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GNSO Policy Development Process on IGO-INGO Access to Curative Rights Protection Mechanisms: Working Group Open Meeting

ICANN56 | 28 June 2016

Agenda for this open Working Group meeting

Purpose	<ol style="list-style-type: none">1. Welcome and introductions; brief update of the PDP scope and status2. Summary & discussion – IGO jurisdictional immunity:<ul style="list-style-type: none">• Implications for the PDP of legal expert research on differing treatment by national courts of IGO jurisdictional immunity – absolute, restrictive, functional• Implications for the PDP of legal expert view of the likely effect of the Mutual Jurisdiction clause (as found in the UDRP and URS) on IGO jurisdictional immunity3. Discussion of legal expert and other suggestions on possible reforms and options for the policy problem presented4. Next steps
Next Steps	<ul style="list-style-type: none">• WG will review ICANN56 discussions and feedback, especially in light of earlier preliminary conclusions on standing and scope of the existing curative rights processes• WG intends to develop preliminary recommendations by ICANN57

Overview and Brief Update

What is the status of this PDP?

About this PDP

WG chartered by GNSO Council to examine:

- Whether existing curative rights processes – the **Uniform Dispute Resolution Policy** and the **Uniform Rapid Suspension** dispute resolution procedure – should be modified to address the specific needs of International Governmental Organizations (IGOs) and International Non-Governmental Organizations (INGOs), and if so, how; or
- Whether a new, narrow procedure is needed

Status of work

- Preliminary conclusion to focus on IGOs (not INGOs)
- Possible standing to file may be based on Article 6ter of the Paris Convention (note that this should not create additional legal rights)
- External legal expert retained to provide opinion on state of international law on IGO jurisdictional immunity



Background information

- GNSO webpage with Issue Report, WG Charter & Council resolutions:
<http://gnso.icann.org/en/group-activities/active/igo-ingo-crp-access>
- WG online collaborative wiki with recordings and transcripts of all meetings and draft documents:
<https://community.icann.org/x/37rhAg>



IGO Jurisdictional Immunity – Report of the External Legal Expert and Discussion

1. Nature of IGO Immunity from National Jurisdictions – Absolute, Restrictive, Functional (1)

Immunity is contextual - IGOs generally enjoy immunity under international law, but different jurisdictions apply the law differently, and even within the same jurisdiction different IGOs may be treated differently:

- Immunity obligations vary by state and by IGO concerned
- Immunity decisions are often based on organization-specific treaties to which not all states are party
- States subject to the same international obligations may implement them in varying ways
- Every jurisdiction resolves immunity questions according to its own law (the “law of the forum”, as informed by international law)

The UDRP and URS **compel consent to a Mutual Jurisdiction** (either the domain name registrar or registrant):

- An IGO that files a Complaint will therefore have agreed to the possibility of a judicial process, regardless of any immunity it might otherwise enjoy under international law

1. Nature of IGO Immunity from National Jurisdictions – Absolute, Restrictive, Functional (2)

Absolute immunity:

- Comprehensive immunity from judicial process, irrespective of the nature of the IGO's activity, in the absence of an express (and strictly construed) waiver
- Example – the United Nations, other IGOs protected in certain States by specific treaties binding those States, or bilateral arrangements between States

Restrictive immunity:

- An exception from absolute immunity for litigation concerning commercial activities like those undertaken by private parties
- Relatively few States have applied this approach to IGOs (exception – the USA)

Functional immunity:

- Immunity limited by the functions of the IGO in question
- Example – language such as IGOs will enjoy the “privileges and immunities as are reasonably necessary for the fulfilment of their functions”
- Can overlap with a restrictive immunity approach, but distinction may be critical – e.g. non-infringing use of its domain is necessary for IGO to carry out its mission

2. Does agreement to Mutual Jurisdiction mean the IGO has waived its immunity?

Outside the domain name area, how do IGOs generally waive immunity?

- Through the IGO's governing instrument (though scope of this is unclear); or
- By way of agreement or pleading (case law not well developed, but agreeing to a Mutual Jurisdiction could be interpreted as a waiver)

Legal expert opinion:

“Allowing an IGO that prevailed in the UDRP process to avoid its waiver and rest on the UDRP result by invoking immunity, while allowing it to waive that immunity by initiating judicial proceedings if it loses to a domain-name registrant, will likely seem asymmetrical and unfair.”

QUESTION FOR DISCUSSION:

If agreeing to Mutual Jurisdiction means an IGO has waived any jurisdictional immunity it may be entitled to in that particular national court, should this PDP consider alternatives that could address this specific issue?

3. What are the policy options for any possible modification?

(A) Maintain status quo, possibly with slight adaptation:

- An IGO may be able, according to the law of its seat, to assign a right of use to another (or, at least, to appoint an agent to enforce its interest)
- ICANN may need to specifically allow for this in the applicable policy/procedure
- But assignments may not always be valid –
 - Will need to be drafted carefully
 - Could be interpreted as falling outside scope of that IGO's immunity under a restrictive or functional approach
 - Could be ruled ineffective as a transfer of rights

(B) Use 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
- But domain name disputes are not contractual arrangements – requiring registrants to agree to such an appeal process could lessen a legitimate registrant's freedom
- Could also be challenged in some courts as creating a further exception to IGO immunity

4. Are there other alternatives? (1)

(A) Make a distinction among the different types of IGOs:

- Maintain existing Mutual Jurisdiction terms in general, but permit particular IGOs to elect instead to submit to arbitration (according to UNCITRAL or some similar procedure)

(B) Rewrite Mutual Jurisdiction clause without prejudging immunity:

- IGO immunity not to be 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 immunity's scope.
- Additional language (exception) could be added as follows:
 - *“... in the event the action depends on the adjudication of the rights of an international intergovernmental organization that would, but for this provision, be entitled to immunity from such judicial process according to the law applicable in that jurisdiction, [as established by a decision of a court in that jurisdiction,] the challenge must be submitted instead for determination [by UNCITRAL in accordance with its rules”*

4. Are there other alternatives? (2)

(C) Alleviate hardship caused by registrant submission to an arbitral/non-judicial process

- E.g. IGO could agree to bear some of the costs if it elects arbitration
 - Needs to be carefully formulated to avoid problems with enforceability

(D) Others?

What are the next steps from here?