ICANN | GNSO

Generic Names Supporting Organization

Final Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Proccess

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Status of This Document

This is the Final Report of the GNSO IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process (PDP) Working Group. This report contains the Working Group's final recommendations and is being submitted to the GNSO Council for its review and approval.

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Preamble

The objective of this Final Report is to present the Working Group's final recommendations for Consensus Policies to be approved by the GNSO Council as a result of this PDP, and document the Working Group's deliberations on the issues raised by its Charter, including its consideration of community input received on the preliminary recommendations and open issues presented in its Initial Report that was published for public comment in January 2017. This Final Report will be submitted to the GNSO Council in accordance with the motion that was proposed and carried during the Council teleconference meeting on 5 June 2014, and which resulted in the creation of this Working Group.

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This Report or parts thereof may be translated into different languages; please note that only the English version is authoritative.

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1 Executive Summary

1.1 Introduction

In June 2014, the GNSO Council launched this Policy Development Process (PDP) and tasked the Working Group to determine whether, in order to address the specific needs and circumstances of international governmental organizations (IGOs) and international non-governmental organizations (INGOs): (1) the curative rights protection mechanisms currently in place for both existing and new generic top level domains (gTLDs) should be amended and, if so, in what respects; or (2) a separate, narrowly-tailored dispute resolution procedure modeled on the existing curative rights protection mechanisms should be developed.

As currently designed, IGOs and INGOs may encounter certain difficulties relying on these curative mechanisms, namely, the Uniform Domain Name Dispute Resolution Policy (UDRP) and Uniform Rapid Suspension procedure (URS), to protect their names and acronyms against abuse. For IGOs, since the procedural rules for both processes require that the party filing the complaint state its agreement to submit to the jurisdiction of a national court for purposes of a challenge to the initial panel determination, this could potentially affect their ability to successfully claim immunity from national jurisdiction. In addition, both processes were designed to be mechanisms to protect the marks of trademark holders, and while some IGOs and INGOs may have trademarks in either their organizational names or acronyms or both, this is not necessarily true in all cases.

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On 5 June 2014, the GNSO Council initiated this PDP and on 25 June 2014 it chartered this IGO-INGO Access to Curative Rights Protection Mechanisms Working Group. A Call for Volunteers to the Working Group (WG) was issued on 11 July 2014, and the WG held its first meeting on 11 August 2014.

1.2 Final Recommendations

The WG Charter specifically directed the WG to examine the following questions: *"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."* Following its analysis of each of the questions outlined in its Charter, the WG arrived at a set of preliminary recommendations for which it sought community input between January and March 2017. Following its review of all feedback received to its Initial Report, the WG prepared this Final Report, which reflects the group's consensus recommendations based on the formal consensus call that is

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required by the GNSO Working Group Guidelines. This Final Report is being submitted to the GNSO Council for its review and action.

Recommendation #1:
The Working Group recommends that no changes to the UDRP and URS be made, and no specific new process be created, for INGOs (including the Red Cross movement and the International Olympic Committee). To the extent that the Policy Guidance document referred to in Recommendation #3A (below) is compiled, the Working Group recommends that this clarification as regards INGOs be included in that document.

Note on Recommendation #1: This recommendation is identical to the original recommendation on this point in the WG's Initial Report.

Consensus Level:

Recommendation #2:
An IGO may elect to fulfil the requirement that a complainant must have standing to file a complaint under the UDRP and URS by demonstrating that it has complied with the requisite communication and notification procedure pursuant to Article 6*ter* of the Paris Convention for the Protection of Industrial Property[1]. The WG believes that this recommendation may be an option in a case where an IGO has certain unregistered rights in its name and/or acronym and must adduce factual evidence to show that it has the requisite substantive legal rights in the name and/or acronym in question. For the avoidance of doubt, the WG emphasizes that:

(a) this alternative mechanism for standing will not be needed in a situation where an IGO already holds trademark rights in its name and/or acronym, as the IGO would in such a case proceed in the same way as a non-IGO trademark owner;
(b) whether or not compliance with Article 6*ter* will be considered determinative of standing is a decision to be made by the UDRP or URS panelist(s) based on the facts of each case; and
(c) this recommendation is not intended to modify or affect any of the existing grounds which UDRP and/or URS panelists have previously found sufficient for IGO standing (e.g. based on statutes and treaties).

Note on Recommendation #2: This recommendation is significantly different from the WG's preliminary recommendation in its Initial Report, where it had recommended that

[1] The full text of Article 6*ter* of the Paris Convention can be found here: http://www.wipo.int/article6ter/en/legal_texts/article_6ter.html and in Annex D of this report.

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compliance with Article 6*ter* can, in and of itself, satisfy the standing requirement. For a full discussion of the WG's deliberations on the changes to the original recommendation as a result of community input received, see the discussion at [insert relevant Section/Page].

Consensus Level:

Recommendation #3:
In relation to the issue of jurisdictional immunity, which IGOs (but not INGOs) may claim successfully in certain circumstances, the WG recommends that:

[RECOMMENDATION #3 TEXT TBD AND INSERTED HERE]

~~**(a) Where a losing respondent has filed proceedings in a court of mutual jurisdiction[2] and the relevant IGO has succeeded in asserting jurisdictional immunity in that court, from that point forward the decision rendered against the losing respondent in the predecessor UDRP or URS must be brought before the [name of arbitration entity] for de novo review and determination. (b) The scope of and principles applicable to the arbitration proceeding referred to in (a) are set out in detail in [Section/Page].**~~

~~**(c) The Mutual Jurisdiction clause of the UDRP and URS Rules[3] be amended to provide that, in a case where an IGO has successfully claimed jurisdictional immunity, the parties must mutually consent to arbitration as a de novo determination of the initial panel decision.**~~

(d) A Policy Guidance document be issued by ICANN outlining 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.

(e) The Policy Guidance document be brought to the notice of the Governmental Advisory Committee (GAC) for its and its members' and observers' information.

[2] 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 national court decides according to its own governing law and analytical methodology. It is not within the purview of ICANN to make any recommendations in respect of a judicial determination of this legal issue.

[3] Currently, these are Section 3(b)(xiii) of the UDRP Rules: https://www.icann.org/resources/pages/rules-be-2012-02-25-en, and Section 3(b)(ix) of the URS Rules: https://newgtlds.icann.org/en/applicants/urs/rules-28jun13-en.pdf.

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Note on Recommendation #3:
As published originally (as Recommendation #4 in the WG's Initial Report) for public comment, the recommendation included two options for which the WG specifically requested community input. The WG subsequently developed an additional four options, based on public comments received and suggestions from WG members. These six options were eventually refined to a list of three, for which the WG conducted an informal preliminary consensus call just prior to ICANN60 in October 2017. Following its review of all feedback received to these options and further WG deliberations, the WG amended its original recommendation substantially to what is now Recommendation #3. For a full discussion of the WG's deliberations on the changes made as a result of community input received, see the discussion at [insert relevant Section/Page].

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Recommendation #4:
In respect of GAC advice concerning access to curative rights processes for IGOs, the Working Group recommends that ICANN investigate the feasibility of providing IGOs and INGOs with access to the UDRP and URS (in line with the recommendations for accompanying Policy Guidance as noted in this report), at no or nominal cost, in accordance with GAC advice on the subject.

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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. ... [5]

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Note on Recommendation #4: This recommendation is identical to the original recommendation on this point in the WG's Initial Report.

Consensus Level:

1.3 Deliberations and Community Input

The WG began its work with a review of historical documentation and related materials on the topic. This included work done previously in and by the ICANN community, including a GNSO Issue Report from 2007 on the topic of Dispute Handling for IGO Names & Abbreviations (which did not result in a PDP at that time due to a lack of GNSO Council votes) as well as reference materials from outside sources (e.g., treaty texts and reports from international organizations).

As required by the GNSO's PDP Manual, the WG reached out to all ICANN Supporting Organizations and Advisory Committees as well as GNSO Stakeholder Groups and Constituencies with a request for input at the start of its deliberations. All responses received were reviewed by the WG and incorporated into its deliberations for each of its Charter questions. The WG also encouraged the participation of IGOs, and sought their input on a number of questions relating to problems that IGOs had highlighted concerning their use of existing curative rights processes.

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In addition to reviewing historical documents and related materials, the WG also considered relevant legal instruments and applicable international law. To assist it with this work, the WG sought the expertise of international legal experts. At the WG's request, ICANN engaged Professor Edward Swaine of George Washington University, USA, to prepare a legal memo on the scope of international law concerning jurisdictional immunity of IGOs. Professor Swaine's memo is included in this Final Report as Annex [ ]. The WG also considered GAC advice relevant to the topic. The GAC advice is included in this Final Report as Annex [ ].

The WG also fully reviewed and extensively considered a proposal from the IGO Small Group, comprising a number of IGO and GAC representatives who had been working with ICANN Board members and staff on a proposal that, among other things, presented some alternatives concerning protection for IGO acronyms for the GAC's and the GNSO's consideration. The IGO Small Group proposal is included in this Final Report as Annex [ ].

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Following the close of the public comment period to its Initial Report, the WG reviewed all community input received and specifically noted any new facts, additional issues or further information that were highlighted in the comments received. This Final Report contains several substantial modifications to some of the WG's preliminary recommendations as a result.

1.4 Conclusions and Next Steps

This Final Report is being submitted to the GNSO Council for its review and action. Should the GNSO Council approve the WG's recommendations, these will be forwarded to the ICANN Board following the requisite public comment period prescribed by the ICANN Bylaws.

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2 The Working Group's Final PDP Recommendations

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The WG was chartered to provide the GNSO Council with policy recommendations regarding the issues identified in the Final Issue Report that preceded and informed the GNSO Council's decision to initiate this PDP[5].

Following its analysis of each of the questions outlined in its Charter related to this task, including a comprehensive review of all the public comments that were submitted in response to its Initial Report, the WG has arrived at a set of final conclusions and policy recommendations. This Section 2 sets out the full text of all of the WG's final PDP recommendations, including any supplemental notes and relevant background information taken into account by the WG when developing these recommendations.

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The WG believes that its final recommendations, if approved by the GNSO Council and the ICANN Board, will result in substantial improvement and clarity regarding IGOs' access to curative rights protection mechanisms.

2.1 Final PDP Recommendations

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2.1.1 Text of the Final Recommendations and Relevant Background Information

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General

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The Charter that was approved by the GNSO Council tasked the WG with examining the following questions: "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 WG's preliminary answers to these questions were no[7]. The WG's final conclusions remain substantively the same, although it has developed certain recommendations to

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[5] See https://gnso.icann.org/en/issues/igo-ingo-crp-access-final-25may14-en.pdf.

[7] As detailed in Section 3.3 of this report (Review of Legal Instruments, Legal Expert Opinion and Other External Source Materials), IGOs and INGOs that have legally protected their names or acronyms can

accommodate issues specific to IGOs, such as in relation to evidence of standing to file a complaint, and the possible use of an arbitration procedure in the case where an IGO has succeeded in claiming jurisdictional immunity against a respondent that brought a case to court following an initial UDRP or URS decision in the IGO's favor. In essence, the WG has concluded that the specific challenges noted in respect of the access to the UDRP and URS by IGOs and INGOs may be resolved without the need to modify any of the substantive grounds of the UDRP and URS, or the need to create a specific and separate dispute resolution procedure.

Reasons for these conclusions, and specific recommendations pertaining to specific questions arising within the scope of its Charter, are described below. Fundamentally, the WG believes that the most prudent and advisable approach would be to not recommend any substantive changes to the UDRP or URS at this time, given:

(1) the ability for an IGO to file a complaint under the UDRP and URS via an assignee, licensee or agent, thereby avoiding any direct concession on the issue of mutual jurisdiction;

(2) the extremely limited probability of a scenario where an IGO might wish to assert immunity against a losing respondent in a national court, where the respondent files a claim following the IGO's success in the UDRP or URS complaint;

(3) the WG's recommendation that where an IGO successfully asserts jurisdictional immunity against a losing respondent in a national court the case may be brought to arbitration instead at the registrant's option;

(4) the importance of recognizing and preserving a registrant's longstanding legal right to bring a case to a court of competent jurisdiction combined with ICANN's questionable authority to deny such judicial access;

(5) the lack of a single, universally applicable rule in relation to IGO jurisdictional immunity; and

(6) the fact that, since the WG commenced its work, the GNSO Council has initiated a separate PDP on all the rights protection mechanisms that have been developed by ICANN, including the UDRP and URS, and as such any substantive changes to these curative rights processes need to be considered in a uniform

access, and some have already made use of, the UDRP and URS, even in the absence of potential recommendations from this WG.

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Deleted: although the WG also identifies and suggests ways in which IGOs can have standing to access the protections of the UDRP and URS without registering trademarks in their names and acronyms, and can substantially insulate themselves from jurisdictional immunity concerns.

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Deleted: the WG's recommendation (below) that even in the absence of national trademark protections or common law rights an IGO may fulfill the "standing" requirement under the UDRP and URS as long as the IGO has completed the requisite notifications and communications procedure under Article 6*ter* of the Paris Convention for the Protection of Industrial Propert ... [8]

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manner in the absence of a clear legal argument or public policy rationale favoring of a piecemeal approach in specific cases.

For INGOs, the WG concluded relatively early on in its deliberations that these organizations have the ability to file (and on many occasions have filed) UDRP and URS complaints by virtue of having national trademark and/or common law rights, and that – unlike IGOs – INGOs stand in the same legal position as other private parties and do not have the additional challenge of wanting to safeguard any possible jurisdictional immunity they may have against a respondent. As a result, the WG came to the conclusion that there is no principled reason to modify the UDRP and/or URS, or create a separate dispute resolution procedure, to address the needs of INGOs (see Recommendation #1 and Section 3 of this report, below, for the rationale).

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Recommendation #1:
The WG recommends that no changes to the UDRP and URS be made, and no specific new process be created, for INGOs (including the Red Cross movement and the International Olympic Committee). To the extent that the Policy Guidance document referred to elsewhere in this set of recommendations is compiled, the WG recommends that this clarification as regards INGOs be included in that document.

One of the first topics discussed by the WG was whether or not the specific needs and concerns of IGOs and of INGOs were of a similar nature, and whether such needs and concerns warranted policy changes to the UDRP and URS. The WG's initial conclusion is that the specific needs and concerns of INGOs are adequately addressed by the current dispute resolution processes (e.g., UDRP and URS) and that there was no principled reason to recommend any modifications to the UDRP or URS, or the creation of a new curative rights process for INGOs.

The following is the WG's rationale for its conclusion that the UDRP and URS do not need to be amended in order to address the needs and concerns of INGOs, and that a new curative rights process applicable to INGOs is not necessary[8]:

1. Many INGOs already have, and do, enforce their trademark rights. There is no perceivable barrier to other INGOs obtaining trademark rights in their names and/or acronyms and subsequently utilizing those rights as the basis for standing in the existing dispute resolution procedures (DRPs) created and

[8] The rationale described in this Section were also sent to all ICANN Supporting Organizations (SOs), Advisory Committees (ACs) and GNSO Stakeholder Groups and Constituencies as part of the WG's solicitation of input from these groups in December 2014, as required by the GNSO's PDP Manual. As highlighted in Section 3 of this report, no objection to this preliminary conclusion or the rationale was raised by any SO, AC or other ICANN community group.

offered by ICANN as a faster and lower cost alternative to litigation. For UDRP and URS purposes they have the same standing as any other private party.

2. Unlike IGOs, who may claim and sometimes be granted jurisdictional immunity in certain circumstances, INGOs have no such claim and are not hindered from submitting to the jurisdiction of national courts under the Mutual Jurisdiction clause within the existing DRPs. The WG's research revealed that some INGOs regularly use the UDRP to protect their rights.

3. Although some INGOs may be concerned about the cost of using the UDRP and the URS, because enforcement through these rights protection mechanisms involves some expenditure of funds, this is not a problem for all INGOs nor is it unique to INGOs as among all rights holders. Furthermore, the issue of ICANN subsidizing INGOs to utilize DRPs is outside the scope of the WG's Charter, and it has no authority to obligate any party (including ICANN) to subsidize the rights protection of another.

4. The WG found that, as of end-2015, the United Nations Economic and Social Council (ECOSOC) list of non-governmental organizations in consultative status consists of nearly 4,000 organizations, of which 147 organizations were in general consultative status, 2,774 in special consultative status, and 979 on the Roster. The WG notes that there might be many more organizations not presently on the ECOSOC list who might claim the right to utilize any new curative rights process created for INGOs. The WG felt that the sheer scale of INGOs, in combination with the factors cited above, weighed against the creation of a special DRP for INGOs, especially as they could not be readily differentiated from other private parties, including other non-profit organizations.

In relation to the Red Cross and the International Olympic Committee, the WG noted that although these INGOs had been specifically highlighted by the GAC as enjoying international legal treaty protections and rights under multiple national laws, for the purposes of this PDP these organizations have demonstrated that: (1) they have ready access to the UDRP and the URS; and (2) they possess strong trademark rights that they vigorously defend and enforce. As such, for the limited purpose of considering INGO access to curative rights protections, the WG determined there was no principled reason to distinguish them from other INGOs. The WG further noted that legal representatives of the International Olympc Committee participated actively in the WG and fully support this conclusion.

After reaching its conclusions in regard to INGOs, the WG conveyed them to GNSO Council, which subsequently amended the WG's Charter to remove INGOs from its scope.

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Additional Background to this Recommendation

The following two paragraphs are taken substantially from the Final Issue Report that outlined the scope of this PDP, and are provided herein as further background to this issue.

1. As recognized in the Final Issue Report scoping out this PDP, the scope of the UDRP and URS as drafted currently applies only to second level domain name disputes where the complainant has legal rights in a trademark or service mark, and the complaint alleges that the respondent's domain name is identical or confusingly similar to that trademark or service mark. The Final Issue Report had also noted that not all IGOs and INGOs will have trademarks in their names and acronyms, and that during the development of the Applicant Guidebook (AGB) for the New gTLD Program, while certain objection procedures and trademark rights-protection mechanisms had been created, the AGB did not contain any specific rules that pertained exclusively to either preventative (i.e. prevent the harm from occurring by excluding an identifier from registration or delegation) or curative (i.e. an organization that claims to have suffered harm is able to file a dispute to cure the defect or problem) rights protections for IGOs or INGOs related directly to their status as international organizations. Rather, the AGB prescribed that organizations that met the existing criteria for a .int registration could avail themselves of the legal rights objection process, and organizations that owned trademark and other intellectual property rights in their names and/or acronyms could participate in the new Trademark Clearinghouse and the associated sunrise registration and Trademark Claims notice processes[9]

2. The AGB also contained top-level protections for certain Red Cross (RC) and International Olympic Committee (IOC) identifiers, through which these RC and IOC identifiers would be reserved and thus withheld from delegation under the New gTLD Program. Both the RC and IOC are INGOs. Subsequently, interim second-level protections for certain RC and IOC and for a specific list of IGO names and acronyms provided by the GAC were granted in response to advice from the GAC.

It is important to note that the second-level protections noted above were granted on an interim basis to allow new gTLDs to begin launching while policy development and

[9] See, e.g., page 4 of the Final Issue Report (https://gnso.icann.org/en/issues/igo-ingo-crp-access-final-25may14-en.pdf).

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consultations continued on the topic of what would be the appropriate second level protections for Red Cross and International Olympic Committee (IOC) names and acronyms, and IGO acronyms.

The final consensus level achieved for Recommendation #1 following the formal consensus call among the WG is ( ).

Recommendation #2:

An IGO may elect to fulfil the requirement that a complainant must have standing to file a complaint under the UDRP and URS by demonstrating that it has complied with the requisite communication and notification procedure pursuant to Article 6*ter* of the Paris Convention for the Protection of Industrial Property[10]. The WG believes that this recommendation may be an option in a case where an IGO has certain unregistered rights in its name and/or acronym and must adduce factual evidence to show that it has the requisite substantive legal rights in the name and/or acronym in question. For the avoidance of doubt, the WG emphasizes that:

(a) this alternative ground for standing will not be needed in a situation where an IGO already holds trademark rights in its name and/or acronym, as the IGO would in such a case proceed in the same way as a non-IGO trademark owner would;

(b) whether or not compliance with Article 6ter will be considered determinative of standing is a decision to be made by the UDRP or URS panelist(s) based on the facts of each case; and

(c) this recommendation is not intended to modify or affect any of the existing grounds which UDRP and/or URS panelists have previously found sufficient for IGO standing (e.g. based on statutes and treaties).

Deleted: **For IGOs, in order to demonstrate standing to file a complaint under the UDRP and URS, it should be sufficient for an IGO (as an alternative to and separately from an IGO holding trademark rights in its name and/or acronym) to demonstrate that it has complied with the requisite communication and notification procedure in accordance with Article 6*ter* of the Paris Convention for the Protection of Industrial Property[11]. For clarity, the WG recommends further that a Policy Guidance document pursuant to the UDRP and URS be prepared and issued to this effect for the benefit of panelists, registrants and IGOs.**

Under the UDRP and URS, the first substantive element that a complainant must satisfy under both procedures is that the complainant has rights in a trademark or service mark. Most UDRP panelists have read this requirement as a requirement for standing to file a complaint[12], and it is generally accepted that the threshold may be satisfied by establishing either ownership or exclusive license rights in the trademark or service mark[13]. The WG considered this requirement in the context of IGOs, with particular reference to the protections offered to IGOs under Article 6*ter* of the Paris Convention for the Protection of Intellectual Property. Initially, the WG concluded that, based on Article 6*ter*, IGOs which have complied with the communications and notifications

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[10] The full text of Article 6*ter* of the Paris Convention can be found here: http://www.wipo.int/article6ter/en/legal_texts/article_6ter.html and in Annex D of this report.

[12] See, e.g., Halpern, Nard & Port, "Fundamentals of United States Intellectual Property Law: Copyright, Patent, Trademark" (Kluwer Law International, 2007).

[13] See the WIPO Overview 2.0 (http://www.wipo.int/amc/en/domains/search/overview2.0/).

procedure described in that treaty provision should be considered to have satisfied the standing requirement of the UDRP and URS. This was the preliminary recommendation in the WG's Initial Report that was published for public comment. However, following its review of comments received that provided additional information on the scope and nature of Article 6ter, the WG concluded that its original recommendation should be amended for the reasons listed below.

Additional Background to this Recommendation:

The WG believes that reliance on Article 6*ter* for the limited purpose of demonstrating standing will not necessarily result in an increased number of complaints, in view of the other factors to be considered by an IGO prior to filing a complaint (such as the need to submit to the Mutual Jurisdiction clause of the UDRP and URS, which may be interpreted to implicate any jurisdictional immunity an IGO may have) and the other substantive components of the UDRP and URS that will still need to be proven. The WG also believes that these considerations more than offset the likelihood that the number and range of IGOs that may rely on Article 6*ter* to demonstrate standing will be different from, and potentially larger than, the list of IGOs provided to ICANN by the GAC in 2013 and as may be updated by the GAC from time to time[14].

From the start, the WG was aware that Article 6*ter* does not in and of itself confer substantive legal rights, or national trademark rights, on an IGO, although the WG believed that its inclusion in an international treaty nevertheless signaled a desire by States to afford some level of protection against unauthorized third party attempts to register an IGO's name or acronym as a trademark. Thus, and for the limited purpose of standing to file a complaint under the UDRP and URS, the WG originally considered this to be sufficiently analogous to the corresponding requirement in the trademark law context that the complainant possess rights in a trademark.

Specific comments were received in response to the WG's preliminary recommendation on this point, expressing concern that this could have the effect of equalizing a treaty notification procedure to trademark rights when the Article 6*ter* process does not have any substantive legal effect and is moreover not consistently applied by all States that are obliged to comply. Although several other commentators supported the WG's initial view, after careful review the WG concluded that the weight of the comments against its preliminary recommendation was more persuasive, especially as the favorable comments generally did not address the specific problems that were noted as a

[14] The current GAC list of IGOs for which appropriate protection was sought for their names and acronyms was sent to ICANN by the GAC in March 2013. It can be viewed here: https://www.icann.org/en/news/correspondence/dryden-to-crocker-chalaby-annex2-22mar13-en.pdf.

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consequence of relying on Article 6*ter*. The WG also took into account the significant time that was spent at ICANN58 (in March 2017) and ICANN59 (in June 2017) discussing the legal implications and consequences of relying on Article 6*ter* for standing, where other community participants (including several with relevant legal expertise) expressed serious doubts about the advisability of retaining the original recommendation on standing[15].

To better assist the community in understanding how the WG came to its initial conclusion, the WG's previous consideration of Article 6ter has been excerpted from the Initial Report as Annex [ ] to this Final Report. To view the comments received and discussions that took place over whether and how to modify that preliminary recommendation, please refer to the documents described and links provided in Annex [ ].

The final consensus level achieved for Recommendation #1 following the formal consensus call among the WG is ( ).

[QUESTION: DO WE NEED TO INCLUDE ANYTHING ON THE ORIGINAL REC 3 WHICH IS NOW DELETED?]

Recommendation #3:

[INSERT FINAL TEXT FOR REC #3]

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

~~**(a) Where a losing respondent has filed proceedings in a court of mutual jurisdiction[20] and the relevant IGO has succeeded in asserting jurisdictional immunity in that court, from that point forward the decision rendered against the losing respondent in the predecessor UDRP or URS must be brought before the [name of arbitration entity] for de novo review and determination.**~~

~~**(b) The scope of and principles applicable to the arbitration proceeding referred to in (a) are set out in detail in [Section/Page].**~~

[15] [ADD LINKS TO THE PUBLIC COMMENT REVIEW TOOL, COMMENT FORUM and ICANN58/59/60 SESSIONS]

[20] The WG notes that the determination in each case as to whether or not the IGO in question may successfully plead jurisdictional 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.

Deleted: ***For the avoidance of doubt, this also means that IGOs that have not complied with the communications and notification procedure prescribed by Article 6ter (e.g. in terms of filing a notification as required) should not be deemed to have fulfilled the standing requirement under the UDRP and URS (in the absence of their possessing registered trademark or common law rights in the IGO name or acronym at issue).***

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Comment [PC8]: Such as?

Comment [MW9R8]: We had an original Rec 3 proposing that panelists consider the grounds listed in Art 6ter in evaluating the other two limbs of the UDRP/URS. Staff suggests we include a footnote here to note what the Rec was, and the fact that it was deleted given the change to Rec 2.

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~~(c) The Mutual Jurisdiction clause of the UDRP and URS Rules[21] be amended to provide that, in a case where an IGO has successfully claimed jurisdictional immunity, the parties must mutually consent to arbitration as a de novo determination of the initial panel decision.~~

Comment [MW10]: This will need substantial changes/updates based on the WG's final deliberations. If the arbitration elements are included in the final recommendation, they should be listed and documented as well.

(d) A Policy Guidance document be issued by ICANN outlining 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.

Comment [PC11]: Same comment as prior on these hanging d and e subsections

(e) The Policy Guidance document be brought to the notice of the Governmental Advisory Committee (GAC) for its and its members' and observers' information.

As with its deliberations and subsequent decision to modify its initial recommendation on standing, the WG spent a significant amount of time discussing the comments that were received to its preliminary recommendations on this point. These preliminary recommendations were that there should be no change to the Mutual Jurisdiction provisions and rules, and the WG had also solicited community input on two options then under consideration, for dealing with the outcome of a successful challenge by an IGO to a court's claiming jurisdiction over it. These two options were:

Deleted: **The WG does not recommend any specific changes to the substantive grounds under the UDRP or URS upon which a complainant may file and succeed on a claim against a respondent (e.g. as listed in Section 4(a)(i) – (iii) of the UDRP). However, the WG proposes that the Policy Guidance document referred to in Recommendation #2 includes a further recommendation that UDRP and URS panelists should take into account the limitation enshrined in Article 6*ter*(1)(c) of the Paris Convention in determining whether a registrant against whom an IGO has filed a complaint registered and used the domain name in bad faith.** ... [10]

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 reviewed numerous comments that were submitted on both the issue of jurisdictional immunity and the two options that were presented by the WG in its preparations of its final recommendations on this topic.

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Additional Background to this Recommendation:

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[21] Currently, these are Section 3(b)(xiii) of the UDRP Rules: https://www.icann.org/resources/pages/rules-be-2012-02-25-en, and Section 3(b)(ix) of the URS Rules: https://newgtlds.icann.org/en/applicants/urs/rules-28jun13-en.pdf.

The WG anticipates that the circumstances under which this scenario would occur – viz., where an IGO files a complaint under the UDRP or URS, the IGO succeeds in the dispute resolution process, and the losing respondent then seeks relief against the IGO with respect to that UDRP or URS decision in a national court – will be rare. As noted above, IGOs are able to file complaints through an assignee, licensee or agent as a means of insulating themselves against any direct concession on mutual jurosdiction.

The WG also notes that, where a losing registrant proceeds to file a complaint in a court against the UDRP or URS decision, a question for the court might be whether or not, by submitting to the Mutual Jurisdiction clause, an IGO will be deemed to have waived any jurisdictional immunity it may otherwise have. Consequently, a court could find that any immunity that may have been claimed by an IGO in respect of an appeal brought before the court by a losing registrant was lost simply by the IGO having filed the UDRP or URS complaint. This possibility is not new[23], and exists in the current environment under the present language of the Mutual Jurisdiction clause. It will continue to be the case regardless of whether the WG's recommendation in respect of arbitration is adopted by ICANN as a Consensus Policy.

[INSERT ADDITIONAL TEXT ABOUT THE VARIOUS OPTIONS AND REFER TO SECTION 4 BELOW CONCERNING THE PRELIMINARY CONSENSUS CALL ON THE FINAL THREE OPTIONS, AS WELL AS NOTES ON MINORITY POSITIONS]

The WG's Deliberations on Whether to Recommend the Creation of a Separate Dispute Resolution Mechanism for IGOs

A. Details of the WG's consultation with an external legal expert on the issue of IGO jurisdictional immunity

For the purpose of understanding the scope and limitations of public international law in relation to the issue of IGO jurisdictional immunity, the WG requested that ICANN engage an external legal expert to advise the WG of the current state of the law on this topic. Professor Edward Swaine of George Washington University in the USA was engaged following a detailed evaluation by the WG of the qualifications of other interested candidates[24].

[23] This possibility was also acknowledged by the WG's external legal expert in his memo: see Page [ ] of Annex [ ].

[24] For details about the criteria agreed on for this engagement, see the WG's wiki space at https://community.icann.org/x/z4BYAw.

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Professor Swaine's final expert opinion was considered by the WG in June 2016[25]. In sum, Professor Swaine's opinion was that:

> *There is no single universal rule that is applicable to IGOs' jurisdictional immunity globally. Rather, such immunity is essentially contextual - IGOs generally enjoy immunity under international law, but different jurisdictions apply the law differently, and even within the same jurisdiction different IGOs may be treated differently:*
>
> - *Immunity obligations vary by state and by IGO concerned;*
> - *Immunity decisions are often based on organization-specific treaties to which not all states are party;*
> - *States subject to the same international obligations may implement them in varying ways; and*
> - *Every jurisdiction resolves immunity questions according to its own law (the "law of the forum", as informed by international law)*
>
> *On the other hand, under the UDRP and URS, a complainant is compelled to consent to a Mutual Jurisdiction (defined as either the domain name registrar or registrant) for purposes of an appeal from a panel's initial determination of a complaint. Thus, an IGO that files a complaint will therefore have agreed to the possibility of a judicial process, regardless of any immunity it might otherwise enjoy under international law.*

According to Professor Swaine, under current international law principles as understood generally, there are three types of jurisdictional immunity which an IGO might claim – absolute, restrictive and functional. An IGO that is entitled to absolute immunity would be entitled to comprehensive immunity from judicial process, irrespective of the nature of the IGO's activity, in the absence of an express (and strictly construed) waiver (for example, the United Nations and other IGOs protected in certain States by specific treaties binding those States, or bilateral arrangements between States).
Under a restrictive immunity approach, however, an exception from absolute immunity is made for litigation concerning commercial activities like those undertaken by private parties – however, with the notable exception of the US, relatively few states have adopted this approach. The WG notes in this regard that the UDRP and URS were designed to apply to trademark related disputes, which are generally viewed as commercial in nature.

[25] For the full text of Professor Swaine's memo, see Annex G of this Initial Report and the WG's wiki space at https://community.icann.org/x/z4BYAw.

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Finally, under a functional immunity approach, an IGO's immunity with respect to a particular jurisdiction is limited to the functions of the IGO in question. For example, certain jurisdictions may have legislative language which limits the extent of IGO jurisdictional immunity to the "privileges and immunities as are reasonably necessary for the fulfilment of their functions". While a functional immunity approach can overlap with a restrictive immunity approach, the distinction may be critical – for instance, a non-infringing use of its domain may be necessary for an IGO to carry out its mission regardless of whether the activities are commercial or not in nature. However, without discounting the importance of loss of monies, impact to reputation, or other harms that may result from an infringed domain, the WG is not able to say for certain that a third party's infringing registration of a domain name would necessarily impede an IGO in carrying out its core mission within the scope of a functional immunity inquiry.

The WG agreed with Professor Swaine's assessment and concluded that "*there is no single universal rule that is applicable to IGOs' jurisdictional immunity globally.*" This lack of a universal rule made it challenging to justify declaring the mutual jurisdiction provisions in the UDRP and URS inapplicable to IGOs, as an IGO's immunity is highly dependent upon the particular jurisdiction and the nature of the specific IGO, amongst other factors. Accordingly, the WG did not feel it was appropriate for ICANN to create a separate, narrowly-tailored dispute resolution procedure that presumed that every IGO would be able to successfully assert immunity in every instance in which a losing domain registrant sought a de novo court determination.

Professor Swaine also analyzed how, outside the domain name arena, IGOs are generally able to waive their jurisdictional immunity, and he noted that there seems to be two main ways to accomplish this: (1) through the IGO's governing instrument (though Professor Swaine noted that the exact scope of this can be unclear); or (2) by way of agreement or pleading (for which option the case law is not well developed). Professor Swaine also expressed the thought that an IGO's agreeing to a Mutual Jurisdiction under the UDRP or URS could be interpreted as a waiver.

In essence, Professor Swaine's legal conclusion in relation to an IGO's jurisdictional immunity for purposes of a domain name dispute under the UDRP or URS was that *"[a]llowing an IGO that prevailed in the UDRP process to avoid its waiver and rest on the UDRP result by invoking immunity, while allowing it to waive that immunity by initiating judicial proceedings if it loses to a domain-name registrant, will likely seem asymmetrical and unfair."* Based on Professor Swaine's expert opinion, the WG came to the conclusion that it would not be possible to recommend a single solution that takes into account all the varying types of IGOs, their activities and the different approaches of multiple national courts as well as the potential facts of a hypothetical UDRP or URS filing. Nevertheless, the WG has strived to find a balanced outcome that respects and preserves an IGO's ability to assert of jurisdictional immunity as well as a registrant's right to appropriate and available legal recourse after initially losing a UDRP or URS determination.

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B. The WG's consideration of Professor Swaine's suggestions and the available policy options

Professor Swaine's opinion was largely focused on the question of what might happen in the case where an IGO files a complaint under the UDRP or URS and wins at the administrative proceedings phase, following which a losing respondent files a claim in a national court against that initial determination. In view of this focus, various policy options were identified for addressing the IGOs' concern over losing the possibility of jurisdictional immunity for this type of proceeding.

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In this regard, the WG discussed the following policy options:

(i) **Make a distinction among different types of IGOs:**

- This option would maintain the existing Mutual Jurisdiction terms in general, but permit particular IGOs to elect instead to submit to arbitration. An option for such arbitration would be the arbitration rules under the UNCITRAL Rules or some similar, internationally recognized procedure.
- In line with Professor Swaine's analysis, the most likely IGOs that would be able to elect an arbitration option would be the United Nations and its constituent bodies (e.g. WIPO, WTO, WHO).

(ii) **Rewrite the Mutual Jurisdiction clause under the UDRP and URS, but without prejudging the outcome where an IGO pleads jurisdictional immunity:**

- Adopting this option would mean that IGO immunity is not to be assumed in circumstances where the relevant jurisdiction would not be inclined to afford it (e.g. its courts apply a functional or restrictive approach and regard the activity as beyond the scope of immunity). Essentially, this option would leave the determination of an IGO's jurisdictional immunity from domain name disputes in any particular jurisdiction to the judgment of that particular national court.

- Professor Swaine also suggested that additional language (in the form of an exception) be added to the UDRP and URS as follows:

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> *"In the event the action depends on the adjudication of the rights of an international intergovernmental organization that would, but for this provision, be entitled to immunity from such judicial process according to the law applicable in that jurisdiction, [as established by a decision of a court in that jurisdiction,] the challenge must be submitted instead for determination [by UNCITRAL in accordance with its rules.]"*

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The WG also noted that Professor Swaine also highlighted the possibility that any hardship endured by a respondent as a result of submission to an arbitral process should be alleviated, e.g. by the IGO's agreeing to bear a proportion of the costs incurred. The WG presumed, given the stated desire of IGOs to have access to curative rights protections at no or exceedingly low cost, that such an approach would elicit objections from them.

The WG spent considerable time reviewing Professor Swaine's notes and final memo, including in open sessions at the ICANN Public Meetings in Marrakech (March 2016) and Helsinki (June 2016). It also considered the applicability and scope of the UNCITRAL Rules[26] to domain name disputes between IGOs and registrants, and noted that the issue of immunity is likely to arise only in those limited cases where a losing respondent (against an IGO complainant, who would have agreed to the Mutual Jurisdiction clause in order to file and proceed with its complaint) files an appeal against the UDRP or URS determination.

Ultimately, the WG concluded that, in relation to the issue of immunity, given: (1) the limited instances of a scenario where an IGO would assert immunity against a losing respondent in a national court, having already filed and won a UDRP or URS complaint; (2) the need to recognize and preserve a registrant's longstanding right to appeal to a court of competent jurisdiction, especially given tha the UDRP and URS are supplements to and not substitutes for existing legal rioghts and processes; and (3) the lack of a single, universally applicable rule in relation to IGO jurisdictional immunity, the most prudent and advisable approach would be to not recommend any changes to the UDRP or URS at this time.

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C. Other research and documentation taken into account by the WG on this issue

Besides Professor Swaine's expert views, the WG also considered research and prior work done on this topic. This included the August 2003 report from the WIPO Secretariat on a possible arbitral appeal mechanism for domain name disputes involving country names, which could conceivably also apply to IGO names and acronyms[27]. The

[26] For the full text of the UNCITRAL Rules, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

[27] See www.wipo.int/edocs/mdocs/sct/en/sct_11/sct_11_5.doc. The WG acknowledges that, in this report, the WIPO Secretariat noted that "[i]n order to strike a balance between the privileges and immunities of sovereign States on the one hand, and the right of a losing UDRP respondent to have the dispute reconsidered in a neutral forum on the other, WIPO member States also recommended to allow IGOs to submit to a special appeal procedure by way of *de novo* arbitration rather than to the jurisdiction of certain national courts of justice". However, for reasons stated in the main text, the Working Group respectfully disagrees with this proposal and notes, further, that in the General Assembly report of the proceedings at hand, there was not agreement on the need to protect IGO names and acronyms and

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WG notes that, in this report, the WIPO Secretariat expressly stated that the following principles ought to apply if a *de novo* arbitration process is to be created:

- The parties should be able to restate their case completely anew. They should not be confined to claiming that the panel did not consider certain relevant facts or wrongly applied the procedure, but should also be able to submit new evidence and new factual or legal arguments;

- In order to provide a meaningful "appeal," conducting a *de novo* arbitration should, as a general rule, not be more burdensome than conducting litigation in a court of mutual jurisdiction;

- The arbitral tribunal should consist of one or more neutral and independent decision makers, who should not be identical or related to the panelists who rendered the initial decision; and

- Either party should be able to present its case in a complete manner. The arbitral tribunal should, for example, have the authority to allow for, or request, additional written submissions, and it should be possible to hold in-person hearings

From publicly available information reviewed by the WG, it appears that no further action was taken on the above-noted *de novo* arbitral appeal mechanism. In light of the fact that it has been over a decade since that proposal was scoped, and given that the WG's recent research revealed that some IGOs do in fact waive their immunity and submit to the Mutual Jurisdiction clause in bringing a UDRP action[28], the present circumstances do not justify amending the UDRP and URS in order to provide IGOs with broad immunity protections.

In this regard, the WG notes that GAC advice to the ICANN Board in relation to this issue was that the UDRP should not be amended[29].

The Working Group recognizes that IGOs may not welcome the fact that adoption of this recommendation by ICANN will mean that IGOs will still have to agree to the Mutual Jurisdiction clause of the UDRP and URS when filing a complaint under either procedure, as it is that clause that preserves the domain registrant's existing legal rights under

country names in this manner (see WO/GA/28/7: http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_28/wo_ga_28_7.pdf).

[28] See, e.g., the resources and links compiled by the WG at https://community.icann.org/x/48PhAg.

[29] See, e.g., the GAC Communique from the Los Angeles ICANN meeting held in October 2014: https://www.icann.org/en/system/files/correspondence/gac-to-board-15oct14-en.pdf.

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applicable law. Nevertheless, in view of the concerns listed in the paragraph immediately above this one, and the other Policy Guidance principles that the WG is recommending be applied to IGO complaints (e.g. standing under Article 6*ter* of the Paris Convention), the totality of these recommendations will improve the protections of the rights of IGOs in their names and acronyms.

Comment [MW14]: This may also need updating depending on the final outcome of Rec 3.

Recommendation #4: In respect of GAC advice concerning access to curative rights processes for IGOs, the WG recommends that ICANN investigate the feasibility of providing IGOs and INGOs with access to the UDRP and URS (in line with the recommendations for accompanying Policy Guidance as noted in this report), at no or nominal cost, in accordance with GAC advice on the subject.

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The WG notes that its Charter does not authorize it to make recommendations that would create a monetary obligation for ICANN or any other party to provide subsidies for particular groups of complainants, or that would otherwise require ICANN to cover the costs (whether in full or substantially) of any particular entity's filing of a UDRP or URS complaint. Nevertheless, in view of GAC advice on the topic[30], it is within the WG's Charter scope to recommend that ICANN investigate the feasibility of providing IGOs and INGOs with the ability to file UDRP and URS complaints at no or minimal cost. The WG further notes that it made inquiry of the GAC in regard to whether the existing fee levels for the UDRP and URS were considered "nominal", but received no clear response on that question.

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[30] See, e.g., the GAC's Los Angeles Communique (October 2014): https://www.icann.org/en/system/files/correspondence/gac-to-board-15oct14-en.pdf.

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3 Deliberations of the Working Group

3.1 Review of Existing Materials

The WG began its work with a review of the historical documentation and related materials on the topic. This included both the records of prior ICANN community work as well as materials from other sources (such as treaty texts and reports from international organizations, in particular, WIPO[31]). To review these materials, the WG formed three Sub Groups – Sub Group A focused on the current state of the UDRP and URS[32], Sub Group B on the number of IGOs and INGOs that could come under consideration as well as the scope of their existing legal protections[33], and Sub Group C on ICANN's historic treatment of these two groups of organizations[34]. ICANN staff also conducted research on the existence of national trademark registrations in a number of jurisdictions for selected IGO and INGO names and acronyms[35].

A partial list of the more significant documents and materials that were reviewed includes:

- The 2001 Final Report on the Second WIPO Internet Domain Name Process (also known as the "WIPO-2 Process")[36]
- The 2003 WIPO Secretariat Paper on a Possible De Novo Appeal Mechanism for Country Names[37]
- The 2004 Final Report of ICANN's Joint Working Group on the WIPO-2 Process
- The 2005 WIPO Paper on Legal and Administrative Aspects of Article 6ter[38]
- The 2007 GNSO Issue Report on Dispute Handling for IGO Names and Abbreviations[39]

[31] See the WG's wiki page at https://community.icann.org/x/DrvhAg for a compilation of these sources.
[32] Sub Group A has a wiki page at https://community.icann.org/x/mRbxAg showing its task list and status updates.
[33] Sub Group B has a wiki page at https://community.icann.org/x/mxbxAg showing its task list and status updates.
[34] Sub Group C has a wiki page at https://community.icann.org/x/nRbxAg showing its task list and status updates.
[35] The scope of this limited initial research and lists of organizations can be viewed on the WG's wiki page at https://community.icann.org/x/wI4QAw.
[36] http://www.wipo.int/export/sites/www/amc/en/docs/report-final2.pdf.
[37] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=18680.
[38] http://www.wipo.int/edocs/mdocs/sct/en/sct_15/sct_15_3.doc.
[39] https://gnso.icann.org/en/issues/igo-names/issues-report-igo-drp-15jun07.pdf.

- The 2007 ICANN Staff Report and Draft Text for a Dispute Resolution Process for IGO Domain Names[40]
- The 2013 Final Report of the PDP Working Group on Protection of IGO and INGO Identifiers in All gTLDs[41]

In addition, the WG reviewed the GAC Communiques and other GAC advice and correspondence that had been published concerning the issue of protection for IGO names and acronyms[42]. ICANN staff also prepared several Briefing Papers and background notes on a number of external sources and reports to assist with the WG's review and deliberations.

The following summary highlights the salient aspects of the above-referenced documents:

- The 2001 Final Report on the Second WIPO Internet Domain Name Process contains a recommendation that the names and acronyms of IGOs benefiting from protection under Article 6*ter* of the Paris Convention be protected from abusive registrations of domain names within the domain name system (DNS). The recommendation for protection was by way of a special administrative procedure to be developed and supervised by the constituent members of IGOs (namely, States), and enforced within the DNS through the ICANN system. Notably, the Report acknowledged that, at least in cases not involving the use of domain names as trademarks, establishing such a procedure would require the creation of new international law.

- The 2003 WIPO Secretariat Paper on a Possible De Novo Appeal Mechanism for Country Names noted that WIPO member States had recommended that the UDRP should be modified to allow IGOs to file complaints in respect of the abusive registration of their protected names and acronyms, but that a number of IGOs, including the United Nations, had indicated that they could not participate in a dispute resolution process which, like the UDRP, would require the organization to submit to the jurisdiction of national courts upon appeal. It therefore recommended allowing IGOs to submit to a special appeal procedure by way of de novo arbitration. However, another section of the same paper notes that, while the option of bringing the dispute before a court of competent jurisdiction is open to both parties, it is particularly important for a losing

[40] https://gnso.icann.org/drafts/gnso-igo-drp-report-v2-28sep07.pdf.
[41] https://gnso.icann.org/en/issues/igo-ingo-final-10nov13-en.pdf.
[42] These have been collated and can be viewed at https://gacweb.icann.org/display/GACADV/IGO+and+INGO+Names.

respondent, for whom the UDRP procedure initiated by the complainant was mandatory. The paper notes further that for a losing respondent who had to submit to the UDRP in the domain name registration agreement, the possibility of initiating court litigation in at least one convenient forum is an important due process safeguard. The paper acknowledged that the requirement for UDRP complainants to submit to a "mutual jurisdiction" does not prevent either party from initiating court litigation elsewhere and, similarly, a State's submission to de novo arbitration should not restrict either party's recourse to a national court of justice.

- The 2005 WIPO Paper on Legal and Administrative Aspects of Article 6*ter* noted that Article 6*ter* provides a degree of legal protection to abbreviations and names of IGOs, of which at least one member State is a member of the Paris Union; that Article 6*ter* is applicable to the States party to the Paris Convention as well as to all Members of the World Trade Organization (WTO), whether or not party to the Paris Convention, by virtue of Article 2.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); and, that as of August 2005, 141 IGOs had requested communications that had subsequently been sent by the International Bureau of WIPO to those States that were party to the Paris Convention as well as to the Members of the WTO that were not party to the Paris Convention.

- The 2007 GNSO Issue Report on Dispute Handling for IGO Names and Abbreviations recommended that a separate DRP be developed for IGO names and abbreviations as domain names at the second or third level in new gTLDs, and that once the process was developed, the GNSO Council consider launching a PDP to investigate its application to existing gTLDs. However, no further action was taken by the Council in regard to this staff recommendation, and no PDP to investigate the possibility was launched until the chartering of the present WG.

- The 2007 ICANN Staff Report and Draft Text for a Dispute Resolution Process for IGO Domain Names was delivered three months after the above referenced Issue Report. It contained a proposed DRP in relation to the suggestion in the Issue Report that could be applicable to new gTLDs. The scope of the proposed process was that it would apply to complaints initiated by IGOs where there was a registration or use, as a domain name, of the complainant's name or abbreviation that has been communicated under Article 6*ter* of the Paris Convention. It would have permitted either party to appeal an initial determination to an arbitral tribunal for independent resolution, but did not identify what tribunal might have such jurisdiction. Again, neither the GNSO Council nor ICANN took any action to implement this proposed mechanism, and no such process was included within the Applicant Guidebook for the 2012 New gTLD Program.

- The 2013 Final Report of the PDP Working Group on Protection of IGO and INGO Identifiers in All gTLDs dealt solely with preventative protections for the Red Cross/Red Crescent, International Olympic Committee, INGOs, and IGOs, and not with potential curative rights mechanisms except to recommend that an Issue Report on the topic be created. This led to the Issue Report that scoped the issues for this current PDP.

3.2 Status of Previous ICANN Work

The WG's review of the historical materials confirmed that the issue of appropriate handling of domain name disputes relating to IGO names and, especially, acronyms, has been a long standing one in both the ICANN and international multilateral community. For example, in 2003, an ICANN Joint Working Group comprising community members from the At Large Advisory Committee (ALAC), the GAC and the GNSO had discussed options for handling domain name disputes involving IGOs, following the WIPO-2 Process. That Joint Working Group failed to reach consensus on any recommendations, and as a consequence no formal action was taken by the GNSO Council or ICANN on the matter. Subsequently, in 2007, a GNSO Issue Report on Dispute Handling for IGO Names & Abbreviations noted a number of possible methods for handling domain name disputes concerning IGO names and abbreviations. However, a PDP was not initiated on the topic at the time, as the requisite number of GNSO Council votes for launching a PDP was not attained.

The topic of IGO names and acronyms, and more specifically, the question of appropriate protection for such identifiers in the DNS, arose again during the development of the 2012 New gTLD Program expansion round. The Applicant Guidebook (AGB) for the Program did not initially contain specific protections for IGOs, although it provided for the ability of organizations meeting the existing criteria for a .int registration to file objections under the prescribed legal rights objection process. The AGB also contained provisions allowing organizations that owned trademark and other intellectual property rights in their names and/or acronyms to enter those identifiers into the new Trademark Clearinghouse and as a result participate in the Sunrise Registrations and Trademark Claims Notice protections offered through the Clearinghouse. These organizations could also access and use the new URS procedure, on the basis of their having ownership of a relevant trademark.

In June 2011, the ICANN Board directed that top-level prohibitions on the delegation of certain Red Cross and IOC identifiers be included in the final AGB. In November 2012, second-level protections for certain Red Cross and IOC identifiers were added to the list of identifiers that new gTLD registry operators were obliged to withhold from registration. These protections were intended to be interim measures, applicable during the period in which the GAC and GNSO continued to develop policy advice concerning appropriate protections for these two INGOs at the top and second level. Subsequently,

the Board granted temporary protection for a specific list of IGO names and acronyms provided by the GAC[43], in response to advice from the GAC, again on an interim basis, to allow gTLDs approved under the 2012 New gTLD Program to begin launching while policy development work continued.

The GNSO concluded an expedited PDP on the protection of IGO and INGO identifiers in all gTLDs in November 2013. The consensus recommendations from this PDP were adopted unanimously by the GNSO Council[44]; however, some of those recommendations were inconsistent with GAC advice on the topic and in April 2014 the ICANN Board approved only those GNSO recommendations that were viewed as consistent with GAC advice. For purposes of this current PDP, the inconsistent recommendation of greatest relevance is the different perspective of the GAC and the GNSO on the question of protection for IGO acronyms. Where the GAC had advised that protection for IGO acronyms be of a permanent nature and disputes should be resolved via binding third party arbitration, the GNSO had recommended that IGO acronyms be protected via the Trademark Clearinghouse mechanism of a 90-days Claims Notice period. The inconsistency between the GAC advice and GNSO recommendations on this point remains unresolved, and led to the formation of the IGO Small Group in 2014, whose eventual proposal and its consideration by this WG is detailed further below, in Section 3.4.

3.3 Review of Legal Instruments, Legal Expert Opinion and Other External Source Materials

Consideration of the needs and concerns of INGOs

Assisted by the reports of its three Sub Groups that reviewed the historical documentation on the topic, the WG came to the preliminary conclusion early on in its deliberations that there was no substantive principled reason to accord any special treatment to INGOs (including the Red Cross movement and the IOC, which had been specific subjects of analysis under a previous GNSO PDP) in relation to either amendment of existing, or development of a new, dispute resolution process. The WG's rationale for this decision was set out in detail in an annex to the WG's initial solicitation

[43] The GAC's list of IGOs was provided to ICANN in March 2013: https://www.icann.org/en/news/correspondence/dryden-to-crocker-chalaby-annex2-22mar13-en.pdf; the criteria for inclusion on the GAC list was noted here: https://www.icann.org/en/news/correspondence/dryden-to-crocker-chalaby-annex1-22mar13-en.pdf.
[44] See http://gnso.icann.org/en/council/resolutions#20131120-2.

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of input from all ICANN SO/ACs, sent in December 2014[45]. The WG also presented this preliminary conclusion to the GNSO Council and the community, and received no objections from the Council, any SO/AC or the community generally. **The WG's agreed text for this final recommendation, and its accompanying rationale, is set out in full as Recommendation #1 in Section 2, above.**

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Consideration of the need for IGOs to demonstrate standing under the UDRP and URS

Following its decision to focus further discussions on IGOs, the WG moved on to consider the question of how to deal with the fact that not all IGOs possess national or common law trademark rights in their names or acronyms – in which case the IGO would not then have standing to file a complaint under the UDRP or URS. As further described in Section 2 (above), the WG's preliminary recommendation in its Initial Report, after substantial research and discussion, was that standing to file can also be demonstrated by those IGOs which have invoked the protections provided by Article 6*ter* of the Paris Convention on Industrial Property.

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The WG notes that the potential applicability of Article 6*ter* was first raised by the IGOs in their initial request to ICANN for protection of their names and acronyms in the top and second level of the domain name system, in which they stated, "The names and acronyms of IGOs are protected within the scope of Article 6*ter* of the Paris Convention for the Protection of Industrial Property (with 173 Contracting Parties), as further referred to in Article 16 of the Trademark Law Treaty and Article 2 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights".[46] In their letter, the various IGO legal counsel that signed it stated that international legal norms such as Article 6*ter* supported the targeted exclusion from registration by third parties of IGO names and acronyms (i.e. preventative protections). While this WG is concerned solely with the topic of curative protections for IGO names and acronyms, it nevertheless considered the applicability and relevance of Article 6*ter* to the issue.

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The WG acknowledges that Article 6*ter* does not confer substantive legal rights, whether as trademarks or in other forms. Rather, it provides protection to IGO names and acronyms by requiring contracting States that are party to the treaty or that otherwise are obliged to abide by the treaty provisions to prohibit confusing third-party use of those identifiers *as trademarks* in industrial or commercial activities, on the basis that such exclusion reflects the public status of IGOs and prevents confusion that would

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[45] See Annex C, containing the Working Group's letter to all ICANN SO/ACs, which can be found at https://community.icann.org/x/T5gQAw.

[46] See the 13 December 2011 letter sent by the legal counsel of twenty-eight IGOs: https://www.icann.org/en/system/files/files/igo-counsels-to-beckstrom-et-al-13dec11-en.pdf.

interfere with such status[47]. Given this linkage of Article 6*ter* protections to national trademark regimes, and for the limited purpose of demonstrating standing to file a UDRP or URS complaint, the WG initially recommended that protections afforded to IGO names and acronyms by Article 6*ter* can be viewed as sufficient for that specific purpose. As detailed in Section 2.1 above, however, the WG's review of community input on this preliminary recommendation has resulted in the WG modifying its original conclusion on the issue of standing. **The WG's agreed text for this final recommendation, and its accompanying rationale, are set out in full as Recommendation #2 in Section 2, above.**

Consideration of a separate dispute resolution process for IGOs

The WG's conclusions on the issues of standing and substantive grounds under the UDRP and URS also meant that, in relation to these questions, there was no compelling reason based in those considerations to create a separate DRP applicable only to IGOs. In particular, the WG found no broadly accepted legal basis for the protection of IGO names and acronyms other than trademark law.

The WG also considered at length a further challenge that may be faced by IGOs – the risk that agreeing to submit to the Mutual Jurisdiction clause of the UDRP and URS by filing a complaint will strip an IGO of any jurisdictional immunity it may enjoy in a particular national court. ICANN staff, assisted by several WG members, conducted research on the scope of IGO jurisdictional immunity in selected jurisdictions and under applicable international treaties. The WG also initially consulted Mr. Hans Corell, an international law expert, in relation to several preliminary questions on the matter[48]. Although this initial consultation provided the WG with some basic information, the WG concluded that there were still outstanding questions and a need for further information and guidance to enable the WG to reach substantive conclusions. The WG therefore requested that ICANN assist it by engaging an external legal expert to provide it with a more detailed analysis. The WG thanks ICANN for providing the staff resources and modest financial support to facilitate that request. Following consideration of several candidates nominated by WG members in the legal community, the WG agreed that Professor Edward Swaine of George Washington University, USA, should be

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[47] See, e.g., http://www.wipo.int/edocs/pubdocs/en/intproperty/611/wipo_pub_611.pdf (BIRPI Guide to the Application of the Paris Convention, Bodenhausen (1968)); http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf (WIPO Intellectual Property Handbook: Policy, Law, and Use, chapter 5); and http://archive.icann.org/en/committees/JWGW2/WIPO2-note.pdf (WIPO Briefing Note to ICANN, 2005).

[48] For the research conducted by ICANN staff, questions sent to Mr. Corell and his response, see https://community.icann.org/x/wI4QAw.

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engaged as the external legal expert[49]. The internal process leading to the retention of Prof. Swaine for this task, and the subsequent development of his Final Memo and consideration thereof added approximately one year to the time required for completion of this PDP. However, the WG would have been unable to complete its task absent such expert legal advice on the scope of IGO jurisdictional immunity.

The WG developed several detailed questions for Professor Swaine to respond to, focusing on a determination of the scope of international law concerning the jurisdictional immunity of IGOs (as distinct from the sovereign immunity of States). In order for the WG to properly evaluate the need to either amend the UDRP or URS, or develop a new mechanism, to address the question of immunity, it needed to more fully understand international law (whether through treaty or customary law) on the topic and its scope.

Professor Swaine delivered a preliminary synopsis to the WG at the end of January 2016. Following review of this document and WG discussion, including at the ICANN meeting in Marrakech in March 2016, and a subsequent call between the WG and Professor Swaine, Professor Swaine updated his report and provided a Final Memo to the WG in June 2016[50]. Subsequently, representatives from various IGOs sent a letter to the GNSO Council commenting on Professor Swaine's memo in October 2016[51].

Based on Professor Swaine's expert opinion, as documented in his Final Memo, that there is not a uniform rule in international law governing IGO jurisdictional immunity and that the extent and success of an immunity claim in different national courts can vary depending on a number of factors, as well as concerns about ICANN seeking to deny domain registrants access to related statutory rights, the WG agreed that no change should be made to the Mutual Jurisdiction clause of either the UDRP or the URS. As the WG nevertheless recognized that IGOs may in some circumstances be able to successfully plead immunity, it went on to consider two options that might address this potential situation and supplement the UDRP and URS. The WG's review of public comments received on this topic did not yield any new or additional rationale for departing from its initial recommendation to retain the Mutual Jurisdiction clause.

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The WG's conclusions on the issue of jurisdictional immunity further reinforces its view that there is no reason to develop a separate DRP applicable only to IGOs. On the related question of whether or not appeals from initial panel decisions should depart

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[49] A list of the various experts under consideration by the WG can be found at https://community.icann.org/x/z4BYAw.
[50] Professor Swaine's preliminary synopsis and Final Memo can be found at https://community.icann.org/x/z4BYAw.
[51] See https://gnso.icann.org/en/correspondence/igo-note-wg-swaine-memo-12jul16-en.pdf.

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from the longstanding rule of appeal to a national court and instead be determined by another form of alternative dispute resolution in the form of arbitration, the WG's analysis of the available options, including previous documentation on this specific possibility[53], and its impact on a registrant's legal rights, led it to conclude initially that its recommendations provide sufficient protection to IGOs while preserving the right to judicial appeal. As described elsewhere in this Final Report, the WG has since modified its preliminary recommendations by recommending the possibility of arbitration, based on certain specific elements and criteria, in the event that an IGO succeeds in pleading jurisdictional immunity in a national court in which a losing registrant has filed a claim following an initial UDRP or URS panel decision in the IGO's favor.

Comment [MW15]: This may need to be amended based on the final WG agreement.

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Consideration of the question of the cost for IGOs of using the UDRP and URS

Finally, the WG considered the GAC advice from its Buenos Aires Communique of November 2015 that IGO access to and use of curative rights processes should be at low or nominal cost. The WG agreed that the question of cost was one more appropriately referred to ICANN and is outside the remit of the WG Charter. **This preliminary conclusion is further detailed as Recommendation #4 in Section 2, above.**

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The WG notes that its recommendations that the UDRP should not be amended is in line with previous GAC advice, as provided by the GAC in its October 2014 Communique from the Los Angeles meeting. The WG acknowledges that the GAC subsequently provided advice recommending the creation of a separate dispute resolution procedure (e.g. in its March 2017 Copenhagen Communique). Nevertheless, the WG concludes that, while its final recommendations differ from GAC advice on the topic and the IGO Small Group Proposal (discussed further in Section 3.4, below), overall they address the needs and concerns of IGOs that have been raised with ICANN while preserving the benefits and certainty of the existing curative rights processes and protecting the legal rights of registrants[54].

Comment [MW16]: Does this need to be updated in light of GAC advice

Comment [PC17]: Let's discuss

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[53] See, e.g., a paper prepared by the WIPO Secretariat for the Standing Committee on Trademarks in August 2003: www.wipo.int/edocs/mdocs/sct/en/sct_11/sct_11_5.doc.

[54] A compilation of communications from the GAC, including GAC advice issued via various Communiques in relation to the topic of IGO protections, is available in Annex F. The full text of the IGO Small Group Proposal, including the Board cover letter forwarding it to the GNSO Council, can be found in Annex E.

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3.4 Working Group Interaction with IGOs, Consideration of the IGO Small Group Proposal and Open Community Discussions at the ICANN57, ICANN58, ICANN59 & ICANN60 Public Meetings

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Process Background

This PDP was initiated to consider the specific topic of curative rights protections for IGOs and INGOs, which was a topic that had been noted by the previous GNSO PDP on IGO-INGO Protections in All gTLDs as needing to be scoped by an Issue Report as a mandatory first step prior to a separate, new PDP. The previous PDP Working Group had reached consensus on a number of recommendations pertaining to preventative protections for certain IGO and INGO names and acronyms[55]. While some of the policy recommendations have since been approved by the ICANN Board[56], several remain under Board consideration as the GNSO's recommendations on those points are inconsistent with GAC advice provided to the Board on the same topics[57], and the Board had requested additional time to consider them. The Board had previously also requested that its New gTLD Program Committee (NGPC) develop a proposal for Board consideration that would take into account the GAC advice as well as the GNSO's recommendations[58].

To provide a procedural path forward for resolution of the matter, the NGPC facilitated the creation of an IGO Small Group, comprising representatives from the GAC and IGOs working with Board representatives and ICANN staff to finalize a proposal for GAC and GNSO consideration. The formation of the group was highlighted by the GAC Chair during the joint GAC-GNSO meeting at ICANN51 in Los Angeles in October 2014, where it was noted that the group would "provide inputs or maybe some guidance to the GNSO so that it's clear, or as clear as possible, for [the GNSO] about what are the issues there that are really remaining"[59]. The starting point for the IGO Small Group's

[55] See the PDP Working Group's Final Report at https://gnso.icann.org/en/issues/igo-ingo-final-10nov13-en.pdf, with Minority Statements (including from participating IGOs) at https://gnso.icann.org/en/issues/igo-ingo-final-minority-positions-10nov13-en.pdf.

[56] The Board resolution approving the consistent recommendations and requesting more time to consider the remaining recommendations while facilitating discussions on reconciliation of the inconsistencies can be viewed at http://www.icann.org/en/groups/board/documents/resolutions-30apr14-en.htm#2.a.

[57] The GAC had issued advice to the ICANN Board via several Communiques between 2013 and the present time concerning IGO protections, especially for IGO acronyms. For a listing of all the GAC advice on this point, see https://gacweb.icann.org/display/GACADV/IGO+Names+and+Acronyms and the summary compilation of GAC advice in Annex F.

[58] See http://www.icann.org/en/groups/board/documents/resolutions-07feb14-en.htm#2.a.

[59] See Page 27 of the transcript from this meeting: https://la51.icann.org/en/schedule/sun-gac-gnso/transcript-gac-gnso-12oct14-en.pdf.

deliberations was the initial NGPC proposal that had been sent to the GAC and the GNSO in March 2014[60]. Although the NGPC proposal focused on the topic of preventative protections for IGO acronyms, it also contained suggestions for modifying the URS (specifically, removing the need to consent to jurisdiction and the possibility of appeal) and the setting up of an arbitration process to resolve claims of abuse of IGO acronyms.

In June 2014, the NGPC wrote to the GNSO Council requesting that the GNSO consider modifying its original PDP recommendations in accordance with the GNSO's documented processes for such amendment[61]. In the letter, the NGPC acknowledged the then-recent initiation of this current PDP on curative rights, and noted that the Board would not take any action on GAC advice concerning curative rights protections for IGOs until the conclusion of this PDP. The GNSO Council took no further action in relation to IGO acronyms following additional discussions with the NGPC later that year, pending further Board/NGPC input on possible modifications to the GNSO's adopted policy recommendations that might be appropriate and acceptable to all parties.

In December 2014, pursuant to a mandatory requirement for all GNSO PDPs, this WG had sought input from all ICANN SO/ACs. In addition to a response from the GAC[62], IGO representatives also provided responses to the WG in January 2015, following which the WG sent a few additional questions to the IGOs to which the group did not receive a further response. However, representatives of various IGOs who were participants in the IGO Small Group attended and participated in the WG's open sessions at ICANN53 in Buenos Aires (June 2015)[63] and at ICANN56 in Helsinki (June 2016)[64]; however, despite affirmative outreach, no IGO representative elected to become a member of the Working Group (although one IGO representative had earlier signed up as an observer).

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[60] See https://gnso.icann.org/en/correspondence/chalaby-to-robinson-20mar14-en.pdf for a brief description of the scope of the original proposal, and https://gnso.icann.org/mailing-lists/archives/council/msg15906.html for the full text of the proposal.
[61] See https://gnso.icann.org/en/correspondence/chalaby-to-robinson-16jun14-en.pdf. Further correspondence followed between the GNSO Council and the NGPC, in July 2014 (https://gnso.icann.org/en/correspondence/chalaby-to-robinson-24jul14-en.pdf), October 2014 (https://gnso.icann.org/en/correspondence/robinson-to-chalaby-disspain-07oct14-en.pdf) and January 2015 (https://gnso.icann.org/en/correspondence/chalaby-to-robinson-15jan15-en.pdf). The GNSO Council also wrote to the GAC Chair in July 2014, noting that it had already initiated a new PDP that would, among other things, consider modifications to the URS in relation to IGO protections (https://gnso.icann.org/en/correspondence/robinson-to-dryden-25jun14-en.pdf).
[62] For a copy of the original WG request and copies of all the responses received, see Annexes B and C of this report and the WG wiki space at https://community.icann.org/x/T5gQAw.
[63] See https://buenosaires53.icann.org/en/schedule/wed-igo-ingo-crp-access/transcript-igo-ingo-crp-access-24jun15-en.pdf.
[64] See https://gnso.icann.org/en/meetings/transcript-igo-ingo-crp-access-28jun16-en.pdf.

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In June 2015, the co-chairs of this WG met with the GAC Chair and two GAC vice-chairs at the ICANN meeting in Buenos Aires to discuss the progress of work on IGO curative rights protections and to encourage participation in the WG by GAC members[65]. In July 2015, representatives of the IGO Small Group held a face to face meeting to further discuss the proposal that would ultimately be shared with the GAC and the GNSO[66]. In October 2015, the GAC Chair and Chris Disspain (the Board "shepherd" for this topic) held a teleconference with the WG co-chairs and other GNSO representatives regarding the various work tracks within the GNSO on IGO protections and the IGO Small Group work. In June 2016, at the ICANN meeting in Helsinki, the topic of IGO acronyms protection was discussed by the GNSO Council and the ICANN Board[67], where the Council raised its concern that it had not had much visibility into the IGO Small Group discussions; and WG co-chair Philip Corwin provided an update on the PDP work, including noting the limited extent of GAC and IGO participation in the WG.

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The final proposal from the IGO Small Group was circulated to the GAC and the GNSO on 4 October 2016[68] via letter from the ICANN Board. The Board noted that those aspects of the proposal that related to curative rights would likely be referred to this WG, and requested that the WG fully consider the proposal, stating, "the Board hopes that the other elements of the attached proposal will be helpful to the GNSO in its deliberations over considering possible amendments to its previously adopted policy recommendations on preventative protection for IGO acronyms. However, that letter did not endorse the Small Group proposal, and further stated, "I wish to reiterate our belief that the most appropriate approach for the Board in this matter is to help to facilitate a procedural way forward for the reconciliation of GAC advice and GNSO policy prior to the Board formally considering substantive policy recommendations". On 31 October 2016, legal counsel from various IGOs sent a letter to the GNSO Council stating that IGO immunity is incompatible with the Mutual Jurisdiction requirements of the UDRP and URS, and claiming that the IGO Small Group Proposal represents a compromise on the part of the IGOs in relation to their initial request that their acronyms (which are the terms by which they are most commonly known) be reserved permanently[69].

[65] Initially, one representative of a GAC member country was a member of the WG; however, due to his not filling out a Statement of Interest (which is a requirement for participation in a GNSO Working Group) despite numerous reminders over a substantial period of time, his status was changed to that of an observer in accordance with GNSO practice. As of the date of this Initial Report, there are two GAC observers to this WG (in addition to one IGO observer).

[66] See letter from the Secretary General of the OECD (which hosted the meeting) to the ICANN CEO: https://www.icann.org/en/system/files/correspondence/gurria-to-chehade-20jul15-en.pdf.

[67] See https://gnso.icann.org/en/meetings/transcript-gnso-board-27jun16-en.pdf.

[68] See https://gnso.icann.org/en/correspondence/crocker-icann-board-to-council-chairs-04oct16-en.pdf. The Board letter and the full IGO Small Group Proposal has been included in this Report as Annex E.

[69] See https://gnso.icann.org/en/correspondence/igos-to-gnso-31oct16-en.pdf.

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The IGO Small Group Proposal and the WG's review of the proposal

The IGO Small Group Proposal included proposals touching on curative rights processes as a complement to meaningful preventative protections for IGO acronyms. It outlined the basis for the specific proposals it contained as follows:

> *"(1) The basis for protection of IGO acronyms should not be founded in trademark law, as IGOs are created by governments under international law and are in an objectively different category of rights-holders;*
> *(2) As IGOs perform important global missions with public funds, the implementation of appropriate protections for IGO names and acronyms is in the public interest; and*
> *(3) The Eligible IGOs that would qualify for protections under this proposal are those that are named on the GAC List of IGOs (initially submitted to ICANN in March 2013) as may be updated from time to time in accordance with GAC advice issued on 22 March 2013."*

On curative rights, one proposal was the creation of a separate DRP for IGOs, as follows:

> *"ICANN will facilitate the development of rules and procedures for a separate (i.e., separate from the existing UDRP) dispute resolution mechanism to resolve claims of abuse of domain names that are registered and being used in situations where the registrant is pretending to be the IGO or that are otherwise likely to result in fraud or deception, and (a) are identical to an IGO acronym; or (b) are confusingly similar to an IGO acronym; or (c) contain the IGO acronym. Decisions resulting from this mechanism shall be "appealable" through an arbitral process to be agreed."*

A further proposal was for a rapid relief mechanism, separate from the URS, to address clear-cut cases of abuse. Under this proposal, an eligible IGO may obtain a rapid temporary suspension of a domain name in situations where it would not be reasonable for it to use the above-mentioned dispute resolution mechanism, if certain conditions are met. These are:

> *"(1) The subject domain name is*
> > *(a) identical or confusingly similar to an IGO acronym; and*
> > *(b) registered and used in situations where the registrant is pretending to be the IGO or that are otherwise likely to result in fraud or deception; and*
> *(2) there is an obvious risk of imminent harm from the claimed abuse of such domain name, (e.g. such as fraudulently soliciting donations in the wake of a humanitarian disaster)."*

Relief under this new rapid relief mechanism would be the same as under the URS, i.e. suspension and not transfer or cancellation of the domain name in question.

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The IGO Small Group Proposal also included a proposal for ICANN to "work with the IGOs and the mechanism providers to ensure that IGOs are not required to pay filing or any other ICANN-defined fees to access and use those mechanisms unless the examiner finds the case to have been brought in bad faith. Three or more findings of cases brought in bad faith by the same IGO may lead to that IGO being suspended from using the mechanism for a period of one year."

The WG reviewed and discussed the IGO Small Group Proposal at its meetings on 13 October 2016[70] and 20 October 2016[71]. It should be noted that, by the time of receipt of the IGO Small Group Proposal, the WG had already reached preliminary agreement on a number of potential recommendations concerning curative rights protections for IGOs. The WG's review of the IGO Small Group Proposal thus focused on whether the proposals contained therein warranted modifications or updates to the WG's preliminary conclusions.

During the two meetings where it focused on the IGO Small Group Proposal, the WG reviewed all the aspects that pertained to curative rights. It concluded that, while IGOs may be in an objectively different category than trademark holders (as had been noted several times by the GAC), the WG's agreed preliminary recommendations not only provide sufficient protection for IGO names and acronyms, in some cases its recommendations are broader than and thus provide potentially greater protection for IGOs than what is in the IGO Small Group Proposal. The WG believes that its final recommendations achieve the same result. For instance, clarifying that IGOs may be able to demonstrate unregistered rights in their names or acronyms to satisfy the requirement of standing to file a UDRP or URS complaint and not limiting the recommendations only to those IGOs identified by the GAC. The WG also noted that the IGO Small Group Proposal continued to be based on the assumption that IGOs are able to claim broad jurisdictional immunity in multiple national courts, which the WG concluded is at substantial odds with the expert opinion provided by Professor Swaine. Therefore the WG concluded that there is no basis for stripping a losing registrant of the right to appeal to a national court, as is called for by the IGO Small Group Proposal. Finally, the WG noted that the elements of the separate mechanisms outlined in the IGO Small Group Proposal are already within the scope of the existing URS and UDRP. There therefore did not seem to be a substantive rationale for creating separate dispute resolution processes as proposed by the IGO Small Group.

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Comment [MW19]: Amended to reflect Phil's comment to staff that the original text may need updating based on the change to Rec 2.

[70] See https://community.icann.org/x/-hi4Aw.
[71] See https://community.icann.org/x/wSC4Aw.

The following is a comparative table showing the differences between the specific details of the IGO Small Group Proposal concerning curative rights and the WG's recommendations and rationale for its conclusions.

IGO Small Group Proposal	Working Group Preliminary Recommendations[72]	Notes
Separate dispute resolution process for domains registered and used in situations where registrant is pretending to be the IGO or otherwise likely to result in fraud or deception, *and* (a) are identical to an IGO acronym; or (b) are confusingly similar to an IGO acronym; or (c) contain the IGO acronym. Decisions to be "appealable" through an arbitral process	**No separate dispute resolution process:** Subject to a UDRP or URS panel's determination of this issue, standing to file under the UDRP or URS can potentially be evidenced by an IGO's having filed the requisite notification to WIPO under Article 6*ter* of the Paris Convention for the Protection of Industrial Property (this supplements the existing option of filing under the UDRP or URS if the IGO has trademark rights in its name and/or acronym) A registrant's right of recourse to a national court is preserved, but where an IGO has successfully argued that it has jurisdictional immunity in that national court, the parties may agree to settle the case through binding arbitration	The WG's recommendations apply to all IGOs and as such provide protection to a broader group of IGOs than those covered by the IGO Small Group Proposal. The WG also concludes that the substantive scope of the UDRP already covers the situations described in the IGO Small Group Proposal and in some cases may provide broader protection. The external legal expert report confirms that the state of international law on IGO jurisdictional immunity is not uniform, and can depend on a number of factors, including the existence of a bilateral treaty and whether the national court in question applies the principles of absolute, functional or restrictive immunity to the IGO. As such, the disadvantages

[72] See Section 2, above, for the full set of recommendations and rationales.

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Comment [MW20]: Final text TBD pending final WG agreement.

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	A Policy Guidance document to be developed and issued clarifying that IGOs have the option to file through an assignee, licensee, or agent	(especially to a registrant) of removing entirely the right of recourse to a national court seemed disproportionate to the possible benefits. The WG further believed that the availability of curative relief is intended to be a supplement to rather than a substitute for existing legal protections; that an attempt by ICANN to prevent a domain registrant from exercising national legal rights could set an undesirable precedent; and that in any event there could be no assurance that a court would dismiss a legal action brought by a registrant based upon such ICANN policy seeking to prevent court access. Allowing an IGO to file via a representative third party would insulate the IGO from any direct admission that it was waiving its claimed immunity in the event of a subsequent appeal to a court of mutual jurisdiction. Additionally, the WG's final recommendations include a significant change from its preliminary conclusions in that the WG is expressly recommending that arbitration can be an

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		agreed dispute resolution mechanism where an IGO has successfully claimed jurisdictional immunity in a court in which a losing respondent has filed a claim; or where the two parties to the dispute mutually agree to proceed directly to arbitration.
Rapid relief mechanism where domain is: (a) identical or confusingly similar to an IGO acronym; and (b) registered and used in situations where the registrant is pretending to be the IGO or that are otherwise likely to result in fraud or deception; and (c) there is obvious risk of imminent harm from the claimed abuse of the domain	**No separate rapid relief mechanism and no change to the URS**	The WG believes that the substantive scope of the URS already covers the situations described in the IGO Small Group Proposal and may in some cases provide broader protection, as noted in this Final Report. The WG notes that the external legal expert report confirms that the state of international law on IGO jurisdictional immunity is not uniform, and can depend on a number of factors, including the existence of a bilateral treaty and whether the national court in question applies the principles of absolute, functional or restrictive immunity to the IGO. As such, the disadvantages (especially to a registrant) of deleting the requirement to submit to the long standing Mutual Jurisdiction standard outweighed any purported benefits.

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"Eligible IGOs" are IGOs who are on the GAC List from March 2013 (as updated from time to time by the GAC)	The WG's final recommendations are not limited to these "Eligible IGOs" but apply to all IGOs who have either registered or unregistered rights in their names and/or acronyms	The WG recognizes that the number of eligible IGOs under its preliminary recommendations is likely to be greater than those on the GAC List. The bona fide status of an IGO is an element to be considered by a court in evaluating its immunity request.
Mechanisms to be available to IGOs at no cost unless case is brought in bad faith A finding of three or more filings in bad faith to result in an IGO not being permitted to use the mechanism for one year	ICANN to investigate the feasibility of providing IGOs with access to the UDRP and URS at low or nominal cost	The WG does not have the remit or authority to compel ICANN to create a subsidy or other cost relief measures for IGOs, whether generally or on a selective basis, but has no objection if ICANN wishes to explore this possibility. As the WG has not recommended the creation of new, IGO-specific curative rights protection mechanisms, it believes that the rules regarding bad faith filings by IGO complainants should be the same as for any other party initiating a UDRP or URS; and that any recommended alterations are within the jurisdiction of the ongoing WG that is reviewing all rights protection mechanisms in all gTLDs.

Discussions during the open community sessions at the ICANN57, ICANN58, ICANN59 & ICANN60 Public Meetings

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Deleted: are IGOs who have fulfilled the requisite notification procedure under Article 6*ter* of the Paris Convention for its name and/or acronym, or

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At ICANN57 in Hyderabad in November 2016, the WG held an open community session where it presented a comparative overview of the differences between the WG's agreed preliminary recommendations and the specific proposals contained in the IGO Small Group Proposal.

The GAC Communique issued at the conclusion of the Hyderabad meeting contained GAC consensus advice on IGO protections[73]. The GAC advice included a request that this WG take the IGO Small Group Proposal into account in its deliberations. The rationale that was provided by the GAC was that

- *"IGOs undertake global public service missions, and protecting their names and acronyms in the [domain name system is in the global public interest.*
- *IGOs are unique treaty-based institutions created by governments under international law.*
- *The small group compromise strikes a reasonable balance between rights and concerns of both IGOs and legitimate third parties.*
- *ICANN's Bylaws and Core Values indicate that the concerns and interests of entities most affected, here IGOs, should be taken into account in policy development processes."*

At ICANN58 in Copenhagen in March 2017, the WG held another open community session where it presented the text of its preliminary recommendations, as published for public comment in January, and specifically sought community feedback on the two options relating to the handling of the IGO jurisdictional immunity question. Two dialogue sessions between GAC and GNSO representatives on the dual topics of Red Cross and IGO protections, facilitated by former Board member Bruce Tonkin and aimed at reconciling differing GAC advice and GNSO policy recommendations, were also held during ICANN58.

The GAC Communique issued at the conclusion of the Copenhagen meeting acknowledged the facilitated dialogues that took place, and included GAC advice that called on the ICANN Board to:

I. *"pursue implementation of (i) a permanent system of notification to IGOs regarding second-level registration of strings that match their acronyms in up to two languages and (ii) a parallel system of notification to registrants for a more*

[73] See https://gacweb.icann.org/download/attachments/27132037/GAC%20ICANN%2057%20Communique.pdf?version=6&modificationDate=1478668059355&api=v2. The relevant text, as well as previous GAC advice on the topic of IGO protections, has been included in Annex F.

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limited time period, in line with both previous GAC advice and GNSO recommendations;

II. *facilitate continued discussions in order to develop a resolution that will reflect (i) the fact that IGOs are in an objectively unique category of rights holders and (ii) a better understanding of relevant GAC Advice, particularly as it relates to IGO immunities recognized under international law as noted by IGO Legal Counsels; and*

III. *urge the Working Group for the ongoing PDP on IGO-INGO Access to Curative Rights Protection Mechanisms to take into account the GAC's comments on the Initial Report."*

At ICANN59 in Johannesburg in June 2017, the WG held an open community session where it presented some of its likely final recommendations based on its comprehensive consideration of public comments received on its preliminary recommendations, including from the GAC and a substantial number of IGOs. The WG presented its proposed substantive modification to its original recommendation concerning standing under the UDRP and URS and requested community feedback on the topic of arbitration as a possible option in a situation where an IGO has successfully claimed jurisdictional immunity as against a losing respondent who filed a claim in a national court.

The GAC Communique issued at the conclusion of the Johannesburg meeting reiterated previous GAC consensus advice on IGO protections, i.e. that curative rights protections for IGOs should be modeled on, but separate from, the existing UDRP, provide standing based on IGOs' status as public intergovernmental institutions, and respect IGOs' jurisdictional status by facilitating appeals exclusively through arbitration. The GAC's rationale for this advice was that it *"aligns with the view of governments that IGOs perform important public functions for citizens worldwide, and that protecting their identities in the DNS serves to minimize the potential for consumer harm."*

The GAC also expressed concern that this WG seemed to be preparing final PDP recommendations that differed from GAC advice, and requested that the ICANN Board *"ensure that such recommendations adequately reflect input and expertise provided by IGOs"*.

At ICANN60 in Abu Dhabi, the WG's open community session focused on the proposed final recommendations, including the still-outstanding question as to which of the three final options on the handling of the IGO jurisdictional immunity issue (or other alternative) would be most appropriate.

The GAC Communique issued at the end of the Abu Dhabi meeting noted the GAC's willingness to continue to work with the GNSO community on resolving the issue of IGO protections, and called on the ICANN Board to *"review closely the [GNSO's] decisions on this issue in order to ensure that they are compatible with [the] values [of openness,*

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transparency and inclusion, and representativeness and process integrity enshrined in the ICANN Bylaws and GNSO Operating Procedures,] and reflect the full factual record."

WG Acknowledgment of GAC Advice and Input

The WG appreciates and acknowledges the GAC advice that has been issued to date, and has given thorough consideration to all the GAC advice as well as the IGO Small Group Proposal. The many discussions that took place between the publication of its Initial Report and the finalization of this Final Report demonstrates the seriousness with which the WG considered all input received, in developing recommendations that the WG believes are respectful and protective of IGO missions and their treaty basis. In addition, representatives of some IGOs attended and spoke at several open meetings held by the WG at the various ICANN Public Meetings that took place between June 2015 and November 2017, and the WG has devoted a substantial amount of time to considering the IGOs' requests, positions and concerns. With the modifications that it has made to some of its preliminary recommendations as noted in this Final Report, the WG believes that its final recommendations strike the necessary balance between accommodating IGOs' needs and status, and the existing legal rights of registrants.

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Deleted: The WG welcomes and will thoroughly consider all community input on its recommendations and rationale as stated in this Initial Report.

4 Conclusions and Next Steps

4.1 Results of WG Consensus Call

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By end-September 2017, the WG co-chairs considered that the WG had reached preliminary consensus on the proposed final recommendations concerning INGOs (final recommendation #1), IGO standing (final recommendation #2) and costs and feasibility (final recommendation #4). Following ICANN59 in June, the WG had focused most of its attention and time on attempting to reach consensus on the issue of IGO jurisdictional immunity. Based on community input on the two options that were published for public comment in its Initial Report and the community discussions that took place at ICANN58 and ICANN59, the WG developed a list of six possible options for discussion on the question of the appropriate process for final disposition of a case where a losing registrant has filed claim in a national court but the IGO has successfully claimed immunity from the jurisdiction of that court. The WG also considered a list of possible mandatory elements to be included should any arbitration option be included within the final recommendation on this point, and commenced an impact analysis on each of the six options.

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Following extensive WG discussions, a final list of three options was proposed by the co-chairs for WG consideration. This list contained the original two options first published in the WG's Initial Report, with Option 2 having been modified to add specific elements related to the possibility of arbitration and/or limited judicial consideration solely of ownership of the disputed domain names. These additional elements were developed based on suggestions made in two of the six options that had been suggested. The third option in the final list was one of the six suggested options, and represented a "middle ground" where disposition of the case would differ depending on whether the disputed domain was created before or a certain date.

In October 2017, the WG conducted a preliminary consensus call on the three final options. The poll results were presented to the GNSO Council and community at ICANN60.

Following additional WG deliberations in November and December 2017, a formal consensus call on all the proposed final recommendations, including text of a proposed final recommendation #3 (on the topic of IGO jurisdictional immunity), was launched on (DATE) and closed on (DATE).

The results of this formal consensus call indicated (INSERT TEXT HERE).

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4.2 Next Steps

The WG is submitting this Final Report to the GNSO Council for its review and vote as to whether or not to approve the WG's final recommendations, in accordance with the ICANN Bylaws and the GNSO PDP Manual.

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5 Background

5.1 Process Background

On 20 November 2013, the GNSO Council unanimously adopted all of the consensus recommendations made by the PDP Working Group on the Protection of IGOs and INGOs in All gTLDs. The group had recommended that the GNSO Council request an Issue Report to assist it in determining whether a PDP should be initiated in order to explore possible amendments to the UDRP and the URS, to enable access to and use of such curative rights protection mechanisms by IGOs and INGOs.

- On 25 May 2014, ICANN published the Final Issue Report on Amending the Uniform Dispute Resolution Policy and the Uniform Rapid Suspension Procedure for Access by Protected International Governmental Organizations and International Non-Governmental Organizations. In this Final Issue Report, ICANN staff recommended that the GNSO Council commence a PDP on the topic.
- On 5 June 2014, the GNSO Council initiated the PDP.
- On 25 June 2014, the GNSO Council approved the Charter for the IGO-INGO Access to Curative Rights Protection Mechanisms PDP Working Group.
- A Call for Volunteers to the WG was issued on 11 July 2014, and the WG held its first meeting on 11 August 2014, with the initial Council liaison Mr. Petter Rindforth acting as interim WG Chair.
- On 4 September 2014, the GNSO Council confirmed the appointment of Mr. Philip Corwin and Mr. Petter Rindforth as WG Co-Chairs[74].
- On 16 June 2015, the GNSO Council approved a request from the PDP Working Group to amend the scope of its Charter, such that the WG would be able to "take into

[74] Following the conclusion of Mr. Rindforth's term as a GNSO Council member, in which capacity he had been the Council's initial liaison to the WG, Ms. Susan Kawaguchi was confirmed as the new Council liaison to succeed Mr. Rindforth.

account any criteria for IGO or INGO protection that may be appropriate, including any that may have been developed previously, such as the list of IGO and INGO identifiers that was used by the GNSO's prior PDP WG on the Protection of International Organization Identifiers in All gTLDs as the basis for their consensus recommendations and the GAC list of IGOs as provided to ICANN in March 2013"[75].

5.2 Issue Background

The IGO-INGO Access to Curative Rights Protection Mechanisms PDP WG 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 WG was expected to, at a minimum, consider the following topics:

- Differences between the UDRP and URS
- Relevance of existing protections under the Applicant Guidebook for the New gTLD Program
- Interplay between this issue and the forthcoming review of the UDRP
- The distinction (if any) between IGOs and INGOs for purposes of this issue
- The potential need to distinguish between a “legacy” gTLD and a “new” gTLD launched under the New gTD Program
- The potential need to clarify whether the URS is Consensus Policy binding on ICANN contracted parties
- The need to address the issue of the costs to IGOs and INGOs of using curative processes
- The relevance of the existence of legal protections under international treaties and/or multiple national laws

[75] See https://gnso.icann.org/en/council/resolutions#20150416-3 (noting that the original scope of the Charter was limited only to the identifiers of those IGOs and INGOs that had been listed by the previous PDP Working Group on IGO and INGO protections).

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5.2.1 Background Work by the GNSO and the ICANN Community

In 2007 a GNSO Issue Report on Dispute Handling for IGO Names & Abbreviations had analyzed some possible methods for handling domain name disputes concerning IGO names and abbreviations, but not those of INGOs. A PDP on the topic was however not initiated due to lack of the requisite number of votes in the GNSO Council. Previously, in 2003, an ICANN Joint Working Group comprising community members from the ALAC, the GAC and the GNSO had also discussed various possible dispute resolution mechanisms for IGOs in response to a 2001 report on the applicability of the UDRP to certain types of identifiers (including those of IGOs) by WIPO. The Joint Working Group failed to reach consensus on WIPO's recommendations, and no formal action was taken by the GNSO Council or ICANN on the matter.

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6 Approach Taken by the Working Group

6.1 Working Methodology

The IGO-INGO Access to Curative Rights Protection Mechanisms WG began its deliberations on 11 August 2014. It decided to conduct its work primarily through weekly conference calls, in addition to email exchanges on its mailing list, with further discussions taking place at ICANN Public Meetings when scheduled. All the WG's meetings are documented on its wiki workspace (https://community.icann.org/x/37rhAg), including its mailing list (http://mm.icann.org/pipermail/gnso-igo-ingo-crp/), draft documents, background materials and input received from ICANN's SO/ACs and the GNSO's Stakeholder Groups and Constituencies.

The WG also prepared a Work Plan (https://community.icann.org/x/9brhAg), which was reviewed on a regular basis. In accordance with the GNSO's PDP Manual, the WG solicited early input from ICANN's SO/ACs and the GNSO's Stakeholder Groups and Constituencies, and considered all input received in response. It also reviewed the historical documentation on this topic early on in its deliberations[76], and considered advice provided by the GAC to the ICANN Board as well as the IGO Small Group Proposal (as described in Section 3, above).

The WG scheduled community sessions at each ICANN Public Meeting that took place after its formation, at which it presented its preliminary findings and/or conclusions to the broader ICANN community for discussion and feedback. The topics discussed at the ICANN Public Meetings that took place just prior to the publication of the WG's Initial Report and through November 2017 are summarized in Section 3, above.

6.1.1 WG Membership and Attendance

Comment [MW21]: This section will be updated to reflect the most current numbers and affiliations.

The members[77] of the IGO-INGO Access to Curative Rights Protection Mechanisms WG are:

[76] Much of the historical records, treaty texts, reports and papers considered by the WG is listed on the WG's wiki space: https://community.icann.org/x/DrvhAg.

[77] A person may join a GNSO Working Group as either a Member or an Observer. Observers have read-only rights to the WG mailing list, and do not participate in meetings, discussions or consensus calls. For a list of the Observers to this WG, see the WG's wiki space at https://community.icann.org/x/97rhAg.

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Name	Affiliation
Alex Lerman	Individual
Brian Scarpelli	IPC
Claudia MacMaster Tamarit	Int'l Org for Standardization
David Healsley	IPC
David Maher	RySG
George Kirikos	Individual
Griffin Barnett	IPC
Helen Palm	Individual
Holly Lance	IPC
Imran Ahmed Shah	NCUC
Jay Chapman	BC
Jim Bikoff	IPC
Kathy Kleiman	NCUC
Keith Drazek	RySG
Lori Schulman	IPC
Mason Cole	RySG
Mike Rodenbaugh	IPC
Nat Cohen	BC
Osvaldo Novoa	ISPCP
Paul Raynor Keating	NCUC
Paul Tattersfield	Individual
Petter Rindforth (WG Co-Chair)	IPC
Phil Corwin (WG Co-Chair)	BC
Poncelet Ileleji	NPOC
Reg Levy	RySG

Comment [PC22]: Needs to be updated to reflect my switch to RySG in November 2017

Comment [MW23R22]: Yes, we will update the entire table as well as attendance numbers to reflect the current situation.

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Name	Affiliation
Susan Kawaguchi (GNSO Council Liaison)	BC
Theo Geurts	RrSG
Thomas Rickert	NomCom
Valeriya Sherman ++	IPC

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The Statements of Interest of the WG members can be found at https://community.icann.org/x/97rhAg.

The attendance records can be found at https://community.icann.org/x/-jXxAg. The email archives can be found at (http://mm.icann.org/pipermail/gnso-igo-ingo-crp/.

* The following are the ICANN SO/ACs and GNSO Stakeholder Groups and Constituencies for which WG members were requested to provide affiliations for:

RrSG – Registrars Stakeholder Group
RySG – Registries Stakeholder Group
CSG – Commercial Stakeholder Group
CBUC – Commercial and Business Users Constituency
IPC – Intellectual Property Constituency
ISPCP – Internet Service Providers and Connectivity Providers Constituency
NCSG – Non-Commercial Stakeholder Group
NCUC – Non-Commercial Users Constituency
NPOC – Not-for-Profit Operational Concerns Constituency
GAC – Governmental Advisory Committee
ALAC – At Large Advisory Committee

** This list was accurate as of ( ) December 2017. Note that some members joined the WG only after it began meeting, and WG members that have since left are indicated with ++ against their names.

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7 Community Input

7.1 Initial Request for Input

According to the GNSO's PDP Manual, a PDP WG should formally solicit statements from each GNSO Stakeholder Group and Constituency at an early stage of its deliberations. A PDP WG is also encouraged to seek the opinion of other ICANN Supporting Organizations and Advisory Committees who may have expertise, experience or an interest in the issue. As a result, the WG reached out to all ICANN SO/ACs as well as GNSO Stakeholder Groups and Constituencies with a request for input (see Annexes B and C) at the start of its deliberations. In response, statements were received from the following:

- Intellectual Property Constituency (IPC) - GNSO
- Internet Service Providers & Connectivity Providers Constituency (ISPCP) - GNSO
- Registries Stakeholder Group (RySG) - GNSO
- Governmental Advisory Committee (GAC)
- Security and Stability Advisory Committee (SSAC)

The full statements can be found here: https://community.icann.org/x/T5gQAw.

7.2 Review of Input Received

All of the statements received were reviewed by the WG as part of its deliberations, and considered by the WG as it developed its preliminary recommendations for its Initial Report. The GAC and several GNSO stakeholder groups and constituencies (i.e. the Registries Stakeholder Group, the Registrars Stakeholder Group, the IPC and ISPCPC) also filed comments on the Initial Report, which were taken into account by the WG as it developed its final recommendations.

8 Annex A – PDP Working Group Charter

WORKING GROUP CHARTER

Working Group Charter for a Policy Development Process for IGO and INGO Access to Curative Rights Protections

WG Name:	IGO-INGO Access to Curative Rights Protection Working Group	
Section I: Working Group Identification		
Chartering Organization(s):	Generic Names Supporting Organization (GNSO) Council	
Charter Approval Date:	25 June 2014 (further amended on 16 April 2015)	
Name of WG Chair:	Philip Corwin and Petter Rindforth	
Name(s) of Appointed Liaison(s):	Susan Kawaguchi	
WG Workspace URL:	https://community.icann.org/x/37rhAg	
WG Mailing List:	http://mm.icann.org/pipermail/gnso-igo-ingo-crp/	
GNSO Council Resolution:	**Title:**	Motion to initiate a Policy Development Process (PDP) for IGO and INGO Access to Curative Rights Protection Mechanisms
	Ref # & Link:	https://gnso.icann.org/en/council/resolutions#20140625-1 (amended at https://gnso.icann.org/en/council/resolutions#20150416-3)
Important Document Links:		
Section II: Mission, Purpose, and Deliverables		
Mission & Scope:		
Background At its meeting on 20 November 2013, the GNSO Council unanimously adopted all the consensus recommendations made by the GNSO's PDP Working Group on the Protection of International Organization Names in All gTLDs (IGO-INGO WG) and requested an Issue Report to assist in determining whether a PDP should be initiated in order to explore possible amendments to the Uniform Dispute Resolution Policy (UDRP) and the Uniform Rapid Suspension procedure (URS), to enable access to and use of such curative rights protection mechanisms by protected IGOs and INGOs.		

In 2007 a GNSO Issue Report on Dispute Handling for IGO Names & Abbreviations had analyzed some possible methods for handling domain name disputes concerning IGO names and abbreviations, but not those of INGOs. A PDP on the topic was however not initiated due to lack of the requisite number of votes in the GNSO Council. Previously, in 2003, an ICANN Joint Working Group comprising community members from the At Large Advisory Committee (ALAC), the Government Advisory Committee (GAC) and the GNSO had also discussed various possible dispute resolution mechanisms for IGOs in response to a 2001 report on the applicability of the UDRP to certain types of identifiers (including those of IGOs) by the World Intellectual Property Organization (WIPO). The Joint Working Group failed to reach consensus on WIPO's recommendations, and no formal action was taken by the GNSO Council or ICANN on the matter.

In January 2012 ICANN launched the New gTLD Program, which included a number of rights-protection mechanisms specifically developed for the Program. These included objection procedures to new gTLD applications (including a legal rights objection procedure for trademark owners and organizations with registrations in the .int TLD) and the URS for second level registrations in approved new gTLDs (modeled after the UDRP). The ICANN Board also granted certain temporary protections at the top and second levels in the New gTLD Program for the Red Cross movement, the International Olympic Committee and IGOs, which were to remain in place until a permanent solution based on GAC Advice and policy recommendations from the GNSO could be developed. The GNSO's recommendations, as approved by the GNSO Council on 20 November 2013, were submitted to the ICANN Board for consideration in February 2014. These were acknowledged by the Board in February 2014, in directing its New gTLD Program Committee (NGPC) to develop a comprehensive proposal taking into account the GAC advice received on the topic and the GNSO's recommendations. The NGPC developed and sent a proposal to the GAC in March 2014. In April 2014 the ICANN Board adopted those GNSO recommendations that are not inconsistent with GAC advice received on the same topic and resolved to facilitate dialogue among the GAC, GNSO and other affected parties to resolve the remaining differences between GAC advice and the GNSO recommendations.

Mission and Scope

This Curative Rights Protection for IGOs and INGOs PDP Working Group (WG) is 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. In commencing its deliberations, the WG should at an early stage gather data and research concerning the specific topics listed in Section X of the Final Issue Report as meriting such further documentation.

As part of its deliberations, the CRP PDP WG should, at a minimum, consider the following issues detailed in Section IX of the Final Issue Report. These are:

- *The differences between the UDRP and the URS;*
- *The relevance of existing protection mechanisms in the Applicant Guidebook for the New gTLD Program;*
- *The interplay between the topic under consideration in this PDP and the forthcoming GNSO review of the UDRP, URS and other rights-protection mechanisms;*

- *The distinctions (if any) between IGOs and INGOs for purposes of this PDP;*
- *The potential need to distinguish between a legacy gTLD and a new gTLD launched under the New gTLD Program;*
- *The potential need to clarify whether the URS is a Consensus Policy binding on ICANN's contracted parties;*
- *The need to address the issue of cost to IGOs and INGOs to use curative processes; and*
- *The relevance of specific legal protections under international legal instruments and various national laws for IGOs and certain INGOs (namely, the Red Cross movement and the International Olympic Committee)*

The WG should also include the following additional topics in its deliberations:

- *Review the deliberations of the 2003 President's Joint Working Group on the 2001 WIPO report as a possible starting point for the PDP WG's work and consider whether subsequent developments such as the introduction of the New gTLD Program and the URS may mean that prior ICANN community recommendations on IGO dispute resolution are no longer applicable;*
- *Examine whether or not similar justifications and amendments should apply to both the UDRP and URS, or if each procedure should be treated independently and/or differently;*
- *Reach out to existing ICANN dispute resolution service providers for the UDRP and URS as well as experienced UDRP panelists, to seek input as to how the UDRP and/or URS might be amended to accommodate considerations particular to IGOs and INGOs;*
- *Determine what (if any) are the specific different considerations (including without limitation qualifying requirements, authentication criteria and appeal processes) that should apply to IGOs and INGOs;*
- *Conduct research on applicable international law regarding special privileges and immunities for IGOs*
- *Conduct research on the extent to which IGOs and INGOs already have trademarks and might be covered, in whole or in part, by existing UDRP and URS proceedings;*
- *Conduct research on the number and list of IGOs currently protected under Article 6ter of the Paris Convention on Intellectual Property;*
- *Conduct research on the number and list of INGOs included on the United Nations list of non-governmental organizations in consultative status with the Economic and Social Council. ;*
- *Consider whether or not there may be practicable alternatives, other than amending the UDRP and URS, that can nonetheless provide adequate curative rights protections for IGOs and INGOs, such as the development of a specific, narrowly-tailored dispute resolution procedure modeled on the UDRP and URS, and applicable only to IGOs and/or INGOs;*
- *Consider mechanisms that would require a very clear definition of the mission of the IGOs, its scope of operations and the regions and countries in which it operates; the goal here being to provide a context for the IGO or INGO similar to the scope and terms of a trademark with its International Class and clear description of goods and services;*
- *Consider recommendations that incorporate fundamental principles of fair use, acknowledge free speech and freedom of expression, and balance the rights of all to use generic words and other terms and acronyms in non-confusing ways; and*
- *Bear in mind that any recommendations relating to the UDRP and URS that are developed by*

this PDP WG may be subject to further review under the GNSO's forthcoming PDP to review the UDRP and all the rights protection mechanisms that were developed for the New gTLD Program. The WG should invite participation from other ICANN Supporting Organizations and Advisory Committees, including the GAC, and from interested IGOs and INGOs. It should track any ongoing discussions between the GAC and GNSO on resolving remaining differences between GAC advice and the GNSO recommendations on RCRC and IGO acronym protection. It may also wish to consider forming sub-groups to work on particular issues or sub-topics in order to streamline its work and discussions. For purposes of this PDP, the WG shall take into account any criteria for IGO or INGO protection that may be appropriate, including any that may have been developed previously, such as the list of IGO and INGO identifiers that was used by the GNSO's prior PDP WG on the Protection of International Organization Identifiers in All gTLDs as the basis for their consensus recommendations and the GAC list of IGOs as provided to ICANN in March 2013[1].
Objectives & Goals:
To develop, at a minimum, an Initial Report and a Final Report regarding the WG's recommendations on issues relating to the access by IGOs and INGOs to curative rights protection mechanisms, following the processes described in Annex A of the ICANN Bylaws and the GNSO PDP Manual.
Deliverables & Timeframes:
The WG shall respect the timelines and deliverables as outlined in Annex A of the ICANN Bylaws and the PDP Manual. As per the GNSO Working Group Guidelines, the WG shall develop a work plan that outlines the necessary steps and expected timing in order to achieve the milestones of the PDP as set out in Annex A of the ICANN Bylaws and the PDP Manual, and shall submit this to the GNSO Council.
Section III: Formation, Staffing, and Organization
Membership Criteria:
The WG will be open to all interested in participating. New members who join after certain parts of work has been completed are expected to review previous documents and meeting transcripts.
Group Formation, Dependencies, & Dissolution:
This WG shall be a standard GNSO PDP Working Group. The GNSO Secretariat should circulate a 'Call For Volunteers' as widely as possible in order to ensure broad representation and participation in the WG, including:

[1] This paragraph was amended by the GNSO Council on 16 April 2015. The original text of this paragraph read as follows: "*For purposes of this PDP, the scope of IGO and INGO identifiers is to be limited to those identifiers previously listed by the GNSO's PDP WG on the Protection of International Organization Identifiers in All gTLDs as protected by their consensus recommendations (designated by that WG as Scope 1 and Scope 2 identifiers, and listed in Annex 2 of the Final Issue Report).*"

- Publication of announcement on relevant ICANN web sites including but not limited to the GNSO and other Supporting Organizations and Advisory Committee web pages; and
- Distribution of the announcement to GNSO Stakeholder Groups, Constituencies and other ICANN Supporting Organizations and Advisory Committees

Working Group Roles, Functions, & Duties:

The ICANN Staff assigned to the WG will fully support the work of the Working Group as requested by the Chair including meeting support, document drafting, editing and distribution and other substantive contributions when deemed appropriate.
Staff assignments to the Working Group:

- GNSO Secretariat
- ICANN policy staff members (Berry Cobb & Mary Wong)

The standard WG roles, functions & duties shall be those specified in Section 2.2 of the GNSO Working Group Guidelines.

Statements of Interest (SOI) Guidelines:

Each member of the WG is required to submit an SOI in accordance with Section 5 of the GNSO Operating Procedures.

Section IV: Rules of Engagement

Decision-Making Methodologies:

The Chair will be responsible for designating each position as having one of the following designations:

- **Full consensus** - when no one in the group speaks against the recommendation in its last readings. This is also sometimes referred to as **Unanimous Consensus.**
- **Consensus** - a position where only a small minority disagrees, but most agree. *[Note: For those that are unfamiliar with ICANN usage, you may associate the definition of 'Consensus' with other definitions and terms of art such as rough consensus or near consensus. It should be noted, however, that in the case of a GNSO PDP WG, all reports, especially Final Reports, must restrict themselves to the term 'Consensus' as this may have legal implications.]*
- **Strong support but significant opposition** - a position where, while most of the group supports a recommendation, there is a significant number of those who do not support it.
- **Divergence** (also referred to as **No Consensus**) - a position where there is no strong support for any particular position, but many different points of view. Sometimes this is due to irreconcilable differences of opinion and sometimes it is due to the fact that no one has a particularly strong or convincing viewpoint, but the members of the group agree that it is worth listing the issue in the report nonetheless.
- **Minority View** - refers to a proposal where a small number of people support the recommendation. This can happen in response to **Consensus**, **Strong support but significant opposition**, or **No Consensus;** or it can happen in cases where there is neither support nor opposition to a suggestion made by a small number of individuals.

In cases of **Consensus**, **Strong support but significant opposition**, and **No Consensus**, an effort should be made to document variances in viewpoint and to present any **Minority View** recommendations that may have been made. Documentation of **Minority View** recommendations normally depends on

text offered by the proponent(s). In all cases of **Divergence,** the WG Chair should encourage the submission of minority viewpoint(s).

The recommended method for discovering the consensus level designation on recommendations should work as follows:

i. After the group has discussed an issue long enough for all issues to have been raised, understood and discussed, the Chair, or Co-Chairs, make an evaluation of the designation and publish it for the group to review.
ii. After the group has discussed the Chair's estimation of designation, the Chair, or Co-Chairs, should reevaluate and publish an updated evaluation.
iii. Steps (i) and (ii) should continue until the Chair/Co-Chairs make an evaluation that is accepted by the group.
iv. In rare cases, a Chair may decide that the use of polls is reasonable. Some of the reasons for this might be:
    - A decision needs to be made within a time frame that does not allow for the natural process of iteration and settling on a designation to occur.
    - It becomes obvious after several iterations that it is impossible to arrive at a designation. This will happen most often when trying to discriminate between **Consensus** and **Strong support but Significant Opposition** or between **Strong support but Significant Opposition** and **Divergence.**

Care should be taken in using polls that they do not become votes. A liability with the use of polls is that, in situations where there is **Divergence** or **Strong Opposition**, there are often disagreements about the meanings of the poll questions or of the poll results.

Based upon the WG's needs, the Chair may direct that WG participants do not have to have their name explicitly associated with any Full Consensus or Consensus views/positions. However, in all other cases and in those cases where a group member represents the minority viewpoint, their name must be explicitly linked, especially in those cases where polls where taken.

Consensus calls should always involve the entire WG and, for this reason, should take place on the designated mailing list to ensure that all WG members have the opportunity to fully participate in the consensus process. It is the role of the Chair to designate which level of consensus has been reached and to announce this designation to the WG. WG member(s) should be able to challenge the designation of the Chair as part of the WG discussion. However, if disagreement persists, WG members may use the process set forth below to challenge the designation.

If several participants (see Note 1 below) in a WG disagree with the designation given to a position by the Chair or any other consensus call, they may follow these steps sequentially:

1. Send email to the Chair, copying the WG explaining why the decision is believed to be in error.
2. If the Chair still disagrees with the complainants, the Chair will forward the appeal to the liaison(s) from the Chartering Organization (CO). The Chair must explain his or her reasoning in the response to the complainants and in the submission to the liaison(s). If

the liaison(s) supports the Chair's position, the liaison(s) will provide their response to the complainants. The liaison(s) must explain their reasoning in the response. If the liaison(s) disagrees with the Chair, the liaison(s) will forward the appeal to the CO. Should the complainants disagree with the liaison(s)'s support of the Chair's determination, the complainants may appeal to the Chair of the CO or their designated representative. If the CO agrees with the complainants' position, the CO should recommend remedial action to the Chair.

3. In the event of any appeal, the CO will attach a statement of the appeal to the WG and/or Board report. This statement should include all of the documentation from all steps in the appeals process and should include a statement from the CO (see Note 2 below).

Note 1: Any Working Group member may raise an issue for reconsideration; however, a formal appeal will require that that a single member demonstrates a sufficient amount of support before a formal appeal process can be invoked. In those cases where a single Working Group member is seeking reconsideration, the member will advise the Chair and/or Liaison(s) of their issue and the Chair and/or Liaison(s) will work with the dissenting member to investigate the issue and to determine if there is sufficient support for the reconsideration to initiate a formal appeal process.

Note 2: It should be noted that ICANN also has other conflict resolution mechanisms available that could be considered in case any of the parties are dissatisfied with the outcome of this process.

Status Reporting:

As requested by the GNSO Council, taking into account the recommendation of the Council liaison(s) to the WG.

Problem/Issue Escalation & Resolution Processes:

The WG will adhere to ICANN's Expected Standards of Behavior as documented in Section F of the ICANN Accountability and Transparency Frameworks and Principles, January 2008.

If a WG member feels that these standards are being abused, the affected party should appeal first to the Chair and Liaison(s) and, if unsatisfactorily resolved, to the Chair of the CO or their designated representative. It is important to emphasize that expressed disagreement is not, by itself, grounds for abusive behavior. It should also be taken into account that as a result of cultural differences and language barriers, statements may appear disrespectful or inappropriate to some but are not necessarily intended as such. However, it is expected that WG members make every effort to respect the principles outlined in ICANN's Expected Standards of Behavior as referenced above.

The Chair, in consultation with the CO liaison(s), is empowered to restrict the participation of someone who seriously disrupts the Working Group. Any such restriction will be reviewed by the CO. Generally, the participant should first be warned privately, and then warned publicly before such a restriction is put into place. In extreme circumstances, this requirement may be bypassed.

Any WG member that believes that his/her contributions are being systematically ignored or

discounted or wants to appeal a decision of the WG or CO should first discuss the circumstances with the WG Chair. In the event that the matter cannot be resolved satisfactorily, the WG member should request an opportunity to discuss the situation with the Chair of the CO or their designated representative.

In addition, if any member of the WG is of the opinion that someone is not performing their role according to the criteria outlined in this Charter, the same appeals process may be invoked.

Closure & Working Group Self-Assessment:

The WG will close upon the delivery of the Final Report, unless assigned additional tasks or follow-up by the GNSO Council.

Section V: Charter Document History

Version	Date	Description

Staff Contact:	Mary Wong	**Email:**	Policy-staff@icann.org

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9 Annex B – WG Request for GNSO Stakeholder Group/Constituency Statements

Stakeholder Group / Constituency Input Template
IGO-INGO Access to Curative Rights Protection Mechanisms Working Group

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December 12, 2014

Dear [SG/C/SO/AC Chair]

We write as the Co-Chairs of the GNSO's IGO-INGO Access to Curative Rights Protections (CRP) Working Group (WG), which was chartered by the GNSO Council to conduct a Policy Development Process (PDP) to determine:

(1) Whether the Uniform Dispute Resolution Policy (UDRP) and/or the Uniform Rapid Suspension procedure (URS) should be amended, and if so, how; or

(2) Whether a separate, narrowly-tailored dispute resolution procedure modeled on the UDRP and/or the URS should be developed, in either case to address the specific needs and concerns of International Governmental Organizations (IGOs) and/or International Non-Governmental Organizations (INGOs).

The origin of this WG lies in the work of the previous GNSO PDP Working Group on the Protection of International Organizational Names in All gTLDs, whose recommendations had been unanimously adopted by the GNSO Council at the GNSO Council meeting on 20 November 2013. One of those recommendations was for the GNSO Council to request an Issue Report on the question of curative rights protection for IGOs and INGOs, which led to the formation of this WG. The WG commenced its work in August 2014. The GNSO's PDP Manual mandates that each PDP WG reach out at an early stage to all GNSO Stakeholder Groups and Constituencies to seek their input, and encourages WGs to seek input from ICANN's Supporting Organizations and Advisory Committees as well. Given the progress and decisions made by our WG, we are now writing to update you on our activities to date, and to provide your group with an opportunity to assist the WG with its assigned task, in respect of the following questions and issues that stem from our Charter and the initial deliberations of the WG.

First, we wish to inform you that the WG has reached a majority decision that there is no principled reason to consider INGOs in general as a special category of

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protected organizations, for purposes of the specific tasks for which the WG was chartered in this PDP. The rationale for this decision is provided in Attachment A.[2]

Question 1: What is the [your organization]'s view on the WG's decision to exclude INGOs from further consideration in this PDP?

Second, the WG has considered most of the background information available to it, including the documentation from the 2001-2 WIPO Process-2 and the previous scoping work done by the ICANN community (including the GNSO) in 2004 and 2007. It has also reviewed the various expressions of GAC advice concerning the issue of curative rights protection for IGOs, as expressed in several GAC Communiques.

At this point, the WG would appreciate input from the [your organization] on the following questions that it will need to answer in the course of this PDP:

- One of the requirements under the UDRP and the URS is that the complainant must possess trademark or substantively similar rights in the word(s) for which the respondent has registered an identical or confusingly similar domain name (this is sometimes commonly called the "standing" requirement). The WG is still investigating the ability and practice of IGOs obtaining trademarks in their names and acronyms.

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?

- A specific issue involving IGOs is the requirement for the organization, both as a domain registrant, and as a complainant under the UDRP and the URS, to agree to submit to the jurisdiction of a national court for purposes of an appeal. This may be problematic for IGOs due to possible issues with sovereign immunity. The WG is currently analyzing the sovereign immunity issue and is conducting research on how various

[2] This determination is made with due recognition of the special protections afforded to the Red Cross movement and International Olympic Committee. Although the International Olympic Committee and the International Red Cross and Red Crescent Movement have access to and have used the existing Rights Protection Mechanisms, they have been afforded special protection by ICANN to reduce their reliance on these RPMs due to the volume of cybersquatting on the desirable names of these beneficent organizations, which compounded their cost and burden of using these RPMs. *See* https://www.icann.org/resources/pages/reserved-2013-07-08-en/. The Working Group understands this, and its statement regarding INGOs in general should be interpreted consistently with this special protection.

nations have chosen to implement Paris Convention Article 6ter protections within their jurisdictions.

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

- The GAC has advised that any dispute resolution process relating to IGOs should be at no or nominal cost to the IGOs. The WG has noted that the fees and associated legal costs for the UDRP and the URS are substantially less than for litigation involving the same matters. Although the WG's charter tasks it to analyze the issue of costs, the WG does not have the ability to create any fund or other subsidy mechanisms for IGOs who claim an inability to shoulder the costs of existing dispute resolution mechanisms.

Question 4: What is the [your organization]'s view on this issue, and in your view are the existing UDRP and URS fees "nominal"?

In addition to the above questions, the WG Charter, which can be found at http://gnso.icann.org/en/drafts/igo-ingo-crp-access-charter-24jun14-en.pdf, requires the WG to discuss a number of other issues. We would welcome the [your organization]'s feedback on any or all of these Charter questions.

In particular, we would welcome input on the following topics:

- Whether the URS should be a Consensus Policy;
- Considerations of applying policies formulated by this WG to both "legacy" gTLDs and the new gTLDs currently being delegated in this expansion round. (Note: This may potentially include the URS, which is currently mandatory only for gTLDs delegated under ICANN's New gTLD Program. The WG also notes that the GNSO is scheduled to examine the issue of the efficacy of all rights protection mechanisms (RPMs) in both the legacy and new gTLDs in an upcoming Issue Report in early 2015);
- Whether the UDRP or the URS, or both, should be amended to address the particular needs and concerns of IGOs; and, if so, how;
- If the UDRP and/or the URS are not to be amended, whether a specific, narrowly-tailored dispute resolution procedure designed to address the particular needs and concerns of IGOs should be developed.

Thank you for the [your organization]'s consideration of these questions. We look forward to any comments and any input that you and the organization you Chair are

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able to provide to our WG. If possible, please forward your comments and input to us by **Friday, January 23 2015** so that we may fully consider it in our further deliberations.

Best regards,

Philip Corwin & Petter Rindforth (WG Co-Chairs)

Attachment A

Rationale for the Working Group's Decision to Exclude International Non-Governmental Organizations (INGOs) from Further Consideration in our Deliberations

The WG has made an initial determination to exclude INGOs from further consideration for special curative rights protection procedures aside from the existing and un-amended UDRP and URS for the following reasons:

- Many INGOs already have, and do enforce their trademark rights, and there is no perceivable barrier to other INGOs obtaining trademark rights in their names and/or acronyms and subsequently utilizing those rights as the basis for standing in the existing dispute resolution procedures (DRPs) created and offered by ICANN as a faster and lower cost alternative to litigation.
- There is no claim of a "sovereign immunity" obstacle hindering INGOs from submitting to national jurisdiction in the appeals process from the existing DRPs, and some INGOs regularly use the UDRP to protect their rights.
- Given the above determinations regarding access to trademark rights and irrelevance of the sovereign immunity issue, the WG believes that there is no principled reason to consider any amendment of the UDRP or the URS to accommodate INGOs.
- Although some INGOs may be concerned about the cost of using the UDRP and the URS, because enforcement through these RPMs involves some expenditure of funds, this is not a problem for all INGOs nor is it unique to INGOs as rights holders; furthermore, the issue of ICANN subsidizing INGOs to utilize DRPs is outside the scope of this WG's Charter and its authority.
- The September 1, 2013 United Nations Economic and Social Council (ECOSOC) list of of non-governmental organizations in consultative status with it consists of nearly 4,000 organizations, of which 147 organizations were in general consultative status, 2,774 in special consultative status, and 979 on the Roster. The WG also became aware that there might be many more organizations not presently on the ECOSOC list who might claim the right to utilize any new curative rights process (CRP) created for INGOs. The

WG felt that the sheer scale of INGOs, in combination with the factors cited above, weighed against creation of a special DRP.

- While this is the "IGO-INGO Access to Curative Rights Protection Working Group", its Charter (available at http://gnso.icann.org/en/drafts/igo-ingo-crp-access-charter-24jun14-en.pdf) does not require it to develop a CRP mechanism responsive to any special legal status for all INGOs. Rather, the Charter only requires it to consider "*The relevance of specific legal protections under international legal instruments and various national laws for IGOs* ***and certain INGOs*** *(namely, the Red Cross movement and the International Olympic Committee)* (Emphasis added). The Charter also requires that this WG consider "The distinctions (if any) between IGOs and INGOs for purposes of this PDP". The WG has considered those distinctions and determined that they are sufficient such that a specially-tailored DRP for INGO's generally is not warranted, and that the WG should focus its remaining time and attention on the complex issues relating to protections for IGOs.

  The determination to suspend further consideration of INGO access to DRPs takes into consideration the special protections afforded to the Red Cross movement and the International Olympic Committee. The WG noted that although these INGOs are specifically highlighted by the GAC and the Charter provision cited above as enjoying international legal treaty protections and rights under multiple national laws, for the purposes of this PDP they have demonstrated that: (1) they have access to the UDRP and the URS; and (2) they possess trademark rights that they defend and enforce. As such, for the limited purpose of considering access of INGOs to curative rights protections, the WG determined there was no principled reason to distinguish them from other INGOs. The WG noted that legal representatives of the International Olympic Committee are active in the WG and fully support this conclusion.

The determinations cited above represent a strong majority position among all participating members of the WG. A minority view was expressed based on the viewpoint that the case for considering creation of a special DRP even for IGOs was too weak to justify further WG time and effort. That minority view did not prevail and the WG will continue to consider whether any special needs or considerations relating to IGOs justify amendment of the UDRP and the URS or, in the alternative, provide a rationale for creation of a DRP solely for use by IGOs.

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10 Annex C – WG Request for Input from ICANN SO/ACs

Supporting Organization / Advisory Committee Input Template
IGO-INGO Access to Curative Rights Protection Mechanisms Working Group

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December 12, 2014

Dear [SG/C/SO/AC Chair]

We write as the Co-Chairs of the GNSO's IGO-INGO Access to Curative Rights Protections (CRP) Working Group (WG), which was chartered by the GNSO Council to conduct a Policy Development Process (PDP) to determine:

(1) Whether the Uniform Dispute Resolution Policy (UDRP) and/or the Uniform Rapid Suspension procedure (URS) should be amended, and if so, how; or

(2) Whether a separate, narrowly-tailored dispute resolution procedure modeled on the UDRP and/or the URS should be developed, in either case to address the specific needs and concerns of International Governmental Organizations (IGOs) and/or International Non-Governmental Organizations (INGOs).

The origin of this WG lies in the work of the previous GNSO PDP Working Group on the Protection of International Organizational Names in All gTLDs, whose recommendations had been unanimously adopted by the GNSO Council at the GNSO Council meeting on 20 November 2013. One of those recommendations was for the GNSO Council to request an Issue Report on the question of curative rights protection for IGOs and INGOs, which led to the formation of this WG. The WG commenced its work in August 2014. The GNSO's PDP Manual mandates that each PDP WG reach out at an early stage to all GNSO Stakeholder Groups and Constituencies to seek their input, and encourages WGs to seek input from ICANN's Supporting Organizations and Advisory Committees as well. Given the progress and decisions made by our WG, we are now writing to update you on our activities to date, and to provide your group with an opportunity to assist the WG with its assigned task, in respect of the following questions and issues that stem from our Charter and the initial deliberations of the WG.

First, we wish to inform you that the WG has reached a majority decision that there is no principled reason to consider INGOs in general as a special category of

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protected organizations, for purposes of the specific tasks for which the WG was chartered in this PDP. The rationale for this decision is provided in Attachment A.[3]

Question 1: What is the [your organization]'s view on the WG's decision to exclude INGOs from further consideration in this PDP?

Second, the WG has considered most of the background information available to it, including the documentation from the 2001-2 WIPO Process-2 and the previous scoping work done by the ICANN community (including the GNSO) in 2004 and 2007. It has also reviewed the various expressions of GAC advice concerning the issue of curative rights protection for IGOs, as expressed in several GAC Communiques.

At this point, the WG would appreciate input from the [your organization] on the following questions that it will need to answer in the course of this PDP:

- One of the requirements under the UDRP and the URS is that the complainant must possess trademark or substantively similar rights in the word(s) for which the respondent has registered an identical or confusingly similar domain name (this is sometimes commonly called the "standing" requirement). The WG is still investigating the ability and practice of IGOs obtaining trademarks in their names and acronyms.

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?

- A specific issue involving IGOs is the requirement for the organization, both as a domain registrant, and as a complainant under the UDRP and the URS, to agree to submit to the jurisdiction of a national court for purposes of an appeal. This may be problematic for IGOs due to possible issues with sovereign immunity. The WG is currently analyzing the sovereign immunity issue and is conducting research on how various

[3] This determination is made with due recognition of the special protections afforded to the Red Cross movement and International Olympic Committee. Although the International Olympic Committee and the International Red Cross and Red Crescent Movement have access to and have used the existing Rights Protection Mechanisms, they have been afforded special protection by ICANN to reduce their reliance on these RPMs due to the volume of cybersquatting on the desirable names of these beneficent organizations, which compounded their cost and burden of using these RPMs. *See* https://www.icann.org/resources/pages/reserved-2013-07-08-en/. The Working Group understands this, and its statement regarding INGOs in general should be interpreted consistently with this special protection.

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nations have chosen to implement Paris Convention Article 6ter protections within their jurisdictions.

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

- The GAC has advised that any dispute resolution process relating to IGOs should be at no or nominal cost to the IGOs. The WG has noted that the fees and associated legal costs for the UDRP and the URS are substantially less than for litigation involving the same matters. Although the WG's charter tasks it to analyze the issue of costs, the WG does not have the ability to create any fund or other subsidy mechanisms for IGOs who claim an inability to shoulder the costs of existing dispute resolution mechanisms.

Question 4: What is the [your organization]'s view on this issue, and in your view are the existing UDRP and URS fees "nominal"?

In addition to the above questions, the WG Charter, which can be found at http://gnso.icann.org/en/drafts/igo-ingo-crp-access-charter-24jun14-en.pdf, requires the WG to discuss a number of other issues. We would welcome the [your organization]'s feedback on any or all of these Charter questions.

In particular, we would welcome input on the following topics:

- Whether the URS should be a Consensus Policy;
- Considerations of applying policies formulated by this WG to both "legacy" gTLDs and the new gTLDs currently being delegated in this expansion round. (Note: This may potentially include the URS, which is currently mandatory only for gTLDs delegated under ICANN's New gTLD Program. The WG also notes that the GNSO is scheduled to examine the issue of the efficacy of all rights protection mechanisms (RPMs) in both the legacy and new gTLDs in an upcoming Issue Report in early 2015);
- Whether the UDRP or the URS, or both, should be amended to address the particular needs and concerns of IGOs; and, if so, how;
- If the UDRP and/or the URS are not to be amended, whether a specific, narrowly-tailored dispute resolution procedure designed to address the particular needs and concerns of IGOs should be developed.

Thank you for the [your organization]'s consideration of these questions. We look forward to any comments and any input that you and the organization you Chair are

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able to provide to our WG. If possible, please forward your comments and input to us by **Friday, January 23 2015** so that we may fully consider it in our further deliberations.

Best regards,

Philip Corwin & Petter Rindforth (WG Co-Chairs)

11 Annex D – Text of Article 6*ter* of the Paris Convention for the Protection of Industrial Property

11.1 Full Text of Article 6ter of the Paris Convention[1]

Article 6ter of the Paris Convention

Marks: Prohibitions concerning State Emblems, Official Hallmarks, and Emblems of Intergovernmental Organizations

(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.

(c) No country of the Union shall be required to apply the provisions of subparagraph (b), above, to the prejudice of the owners of rights acquired in good faith before the entry into force, in that country, of this Convention. 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.

(2) Prohibition of the use of official signs and hallmarks indicating control and warranty shall apply solely in cases where the marks in which they are incorporated are intended to be used on goods of the same or a similar kind.

[1] The full text of Artcile 6*ter* of the Paris Convention as replicated in this Annex was obtained from this link: http://www.wipo.int/article6ter/en/legal_texts/article_6ter.html

(3) (a) For the application of these provisions, the countries of the Union agree to communicate reciprocally, through the intermediary of the International Bureau, the list of State emblems, and official signs and hallmarks indicating control and warranty, which they desire, or may hereafter desire, to place wholly or within certain limits under the protection of this Article, and all subsequent modifications of such list. Each country of the Union shall in due course make available to the public the lists so communicated. Nevertheless such communication is not obligatory in respect of flags of States.

(b) The provisions of subparagraph (b) of paragraph (1) of this Article shall apply only to such armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations as the latter have communicated to the countries of the Union through the intermediary of the International Bureau.

(4) Any country of the Union may, within a period of twelve months from the receipt of the notification, transmit its objections, if any, through the intermediary of the International Bureau, to the country or international intergovernmental organization concerned.

(5) In the case of State flags, the measures prescribed by paragraph (1), above, shall apply solely to marks registered after November 6, 1925.

(6) In the case of State emblems other than flags, and of official signs and hallmarks of the countries of the Union, and in the case of armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations, these provisions shall apply only to marks registered more than two months after receipt of the communication provided for in paragraph (3), above.

(7) In cases of bad faith, the countries shall have the right to cancel even those marks incorporating State emblems, signs, and hallmarks, which were registered before November 6, 1925.

(8) Nationals of any country who are authorized to make use of the State emblems, signs, and hallmarks, of their country may use them even if they are similar to those of another country.

(9) The countries of the Union undertake to prohibit the unauthorized use in trade of the State armorial bearings of the other countries of the Union, when the use is of such a nature as to be misleading as to the origin of the goods.

(10) The above provisions shall not prevent the countries from exercising the right given in paragraph (3) of Article 6quinquies, Section B, to refuse or to invalidate the registration of marks incorporating, without authorization, armorial bearings, flags, other State emblems, or official signs and hallmarks adopted by a country of

the Union, as well as the distinctive signs of international intergovernmental organizations referred to in paragraph (1), above".

12 Annex E - Text of Final IGO Small Group Proposal and Accompanying Board Letter

4 October 2016

Dr. Stephen D. Crocker, Chair
Board of Directors, ICANN

Donna Austin, GNSO Council Vice-Chair (Contracted Parties House)
Heather Forrest, GNSO Council Vice-Chair (Non-Contracted Parties House)
James Bladel, GNSO Chair

NEXT STEPS IN RECONCILING GAC ADVICE AND GNSO POLICY RECOMMENDATIONS WITH
RESPECT TO THE PROTECTION OF IGO ACRONYMS IN THE DOMAIN NAME SYSTEM

Dear Donna, Heather and James,

I write on behalf of the ICANN Board of Directors, in response to the GNSO Council's letter to the Board of 31 May 2016 concerning next steps in the reconciliation of GAC advice with GNSO policy recommendations relating to the protection of certain Red Cross identifiers and International Governmental Organizations (IGO) acronyms (https://www.icann.org/en/system/files/correspondence/gnso-council-chairs-to-crocker-31may16-en.pdf). We note the GNSO Council's request for specific input from the Board on this topic, and wish to record our appreciation to the Council for the discussion that we had at ICANN56 in Helsinki.

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As we mentioned at the time, staff and Board representatives continue to work with a small group of representatives from the GAC and the IGOs to finalize a proposal regarding IGO acronym protection to be sent to the GAC and the GNSO for consideration. In this regard, I am pleased to inform you that the Board has been notified that the small group has reached consensus on a proposal for a number of general principles and suggestions that it hopes will be acceptable to the GAC and the GNSO. I attach that proposal to this letter for the GNSO's review.

The Board's understanding is that those aspects of the proposal that concern curative rights protection may be referred by the GNSO Council to the GNSO's Working Group that is conducting the ongoing Policy Development Process (PDP) on IGO-INGO Access

to Curative Rights Mechanisms. We understand further that the Working Group is currently discussing preliminary recommendations that it intends to publish for public comment soon, in the form of an Initial Report. We therefore hope that the presentation of the attached proposal is timely, and will be fully considered by the Working Group regarding the specific topic of enabling adequate curative rights protections for IGO acronyms, and in conjunction with the GNSO Council's management of the overall process for possible reconciliation of GNSO policy with GAC advice. We also acknowledge, in line with prior correspondence between the Board's New gTLD Program Committee and the GNSO Council, that the Board will not take action with respect to GAC advice on curative rights protections for IGOs prior to the conclusion of the GNSO's PDP.

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Similarly, the Board hopes that the other elements of the attached proposal will be helpful to the GNSO in its deliberations over considering possible amendments to its previously adopted policy recommendations on preventative protection for IGO acronyms. We have acknowledged previously the process in the GNSO's PDP Manual that will apply to the consideration of any such amendment prior to Board consideration of the policy recommendations (https://gnso.icann.org/en/correspondence/chalaby-to-robinson-16jun14-en.pdf).

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On behalf of the Board, I wish to reiterate our belief that the most appropriate approach for the Board in this matter is to help to facilitate a procedural way forward for the reconciliation of GAC advice and GNSO policy prior to the Board formally considering substantive policy recommendations. We note that the attached proposal concerns only the matter of protection for IGO acronyms, and does not also cover the outstanding issue of protection for Red Cross national society names and the identifiers of the international Red Cross movement. We hope to continue discussion on this topic with the GNSO and the GAC, and anticipate a fuller discussion amongst all affected parties concerning resolution of the issue of protections for the Red Cross and IGOs at the upcoming ICANN57 meeting in Hyderabad in early November. We will direct ICANN staff to coordinate the Hyderabad scheduling for each of our groups accordingly.

We continue to appreciate the GNSO's hard work in developing policy recommendations and look forward to working together with you on this matter. In the meantime, we note that the temporary protections afforded to IGO acronyms remain in place while we continue our discussions.

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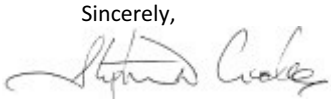
Thank you.

Sincerely,



Dr. Stephen D. Crocker
Chair, ICANN Board of Directors

IGO "SMALL GROUP" PROPOSAL FOR DEALING WITH THE PROTECTION OF IGO ACRONYMS AT THE SECOND LEVEL OF THE DOMAIN NAME SYSTEM (4 October 2016)

Executive Summary

This Paper sets out a proposal to deal with the protection of IGO acronyms at the second level in the domain name system (the ICANN Board permanently implemented protections for full names at the top and second levels on 30 April 2014). It describes a process whereby an Eligible IGO (as defined in this Paper) may be notified of a third party registration of its acronym in a new gTLD launched under ICANN's New gTLD Program, as well as the proposed establishment of appropriate dispute resolution processes to enable protection of an Eligible IGO's acronym in appropriate circumstances in all gTLDs.

The proposal outlined in this Paper was developed by the "small group"[1] of representative IGOs in conjunction with GAC and Board (NGPC) representatives. ICANN staff assisted with certain aspects of drafting as well as subject matter advice during the process.

It is hoped that this Paper, coupled with further detailed discussions with the GNSO, the GAC and staff as to the feasibility of these proposals and their implementation will lead to an agreed permanent solution for the protection of IGO acronyms in the domain name system.

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Background

[1] This informal IGO "small group" had been formed following the ICANN51 meeting in October 2014, comprising representatives from various IGOs working with GAC and Board (NGPC) representatives to develop this proposal in order to facilitate a reconciliation of GAC advice and GNSO policy recommendations on the issue of IGO acronyms protection. See, e.g., the GAC's ICANN53 Buenos Aires Communique (June 2015) (https://gacweb.icann.org/download/attachments/28278854/GAC Buenos Aires 53 Communique.pdf?version=1&modificationDate=1436284325000&api=v2); this January 2015 letter from the NGPC Chair to the GNSO Council https://gnso.icann.org/en/correspondence/chalaby-to-robinson- 15jan15-en.pdf); this July 2015 letter from the OECD Secretary-General to ICANN's CEO (https://www.icann.org/en/system/files/correspondence/gurria-to-chehade-20jul15-en.pdf); and the most recent GAC Communique from ICANN56 Helsinki (June 2016) (https://gacweb.icann.org/download/attachments/27132037/20160630_GAC ICANN 56 Communique_FINAL %5B1%5D.pdf?version=1&modificationDate=1469016353728&api=v2).

The IGO-GAC-NGPC small group that has been discussing the topic of appropriate IGO protections, based on the NGPC's initial proposal of March 2014, agree that the following general principles should underpin the framework for any permanent solution concerning the protection of IGO names and acronyms in the domain name system:

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1. The basis for protection of IGO acronyms should not be founded in trademark law, as IGOs are created by governments under international law and are in an objectively different category of rights-holders;
2. As IGOs perform important global missions with public funds, the implementation of appropriate protections for IGO names and acronyms is in the public interest; and
3. The Eligible IGOs that would qualify for protections under this proposal are those that are named on the GAC List of IGOs (initially submitted to ICANN in March 2013) as may be updated from time to time in accordance with GAC advice issued on 22 March 2013.

Proposals

1. Pre-Registration Protections for IGO Acronyms:

- A process will be established whereby Eligible IGOs will be able to submit to the GAC Secretariat within a defined time period and at no cost to them, up to two acronyms per IGO (representing their names in up to two different languages) to be added to a mechanism functionally equivalent to the Trademark Clearinghouse (TMCH).
- Participating Eligible IGOs shall designate a contact email address (which shall be updated from time to time by the IGO) via the GAC Secretariat and within a defined time period to receive email notifications of domain name registrations corresponding to their submitted IGO Acronyms for the duration of the existence of any mechanism functionally equivalent to the TMCH.
- Where the above proposals differ from the existing GNSO policy recommendations, the GNSO will be requested to consider modifying its recommendations, as envisaged in the 2014 discussion and correspondence between the GNSO Council and the NGPC.

2. Dispute Resolution Mechanism

- ICANN will facilitate the development of rules and procedures for a separate (i.e., separate from the existing UDRP) dispute resolution mechanism to resolve claims of abuse of domain names that are registered and being used in situations where the registrant is pretending to be the IGO or that are otherwise likely to result in fraud or deception, *and* (a) are identical to an IGO acronym; (b) are confusingly similar to an IGO acronym; or (c) contain the IGO acronym.

- Decisions resulting from this mechanism shall be “appealable” through an arbitral process to be agreed.

3. Rapid relief mechanism

- ICANN will facilitate the creation of a mechanism through which an Eligible IGO may obtain a rapid temporary suspension of a domain name in situations where it would not be reasonable for it to use the agreed Dispute Resolution Mechanism, as per the specific conditions defined below. For clarity, this procedure would not be intended for use in any proceedings with material open questions of fact, but only clear-cut cases of abuse.

- To obtain such relief an Eligible IGO must demonstrate that:
  1) The subject domain name is (a) identical or confusingly similar to an IGO acronym, and (b) registered and used in situations where the registrant is pretending to be the IGO or that are otherwise likely to result in fraud or deception; and
  2) there is an obvious risk of imminent harm from the claimed abuse of such domain name, (*e.g.* such as fraudulently soliciting donations in the wake of a humanitarian disaster).
- Relief under this mechanism will be the same as that provided under the URS.

4. Costs related to the mechanisms referred to in this proposal

- ICANN will work with the IGOs and the mechanism providers to ensure that IGOs are not required to pay filing or any other ICANN-defined fees to access and use those mechanisms unless the examiner finds the case to have been brought in bad faith. Three or more findings of cases brought in bad faith by the same IGO may lead to that IGO being suspended from using the mechanism for a period of one year.

5. Glossary

- *Eligible IGO*: An intergovernmental organisation whose name appears on the list attached as Annex 2 to the 22 March 2013 Letter from Heather Dryden, Chair of the Governmental Advisory Committee to Steve Crocker, Chair, ICANN Board as may be updated from time to time in accordance with the GAC advice issued on 22 March 2013.
- *IGO Acronym*: An abbreviation of the names of Eligible IGOs in up to two languages.

Next Steps

1) This proposal will be circulated to and discussed with the larger group of IGOs, and to the GAC and the GNSO, including the Chairs of the Curative Rights PDP WG;

2) Subject to advice from the GAC and the GNSO, the GDD will consider adopting the amended proposal and instructing staff to work up the relevant implementation details for subsequent discussion and (as appropriate) approval; and

3) Temporary protection for IGO Acronyms will cease when the new process is implemented (as noted above, IGO full names have been accorded protection at both the top and second levels pursuant to the ICANN Board's decision of 30 April 2014).

13 Annex F - Compilation of GAC Communications and Advice Issued Concerning IGO Protections

COMPILATION OF GAC COMMUNICATIONS AND ADVICE CONCERNING PROTECTION FOR IGO NAMES & ACRONYMS

April 2012 (Letter to ICANN Board)
The GAC has considered the Board's request for policy advice on the expansion of protections to include IGOs, and advises that in the event that additional IGOs are found to meet the above criteria, this would be a consideration in the formulation of GAC advice for IGO protections in future rounds, as well as consideration of protections for IGOs, more generally.
Therefore, the GAC advises that no additional protections should be afforded to IGOs, beyond the current protections found in the Applicant Guidebook, for the current round.

October 2012 (Toronto Communique)
While the GAC continues its deliberations on the protection of the names and acronyms of Intergovernmental Organizations (IGOs) against inappropriate third-party registration;

The GAC advises the ICANN Board that:

- In the public interest, implementation of such protection at the second level must be accomplished prior to the delegation of any new gTLDs, and in future rounds of gTLDs at the second and top level.
- The GAC believes that the current criteria for registration under the .int top level domain, which are cited in the Applicant Guidebook as a basis for an IGO to file a legal rights objection, provide a starting basis for protecting IGO names and acronyms in all new gTLDs.
- Building on these criteria, the GAC and IGOs will collaborate to develop a list of the names and acronyms of IGOs that should be protected. Pending further work with ICANN on specific implementation measures for this initiative, the GAC believes this list of IGOs should be approved for interim protection through a moratorium against third-party registration prior to the delegation of any new gTLDs.

April 2013 (Beijing Communique)
The GAC stresses that the IGOs perform an important global public mission with public funds, they are the creations of government under international law, and their names

and acronyms warrant special protection in an expanded DNS. Such protection, which the GAC has previously advised, should be a priority.

This recognizes that IGOs are in an objectively different category to other rights holders, warranting special protection by ICANN in the DNS, while also preserving sufficient flexibility for workable implementation.

The GAC is mindful of outstanding implementation issues and commits to actively working with IGOs, the Board, and ICANN Staff to find a workable and timely way forward.
Pending the resolution of these implementation issues, the GAC reiterates its advice to the ICANN Board that … appropriate preventative initial protection for the IGO names and acronyms on the provided list be in place before any new gTLDs would launch.

July 2013 (Durban Communique)
The GAC reaffirms its previous advice from the Toronto and Beijing Meetings that IGOs are in an objectively different category to other rights holders thus warranting special protection by ICANN. IGOs perform important global public missions with public funds and as such, their identifiers (both their names and their acronyms) need preventative protection in an expanded DNS.

The GAC understands that the ICANN Board, further to its previous assurances, is prepared to fully implement GAC advice; an outstanding matter to be finalized is the practical and effective implementation of the permanent preventative protection of IGO acronyms at the second level.

The GAC advises the ICANN Board that:

The GAC is interested to work with the IGOs and the NGPC on a complementary cost-neutral mechanism that would:

a. provide notification to an IGO if a potential registrant seeks to register a domain name matching the acronym of an IGO at the second level, giving the IGO a reasonable opportunity to express concerns, if any; and

b. allow for an independent third party to review any such registration request, in the event of a disagreement between an IGO and potential registrant.

The initial protections for IGO acronyms confirmed by the NGPC at its meeting of 2 July 2013 should remain in place until the dialogue between the GAC, NGPC, and IGO representatives ensuring the implementation of preventative protection for IGO acronyms at the second level is completed.

November 2013 (Buenos Aires Communique)

The GAC advises the ICANN Board that:

The GAC, together with IGOs, remains committed to continuing the dialogue with NGPC on finalising the modalities for permanent protection of IGO acronyms at the second level, by putting in place a mechanism which would:

a. provide for a permanent system of notifications to both the potential registrant and the relevant IGO as to a possible conflict if a potential registrant seeks to register a domain name matching the acronym of that IGO;
b. allow the IGO a timely opportunity to effectively prevent potential misuse and confusion;
c. allow for a final and binding determination by an independent third party in order to resolve any disagreement between an IGO and a potential registrant; and
d. be at no cost or of a nominal cost only to the IGO.

The GAC looks forward to receiving the alternative NGPC proposal adequately addressing this advice. The initial protections for IGO acronyms should remain in place until the dialogue between the NGPC, the IGOs and the GAC ensuring the implementation of this protection is completed.

March 2014 (Singapore Communique)
The GAC recalls its previous public policy advice from the Toronto, Beijing, Durban and Buenos Aires Communiqués regarding protection for IGO names and acronyms at the top and second levels and awaits the Board's response regarding implementation of the GAC advice.

June 2014 (London Communique)
The GAC:

- reaffirms its advice from the Toronto, Beijing, Durban, Buenos Aires and Singapore Communiqués regarding protection for IGO names and acronyms at the top and second levels, as implementation of such protection is in the public interest given that IGOs, as created by governments under international law are objectively different rights holders;
- notes the NGPC's letter of 16 June 2014 to the GNSO concerning further steps under the GNSO Policy Development Process while expressing concerns that the process of implementing GAC advice has been so protracted;
- welcomes the NGPC's assurance that interim protections remain in place pending any such process; and
- confirms its willingness to work with the GNSO on outcomes that meet the GAC's concerns.

October 2014 (Los Angeles Communique)
The GAC reaffirms its advice from the Toronto, Beijing, Durban, Buenos Aires, Singapore and London Communiqués regarding protection of IGO names and

acronyms at the top and second levels, as implementation of such protection is in the public interest given that IGOs, as created by governments under international law, are objectively different right holders; namely,

i. Concerning preventative protection at the second level, the GAC reminds the ICANN Board that notice of a match to an IGO name or acronym to prospective registrants, as well as to the concerned IGO, should apply in perpetuity for the concerned name and acronym in two languages, and at no cost to IGOs;

ii. Concerning curative protection at the second level, and noting the ongoing GNSO PDP on access to curative Rights Protection Mechanisms, the GAC reminds the ICANN Board that any such mechanism should be at no or nominal cost to IGOs; and further, in implementing any such curative mechanism,

The GAC advises the ICANN Board:

- that the UDRP should not be amended;
- welcomes the NGPC's continued assurance that interim protections remain in place pending the resolution of discussions concerning preventative protection of IGO names and acronyms; and
- supports continued dialogue between the GAC (including IGOs), the ICANN Board (NGPC) and the GNSO to develop concrete solutions to implement long-standing GAC advice.

February 2015 (Singapore Communique)
The GAC will continue to work with interested parties to reach agreement on appropriate permanent protections for names and acronyms for Inter-Governmental Organisations. This will include working with the GNSO PDP Working Group on IGO-INGO Access to Curative Rights Protection Mechanisms; and with IGOs and the NGPC.

June 2015 (Buenos Aires Communique)
Consistent with previous GAC advice in previous Communiqués regarding protection for IGO names and acronyms at the top and second levels, the GAC takes note of the progress made by the informal “small group” towards developing mechanisms in line with previous GAC advice, and calls upon the small group to meet in the near term with a view towards developing a concrete proposal for these mechanisms before the next ICANN meetings in Dublin; and welcomes the preventative protections that remain in place until the implementation of permanent mechanisms for protection of IGO names and acronyms at the top and second levels.

October 2015 (Dublin Communique):
The GAC advises the Board:

- to facilitate the timely conclusion of discussions of the “small group” and the NGPC in an effort to resolve the issue of IGO protections.

June 2016 (Helsinki Communique):

The GAC remains committed to protections of IGO names and acronyms at the top and second levels, which are in the public interest given that IGOs, as publicly-funded entities created by governments under international law, are objectively unique rights holders.

The GAC recalls its advice since the 2012 Toronto Communiqué in this regard, and remains of the view that: (i) concerning preventive protection at the second level, that notice of a match to an IGO name or acronym to prospective registrants as well as the concerned IGO should be mandated in perpetuity for the concerned name and acronym in two languages and at no cost to IGOs; (ii) concerning curative protection at the second level, and noting the ongoing GNSO PDP on access to curative rights protection measures, that any such mechanism should be separate from the existing UDRP, offer parties an "appeal" through arbitration, and be at no or nominal cost to IGOs;

The GAC notes the ongoing work of the informal "small group" and the efforts of those involved to develop mechanisms that implement the above-mentioned advice. The GAC remains of the view that the preventive protections for IGO acronyms should be maintained pending the implementation of mechanisms for the permanent protection of IGO names and acronyms at the top and second levels.

November 2016 (Hyderabad Communique):
The GAC takes note of the letter from the Secretary General of the United Nations to Ministers regarding policy development at ICANN related to the potential unauthorized use of IGO names 8 and acronyms in the Internet Domain Name System. In this respect, the GAC reiterates its concern regarding the issue set forth by the UN Secretary General.

The GAC advises the ICANN Board:

I. To take action and engage with all parties in order to facilitate, through a transparent and good faith dialogue, the resolution of outstanding inconsistencies between GAC advice and GNSO recommendations with regard to the protection of IGO acronyms in the DNS and to report on progress at ICANN 58.

II. That a starting basis for resolution of differences between GAC Advice and existing GNSO Recommendations would be the small group compromise proposal set out in the October 4, 2016 letter from the ICANN Board Chair to the GNSO, namely that ICANN would establish all of the following, with respect to IGO acronyms at the second level:

- a procedure to notify IGOs of third-party registration of their acronyms;
- a dispute resolution mechanism modeled on but separate from the UDRP, which provides in particular for appeal to an arbitral tribunal instead of national courts, in conformity with relevant principles of international law; and

- an emergency relief (e.g., 24-48 hours) domain name suspension mechanism to combat risk of imminent harm.

III. That, to facilitate the implementation of the above advice, the GAC invites the GNSO Working Group on Curative Rights Protection Mechanisms to take the small group proposal into account.
IV. That, until such measures are implemented, IGO acronyms on the GAC-provided list remain reserved in two languages.

Rationale:
IGOs undertake global public service missions, and protecting their names and acronyms in the DNS is in the global public interest. IGOs are unique treaty-based institutions created by governments under international law. The small group compromise strikes a reasonable balance between rights and concerns of both IGOs and legitimate third parties. ICANN's Bylaws and Core Values indicate that the concerns and interests of entities most affected, here IGOs, should be taken into account in policy development processes.

March 2017 (Copenhagen Communique):
The GAC notes that a dialogue facilitated by the Board on this topic has begun between the GAC and the GNSO (including its relevant Working Groups). The GAC expects that these discussions would resolve the long-outstanding issue of IGO acronym protections and understands that temporary protections will continue to remain in place until such time as a permanent agreed solution is found. Based upon the facilitated discussions up to this stage,

The GAC advises the ICANN Board to:

I. pursue implementation of (i) a permanent system of notification to IGOs regarding second-level registration of strings that match their acronyms in up to two languages and (ii) a parallel system of notification to registrants for a more limited time period, in line with both previous GAC advice and GNSO recommendations;
II. facilitate continued discussions in order to develop a resolution that will reflect (i) the fact that IGOs are in an objectively unique category of rights holders and (ii) a better understanding of relevant GAC Advice, particularly as it relates to IGO immunities recognized under international law as noted by IGO Legal Counsels; and
III. urge the Working Group for the ongoing PDP on IGO-INGO Access to Curative Rights Protection Mechanisms to take into account the GAC's comments on the Initial Report.

Rationale:

This Advice captures achievements made to date in the facilitated discussions, in the hope that this will be instrumental in resolving this long-standing issue at the earliest opportunity.

June 2017 (Johannesburg Communique):
The GAC reiterates its Advice that IGO access to curative dispute resolution mechanism should:

- be modeled on, but separate from, the existing Uniform Dispute Resolution Policy (UDRP)
- provide standing based on IGOs' status as public intergovernmental institutions, and
- respect IGOs' jurisdictional status by facilitating appeals exclusively through arbitration.

The GAC expresses concern that a GNSO working group has indicated that it may deliver recommendations which substantially differ from GAC Advice, and calls on the ICANN Board to ensure that such recommendations adequately reflect input and expertise provided by IGOs.

Rationale:
This Advice aligns with the view of governments that IGOs perform important public functions for citizens worldwide, and that protecting their identities in the DNS serves to minimize the potential for consumer harm.

November 2017 (Abu Dhabi Communique):
The GAC recalls its longstanding advice on the topic of IGO protections and is closely monitoring the ongoing PDP on IGO-INGO Access to Curative Rights Protection Mechanisms. The GAC remains open to working with the GNSO to try to find a mutually-agreeable resolution to this issue. The GAC also recalls the values of openness, transparency and inclusion, and representativeness and process integrity, that are respectively enshrined in ICANN's Bylaws and GNSO Operating Procedures.

The GAC advises the ICANN Board to:
a. review closely the decisions on this issue in order to ensure that they are compatible with these values and reflect the full factual record.

Rationale:

Although the ICANN Community is still awaiting the final report for the PDP on IGO-INGO Access to Curative Rights Protection Mechanisms, preliminary communications indicate that the Working Group's proposal will conflict with GAC advice on the issue and GAC input to the PDP as well as the comments of over 20 IGOs who submitted comments to the Working Group's draft report. The Board plays an important role in ensuring the proper application of the ICANN Bylaws and GNSO Operating Procedures,

and the GAC expects that a basic safeguard would be a close Board review of GNSO policy recommendations, especially where such recommendations directly contradict GAC advice.

14 Annex G – Final Memo from External Legal Expert

14.1 Full Text of Legal Memo on IGO Jurisdictional Immunity Prepared by Professor Edward Swaine

Comment [PC24]: When will Swainme memo text be inserted?

Comment [MW25R24]: We'll be sure to insert it for the final Consensus Call – inserting it now will make the document extremely long.

15 Annex [ ] – Background to the WG's Initial Recommendation concerning Article 6*ter* of the Paris Convention for the Protection of Industrial Property

The following text is excerpted from the WG's Initial Report, where it described the scope of this treaty provision and outlined the requisite notification process. It is being reproduced in this Annex to provide the full context for the WG's initial conclusion.

A. Purpose, Scope and Limitations of Article 6ter

The purpose of Article 6*ter* is to protect armorial bearings, flags and other State emblems of the States party to the Paris Convention[1] as well as official signs and hallmarks indicating control and warranty adopted by them. This protection was extended to armorial bearings, flags, other emblems, and abbreviations and names of international intergovernmental organizations by the Revision Conference of Lisbon in 1958.

Under paragraph 6(1)(a) of Article 6*ter*, the States that are party to the Paris Convention *"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."* Under paragraph 6(1)(b), the protections described by paragraph (a) "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".

It should be noted that paragraph (c) clarifies that States "shall not be required to apply the said provisions when the use or registration referred to in subparagraph (a), above,

[1] Note that, as a result of the TRIPS Agreement which came into effect in January 1995, the obligations for States party to the Paris Convention also became applicable to any State that becomes a member of the World Trade Organization, regardless of whether that State also signed up to the Paris Convention individually.

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." ……

B. The Communications Procedure to be followed by IGOs under Article 6ter[2]

Under Article 6*ter*, States and IGOs wishing to avail themselves of the protections have to follow a prescribed procedure. This requires the sending of a communication regarding the particular sign or emblem for which protection is sought to the International Bureau of WIPO, which will then communicate it to the other States party to the Paris Convention or otherwise bound to observe the obligations thereunder. The current WIPO communication procedure involves the periodical electronic publication by WIPO of those signs and emblems (including IGO names and acronyms) for which protection under Article 6*ter* is being requested, in what is known as the Article 6ter Express Database (http://www.wipo.int/ipdl/en/6ter/). The nature of the names and acronyms concerned as well as the IGO that has requested their protection is published, in English and French, together with the individual reproductions of the names and acronyms concerned.

The electronic publication is made on a semi-annual basis, on the last working day of the months of March and September. A link to the most recent communications is inserted into the database, which indicates the communications that were received by WIPO during the six months previous to the most current publication. The date of publication is considered to constitute the date of receipt of the communication by individual States party to the Paris Convention and any other party bound to apply Article 6*ter* of the Paris Convention[3].

There does not appear to be any procedure by which any publication may be investigated, examined, or challenged. In this regard, the inclusion within the database bears similarity to registrations in jurisdictions that do not subject trademark registrations to an investigatory process. The WG notes that UDRP panels have typically found trademark registrations that are automatic or unexamined (such as United States

[2] See http://www.wipo.int/article6ter/en/communication.html for a description of the communications procedure, and http://www.wipo.int/article6ter/en/general_info.html for general information about Article 6*ter*.

[3] See http://www.wipo.int/article6ter/en/communication.html. The specific process for IGOs is also detailed by WIPO at http://www.wipo.int/article6ter/en/igos.html.

(US) state registrations as opposed to US federal registrations) are not owed the same deference under the UDRP as examined registrations[4].....

[4] See, e.g., Para 1.1, *WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition* (WIPO Overview 2.0), World Intellectual Property Organization (2011).

16 Annex [ ] – Information on WG Review of Public Comments Received to the Initial Report

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Page 5: [2] Deleted Mary Wong 11/28/17 4:34:00 PM

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The WG does not recommend any specific changes to the substantive grounds under the UDRP or URS upon which a complainant may file and succeed on a claim against a respondent (e.g. as listed in Section 4(a)(i) – (iii) of the UDRP). However, the WG proposes that the Policy Guidance document referred to in Recommendation #2 includes a further recommendation that UDRP

and URS panelists should take into account the limitation enshrined in Article 6*ter*(1)(c) of the Paris Convention in determining whether a registrant against whom an IGO has filed a complaint registered and used the domain name in bad faith.

Recommendation #4:

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[NOTE THAT A WORDING MAY BE NEEDED IF ONE OF THE OPTIONS UNDER DISCUSSION IS ADOPTED, e.g.:

If it is Option 3 (respondent waives monetary claims): "the Mutual Jurisdiction clause of the UDRP and URS be amended to include language dealing with the case where a losing respondent, as against an IGO complainant, commences legal proceedings in a court of competent jurisdiction following the initial panel determination, as in this situation the respondent must waive any right to any judicial remedy other than the right to retain the domain name or names if the respondent's claim succeeds."

If it is Option 4 (arbitration for domains registered after this PDP policy becomes effective): "the Mutual Jurisdiction clause of the UDRP and URS be amended to include language dealing with the case where a losing respondent, as against an IGO complainant, wishes to have the initial panel determination in relation to a domain name or names registered after the effective date of the WG's proposed Consensus Policy reconsidered, as in this case arbitration rather than a judicial proceeding will be mandatory"

Page 7: [5] Deleted **Author**

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.

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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.

An Important Note regarding Recommendation #4:

The WG has yet to conclude which of the additional two options outlined above represents the optimal approach, or if a third alternative is preferable. As such, the WG has identified a number of different factors, including possible policy benefits and problems, to consider when examining the various options. Please see Section 2 of this Initial Report for further detail and context. The WG welcomes specific input from the community on this open question.

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The following preliminary recommendations are being published by the WG for public comments. All input received will be reviewed by the WG, and if deemed appropriate, incorporated into the WG's Final Report. This review process may result in amendments or updates to the preliminary recommendations contained in this Initial Report.

Several open questions on which the WG has yet to reach preliminary agreement or for which the WG would like to seek community input prior to finalizing its recommendations on those topics are also listed in this Section; in particular, community feedback is sought on whether Option 1 or Option 2 in relation to Recommendation #4, or some other alternative formulation, is preferred.

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the WG's recommendation (below) that even in the absence of national trademark protections or common law rights an IGO may fulfill the "standing" requirement under the UDRP and URS as long as the IGO has completed the requisite notifications and communications procedure under Article 6*ter* of the Paris Convention for the Protection of Industrial Property;

(3)

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Additional Background to this Recommendation

A. Purpose, Scope and Limitations of Article 6ter

The purpose of Article 6*ter* is to protect armorial bearings, flags and other State emblems of the States party to the Paris Convention[1] as well as official signs and hallmarks indicating control and warranty adopted by them. This protection was extended to armorial bearings, flags, other emblems, and ***abbreviations and names*** of international intergovernmental organizations by the Revision Conference of Lisbon in 1958.

Under paragraph 6(1)(a) of Article 6*ter*, the States that are party to the Paris Convention *"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."* Under paragraph 6(1)(b), the protections described by paragraph (a) "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

[1] Note that, as a result of the TRIPS Agreement which came into effect in January 1995, the obligations for States party to the Paris Convention also became applicable to any State that becomes a member of the World Trade Organization, regardless of whether that State also signed up to the Paris Convention individually.

names, that are already the subject of international agreements in force, intended to ensure their protection".

It should be noted that paragraph (c) clarifies that States "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." As discussed further below, the WG believes that this limitation on the extent of the obligations of States in relation to Article 6*ter* is likely to be, and should be, taken into account by UDRP and URS panelists in considering whether the registrant has registered and used the domain name in question in bad faith.

B. The Communications Procedure to be followed by IGOs under Article 6ter[2]

Under Article 6*ter*, States and IGOs wishing to avail themselves of the protections have to follow a prescribed procedure. This requires the sending of a communication regarding the particular sign or emblem for which protection is sought to the International Bureau of WIPO, which will then communicate it to the other States party to the Paris Convention or otherwise bound to observe the obligations thereunder. The current WIPO communication procedure involves the periodical electronic publication by WIPO of those signs and emblems (including IGO names and acronyms) for which protection under Article 6*ter* is being requested, in what is known as the Article 6ter Express Database (http://www.wipo.int/ipdl/en/6ter/). The nature of the names and acronyms concerned as well as the IGO that has requested their protection is published, in English and French, together with the individual reproductions of the names and acronyms concerned.

The electronic publication is made on a semi-annual basis, on the last working day of the months of March and September. A link to the most recent communications is inserted into the database, which indicates the communications that were received by WIPO during the six months previous to the most current publication. The date of publication is considered to constitute the date of receipt of the communication by individual States party to the Paris Convention and any other party bound to apply Article 6*ter* of the Paris Convention[3].

There does not appear to be any procedure by which any publication may be investigated, examined, or challenged. In this regard the inclusion within the database bears similarity to registrations in jurisdictions that do not subject trademark registrations to an investigatory process. The WG notes that UDRP panels have typically found trademark registrations that are automatic or unexamined (such as United States (US) state registrations as opposed to US

[2] See http://www.wipo.int/article6ter/en/communication.html for a description of the communications procedure, and http://www.wipo.int/article6ter/en/general_info.html for general information about Article 6*ter.*

[3] See http://www.wipo.int/article6ter/en/communication.html. The specific process for IGOs is also detailed by WIPO at http://www.wipo.int/article6ter/en/igos.html.

federal registrations) are not owed the same deference under the UDRP as examined registrations[4]. By stating its position above regarding the acceptance of Article 6*ter* notification as conferring standing under the UDRP, the WG is not intending to alter existing UDRP jurisprudence or suggest that the pre-existing standards used by UDRP panelists with regard to the recognition of trademarks obtained via an automated or unexamined process be altered in any manner.

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The WG does not recommend any specific changes to the substantive grounds under the UDRP or URS upon which a complainant may file and succeed on a claim against a respondent (e.g. as listed in Section 4(a)(i) – (iii) of the UDRP). However, the WG proposes that the Policy Guidance document referred to in Recommendation #2 includes a further recommendation that UDRP and URS panelists should take into account the limitation enshrined in Article 6*ter*(1)(c) of the Paris Convention in determining whether a registrant against whom an IGO has filed a complaint registered and used the domain name in bad faith.

In the view of the WG, a UDRP or URS panelist's/panel's finding that the registration and use of the domain name in question is of such a nature as to suggest to the public that a connection exists between the IGO concerned and the registrant, or that such registration and use is likely of such a nature as to mislead the public as to the existence of a connection between the respondent-registrant and the IGO in question, should be considered as indicative of bad faith.

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 fall to 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[5], the WG recommends that in that case:

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The Article 6*ter* notification process is relatively straightforward and that once an IGO has filed the requisite notice with WIPO it should possess the necessary standing to file a complaint.

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[4] See, e.g., Para 1.1, *WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition* (WIPO Overview 2.0), World Intellectual Property Organization (2011).

[5] The Working Group 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 national law. It is not within the purview of ICANN to make any recommendations in respect of a judicial determination of this legal issue.