

August 14, 2019

Re: WIPO Arbitration and Mediation Center observations on *GNSO PDP on IGO-INGO Access to Curative RPMs Policy Recommendations for ICANN Board Consideration*

The following observations are submitted to assist the ICANN Board's deliberations on the protection of IGO causes legally recognized by governments the world over. Such protection would signal a commitment to a more credible DNS that prioritizes trust and consumer safety by balancing the rights of IGOs and good-faith registrants.

IGOs have a unique legal status

IGOs are unique institutions created by governments to fulfill global public missions. To assist them in fulfilling these missions, IGOs have been afforded certain "privileges and immunities" protections under international law.

Against this background, the GAC Principles on New gTLDs call on ICANN to accommodate IGOs' rights in their identifiers. Having observed the failure to address these concerns, the United Nations Secretary-General in 2016 raised this with UN Member States for ICANN's attention.

IGOs face specific challenges in addressing fraud targeting them in the DNS

It will come as no surprise to the ICANN Board that against the first-come first-served open registration model, bad actors misuse IGOs' identities to public detriment. Not only are individual donors defrauded, but the intended beneficiaries of IGOs' missions, such as victims of humanitarian crises, lose out.

This risk was highlighted by the New York Times on the heels of the global Ebola crisis:
https://bits.blogs.nytimes.com/2014/10/24/malicious-ebola-themed-emails-are-on-the-rise/?_r=0.

/...

Based on their unique legal status described above, IGOs face challenges in using existing rights protection mechanisms such as the UDRP for trademark owners.

More specifically, GAC Advice and correspondence to ICANN from IGO Legal Counsels has been clear on the facts: both in terms of (i) the scope of rights to support standing to file a case, and (ii) “Mutual Jurisdiction”, the UDRP does not accommodate IGOs’ specific circumstances.

A separate mechanism modeled on the UDRP could however easily do so.

The current recommendations do not account for IGOs’ unique status

ICANN’s Bylaws and Core Values expect that the concerns and interests of entities most affected, in this case IGOs, should be taken into account in policy development processes.

The Minority Statement of former co-chair for the “IGO Curative” PDP, Mr. Phillip Corwin, summarizes the state of the IGO Curative PDP however, as:

“... [having] utterly failed to provide a policy recommendation that reasonably resolves the central challenge it confronted; [i]nstead, it has produced a policy recommendation that grants excessive favoritism to registrant[s].”

Not only did the former co-chair raise concerns about capture of the IGO Curative Working Group, but the GAC raised issues of capture and process integrity in its (2017) Abu Dhabi Communiqué.

Over the history of this file, ICANN’s position has remained limited to the PDP having to run its course as such.¹

With respect, the PDP process fails its intended purpose when individual agendas beget a report that, against reason, rejects IGOs’ clear legal status as explained by Counsels of IGOs, and instead even seeks to make the existing situation worse for IGOs, and their constituents and beneficiaries.

Having reached this point, we wish to draw the Board’s attention to an opportunity for it to productively manage this policy process going forward, by:

- (i) rejecting Council Resolution 20190418-3 (which itself contains plainly untenable workarounds, all of which run counter to the legal facts),
- (ii) instructing the GNSO Council that as it embarks on a process to re-charter work on Recommendation No. 5 of the IGO Curative PDP, the principles enshrined in the Bylaws and Core Values of taking into account the concerns of IGOs are adequately accounted for, and
- (iii) encouraging the GNSO to manage its policy process with a specific view to addressing issues of capture and process integrity.

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¹ It is noted here that, having participated in a prior Working Group which result necessitated IGOs insisting on a Minority Statement (in the face of a misleading “consensus” designation), and having taken a reasoned assessment of the IGO Curative Working Group’s composition and early discussions, IGOs determined they could not then justify joining the IGO Curative Working Group.

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IGOs – and the donors supporting them and especially the global citizens relying on them – merit tailored protection in the DNS commensurate with their unique treaty-based position, and ICANN's Board has the capacity to steer this file in the right direction.

Thank you for giving this longstanding file your effective consideration.

These observations are posted on the WIPO website at:
www.wipo.int/amc/en/domains/resources/icann.

Yours sincerely,



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