



**Comment on IGO-INGO
Access to Curative Rights
Protection Mechanisms
Policy Recommendations for
ICANN Board Consideration**

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Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

BC Comment on GNSO Policy Development Process on IGO-INGO Access to Curative Rights Protection Mechanisms Policy Recommendations for ICANN Board Consideration¹

The Business Constituency supports the GNSO Council's resolution regarding Approval of the Final Report from the GNSO PDP Working Group on Access to Curative Rights Protection Mechanisms (the "Working Group") by International Governmental Organizations (IGOs) and International Non-Governmental Organizations (INGOs).

The BC previously supported all Recommendations of the Initial Report of the Working Group² and continues to support the Council's approval of Recommendations 1-4 of the Final Report. In the interest of finding a compromise resolution to the complex and controversial Recommendation 5, the BC supports deferring the subject matter of Recommendation No. 5 to the RPM Working Group for further study within a specifically chartered small group.

The UDRP is celebrating its 20th anniversary this year and has been widely credited as an effective tool for dealing with clear cases of cybersquatting. The Working Group considered IGO and INGO access to the UDRP and URS and determined that the UDRP and URS could be satisfactorily used by IGOs and INGOs to address clear cases of cybersquatting; some had done so to-date. Accordingly, the BC supports the Working Group's findings and sees no need to conceive, develop, and implement a separate rights protection mechanism for IGOs and INGOs. This would involve an unnecessarily complex, lengthy, and expensive exercise to find a solution in search of a problem.

To further assist IGOs in accessing their existing rights under the existing UDRP and URS, the Working Group set forth in its Recommendation 2, that IGOs should be able to access the UDRP even without a registered trademark, and specifically proposed additional policy guidance to improve and clarify IGO access to the UDRP. We would support IGOs and INGOs being involved in developing such guidance, as their practical experience will be vital in ensuring that it is useful and effective.

Similarly, pursuant to its Recommendation 3, the Working Group recommended providing greater policy clarity confirming that IGOs can access the UDRP without directly consenting to the jurisdiction of any national courts and thereby protecting IGO immunity.

¹ ICANN public comment page at <https://www.icann.org/public-comments/igo-ingo-crp-recommendations-2019-07-11-en>

² See; https://www.bizconst.org/assets/docs/positions-statements/2017/2017_03March_07%20BC%20comment%20on%20draft%20PDP%20report%20for%20IGO-INGO%20RPMs.pdf

Regarding providing subsidies to IGOs for accessing the UDRP or URS, the Working Group properly found pursuant to Recommendation 4 that this is a question to be taken up between the ICANN Board, the GAC and IGOs; however the Working Group properly noted that some members believed that where a subsidy is provided to a complainant, it may also be appropriate to consider providing one to the respondent in some circumstances.

As far as Recommendation 5 is concerned, as noted above, the BC approves of the deferral of this issue to a dedicated small group within the ongoing RPM Review, in an effort to seek further study and broader support for a policy resolution to the question of ‘what happens when a registrant ‘appeals’ a UDRP decision to a national court’. As noted by the BC in its Comments on the Initial Report³, claims of jurisdictional immunity to a court proceeding can and should be advanced before such national court and cannot be pre-determined by ICANN fashioning a blanket rule that does not take into account the facts and circumstances of each case.

In the BC’s aforementioned Comments on the Initial Report, we supported what was ultimately the Minority position in the Final Report, namely that “in those rare instances in which a losing registrant seeks judicial appeal and the IGO subsequently successfully asserts its immunity to the court’s jurisdiction...the decision rendered against the registrant in the predecessor UDRP or URS may be brought before a to-be-determined arbitration forum for de novo review and determination”.

The Majority position in the Final Report, in contrast, was that where a registrant was prevented by a court from appealing a UDRP decision due to an IGO’s asserted immunity, the original UDRP decision should be vacated since otherwise the IGO would be effectively permitted to avail itself of the UDRP but shield itself from any appeal. The BC maintains its preference for its original position as espoused by the Minority position in the Final Report and trusts that working through the practicalities and specificities with the INGO-IGO community will provide clarity on the way forward.

Accordingly, the BC supports further examination of this issue within a dedicated small group under the umbrella of the RPM Working Group where hopefully a solution may be found which satisfies all stakeholders. Given the history surrounding this subject we would support outreach to, and involvement of, IGOs and INGOs in this process, as well as experts in this specialized area of international law.

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This comment was drafted by Zak Muscovitch, with edits by Andy Abrams, Marie Pattullo, and Jimson Olufuye.

It was approved in accord with the BC Charter.

³ See; https://www.bizconst.org/assets/docs/positions-statements/2017/2017_03March_07%20BC%20comment%20on%20draft%20PDP%20report%20for%20IGO-INGO%20RPMs.pdf