ICANN-GNSO Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanism Policy Development Process

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Comments from the United Nations Educational, Scientific and Cultural Organization (UNESCO)

1. The United Nations Educational, Scientific and Cultural Organization ("UNESCO") is pleased to submit its comments on ICANN's Generic Names Supporting Organization ("GNSO") Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanism Policy Development Process, published on 19 January 2017 ("Initial Report").

2. UNESCO fully concurs with the comments already submitted by the OECD (submitted on 27 February 2017) and by the United Nations (submitted on 1 March 2017). We wish to provide additional comments on Recommendation #4 of the GNSO's Policy Development Process Working Group ("Working Group"). UNESCO submits that this recommendation deprives Inter-Governmental Organizations ("IGOs") of their access to an effective curative rights protection mechanism because it fails to account for IGOs' immunities.

3. It is worth recalling that IGOs are particularly exposed to fraudulent registrations of domain names. Since ICANN introduced a program which resulted in a potentially limitless expansion of the domain name system in 2011, UNESCO and other IGOs have been exposed to online fraud in a way not previously seen. For instance, cyber-criminals have used UNESCO's name or acronym in a domain name to fool internet users into making payments. These frauds are of particular gravity because they do not only affect IGOs themselves and their donors, but also the public interests towards which these payments could have been directed. It is therefore crucial that ICANN guarantees IGOs an access to an appropriate dispute resolution mechanism, given the public interests at stakes.

1. Recommendation #4(a)

4. The Mutual Jurisdiction clause of the Uniform Dispute Resolution Policy ("UDRP") requires that complainants alleging that a domain name registration infringes their trademark agree to "*submit, with respect to any challenges to a decision in the administrative proceeding cancelling or transferring a domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction*." Under ICANN's rules of procedure, a "*Mutual Jurisdiction*" means a national jurisdiction at the location of either the principal office of the registrar of the domain name, or at the domain-name registrant's location.

5. In its Recommendation #4, the Working Group recommended that "*no change be made to the Mutual Jurisdiction clause*" of the UDRP. Accordingly, under this Mutual Jurisdiction Clause, IGOs wishing to initiate proceedings under the UDRP would be forced to agree in advance to submit to the jurisdiction of a national court in case of appeal. UNESCO submits that the Mutual Jurisdiction Clause, as it stands, is inconsistent with IGOs' jurisdictional immunity.

a. IGOs enjoy jurisdictional immunity

6. It is well-established under international law that IGOs enjoy immunity from national jurisdictions. This immunity is enshrined in various legal instruments such as IGOs'

founding treaties, international conventions, host-country agreements and even national statutes.[1] For instance, the United Nations' privileges and immunities are enshrined in Article 105 of the Charter of the United Nations Organization:

> "*The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.*"

7. The United Nations' immunity from jurisdiction and execution is also set out in Article 2 of the Convention on the Privileges and Immunities of the United Nations, which provides that:

> "[t]*he United Nations, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution*."

8. Similarly, the United Nations' specialized agencies have immunity from jurisdiction, as set out in Article 3 of the Convention on the Privileges and Immunities of the Specialized Agencies:

> "[t]*he specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any representations without detriment to the interests of the agency.*"

9. In the particular case of UNESCO, Article XII of the Constitution of the United Nations Educational, Scientific and Cultural Organization provides that "[t]*he provisions of Articles 104 and 105 of the Charter of the United Nations Organization concerning the legal status of that Organization, its privileges and immunities, shall apply in the same way to* [UNESCO]."

10. By treaty, the international community has therefore granted IGOs full immunity from legal process to ensure their independence from any State, and allow them to fulfil the objectives of public interest for which they were established.

b. An IGO would enjoy immunity in the case of UDRP appeal under every legal approach to immunity

11. The Working Group stated that one of the reasons why the Mutual Jurisdiction Clause should not be amended is because "*there is no single universal rule applicable to IGOs' jurisdictional immunities globally*." To support this allegation, the Working Group relied on Professor Swaine's finding that there are three approaches to immunity applied by courts: absolute, functional and restrictive. [2]

12. First, and as explained below, national courts have no jurisdiction to determine the extent of the immunities enjoyed by IGOs.

13. Second, an IGO would have immunity from jurisdiction under any of these three legal approaches.

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[1] Such as the International Organizations Act 1968 in the United Kingdom, or the International Organizations Immunity Act in the United States, both referred to by Professor Swaine in his memorandum, p. 86.
[2] Professor Swaine's memorandum, pp. 88-96.

14. In fact, in his memorandum, Professor Swaine stated that a jurisdictional immunity claim from an IGO in this context would prevail under an absolute immunity approach, but also under a functional immunity approach because "*it is part of an IGO's mission to maintain the distinctive character of its name, and avoid confusing domain-name registration.*"[3]

15. As concerns the restrictive immunity approach, Professor Swaine rightly pointed out that it is applied only by "*relatively few states*." In any event, under such approach, the immunity of an IGO would depend on the nature of its act, i.e. whether they are commercial or not. However, an IGO seeking to protect its name from fraudulent registration in the Domain Name System is not of commercial character, especially considering that IGOs do not hold trademarks and do not use their names for commercial purposes. In this context, Professor Swaine concluded that even in the United States, where the restrictive approach is applied, "*an IGO's registration of trademarks* […] *solely for defensive purposes might not be deemed commercial activity*." *A fortiori*, an IGO's activity related to the protection of its name and acronym, which are not registered as trademarks, would not be considered a commercial act.

16. UNESCO therefore submits that, contrary to the recommendation of the Working Group, the Mutual Jurisdiction clause should be amended to take into account the nature of IGOs and their full immunity from legal process, while also respecting registrants' right to have an unfavourable UDRP Panel decision reviewed. As stated by Professor Swaine, "*IGOs typically resolve the tension between immunity and judicial processes*" by referring to arbitration.[4]

2. Recommendation #4(b)

17. To circumvent the issue of jurisdictional immunity, the Working Group suggested that IGOs "*elect to have a complaint filed under the UDRP and/or URS on their behalf by an assignee, agent or licensee*" so they can proceed to an appeal before a national jurisdiction without having to waive their immunity.

18. Contrary to what the Working Group stated, IGOs are not "*able to file complaints through an assignee, licensee or agent*"[5] without waiving their immunity. An assignee, licensee or agent would lodge a complaint *on behalf* of the IGO, and thus even an assignment could be construed as a waiver of immunity.

19. For these reasons, we concur with OECD's comment that "[i]*n light of the uncertainty surrounding the effectiveness of assignment from both an immunities and intellectual property perspective, the conclusion that such a complicated legal workaround is a viable remedy for the problem at hand is unsupported by the facts presented in the* [Working Group]*'s report.*"[6]

3. Recommendation #4(c)

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[3] Professor Swaine's memorandum, p. 96.
[4] Professor Swaine's memorandum, p. 103.
[5] Initial Report, p. 15.
[6] OECD's comments submitted on 27 February 2017, available at: https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/msg00002.html, p. 3.

20. Finally, the Working Group proposed two options addressing the cases "*where an IGO succeeds in asserting its claim of jurisdictional immunity in a court of mutual jurisdiction*." In this regard, UNESCO reiterates that, precisely because IGOs are immune from jurisdiction by international treaty, the extent of this immunity cannot be determined by a national court.

21. In fact, IGOs' immunity from legal process prevents IGOs from appearing before a national court at all, even if it is to raise a so-called "*immunity claim*." This is because the mere fact that an IGO appears before a court could be construed as a waiver of immunity. Therefore, the Working Group based Recommendation #4 on the wrong assumption that "*IGOs* […] *may claim* [jurisdictional immunity] *successfully in certain circumstances*." IGOs' immunity is not a mere jurisdictional objection that has to be raised during the proceedings by the IGO and that is ultimately decided by the Court. IGOs' jurisdictional immunity rather renders the appeal inadmissible *ratione materiae*. If a court of national jurisdiction could decide whether an IGO has immunity or not, this would defeat the purpose of jurisdictional immunity, which is to guarantee IGOs' independence in the performance of their functions.

22. Even if a national court were able to determine the extent of an IGO's immunity in a case to which an IGO would be party, an "*immunity claim*" would be unlikely to succeed before any Court. As described by the Working Group itself in the Initial Report, the mere fact that an IGO agrees to a Mutual Jurisdiction under the UDRP or URS could likely be interpreted as an implicit waiver of immunity.[7] As Professor Swaine expressed: "*the* […] *question is whether –in light of an IGO's assent to Mutual Jurisdiction – its immunity remains. Here, the more likely answer is that it would not.*"[8]

23. In sum, even if IGOs could raise a claim of immunity directly before a court, the Mutual Jurisdiction Clause, as it stands, would leave no chance for this claim to succeed. For this reason, there is no need to discuss the two options proposed by the Working Group. UNESCO reiterates that the best solution would be to avoid the determination of the IGOs' immunity altogether by automatically referring the appeal to arbitration.

24. For instance, the Mutual Jurisdiction clause could be amended by adding the following paragraph:

> "in the event that the complainant is an IGO enjoying privileges and immunities under relevant treaties, challenges to a decision in the administrative proceeding cancelling or transferring a domain name shall be referred to final and binding arbitration."

[7] Initial Report, pp. 15, 19; Professor Swaine's memorandum, p. 78.
[8] Professor Swaine's memorandum, p. 78.