**Recommendation #4:** In relation to the issue of jurisdictional immunity, which IGOs may claim successfully in certain circumstances (but not INGOs), the Working Group recommends that: (a) no change be made to the Mutual Jurisdiction clause of the UDRP and URS; (b) IGOs be notified that 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, then

[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 may be brought before the [name of arbitration entity] for de novo review and judgment.

The Working Group recommends, further, that a Policy Guidance document be prepared and circulated to the Governmental Advisory Committee (GAC) and the IGO representatives who have been active on this issue at ICANN, that outlines the specific options available to IGOs who seek to suspend, cancel or transfer a registrant’s domain name.

In presenting Options 1 and 2 above, the WG acknowledges that it has yet to uncover a perfect solution. As such, the WG has identified a number of different factors to consider when examining the two options. Accordingly, the WG would like to solicit input from the community to aid in developing its final recommendations.

For context, the WG anticipates that the circumstances under which this scenario would occur – 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 UDRP or URS decision – will be extremely rare. Here are some further thoughts and questions related to the two options:

Option 1:

“The decision rendered against the registrant in the predecessor UDRP or URS shall be vitiated”

* It needs to be noted however, that IGO immunity is not 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 that IGO’s immunity)
* By vitiating the decision against the registrant in a UDRP or URS in the circumstance where an IGO has successfully claimed jurisdictional immunity, would we avoid creating a situation that would not otherwise arise in the absence of the UDRP?
* By vitiating the decision against the registrant in a UDRP or URS in the circumstance where an IGO has successfully claimed jurisdictional immunity, would we encourage the losing registrant to seek relief in the courts (leaving the IGO with minimal choices – either waive jurisdictional immunity or seek jurisdictional immunity and thereby have the decision vitiated)?
* Is the registrant provided adequate paths for recourse?

Option 2:

“The decision rendered against the registrant in the predecessor UDRP may be brought before the [name of arbitration entity] for de novo review and judgment.”

* The option to allow use of an arbitral or third party non-judicial process, familiar to IGOs in contractual disputes or under the United Nations Commission on International Trade Law (UNCITRAL) Rules is indicated by GAC representatives as an acceptable solution.
* But domain name disputes are not contractual arrangements – requiring registrants to agree to such an appeal process could lessen a legitimate registrant’s freedom
* There is also a risk that such system could be challenged in some courts as creating a further exception to IGO immunity
* Would an IGO be deemed to have already waived immunity by utilizing the UDRP or URS and accordingly, submitting to the Mutual Jurisdiction clause?
* Is the provision of a de novo review similar or equivalent in the scope of relief it would offer a registrant that sought relief via the courts?

In considering the benefits and drawbacks of each option, the WG has not achieved full consensus conclusion for either option, though it has reached rough consensus in support of Option 1.

For the purposes of understanding the scope and limitations of public international law in relation to the issue of IGO jurisdictional immunity, the Working Group requested that ICANN engage an external legal expert to advise the Working Group 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 Working Group of the qualifications of other interested candidates[[1]](#footnote-1).

1. For details about the criteria agreed on for this engagement, see the Working Group’s collaborative wiki space at<https://community.icann.org/x/z4BYAw>. [↑](#footnote-ref-1)