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August 20, 2019

ICANN Board [via email to comments-igo-ingo-crp-recommendations-11jul19@icann.org]

Subject: Call for Public Comments on GNSO Policy Development Process on IGO-INGO Access to Curative Rights Protection Mechanisms Policy Recommendations for ICANN Board Consideration

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Dear ICANN Board,

This comment is in response to the call for public comments on "GNSO Policy Development Process on IGO-INGO Access to Curative Rights Protection Mechanisms Policy Recommendations for ICANN Board Consideration" as per the notice at:

<https://www.icann.org/public-comments/igo-ingo-crp-recommendations-2019-07-11-en>

Sincerely,

George Kirikos

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1. ICANN PUBLIC COMMENT PERIODS ARE A SHAM. ALL PUBLIC COMMENT PERIODS SHOULD BE SUSPENDED UNTIL A FULL INVESTIGATION HAS OCCURRED

As a preliminary matter, I note with approval and fully support the recent Reconsideration Request 19-2 filed by Namecheap, Inc. regarding the .org contract renewal:

<https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en>

where Namecheap wrote:

The ICANN org will decide whether to accept or reject public comment, and will unilaterally (sic) make its own decisions- even if that ignores the public benefit or almost unanimous feedback to the contrary, and is based upon conclusory statements not supported by evidence. **This shows that the public comment process is basically a sham**, and that ICANN org will do as it pleases in this and other matters. **It is a concern not only for the renewal of the .org** and other legacy TLD registry agreements being renewed in 2019, but an even greater concern for the upcoming renewal of the .com registry agreement- **as well as other vital policy issues under consideration by ICANN now and in the future**. [p. 12, emphasis added]

These are strong but thoughtful words from a highly respected company in the domain industry, whose views are shared by many. One of the synonyms for the word sham is fraud, and it's apparent now that a fraud has been perpetrated on the public, namely ICANN deceiving the public into believing that these comment periods were legitimate opportunities for meaningful input. The reconsideration request isn't strictly limited to the .org renewal, but directly calls into question the legitimacy of all of ICANN's public comment periods for all of the policy issues now and in the future. ICANN should not take their reconsideration request lightly, but should instead call for a full public investigation with full opportunity for the ICANN community to weigh in on this procedural matter which is at the core of ICANN itself. Until such an investigation has concluded, I call on ICANN to suspend all public comments periods, in order to ensure the process integrity of all policymaking.

Of course, given ICANN's comment process is a sham, this comment itself will likely be ignored, but I place it on the public record for posterity so that a higher authority will eventually hold ICANN accountable. My remaining comments are thus made "in protest" given that the process itself is

currently a sham, but I place them again on the record so that fair-minded members of the public can later scrutinize ICANN's processes, and hold them accountable.

2. THE ICANN BOARD SHOULD ACCEPT ALL 5 RECOMMENDATIONS OF THE WORKING GROUP REPORT, NOT JUST THE FIRST 4 RECOMMENDATIONS

Despite making 5 recommendations, the GNSO Council only adopted the first 4, due to flawed reasoning and "backchannel sabotage" of the report by its opponents. If one examines the process closely, one can see clear attempts by others to manipulate the process (while they themselves falsely allege that the process was 'captured', etc.).

In December 2017, I filed a section 3.7 appeal via the relevant section of the Working Group Guidelines, challenging attempts by the co-chairs of the PDP to manipulate the outcome of the policymaking. That section 3.7 appeal can be read in full via two parts at:

Part 1:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-January/001035.html>

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/attachments/20180111/c89edbb8/igo-appeal-section37-20180111-final-0001.pdf>

in combination with:

Part 2:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-February/001091.html>

<http://mm.icann.org/pipermail/gnso-igo-ingo-crp/attachments/20180212/54044f71/igo-appeal-section37-reply-20180212-final-0001.pdf>

To summarize 20 pages briefly, the co-chairs used (and wished to use in the future) anonymous polling to determine consensus, which clearly violated ICANN's transparency requirements, and they failed to be neutral. This was

egregious conduct by the co-chairs, for which they were not properly held accountable by GNSO Council, although one of the 2 co-chairs (Mr. Philip S. Corwin, Policy Counsel at Verisign) later did resign as co-chair [that former co-chair of the IGO PDP working group continues his misuse of the co-chair position in the separate RPM PDP working group, as documented at <https://freespeech.com/2019/08/05/misuse-of-icann-pdp-chair-position-to-relitigate-working-group-decisions/>].

As part of the Section 3.7 appeal, it was I who explicitly questioned whether or not Recommendation #5 was in scope of the working group's charter, or whether it should instead be sent to the RPM PDP. See section 19 of "Part 1" above, where I argued:

A policy recommendation to do so, only in the context of disputes involving IGOs, **appears to go beyond the IGO PDP's limited charter and conflicts with the work of the RPM PDP, which is best suited to handle that** "quirk of process" for all disputes, rather than just those involving IGOs. [section 19, emphasis added]

The then chair of the GNSO Council, Ms. Heather Forrest, intervened, and discussions were held regarding the section 3.7 appeal. While all of my discussions were recorded and held on the public record, I note that the ones between Ms. Forrest and the co-chairs are not on the public record, disturbingly.

However, **it was Ms. Forrest who decided (acting on behalf of GNSO Council, as its chair) that work would proceed on Recommendation #5!** This can be verified by going back to the transcript of the call I had with her on February 20, 2018:

<https://community.icann.org/display/gnsoicrmpdp/2018-02-20+Discussion+Call>

<https://community.icann.org/download/attachments/79435296/Transcript%20Section%203.7%20appeal%2020%20Feb%202018.pdf?version=1&modificationDate=1519259328000&api=v2>

where she said (that aspect of the conversation started on page 8 or so, and going into page 16):

George, I think I have a better understanding of what you're saying about the charter. But I think I'm inclined to say, you know, even in your description just now, you said that it's something that happens after the EDRP. And again, I think it's certainly the case in all our PDPs. We can open up each one of them for this sort of review, and say that along the way in our deliberations, **we come up with stuff that's related. But maybe not explicitly set out.** And I'm not convinced here, at least on the face

of it. Maybe I'm missing something that this group has gone completely off scope here. And I just - I see Paul's hand. I just say, I put a marker down to say there's this business about the charter that we're discussing now. [p. 13, emphasis added]

and

I'm a little bit - I'm live to this discussion in a sense that we've just come off of a joint call with the RPM PDP and subpro co-chairs and we've been talking all morning about **interplay**. And, you know, I think the thing that I would summarize from those discussions, the more we talked about these things, the reality is that the GNSO's mandated has everything to do with gTLD policy. And **the changes that one PDP bleeds into another are entirely likely. And it's for that exact reason that we have references to other PDPs that sit in the charter.**

So, you know, subpro explicating references RPMs. It also references CCT. This PDP predates some efforts, but not other efforts. And so we have this, sort of, complicated web that we're weaving. If we had a look at as Council has recently done in January. We currently have five, it depends on how you count them 4, 5, or 6, it really depends whether you count the reopened Red Cross and so on, PDPs on foot. And they all in some way intersect with each other. **So I want to be a little bit mindful of this idea of just ping it- you know, fling it to another PDP. just going to have lots of flinging. And not getting stuff done.**

I'm not in any way making light of the charter. We need a charter. **But again charters, you know, I think it needs - we need to have the flexibility of the community to deal with things that are sufficiently related to a charter that our work then goes on to inform the work of others rather than just pass things on to others.** So that - it's my preliminary thoughts there. And I think we need to be mindful of those sorts of things. [pp.16-17, emphasis added]

So, it wasn't my decision in early 2018 to spend months trying to reach consensus on Recommendation #5 -- it was GNSO Council itself through its own chair! Ms. Forrest in February 2018 didn't want to "fling it to another PDP"! She knew all about the interplay between the PDPs, and sought flexibility. Ultimately, she wanted to focus on reaching consensus. The working group accepted the task, and spent months attempting to reach consensus, which we actually did finally achieve. The final report of the working group was completed in July 2018, with 5 consensus recommendations, including consensus on Recommendation #5.

After that consensus was reached, the opponents then tried to discredit the process - a process they had full control over! It's only **after** they didn't get the result they desired, that they changed their talking points - including attempting to cast aspersions on me personally for filing the meritorious Section 3.7 appeal itself.

But, anyone looking at the true history of the working group can verify that the process of working towards achieving consensus on Recommendation #5 was approved by the GNSO Council chair herself (over my initial objection at the time!). It's documented in the transcripts and public record at the time (as noted above).

It was only after seeing the outcome of the recommendation that GNSO Council flip flopped, and then tried to characterize the process as broken, when it was the GNSO Council (through its chair) that explicitly authorized us to attempt to reach consensus for Recommendation #5.

For example, in the transcript of the April 18, 2019 GNSO Council meeting,

<https://gns0.icann.org/en/meetings/transcript-council-18apr19-en.pdf>

the current GNSO Council Chair, Keith Drazek (also of Verisign, like the former co-chair of the IGO PDP who resigned and who even filed a minority report attacking the consensus that was reached) said:

There was a consensus set of recommendations that came from that group. and we're in a situation now where I think we've recognized that one of the five recommendations **had serious problems, was out of scope** and recommended changes to a consensus policy that is currently or about to be under review by the RPM PDP Working Group. [p. 35, emphasis added]

Similar kinds of statements were made on other GNSO Council calls after we reached consensus on all 5 recommendations. Rather than recognize the success of the PDP in reaching consensus, its good work was undermined by its opponents in a smear campaign.

One GNSO Councillor, Ms. Elsa Saade, openly discussed this on the GNSO Council call of February 14, 2019, where she said:

<https://gns0.icann.org/en/meetings/transcript-council-extraordinary-14feb19-en.pdf>

But anyway, I was saying that **I don't think that we're being completely honest with ourselves and the reasons why we are not taking on the full recommendations that the group had consensus on.**

And if we, I mean, I personally would vote to have all of them go through and then see how the Board would take it forward, but in terms of - because especially **because if we do not do that we're setting a precedence for the GNSO Council which had not been set before** I'd say in terms of a back channel, I don't - I'm going to dare say but a **back channel sabotage** in a way. I'm putting it out there on

the record in my own personal capacity here. So that's why I think we should take it on fully and take this - have this go through fully as a full recommendation set or list. [p. 45, emphasis added]

"Back channel sabotage" is an apt description for what opponents of the IGO PDP final report have been doing since July 2018. They attempted to rewrite history through a false narrative in order to prevent the entire report from being adopted and forwarded to the Board for approval.

There were even openly false statements made to suggest that less than 10 people participated in the PDP! Ms. Forrest, in that same February 14, 2019 council meeting said:

I continue to have deep concerns around the fact that having a PDP final report that was **ultimately voted on by less than 10 people** is a dangerous precedent for an open PDP, for a PDP that started with more members than that and had some attrition along the way. (p. 37, emphasis added)

In fact, there were **15 members** on the consensus call, as I documented in real-time to Ms. Forrest (and GNSO Council), as I was listening to that call, and further posted at:

<https://mm.icann.org/pipermail/gns0-igo-ingo-crp/2019-February/001417.html>

<https://mm.icann.org/pipermail/gns0-igo-ingo-crp/2019-February/001418.html>

<https://mm.icann.org/pipermail/gns0-igo-ingo-crp/2019-February/001419.html>

This level of participation is typical and even higher than past PDPs, as discussed in the 2nd link.

As I dissect in the 3rd link above, Ms. Forrest then pretended to backtrack on those numbers, falsley claiming that she was looking for the numbers (when I already sent them to her), but never did she actually correct herself and post the numbers that would expose her falsehood to the rest of the group. One can lie by omission, and that's what Ms. Forrest did. Nor did GNSO Council leadership post the true numbers to the GNSO Council mailing list (despite being cc'd on all the emails I sent to the IGO PDP mailing list on this topic which documented the falsehood presented by Ms. Forrest).

Mr. Paul McGrady, a trademark lawyer who opposes Recommendation #5 (and who is often on the opposite side of domain name registrants in policy

debates), also repeated that false narrative of a “very small group” that “only 10 people want to be at” [p. 39 of February 14, 2019 transcript linked to from above]

I think it’s very important that people look at the 15 people who formed the consensus call, to see that there was no “capture”. Those who were in support of the final consensus recommendation #5 included:

https://docs.google.com/spreadsheets/d/e/2PACX-1vQgB2sY5AgaBZUHsHJJPLIsAwTFj-0i3FsammN5q-iD1QCQ_EMBC8LTzZ30TGvrf6Fw_mUvlnHa9DV9/pubhtml

David Maher, myself, Mike Rodenbaugh, Zak Muscovitch, Nat Cohen, Alex Lerman, Jay Chapman, Paul Keating, Reg Levy, Crystal Ondo, and Paul Tattersfield. As noted in a letter from 9 of those members:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-August/001393.html>

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/attachments/20180816/6fd7987d/GroupLettertoICANNAugust162018-0001.pdf>

(responding to claims of capture) there was a cross-section of members from various constituencies.

In fact, if you analyze the results of the consensus call more deeply, Mr. Corwin (who was a vocal opponent of the recommendation) was a member of the Registries constituency representing Verisign, yet 2 other members of the Registries constituency (namely Ms. Ondo of Donuts and Mr. Maher of PIR) were **for** the consensus recommendation. And those 2 members were also **against** Mr. Corwin’s preferred option (“Option #3”). Indeed, Mr. Corwin and Mr. Rindforth were the main members who singularly focused on a single option, rather than attempt to reach consensus by supporting multiple options (as nearly every other participant supported multiple options for recommendation #5). Even Reg Levy of Tucows, from the Registrars constituency, was against the option favoured by Mr. Corwin.

It's important to note that the chair of the EPDP on WHOIS working group, Mr. Kurt Pritz, explicitly cited the results of the IGO PDP in support of their EPDP’s consensus level designations!

<https://mm.icann.org/pipermail/gnso-epdp-team/2019-February/001710.html>

The important section is at:

We particularly examined the Curative Rights PDP, IGO/NGO PDP and the Registration Abuse Policies WG (and others). In those we found examples of designations of consensus where 4 of 15 members disagreed or representatives of three different GNSO groups disagreed.

The "4 of 15" comes directly from the IGO PDP! In other words, the IGO PDP's consensus level designations have now been "battle tested" vs that of the EPDP on WHOIS. The IGO PDP's consensus level was the model of success. And the GNSO Council **adopted in full** the Final Report of the EPDP on WHOIS.

This demonstrates that to be consistent with the EPDP on WHOIS, GNSO **Council should have similarly approved all 5 of the IGO PDP's final report's recommendations, which I now ask that the ICANN Board do.** The "backchannel sabotage" perpetuated by opponents of the final report should not be allowed to succeed.

3. IGOs HAVE WASTED THE RESOURCES OF THE COMMUNITY FOR MORE THAN 15 YEARS ON DEMANDS THAT ARE UNREALISTIC

It's important to understand that the IGOs have been wasting the resources of ICANN for more than 15 years, repeatedly asking for special rights that are not supported by law, nor by the community. Ms. Wendy Seltzer wrote a blog post on CircleID in December 2003 on this very topic!

http://www.circleid.com/posts/why_wipo_does_not_like_the_udrp/

where she wrote:

WIPO doesn't like the UDRP as it stands, because its claimants must subject themselves to the jurisdiction of national courts. International Government Organizations (IGOs) would prefer international arbitration, where not only can they keep their sovereign immunity, but the procedural and substantive rules differ. **But the possibility of appeal to national courts is no minor detail, but part of the balance keeping domain name disputes in check. If UDRP arbitrators, or the ICANN "consensus" veer too far from national laws, they can be corrected by courts.**

In other words, this is an issue that IGOs have litigated and relitigated ad

nauseum at ICANN. They seek a one-sided unbalanced solution that would obliterate access to the courts (I'll discuss further below why their position is untenable, and inconsistent with law). The IGOs have no new facts, no new law, and no new arguments. All they do year after year is complain, and ignore the solid reasoning that rejects their extremist demands. They want to create a forum for disputes where the odds are tilted in their favour. Such blatantly self-serving proposals by the IGOs are rejected repeatedly. Their only hope is to keep repeating their false narratives (discussed further below), and prevent the other side of the narrative (i.e. the truth) from showing up to present the other side of the argument. Indeed, they and other opponents of the final report hope to control the composition of any future working group on this topic (e.g. via mechanisms like PDP 3.0 reform, which will be used to stifle debate, create censorship), as they simply cannot compete in the marketplace of ideas on a level playing field. The threat of "capture" is forward looking, where capture is actively being contemplated by those who've failed in their agenda for the past 15+ years. The "backchannel sabotage" that Ms. Saade warned about is now in action, and ICANN's Board must prevent this from happening.

4. DESPITE PERSONALLY OPPOSING RECOMMENDATION #4, I ACCEPT THE FINAL REPORT'S RECOMMENDATIONS AS A WHOLE

As can be seen by the consensus call:

https://docs.google.com/spreadsheets/d/e/2PACX-1vQgB2sY5AgaBZUHsHJJPLIsAwTFj-0i3FsammN5q-iD1QCQ_EMBC8LTzZ30TGvrf6Fw_mUvlnHa9DV9/pubhtml

I was personally opposed to Recommendation #4, but was in a minority (the other members were able to reach consensus). However, I do respect and accept the outcome as a whole, as it went through the proper process (eventually, as I had to file the Section 3.7 appeal to prevent manipulation by the co-chairs).

One should contrast this with the hypocritical arguments of Mr. Corwin, who argues for "capture." Not only was there no capture (as documented above), it's an absurd argument given that there was disagreement amongst those who are allegedly doing the capturing! In other words, how is it I wasn't able to impose my views on Recommendation #4, if I was part of some "capture"? Indeed, taken to its logical conclusion, if there really was "capture", it would affect the entire report, for all recommendations, including Recommendation #1 where there was FULL CONSENSUS. Instead, opponents of the report like Mr. Corwin engage in cherry-picking, to only

claim that “capture” was limited to recommendations that deviated from their own personal positions. Where the group agreed with Mr. Corwin, there was no capture, in his eyes. Obviously such self-serving and inconsistent logical fallacies don’t survive any scrutiny.

It’s critical to note that Mr. Corwin could have invoked section 3.6 of the Working Group Guidelines:

<https://gnso.icann.org/en/council/annex-1-gnso-wg-guidelines-18jun18-en.pdf>

to challenge the consensus level designations.

However, if disagreement persists, members of the WG may use the process set forth below to challenge the designation. [p. 10]

Mr. Corwin never did so. Furthermore, Mr. Corwin could have filed a Section 3.7 appeal, challenging the chair for not fulfilling their roles under section 3.2 of the Working Group Guidelines:

3.2 Representativeness

Ideally, a Working Group should mirror the diversity and representativeness of the community by having representatives from most, if not all, CO Stakeholder Groups and/or Constituencies. It should be noted that certain issues might be more of interest to one part of the community than others. The Chair, in cooperation with the Secretariat and ICANN Staff, is continually expected to assess whether the WG has sufficiently broad representation, and if not, which groups should be approached to encourage participation. Similarly, **if the Chair is of the opinion that there is over-representation to the point of capture, he/she should inform the Chartering Organization.** [p. 7]

Again, Mr. Corwin never did so (it would have been somewhat silly, given he was chair for nearly the entire PDP, so he’d be filing a complaint against himself; but, even after he resigned as co-chair, he didn’t file a Section 3.7 appeal against the remaining chair). Indeed, in the RPM PDP, where Mr. Corwin is a co-chair, he fails to acknowledge how that PDP has already been captured by the Intellectual Property Constituency and their pro-complainant allies, who have dominated that working group and its sub teams. It would be a farce to hand-off the work of the IGO PDP which had representational balance to the RPM PDP at this point, given the imbalance that exists (and where forces are at work via PDP 3.0 to deny representation to knowledgeable voices like my own from participating).

5. FINAL REPORT WAS RUSHED TO COMPLETION, IN

ORDER TO UNDERMINE THE REASONING BEHIND ALL RECOMMENDATIONS

After the working group reached consensus on all 5 recommendations, opponents of the outcome (including ICANN staff) worked to undermine and sabotage the production of the final report, by imposing a short deadline that was insufficient to fully explain the reasoning behind decisions. This can be understood by reviewing the archives of the full working group's mailing list at:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/>

in particular in June and July 2018. I was compelled to file a 2nd Section 3.7 appeal, to attempt to give us more time to properly write up a final report, see, for example:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001254.html>
<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-July/001342.html>

Despite being one of the few that actually read the draft reports and made comments, I eventually had to disavow the report itself:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-July/001379.html>

because the rationales were not properly done (although the recommendations themselves were properly recorded). It later became obvious that the members of the PDP were duped as to the reasons for the deadline, as I noted at:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-July/001385.html>

In particular, GNSO Council didn't vote on the final report in their July 2018 meeting, which was the justification for the completion deadline of the report (they later kept delaying and delaying, as opponents continued to undermine it via backchannel sabotage over 9 months up until the April 2019 resolution of GNSO Council, without providing those who created the consensus an equal opportunity to counter that sabotage). As I noted in the emails linked to above, the prior IGO-related PDP from 2013 had their final report adopted a mere 10 days later by GNSO Council. The difference between 9 months vs 10 days can be explained by the actions of the backchannel saboteurs, who worked to prevent all 5 recommendations from being adopted.

6. IMPORTANT ANALYSIS AND EVIDENCE EXCLUDED FROM FINAL REPORT DUE TO ICANN STAFF SABOTAGE

In conjunction with section #5 above, ICANN staff themselves worked to undermine and sabotage the final report, with important analysis and evidence appearing nowhere in the report. For example, the rationale for Option #1 of Recommendation #5 (the option that reached consensus) is a mere 4 lines! (page 19 of the report) Similarly, the other options and rationales for the various options in Recommendation #5 are exceedingly brief. Less than one-and-a-half additional pages of commentary appear starting from the bottom of page 21 and going to the top of page 23. Had we had sufficient time, we could have and should have done a lot better. I'll cover some arguments later in this document, including (i) the role reversal that happens between plaintiff/defendant caused by the UDRP and appeals, (ii) the historical "grand bargain" which required access to the courts that was the foundation of the UDRP, and (iii) how "immunity" is a defense to an action, and not an issue when IGOs initiate a dispute.

Even simple but important evidence, like how arbitration is actually more expensive than courts (thus undermining Mr. Corwin's preferred option, which was soundly rejected by the working group, i.e. "consensus against" for his option #3), appears nowhere in the rationale, but was brought up in the working group:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-November/000929.html>

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-November/000930.html>

A proper final report would have collated all the arguments that were raised and properly summarized them in the final report, but ICANN Staff did not do this, and did not give enough time for others to do this either. So, we came to the right conclusions, but they'd only be fully understood by those who read the mailing list and the transcripts of the calls, where the arguments, analysis and evidence were presented.

ICANN staff repeatedly produced shoddy work throughout this PDP, as documented at:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-May/001140.html>

where attempts at consensus were apparently miscounted via a non-transparent process (even though the counts were only up to 10, which is

very fishy, given that later analysis shows that we were able to reach consensus when everyone was transparent about their positions on the mailing list),

and

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001249.html> which I directly brought to Mr. Goran Marby's (CEO of ICANN) attention (with cc: to the affected staff), but who did nothing about it. Their work was repeatedly replete with errors during the PDP. In an email to Mr. Marby, I elaborated in some detail (June 18, 2018):

To illustrate, and just limiting the following analysis to the consensus level documents for now, consider:

1. staff's original document is at:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001238.html> (as attachment)

2. my response to it, pointing out it is replete with errors:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001245.html>

3. staff document gets updated:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001264.html>

4. I point out it *still* has errors:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001265.html>

5. I end up *completely* redoing their work:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001274.html>

and <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001277.html>

In particular, contrast:

https://docs.google.com/spreadsheets/d/e/2PACX-1vQgB2sY5AgaBZUHsHJJPLIsAwTFj-0i3FsammN5q-iD1QCQ_EMBC8LTzZ30TGvrf6Fw_mUvlnHa9DV9/pubhtml

to anything that staff produced.

if you truly think staff's work output is worth "standing by", try doing a "redline" of staff's own work, between the first document (in #1 above) and their second document (#3) above. I don't have software that generates redlines automatically, but even a casual look at the differences between their own version (let alone the version I produced independently) shows:

- a) in recommendation #1: 3 new names added
- b) in recommendation #2: change of consensus result, 1 new name added, change of support levels
- c) in recommendation #3: 2 new names added
- d) in recommendation #4: 3 new names added
- e) in option #1 of recommendation five: 1 name changed from support to do not support, and 2 new names added
- f) in option #2 of recommendation five: change of consensus result, and 3 new names added
- g) in option #3 of recommendation five: change of consensus result, 1 name moved from 'support' to 'do not support', and 4 names added
- h) in option #4 of recommendation five: 3 new names added
- i) in option #5 of recommendation five: change of consensus result, 3 new names added
- j) in option #6 of recommendation five: change of consensus result, 3 new names added

Remember, the above analysis was just comparing their *own* 2 versions! (there are more errors, if you compare against the results I produced, which has stood the test of time).

Mr. Marby responded on July 2, 2018, but didn't agree that this was a problem, and wanted me to shunt my concerns to a subordinate. He did so with no rationale. This is consistent with ICANN's poor decision-making by staff, that they don't even attempt to explain away their documented low quality work product. I even challenged Mr. Marby (on July 3, 2018 via email) to provide me with any rationale at all, stating.

Rather than even attempting to provide a rational basis for disagreeing, you simply

responded by proposing it be dealt with by a subordinate. An example of a rationale might have been:

"George, as part of your list of concerns, you provided an example of a document with 10 errors. At ICANN, documents with 25 errors or less are considered to meet our standards, thus there was no urgency in correcting it."

That would have been a rather silly rationale, obviously, but at least it would have been an attempt to provide a basis for disagreeing. Providing no explanation at all is even worse, as it means that views are held based on no reasoning or basis at all."

There's a saying that **the fish rots from the head down**, and it's clear to me that Mr. Marby himself is part of the root cause of ICANN's failings. Of course, Mr. Marby himself sits on the ICANN Board, so it's unlikely anything will change (but I'm writing this to be on the record, in the hopes that eventually an external power/mechanism will eventually hold ICANN accountable for their failings). Eventually, bad organizations fail, when enough people feel empowered to speak out.

This sabotage of the final report's full recommendations (inclusive of Recommendation #5) by ICANN staff continued well past the production of that report, but through messaging and presentations to GNSO Council, which I discussed in detail at:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-November/001404.html>

7. IMMUNITY IS A DEFENSE TO A DISPUTE, AND NOT AN ISSUE WHEN IGOs INITIATE A DISPUTE

It's important to understand that IGOs repeatedly overstate the nature of their immunity. They often pretend that it's always absolute, when the nature of immunity will often depend on the specific IGO, the national jurisdiction (which may not even recognize a given IGO), specific terms of a treaty, and other factors.

However, at a more basic level, immunity is a **defense** to a dispute initiated by others against the IGO. It's intended to protect the IGO when the IGO is the target of a dispute. **Whenever an IGO is the initiator of a dispute, though (when it's the Plaintiff/Complainant), then it has waived any immunity. Immunity is simply not in play anymore.** This is such a basic thing, but has not been understood by some who've only read imperfect summaries of the debate.

The mutual jurisdiction clause of the UDRP, and similar clauses of the URS, which IGOs complain bitterly about, attempts to reflect the reality that they are the initiators (not the target) of the underlying dispute. There is simply no expectation of immunity when IGOs are the initiator of the dispute (rather than the target of the dispute).

IGOs instead try to pretend that there are 2 separate “disputes”, the dispute at the UDRP/URS provider, and then a second dispute if the decision goes to a national court (i.e. if the domain registrant loses at the UDRP/URS level, and seeks to challenge that outcome in the courts). This is simply nonsensical. It is clear that there is 1 overall dispute, which is split between potentially many steps/stages (UDRP/URS, and then courts if need be). IGOs want immunity in the second step of the dispute, in the courts, if they win at the initial UDRP/URS step of the process. That is simply untenable, and not consistent with the nature of immunity when the IGO is the initiator of the overall dispute concerning the domain name. It’s also inconsistent with the history of the development of the UDRP (discussed below), where it was never intended for the UDRP to be the “final say” on a dispute. Access to the national courts for a decision on the merits with full due process was never a right to be lost by any party to a dispute.

8. FUNDAMENTAL BUT SUBTLE DESIGN FLAW IN THE UDRP CAUSES ROLE REVERSAL BETWEEN PLAINTIFFS AND DEFENDANTS WHEN TAKING MATTERS TO COURT

In order to truly understand the issues in play at a deep level (which again is not reflected in the final report, despite being discussed in the working group repeatedly), one needs to understand that there is a fundamental but subtle design flaw in the UDRP (and URS).

If the UDRP didn’t exist, and an aggrieved party or rightsholder (e.g. IGO, trademark owner, etc.) initiates a dispute in the courts, that party would be the Plaintiff/Complainant in the domain dispute. The domain owner, on the other hand, would be the Defendant/Respondent. **Thus, the natural role of the initiator of the dispute (rightsholder, IGO, etc.) is as Plaintiff/Complainant, and the natural role of the domain owner is the Defendant/Respondent had the UDRP/URS never existed.**

But, let’s now add the UDRP/URS into the mix. As a first step, instead of going to court immediately, the IGO or rightsholder becomes the Complainant in the UDRP/URS, and the domain owner becomes the Respondent. However, should the domain owner lose at the UDRP/URS level and wish to challenge the outcome in the courts, in other words take the next step in the overall dispute, something happens, namely a **role**

reversal. In that second step of the overall dispute, now at the courts, the domain owner is the Plaintiff/Complainant, and the IGO or rightsholder is the Defendant/Respondent. **The natural role of the initiator of the dispute, as discussed in the prior paragraph, should be the Plaintiff/Complainant, but is now the Defendant/Respondent. Similarly, the natural role of the domain name owner should be Defendant/Respondent, but is now Plaintiff/Defendant.**

It might seem to some that party A suing party B is exactly the same as party B suing party A, if the underlying dispute hasn't changed. However, **it turns out that there can be subtle differences under the law. Party A suing party B is not identical under the law to party A suing party B. Those subtle differences can cause enormous unintended consequences, and that is why the IGO PDP working group spent considerable time on Recommendation #5, as it is one of the "edge cases" where that subtle difference can have an enormous impact.**

In the situation of the IGOs in particular, the role reversal means that as a Defendant/Respondent in the court case, they might attempt to assert an immunity defense, an argument that would be **impossible** for them to have raised had they been the Plaintiff/Complainant from the start in the courts (their natural role, had the UDRP/URS not existed). In other words, the existence of the UDRP/URS step as a stage in the overall dispute could interfere with a domain registrant's fundamental and natural rights (had the UDRP/URS never existed) to have the matter decided in the courts.

Now, the courts could (and probably would in most cases) find that the mutual jurisdiction clause in the UDRP/URS constitutes a waiver of immunity, in which case there's no actual interference. But, a court could in theory find that the mutual jurisdiction clause doesn't constitute a waiver of immunity, and find that the court thus could not hear the underlying merits of the case. This latter theoretical possibility, an unintended **"quirk of process"**, is **corrected by Recommendation #5, by simply placing the two parties (the IGO and the domain registrant) back in the exact same positions they would have been had there not been that "role reversal" at the UDRP/URS step that switched the Plaintiff/Defendant roles.** The IGO could then proceed with the court case as Complainant, at their discretion.

As it turns out, the potential unintended consequences of the role reversal are not limited to the IGO immunity scenario. It turns out that in the UK jurisdiction, courts are finding that domain name registrants lack a "cause of action" to initiate a dispute that challenges a UDRP/URS outcome. This was discussed in the IGO PDP as the other major "edge case", and was also

discussed in more detail in the RPM PDP, see:

<https://mm.icann.org/pipermail/gnso-rpm-wg/2018-October/003386.html>

and related threads, where various UK court decisions are cited. Mr. David Maher also wrote an excellent article on CircleID on this issue:

http://www.circleid.com/posts/20180103_the_udrp_and_judicial_review/

As you'll see in the next section, that "cause of action" issue was actually intended to be fixed by the mutual jurisdiction clause of the UDRP at the time it was designed in the late 1990s, but it turns out that that was not a perfect solution, and thus these unintended consequences of the role reversal exist.

Because these two edge cases have the same root cause, this was one of the arguments for creating a global solution to both issues within the RPM PDP, i.e. this was Option #4 in the discussions of Recommendation #5 (see pages 20-21 of the Final Report), but yielded "STRONG SUPPORT BUT SIGNIFICANT OPPOSITION". The people who were opposed to Option #1 now want a chance to change the outcome by revisiting the entire debate within the RPM PDP, even though that debate was fully considered and resulted in a clear CONSENSUS for Option #1. At the time, they (including Ms. Forrest, as Chair of the GNSO Council) strongly advocated for a decision by the IGO PDP, instead of "punting" it to the RPM PDP, but now that their preferred option was rejected, they are singing a different tune and want to revisit it again in a venue where they can call the shots, exclude participation from those who have invested 4 years understanding the issues, and are able to capture the process. They falsely claim capture in the IGO PDP, falsely accusing others of what they themselves are trying to accomplish through their backchannel sabotage of ICANN processes. In their world, there is no closure on any issue, unless they get their way, and they will constantly relitigate properly decided issues until they get what they want. That is unacceptable.

In a later section of this document, I'll examine whether it's possible to design a version of the UDRP/URS that doesn't have this fundamental design flaw with the role reversal, and it turns out that the answer is YES, it can be done!

9. HISTORICAL GRAND BARGAIN WHICH REQUIRES ACCESS TO THE COURTS FOR A DECISION ON THE MERITS WAS THE FOUNDATION OF THE UDRP, WHICH SOME WANT TO UNDERMINE

It's crucial to have studied the origins of the UDRP, to understand consensus Recommendation #5, yet none of what follows is in the Final Report or in subsequent documents provided to Council.

Some folks, like Mr. Corwin, have even attempted to rewrite history, claiming that:

<https://mm.icann.org/pipermail/gnso-rpm-wg/2018-October/003424.html>

The UDRP system cannot provide judicial review, it can merely step back when either party invokes relevant national law in which it has a right of action, whether that occurs before, during, or after the UDRP – and it does so. **Providing access to relevant law in various jurisdictions in which a domain registrant has a right of action is a task of industry trade and cyber-rights groups.** [emphasis added]

and

We simply disagree on what the “bargain” was when the UDRP was established. It was a guarantee that available legal rights would be respected and be superior to the UDRP, not a guarantee that they would be available – and certainly there was no understanding that a domain registrant would be immune from a UDRP if the relevant mutual jurisdictions failed to provide adequate legal rights or associated cause of action. The cure for this situation is an expansion of domain registrant rights or causes of actions in jurisdictions where they are now lacking – or, in the alternative, discussion of an internal appeals process when such rights are unavailable. [emphasis added]

These statements were on the RPM PDP mailing list, when the topic came up, which informs his views on the related question in the IGO PDP on access to the courts (that was the context of the thread, as I put forth various solutions related to access to the courts).

Mr. Corwin, and the views of others working to sabotage the PDP's recommendation #5, are completely wrong and at odds with the history of the UDRP, as documented at:

<https://www.icann.org/resources/pages/schedule-2012-02-25-en>

<https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-25-en>

"The proposals were designed to provide trademark holders with the **same rights** they have in the physical world, to ensure transparency, and to guarantee a dispute

resolution mechanism **with resort to a court system**. [emphasis added]

Notice the “same rights” and “with resort to a court system” language. It can’t get much clearer than that. Recommendation #5 provides exactly that, the same rights and resort to the court system.

The White Paper goes on to say:

Further, it should be clear that whatever dispute resolution mechanism is put in place by the new corporation, that mechanism should be directed toward disputes about cybersquatting and cyberpiracy and not to settling the disputes between two parties with legitimate competing interests in a particular mark. **Where legitimate competing rights are concerned, disputes are rightly settled in an appropriate court**. [emphasis added]

Again, Recommendation #5 accomplishes that, by ensuring that it is up to the appropriate courts to decide on the merits. IGOs ignore these facts, and are happy to instead push for binding arbitration in unaccountable kangaroo arbitration panels as being “good enough” for registrants.

The issues surrounding access to the courts for a decision on the merits was well understood at the time the UDRP was created nearly 20 years. Section 4(k) of the UDRP and the corresponding URS rules were an attempt to accomplish that, but they are not entirely effective (Recommendation #5 fixes this).

Indeed, if one goes to the Staff report at the time:

<http://archive.icann.org/en/meetings/santiago/udrp-staff-report.htm>

"DNSO Recommendation 4(b): The need to address the situation wherein a domain name registrant who has been unsuccessful in the ADR process is effectively prevented from "appealing" the result in a court due to the absence of a cause of action in contract, tort, regulation, statute or constitutional right. It was noted that there is an imbalance in the WIPO process in that an unsuccessful complainant will always be able to judicially challenge an ADR result by virtue of the jurisdiction of the registry being imposed over the dispute by the WIPO Report;

Staff Suggestion on DNSO Recommendation 4(b): The staff agrees that **both registrants and challengers should have equal opportunities to "appeal" an outcome of the administrative dispute-resolution procedure**. Some commentators have suggested that the DNSO-recommended **proposal would afford challengers significantly superior "appeal" rights**. The staff notes that **this result would be a clearly unintended consequence of the DNSO proposal. The staff believes that this concern can and should be fully addressed in the implementation of the**

dispute-resolution policy, which should explicitly negate this possibility.
[emphasis added]

The possible inability to have the access to the courts for a decision on the underlying merits due to immunity issues for IGOs was another “unintended consequence”, which would be fully corrected by the Consensus Recommendation #5.

Furthermore, to understand the development of UDRP's Section 4(k), see:

<http://www.dnso.org/dnso/notes/19990729.NCwga-report.html>

The **need to address the situation wherein a domain name registrant who has been unsuccessful in the ADR process is effectively prevented from appealing** the result in a court due to the **absence of a cause of action** in contract, tort, regulation, statute or constitutional right. It was noted that there is **an imbalance in the WIPO process** in that an unsuccessful complainant will always be able to judicially challenge an ADR result by virtue of the jurisdiction of the registry being imposed over the dispute by the WIPO Report.

One suggested **solution to this problem** which WG-A agrees merits further consideration, is the requirement that a complainant enter into a contract with the registrant (or the arbitral institution in a jurisdiction that recognizes third party beneficiary agreements) as a condition of initiating ADR, that provides for consent to be sued in the jurisdiction where the registrant is ordinarily resident, and in the jurisdiction where the subject registrar is located (assuming both parties do not agree to voluntarily contract out of the right to subsequent litigation).

So, in other words, Consensus Recommendation #5 is entirely consistent with the history and purpose of the UDRP, and fixes issues that were not anticipated correctly by the current existing policy.

Recommendation #5 puts both parties back in the same legal position they'd be had the UDRP/URS not taken place (which interfered with the access to the courts to render a final decision on the matter), to ensure that it's the courts that have the final say on the merits of a dispute, without interference by ICANN or its policies. It makes sure that ICANN is not granting either side any better outcome or rights from the UDRP/URS than exists in the real courts. In other words, Recommendation #5 ensures that both the IGO and the domain name registrant have the outcome determined by the courts, as was expressly desired in the development of the UDRP (which the URS is modeled on).

Everything put forward by the IGOs, in trying to discredit the PDP's final report, is an attempt by IGOs to create a process that would give them

better outcomes and better rights than exist in real national courts and under national laws. They want an uneven playing field, one that advantages themselves to the detriment of others. Those attempts should be vehemently opposed (which the Consensus accomplished), as otherwise it would mean ICANN would be creating its own “**new law**”, rather than creating policies that are consistent with **existing** laws of nations.

10. IT IS POSSIBLE TO REDESIGN THE UDRP/URS WITHOUT THE ROLE REVERSAL FLAW

At a very late stage of the IGO PDP, in June 2018, too late for the working group to really consider, I discovered that an elegant solution exists which completely eliminates the role reversal flaw discussed above. This was posted to the mailing list on June 7, 2018:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001226.html>

which documented a procedure within the rules of the “Civil Resolution Tribunal” an online tribunal that handles small claims and strata (condominium) disputes in the British Columbia, Canada.

In particular, they have a “Notice of Objection” system as their appeal mechanism:

If you disagree with the CRT’s final decision on a small claims matter, including a default decision, you can pay a fee and file a Notice of Objection with the CRT. The Notice of Objection must be filed within 28 days after a party receives a CRT decision. The CRT cannot issue an order in a small claims dispute until the deadline for filing a Notice of Objection expires. **If a Notice of Objection is filed, the CRT decision is not enforceable. If any party wants to continue any of the claims that were included in the dispute, that party must file a Notice of CRT Claim in the BC Provincial Court.** [emphasis added]

Essentially, if one pays the appropriate fees and files a “Notice of Objection”, the decision is not enforceable, and further court action (in an established offline court) would be required.

In a UDRP/URS context, this means that there’d be no reversal of the roles of plaintiff/defendant in the court, compared with the complainant/respondent in the UDRP/URS procedure. Thus, the “edge case” involving IGOs discussed in section 8 above, where an IGO can become a defendant in the courts due to the role reversal and attempt to assert immunity, simply doesn’t exist under the Notice of Objection. Instead, the IGO would continue to have their “natural role” as Complainant in the

courts, as is the case had the UDRP/URS never existed.

The UK lack of “cause of action” issue mentioned above in section 8, caused by the role reversal, also doesn’t arise, as the trademark holder would be the complainant in the court case (if the UDRP/URS decision became not enforceable).

Furthermore, to prevent “gaming” of the notice of objections, various court costs can be assessed in the courts later on, if the party who filed the notice of objection did no better in the courts:

If the person who filed the Notice of Objection does not have a better outcome in the BC Provincial Court than in the CRT’s decision, the BC Provincial Court may order that party to pay a penalty to the other party [emphasis added]

This is a far more elegant solution to the problem, and I also formally proposed it within the RPM PDP, see:

<https://community.icann.org/download/attachments/93126760/URS-Proposal-18.pdf?api=v2>

(although some folks are trying to kill off these proposals before the public can even comment on them, continuing their back channel sabotage, as discussed at <https://freespeech.com/2019/08/05/misuse-of-icann-pdp-chair-position-to-relitigate-working-group-decisions/>)

I personally put out an olive branch directly by email to Mr. Passaro of the OECD to raise this as a possible solution, and we did have fruitful discussions. I strongly believe that this could form the basis for a global solution, and I didn’t invent it --- it’s modeled on a procedure created by others in an established legal system. While IGOs are obviously trying to convince ICANN to tilt the scales in their favour by creating an uneven playing field that advantages them, this “Notice of Objection” system keeps things entirely neutral for all sides, and recognizes that ICANN isn’t the place to create “new law”, but instead it is the national courts that have supremacy. For IGOs, there's a particular advantage in that there would not need to be a “mutual jurisdiction” clause at the time of the filing of a UDRP/URS, because it’s no longer necessary. i.e. the Notice of Objection means the decision is unenforceable, so then it’s entirely up to the IGO to decide whether they wish to pursue the dispute in court (as the initiator of the court action). IGOs wouldn’t have to risk others dragging them into a court via the inherent waiver of immunity from the current mutual jurisdiction clause, in other words.

Mr. Passaro's main concern appeared to be the potential "gaming" by a malevolent domain owner (i.e. a true fraudster), if the cost of the "Notice of Objection" was too small. But, I believe a suitable figure could be determined that would fully address his concerns (on the order of several thousand dollars at risk -- it cannot be free, to ensure that potential legal costs are also covered if the objector simply doesn't show up to defend in court).

When it comes down to it, real fraudsters (those who engage in phishing, spam, etc.) will never show up in court, or want to go to court -- they'd simply be arrested by authorities if they did so. It's those with valuable and desirable domain names who would want to challenge adverse UDRP/URS outcomes in court, and it happens far more than IGOs (especially WIPO) care to admit, e.g. with the IMI.com and ADO.com disputes:

ADO.com:

<https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2017-1661>

http://www.circleid.com/posts/20180301_ica_statement_on_adocom_udrp_decision_overreaching_panelists/

<https://domainnamewire.com/2019/01/10/ado-com-domain-dispute-settled/>

3-0 in favour of complainant at WIPO, but which settled completely in favour of the domain name owner when it went to the courts.

IMI.com:

<https://www.adrforum.com/domaindecisions/1753342.htm>

<https://domainnamewire.com/2019/06/25/jury-overturms-horrible-cybersquatting-decision-for-imi-com/>

<https://domainnamewire.com/2019/08/12/heres-the-crazy-story-from-the-imi-com-cybersquatting-trial/>

The IMI.com dispute went to a jury, which completely overturned the panel decision at NAF, correcting a huge injustice.

These are the kinds of cases that IGOs are arguing should not be available to be appealed to the courts, and that position is dangerous and self-serving. IGOs want a license to commit reverse domain name hijacking, stealing valuable domain names, by preventing these cases from going to the courts for full hearing on the merits with all the protections of due

process that only courts can provide.

Folks like INTA and Mr. Corwin put forth the proposition that arbitration (made up of many of the same individuals who currently issue incorrect decisions that are overturned by courts) is a “good enough” solution, but a faulty solution like the one they advocate is no solution at all. All arbitration would do is allow for a system that is already biased in favour of trademark holders and complainants to go unchecked by the courts, as noted above by Ms. Seltzer. Court access is essential in order to ensure that a truly neutral venue operated with full due process exists (discovery, cross-examination, rules of evidence, etc), which also has multiple levels of appeals (e.g. in Canada, one can appeal to provincial courts of appeal, and even the Supreme Court of Canada) for the most contentious disputes.

A balanced notice of objection system would deter fraudsters from ever sending disputes to the courts, but would not prevent legitimate disputes, like those above, from being decided by national courts. In the eyes of IGOs, though, there are no legitimate cases that ever deserve the protections of court access -- their position is untenable.

If one really thinks about matters deeply, the only scenario that an IGO should be concerned about is where they have brought a UDRP/URS dispute that is **not meritorious**, which is decided incorrectly by the panel, and which the registrant (rightly) wishes to have determined via the courts. (A scenario where the registrant **loses** in court on the merits doesn't harm the IGO.)

Only a scenario where the registrant **wins** in court would harm the IGO. **That's exactly the scenario where the IGO (like any other party to a dispute) indeed should be harmed, where they initiated an unmeritorious claim, and ultimately lost.** ICANN should not be interfering with this natural outcome, which exists for all parties to disputes. **IGOs are not so “special” that they should be able to initiate disputes with complete impunity, when those cases are not meritorious.**

11. IGOs ROUTINELY MAKE FALSE AND MISLEADING STATEMENTS TO SUPPORT THEIR FAULTY POSITIONS

It's no secret that IGOs have been at this for over 15 years, as discussed above. Their tactics, though, should not be respected, as they **routinely make false and misleading statements to support their faulty positions.** It appears that they believe that repeating a false statement over and over again will convert it into the truth. Or perhaps they hope that

those who know the truth will stop rebutting their arguments, so that they can get their way through “exhaustion” of their opponents. 15 years is a long time, especially given that the facts and the law that undermine all of their arguments have never changed.

For instance, IGOs routinely state that the current UDRP rules “prevent” them from using it.

<https://mm.icann.org/pipermail/discussion-igo-rc/2017-May/000156.html>

As we have discussed at length, the mutual jurisdiction provision of the UDRP in fact **prevents IGOs from using the UDRP**. [emphasis added]

That is simply wrong, as has been pointed out repeatedly to them, and easily disproven. The Final Report documents a number of cases brought by IGOs.

Indeed, several IGOs—including the International Mobile Satellite Organization (INMARSAT), the International Bank for Reconstruction and Development (IBRD), and the Bank for International Settlement (BFIS)—have prevailed in UDRP complaints.⁵

⁵ Respectively, in *International Mobile Satellite Organisation and Inmarsat Ventures Limited (formerly known as Inmarsat Holdings Limited) v. Domains, EntreDomains Inc. and Brian Evans*, D2000-1339 (WIPO Nov. 30, 2000); *International Bank For Reconstruction and Development d/b/a The World Bank v. Yoo Jin Sohn*, D2002-0222 (WIPO May 7, 2002); and *Bank for International Settlements v. BFIS*, D2003-0984 (WIPO March 1, 2004), *Bank for International Settlements v. BIS*, D2003-0986 (WIPO March 2, 2004), *Bank for International Settlements v. James Elliott*, D2003-0987 (WIPO March 3, 2004), *Bank for International Settlements v. G.I Joe*, D2004-0570 (WIPO (Sept. 27, 2004), *Bank for International Settlements v. BIS*, D2004-0571 (WIPO Oct. 1, 2004), and *Bank for International Settlements v. Fortune Nwaiwu*, D2004-0575 (WIPO Oct. 1, 2004). A few other matters are catalogued in the Index of WIPO UDRP Panel Decisions, <http://www.wipo.int/amc/en/domains/search/legalindex/>, as involving IGOs. In one, involving the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), a decentralized agency of the European Union, the complaint was denied due to its failure to establish rights to marks or services. *European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) v. Virtual Clicks / Registrant ID:CR36884430, Registration Private Domains by Proxy, Inc.*, D2010-0475 (WIPO July 7, 2010). In another, involving UNITAID, an IGO hosted by the World Health Organization (WHO), trademark rights were assigned by a fiduciary agreement to a private enterprise, which registered them on behalf of the WHO and UNITAID. *Lenz & Staehelin Ltd v. Christopher Mikkelsen*, D2012-1922 (WIPO Jan. 8, 2013). [pp. 118-119 of final report, and footnote 5]

At ICANN 60 (after those cases above had already been published in a prior report), Mr. Brian Beckham of WIPO openly made false statements concerning the number of disputes involving IGOs:

<https://icann60abudhabi2017.sched.com/event/CbFM/gnso-igo-ingo-curative-rights-protections-pdp-wg-face-to-face>

https://schd.ws/hosted_files/icann60abudhabi2017/67/Transcript%20IGO%20INGO%20CRP%20Abu%20Dhabi%2001%20Nov.pdf

We were discussing the number of UDRP cases that had been brought by IGOs:

Philip Corwin: I just want to add to that. I note in a chat room that one of our working group members noted that there have been fewer than a dozen UDRPs filed by IGOs in the last 20 years. [p. 25]

(it was I who had pointed that out in the Adobe Connect chat room)

But Brian Beckham then falsely claimed that the number was actually only 2!

"Brian Beckham: Thank you. Brian Beckham from WIPO for the record. Just a small point of clarification, I think - I'm not on the chat, but this reference to less than a dozen, if my memory serves, **it was actually two cases** that have been identified over almost the past 20 years, for whatever that's worth, for historical context. **Correct, two.** [emphasis added]

This was clearly false, although he declared it "Correct", as anyone can count the number of cases from footnote 5 above (and Mr. Beckham was fully aware of that, having previously commented on a previous report which cited those cases).

IGOs will often claim that the assignee, licensee or agent "workaround" which we highlighted in the report is untested and unproven. This shows that even when working group members bent over backwards to attempt to help IGOs, that they slap working group members in the face and disrespect them. In fact, an IGO already tested such an approach, namely UNITAID:

<https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2012-1922>

in a completely successful manner.

IGOs routinely overstate the protections afforded towards the marks they

use, either directly or through lies of omission. They don't believe in coexistence, but instead incorrectly assert that they have exclusivity over terms they use. They were even able to convince ICANN to create a reserved list where terms like "ECO" and "PAM" that have many competing uses are instead reserved and prevented from being used by any others as second-level domains via the reserved list. That was a completely unbalanced and wrong decision. The current list of reserved names can be seen at:

<https://www.icann.org/sites/default/files/packages/reserved-names/ReservedNames.xml>

and has numerous short acronyms used by many entities. If you plug in any of those terms into databases like OpenCorporates.com, you'll find many legitimate competing uses throughout the world.

Often, IGOs will point to Article 6ter as the basis of their claims:

https://www.wipo.int/article6ter/en/legal_texts/article_6ter.html

What they usually do is simply quote **the beginning of the text**:

(1) (a) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

and suggest "Yes, our protections are very strong". What they will fail to point out, though, is that coexistence is explicit within Article 6ter! They rarely will point out that qualifier themselves:

From section c) in the same document:

The countries of the Union **shall not be required to apply the said provisions when the use or registration** referred to in subparagraph (a), above, **is not of such a**

nature as to suggest to the public that a connection exists between the organization concerned and the armorial bearings, flags, emblems, abbreviations, and names, or **if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization.** [emphasis added]

That severely weakens any rights that they claim to have, making them far more ordinary and less "special" than they claim.

This came up in the IGO "Small Group", when Bruce Tonkin (a former member of the ICANN Board) an "amateur" who isn't well versed in the topic compared with members of the IGO PDP who researched the topic for 4 years, made a post suggesting that Australian law had very strong protection for IGOs:

<https://mm.icann.org/pipermail/discussion-igo-rc/2017-May/000166.html>

So this is an example of applicable local law:

International Organisations (Privileges and Immunities) Act 1963

<https://www.legislation.gov.au/Details/C2016C01053>

" Except with the consent in writing of the Minister, a person (including a body corporate) shall not:

(a) use the name or an abbreviation of the name of an international organisation to which this Act applies in connexion with a trade, business, profession, calling or occupation;"

There is a list of organizations to which the act applies.

Looks like strong protection at least in Australia. [emphasis added]

Mr. Beckham of WIPO replied with:

<https://mm.icann.org/pipermail/discussion-igo-rc/2017-May/000168.html>

This squarely underscores what has been put forward inter alia by IGOs and the GAC for some years now (which was also noted as having broad agreement in concluding the Sunday evening session in Copenhagen), **namely a strong public policy basis** for the limited protection sought for IGO identifiers in furtherance of their global public missions -- of which we are all beneficiaries. [emphasis added]

What **Mr. Beckham didn't say** is that **Mr. Tonkin only quoted a small section of the Australian Legislation:**

<https://www.legislation.gov.au/Details/C2016C01053>

Had he scrolled down a little bit to section 12(3) it **clearly is qualified and weakened considerably by the following text:**

(3) A person **shall not be convicted of an offence** against this section in respect of the use of an abbreviation of the name of an international organisation to which this Act applies **if the use occurred in such circumstances or in relation to such matters as to be unlikely to be taken to imply any connexion with the organisation, unless the prosecution proves that the use was intended to imply such a connexion.** [emphasis added]

which mirrors the coexistence principle in Article 6ter's text above. **These lies of omission are standard tactics of IGOs trying to convince ICANN that they are "special."**

12. CONCLUSIONS

In conclusion, all 5 recommendations in the final report should be adopted by the ICANN Board. Furthermore, the "Notice of Objection" system discussed in Section 10 should one day become the model for reform of the UDRP and URS, to solve the "role reversal" design flaw inherent in both procedures. Lastly, ICANN should block efforts of those who've engaged in backchannel sabotage of the IGO PDP's recommendations, and who further seek to capture future policy work by controlling the composition, membership and participation of future working groups.