**DISCUSSION OF BENEFITS/DISADVANTAGES OF THE TWO OPTIONS NOTED BY THE WORKING GROUP IN RELATION TO RECOMMENDATION #4 OF ITS INITIAL REPORT**

**Draft prepared by ICANN staff (17 May 2017)**

Text of Recommendation #4:

*“In relation to the issue of jurisdictional immunity, which IGOs (but not INGOs) may claim successfully in certain circumstances, the WG recommends that:*

*(a) no change be made to the Mutual Jurisdiction clause of the UDRP and URS;*

*(b) the Policy Guidance document initially described in Recommendation #2 (above) also include a section that outlines the various procedural filing options available to IGOs, e.g. they have the ability to elect to have a complaint filed under the UDRP and/or URS on their behalf by an assignee, agent or licensee; such that*

*(c) claims of jurisdictional immunity made by an IGO in respect of a particular jurisdiction will be determined by the applicable laws of that jurisdiction.*

*Where an IGO succeeds in asserting its claim of jurisdictional immunity in a court of mutual jurisdiction[[1]](#footnote-1), the Working Group recommends that in that case:*

*Option 1 - the decision rendered against the registrant in the predecessor UDRP or URS shall be vitiated; or*

*Option 2 – the decision rendered against the registrant in the predecessor UDRP or URS may be brought before the [name of arbitration entity] for de novo review and determination.*

*The WG recommends, further, that the Policy Guidance document referred to in Recommendation #2 (above) be brought to the notice of the Governmental Advisory Committee (GAC) for its and its members’ and observers’ information.”*

Summary of Benefits & Disadvantages of Options 1 & 2:

OPTION 1 -

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| --- | --- | --- |
| **Benefits** | **Disadvantages** | **WG Discussion/Comments** |
| Court decides case on de novo basis, as this is not strictly speaking an “appeal” from a panel determination. | What would be the advantage of vitiating the initial panel determination in such a case? Does this mean that the registrant can transfer the domain once the lawsuit is filed? |  |
| Creates certainty for a losing registrant in terms of the consequences of filing a complaint in a national court. | What are the implications of saying that merely filing a court complaint means an otherwise legally-valid panel determination is now void and has no legal effect? What can/must the registrar do in such an instance? |  |
| The same UDRP/URS process applies all the way through the initial administrative proceeding – no special treatment or process just because it is an IGO name/acronym at issue. | Risk that since the Mutual Jurisdiction clause remains unchanged, a court could rule that an IGO has already waived its immunity by agreeing to the Mutual Jurisdiction clause in the first place. |  |

OPTION 2 –

|  |  |  |
| --- | --- | --- |
| **Benefits** | **Disadvantages** | **WG Discussion/Comments** |
| Consistent with the requests from the GAC and the IGOs | Inconsistent with current UDRP/URS | Need to discuss if a specific administering institution – as well as specific applicable arbitration rules (e.g. UNCITRAL) - should be recommended if this goes forward. |
| Familiar and commonly used in commercial transactions (including many IGO contracts) | Does recommending binding arbitration (as a final decision from an initial panel determination) effectively remove a registrant’s right to have a national court determine the issue? Or is this equivalent? | Need to review WIPO Secretariat 2003 paper on minimum requirements designed to ensure adequate protection for registrants and a robust process. |
| Does not trigger difficult legal questions about the legal implications of vitiating a panel decision (per Option 1). |  |  |

1. The WG notes that the determination in each case as to whether or not the IGO in question may successfully plead immunity is a question that each court decides according to its own law. It is not within the purview of ICANN to make any recommendations in respect of a judicial determination of this legal issue. [↑](#footnote-ref-1)