

FOR GNSO COUNCIL CONSIDERATION: IGO WORK TRACK

DRAFT PAPER FOR DISCUSSION (as of 20 July 2021)

I. Introductory Overview

The GNSO Council is being asked to determine two questions concerning the ongoing IGO Work Track.

(a) Question 1

The first question relates to the fact that the IGO Work Track was originally [convened](#) under the auspices of the then-ongoing Review of All Rights Protection Mechanisms (RPM) Policy Development Process (PDP) Working Group, on the assumption that RPM Phase 2 work would have started shortly after completion of Phase 1 of the PDP. As such, the Council approved the IGO Work Track charter as an [Addendum](#) to the RPM PDP charter. The Council had pursued this path following its earlier [decision](#) not to approve Recommendation #5 from the IGO-INGO Curative Rights PDP Working Group (on the question of IGO jurisdictional immunity), preferring to refer the question to the RPM PDP.

However, it is not currently clear when RPM Phase 2 will start. The Council had indicated previously that the RPM charter will require a review and modification before work restarts and the question as to when and how to approach this task is on the Council's agenda at its upcoming July meeting. In addition, in response to concerns at the time that the IGO Work Track could result in a small group having the power to determine Consensus Policy, the Addendum contains an explicit requirement that the RPM Working Group have the opportunity to provide input on any preliminary Work Track recommendations (but not have veto power over any final recommendations in the absence of new issues that the Work Track did not consider).

FOR COUNCIL DISCUSSION:

- Without any RPM Phase 2 Working Group in existence at this time, the current Work Track is orphaned. However, it is on track to deliver its Initial Report for publication and Public Comment, and likely also its Final Report, before RPM Phase 2 is launched. *How should the Council resolve this procedural problem in such a way as to ensure that the outputs from the IGO Work Track comply with all the requirements applicable to Consensus Policy development (including all relevant Bylaws requirements), while allowing the work to continue and recognizing that the IGO Work Track membership is broadly representative, has worked together in good faith collaboratively and constructively, and as a result has made good progress on a difficult and complex¹ issue?*

(b) Question 2

¹ To illustrate the complexity of the issues presented by this project, the Preliminary Issue Report scoping the IGO-INGO Curative Rights PDP was published in November 2013, with the Final Issue Report submitted in March 2014. The PDP was launched in June 2014 and its Final Report completed over four years later, in July 2018. The Council discussed the report and recommendations, including Recommendation #5, over the course of several meetings between its receipt of the Final Report and its vote on the five recommendations in April 2019. In respect of Recommendation #5, the PDP Working Group enlisted the assistance of an external legal expert to provide advice on the question of IGO jurisdictional immunity and how this principle has evolved and been applied in courts across multiple jurisdictions.

The second question relates to the IGO Work Track's scope of work, as instructed by the GNSO Council when convening the group. In referring IGO-INGO Curative Rights Recommendation #5 to RPM Phase 2, the Council had specifically directed that the work should focus on *"whether an appropriate policy solution can be developed that is generally consistent with Recommendations 1, 2, 3 & 4 of the PDP Final Report and:*

- a. *accounts for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances;*
- b. *does not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction;*
- c. *preserves registrants' rights to judicial review of an initial UDRP or URS decision; and*
- d. *recognizes that the existence and scope of IGO jurisdictional immunity in any particular situation is a legal issue to be determined by a court of competent jurisdiction.*

As directed, the IGO Work Track has kept Recommendation #5 (regarding IGO jurisdictional immunity) at the forefront in its work. However, it has concluded that a feasible and appropriate policy solution cannot be crafted simply by looking at that recommendation in isolation. Since Recommendation #5 is concerned with the outcome of a dispute resolution process where the affected IGO claims immunity from the jurisdiction of a court, the IGO Work Track believes it is necessary to first determine how and which IGOs are able to gain entry into the dispute mechanism in the first place, especially as IGOs may not own trademarks in their names or acronyms; in other words, concentrating on the end of the process only is not meaningful if the IGOs will not be in a position to ever use the mechanism in the first place. While the Work Track is in the midst of considering an arbitration mechanism in direct response to recommendation #5, this is in the context of:

1. Considering addressing the jurisdictional issue presented by Recommendation #5 by proposing that IGOs be exempt from the current requirement to agree to a Mutual Jurisdiction (as defined by the Uniform Domain Name Dispute Resolution Policy).
2. Establishing better defined and determinative eligibility requirements to demonstrate unregistered rights under the UDRP.

The Work Track seems to have come up with a solution that preserves a losing registrant's right to file court proceedings while allowing for both parties to agree to binding voluntary arbitration, which appear connected to points (b) and (c) from the Council's guidance above.

FOR COUNCIL DISCUSSION:

- While this approach and solution demonstrates the progress that the Work Track has made, *are the Work Track's possible recommendations "generally consistent" with the four IGO-INGO Curative Rights PDP recommendations the Council has already approved and that are currently pending before the Board?*

Below are additional considerations around whether the Work Track's possible recommendations are "generally consistent." Note that these bullet points were developed by staff alone and that in particular, the Work Track has NOT yet specifically considered the interplay between its potential recommendations and the recommendations from the original IGO-INGO Curative Rights PDP:

- Point 1 above appears to provide an additional mechanism to address the mutual jurisdiction issue as compared to the IGO-INGO Curative Rights PDP Recommendation #3, which provides guidance on various procedural filing options. Point 1 is also connected to point (a) from the Council’s guidance.
- Point 2 above appears to address IGO eligibility in a different manner than the IGO-INGO Curative Rights PDP Recommendation #2, by establishing criteria to demonstrate unregistered rights rather than only suggesting that Article 6ter may allow an IGO to demonstrate eligibility.
- Recommendations #1 and #4 appear unaffected by the Work Track’s possible recommendations.

II. Proposed Path Forward for Question #1

ICANN Policy Staff believe that the most appropriate approach at this stage is to amend the IGO Work Track charter (i.e., the Addendum to the RPM charter) to restructure the Work Track into an Expedited Policy Development Process (EPDP) Working Group².

Rationale:

- While the GNSO Council can only initiate an EPDP in certain specified circumstances under the Bylaws, the origin and history of the IGO Work Track can be said to satisfy this particular criterion, viz. *“to create new or additional recommendations for a specific policy issue that had been substantially scoped previously such that extensive, pertinent background information already exists, e.g. (a) in an Issue Report for a possible PDP that was not initiated; (b) as part of a previous PDP that was not completed; or (c) through other projects such as a [GNSO Guidance Process”*. While the current Work Track does not reflect any of the three listed examples, these have previously been determined to be only illustrative and not exhaustive.
- In the present case, there is no question that the specific policy issue (i.e., IGO-INGO Curative Rights Recommendation #5) has been “substantially scoped” – it was the subject of thorough and extensive discussions in the IGO-INGO PDP Working Group and the GNSO Council also spent a considerable amount of time and effort considering the recommendation. In addition, “pertinent background information” definitely exists – e.g., the Curative Rights Working Group deliberations and Final Report as well as the Council’s own materials and resolutions on the matter.
- To the extent that the IGO Work Track recommendations require a modification to the UDRP – an ICANN Consensus Policy – the Bylaws note that *“[p]rovided the Council believes and*

² ICANN Policy Staff submitted questions to ICANN’s Legal Department on the procedural issues 1) on whether a Work Track is able to develop Consensus Policy Recommendations and 2) the possibility of restructuring the Work Track as an EPDP. For the first question, ICANN’s Legal Department assessed that per the GNSO Operating Procedures, “the lifespan of a sub-team should not extend beyond that of the Working Group,” which means that the currently orphaned Work Track is not in a position to develop Consensus Policy Recommendations. For the second question, ICANN’s Legal Department did not find any language in the GNSO Operating Procedures that would prevent restructuring the Work Track as an EPDP. However, they believe it might be more appropriate to consider the current Work Track as not having the proper standing at this time to develop Consensus Policy recommendations, which necessitates the initiation of a new policy development process.

documents via Council vote that the above-listed criteria are met, an EPDP may be initiated to recommend an amendment to an existing Consensus Policy”.

- At a more general level, the Bylaws also provide that, as part of its responsibilities for managing the policy development process of the GNSO, the GNSO Council “*shall adopt such procedures (the “GNSO Operating Procedures”) as it sees fit to carry out that responsibility”*. While the general assumption is that an EPDP will normally be initiated “from scratch”, there is nothing in the GNSO Operating Procedures (including the EPDP Manual) that implies an EPDP cannot be used for policy deliberations that are already ongoing.
- Restructuring the IGO Work Track as an EPDP will ensure that its deliberations meet and comply with all the rules applicable to a GNSO policy process that results in binding Consensus Policy.

The other alternatives seem to be less practicable than an EPDP. While the obvious solution may seem to be to either reconvene the RPM Phase 1 Working Group or to pause the Work Track until RPM Phase 2 starts up, each has substantial drawbacks.

For the former option, the IGO Work Track began its work, for all intents and purposes, after RPM Phase 1 had completed its work. As such, the RPM Phase 1 Working Group has never had any involvement with the Work Track. Reconvening it for the sole procedural purpose of adhering to the Addendum will likely lead to significant delay as well as run the risk of relitigating matters amongst a larger group that has never considered the questions of international law or IGO privileges and immunities that govern the issue at hand.

For the latter option, scoping and rechartering RPM Phase 2 is likely to be a substantial effort and as noted above, will be the subject of discussion during the Council’s July meeting. Following this option will most likely add significant delay while running the risk of further complicating what is likely to be an already complex Phase 2, without it being clear that there is sufficient overlap with the IGO Work Track to justify the risks and disadvantages. In addition, by making the Work Track dependent upon the RPM Phase 2 charter revision exercise, this option may result in rushing the charter revisions in order to allow the Work Track to continue its efforts.

The only other option is for the GNSO Council to recharter the IGO Work Track as a “regular” PDP. However, it is not clear that this alternative presents clearer advantages – including from an accountability and Bylaws-compliance perspective – compared to an EPDP.

Additional Notes on Electing to Use an EPDP or a PDP:

- The Council should note that voting thresholds differ in some material respects as between an EPDP and a PDP, viz.:
 - Initiation - for a PDP that is within scope of the GNSO: an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House; for an EPDP, a GNSO Supermajority³ vote is required.

³ The Bylaws define a "GNSO Supermajority" as either two-thirds (2/3) of the Council members of each House, or three-fourths (3/4) of the Council members of one House and a majority of the Council members of the other House.

- Charter approval: same as above (i.e., for a PDP: an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House; for an EPDP, a GNSO Supermajority vote).
- However, the voting threshold is the same for approving PDP or EPDP recommendations that impose binding contractual obligations on ICANN's Contracted Parties by way of Consensus Policy (i.e., meet or exceed GNSO Supermajority).

III. Proposed Path Forward for Question #2

The Council needs to determine whether the solution that the Work Track is working towards adheres to the requirements in the Addendum. As such, the staff proposal here is for the Council to discuss Question #2, potentially in parallel with a public comment proceeding. Note that to aid in that analysis, the Work Track will seek to deliver a draft proposal of its expected recommendations to the Council prior to the Council's August meeting, which will be in advance of the public comment proceeding.

IV. An Informational Note on Public Comments and the Need for a Project Change Request

Given the Work Track's progress and its current timeline, its preliminary recommendations could be drafted in time to open a Public Comment Proceeding by or in August 2021. However, due to the need to migrate the current Public Comment platform on the ICANN org website to a substantially new feature that will be compliant with the Information Transparency Initiative and its requirements, ICANN org needs to impose a moratorium on launching Public Comment proceedings between late July and end August. As a result, the committed deliverable dates by the Work Track leadership will be missed, which will necessitate the Council's considering a Project Change Request, even though the delay will be due to external factors outside the WT's or the Council's control. [See PCR, submitted separately].

Appendix: Text of the five IGO-INGO Curative Rights PDP Recommendations

Recommendation 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.

Recommendation 1(b): For IGOs, no specific new dispute resolution procedures are to be created.

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 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.

Recommendation 5: 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).
