

IGO-INGO Access to Curative Rights Policy Development Process (PDP)

GNSO Council Webinar & Discussion

9 October 2018



Agenda

- ⊙ **Introduction** – clarifying scope of discussion
- ⊙ **PDP Charter** – what was the Working Group chartered to address?
- ⊙ **Process questions** – what process issues were encountered during the PDP and has the Working Group followed due process?
- ⊙ **GAC advice** – did the Working Group address GAC advice on the topic?
- ⊙ **Next steps** – including agenda/actions for ICANN63

What are the PDP final recommendations? (1)

Recommendation #1 (Full Consensus):

- ⊙ 1(a). For **INGOs** (including the Red Cross movement and the International Olympic Committee): **no substantive changes to the UDRP and URS are to be made, and no specific new dispute resolution procedures** are to be created.
- ⊙ 1(b). For **IGOs**: **no specific new dispute resolution procedures** are to be created.

Recommendation #2 (Consensus):

- ⊙ ... an **IGO** may seek to demonstrate that it has the requisite standing to file a complaint under the UDRP/URS by showing that it has complied with the **requisite communication and notification procedure** in accordance with Article 6ter of the Paris Convention for the Protection of Industrial Property.
- ⊙ An IGO may consider this to be an option where it does not have a registered trademark or service mark in its name and/or acronym but believes it has certain unregistered trademark or service mark rights for which it must adduce factual evidence to show that it nevertheless has substantive legal rights in the name and/or acronym.

What are the PDP final recommendations? (2)

- ⦿ Specific Policy Guidance to be issued by ICANN:
 - (a) this alternative mechanism for standing is not needed in a situation where an IGO already holds trademark or service mark rights in its name and/or acronym, as the IGO would in such a case proceed in the same way as a non-IGO trademark owner;
 - (b) whether or not compliance with Article 6ter will be considered determinative of standing is a decision to be made by the UDRP or URS panelist(s) based on the facts of each case; and
 - (c) the possibility that an IGO may seek to rely on its compliance with Article 6ter to demonstrate standing should not modify or affect any of the existing grounds which UDRP and/or URS panelists have previously found sufficient for IGO standing (e.g. based on statutes and treaties).

Recommendation #3 (Consensus):

- ⦿ ICANN shall create and issue **Policy Guidance**:
 - (a) outlining the **various procedural filing options available to IGOs**, e.g. they have the ability to elect to have a complaint filed under the UDRP and/or URS on their behalf by an assignee, agent or licensee; and
 - (b) advising IGOs and INGOs to, in the first instance and prior to filing a UDRP or URS complaint, **contact the registrar of record** to address the harms for which they are seeking redress.

What are the PDP final recommendations? (3)

- ⦿ .. ICANN shall ensure that this Policy Guidance document is brought to the notice of the Governmental Advisory Committee (GAC) for its and its members' and observers' information, and published along with the procedures and rules applicable to the UDRP and URS on the ICANN website.

Recommendation #4 (Consensus):

- ⦿ ... **no support within the Working Group for a recommendation to provide subsidies to any party to use the UDRP or URS.** Nevertheless, the Working Group recognizes that it has no authority to obligate the expenditure of ICANN funds, and it understands, further, that the feasibility of providing IGOs with access to the UDRP and URS at no or nominal cost to the IGOs is a question that must be addressed directly through discussions between the ICANN Board with the GAC and IGOs. The Working Group also notes that many Working Group members believe that a respondent should also be eligible to receive financial support for its defense in a case where ICANN has subsidized the complainant.

Recommendation #5 (Consensus)**:

- ⦿ Where a losing registrant challenges the initial UDRP/URS decision by filing suit in a national court of mutual jurisdiction and the IGO that succeeded in its initial UDRP/URS complaint also **succeeds in asserting jurisdictional immunity in that court, the decision rendered against the registrant in the predecessor UDRP or URS shall be set aside** (i.e. invalidated).
 - *NOTE: 2 Minority Statements were filed against Recommendation #5, with a 3rd Minority Statement filed providing one member's views on a number of issues.*

Scope of the PDP – the Charter

Does the Council believe that the PDP has addressed the issues that it was chartered to address, i.e.:

- What questions/topics was the Working Group chartered to consider, did it consider those charter topics/questions, and did it do so in a legitimate way?

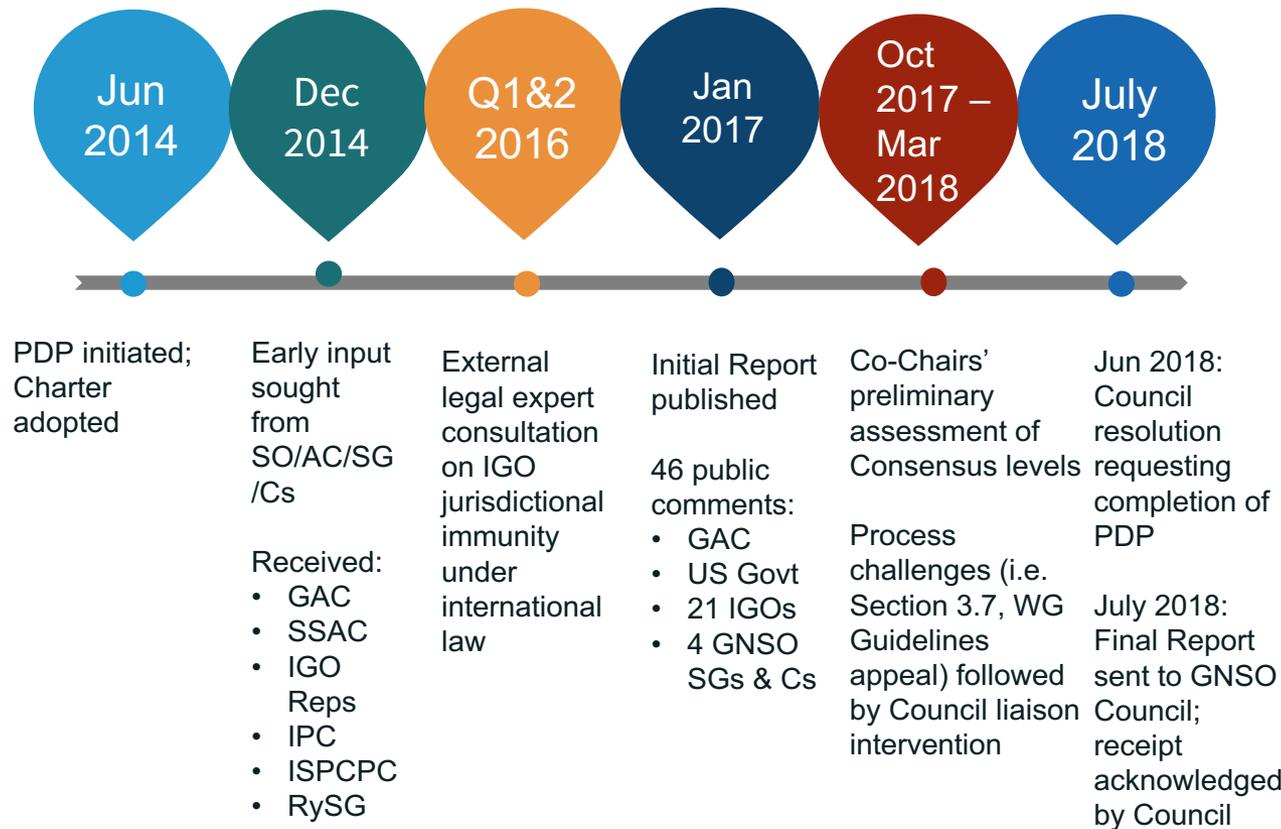
What was the PDP Working Group chartered to do?

- “... provide the GNSO Council with policy recommendations regarding ***whether to amend the UDRP and URS*** to allow access to and use of these mechanisms by IGOs and INGOs ***and, if so in what respects; or whether a separate, narrowly-tailored dispute resolution procedure at the second level modeled on the UDRP and URS that takes into account the particular needs and specific circumstances of IGOs and INGOs should be developed***”.
- Charter also contains questions from the Issue Report for the Working Group to address, including:
 - Differences (if any) between IGOs and INGOs;
 - Relevance of protections under international legal instruments and national laws;
 - Cost issues;
 - Relevance of prior ICANN community work on the topic (e.g. 2003 President’s Joint Working Group, 2007 Issue Report work on dispute resolution for IGOs);
 - Research as needed, including on special privileges and immunities for IGOs under international law and number/type of INGOs;
 - Practicable alternatives that can provide adequate protections, such as the development of a specific, narrowly-tailored dispute resolution procedure modeled on the UDRP and URS and applicable only to IGOs and/or INGOs.

Process Questions

- Has the Working Group followed due process?
- What were the process issues (if any) encountered by the Working Group?

PDP Timeline



If GNSO Council approves PDP recommendations, next step is to send them to the Board:

- **Additional public comment opportunity**
- **Notification to the GAC**

GAC Advice on IGO Protections

Did the Working Group address GAC advice on this topic?

What was the GAC advice received on the topic?

Essentially, GAC advice is for a separate dispute resolution procedure based on IGOs' status as international treaty-based creations of member governments, with appeals to be determined via arbitration:

- November 2017 (Abu Dhabi Communique):
 - The GAC recalls its longstanding advice on the topic of IGO protections and is closely monitoring the ongoing PDP on IGO-INGO Access to Curative Rights Protection Mechanisms. The GAC remains open to working with the GNSO to try to find a mutually agreeable resolution to this issue. The GAC also recalls the values of openness, transparency and inclusion, and representativeness and process integrity, that are respectively enshrined in ICANN's Bylaws and GNSO Operating Procedures.
 - The GAC advises the ICANN Board to review closely the decisions on this issue in order to ensure that they are compatible with these values and reflect the full factual record.
- June 2017 (Johannesburg Communique):
 - The GAC reiterates its Advice that IGO access to curative dispute resolution mechanism should: I. be modeled on, but separate from, the existing Uniform Dispute Resolution Policy (UDRP) II. provide standing based on IGOs' status as public intergovernmental institutions, and III. respect IGOs' jurisdictional status by facilitating appeals exclusively through arbitration.
 - The GAC expresses concern that a GNSO working group has indicated that it may deliver recommendations which substantially differ from GAC Advice, and calls on the ICANN Board to ensure that such recommendations adequately reflect input and expertise provided by IGOs.

Next Steps

- ICANN63 and Council action on the PDP recommendation

When is the Council expected to vote on the PDP recommendations?

Under the GNSO PDP Manual:

- “The GNSO Council is strongly encouraged to allow sufficient time for Stakeholder Group, Constituency and Councilor review of the Final Report prior to a motion being made to formally adopt the Final Report. However, the GNSO Council is also encouraged to take formal action on a Final Report in a timely manner, and preferably no later than the second GNSO Council meeting after the report is presented.”
- “At the request of any Council member, for any reason, consideration of the Final Report maybe postponed for no more than one (1) meeting, provided that such Council member details the rationale for such a postponement.”
- “The GNSO Council may, if deemed appropriate, schedule a separate session with the PDP Team to discuss the Final Report and ask any clarifying questions that might arise.”
- “The GNSO Council is strongly discouraged ... from modifying recommendations wherever possible. In the event the GNSO Council expresses concerns or proposes changes to the PDP recommendations, it may be more appropriate to pass these concerns or recommendations for changes back to the respective PDP Team for input and follow-up.”

What happens after the Council votes?

- Approved recommendations are forwarded to the ICANN Board for their review and action via an approved GNSO Council Recommendations Report
 - Report can supplement any Staff Reports that may highlight any legal, implementability, financial, and other operational concerns related to the PDP recommendations
- Under the ICANN Bylaws:
 - Board must provide notice and “reasonable opportunity” for comment on proposed policies
 - Board must request GAC opinion “where the policy action affects public policy concerns” and must “duly take into account any GAC advice timely presented”.
 - Board then meets to discuss “as soon as feasible, but preferably not later than the second meeting after receipt” of the GNSO Recommendations Report:
 - GNSO Supermajority approval can be ***rejected by a vote of >2/3 of the Board if the Board determines that such policy is not in the best interests of the ICANN community or ICANN.***
 - If this happens, Board must send a statement to the Council “articulat[ing] the reasons for its determination”; Council must review Board statement “as soon as is feasible” and engage in a discussion with the Board.
 - Council then affirms or modifies its recommendations and communicates result and explanation. If supplemental recommendation attains GNSO Supermajority vote, the Board must adopt unless >2/3 determines it is not in the interests of the ICANN community or ICANN.

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