



Creating Markets, Creating Opportunities

August 20, 2019

Comments of the International Finance Corporation (IFC) on the Final Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process (the Final Report)

Ladies and Gentlemen:

IFC refers to the Comments of the International Bank for Reconstruction and Development (the “World Bank”) on the Final Report. IFC supports the comments filed by the World Bank and by other Intergovernmental Organizations (IGOs). We reiterate the sentiment expressed by others that IGOs merit tailored protection in the DNS system commensurate with their unique treaty-based character, including the privileges and immunities accorded to them by their member countries. Accordingly, we request the ICANN Board to take appropriate action to protect IGOs.

IFC is an international organization established by Articles of Agreement among its member countries, including the United States of America, and a member of the World Bank Group. We are generally considered the **largest** global development institution focused exclusively on supporting the private sector in developing countries, including investment and advisory services, and mobilization of investment capital from public and private investors. As with the World Bank, IFC is a public IGO whose purpose is to fund and encourage development activity in its member states. Its twin goals are eliminating severe poverty and boosting global prosperity by 2020. IFC is owned and controlled by its 185 member nations, who contribute public funds to its development work. Because IFC operates across international borders in its member nations, its member states have agreed to allow it certain privileges and immunities from the application of their national laws in its operations. Further, IFC, like other NGOs, increasingly leverages technological means, including web-enabled platforms, to achieve our development objectives.

IFC’s name is often misused in frauds and scams, as are the names of other IGOs. These scams can be perpetrated, or assisted, by the misleading registration of domain names with similar or identical names and acronyms to an IGO, can cause confusion in the marketplace, and can cause irreparable harm to our clients, reputation and mandate. Any

resources that IFC has to expend to address such fraudulent domain name abuse must be diverted from the development assistance it is mandated to offer to the world's poorest nations. As a result, IFC, along with 196 other IGOs, has long been requesting that ICANN grant to IGOs some basic protections for their names and acronyms under the [g]TLD program beyond the curative rights proposed by the GSNO.

The GNSO Final Report refuses to make any accommodations for IGOs, and seeks to force the IGOs to choose between protecting their acronyms or protecting the immunities that allow them to operate internationally without the constant threat of lawsuits in every member country. The GNSO obtained a legal opinion that explains the special nature of IGOs and the consequences of their status, which is attached to the GNSO Initial Report as Annex 14, [to the Initial Report](#), but the GNSO largely rejects or contradicts the implications of the advice provided by its own legal expert. Similarly, the GNSO appears to have rejected the input it received from the IGO Small Group on this topic.

Recommendation #1:

1(a) IFC is not an INGO, and has no comments on this recommendation concerning INGOs.

1(b) IFC concurs with the World Bank's comments on this point. IFC reiterates that the privileges and immunities of IGOs are not a simple topic. The GAC's advice on the IGO issue was long in favor of allowing IGOs to have completely preventative protections for their acronyms, which would have avoided complex immunity issues altogether. Ultimately, in an effort to reach a resolution on this issue, the GAC has accepted and recommended a curative mechanism for IGOs to defend their acronyms, but the GAC's recommendation also avoids use of national courts altogether.

IFC agrees with the World Bank that the ICANN Board was correct when it agreed that this issue could be resolved according to the October 4, 2016, Policy Recommendations presented to the GNSO and the Board by the IGO "Small Group." Annex 12 to the GNSO report contains a copy of these recommendations, which include an arbitral appeal process from any Uniform Dispute Resolution Procedure (UDRP) determination of an allegation of domain name abuse. That method would avoid concerns about immunity waivers completely. Instead of following these recommendations, however, the GNSO's Interim Report departed from that advice in several key ways, apparently mostly based on a reluctance to make any changes to the existing UDRP and Uniform Rapid Suspension Process (URS) process.

The GNSO continues to dismiss the conclusions of GNSO's own legal expert and the implications arising from such conclusions, and attempts to force IGOs to choose between compromising their right to prevent fraud using their acronyms, or to compromise the immunities granted to IGOs by their member states.

Professor Swaine concludes 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.” While (i) Professor Swaine’s opinion is necessarily broad stroke and generalized, as it attempts to deal with the different immunities granted to IGOs by their member governments under international and national law; and (ii) like the World Bank, IFC is not agreeing that his opinion is in any way specifically binding on it, or indeed that IFC would be waiving any immunity in any way by engaging in any action relating to its acronym, including in the UDRP or the URS), IFC concurs that the GNSO should acknowledge the conclusions and implications expressed in the legal opinions in Annex 14 to the GNSO’s own Interim Report.

The GNSO falsely envisions a world in which IGOs avail themselves of the current UDRP process, including the Mutual Jurisdiction clause, but then will somehow still be able to claim immunity in an appeal of that decision to a national court. This is extremely unlikely, and this counterfactual assumption should not form the basis for any serious recommendations.

Further, IFC disagrees with the Working Group’s apparent justification for compelling potential waiver by asserting that the lack of a single universal rule applicable to IGO immunities mandates this approach. IFC’s Articles of Agreement provide it with the benefit of jurisdictional immunity except in very narrow circumstances. The potential waiver of our privileges and immunities, accorded to us by sovereign countries to achieve public purposes, even to protect our very names, would be counter to the intent and interests of our shareholders.

The GNSO’s recommendations simply defend the status quo and the existing UDRP and URS process, and seek to avoid making any accommodations for IGOs similar to those already granted to the International Committee of the Red Cross and the International Olympic Committee. The GNSO does not adequately consider the actual threat posed to IGOs by being forced to potentially waive their immunities in order to participate in the UDRP, and provides no reasonable options. Since the GNSO is unable to come up with any viable alternative recommendation on this issue, the October 4, 2016, Small Group recommendations should simply be adopted by the ICANN Board. At a minimum, the Mutual Jurisdiction provisions should clarify that mere participation in UDRP’s quasi-arbitral process does not in itself waive any privilege or immunity to which the IGO party may be entitled.

Recommendation #2:

IFC concurs with the World Bank that the GNSO seeks to require too legalistic and technical a test before many IGOs would be able to even access the UDRP or (URS). The UDRP and URS generally require a claimant to prove that it has the right to assert protection for a name or acronym. A convenient shorthand is to require evidence of a valid trademark or service mark in the name or acronym a claimant seeks to protect. For

corporations organized under national law, this test makes sense. For IGOs, however, such a requirement is often disqualifying, since IGOs often choose not to register their names as trademarks in all of the nations in which they operate. IFC, like the OECD, urges the GNSO to allow arbitrators in the URDP and URS systems to apply international law, which may include Article 6*ter* of the Paris Convention, to evaluate whether an IGO has standing to file a claim. Further, the GNSO may consider the reality that various national laws indeed grant strong legal protections to IGO names as such, effectively establishing ownership rights sufficient for standing in all events. No special restrictions are justified for IGO claims.

Recommendation #3:

The GNSO suggests that an IGO could sidestep any immunity issue by simply filing a complaint before the UDRP and/or URS through an assignee, licensee or agent. IFC concurs that this suggestion is of course impossible to implement if a third party brings a case, well founded or not, directly against an IGO, which would be left to defend itself in the UDRP proceeding at the risk of having waived its immunity in any later appeal. In addition, even where an IGO is considering filing a claim itself, the GNSO completely fails to explain how this assignment trick would work in practice. The difficulty and complexity inherent in an attempt to assign name rights are explained in detail by Professor Swaine. For one thing, the assignment may well be rejected by the UDRP or a court. In addition, the assignment, particularly to an “agent”, might also be ineffective in protecting the IGO’s immunity. The GNSO’s recommendation that an IGO should routinely give control of its name to a third party in order to file a UDRP proceeding to protect its name makes very little sense and continues to threaten the immunities of the IGO. Similar difficulty and complexity apply to the GNSO’s recommendation to have IGOs contact the registrar of record to address the harms for which the IGOs are seeking to redress prior to filing a UDPR and/or URS complaint. As noted, IGOs, like their commercial counterparts, often choose not to register their names as trademarks in all of the nations in which they operate. In our case, the cost of registering and monitoring trademark applications across 185 countries would consume resources better spent on development assistance”.

Recommendation #4:

IFC reiterates that 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.

Recommendation #5:

IFC reiterates its comments above under Recommendation #1(b).