

The background of the image is a photograph of a city at dusk. On the left, several tall, modern skyscrapers with glass facades are illuminated. In the center, there is a large, ornate fountain structure. On the right, a large, illuminated archway with a dome on top is visible. The foreground is filled with colorful flower beds in shades of red, pink, and white, with a paved walkway leading through them. The sky is a deep orange and red from the setting sun.

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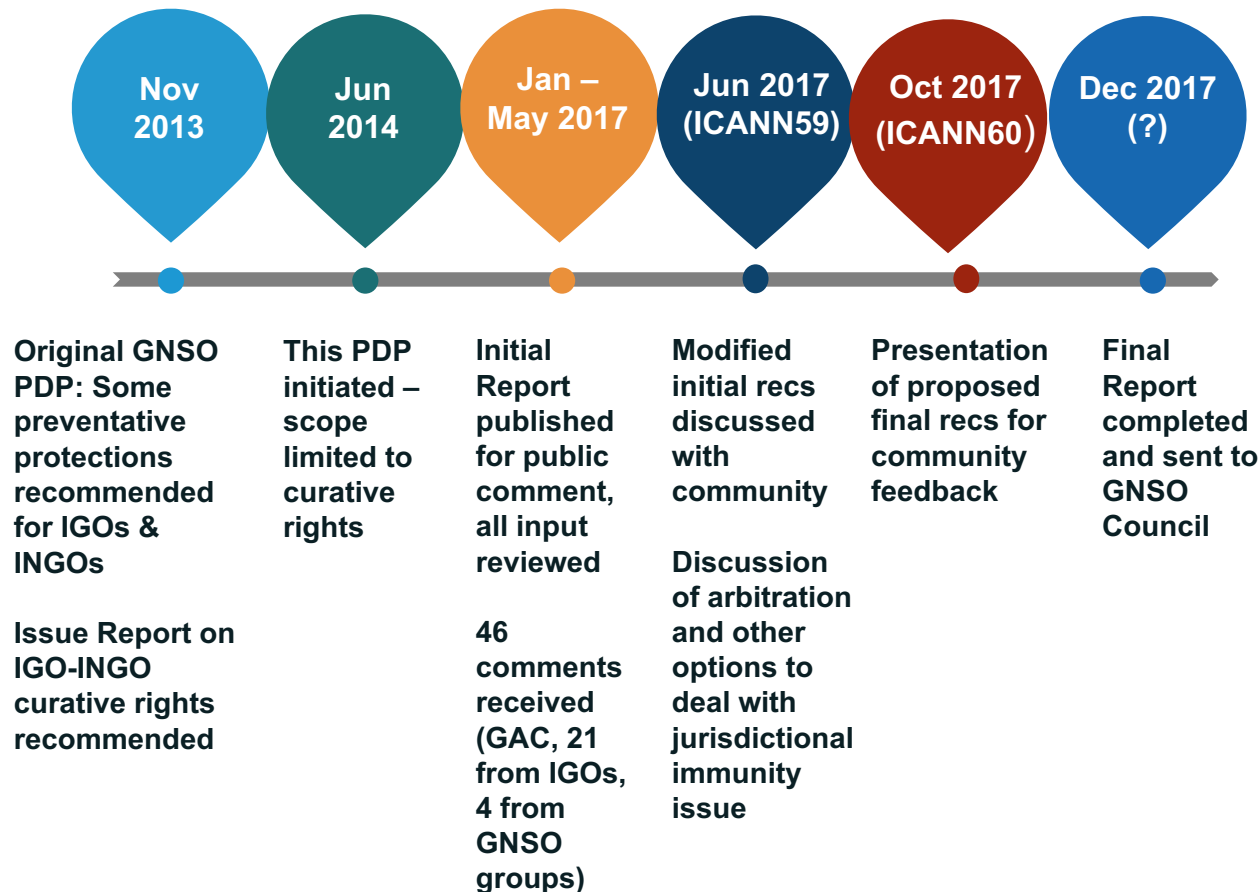
IGO-INGO Access to Curative Rights Mechanisms Policy Development Process (PDP) Working Group

Open Community Session
ICANN60, Abu Dhabi

12 October 2017



OVERVIEW: Project Timeline & Major Milestones



PDP running in parallel to ongoing efforts to reconcile inconsistent GAC advice & GNSO policy on other aspects of IGO/INGO issues not in scope for this PDP (i.e. Red Cross names; preventative protections for IGO acronyms)

- ⦿ **The Working Group 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 Policy Guidance is issued, the Working Group recommends that this clarification as regards INGOs be included in that document.**

CO-CHAIRS' EVALUATION OF LIKELY CONSENSUS ON
RETAINING THIS INITIAL RECOMMENDATION IN THE FINAL
REPORT: **HIGH**

Preliminary Recommendation #2 – CHANGE RECOMMENDED

Original Recommendation:

- ⦿ **For IGOs to demonstrate standing to file a complaint under the UDRP and URS, it will be sufficient (as an alternative and separately from trademark rights in the IGO name and/or acronym) to demonstrate that compliance with the procedure under Article 6*ter* of the Paris Convention for the Protection of Industrial Property.**

Recommended Change:

- ⦿ **An IGO may elect to fulfil the standing requirement under the UDRP and URS by demonstrating that it has complied with the requisite communication and notification procedure pursuant to Article 6*ter* of the Paris Convention for the Protection of Industrial Property.**
- ⦿ **This may be an option in a case where an IGO has unregistered rights in its name and/or acronym and must adduce factual evidence to show that it has the requisite substantive legal rights in the name and/or acronym in question.**

Preliminary Recommendation #2 – cont'd

Recommended Change (cont'd):

⦿ **For the avoidance of doubt:**

1. **This alternative mechanism for standing will not be needed where an IGO already holds trademark rights in its name and/or acronym**
 - *the IGO would in such a case proceed in the same way as a non-IGO trademark owner;*
2. **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**
3. **This recommendation is not intended to amend or affect any of the existing grounds upon which UDRP and/or URS panelists have previously found sufficient for IGO standing (e.g. based on statutes and treaties).**

CO-CHAIRS' EVALUATION OF LIKELY CONSENSUS TO MAKE THIS CHANGE FOR THE FINAL REPORT: **HIGH**

Preliminary Recommendation #3 – DELETION RECOMMENDED

Original recommendation:

- **No specific changes recommended to the substantive grounds under the UDRP or URS upon which a complainant may file and succeed on a claim against a respondent (Section 4(a)(i) – (iii) of the UDRP)**
 - *Concept of bad faith registration and use covers a very broad range of offensive activities, including those covered by scope of Article 6ter protections.*
- **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.**

This recommendation is no longer necessary, given the proposed amendment to Recommendation #2

CO-CHAIRS' EVALUATION OF LIKELY CONSENSUS IN FAVOR OF DELETION: **HIGH**

NO CHANGE RECOMMENDED TO THE INITIAL GENERAL RECOMMENDATION:

⦿ **On IGO jurisdictional immunity:**

(a) no change recommended to the Mutual Jurisdiction clause of the UDRP and URS

- *ICANN curative rights processes are in addition to, and not a substitute for, existing statutory rights; ICANN has no power to extinguish registrant rights to seek judicial redress;*

(b) Policy Guidance document to be prepared, to outline 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*

(c) Claims of IGO jurisdictional immunity to be determined by the applicable laws of that jurisdiction.

Two options were published for public comment in January 2017:

- ⦿ **Where a losing registrant appeals to a court of mutual jurisdiction and an IGO succeeds in its claim of jurisdictional immunity:**
 - ***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.***
- ⦿ Both options saw some support from various commentators, with the IGOs favoring Option 2
- ⦿ Working Group reviewed all comments and conducted an Impact Analysis
- ⦿ Working Group also considered additional alternative options, some built on certain elements in either Option 1 or 2

Preliminary Recommendation #4 – PENDING (3/5)

Preliminary consensus call conducted recently on three options

- ⦿ **Applies where the losing registrant challenges the initial UDRP/URS decision by filing court proceedings and the IGO successfully asserts immunity from the jurisdiction of that court**

Option A:

- ⦿ **The decision rendered against the registrant in the predecessor UDRP or URS shall be vitiated.**

Option B:

- ⦿ **For domain names with a CREATION DATE before [**Policy Effective Date**], Option A applies. In relation to domain names with a CREATION DATE on or after [**Policy Effective Date**], Option C applies.**
 - After five (5) years or 10 instances of Option C being utilized, whichever occurs first, ICANN and the various dispute resolution providers (including any who have administered arbitration proceedings under the new Option C) will conduct a review to determine the impact, both positive and negative, as a result of “trying out” Option C.

Option C:

- ⊙ **Registrant to have 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.**
- ⊙ **Registrant to be given 10 days (or a longer period of time if able to cite a national statute or procedure that grants a longer period) 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.**

Some fundamental elements will need to be included in any arbitration option (e.g. applicable substantive law and procedural rules; venue; panelist selection; language of proceedings; availability of discovery; available remedies; awarding of costs; enforcement considerations)

Further Notes on Option C:

- ⊙ IGO filing a UDRP/URS complaint to be required to agree to this limited arbitration mechanism when filing.
 - *If, subsequently, it refuses to participate in the arbitration, the enforcement of the underlying UDRP/URS decision will be permanently stayed.*
- ⊙ Parties to have 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, parties are free to utilize the limited arbitration mechanism at any time prior to the registrant filing suit in a court of mutual jurisdiction.
- ⊙ In agreeing to utilize the limited arbitration mechanism, ICANN must be informed.

Results of Preliminary Consensus Call on Options A-C

⊙ Results** of preliminary survey of Working Group members:

Option A:

- *Original UDRP/URS panel decision is set aside if IGO succeeds in claiming immunity after a losing respondent files in court*
- *3 support, 8 do not support*

Option B:

- *Option A applies to domains created before a certain date; Option C applies (for a limited “trial period”) to all domains created on or after that date*
- *1 supports, 10 do not support*

Option C:

- *Dispute can be transferred to arbitration (process to include certain specific elements), limited to decision on ownership of domain*
- *8 support, 2 do not support, 1 can live with it*

*** (1 additional respondent indicated support for all 3 options; another indicated he can live with all three options)*

13 out of 19 Working Group members indicating continued participation responded to the survey

- ⦿ **ICANN to investigate the feasibility of providing IGOs and INGOs with access to the UDRP and URS, at no or nominal cost, in accordance with GAC advice on the subject.**

CO-CHAIRS' EVALUATION OF LIKELY CONSENSUS ON
RETAINING THIS RECOMMENDATION IN THE FINAL
REPORT: **HIGH**

Further Information

- Background information:
<https://gnso.icann.org/en/group-activities/active/igo-ingo-crp-access>
- Latest GNSO Policy Brief:
<https://gnso.icann.org/en/issues/pdp-update-igo-ingo-crp-access-15aug17-en.pdf>
- Working Group online wiki space (with meeting transcripts, call recordings, draft documents and background materials):
<https://community.icann.org/x/37rhAg>

A world map where the continents are defined by a complex network of white dots and lines, resembling a social or data network. The background is a solid dark blue color. The text "Questions / Discussion" is centered in white, bold font.

Questions / Discussion