## **ANNEX TO THE 7 MARCH 2018 STRAW MAN PAPER: THE SIX POLICY OPTIONS AND A SUMMARY ANALYSIS**

The six policy options under consideration for handling the issue of IGO jurisdictional immunity were developed following discussions at ICANN60 in October 2017, where three options had been presented for community feedback. The current text of the six options are:

Option 1 (unchanged from the text presented for the October 2017 poll):

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

Option 2 (unchanged from the text presented for the October 2017 poll):

* ***In relation to domain names with a CREATION DATE before the (Policy Effective Date), then Option [1] applies. In relation to domain names with a CREATION DATE on or after the (Policy Effective Date), Option [3] shall apply. After five (5) years or 10 instances of Option [3] being utilized, whichever occurs first, ICANN and the various dispute resolution providers (including any who have administered arbitration proceedings under the new Option [3] will conduct a review to determine the impact, both positive and negative, as a result of “trying out” Option [3].***

Option 3 (unchanged from the text presented for the October 2017 poll):

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

Option 4 (proposed by Zak Muscovitch and presented on the Working Group’s 14 December 2017 call):

* ***Our initial report and recommendation (that no change is required) remains valid and should be reflected in the published report of this WG.  Our report should advise that even if a change were advisable or appropriate, such would necessarily require modifications to the UDRP and its accompanying rules.  As such changes are within the ambit of the RPM WG, we feel it inappropriate to inject our proposals in that regard. Accordingly, the IGO WG strongly recommends that any changes to how the UDRP procedure is drafted and employed for IGO's, if any, should be referred to the RPM WG for consideration within its broader mandate to review the UDRP.***

Option 5 (proposed by George Kirikos, modified from an earlier proposal and also noted as a proposal that can be included in Option 4 in the event of a referral to the RPM Working Group):

* ***The text of both the UDRP and URS rules and policies shall be modified so that, in the event a domain name dispute (UDRP or URS) is initiated by an IGO as complainant and a registrant commences an "in rem" action in a court of mutual jurisdiction concerning that domain name, the registrar shall treat that court action in the same manner as if an "in personam" action had been brought directly against the IGO.***

Option 6 (proposed by Paul Tattersfield, with a slight amendment to the text following discussion on the Working Group’s 14 December call):

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

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The Working Group has not discussed these options since a formal appeal was filed on 19 December 2017 by Mr. George Kirikos challenging the co-chairs’ authority and proposal to use an anonymous poll. The appeal has proceeded through the first stage under the GNSO Working Group Guidelines (i.e. a discussion between the appellant and the co-chairs) as well as the second stage (i.e. a discussion between the appellant and the GNSO Chair or her designated representative). As of 7 March 2018, a final resolution of the appeal agreed on by all affected parties has not yet been announced to the Working Group.

**Brief Analysis of the Six Options**

Option 1 - the Working Group should consider the implications under Option 1 of setting aside the original UDRP or URS decision in which the IGO complainant prevailed. While some Working Group members believe that this merely reflects the situation that would have arisen had the IGO not filed a UDRP or URS complaint, the fact remains that such a proceeding was commenced in which a panelist found in favor of the IGO. Reversing that decision without a judicial or other appellate examination of the merits of the case may potentially place the IGO in a worse position than the current state of affairs, where the initial decision stands unless and until the national court rules in favor of the registrant on the substantive (not merely procedural) issues.

Option 2- As this is a combination of Options 1 & 3 (discussed below), it also has the disadvantages potentially associated with both options.

Option 3 - While Option 3 incorporates the possibility of arbitration (an option that some IGOs have favored though generally as an alternative precluding a judicial proceeding), it nevertheless still requires the IGO to first appear in the national court to plead its case for jurisdictional immunity. Arbitration only “kicks in” after the IGO successfully does so, at the registrant’s option. Any amendment that may be needed to the UDRP and URS will relate purely to clarifying when and how arbitration in these circumstances will be used. As arbitration is not currently precluded by the UDRP or URS, it is not clear that Option 3 will necessarily address the concerns and needs of IGOs as noted in the Issue Report preceding this PDP. Option 3 (and Option 6 below) does, however, attempt to expressly include arbitration as an option for the parties, albeit only upon a successful immunity plea by the IGO in court.

Option 4 – Option 4 means that there will essentially be no change to the current processes as a result of this PDP. The RPM Working Group will not begin to address a review of the UDRP till possibly mid-2019; referring the question to the group will also mean it needs to consider how its current discussions about the URS should factor in IGO concerns. In addition, previous community discussions had not yielded any consensus on how to deal with IGO issues in the UDRP context. While adopting Option 4 may allow the Curative Rights Working Group to claim consensus on its single remaining issue, it will also have the effect of merely postponing the same complex discussion for another day in another GNSO group.

Option 5 - As was the case with a previous iteration of this option, this option may not adequately take into account the fact that many jurisdictions have not yet clearly indicated that domain names are treated as property and can be handled as an “in rem” action. In addition, differences between civil law and common law jurisdictions are not accounted for. This option could therefore have the effect of treating domain names differently purely as a result of the applicable Mutual Jurisdiction in any one case.

Option 6 – Option 6 builds on certain aspects of the Nominet appeal model, although in other aspects it adopts (and thus incorporates the potential problems of) Option 1. The Working Group has not engaged in an extensive analysis of the benefits (or otherwise) of adding a compulsory mediation step to the UDRP or URS, as part of which analysis the question of the implications for non-IGO complainants (and thus a potential impact on the RPM PDP) should also be discussed.