

February 21, 2017

Re: WIPO Arbitration and Mediation Center observations on *ICANN's Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process*

The WIPO Arbitration and Mediation Center is pleased to submit the following observations on the present Initial Report.

As stated in the preamble to this Issues Report: “the GNSO Council launched this Policy Development Process (PDP) and tasked the Working Group to determine whether, **in order to address the specific needs and circumstances of international governmental organizations (IGOs)**...[the UDRP and URS] should be amended and, if so, in what respects; or (2) a separate, narrowly-tailored dispute resolution procedure modeled on the existing curative rights protection mechanisms should be developed.” (emphasis added)

To assess whether a particular policy would in fact “address the specific needs and circumstances of IGOs”, that question would naturally be put to IGOs themselves. In fact, on numerous occasions in the history of this file, it was. Nevertheless, the Initial Report does not take proper account of IGOs’ feedback.

Before explaining how the Initial Report fails to reflect IGOs’ feedback, it is worth recalling that a compelling argument may be made for stronger, preventative (rather than curative) protection. Such a bar on domain name registrations corresponding to IGO identifiers would, against hundreds of millions of registered domain names, involve roughly only 200 IGOs. Even so, recognizing co-existence principles, IGOs understand the alternative of facilitating protection through a curative mechanism – assuming it is appropriately designed.

The recommendations do not account for IGOs’ unique status

Correspondence from IGO Legal Counsels as well as GAC Advice has been clear: both in terms of (i) the scope of rights to support standing to file a case, and (ii) “Mutual Jurisdiction”, the UDRP does not accommodate IGOs’ specific needs and circumstances; but a separate mechanism modeled on the UDRP would.

While ICANN's Bylaws and Core Values indicate that the concerns and interests of entities most affected, here IGOs, should be taken into account in policy development processes, the Working Group's recommendations fail to adequately meet this mandate.

The recommendations do not reflect the global public interest

IGOs are unique institutions created by governments to fulfill global public missions. As such, IGO identifiers warrant tailored protection by ICANN in keeping with the global public interest behind their causes.

Despite IGOs' recognized international status, nothing in today's DNS prevents criminal elements from executing scams through the misuse of IGO identities. In addition to individual donors being defrauded, it is the IGO beneficiaries such as victims of humanitarian disasters who lose out when bad actors misappropriate funds intended for IGO campaigns.

This risk was highlighted e.g., by the New York Times on the heels of the global Ebola crisis: https://bits.blogs.nytimes.com/2014/10/24/malicious-ebola-themed-emails-are-on-the-rise/?_r=0.

Against such background, GAC Principles on New gTLDs call on ICANN to accommodate IGOs' rights in their names and acronyms. Likewise, having observed ICANN's failure to address these concerns so far, the United Nations Secretary-General in 2016 addressed this topic with UN Member States.

The suggested workarounds miss the target

The Working Group's suggestion to issue "Policy Guidance" on UDRP standing, and to apply agency principles to avoid jurisdictional questions, is misguided in two respects.

First, such "alternative guidance" would contravene the plain language of the UDRP itself. We strongly feel that ICANN should see this as inadvisable for a number of reasons.

Second, given that fair resolution of disputes involving IGOs more generally through independent and impartial arbitration is already widely accepted (see Swaine Memo page 28), the application of agency principles would be an artifice creating unnecessary legal hurdles.

The core question before us is a simple one

Ultimately, the present exercise may come down to a core question:

Should an unfettered DNS market prevail over appropriately protecting IGO identifiers in accordance with their international status?¹

¹ It is recalled here that, over deemed "consensus", IGOs were forced to argue for inclusion of a "Minority Statement" in a prior Working Group effort on so-called preventative IGO protection. See in particular pages 6 and 7 at: <https://gnso.icann.org/en/issues/igo-ingo-final-minority-positions-10nov13-en.pdf>.

This raises larger questions beyond the scope of this submission concerning the nature of ICANN's multi-stakeholder model, where, as summarized in the [IPC's comments on the GNSO review](#): "ICANN cannot effectively [improve [Internet] policy [for] internet users'] when its chief policy development Council is captured by [registration] parties".

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To many, the answer would seem to be straightforward:

IGOs – and the donors supporting them and especially the citizens relying on them – merit tailored protection in the DNS commensurate with their unique treaty-based position.

The means to achieve this would seem equally straightforward: ICANN should be able to accommodate IGOs' specific needs and circumstances through a narrowly tailored dispute resolution mechanism modeled on, but separate from, the UDRP.

By facilitating this, not only would ICANN help protect IGO causes recognized by governments the world over, but it would signal a commitment to a more credible DNS that prioritizes trust and consumer safety in balancing the rights of IGOs and good-faith registrants.

Thank you for giving this longstanding file your effective consideration.

These observations are posted on the WIPO website at:
www.wipo.int/amc/en/domains/resources/icann.

Yours sincerely,



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