

INITIAL CONSENSUS DESIGNATIONS ON FOUR POLICY RECOMMENDATIONS & SIX ADDITIONAL OPTIONS FOR A POSSIBLE RECOMMENDATION FIVE

Prepared by ICANN staff based on mailing list discussions and related Working Group calls and feedback ([updated 20 June 2018](#)).

Preliminary Notes:

- The consensus call was initiated on 25 May 2018, with a closing date of 8 June 2018. By the latter date, responses had been received via the Working Group mailing list.
- It is the role and responsibility of the Working Group chair(s) to designate each recommendation/proposal with a consensus level based on the definitions in the Working Group Guidelines. These initial designations may be challenged by members, following discussion of which the chair(s) should reevaluate and publish an updated set of designations (see Section 3.6 of the Guidelines: <https://gnso.icann.org/sites/default/files/file/field-file-attach/annex-1-gnso-wg-guidelines-30jan18-en.pdf>).
- Consensus level designations are not based on formal voting but rather are made by the chair(s) based on participation by members in raising and discussing the issues for which policy recommendations are being considered.
- For purposes of this PDP, the policy recommendations for which a consensus call was launched on 25 May are divided into two main sections. The first section concerns recommendations for which draft text had previously been discussed by the Working Group and general agreement seemed to have been reached on the objective and nature of the recommendations in question; the second section lists six policy options that the Working Group had been discussing and for each of which members were asked as part of the consensus call to indicate their support.
- The following initial designations were made based substantially on specific feedback provided via the Working Group mailing list (as recommended by the Working Group Guidelines) by members. Consideration was also given to Working Group deliberations conducted via conference calls and mailing list discussions as well as feedback provided to the Council liaison through the office hours sessions conducted in March 2018.
- It should be noted that while responses were received from a number of Working Group members, not all members provided specific feedback. However, all members had been notified regularly of the status of each recommendation and proposal as well as the initiation and relevant dates of the consensus call. Hence it may be concluded that all members had the opportunity to provide specific feedback, with some choosing not to do so.

RECOMMENDATIONS FOR WHICH TEXT HAS BEEN AGREED OR DISCUSSED PREVIOUSLY:

1(a). ~~For INGOs (including the Red Cross movement and the International Olympic Committee), no substantive changes to the UDRP and URS are to be made, and no specific new [dispute resolution procedures are to be](#) created.~~

1(b). ~~For IGOs, no specific new [dispute resolution procedures are to be](#) created.~~

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Approved by Petter Rindforth, Working Group Chair and supported by Susan Kawaguchi, Council liaison (June 11, 2018)

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Commented [MW1]: This can also be incorporated into Recommendation #3 as a new first sentence, with the addition of the word “Rather” at the start of the next sentence.

Consensus result for Recommendation #1: Full Consensus

2. The Working Group notes that an IGO may seek to demonstrate that it has the requisite standing to file a complaint under the UDRP or URS by showing that it has complied with the requisite communication and notification procedure in accordance with Article 6ter of the Paris Convention for the Protection of Industrial Property. An IGO may consider this to be an option where it does not have a registered trademark or service mark in its name and/or acronym but believes it has unregistered trademark or service mark rights for which it must adduce factual evidence to show that it nevertheless has substantive legal rights in the name and/or acronym in question. In this regard, the Working Group recommends that specific Policy Guidance on this topic be issued by ICANN to clarify the following points:

- (a) this alternative mechanism for standing is not needed in a situation where an IGO already holds trademark or service mark 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 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) the possibility that an IGO may seek to rely on its compliance with Article 6ter to demonstrate standing should not 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).

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Consensus result for Recommendation #2: Consensus

3. ICANN Organization shall create and issue Policy Guidance 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 any claim of jurisdictional immunity made by an IGO in respect of a particular jurisdiction will be determined by the applicable laws of that jurisdiction. In addition, ICANN Organization shall ensure that this Policy Guidance document is brought to the notice of the Governmental Advisory Committee (GAC) for its and its members' and observers' information and published along with the procedures and rules applicable to the UDRP and URS on the ICANN website.

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Consensus result for Recommendation #3: Consensus

4. In accordance with GAC advice concerning access to curative rights processes for IGOs as well as the Charter language requiring the Working Group to consider "The need to address the issue of cost to IGOs and INGOs to use curative processes", and in recognition that this Working Group has no authority to obligate the expenditure of ICANN funds, the Working Group recognizes that the feasibility of providing IGOs with access to the UDRP and URS at no or nominal cost to the IGOs is one that must be addressed directly through discussions between the ICANN Board with the GAC and IGOs, while further noting that many Working Group

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members believe that a respondent should also be eligible to receive financial support for its defense in a case where ICANN has subsidized the complainant.

Note: A few Working Group members strongly oppose providing any subsidies at all for using the UDRP or URS. Two Working Group members suggested that more specific boundaries should be prescribed should discussions with the GAC on this topic be initiated, e.g. creation of an objective standard for financial support, setting specific quantitative limits such as a specific dollar amount per year per IGO, or introducing some form of means testing.

Consensus result for Recommendation #4: Strong Support but Significant Opposition

SIX POLICY OPTIONS FOR A POSSIBLE RECOMMENDATION FIVE:

Preliminary Notes:

- Several Working Group members support more than one option, with a few noting expressly that some of the options are not necessarily mutually exclusive.
- A few Working Group members that supported more than one option nevertheless indicated that they preferred one option above the others and supported one or more of the other options only if their preferred option is not what is ultimately approved.
- In general, of the Working Group members that indicated they can support more than one option, the most preferred option was Option 4; however, two Working Group members noted that they supported Option 4 only if Option 1 was clearly untenable.
- A few Working Group members specifically stated that they can support one or more of the options except Option 3.

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 set aside (i.e. invalidated).*

Consensus result for Option 1: Consensus or Strong Support but Significant Opposition

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].*

Consensus result for Option 2: No Consensus/Divergence

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Commented [MW2]: Suggestions were made to use words such as “vacated” or “unenforceable”. Staff suggests this alternative updated formulation as “vacating” the panel decision seems to equate a mandatory administrative proceeding to a court judgment, while “unenforceable” in law does not mean the same thing as rendering the original decision without legal effect altogether, which staff believes was the intent of this Option 1.

Commented [MW3]: As a few WG members who supported both Options 1 & 4 indicated that, of the two, they prefer Option 1, should this be designated as Consensus?

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Reg Levy ¶

Paul Keating ¶

Zak Muscovitch ¶

Jay Chapman ¶

Alexander Lerman ¶

Nat Cohen ¶

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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.*

Note: While several Working Group members strongly oppose this option, a few noted that in principle this type of recommendation may nevertheless be workable if substantive and substantial safeguards can be built in or if it was limited only to very specific cases (e.g. blatant cybersquatting).

Consensus result for Option 3: **Minority View (with Consensus Against this option)**

Option 4 (initially proposed by Zak Muscovitch, updated following Working Group discussion on 25 May 2018):

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

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Consensus result for Option 4: Consensus or Strong Support but Significant Opposition

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.*

Consensus result for Option 5: No Consensus/Divergence

Option 6 (initially proposed by Paul Tattersfield, with a slight amendment to the text following discussion by the Working Group):

- *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.*

Note: One Working Group member is considered to have supported this option on the basis that this was viewed to be a workable option if additional refinements were made to it (although this member continued to prefer Option 1). Other Working Group members expressed concern over the question as to who would fund a mediation option.

Consensus result for Option 6: Strong Support but Significant Opposition

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Commented [MW5]: Should Option 4 become a consensus recommendation, the WG may consider specifically adding the mediation idea as a suggestion for consideration by the RPM WG.

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Support:

Paul Tattersfield
Crystal Ondo
Reg Levy
Paul Keating
Zak Muscovitch
Jay Chapman
Alexander Lerman
Nat Cohen
George Kirikos
Mike Rodenbaugh
David Maher

Do not support:

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Jim Bikoff

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