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Governmental Advisory Committee Comment on the Initial Report from the EPDP on Specific Curative Rights Protections for IGOs

Introduction

The GAC appreciates the work of the EPDP convened to address the question of IGO access to a curative rights protection mechanism. The GAC reiterates that IGOs are unique treaty-based institutions created by governments under international law, and especially noting that IGOs undertake global public service missions, that protecting their names and acronyms in the DNS is in the global public interest. The GAC also recalls that ICANN’s Bylaws and Core Values indicate that the concerns and interests of entities most affected, here IGOs, should be taken into account in policy development processes.

The central issue that has been raised in the EPDP is that unlike trademark owners, IGOs benefit from privileges and immunities under international law; indeed, this is seen as core to their existence and ability to carry out their activities. As stated in the Swaine Memo “IGO immunity is often likened to the foreign ‘sovereign’ immunity of states, but [in fact] IGOs are considered more vulnerable than states, since they have no territory or population, and must conduct their affairs in jurisdictions and through persons not their own.” Whereas a trademark owner in a UDRP case is able to agree to submit to the jurisdiction of a court if a registrant wishes to “appeal” a UDRP decision against it, this (agreement to submit to the jurisdiction of a court) is not a viable option for IGOs. As a result, IGOs have raised concerns about access to the UDRP as a curative rights protection mechanism. (It is worth noting here too that IGOs have conceded that requesting a block of their identifiers (often short acronyms) in the DNS would not adequately account for legitimate co-existence.) For this reason, in its Hyderabad and Johannesburg Communiqués, GAC Advice stated that a mechanism such as the UDRP should respect IGOs’ jurisdictional status by facilitating appeals through arbitration. Looking again to the Swaine Memo, many pages (including robust footnotes) are spent to *summarize* the highly complex scope of immunities and different possible national implementation and court assessment approaches, which it is said overall can be

characterized as unpredictable; nevertheless Prof. Swaine concludes that and that “an argument that it is part of an IGO’s mission to maintain the distinctive character of its name, and avoid confusing domain-name registration, and thus deserving of immunity, seems colorable or even likely to prevail.” Moreover, the increased reliance during COVID times of an Internet presence would almost unavoidably be seen as linked to an IGO’s functions (one of the tests for assessing the scope of immunities). In other words, it is likely that the court option being sought would ultimately prove fruitless.

As noted above, under the UDRP, a registrant may seek judicial review of a UDRP case; Prof Swaine therefore raises the issue in the context of striking the current UDRP “mutual jurisdiction” clause in light of IGO immunities, noting that “were an IGO able to secure from ICANN the transfer of another registrant’s domain, without adequate means of challenging that result, such proceedings might pose concerns.” Addressing this conflict between immunity and access to courts, Prof. Swaine notes that a material factor in a seminal case was “whether the [employees] had available to them reasonable alternative means to protect effectively their rights.”

Here, it is proposed that to (a) give registrants “reasonable alternative means to protect effectively their rights” and (b) respect IGOs’ immunities, an alternative to court in the form of arbitration is provided to the parties. Notably, in terms of similarities to court, arbitration processes routinely account for due process, impartiality of arbitrators (including challenge processes), documentary and evidentiary exchanges, the calling of witnesses, and (virtual) hearings. Arbitration provides all of these process protections but in less time, and involving less costs than a trial in court – let alone one involving the highly complex and potentially unpredictable nature of assessing the scope and application of IGO immunities.

Permitting arbitration after court proceedings (potentially involving multiple appeals) would create an overly complex, inefficient and costly process. It is noted in this context that in its Buenos Aires and Los Angeles Communiqués, GAC Advice stated that curative rights protections (such as the UDRP) should be at no or nominal cost to IGOs (notably given IGOs’ public interest missions and the fact that their budgets come from public funds). While arbitration would involve some cost, a court process would predictably and unnecessarily increase costs for both the IGO and the registrant.

Specific Comments to Options Raised in the Initial Report

Proposal: Arbitration should be the exclusive means of appeal.

Rationale: GAC Advice in the Hyderabad and Johannesburg Communiqués stated that the UDRP should not be amended and that IGO access to a curative dispute resolution mechanism should be modelled on but separate from the UDRP and respect IGOs’ jurisdictional status by facilitating appeals exclusively through arbitration. Arbitration is a globally-accepted and proven dispute resolution mechanism, which ICANN itself uses in its registry and registrar agreements, and many registrars (such as GoDaddy, the world’s largest) use it in their agreements with registrants. In an ordinary commercial setting, the parties choose a means of resolving disputes before they arise (i.e., dispute resolution before an arbitral tribunal, **or** before a court). Indeed, an arbitration clause is generally deemed to exclude the jurisdiction of the court. It is therefore inconsistent and at odds with regular commercial practice to insist that registrants also be afforded the right to bring court proceedings, particularly given that courts would normally be expected to uphold IGO immunities. Overall, providing appeals through arbitration, not courts, is a compromise which strikes a reasonable balance between rights and concerns of both IGOs and legitimate third parties.

If arbitration is not the exclusive means of resolving appeals from a curative rights protection mechanism (in this context, the UDRP and/or URS):

- **Arbitration should at least be the default option, with the registrant permitted to opt out within a limited time period**
- **If registrants are permitted to appeal in court, they should not also be able to subsequently commence arbitration if unsuccessful – whether for substantive or procedural reasons – in court.**

Rationale: Permitting arbitration after court proceedings (potentially involving multiple appeals) would create an overly complex, inefficient, and costly process. GAC Advice in the Buenos Aires and Los Angeles Communiqués reiterated that curative rights protections should be at no or nominal cost to IGOs. While the UDRP and/or URS and appeal via arbitration would each involve costs, a court process would introduce tremendously increased – and preventable – costs, both for registrants and for IGOs (which it is noted rely on public funding).

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