

Comments from the United Nations

The United Nations is pleased share its comments on the Initial Preliminary Report on the IGO-INGO Access to Curative Rights Protection Mechanism Policy Development Process.

The United Nations expresses full support for the comprehensive comments provided by the OECD. In doing so, the United Nations would like to elaborate on two matters: (a) the status of inter-governmental organizations (IGOs) vis-à-vis the Mutual Jurisdiction Clauses of the UDRP and the URS, which requires those organizations to waive their immunities in advance and to agree to appear before the national courts of the Member States, and (b) arbitration as a familiar and commonly used dispute resolution mechanism.

The Mutual Jurisdiction Clause

In its Recommendation #4, the Working Group suggests that no change be made to the Mutual Jurisdiction Clause of the UDRP (paragraph 4(k)) and URS (Article 13). The Working Group suggests that the agreement in the Mutual Jurisdiction Clause to refer a dispute to a national court at any stage of the proceeding should remain in place and that IGOs may nonetheless claim jurisdictional immunity if and when a dispute should come before a national court, notwithstanding that they would have already agreed to submit to the jurisdiction of national courts. The Working Groups posited that the specific national court could then determine whether the IGO indeed has immunity under the applicable laws of that jurisdiction. This recommendation fails to address both the status of IGOs as organizations of sovereign member states and the basic premise of forum selection clauses such as the Mutual Jurisdiction Clause in the UDRP and URS.

The status of IGOs – By the terms of the treaties establishing them, the United Nations and other international inter-governmental organizations have, in the territories of their Member States, such privileges and immunities as are necessary for the fulfilment of their functions. Because the Member States act as a collective when determining the functions and activities of the United Nations and other IGOs and collectively bear the liabilities of such IGOs, individual Member States cannot, through their judicial, administrative or legislative processes interfere with the independent functions and activities of IGOs or individually impose liabilities on them

The IGOs cannot, therefore, waive their immunities from national jurisdictions by agreement in advance, as is required by the UDRP and URS. This does not mean that IGOs are above the law. The treaties that establish IGOs effectively require IGOs to resolve contractual or other legal disputes through appropriate non-Member State dispute-resolution means such as arbitration.

Forum Selection Clauses – Forum selection clauses provide an expression of consent by the participating parties to submit to a given jurisdiction. The Mutual Jurisdiction Clause of the UDRP and URS does this exactly. The Mutual Jurisdiction Clause provides that the parties agree in advance that national courts shall be competent to hear and rule on disputes that have been brought to the UDRP and URS. Thus, leaving the jurisdictional clause of the UDRP and URS in place would require an IGO to have already agreed to appear before a court of national jurisdiction and, therefore, to have agreed in advance to waive its immunities. Should the IGO subsequently assert its immunity, the IGO could be perceived as renegeing on that agreement.

For example, the Supreme Court of the United States has explained that the purpose of forum selection clauses is to prevent “sparring litigants” from having to waste time and money on

determining whether a given venue is the correct forum for litigating their disputes (*Carnival Cruise Lines, Inc. v. Shute* 499 U.S. 585, 594 (1991)). In other words, once an IGO has waived its immunity and agreed to the Mutual Jurisdiction Clause, the forum selection clause of the UDRP and URS, a court of national jurisdiction may very well consider the IGO's motion to reassert its immunity to be an undue and wasteful imposition on the court's time. In the United States, a finding of this type by a national court would be consonant with the jurisprudence of the Supreme Court.

Arbitration as a common method for dispute resolution

The Working Group suggested that arbitration may not be a proper alternative to national courts as a means to appeal an UDRP or URS finding because the arbitration mechanism is not familiar to registrants. We respectfully disagree.

Arbitration is a common method for dispute resolution and especially popular between entities that come from different national jurisdictions, since the awards are valid in any country, regardless of where the decision was made. Indeed, the UDRP itself mentions arbitration multiple times as a recognized dispute resolution method. "Godaddy", which styles itself as the world's largest domain name registrar, requires domain name registrants to abide by binding arbitration in Article 25 of its Universal Terms of Service (Last revised on 25 January 2017, available at <https://www.godaddy.com/legal-agreements.aspx>). Arbitration also features as a common form of dispute resolution in the End User License Agreements of major software providers. Thus, it seems unlikely that the relevant stakeholders, who are at the cutting end of information technology, would be unfamiliar with the process of arbitration.

As noted, IGO treaties effectively provide that arbitration is the appropriate means to resolve legal disputes to which IGOs are party.

Conclusion

As the United Nations has noted on multiple occasions, a simple means of allowing IGOs to benefit from the UDRP and URS processes is to eliminate for them the obligation, set forth in the Mutual Jurisdiction Clauses of the UDRP and URS, to waive their immunity from national jurisdictions in advance.

In light the reasons enumerated by the OECD, and of the further elaboration offered above by the United Nations, we urge all relevant parties to adopt an effective mechanism that will protect the public and prevent the misleading use of the names and acronyms of inter-Governmental organizations in the DNS.