

## **GNSO Council Recommendations Report to the ICANN Board – Adoption of Final Recommendations from the Policy Development Process on IGO-INGO Access to Curative Rights Protection Mechanisms**

16 May 2019

### Status of This Document

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This is the GNSO Council Recommendations Report to the ICANN Board following the approval by the GNSO Council of four out of five of the Final Recommendations from the Policy Development Process on International Governmental Organizations (IGO) & International Non-Governmental Organizations (INGO) Access to Curative Rights Protection Mechanisms Working Group.

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## 1. Executive Summary

On 18 April 2019, the GNSO Council [voted](#) to approve, by a GNSO Supermajority, four of the five consensus recommendations contained in the [Final Report](#) from the Working Group that had been chartered to conduct a Policy Development Process (PDP) on IGO-INGO Access to Curative Rights Protection Mechanisms. This Recommendations Report is being sent to the ICANN Board for its review of the four recommendations approved by the GNSO Council, which the GNSO Council recommends be adopted by the ICANN Board. Please see Annex A for a summary of all the approved recommendations.

The IGO-INGO Access to Curative Rights Protection Mechanisms was [chartered](#):

“to provide the GNSO Council with policy recommendations regarding whether to amend the [Uniform Domain Name Dispute Resolution Policy, i.e.] UDRP and [the Uniform Rapid Suspension Procedure, i.e.] 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.”

As part of its deliberations on this issue, the PDP Working Group was tasked to “at an early stage gather data and research concerning the specific topics listed in Section X of the Final Issue Report [and], at a minimum, consider the ... issues detailed in Section IX of the Final Issue Report”.

The Working Group published an [Initial Report](#) for public comment on 20 January 2017. Following an extensive review of all the public comments received as well as additional discussions over a number of policy options developed subsequent to the Initial Report, the Working Group finalized its recommendations and submitted its [Final Report](#) to the GNSO Council on 9 July 2019. The Final Report included three Minority Statements filed by three members of the Working Group. These Minority Statements can be found in Annex B of the Final Report.

The four policy recommendations being sent to the Board for adoption will not impose obligations on contracted parties. Nevertheless, under the ICANN Bylaws, the Council’s Supermajority support for these four recommendations obligates the Board to adopt the recommendations unless, by a vote of more than two-thirds, the Board determines that the policy is not in the best interests of the ICANN community or ICANN.

With respect to the remaining, fifth, recommendation from the Working Group, the GNSO Council has voted to refer the issue to Phase Two of the GNSO PDP on Review of All Rights Protection Mechanisms (RPMs) in All gTLDs. As a result, the GNSO Council is not requesting any action from the Board on that recommendation at this time.

## 2. GNSO Vote

*If a successful GNSO Vote was not reached, a clear statement of all positions held by Council members. Each statement should clearly indicate (i) the reasons underlying each position and (ii) the Constituency(ies) or Stakeholder Group(s) that held that position.*

While the GNSO Council approved the Working Group's Final Report with Supermajority support, the vote was not unanimous. Councilors voted in support of the motion with 100% of the Contracted Parties House in favor and 84.62% of the Non-Contracted Parties House in favor. Votes against the motion were recorded from the two Councilors representing the Intellectual Property Constituency. Their rationales for voting against the motion can be found [here](#).

### 3. Analysis of affected parties

*An analysis of how the issue(s) would affect each Constituency or Stakeholder Group, including any financial impact on the Constituency or Stakeholder Group.*

None of the four recommendations approved by the GNSO Council are expected to have direct financial impact on any GNSO Constituency or Stakeholder Group. To the extent that Recommendations 2 and 3 require the preparation of Policy Guidance documentation from the ICANN Organization with respect to certain aspects of the UDRP and URS, this may provide clarification as to the scope of those dispute resolution procedures in relation to the filing of complaints by IGOs. In particular, Recommendation 3 specified that the requisite Policy Guidance be circulated to the Governmental Advisory Committee (GAC) and published on the ICANN website along with the rules and procedures applicable to the UDRP and URS.

Although Recommendation 4 relates to the issue of cost of access to and use of the UDRP and URS by IGOs, it is limited to recommending that this issue be the subject of direct discussion between the ICANN Board, the GAC and IGOs. Any financial or other impact flowing from the adoption of this recommendation will therefore depend on whether such discussions take place and their outcome.

### 4. Period of time needed to implement recommendations

*An analysis of the period of time that would likely be necessary to implement the policy.*

The operational requirements of the four recommendations relate to the preparation of Policy Guidance documentation by the ICANN Organization. Implementation planning can commence immediately upon the Board's adoption of these recommendations. As an Implementation Review Team (IRT) had already and previously been formed to coordinate implementation of the final recommendations of a prior GNSO PDP on Protection of IGOs & INGOs in All gTLDs, and as that IRT remains active for the purpose of implementing recent adoption of specific policy recommendations concerning Red Cross names, the ICANN Organization anticipates that implementation work for this PDP will be undertaken with that IRT. In view of current workload and resource allocation, it is estimated that implementation of these four recommendations can be completed within one (1) year of their adoption by the Board.

### 5. External advice (if any)

*The advice of any outside advisors relied upon, which should be accompanied by a detailed statement of the advisor's (i) qualifications and relevant experience; and (ii) potential conflicts of interest.*

The Working Group sought the advice of external legal experts twice during its deliberations, on the issue of IGO jurisdictional immunity which is the subject of Recommendation 5. Recommendation 5 is not part of this Recommendations Report.

## 6. Final Report Submission

The Working Group's Final Report was submitted to the GNSO Council on 9 July 2018 and can be found here in full: [Final Report](#). The four recommendations that were approved by the Council in April 2019 are included as an annex to this report.

## 7. Council Deliberations

*A copy of the minutes of the Council deliberation on the policy issue, including all opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.*

The minutes from the GNSO Council's April 2019 meeting where it approved four of the five PDP recommendations can be found [here](#).

Between the submission of the Final Report in July 2018 and the GNSO Council's vote in April 2019, the GNSO Council discussed the recommendations on several occasions, including at a webinar conducted on 9 October 2018<sup>1</sup> and during the GNSO Council's meetings in August 2018, October 2018, November 2018, December 2018 and January 2019<sup>2</sup>. As part of these discussions, the GNSO Council also reviewed the procedural options currently available to it under the GNSO's operating rules and procedures<sup>3</sup>.

Although a motion to approve all five PDP recommendations had been submitted for the Council's action at the ICANN63 Public Meeting in Barcelona, Spain, the Council agreed to withdraw the motion in view of a number of concerns about the report that had been raised by several Councilors and stakeholder groups.

The Council also discussed the issue with the GAC on several occasions, including at ICANN63 and, most recently, at the joint GAC-GNSO meeting held during the ICANN64 Public Meeting in Kobe, Japan. The GAC Chair had also sent a [letter](#) to the GNSO Council leadership requesting an opportunity for the GAC to engage with the GNSO Council, to which the GNSO Council leadership [responded](#) on 14 January 2019. On 17 April 2019, the GAC Chair [wrote](#) again to the GNSO Council leadership, noting the GAC's regret that the GNSO Council's motion did not appear to reflect what the GAC believed to be the understanding reached in Kobe. In view of the range of opinions expressed within the Council, the Council's decision sought to ensure that the GAC's concerns can be addressed in what the Council believes to be the most appropriate forum.

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<sup>1</sup> The slide deck, transcript and recording of the webinar can be found at <https://gns0.icann.org/en/group-activities/calendar/2018#oct>.

<sup>2</sup> Minutes, recordings and transcripts of these discussions can be accessed from the GNSO Council's calendar page: <https://gns0.icann.org/en/group-activities/calendar/2018>.

<sup>3</sup> See, e.g.: <https://gns0.icann.org/en/drafts/igo-ingo-crp-procedural-options-council-29nov18-en.pdf> and <https://mm.icann.org/pipermail/council/2018-December/022153.html>.

## 8. Consultations undertaken

In accordance with the requirements of the GNSO PDP Manual, the Working Group solicited early input from ICANN's Supporting Organizations and Advisory Committees as well as the GNSO's Stakeholder Groups and Constituencies. It also reviewed the historical documentation (including applicable treaties, reports and prior ICANN community work) on this topic early on in its deliberations, and considered all relevant advice provided by the GAC to the ICANN Board as well as a November 2016 proposal from a small group of IGOs working with members of the ICANN Board. The Working Group's consideration of all the input received is documented in the Final Report, in particular, Sections 3 & 7 and Annexes C, D & E.

## 9. Summary and analysis of Public Comment Forum

*Summary and analysis of Public Comment Forum to provide input on the Initial Report.*

A [public comment forum](#) on the Working Group's Initial Report was opened on 20 January 2017. A Report on Public Comment was [published](#) on 7 May 2017. The Working Group reviewed all comments received during its deliberations from May to October 2017 in order to develop final recommendations. As documented in the Final Report, the Working Group agreed to amend some of its preliminary recommendations as a result of its review of the input it received through the Public Comment Forum as well as from the Working Group's community engagement sessions at various ICANN Public Meetings during that time.

## 10. Impact/implementation considerations from ICANN staff

The internal ICANN Organization implementation team is expected to comprise the staff members who have been working on the Protection of IGOs and INGOs in All gTLDs (including recent policy recommendations concerning certain Red Cross names). Given the nature of the four recommendations being sent to the Board, the ICANN Organization does not expect the scope of effort required for this implementation to be significant at this juncture.

In view, however, of the pending status of Recommendation 5 (including work that will need to be performed by the RPM PDP Working Group) and the fact that the Board has yet to act to finalize all applicable policies concerning IGO and INGO protections (including in relation to those GNSO policy recommendations that are inconsistent with GAC advice and that were deferred by the Board in April 2014), the ICANN Organization anticipates that more extensive and additional work to complete implementation on all IGO and INGO protections will be needed in the future; especially if the final recommendations from the GNSO resulting from work on Recommendation 5 require a review or modification of any ongoing implementation work.

## Annex A: Final Recommendations from the PDP Working Group on IGO-INGO Access to Curative Rights Protection Mechanisms (extracted from the Executive Summary of the Final Report)

The GNSO Council is sending the first four PDP recommendations to the Board for its adoption, as reproduced below. As noted in the main text of this report, the fifth PDP recommendation is being referred to the RPM PDP Working Group and does not form part of this report<sup>4</sup>.

The PDP Working Group reached FULL CONSENSUS on the following recommendation:

### **Recommendation 1.**

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.

The PDP Working Group reached CONSENSUS on the following recommendations:

### **Recommendation 2:**

The Working Group notes that an IGO may seek to demonstrate that it has the requisite standing to file a complaint under the UDRP or 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 in question.

In this regard, the Working Group recommends that specific Policy Guidance on this topic be issued by ICANN to clarify the following points: (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

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<sup>4</sup> The text of Recommendation 5, which gained the consensus of the Working Group, can be viewed on Page 6 of the Final Report. As of 6 May 2019, the GNSO Council intends to discuss the modifications that will need to be made to the RPM PDP Charter to accommodate the work required for Recommendation 5 at its next meeting, on 16 May 2019.

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:**

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. In addition, 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:**

Notwithstanding GAC advice concerning access to curative rights processes for IGOs as well as the Charter language requiring the Working Group to consider "the need to address the issue of cost to IGOs and INGOs to use curative processes", there was 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.