

Registries Stakeholder Group Statement

Issue: GNSO Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process.

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Draft registry comment on GNSO Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process

Thank you for the opportunity to comment on the GNSO's work to identify a curative rights mechanism for IGOs and INGOs. The RySG is grateful to the Working Group (WG) for its hard work on this PDP.

We offer the following comment on each of the WG's recommendations:

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.

The RySG supports this recommendation. The UDRP and URS, as drafted, adequately serve the proposal to provide certain curative rights. As the WG found, INGOs are not readily differentiated from other private parties and are in fact perfectly capable of enforcing their trademark rights under these policies.

Further, changes would present uncertainty and any expansion could lead to a slippery slope that would embolden others to attempt to alter well-established and -defined procedures to accommodate their own interests¹ that are appropriately addressed elsewhere.

Recommendation 2: 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

¹ According to the WG: 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 that 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.

rights in its name and/or acronym) to demonstrate 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. 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.

The RySG has neither a pro nor con comment on this recommendation, as no case has yet been presented. However, this seems like a reasonable threshold for an IGO to meet, and is reasonable for the protection of registrant interests. The RySG sees little need to invent a new process specifically for IGOs.

Recommendation 3: *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 6ter(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.*

The RySG supports no changes to the UDRP or URS process for either party in disputes involving IGOs. The RySG further supports an appropriate policy guidance document that clearly explains the limitations of any rights under Article 6ter of the Paris Convention.

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, the WG recommends that in that case:*

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 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.

- The RySG supports Recommendation 4(a) that the Mutual Jurisdiction clauses of UDRP and URS remain unchanged.
- Recommendation 4(b): The RySG does not believe ICANN or the WG should provide any sort of legal advice to an IGO filing a UDRP or URS complaint. Furthermore, the locale of the agency or assignee filing the complaint is completely unrelated to the Mutual Jurisdiction of UDRP or URS (which are both limited to the location of the registrar or registrant, as elected by the complainant).
- The RySG supports Recommendation 4(c).

- The RySG agrees with the analysis of the WG on pages 15-17 of the initial report as summarized by the bulleted considerations on those pages: neither Option 1 nor 2 solve the problem the working group is trying to address. Both merely introduce new levels of complexity and cost and lose the delicate balance the UDRP and URS have struck. All complainants choose from a variety of legal and non-legal options including doing nothing, going to court and using the UDRP/URS, and must weigh the relative costs and benefits accordingly. The RySG supports the WG's conclusion as stated on page 19 that "it would not be possible to recommend a single solution that takes into account all [of the variables]...."

Recommendation 5: 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.

The RySG respectfully disagrees with the notion that actions might be brought at nominal or no cost, as this sets a dangerous policy precedent and could encourage other various parties to plead for similar no-cost access to UDRP and URS, potentially leading to abusive use.
