



IPC Responses to Questions Posed by Co-Chairs IGO—INGO Access to Curative Rights Protections (CRP) Working Group (WG)
January 23, 2015

Question 1: What is the view of your Stakeholder Group/Constituency on the WG's decision to exclude INGOs from further consideration in this PDP?

RESPONSE: We agree with the conclusion that there is no principled reason to consider INGOs in general as a special category of protected organizations, for purposes of the specific tasks for which the WG was chartered in this PDP. The further grounds for this conclusion are more fully presented and explained in Attachment A of the WG's letter of December 14, 2014.

Question 2: What should be the basis (if any) – other than trademark rights – for the “standing” criteria required in any dispute resolution process for IGOs?

RESPONSE: We believe that for purposes of standing, the IGO must possess either trademark rights or be the subject of national legislation or multilateral treaty that prohibits the registration or use of the IGO's brand, except by, or with, the authorization of the IGO. Such legislation or treaty would obviate the need for the IGO to possess a trademark registration, because the legislation or treaty serves the same essential purpose as a registration, namely, providing notice to the public of the IGO's exclusive rights to use its brand for particular goods or services.

Importantly, apart from standing, we believe that the IGO should still be required to prove bad faith registration or use, which is a separate analysis. By way of example, national legislation protecting an IGO's brand in South Africa would be sufficient to establish standing to bring a complaint against a registrant in Canada, but by itself it would not be sufficient to establish that the Canadian individual possessed notice of the IGO's rights and therefore had the requisite bad faith at the time of registration.

Question 3: How should a curative rights process appropriately deal with this problem while also ensuring adequate due process protections for registrants?

RESPONSE: The rights protection mechanisms offered by ICANN include critical features intended to ensure that all parties are treated fairly. If an IGO wishes to avail itself of the remedies provided by invoking a rights protection mechanism (RPM), then it must also take on the obligations, including agreeing that an “appeal” can be taken in the jurisdiction of either the registrar or registrant. There should be no special treatment carved out for IGOs if the result would be unfairness for registrants. If the IGO cannot, as a matter of law, subject itself to such courts, then it cannot, as a matter of fairness, take advantage of the RPM. Although we have not studied the issue, it seems that any attempt to develop an alternative, contractual curative rights



process may suffer from the same problem of defining the jurisdiction in which both parties agree that an appeal from the rights protection mechanism can be adjudicated.

Question 4: What is your Stakeholder Group/Constituency view on this issue, and in your view are the existing UDRP and URS fees “nominal”?

RESPONSE: Currently, the fees for UDRP actions are uniform without regard to the characteristics of the party that initiates them. We do not believe that this long-standing rule should be varied for IGOs by allowing them to commence UDRP actions for no fee or a “nominal” fee. ICANN could theoretically create a “sliding scale” or discount for UDRP fees, but if it did, such a discount should be equally available to all potential claimants based on objective criteria.

In any event, UDRP fees are not “nominal.” In the aggregate, for some brand owners, UDRP fees have become significant disincentives to asserting their legal rights. For smaller brand owners, the level at which this occurs can be quite low. ICANN should consider devoting some portion of the many millions of dollars of excess revenue generated from the new gTLD program beyond the costs of the program and any reasonable contingency related thereto, to subsidizing the cost of UDRP actions for all claimants (including qualified IGOs) that meet objective criteria. ICANN could consider releasing those dollars to the appropriate dispute provider who can use the funds to operate the IGO dispute mechanism at a subsidized level, subject to proof of financial need or satisfaction of similar objective criteria. Until such a system is in place, however, the principle of uniformity of costs for all UDRP participants should be maintained.