March 30, 2017

Re: Comments of IFC on the Initial Report on the IGO/INGO Access to Curative Rights Protections Mechanism Policy Development Process (the “Initial Report”)

Ladies and Gentlemen:

Thank you for the opportunity to comment on the Initial Report. Capitalized terms not otherwise defined herein have the meanings given them in the Initial Report.

International Finance Corporation (“IFC”) is an international financial institution established by Articles of Agreement among its 184 member countries, including the Unites States of America, and a member of the World Bank Group. IFC’s purpose is to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas. We are the largest global development institution focusing exclusively on the private sector in developing countries.

IFC associates itself fully with the comments submitted by the International Bank for Reconstruction and Development (the “World Bank”), and supports the comments made by other IGOs, including the Organisation for Economic Co-Operation and Development. As the Initial Report suggests, IFC relies on its Article 6ter protections, and maintains national trademark registrations and related domain names, both for its organizational name and acronym, and for key initiatives it undertakes to achieve important developmental outcomes. These registrations and activities are essential to achieving our developmental mandate. Accordingly, we agree the premise that the UPRD/URS should provide a fast, low-cost alternative procedure for clear-cut cases of cybersquatting that fully preserve[s] the rights of all parties. We do not however believe the Recommendations support or achieve these aims.

In particular, we emphasize our continuing concern regarding Recommendation #4. First, Professor Swaine’s analysis, while valuable, does not fully reflect and is not fully consistent with our immunities analysis. Accordingly, we are not bound by its analysis or conclusions. In particular, we note that IFC enjoys other privileges and immunities, including archival and staff member immunities, and considers none of these waived by any submission to judicial process or otherwise. These immunities are accorded to IFC by implementing legislation, such as the International Organizations Immunities Act, the IFC Act, and similar legislation in other jurisdictions, as well as our Articles of Agreement and principles of international law.

Second, we note (without waiver or agreement) Professor Swaine’s counsel that “granting Mutual Jurisdiction – via initiation of a complaint, or, for that matter, registration – would likely be understood as a waiver of any immunity the IGO might otherwise assert”. The WG’s assertion that its proposed outcome “respects and preserves an IGO’s assertion of jurisdictional immunity”, or indeed any immunity, is therefore incorrect on the WG’s own terms. The WG is proposing rather that IGOs would participate in a curative mechanism that per the legal expert it engaged requires an ex ante waiver of IGO privileges and immunities, of unclear scope and impact, both as to that mechanism and any future action in national courts.

Finally, we note that whatever the substantive concerns, by declining to consider the accommodations supported by the Small IGO Group, the GAC, or apparently, the ICANN Board, the WG is recommending an approach that impedes rapid or efficient resolution of domain name disputes by registrants. To the contrary, it is effectively proposing that where IGOs are complainants, they pursue actions outside ICANN mechanisms, at considerable burden to both IGOs and registrants, in order to preserve legal rights well established and recognized under international and national laws. By overriding Professor Swaine’s analysis, the WG is also incentivizing non-IGO complainants to pursue frivolous claims against IGOs within the UDRP/URS mechanism, with a view to arriving in national courts asserting arguments inconsistent with the principle of preservation of rights, and pursuing additional and perhaps unrelated claims in that context.

Regarding the GNSO’s suggestion that an IGO could sidestep any immunity issue by simply filing through an assignee, licensee or agent, we fully adopt the World Bank’s views on this recommendation. At best, this is an untested approach that poses unacceptable risk to our immunities and would involve all parties in burdensome court proceedings to determine ancillary issues. Surely commercial arbitration in an established forum, commonplace in the private sector and acceptable to IGOs, makes more sense than this approach.

To conclude, IFC is committed to a fair and efficient curative mechanism. We believe the WG has arrived at Recommendations that do not achieve its stated aims, and in practical effect infringe the established roles and rights of IGOs in the international system. Accordingly, we join the World Bank in requesting the WG to reconsider its draft advice. We are happy to offer any help or cooperation you might reasonably request in this regard.

Thank you for your consideration.

Very truly yours,

Gordon Myers