



Via Email: policy-staff@icann.org

August 21, 2019

Ms. Mary Wong
Policy Development Support
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California
90094-2536, USA

Dear Ms. Wong:

Re: GNSO Policy Development Process on IGO-INGO Access to Curative Rights Protection Mechanisms Policy Recommendations for ICANN Board Consideration

We are pleased to herein provide our comments to the ICANN Board (the “Board”) with regards to the GNSO Council’s (the “Council”) approval of Recommendations 1-4 and deferral of Recommendation 5 of the Final Report (the “Final Report”) of the IGO-INGO Access to Curative Rights Protection Mechanisms Working Group (the “Working Group” or the “WG”) to the RPM Working Group.

Summary:

Should IGOs and INGOs have effective access to rights protection mechanisms which reasonably meet their unique requirement not to submit to courts? **Yes.**

Does this mean that a new rights protection mechanism needs to be established specifically for IGOs and INGOs? **No.**

Misapprehensions

We want to bring to the Board’s attention that considerable misapprehension exists among IGOs and INGOs who believe that the Working Group did not take into account their needs. The fact is

that the Working Group did seriously and respectfully take into account all genuine IGO and INGO needs and legal requirements and did in fact find solutions that should be reasonably satisfactory to IGOs and INGOs.

In particular, each of the four (4) Recommendations that Council approved of were the product of extensive deliberations and reasoned conclusions that both the Majority and the Minority of the Working Group approved of.

Moreover, each of the four (4) approved Recommendations are supportive of the legitimate legal requirements of IGOs and INGOs in protecting their legal rights and providing effective recourse.

The fundamental issue here which the Working Group was tasked with examining, was whether *new* dispute resolution procedures were required for IGOs and INGOs. The Working Group determined that existing dispute resolution procedures, i.e. the successful and widely used UDRP and URS procedures, were in fact currently available to IGOs and INGOs and were currently effective but that additional policy clarification was advisable to make them even more effective for IGOs and INGOs.

The specific concern raised by IGOs and INGOs that they could not avail themselves of the UDRP because they were unable to agree to being subjected to an appeal in a national court of law was addressed. It was determined that IGOs and INGOs had previously utilized the UDRP through a proxy or nominee, so as to not have to agree to being subject to the jurisdiction of a national court in the event of an appeal. Professor Swaine in his legal opinion to the Working Group dated June 17, 2016, noted as follows:

Indeed, several IGOs—including the International Mobile Satellite Organization (INMARSAT), the International Bank for Reconstruction and Development (IBRD), and the Bank for International Settlement (BFIS)—have prevailed in UDRP complaints.⁵

The World Bank in its Comment submitted to the Board dated, August 15, 2019, claims that the issue of whether IGO privileges and immunities are adequately addressed by the existing UDRP should be ‘deferred to the IGOs who are experts on these issues’. The World Bank however, has failed to acknowledge that it was in fact able to successfully bring a UDRP in connection with the domain name, worldbank.net in the case of *International Bank For Reconstruction and Development d/b/a The World Bank v. Yoo Jin Sohn*, WIPO Case No. D2002-0222 back in 2002, and if necessary can do so now as well, particularly with the additional policy guidance recommended by the Working Group.

Pursuant to its Recommendation No. 3, the Working Group nonetheless recommended providing greater policy clarity *confirming* that IGOs can access the UDRP without directly submitting to the jurisdiction of any national courts and thereby protecting IGO immunity. This is a special measure specifically recommended to accommodate IGOs and INGOs, but which did not require creating a brand-new procedure. Rather, the Working Group prudently determined that existing procedures could be satisfactorily adapted.

Ostensibly, IGOs and INGOs would and should be satisfied if existing procedures are currently available to them with some additional revisions and clarification to existing policies, and that is precisely what the Working Group recommended. To-date, the IGOs and INGOs have failed to provide any comprehensible justification for demanding “their own” new procedure in light of the fact that they have previously used the UDRP and continue to be able to, particularly with the recommended policy clarifications.

To further assist IGOs in accessing their existing rights under the existing UDRP and URS, the Working Group recommended in its Recommendation No. 2, that even without a registered trademark, that IGOs should be able to access the UDRP and specifically proposed additional policy guidance to improve and clarify IGO access to the UDRP.

Regarding providing subsidies to IGOs for accessing the UDRP or URS, the Working Group properly found pursuant to Recommendation No. 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.

Accordingly, the Board should acknowledge that reasoned and reasonable Recommendations were provided by the Working Group and reject unjustified attempts to have ICANN create a new procedure when the current one as adapted is effective and satisfactory.

Insofar as Recommendation No. 5 is concerned, this Recommendation obtained consensus within the Working Group and the ICA supported it. The rationale for Recommendation No. 5 was clear and compelling. If an IGO chose to avail itself of the expedited and efficient UDRP procedure instead of going to court as is its other option, and subsequently convinced a court that it was immune from the court’s jurisdiction, that would effectively enable an IGO to avoid having its complaint subject to appeal. This would be fundamentally unfair to registrants.

Accordingly, Recommendation No. 5 justly recommended that if an IGO frustrated the normal court “appeal” process by successfully asserting immunity to the court when it came to an “appeal”, the UDRP decision transferring the domain name should be vacated. This is a fair solution which merely prevents a party from relying on a UDRP transfer order when that same party makes an appeal impossible, thereby depriving the registrant of justice.

Denying a registrant’s “appeal” of a UDRP decision in a court of law is eminently unjustified, yet that is precisely what the IGOs and INGOs have ostensibly demanded. Moreover, the UDRP was conceived as an alternative to the courts, and not as a substitute for them. It was the result of a grand bargain wherein the UDRP was created as an effective and expedited means of asserting rights over domain names, provided however, that the registrant would never lose its inherent right to avail itself of national courts.

Nevertheless and despite the clear merit in Recommendation No. 5, at this time we support the Council’s decision to defer this issue for further study by the RPM Working Group as a means of possibly finding alternative solutions satisfactory to all stakeholders, including IGOs and INGOs.

Respect for the Policy Development Process

The Board is encouraged to maintain the important policy development process where the GNSO is chiefly responsible for policy development. The Council established a Working Group in accordance with its PDP procedures and the Working Group diligently worked for nearly four years to reach reasoned Recommendations. The Board should therefore accept Council's recommendations in full.

It is however, imperative that this time, IGOs and INGOs actually participate when it comes to further deliberations on Recommendation No. 5. IGOs and INGOs failed to directly participate in the established policy development process and they cannot be allowed yet again, to sit on the sidelines while policy is being developed, only to complain once consensus is reached without them.

Lastly, the ICA wishes to specifically bring to the Board's attention, that the Working Group's Recommendations were, apart from IGO and INGO non-participation, the product of a reasonable cross-section of the ICANN community. In particular, the Recommendations received support from 9 individual Working Group members who represent registries, registrars, and registrants (rather than in this case, necessarily representing specific constituencies). A letter was sent to the Board on August 16, 2018, by these 9 members of the Working Group who all expressed their strong support for the Recommendations, including Recommendation #5. A copy of this letter is attached and it attempts to clear up some of the misapprehensions regarding the Final Report. Accordingly, despite the Consensus reached by the Working Group, Council intends to refer Recommendation #5 to a small newly constituted Working Group. The small working group envisioned by Council should be representative of all stakeholders, including but not limited to registrants and IGOs and INGOs.

It should not be used as a means of freezing out particular stakeholders and/or reaching a pre-ordained determination, particularly in light of the fact that Council has already gone against the Consensus of a diligent and longstanding Working Group who already thoroughly studied the issues, because it was under undue pressure by IGOs and INGOs who failed to participate to begin with.

Yours truly,
INTERNET COMMERCE ASSOCIATION



Per:
Zak Muscovitch
General Counsel, ICA

Letter to ICANN Board by 9 Members of the IGO-INGO Working Group

Via Email: Correspondence@icann.org
and board@icann.org
Via Facsimile: +1 310 823 8649

August 16, 2018

ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California
90094-2536, USA

Attn: Board of Directors

Dear ICANN Board of Directors:

Re: PDP-IGO-INGO Access to Curative Rights Protection Mechanisms

We write to you on as members of the IGO-INGO Access to Curative Rights Protection Mechanisms Working Group (the “Working Group”) who worked diligently for four years to develop sound and reasoned policy recommendations as set out in the Final Report.

We have reviewed the letter dated July 27, 2018, which was sent to you by Mr. Stephen Mathias on behalf of the United Nations in connection with the Final Report.

We believe that the Board should be aware of the following:

1. The Working Group operated for four years and was open to all stakeholders. None of the groups that Mr. Mathias writes on behalf of, namely the Universal Postal Union, the World Bank, and the World Health Organization, participated in the Working Group as members. The OECD and WIPO, two of the other groups that Mr. Mathias writes on behalf of, did not actively participate except for WIPO earlier on in an observer capacity. Sending comments during the public comment period is not a substitute for participation in the Working Group.
2. The Working Group included a cross-section of members from various constituencies. There were two members from the Registry Stakeholder Group, 1 member from the Registrar Stakeholder Group, several members from the Business Constituency, one from the IPC, one from the NCUC, and three non-aligned individuals, all of whom supported the strong consensus for Recommendation #5 contained in the Final Report.
3. IGOs encounter legal conflicts with third parties for many disputes that are not always subject to private commercial arbitration, such as trademark, copyright, or patent

infringement, for example. The Working Group determined that IGOs *could access the UDRP without* waiving any jurisdictional immunity by using an agent or nominee to bring the UDRP proceeding, as was done in a case involving UNITAID.¹

4. Professor Swaine in his memorandum to the Working Group, (Page 118, Footnote 5 of the Final Report) pointed out that, “Indeed, several IGOs—including the International Mobile Satellite Organization (INMARSAT), the International Bank for Reconstruction and Development (IBRD), and the Bank for International Settlement (BFIS) have prevailed in UDRP complaints”.
5. Mr. Mathias and the GAC have requested that ICANN create a brand new, untested and cumbersome system when there is no compelling reason that such is necessary. The existing framework for the past nearly 20 years is sufficient, and no one has successfully raised any compelling rebuttal to this conclusion.

Yours truly,

Jay Chapman, President, Digimedia.com, LP
(Member of BC)

Nat Cohen, President, Telepathy, Inc.
(Member of BC)

Paul Keating, Law.es
(Member of NCUC)

George Kirikos, President, Leap of Faith Financial Services Inc.
(Member of At-large)

Alex Lerman, Individual

Reg Levy, Director of Compliance, Tucows,
(Member of Registrars Constituency)

David Maher, Senior Vice-President for Law and Policy, Public Interest Registry
(Member of Registry Stakeholder Group)

Zak Muscovitch, General Counsel, Internet Commerce Association
(Member of BC)

Mike Rodenbaugh, Rodenbaugh Law
(Member of IPC)

cc: Heather Forrest, Susan Kawaguchi, Mary Wong, Petter Rindforth

¹ See; <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2012-1922>