**Minority Statement of Philip S. Corwin**

On June 25, 2014 the [Charter](https://gnso.icann.org/sites/default/files/filefield_45569/igo-ingo-crp-access-charter-24jun14-en.pdf) for this Working Group (WG) was adopted, in which it was *“tasked to provide the GNSO Council with policy recommendations regarding whether to amend the UDRP and URS to allow access to and use of these mechanisms by IGOs and INGOs and, if so in what respects or whether a separate, narrowly-tailored dispute resolution procedure at the second level modeled on the UDRP and URS that takes into account the particular needs and specific circumstances of IGOs and INGOs should be developed”*. The Charter further directed the WG to consider a minimum number of issues, and it soon became apparent in its work that the most important was to consider *“The relevance of specific legal protections under international legal instruments and various national laws for IGOs”*.

After four years of effort this WG has utterly failed to provide a policy recommendation that reasonably resolves the central challenge it confronted; that being how to equitably resolve the inherent tension between the right of domain registrants to seek de novo review of the decision of a curative rights process (CRP) in a court of mutual jurisdiction, with the recognized scope of immunity from judicial process enjoyed by IGOs. Instead, it has produced a policy recommendation that grants excessive favoritism to registrant rights by effectively obliterating any shred of IGO immunity and, in doing so, casts ICANN into a role that is far beyond its proper remit. It is virtually ensured that this central recommendation will not be adopted ICANN’s Board, both on its own lack of merit and after the inevitable receipt of harsh and contrary GAC advice, in the event that GNSO Council elects to send it on to the Board – which, as I explain below, Council should refrain from doing.

This failure not only leaves the festering issue of IGO access to CRP for future resolution within the ICANN community, but brings into question the ability of the PDP consensus approach to resolve narrow but difficult legal/policy issues, or to adequately respond to the legitimate interests of governments and international intergovernmental organizations. I shall, in the second part of this document, outline my thoughts on what lessons the experience of this WG might have for GNSO Council’s ongoing “PDP 3.0” reform effort.

I was selected by this WG’s members as one of its two co-chairs shortly after Charter adoption, and continued in that role until May 11, 2018 when I submitted a letter of resignation stating that, due to other responsibilities and time demands, *“I can no longer devote the time and effort required to effectively and responsibly serve as a Co-Chair of this WG. I shall remain a member of this WG and participate in the wrapping up of its work.”* Given that I served as co-chair for most of the WG’s four year existence I bear some significant responsibility for its failure, and for that I apologize to the entire ICANN community. I believe that I have learned some important lessons from this unhappy experience that will permit me to make more successful contributions to other ICANN policy development efforts, and that will be of assistance to Council as it pursues the PDP 3.0 reform effort.

Recommendation Five Should Be Rejected by Council and the Board

Recommendation Five addresses the central question that this WG wrestled with, that being what should occur in the rare but nonetheless realistic potential circumstance that a domain registrant sought de novo review of an adverse UDRP decision in a court of mutual jurisdiction and the IGO that successfully prosecuted the UDRP subsequently succeeded in asserting its judicial immunity, and the case was therefore dismissed for lack of jurisdiction over one of the parties to the dispute.

The relevant language of the [UDRP](https://www.icann.org/resources/pages/policy-2012-02-25-en) pertaining to such circumstance is contained in Section 4(k), which states in its entirety:

***k. Availability of Court Proceedings.****The mandatory administrative proceeding requirements set forth in*[*Paragraph 4*](https://www.icann.org/resources/pages/policy-2012-02-25-en#4)*shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision.* ***We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under***[***Paragraph 3(b)(xiii)***](https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en#3bxiii)***of the Rules of Procedure.*** *(In general, that jurisdiction is either the location of our principal office or of your address as shown in our Whois database. See*[*Paragraphs 1*](https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en#1mutualjurisdiction)*and*[*3(b)(xiii)*](https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en#3bxiii)*of the Rules of Procedure for details.)* ***If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel's decision, and we will take no further action, until we receive*** *(i) evidence satisfactory to us of a resolution between the parties;* ***(ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn;******or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.*** *(Emphasis added)*

That is, under current policy the dismissal of the litigation initiated by the losing domain registrant, for whatever reason, would result in the domain registrar’s implementation of the UDRP Panel’s decision to extinguish or transfer the domain.

Recommendation Five would turn that policy completely on its head for cases involving IGOs, stating:

 ***Recommendation #5:***

***Where a losing registrant challenges the initial UDRP/URS decision by filing suit in a national court of mutual jurisdiction and the IGO that succeeded in its initial UDRP/URS complaint also succeeds in asserting jurisdictional immunity in that court, the decision rendered against the registrant in the predecessor UDRP or URS shall be set aside (i.e. invalidated).***

While I concur with the other four recommendations contained in the Final Report, they constitute mere window dressing around the edges of this central IGO CRP issue. Those secondary recommendations do not directly address the primary question which underpinned the creation of this WG and which has generated so much discussion and controversy over the four years of its existence.

That question can be introduced and summarized as follows:

* The UDRP and URS both provide a losing domain registrant/respondent with a right to file a judicial appeal where the registrant has ties to a jurisdiction providing a relevant right of action. Both CRPs do that by permitting appeal to a court of mutual jurisdiction; that being a court jurisdiction at the location of either (a) the principal office of the Registrar or (b) the domain-name holder's address as shown for the registration of the domain name in the Registrar's WHOIS database at the time the complaint is submitted to the Provider.

Both CRPs also provide either party to a dispute with the right to file a judicial action prior to the initiation of or during the pendency of the CRP, with the examiner free to suspend or terminate the proceeding, or to continue on to determination (however, if the proceeding continues on to determination, any subsequent court decision is controlling as regards disposition of the domain). The URS also provides for an internal administrative appeal process that is not relevant to the overarching question before the WG.

*Domain registrants who are either located within a jurisdiction that allows for litigation of a domain-related trademark dispute to be initiated by the registrant, or that have obtained a favorable “mutual jurisdiction” through deliberate selection of a registrar principally located in such a jurisdiction, value that legal right and do not want ICANN to require that they surrender it in deference to any party as a condition for domain registration.*

* However, IGOs claim broad jurisdictional immunity from litigation, and both relevant law and judicial decisions provide substantial support for that position, although the ultimate answer as to whether an IGO enjoys such immunity in regard to a particular dispute can only be determined by the national court in which an immunity defense is raised. The issue of whether an IGO has waived its jurisdictional immunity as a consequence of filing a CRP action is also one that can only be answered by a national court when and if such an immunity defense is asserted; the “Swaine memo” described the variety of analytical approaches that would be employed by a court in this situation and noted that different approaches, in combination to differing national law and judicial precedents, could result in different decisions in similar cases. *Whatever the ultimate merits of an IGO’s claim to judicial immunity, IGOs do not want ICANN to require that they surrender any claim to judicial immunity as a condition for filing a CRP action.* In the view of IGOs, their legal rights – and the WG has discerned no available rights other than those conferred under the “trademark or service mark” standard of the UDRP and URS as being the proper basis for initiating a UDRP or URS – should be sufficient to establish standing without further condition, including immunity waiver.
* There is no indication that the potential legal clash between domain registrants and IGOs (or entities possessing sovereign immunity generally; that is, nation-states) was ever considered when the mutual jurisdiction clause of the UDRP was adopted. How, then, are the clashing legal rights of domain registrants and IGOs to be balanced? *And, in particular, what should occur when a losing respondent files a judicial appeal from a UDRP or URS decision, and the IGO targeted by the resulting lawsuit successfully asserts its defensive claim of judicial immunity and the litigation is dismissed by the court?*
* This question is likely to arise very infrequently, as the percentage of UDRP cases that are judicially appealed is quite small, as is the number of CRP actions initiated by IGOs. *But unless this question has been answered in a manner that has a reasonable chance of being adopted as policy by the GNSO Council, and subsequently by the ICANN Board – after the Board considers any relevant GAC advice – this WG has failed in its primary responsibility.* While a WG’s final recommendations should not be determined solely by internal ICANN “political” considerations, a WG’s members must also recognize that its output is just the first step in the process and must be reasonably attuned to receiving a harmonious reception from the broader ICANN community as the policymaking process moves beyond its initial PDP stage.

Given this introductory background, I strongly oppose Recommendation Five, which would vitiate the decision rendered against the registrant in the predecessor UDRP or URS if the IGO succeeded in its assertion of judicial immunity in a subsequent appeal.

I do so for the following reasons:

* ICANN is a California non-profit corporation. It has no right or authority to override, or make any determination regarding the validity or scope of, the legal rights of either party to a CRP whether the relevant law in question is that of California, the United States, or any other nation. I have been unable to support the GAC consensus advice on this matter because it requested that ICANN preemptively deny domain registrants their right, where available, to appeal a UDRP or URS decision to a court of competent and mutual jurisdiction; my view is that ICANN has no valid remit to extinguish the legal rights of one party on behalf on another. Similarly, ICANN has no authority to determine whether an IGO’s filing of a CRP constituted a complete waiver of the procedural and substantive components of its judicial immunity, as that question of waiver can only be determined by a national court based upon its own approach to analyzing issues of sovereign immunity, relevant statutes and case law, and the facts of the dispute. Finally, as a practical matter, ICANN has no ability to prevent a domain registrant who has lost a CRP determination from filing a de novo “appeal”, nor does ICANN have authority to prevent an IGO from asserting a claim of judicial immunity or to compel jurisdiction over an IGO in any national court that has determined that a party appearing before it possesses lawful immunity and is therefore not subject to its jurisdiction.
* This option would single out IGOs – and only IGOs among all possible classes of CRP Complainants -- for punitive treatment for successfully raising a judicial defense in a court appeal from a URDP or URS decision. A trademark dispute is a civil case, and it is common in such cases for the respondent to seek summary dismissal or otherwise assert available defenses for the purpose of terminating the action prior to judgment on the merits. UDRP Rule 4k makes clear that an adverse administrative decision will be implemented against the domain registrant if the panel receives satisfactory evidence that the lawsuit has been dismissed or withdrawn, regardless of the reason for dismissal.

Proponents of Option 1 appear to feel that an assertion of judicial immunity is a violation of the “mutual jurisdiction” provision in the UDRP and URS, but that is an incorrect reading. An IGO’s refusal to participate in a subsequent judicial appeal would be such a violation (and would likely result in a default judicial judgment for the domain registrant/plaintiff), but in the contemplated situation an IGO would have procedurally recognized and acquiesced to the court’s jurisdiction through its appearance before it, while retaining its right to assert relevant substantive defenses. In short, an IGO asserting an immunity defense has accepted the court’s procedural jurisdiction while retaining its ability to assert a substantive defense; if the court rejected that defense, the IGO would either have to acquiesce to its substantive jurisdiction or, by withdrawing, provide the domain registrant with a favorable default judgment.

* This Recommendation fails to satisfy the charge contained in the WG Charter that we “provide the GNSO Council with policy recommendations regarding whether to amend the UDRP and URS to allow access to and use of these mechanisms by IGOs and INGOs”, as it would further discourage IGO use of available CRPs by making clear that such utilization requires an advance capitulation on any substantive claim of jurisdictional immunity raised in a subsequent court appeal. While the WG has determined that a handful of IGOs have utilized CRP, that does not necessarily negate the assertions of IGO representatives that the potential loss of judicial immunity deters many IGOs from utilizing existing CRP avenues. Indeed, ICANN has frozen the registration of all domains matching IGO acronyms at all new gTLDs pending resolution of this issue in a belief that present CRP policy would leave IGOs more vulnerable to cybersquatting than is the situation for private sector entities.
* The notion of vitiating a previously issued decision in a CRP based upon a successful assertion of rights by a party in a subsequent judicial proceeding (as opposed to a final court decision) is both badly flawed policy and of questionable legality.
* This Recommendation, regardless of support level or subsequent action by the GNSO Council, is highly unlikely to ever be adopted by the ICANN Board given the near-certainty of strong adverse advice from the GAC. That opposition would stem not just from the distance between it and prior GAC advice (which, as noted, I do not support), but from two other significant factors.

First, it would create a precedent that any successful assertion of sovereign immunity vitiates a prior CRP decision against the domain registrant bringing the judicial action, and that precedent would logically be applicable not just to IGOs but to any national government or unit thereof that files a CRP action; such result will never be acceptable to the GAC. Second, it would encourage bad actor domain registrants who had lost a CRP decision to file a judicial appeal against an IGO known to guard its sovereign immunity, as that would present the IGO with a very difficult choice between abandoning assertion of its legal status or, if succeeding in such assertion, seeing the cybersquatting determined to exist at the domain in question continue unabated and without additional remedy. While proponents of this Recommendation assert that it would merely restore matters to the stat quo ante that existed prior to the filing of the CRP, if the original CRP determination of bad faith registration and use of a domain had been correct that means that the cybersquatting determined to exist in the CRP action would continue unabated with no alternative means available to stem the ongoing harm to the IGO and the Internet-using public.

This Recommendation should also be rejected because it represents a view of a minority of the full WG membership; and further, because the participating members of the WG were not representative of the broad ICANN community and the WG had, in fact, been operationally captured by a narrow and self-interested faction:

* The list of WG members that can be found at pp. 58-59 of the Final Report shows a membership of 25 (excluding Council Liaison). As the WG approached the decisional phase of its work in the fall of 2017, the other co-chair and I conducted outreach to WG members through support staff to determine whether those members who had not been active on calls and the email list had been continuing to monitor WG activities and wished to participate in a consensus call. We also had staff review all statements of interest (SOIs) to ensure they were current. The list contained in the Final Report resulted from that due diligence and is therefore valid.

However, the result of the consensus call released on June 9, 2018 showed that only 11 members of the WG – a minority of the full membership – supported the recommendation, while 2 (myself and the Chair) opposed it. Council and the Board should not approve a policy recommendation that failed to receive majority support among the full membership of the WG.

* Of the 11 WG members who supported the Recommendation, a majority (7) were either domain investors or attorneys representing domain investors (domainers), indicating that the WG’s consensus call process had been captured by a narrow segment of the ICANN community with a significant commercial interest in the outcome. In addition, 3 of those 7 members participated in an individual capacity and are unaffiliated with any ICANN stakeholder group or constituency.

Domainers are certainly a legitimate segment of the ICANN community; indeed, for more than a full decade, from 2006-2017, I represented a trade association of domain investors within the Business Constituency (BC) and spent substantial time in defense of their legitimate rights. However, based upon that representation, I know that domainers often express a minority view on trademark-related matters even within the BC, much less the entirety of the ICANN community; and that due to their large domain portfolios are substantially more likely to be subject to a UDRP or URS filing than the average domain registrant.

I am certain that if this had been a Recommendation that ICANN implement GAC advice on this matter and thereby deprive domain registrants of a right of judicial appeal when an IGO was the complainant, and the majority of those WG members supporting the recommendation were IGOs, domainers would be quick to assert that the Recommendation should be rejected based upon the self-interest and lack of diversity among those supporting it. The same principle should apply when a WG dominated by domainers supports a recommendation that their appeal rights should extinguish the ability of IGOs to assert judicial immunity by essentially requiring that, if successful, they must acquiesce to a continuation of the cybersquatting found to exist by a CRP panel.

Section 3.2 of the GNSO WG Guidelines states:

***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.*** *(Emphasis added)*

At several points in the course of the WG’s activities, IGO representatives publicly stated that they perceived the WG to have been captured by commercial domain investor interests and might challenge any Final Report on that basis. The Co-Chairs were aware of that possibility and, in an effort to maximize the size and breadth of member participation to deflect such challenge, proposed to initiate the consensus call process with an anonymous poll of members seeking both positions on pending options, as well as full and frank justification for that view without the risk of harsh criticism from other WG members – while being clear that all WG consideration post-poll would be fully transparent. Unfortunately, a WG member who is a domainer not affiliated with any ICANN SO or SG and who strongly supports the Recommendation filed a Section 3.7 appeal in opposition to that proposed poll. After discerning that other WG members had concerns about an anonymous poll, but did not object to a transparent one, the co-chairs proposed to act in that manner -- but the objecting member persisted in his 3.7 action even after the co-chairs stated that the poll would be conducted with full transparency. That is unfortunate, because the final result is exactly what was feared; a central recommendation supported by only a minority of the WG, of whom a majority can be alleged by IGOs to have acted in their own commercial self-interest.

Support for Option 3 for Recommendation 5

Along with the Chair and another WG member, I supported Option 3 for Recommendation Five. While it is imperfect, I believe it constitutes the best feasible approach to balancing the respective legal rights of IGOs and domain registrants while confining ICANN within the proper bounds of its remit.

Option 3 states in its entirety:

 Option 3:

*Where a complainant IGO succeeds in a UDRP/URS proceeding, the losing registrant proceeds to file suit in a court of mutual jurisdiction, and the IGO subsequently succeeds in asserting jurisdictional immunity, the registrant shall have the option to transfer the dispute to an arbitration forum meeting certain pre-established criteria for determination under the national law that the original appeal was based upon, with such action limited to deciding the ownership of the domain name. The respondent shall be given 10 days (or a longer period of time if able to cite a national statute or procedure that grants a period longer than 10 days) to either: (1) inform the UDRP/URS provider [and the registrar] that it intends to seek arbitration under this limited mechanism; or (2) request that the UDRP/URS decision continue to be stayed, as the respondent has filed, or intends to file, case in court against the IGO’s successful assertion of immunity. An IGO which files a complaint under the UDRP/URS shall be required to agree to this limited arbitration mechanism when filing the complaint. If, subsequently. It refuses to participate in the arbitration, the enforcement of the underlying UDRP/URS decision will be permanently stayed. The parties shall have the option to mutually agree to limit the original judicial proceedings to solely determining the ownership of the domain name. Subject to agreement by the registrant concerned, the parties shall also be free to utilize the limited arbitration mechanism described above at any time prior to the registrant filing suit in a court of mutual jurisdiction. In agreeing to utilize the limited arbitration mechanism, both the complainant and respondent are required to inform ICANN.*

I strongly supported Option 3 for the following reasons:

* It acknowledges that ICANN has no right or authority to restrict or extinguish the legal rights and protections of domain registrants or IGOs.
* It properly leaves determination of the merits of an IGO’s claim of judicial immunity to the court of competent and mutual jurisdiction in which it is raised.
* It provides the domain registrant with an ability to receive a determination of the legality of its domain use under relevant national law through an arbitration procedure in the wake of an IGO’s successful assertion of judicial immunity. This would be a substantial improvement for domain registrants compared to current UDRP practice, where the prior UDRP decision would take effect upon dismissal of the litigation. If would therefore fulfill ICANN’s commitment to provide a domain registrant with a second opinion under the law of a mutual jurisdiction, this being done via arbitration when the relevant national court determines that it has no authority over one of the parties to the suit and therefore cannot hear the matter. (I would not support such an arbitration right where the court has authority over both parties and had dismissed the suit based on substantive or procedural grounds other than an immunity defense.) While some members of the WG expressed concerns regarding the lack of full details of how such an arbitration would be conducted, there are multiple professional arbitration bodies around the world that regularly decide commercial disputes on the basis of national law, and there is no reason to believe that the same could not be achieved in this context in a subsequent implementation phase.
* As the only Option that restricts ICANN to its proper remit by restraining it from interference with any party’s legal rights and protections, that properly leaves the determination of judicial immunity to the courts, that recognizes and attempts to balance the respective rights of domain registrants and IGOs, and that introduces the concept of arbitration (which is contained in the GAC advice on this subject), it was the sole Option under discussion that had any realistic chance of being adopted by both GNSO Council and the ICANN Board. While it is imperfect, as are most policy options addressing conflicts of legal rights, it is reasonable and balanced. Once it becomes apparent that Recommendation Five will never become ICANN policy, and that the desire of IGOs to have a means of redressing domain abuse that does not require immediate concession of any claims to substantive judicial immunity, I believe that this option will be revisited as a starting point for a means of attaining that goal in a fair and practical manner.

Potential Referral of this Matter to WG Reviewing All RPMs in all gTLDs

Option 4 for Recommendation Five received strong support but significant opposition. I was one of those who opposed it, and I remain opposed.

The text of Option4 reads:

 Option 4:

*Our initial report and recommendation (that no change is required) remains valid and should be reflected in the published report of this WG. Our report should advise that even if a change were advisable or appropriate, such would necessarily require modifications to the UDRP/URS and its accompanying rules. As such changes are within the ambit of the Review of All Rights Protection Mechanisms (RPM) PDP Working Group, we feel it inappropriate to inject our proposals in that regard. Accordingly, this Working Group strongly recommends that the GNSO Council consult with RPM Working Group and the IGOs participating in the GAC, on whether any changes (if any) to how the UDRP procedure and URS are drafted and employed for IGOs should be referred to the RPM Working Group for consideration within its broader mandate to review the UDRP/URS.*

It would appear that Option 4 has been negated by the consensus for Recommendation Five, as it would require substantial modifications of the UDRP and the URS and their accompanying rules. However, once it becomes clear that Recommendation Five will not become ICANN policy, members of this WG who are also participating in the ongoing Review of all Rights Protection Measures in all gTLDs may suggest that the difficult and divisive issue of how to reconcile registrant legal rights and claims of sovereign immunity from judicial process be relitigated in that WG forum.

The general issue of a judicial immunity based upon a sovereign immunity claim, and its specific application to IGOs, while important, has no broader implications for UDRP/URS appeals practice. If a singularly focused WG cannot provide a viable answer to this question after nearly four years of work, then it is insupportable to ask that it be taken up by a WG that already faces the daunting challenge of multiple difficult issues. Proponents of this Option have also failed to identify with any specificity what other aspects of the UDRP and URS might be implicated by a rifle shot policy recommendation regarding sovereign immunity.

As I am a co-chair of that other WG I am acutely aware of the contentious and challenging issues it must already address under its Charter, encompassing a review of all RPMs created for the new gTLD program in phase one of its work, and then proceeding to the first-ever review of the UDRP in phase two. The Charter of the RPM review WG already directs it to consider the issue of appeals, and the members of the WG are quite capable of determining whether it should address any special attention to the matter of sovereign immunity defenses in that context. While I will of course abide by the consensus among RPM working group members in regard to its administration, I will personally oppose adding the potential “poison pill” issue of treatment of claims of sovereign immunity in the CRP appeals process to its already heavy workload.

In my view, if that issue is to be revisited it should:

* Be considered within a separate and narrowly focused WG
* Address all potential claims of judicial immunity that may arise from both nation-state and IGO complainants, and
* Proceed only if there is a firm commitment from GAC members and IGO representatives to actively participate within it.

Mediation

Option 6 for Recommendation Five received strong support but significant opposition; I opposed it.

Its text reads:

 Option 6:

*We should arrange for the UDRP providers [to] provide [mediation] at no cost to the parties. The UDRP already permits the resolution of disputes through arbitration - I would bind the IGOs to arbitration in the same way the Mutual Jurisdiction clause binds complainants to the registrant’s judicial system. Where an IGO refuses to take part in a judicial proceeding or judicial or arbitral proceedings, or successfully asserts immunity in a judicial proceeding, any prior UDRP determination would be quashed.*

This Option should not become ICANN policy for a number of reasons:

* Its imprecise language seems to confuse voluntary arbitration with mandatory binding arbitration.
* While voluntary mediation may be worthy of encouragement, it should not be required when the resulting delay may permit especially harmful cybersquatting to continue for additional weeks or months.
* Just as this WG has no authority to commit ICANN funds to subsidize the filing of CRP actions by IGOs, we have no authority to require CRP providers to provide mediation services at no cost to the parties.
* To the extent that it requires vitiation of a prior UDRP or URS decision, it suffers from the same fatal defects as Recommendation Five.

The Swaine Memo

The “Legal Memo on IGO Jurisdictional Immunity Prepared by Professor Edward Swaine” appears at pages 89-122 of the Final Report. I am in general agreement with the background discussion of this memo and the WG’s consideration of it that appears at pp. 23-26 of the Report. As described in the Memo, while IGOs do possess judicial immunity its scope is not absolute and varies by jurisdiction; and different courts might rule differently on the question of whether an IGO had waived both procedural and substantive immunity by filing a CRP action subject to “mutual jurisdiction” language.

In 2015 the co-chairs recognized that we could not knowledgeably evaluate IGO claims of broad and absolutely immunity, or how courts would treat an assertion of such immunity in a post-CRP “appeal”, without guidance from an expert in international law. Although it delayed our work for about one year while we conducted a search for an available and knowledgeable expert, and while Professor Swaine prepared his memo, it would have been impossible to responsibly proceed without such input. I want to personally thank ICANN for providing the funds required to retain Professor Swaine’s services, and Professor Swaine for providing such detailed and expert guidance.

When this subject is revisited in the future following the likely failure of Recommendation Five to be adopted as ICANN policy, the Swaine memo should be looked to for guidance by whatever WG revisits the subject of reconciling registrant rights and IGO judicial immunity.

Appendix: Observations on Implications of this WG’s Experience for the GNSO Policy Development Process 3.0

On May 8, 2018 ICANN released the document titled, “GNSO Policy Development Process 3.0/How to increase the effectiveness and efficiency of the GNSO Policy Development Process”. Given my belief that this WG has failed to produce a recommendation on the key issue before it that constitutes a consensus representative of the full ICANN community, or that will ultimately be adopted as policy, I would like to share certain personal observations that may be of use to this ongoing Council effort to improve the efficiency and effectiveness of the multistakeholder model (MSM) consensus policy development process that is a central defining feature of ICANN. This ongoing effort is extremely important, because if WG participants are unwilling to compromise and seek acceptable middle ground policy solutions any dissenting minority can effectively deny the achievement of consensus and, by effectively exercising a veto, prevent ICANN from adopting necessary policy changes and additions in a timely manner.

Unless the MSM can be assured of greater efficiency and effectiveness the only viable alternative might be to adopt a more legislative model of policymaking, in which the achievement of high consensus levels would not be required to effect policy adoption in a timely fashion; that is, a majority would prevail and a minority would lose, as opposed to the PDP’s present goal of a “win-win’ compromise. Moving in that direction would fundamentally alter the nature of ICANN and its policymaking function, and therefore should be avoided unless it proves impossible to effectively reform the MSM.

 Based upon my experience in this WG, the vast majority of it spent as a co-chair, I would make the following suggestions for consideration as the PDP 3.0 project continues:

* A WG should likely not be permitted to proceed if a key constituency that is a central focus of its work is unwilling to actively participate as a member. In the case of this WG, while IGO representatives did on occasion attend and speak at face-to-face meetings, and provide some other limited input to the WG, those IGO representatives stressed they were doing so solely in an individual capacity and not on behalf of the IGOs that employed them, and no IGO representative ever joined the WG as a member. In addition, these and other IGO representatives, along with GAC members, were engaged during much of the WG’s existence in parallel “IGO small group” discussions with the Board. That parallel effort originally started as a forum to address a prior WG’s contentious policy recommendations regarding permanent protections for IGO names and acronyms in new gTLDs, but eventually took up discussion of the same CRP issues being addressed simultaneously by this WG. It appeared that some IGO and GAC participants in those talks were under the misimpression that the “small group” discussions could deliver results on CRP policy matters that can only be properly decided under ICANN Bylaws through the GNSO’s PDP mechanism.

The absence of IGO membership and continuous participation in the WG had two undesirable effects. First, the views of domain investors came to dominate the WG’s policy discussion with no countervailing input from IGOs regarding potential compromises. Second, when the co-chairs on occasion attempted to “play devil’s advocate” and inject what we understood of the IGO perspective into ongoing discussions, this ultimately eroded co-chair authority as some WG members appeared to incorrectly believe that this balancing attempt constituted bias and lack of concern for registrant rights.

* The WG Guidelines should be clarified so that when a chair provides information to WG members regarding other developments within the ICANN community that are relevant to the WG’s task, or conveys views based upon experience with the stages of the PDP mechanisms beyond initial WG efforts (Council and Board consideration of WG recommendations), doing so does not elicit charges of bias and political manipulation.

The co-chairs of this WG were asked to participate by the Board in several discussions it held with IGO representatives and GAC members regarding outstanding IGO-related issues, and we naturally consented. We subsequently conveyed back to the WG the substance of these discussions, as well as the fact that the CRP issue was of great concern to the GAC and that resolving it in a balanced manner could influence future governmental support for ICANN and its MSM. Also, as my co-chair had just left GNSO Council, and I was serving on it for much of this WG’s tenure, we conveyed our personal views on what type of policy resolution could achieve both Council and Board approval, especially given the likelihood of contrary GAC advice to the Board.

Rather than being welcomed by the WG, this information and observations elicited charges from some WG members that we were attempting to manipulate its outcome, and were seeking a final result based on internal ICANN politics rather than objective analysis of relevant law and policy considerations.

* Steps must be taken to ensure that WG chairs can exercise their reasonable discretion in administration of WG activities. While I was a co-chair we always consulted with ICANN policy staff to ensure that our suggestions for the way forward were within any reasonable reading of WG Guidelines. Yet we faced substantial challenges, culminating in the filing of a 3.7 appeal when we proposed to initiate an anonymous poll of all WG members in order to gain better understanding of their policy preferences; and that 3.7 appeal was continued even after we offered to conduct the poll transparently. After I departed as co-chair a second 3.7 appeal was filed by the same WG member in regard to procedures for completing the Final Report that had been communicated by the Chair and the Council Liaison. (I should also note that, while the filing of a 3.7 appeal should not necessitate the halting of WG activities, the initial one we faced was filed as the WG was about to enter the final decisional stage of its work, and the co-chairs expected it to be resolved expeditiously and never anticipated that it would result in a five-month halt.)

**Given the impending launch of the first-ever EPDP, to address the Board’s Temporary Specification on collection and dissemination of WHOIS data in relationship to the EU’s GDPR privacy regulation, 3.7 appeal reform should be undertaken at once to minimize the possibility that this potent mechanism may be utilized to inordinately delay completion of the EPDP’s work within the limited time available.**

At least three substantial reforms should be made to the 3.7 appeal process—

* + A minimum threshold, akin to “probable cause”, should be required to be stated when an action is filed. In addition, ICANN support staff for the WG should file an explanatory statement regarding whether the administrative action being challenged was taken in consultation with staff and whether, in staff’s opinion, the challenged action is consistent with WG Guidelines. These steps can assist the Liaison and Council leadership in quickly assessing whether the challenge is meritorious or should be summarily dismissed.
	+ A meritorious challenge should be rapidly resolved under clear standards, and available forms of relief should be specified in the Guidelines. Absent expeditious action within a pre-stated framework, 3.7 appeals can cast a pall over a WG for an extended period or even bring its work to a halt for an indeterminate time.
	+ Sanctions should be established to deter the filing of non-meritorious 3.7 challenges to WG administrative proposals, including a public warning or termination of member status. If the only penalty for a substantially baseless challenge is its dismissal, there will be no effective disincentive for this mechanism being used to unduly delay or derail a WG’s efforts.
* Finally, under current WG Guidelines a 3.7 challenge can be used in reaction to a chair decision regarding WG administration, as well as to appeal a 3.5 finding that a WG member has acted in a disruptive and/or obstructive manner. These are very different situations, with the first regarding decisions about the best path forward for a WG, and the second relating to a member’s personal conduct. They should be clearly differentiated in the Guidelines and not lumped together as at present.

The GNSO Policy Development Process 3.0 document contains multiple sections relevant to the above concerns and suggestions as well as to observations made in the first section of my Minority Statement, including:

* That “topics under discussion are arguably more complex and divisive compared to previous efforts”, an apt description for the legal treatment of IGO immunity and balancing the respective rights of domain registrants and IGOs. (section 3, p.5)
* While the IGO CRP WG was not large, it nonetheless experienced “discussions turning into zero sum games rather than efforts at compromise”; and it definitely demonstrated that the “longer the PDP lifecycle, the more WG members that drop out, potentially resulting in a ‘consensus by exhaustion’ situation” (section 3.1, p.5).
* Noting that three of the eleven individuals who supported Recommendation Five were not affiliated with any ICANN constituency or stakeholder group, this confirms the observation that, “Recently, WGs have seen a significant increase in individual members who do not represent anyone but themselves and individuals who have been engaged to represent the interests of a third party. There appears to be a fear of giving in and giving up ground at the expense of others. This leads at times to an apparent difficulty (sometimes unwillingness) to listen and meaningfully consider others’ viewpoints.” This was exacerbated by the unwillingness of IGO representatives to participate as WG members and make the case for, and work toward, compromise. (section 3.4, p.8)
* The existence and activities of the “IGO small group” dis-incentivized IGOs from participating in the WG, which exacerbated the imbalance in WG member interests and affiliations, and thereby resulted in “circumvention” of the PDP mechanism and provided “incentives to work around and outside of the PDP, for example, by petitioning the Board or working through respective governments”. Unfortunately, the Board contributed to this situation by allowing the IGO small group to discuss not just the previously addressed topic of permanent protections for IGOs in new gTLDs, but also the very access to CRP issue that was simultaneously being addressed in the WG (section 3.5, p.7).
* All of the Incremental improvements described in the document -- terms of participation for WG members; alternatives to open WG model; and limitations to joining of new members after a certain time – might have been of assistance in delivering a more balanced result from this WG (section 4.1, pp.8-9).
* Likewise, it might have been of assistance to the co-chairs had there been “A playbook or expansion of the GNSO Working Group Guidelines to help WG leaders, members, or participants identify capture tactics as such, along with a toolkit of possible responses to help the WG get back on track without escalating the situation”. (section 4.2, p.9)
* Given that the Section 3.7 appeal was brought against the co-chairs’ proposal for the means of initiating the consensus call process resulted in a delay in WG activity of five months, it is demonstrably correct that “further guidance may be welcome in case there is an appeal under section 3.7 that would result in a faster response to allow a WG to move forward more efficiently during and after the appeal process” (section 4.4, p.11).
* Finally, while it might be useful to “scope the different positions at the outset of a PDP so that it is clear from the start where a possible middle / common ground lies”, the utility of that would be reduced where, as in the case of this WG, the central policy recommendation required an understanding of international law applicable to IGOs that was not available at the start of the WG’s activities, and where the WG comes to be operationally captured by a self-interested faction that has no interest in compromise. (section 4.4, p.11)

In conclusion, it is my hope that this Minority Statement will be of use to Council as it considers how to respond to the Final Report of the WG, as well as how to substantially improve the PDP mechanism for future WGs.