TurnCommerce Inc. does not support the preliminary policy recommendations contained in its Initial Report.

Background:

In June 2014, the GNSO Council chartered the IGO-INGO Access to Curative Rights PDP to develop policy recommendations as to whether "to amend the UDRP and URS to allow access to and use of these mechanisms by IGOs and [International Non-Governmental Organizations (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 IGO-INGOs should be developed." The working group also said its proposal recommendations "will facilitate access to and use of the UDRP and URS by IGOs."[1]

Due to the charter wording, various stakeholder groups did not participate in the work, as concerns about their or their registrants' rights did not appear to be affected. In the absence of that participation, which would otherwise be guardrails to keep things practical and balanced, other groups availed the opportunity to operate with abandon, making suggested changes that lack balancing.

Further, this charter statement and proposed recommendations are fundamentally flawed and make little sense. IGO-INGO's always have had access to the UDRP systems, and they have in fact used the UDRP systems with success. **There is nothing preventing IGO-INGO's from filing and using the UDRP process today**. Historically, after more than 20 years, there has not been one case where an IGO-INGO has won a UDRP or URS, where the registrant has filed action in the court of law. Thus, what exactly is the problem this working group is attempting to solve? Considering this situation has never occurred in the past - why are we spending all this time and effort?

Does it make sense to create carve outs for small group of IGO-INGO's? It seems like we are creating a precedent that carve-outs from the general rules and regulations for the entire UDRP system is something that will be possible in the future? And ICANN granting immunity in certain circumstances?

Or is the core problem that IGO-INGO's want something that no other complaint has - the ability to initiate a complaint without ever having to take the risk of court action? This seems quite unfair! **Why should IGO-INGO's be granted the ability to play by a different set of rules than everyone else? Why should an IGO-INGO have greater legal rights than everyone else?** How is this fair and balanced?

Most concerning is that these recommendations will strip domain registrants of their rights – and be more advantageous for IGO-INGO's and potentially now introduce an arbitration mechanism which can be expensive for registrants with legitimate rights in names to defend internationally. Arbitration will also benefit an IGO-INGO over registrants. There have been defective outcomes or biased panelists or arbitrators finding for complainants without careful examination in certain

[1] https://itp.cdn.icann.org/en/files/generic-names-supporting-organization-council-gnso-council/initial-report-epdp-specific-curative-rights-protections-igo-14-09-2021-en.pdf

geographies, which can be expensive in circumstances where the arbitration finds for the IGO-INGO despite the defendant's legitimate interests.

While the proposal is seeking to make things more efficient for IGO-INGO's, what balances the other side of the scale? Creating policy so one-sided – without even consulting or considering registrants rights under their respective law is problematic.

Stripping Registrars Rights they have under the law:

This working group even said, "*Relatedly, the EPDP team acknowledged that removing this requirement for IGO Complainants could prejudice a registrant's right and ability to have an initial UDRP or URS determination reviewed judicially.*"

Exactly!

This is deeply concerning and problematic. Essentially, the recommendations favor the interest of IGO-INGO's, and put domain registrants at a material disadvantage by taking away their rights under the law.

We also find the summary of the proposal to be misleading. It says several times in the summary that it is "preserving registrant rights" and "does not affect the right and ability of registrants"[2] - but this is simply not true. These proposals are fundamentally reducing registrants' rights - not preserving those rights. Thus, the working group summary pitch line is spinning the narrative - while at the same time ignoring the core fact that registrants will have fewer judicial rights.

Even one member of the working group said, *"I worry about not only the legal ramifications to registrants, but also the optics of ICANN appearing to want to strip registrants of rights they otherwise have at law."*

Mutual Jurisdiction

Removal of the mutual jurisdiction requirement is a fundamental change in UDRP policy. Mutual jurisdiction has worked extremely well and taking this away, without registrant representation and voice, is not appropriate. It makes no sense to remove mutual jurisdiction for one small group of IGO-INGO's who have been entirely un-impacted by the current system in place today.

Offering Immunity

Why would ICANN want to grant IGO-INGO's immunity when they are the ones that are pursuing a UDRP / URS action, but have no consequence of initiating that action? Is this fair and balanced?

Introducing Arbitration

This proposal also suggests introducing arbitration - but we feel that this is a very low benefit with a very high implementation/compliance cost. What about the additional compliance costs

[2] https://www.icann.org/en/public-comment/proceeding/initial-report-epdp-specific-curative-rights-protections-igos-14-09-2021

on registrars of implementing a new system (having to deal with new arbitration providers, changing communications protocols, etc.) for any new system that this working group proposes. Creating a new compliance nightmare for registrars, and a new set of contracts for accrediting arbitration providers, and the fact that one would have to review them every X number of years, have staff oversight, complaints about them, etc.

Being forced into arbitration without mutual agreement could leave room for tactical selection of the arbitration party in a manner that might bias the outcome for the complainant or create such a high-cost burden for the respondent that they might be forced to make pragmatic decisions about their legitimate rights but need to abandon them as they cannot afford defense, or other similar duress-based decisions.

The cost and work and effort will certainly add up, and this seems stacked to disadvantage individual registrants.

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.

How were Registrants Involved in this proposed policy recommendations?

Most importantly, were registrants consulted, interviewed, invited to participate, surveyed, or involved in the deliberations of this working group? If not, why not? Or was this new proposed policy created in a vacuum without the views of registrants considered?

What expert or legal analysis was provided before proposing to make such changes to the UDRP system? What legal analysis was performed from the registrants' rights under the law?

ICANN claims it is a multi-stakeholder model – but we are concerned that registrants had hardly any voice in these recommendations. Thus, this working group has put forward a proposal without consulting any registrants at all - or obtaining a balanced view from the various multi-stakeholders, including registrants (the party that will be most impacted by these changes.) It is deeply concerning this proposal would take away a registrant's right and ability to have the decision be reviewed judicially – without ICANN ever consulting the larger registrant community.

Why would ICANN allow for such a one-sided decision to pass through without giving registrants the ability to weigh in on these matters?

Conclusion:

IGO-INGO's already have access to the UDRP system - thus, what exactly is the problem this working group is attempting to solve?

We do not support removing mutual jurisdiction.

We do not support ICANN offering immunity if the IGO-INGO has elected to initiate a UDRP or URS proceedings. We do not support taking registrants rights away they legally have under the laws.

We do not support forcing arbitration.

Thus, we do not support the policy recommendations contained in this report.

Respectfully submitted,

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