRP/URS, IGOs will naturally choose the venue where the playing field is tilted unfairly in their favour. Removing the ability to appeal to the courts means that arbitration panelists, many of whom are notorious for their poor judgement, would have their decisions left unchecked.  
*GK (27 February 2017)*

*\*Note, several of the comments in support of Option 1 may also be construed to be in opposition to Option 2.*

#### No preference between options

Option 1 seems to correspond more closely to traditional trademark/domain name disputes, and is therefore also likely to be both more practical and more accepted by domain holders, registrars and other groups involved in domain name registration and administration. However, Option 2 may be more acceptable from the perspective of IGO's, as the final decision will not be restricted to a specific national court but will still be handled in a neutral / international way.  
*FICPI (28 February 2017)*

[W]e appreciate the WG asking for input on which of two options are optimal, and also being open to a third alternative that has yet to be considered. We have no specific comment on either option, but instead suggest that the WG be mindful of the potential impacts on time to resolution and cost to resolution, when determining the optimal approach. Such practical considerations are highly relevant to INGOs, IGOs, and domain registrants who are subject to a UDRP or URS action.  
*i2c (21 March 2017)*

... neither Option 1 nor 2 solve the problem the working group is trying to address. Both merely introduce new levels of complexity and cost and lose the delicate balance the UDRP and URS have struck. All complainants choose from a variety of legal and non-legal options including doing nothing, going to court and using the UDRP/URS, and must weigh the relative costs and benefits accordingly. The RySG supports the WG's conclusion as stated on page 19 that "it would not be possible to recommend a single solution that takes into account all [of the variables]...."  
*RySG (29 March 2017)*

## **Comments on Recommendation 5**

#### Supports Recommendation 5

Given the non-commercial nature of IGOs, the OECD agrees that ICANN should investigate the possibility of subsidising the cost of IGO access to the UDRP and URS.  
*OECD (27 March 2017)*

FICPI support Recommendation No 5.  
*FICPI (28 February 2017)*

Recommendation #5 is the one Working Group recommendation that takes the GAC's advice into account, i.e., that any curative rights protection mechanisms be provided at no or nominal cost.  
*GAC (12 March 2017)*

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.  
*WB (29 March 2017)*

... but would want assurance that any costs are not passed on to other stakeholders. We wish also point to the fact that the costs for using URS or UDRP (or, presumably, the IGO DRP) are already lower than traditional civil court actions. Finally, it should be clear that this refers only to filing fees, and not to any other costs in bringing an action (and not to any costs on appeal).  
*IPC (31 March 2017)*

#### Does not support Recommendation 5

The RySG respectfully disagrees with the notion that actions might be brought at nominal or no cost, as this sets a dangerous policy precedent and could encourage other various parties to plead for similar nocost access to UDRP and URS, potentially leading to abusive use.  
*RySG (29 March 2017)*

#### Concern with Recommendation 5

We are somewhat concerned by the possibility that, per Recommendation 5, dispute resolution costs might be borne unequally by parties to a dispute, but note that the working group recommendations are not sufficiently conclusive to permit full comment. We would advise ICANN to seriously consider the potential negative implications of an imbalanced fee scheme for the URS and UDRP in assessing the feasibility of subsidizing IGO or INGO access to these mechanisms.  
*RrSG (31 March 2017)*

## **Section IV: Analysis of Comments**

***General Disclaimer:** This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.*

The Initial Report received 46 comments, though some of them were to support the statements made by others organizations (e.g., the comments of WIPO, OECD, the UN, and WB were supported by various IGOs). Comments were made towards all recommendations.

Recommendation 1: There were relatively few comments on this recommendation, with some commenters indicating support, some taking no position in their capacity as an IGO (as this recommendation is in respect to INGOs), but no parties indicated opposition to this recommendation. One commenter, the IPC, supports the spirit of the recommendation but opposes the concept of a Policy Guidance Document.

Recommendation 2: There was support for recommendation 2 from a broad cross-section of the community (e.g., OECD, IAEA, i2c, ICA, BC, FICPI, RrSG, GK, etc.). However, there was opposition from the USG and IPC to the prospect of using the communication and notification procedure under Article 6ter as a basis for standing under the UDRP and URS, with the USG noting that "This procedure does not have any legal effect under the terms of the treaty itself and therefore, there is no international right."

Additionally, several commenters (i.e., WIPO, GAC, and IPC) were concerned with the development of a Policy Guidance document, preferring the creation of a separate, narrowly tailored process for IGOs to protect their identifiers.

Recommendation 3: A number of commenters supported recommendation 3 (e.g., ICA, BC, FICPI, RySG, GK, etc.). However, there was opposition to recommendation 3 from several commenters (i.e., OECD, WB, GAC, and IPC), with the WB stating, “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,” and the IPC stating, “The IPC is also concerned by the suggestion that the “limitation enshrined in Article 6ter (1)(c)”<sup>4</sup> should be imported into UDRP/URS jurisprudence. This would introduce an additional hurdle for IGO Complainants not currently found in UDRP/URS cases.”

Recommendation 4: There was support and opposition to recommendation 4 as well as for both options 1 and 2. Many commenters supported recommendation 4 (e.g., FICPI, ICA, BC, RySG, i2c, GK, etc.). However, many commenters were opposed to recommendation 4 (e.g., OECD, UN, GAC, IFC, IAEA, WB, IPC, etc.), with some noting that the recommendation does not adequately take into account the jurisdictional immunities afforded IGOs. Some also noted that the proposed work around, of utilizing an assignee or licensee, presents practical and possible legal obstacles.

There were a number of commenters in support of Option 1 (e.g., GK, JE, ICA, etc.), noting that maintaining access to national courts preserves the rights of domain name registrants. Other commenters were opposed to Option 1 (i.e., OECD, BC, and IPC), with the OECD noting that, “Any losing registrant would know that one means of sweeping aside an unfavourable UDRP decision would be to lodge an appeal in a court of mutual jurisdiction. Even if that appeal is baseless, the IGO will be prevented from asserting the immunities granted to it under national and international law because the decision in its favour will simply be swept aside if the immunities claim succeeds.”

There was support from many commenters for Option 2, particularly IGOs (e.g., OECD, UN, UPU, UNESCO, BC, IPC, etc.), with some arguing that arbitration is a familiar and common method for dispute resolution and an arbitration clause is often incorporated into contracts. However, many of the commenters in support of Option 1 felt that being compelled to submit to arbitration was a deprivation of their access to national courts.

Recommendation 5: There was broad support for recommendation 5 (e.g., OECD, FICPI, GAC, WB, GK, BC, IPC, etc.). However, the RySG does not support recommendation 5 and is concerned that, “this sets a dangerous policy precedent and could encourage other various parties to plead for similar no-cost access to UDRP and URS, potentially leading to abusive use.” The RrSG is also concerned that, “dispute resolution costs might be borne unequally by parties to a dispute ...”

The Working Group will consider all comments received and may make adjustments to its recommendations as part of the Final Report as deemed appropriate.