

SUMMARY PAPER: STATUS, ISSUES & NEXT STEPS FOR THE IGO-INGO CURATIVE RIGHTS POLICY DEVELOPMENT PROCESS (PDP) FINAL REPORT

Prepared by ICANN Staff for the GNSO Council (28 November 2018)

FRAMING THE ISSUE:

This paper highlights the status of work on the recently-completed IGO-INGO Curative Rights PDP. The primary aim of this paper is to set out possible options as to a path forward for the GNSO Council's consideration. To assist with the Council's deliberations, this paper also includes an Appendix that documents the concerns raised by Councillors and community members to date about this PDP, with the relevant background and context.

STATUS SUMMARY:

Scope of PDP:

Under its charter¹, the IGO-INGO Curative Rights PDP *"is tasked to 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."*

PDP Status:

The PDP Final Report² was submitted to the GNSO Council in July 2018. Procedurally, the GNSO Council acknowledged receipt³ of the report but has yet to vote on the Final Report and its recommendations. A motion to approve the Final Report was submitted⁴ for the Council's consideration at its October 2018 meeting, but withdrawn⁵ following Council discussion of possible concerns with the PDP; in particular, with Recommendation #5 (relating to the setting aside of a UDRP/URS decision where a losing respondent files suit in a court in which an IGO successfully claims jurisdictional immunity⁶). Substantively, concerns

¹ See: https://gns0.icann.org/sites/default/files/filefield_45569/igo-ingo-crp-access-charter-24jun14-en.pdf

² See <https://gns0.icann.org/sites/default/files/file/field-file-attach/igo-ingo-crp-access-final-17jul18-en.pdf>.

³ See <https://gns0.icann.org/en/council/resolutions#201807>; note that the Council resolution also expressly acknowledges *"the need to consider the topic of curative rights protections for IGOs in the broader context of appropriate overall scope of protection for all IGO identifiers (including IGO acronyms) [and the possibility of] developing a possible path forward that will also facilitate the resolution of the outstanding inconsistencies between GAC advice and prior GNSO policy recommendations on the overall scope of IGO protections"*.

⁴ See <https://mm.icann.org/pipermail/council/2018-October/021868.html>.

⁵ Following discussions during the GNSO's Working Session on Sunday 21 October at ICANN63 and additional discussions within specific Stakeholder Groups and Constituencies, the Council agreed to withdraw the motion from consideration on Tuesday 23 October.

⁶ See Recommendation #5 from the Final Report: *"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)."*

have been raised as to whether the recommendation exceeds the scope of the PDP Charter in that its outcome may not address the needs and concerns of IGOs.

Having withdrawn the motion to vote on the Curative Rights PDP Final Report at ICANN63 in Barcelona (as opposed to deferring the vote to its next meeting), the GNSO Council has a range of procedural options to consider as its next step. Several options are presented below, with a series of considerations. In addition, please refer to the attached flow chart for a visual depiction of these options⁷.

PROCEDURAL OPTIONS FOR THE GNSO COUNCIL AT THIS STAGE:

Principal Question: *What does the Council believe is the appropriate next steps (if any) with regards to the IGO-INGO Curative Rights PDP Final Report, prior to voting on the PDP recommendations and in light of substantive concerns that have been raised as well as conflict with GAC Advice?*

To assist the Council with this question, several options are presented below, with a series of considerations that should be taken into account. Depending on the answer to the question above, these considerations may be considered as either advantages/benefits or disadvantages/risks.

Options (in no particular order of priority)	Considerations
<p>1. Engage in a (facilitated?) dialogue with the GAC **</p> <p><i>** this option is not mutually exclusive from and does not preclude the Council's decision as to the other options listed below; i.e. the Council may choose to engage with the GAC <u>prior to deciding on any of the other options</u></i></p>	<ul style="list-style-type: none"> • Provides the GAC with a role during the GNSO decision-making process that may be seen as circumventing the PDP (unless a specific objective and scope of the dialogue is defined beforehand and accepted by the GAC and GNSO). • Consistent with recommendation from the <i>GAC-GNSO Consultation Group</i> (e.g., for the GAC and GNSO to engage in dialogue to seek to resolve issues). • Allows for direct engagement with the parties that would be most affected by recommendations for IGO curative rights protection mechanisms (e.g., allows the GNSO to demonstrate how GAC Advice was considered, allows the

⁷ The flowchart was prepared by staff for the 2017-2018 GNSO Council leadership team following the Council's receipt of the PDP Final Report. Since the current Council is now in the same position as the previous Council in relation to its options for moving forward, it may be helpful to circulate this flowchart to the full Council at this stage.

	<p>GAC to demonstrate why IGOs require differential treatment, etc.).</p> <ul style="list-style-type: none"> • Follows from discussions at ICANN63 in Barcelona (including between the GAC and GNSO) as well as October 2018 GAC letter to GNSO requesting engagement. • Can use Red Cross facilitated dialogue as a model or starting point (including to define scope of the engagement and emphasize need to identify new developments or exceptional circumstances that may allow the GNSO Council to not accept the current PDP recommendations as they stand).
<p>2. Reject (i.e. vote “down”) all the PDP recommendations</p>	<ul style="list-style-type: none"> • PDP is terminated. • No Board action is required. • The status quo for the UDRP and URS will remain, which is nevertheless still inconsistent with GAC advice relating to IGO curative rights protections. • Council has never rejected consensus PDP recommendations (will likely need to document justifiable reasons for not accepting the recommendations). • Options 3, 4, 5 are foreclosed.
<p>3. Accept all the PDP recommendations</p>	<ul style="list-style-type: none"> • Compatible with vision of Council as the procedural manager of the PDP (rather than substantive policymaker) but may create impression of Council as “rubber stamping” PDP recommendations as long as a PDP Working Group indicates consensus was achieved. • Adopts recommendations that are inconsistent with GAC Advice, creating conflict at Board level. • Does not address all the substantive concerns that have been raised in relation to Recommendation #5. • Options 2, 4, 5 are foreclosed. • Allows the PDP to conclude.
<p>4. Accept Recommendations #1 - #4 and reject Recommendation #5**</p> <p><i>** As #5 will change existing Consensus Policy a Supermajority vote is required to pass this recommendation. For #1-#4, a majority vote in each House (including</i></p>	<ul style="list-style-type: none"> • Potentially less compatible with vision of Council as the procedural manager of the PDP (rather than substantive), although there is no requirement that Council must accept all consensus recommendations from a PDP. • Council has never rejected consensus PDP recommendations (will likely need to document justifiable reasons for not accepting the recommendations). • Allows less impactful recommendations to proceed (as these do not create new Consensus Policy or modify

<p><i>support of 1 Councillor from at least 3 out of the 4 SGs) is sufficient.</i></p>	<p>existing Consensus Policies), though Council will still be adopting recommendations that are inconsistent with GAC Advice, potentially creating conflict at Board level.</p> <ul style="list-style-type: none"> • Rejects the most problematic recommendation. • Allows the PDP to conclude.
<p>5. Send back either Recommendation #5 or all the recommendations to the PDP Working Group</p>	<ul style="list-style-type: none"> • Potentially less compatible with vision of Council as the procedural manager of the PDP (rather than substantive); however, the PDP Manual (Section 12) does specifically prescribe that Council can either consult the Working Group or send back its concerns or proposed changes to the group⁸. • Allows for substantive differences to be worked on further in existing PDP. • If sent back to the same WG, procedural issues could remain (e.g., concerns raised about lack of representation, differences between leadership and members, dominance by a specific group, etc.). • Depending on what the Council decides to send back, this could require a charter amendment. • PDP remains open, options 1, 2, 3, 4 or similar remain available at the conclusion of the PDP’s secondary effort. • Adds more time to the PDP, meaning that current interim reservations for IGO acronyms remain in place for a further unspecified time.
<p>6. Consult with the PDP Working Group to gain specific insights into its deliberations leading up to the consensus result on Recommendation #5 (including nature of Working Group</p>	<ul style="list-style-type: none"> • As noted above, Section 12 of the PDP Manual contemplates the Council passing its concerns about a PDP recommendation back to the Working Group. • Will not require a charter amendment. • May provide the Council with greater clarity as to the nature of the Working Group’s discussions and its rationale.

⁸ Section 12 of the PDP Manual provides that *“Although the GNSO Council may adopt all or any portion of the recommendations contained in the Final Report, it is recommended that the GNSO Council take into account whether the PDP Team has indicated that any recommendations contained in the Final Report are interdependent. The GNSO Council is strongly discouraged from itemizing recommendations that the PDP Team has identified interdependent or modifying recommendations wherever possible”*. In a previous discussion, the then-GNSO Chair had clarified, following consultation with ICANN staff and the Council liaison to the PDP, that Recommendation #5 is not dependent on either the operation, outcome or adoption of any of the other PDP recommendations. Section 12 goes on to state that, where the 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**”* (emphasis added).

<p>deliberations on the question of PDP scope and interplay with the RPM PDP) **</p> <p><i>** this option is not mutually exclusive from and does not preclude the Council's decision as to most of the other options listed above; i.e. the Council may choose to consult with the Working Group in parallel with engaging with the GAC and prior to voting on the Final Report</i></p>	<ul style="list-style-type: none"> • As noted above, procedural issues could arise during this consultation (e.g., concerns raised about lack of representation, differences between leadership and members, dominance by a specific group, etc.) • As noted above, PDP remains open and options 1, 2, 3, 4 or similar remain available at the conclusion of the PDP's secondary effort. • As noted above, this could add more time to the PDP, meaning that current interim reservations for IGO acronyms remain in place for a further unspecified time.
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APPENDIX: ADDITIONAL BACKGROUND

Substantive and procedural concerns and questions had been noted by the 2017-2018 GNSO Council in relation to the Curative Rights PDP. These include:

- 1. The fact that the GNSO chartered a separate PDP to conduct a Review of All Rights Protection Mechanisms (RPMs), including the UDRP and URS, and that PDP is looking at a proposal in the context of its URS review that (like Recommendation #5) pertains to possible consequences if a losing respondent is not able to obtain judicial review of the dispute;*
- 2. Concern that Recommendation #5, if adopted, exceeds the scope of the Curative Rights PDP Charter in that its outcome does not address the needs and concerns of IGOs;*
- 3. Whether the GNSO Council has the authority to remove Recommendation #5 from consideration and act only on Recommendations #1 - #4;*
- 4. What is the full range of procedural options that may be available to the GNSO Council at this stage;*
- 5. A 21 October 2018 letter⁹ from the Governmental Advisory Committee (GAC) noting inconsistency between the PDP recommendations and GAC advice as well as previous GAC requests for dialogue, and requesting the opportunity to engage urgently with the GNSO and that the GNSO Council “give serious consideration to the option of deferring its decision on the named PDP final recommendations until a dialogue between GAC and GNSO Council has been conducted”; and*
- 6. Concern that the procedural challenges faced during the final stages of the PDP demonstrates that consensus was reached by a small group that was not representative of the diversity of interests that may be impacted by the outcome.*

Notes on #1 (implications for the Review of All RPMs PDP):

As of October 2018, the RPM PDP Working Group had preliminarily agreed to publish all proposals it has received for reviewing the URS into its Phase One Initial Report for public comment¹⁰. One of these proposals (submitted by a Working Group member who also participated in the Curative Rights PDP and who proposed what became Recommendation

⁹ The letter has been published at <https://gns0.icann.org/sites/default/files/file/field-file-attach/ismail-to-forrest-et-al-21oct18-en.pdf>.

¹⁰ See the transcript of RPM Working Group’s discussions on this topic at ICANN63: <https://community.icann.org/download/attachments/90773068/RPM%20PDP%20WG%20ICANN63%20Meeting%2021%20Oct%202018%20Session%201.pdf?version=1&modificationDate=1540279658000&api=v2>; and the document outlining all the proposals received: <https://community.icann.org/download/attachments/90773068/%5BIndividual%5D%20Proposals%20for%20URS%20Policy%20%26%20Operational%20Recommendations%20%2816%20Oct%202018%29.pdf?version=1&modificationDate=1540302864000&api=v2>.

#5) was that “the URS and UDRP be modified so that in the event that a court finds a registrant has no cause of action to bring forth an appeal of an adverse URS/UDRP ruling in that jurisdiction, that the URS/UDRP decision be vitiated”. This proposal received limited support from other RPM Working Group members.

As the RPM group’s Initial Report is not likely to be published till spring 2019 at the earliest, and as the group will not proceed to review the UDRP until it completes Phase One of its work, the concern here is that, ***should the Council proceed to approve Recommendation #5, this could be subsequently cited as a factor that should be relevant to the outcome of similar proposals (such as the one noted above) in either Phase One or Phase Two of the RPMs PDP.***

Notes on #2 (whether Recommendation #5 exceeds the scope of the Curative Rights PDP charter):

The PDP charter tasks the Curative Rights Working Group to consider “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”¹¹. During its discussions at ICANN63 in October 2018, the GNSO Council noted that the issue for the PDP to consider relates to access and use of the RPMs by IGOs and INGOs and that, at the present moment, there is no mechanism within either the UDRP or URS to overturn a panel decision. The concern here is therefore that, ***in proposing Recommendation #5, the Curative Rights PDP has exceeded the scope of its charter, by recommending a mechanism that not only overturns a UDRP or URS panel decision, but is only applicable when involving IGOs.*** The new mechanism may serve as a deterrent to IGOs in utilizing the UDRP or URS, resulting in a potential increase in IGO specific cyber-squatting.

Notes on #3 & #4 (the GNSO Council’s procedural options):

As a motion to approve the PDP recommendations had already been proposed for the Council’s October 2018 meeting agenda, the Council discussed its procedural options in light of the concerns and questions that had been raised about the PDP. These included deferral or withdrawal of the motion in question and whether or not the PDP could be terminated. At ICANN63, the GNSO Council:

- Determined that it does not have the option to **terminate** the Curative Rights PDP at this stage, as this is a possibility only if a PDP Final Report has not yet been published¹²;

¹¹ See <https://community.icann.org/display/gnsoicrmpdp/WG+Charter>.

¹² Section 15, PDP Manual: <https://gns0.icann.org/sites/default/files/file/field-file-attach/annex-2-pdp-manual-18jun18-en.pdf>.

- Agreed that **withdrawing** the motion would provide it with greater flexibility and time to consider its next steps, since **deferring** a vote only means postponing action for one meeting¹³ (and the next Council meeting will take place in November 2018);
- Noted that, ***when the Council comes to vote on the PDP, should that vote be to reject the PDP recommendations (i.e. a “down” vote), that action will end the PDP without triggering any Board consideration*** of the PDP recommendations.

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- Please see the Table of Procedural Options (above) for a list of the available options and related considerations.
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In summary, at this stage of its deliberations on the topic of Curative Rights, the GNSO Council has the authority and ability to determine which of the above-noted procedural options is the most appropriate path forward. Under the PDP Manual, although the Council is “*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*”, as phrased, this is a suggested practice rather than a strict requirement. In view of the concerns and questions that have already been noted and the fact that a PDP vote now falls to the newly-seated 2018-2019 Council, it may be more prudent for the Council to more fully weigh its options prior to committing to a formal vote.

However, the Council should also note that the PDP was chartered in June 2014 and that **temporary second level protections for IGO acronyms that were put in place by the ICANN Board will remain operational until a final resolution is reached on the topic of IGO protections.**

Notes on #5 (possible engagement with the GAC):

This option had been raised within the 2017-2018 Council, but there had been no clear support to pursue this suggestion. On 21 October 2018, the GAC Chair wrote formally to the-then GNSO Council leadership team requesting the opportunity to engage urgently with the GNSO in order to avoid yet another conflict between the GAC and the GNSO on the topic of IGO protections. The letter also referenced the recommendation from the GAC-GNSO Consultation Group that encouraged “*the GAC and the GNSO Council to engage in dialogue, either through the regular mechanisms identified (GNSO Liaison to the GAC, GNSO-GAC leadership meetings) or on an ad-hoc basis in those instances where there is an obvious difference between the proposed PDP recommendations and GAC input that has been provided*”.

¹³ This is the GNSO Council’s accepted custom for deferrals and is also documented in relation to requests to postpone a vote on PDP recommendations in Section 12 of the PDP Manual. See also the GNSO Council’s note on this point during its October 2018 meeting where the withdrawal was confirmed: <https://static.ptbl.co/static/attachments/192241/1540495084.pdf?1540495084>.

In addition, the Curative Rights PDP was a topic of discussion at ICANN63, both during the GAC-GNSO meeting (on Sunday 21 October) and the GAC-Board meeting (on Tuesday 23 October). At the former, the GNSO Council leadership team acknowledged receipt of the GAC letter and noted the specific concerns that were raised during the meeting. At the latter, the ICANN Board indicated its willingness to facilitate a balanced resolution of the issues as between the public policy concerns expressed by the GAC and the IGOs, and the need to ensure that the UDRP and the URS remain fair and equitable for registrants. It was also noted that it was not the Board's role to intervene directly or to otherwise bypass the community's processes for policy development and advice.

Finally, it may be noteworthy that in the most recent GAC Communique (from ICANN63 in Barcelona in October 2018) the GAC had advised the ICANN Board that it hoped that the Board can *“facilitate a substantive, solutions-oriented dialogue between the GNSO and the GAC in an effort to resolve the longstanding issue of IGO protections, on which [the GAC] reaffirms its previous advice, notably with respect to the creation of a curative mechanism and maintenance of temporary protections”*¹⁴.

The mechanism for such a dialogue that had been suggested previously was that of a facilitated discussion, along the lines of a similar process that had taken place in March 2017 during the Copenhagen ICANN meeting which focused on the differences between GAC advice and GNSO policy on the protection of Red Cross National Society names. That dialogue (facilitated by former ICANN Board member Bruce Tonkin) had resulted in the GNSO Council's reconvening a PDP Working Group to address new and specific concerns highlighted during the dialogue, and in September 2018 the GNSO Council voted to adopt modified recommendations concerning Red Cross organizational names developed by the reconvened Working Group. **To the extent that the current GNSO Council may wish to consider mechanisms for engaging with the GAC, a facilitated dialogue may therefore be a feasible option.**

¹⁴ See <https://gac.icann.org/contentMigrated/icann63-barcelona-communique>.

Note on #6 (concerns relating to the dynamics and process challenges of the Curative Rights Working Group):

Observations from IGOs¹⁵ and a Minority Statement filed by a former co-chair of the Curative Rights PDP¹⁶ have alluded to this potential issue. Recent GAC Advice has also highlighted *“the values of openness, transparency and inclusion, and representativeness and process integrity, that are respectively enshrined in ICANN’s Bylaws and GNSO Operating Procedures [and 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”*¹⁷. However, it may be worth noting that while IGO representatives engaged with the Working Group at various ICANN meetings and submitted public comments and written input, as did the GAC, they did not participate as active members of the PDP (in contrast with the original IGO-INGO Protections in All gTLDs PDP, conducted between 2012 and 2013).

The Working Group also saw a procedural challenge filed by a Working Group member (citing Section 3.7 of the GNSO’s Working Group Guidelines) against proposed actions and decisions of the co-chairs in the final months of its work. As part of the escalation and resolution process, the GNSO Council liaison to the Working Group, in consultation with the

¹⁵ See, e.g., statement by Jonathan Passaro (OECD) to the GAC during the GAC’s discussion of this topic at ICANN63 on 20 October 2018: *“It can therefore be difficult for people to understand the legal frameworks that govern the way that [IGOs] operate and that facilitate our work. This has been especially evident throughout the policy development process for IGO Access to Curative Rights Protection Mechanisms that we are discussing now. IGOs tried repeatedly to educate those involved in the working group. Most of whom come from private domain registration sector regarding the nature of IGOs and why current UDRP is incompatible with our legal status. We thought that we would be helped on this front by the expert report of an international law professor that the working group actually enlisted to help them. But instead the working group cherry picked passages from his report and ignored those sections that supported our consistent position about IGOs ... is also the subject of minority statements from both of the working groups chairs, that raise serious procedural and substantive concerns. If the final report of the work group does not even have backing of its own chairs I fail to understand how the council can move forward with the report”*; and by Brian Beckham (WIPO): *“... in Abu Dhabi, the GAC raised concerns about openness, transparency and inclusion and representativeness and process integrity that are enshrined in ICANNs bylaws and GNSO operating procedures. These concerns have unfortunately played out in the PDP working group report ...”* (<https://static.ptbl.co/static/attachments/192334/1540588197.pdf?1540588197>).

¹⁶ See the Minority Statement filed by Philip Corwin (at pp. 76-77):

https://gns0.icann.org/sites/default/files/file/field-file-attach/igo-ingo-crp-access-final-17jul18-en_0.pdf.

¹⁷ See the GAC’s Abu Dhabi Communique (November 2017): <https://gac.icann.org/contentMigrated/icann60-abu-dhabi-communique>. A letter from the GAC Chair to the GNSO Council leadership dated 9 August also noted the GAC’s concern *“that the core “recommendation” of the IGO Curative PDP not only failed to reach consensus (amongst only a handful of active participants), but that minority statements of the former co-chair and of the remaining co-chair seriously call into question both the methodology and the results of the IGO Curative PDP. These minority statements echo concerns as to representativeness and process integrity expressed by the GAC in its Consensus Advice to the Board in the Abu Dhabi Communique”* (<https://gns0.icann.org/sites/default/files/file/field-file-attach/ismail-to-forrest-igo-crpm-final-report-09aug18-en.pdf>).

GNSO Chair, conducted individual consultations with interested Working Group members and facilitated at least one Working Group call¹⁸.

Although the 2017-2018 GNSO Council acknowledged the fact that these concerns were expressed, the most recent Council discussions have focused on the substantive and procedural concerns and questions that have been raised (as described above). As such, this point is noted in this paper for the sake of completeness rather than as a specific issue that the current 2018-2019 GNSO Council is required to consider, other than perhaps as part of a potential decision to refer matters back to the PDP Working Group.

¹⁸ See pp. 50-52 (Section 3.5) of the PDP Final Report for a summary of and relevant links concerning this appeal and the process followed by the Council liaison: https://gnso.icann.org/sites/default/files/file/field-file-attach/igo-ingo-crp-access-final-17jul18-en_0.pdf.