**IGO Work Track: Summary of Agreements & Options for Further Discussion**

**DRAFT as of 11 March 2021**

Summary of Agreements to date:

* The Work Track scope is defined and limited by the GNSO Council’s instructions that any recommended policy actions be “generally consistent” with Recommendations 1-4 from the Curative Rights PDP. Given the GNSO Council’s instructions, it is currently out of scope for the Work Track to develop a separate dispute resolution process for IGOs.
* There are two challenges that IGOs face with using the current form of the UDRP and URS: (1) the requirement to have a trademark in order to have standing to file a complaint; and (2) the requirement to submit to Mutual Jurisdiction, which can compromise an IGO’s immunities and privileges in relation to the jurisdiction of a court in which a registrant files proceedings against an IGO.
* The Work Track will first consider whether it may be able to reach agreement on the question of standing, before considering the further issue of jurisdictional immunity.
* Recommendation 2 from the Curative Rights PDP places responsibility for determining whether an IGO’s compliance with the Article 6ter notification procedure is sufficient to grant standing under the UDRP and URS on the panelist(s). It is unlikely that panelists will wish to have this responsibility, especially as it requires familiarity with Article 6ter and IGO rights and protections.
* It may be possible to “tweak” (modify) Recommendation 2 to handle the question of IGO standing. At this stage, it is not necessary to consider if modifications are needed to any of the other three Curative Rights PDP recommendations that were approved by the GNSO Council.
* The Work Track Chair and GNSO Council liaison are obliged to report periodically to the GNSO Council. In the event that the Work Track reaches a point in its discussions that seem to indicate it can agree on a solution to the issue of standing through modifying Recommendation 2, the GNSO Council will have to modify or loosen its original instructions in order to allow the Work Track to complete work on the proposed solution.
* Recommendation 5 was the Curative Rights PDP Working Group’s attempt to deal with the issue of IGO jurisdictional immunity but is not workable. While one path toward completing its work is to recommend “reversing” Recommendation 5, this would merely reflect the status quo and is not a policy solution. The Work Track agreed to consider if an arbitral mechanism to handle challenges to UDRP and URS panel decisions may be more appropriate, after it concludes its discussions on the issue of standing.

Options for Discussion:

1. **On the Question of Standing to File a Complaint under the UDRP and URS**

There is general agreement that this should be treated as a purely procedural issue, resolution of which will mean an IGO is able to get “into the funnel” to file a UDRP or URS complaint. The basis for standing should not be taken to indicate or prove the nature or scope of any substantive rights that an IGO may have.

|  |  |  |
| --- | --- | --- |
| **Option/Proposal** | **Advantages/Benefits** | **Disadvantages/Risks** |
| Standing based on the fact that the IGO has followed the Notification Procedure under Article 6ter of the Paris Convention for the Protection of Industrial Property[[1]](#footnote-1) | * Standing is based on protections afforded by an international treaty * Clear documented evidence available (via search of the WIPO database, updated twice yearly) * Does not require discretion or judgment on the part of the panelist or ICANN | * Article 6ter does not confer substantive rights, unlike a trademark registration |
| Standing based on the fact that the IGO is on the GAC list[[2]](#footnote-2) (prepared in 2013 and updated periodically by the GAC) | * List criteria: IGO created by treaty and has international legal personality | * Need clarity from GAC as to completeness and accuracy of the list * GAC currently has no mechanism to update or verify the list regularly |
| Standing based on the fact that the IGO is in the WIPO International Bureau 6ter database | * Searchable database containing IGOs who have complied with the Notification Procedure | * Unclear why this will be preferable (or different from) requiring that the IGO has followed the Notification Procedure, as demonstrated by a search of the database |
| OTHER SUGGESTIONS: |  |  |

Notes:

* As standing will be treated as a purely procedural matter, the IGO will still have to go on to prove that the registrant does not have rights or legitimate interests in the disputed domain name, and has registered and used it in bad faith[[3]](#footnote-3).
* All other (including procedural) requirements of the UDRP and URS will also need to be satisfied.

1. **On the Question of Jurisdictional Immunity**

The Work Track plans to move on to discuss this topic after completing its work on standing. Some of the options that the Work Track may wish to consider could be viewed as potentially inconsistent with Curative Rights Recommendations 1-4. This will involve consulting the GNSO Council to determine if the Council wishes the Work Track to continue with its work, including possibly reviewing any limitations created by the Council’s original directions.

|  |  |  |
| --- | --- | --- |
| **Option/Proposal** | **Advantages/Benefits** | **Disadvantages/Risks** |
| Reverse Rec 5, viz.: In a case where a losing registrant files suit in court and the IGO succeeds in demonstrating immunity, the original UDRP/URS decision stands | * Directly addresses and clearly rejects Rec 5 | * Does not provide a solution to the issue * Merely restates the status quo |
| Recommend that challenges to UDRP & URS panel decisions be handled solely through binding arbitration  Notes:   * Will need to develop scope and criteria (e.g. whether it is de novo determination, admissibility of additional evidence) * Will need to clarify what existing set of arbitral rules might apply or be a starting point | * Relies on a recognized dispute resolution mechanism that is used in commercial disputes and by IGOs * Will not require IGOs to give up jurisdictional immunity | * Will exclude the possibility of a losing registrant filing suit in a court of competent jurisdiction; inconsistent with GNSO Council instructions * Can be as expensive (or more so) than court proceedings |
| Recommend that challenges be heard by a panel comprising experienced UDRP/URS panelists  Notes:   * Will need to develop rules and requirements (e.g. number of panelists, minimum expertise, rule against the same panelist hearing the appeal) * Possibility of creating a Standing Panel from which the panelists can be drawn | * Leverages expertise of UDRP & URS panelists * Not as expensive and more timely than arbitration | * If the possibility of court proceedings is excluded, this will be contrary to GNSO Council instructions |
| OTHER SUGGESTIONS: |  |  |

1. For a comprehensive description of the specific processes and requirements for notification and communication as well as the role of WIPO’s International Bureau, see the WIPO Secretariat’s 2005 paper on Legal & Administrative Aspects of Article 6ter: <https://www.wipo.int/edocs/mdocs/sct/en/sct_15/sct_15_3.pdf>. [↑](#footnote-ref-1)
2. See <https://www.icann.org/en/system/files/correspondence/dryden-to-crocker-chalaby-annex2-22mar13-en.pdf>. [↑](#footnote-ref-2)
3. Modifications of other specific elements of the UDRP and URS, such as bad faith and remedies, is out of scope for this Work Track as the review of these elements will be done as part of the Phase Two work of the Review of All Rights Protection Mechanisms PDP. [↑](#footnote-ref-3)