# Straw Man Paper on Policy & Procedural Options relating to IGO Jurisdictional Immunity for the IGO-INGO Curative Rights Policy Development Process Working Group

(prepared by ICANN staff at the request of the GNSO Chair - 7 March 2018)

## Summary

This Straw Man Paper was prepared by ICANN staff at the request of the GNSO Chair, following a call on 1 March 2018 between the GNSO Chair, the IGO-INGO Curative Rights PDP Working Group co-chairs and the GNSO Council Liaison to the Working Group. **The Paper summarizes the approach that the GNSO Chair (Dr. Heather Forrest), in consultation with GNSO Council Liaison (Ms. Susan Kawaguchi) recommends be followed by the Working Group.** The recommendation is being made by the GNSO Chair in accordance with her role under the Working Group member appeal process outlined in Section 3.7 of the GNSO Working Group Guidelines. This approach is intended to provide a starting point for further Working Group discussions to try to reach consensus and conclude its work on the recommendations under discussion in this PDP.

## Scope of Paper

This paper outlines where things stand currently within the Working Group on the formation of consensus (if any) on each of the six identified policy options for handling the issue where an International Governmental Organization (IGO) claims immunity from the jurisdiction of a national court in which a registrant, who has lost in a proceeding either under the Uniform Dispute Resolution Policy (UDRP) or Uniform Rapid Suspension procedure (URS), has filed suit against that IGO. It also describes a possible procedural path forward that may enable the Working Group to resume its policy discussions and attempt to reach consensus on a set of final recommendations.

## Current Issues

The Working Group is currently facing the following process-related issues:

* An agreed metholodology by which to reach possible consensus (as defined by the GNSO Working Group Guidelines[[1]](#footnote-1)) for a final recommendation on this one remaining substantive issue before the group; and
* An appeal brought under Section 3.7 of the GNSO Working Group Guidelines by a Working Group member, supported by two other members, challenging the scope of the Working Group co-chairs’ authority under the Guidelines to determine the metholodology to be used to designate consensus and, specifically, the co-chairs’ proposal to use an anonymous poll for that purpose.

During preparations for the Section 3.7 appeal, the GNSO Chair requested that staff conduct a brief analysis of the six options on which the Working Group is attempting to reach consensus. Based on that analysis, the GNSO Chair recommends that the Working Group, when it resumes deliberations, focus primarily on the fundamental issue concerning the need to clarify whether any of the options fulfill the purpose of the PDP, as defined by the Working Group Charter. In addition, this paper outlines a possible procedural path forward that may address a different but no less important concern which emerged during the recent discussions, i.e. lack of active regular participation by a broader and numerically significant number of Working Group members.

## Recommendations

It wil be imperative for the Working Group, in resolving the process issues, to also consider workable options for handling the other issues noted above. The following is a summary of the recommendations that are detailed in the remainder of this Paper:

* Whether or not a facilitator is brought in, and whether or not a non-anonymous poll is agreed to be appropriate going forward, in view of the time that has elapsed since the last Working Group discussion of its policy options, **the GNSO Council Chair and Council Liaison believe that the Working Group needs to agree on a path forward that will, most efficiently and without delay, allow for an initial designation of consensus to be made by the co-chairs for the full Working Group to discuss.** One possible approach is for the Council Liaison to step in to solicit individual views of all Working Group members, to inform the next set of Working Group discussions, as described further below.
* **Under Section 3.6 of the Working Group Guidelines, the consensus process is an iterative one that allows for individual and group disagreement with the co-chairs’ initial and subsequent designations – to be followed until a final, agreed level is accepted by the Working Group**. Findings based on the Liaison’s consultations with individual members should therefore form the basis for the initial designation.
* In moving ahead with the consensus process, it will be helpful to **focus the Working Group’s deliberations on whether, and the extent to which, each option enhances accessibility to the UDRP and URS for IGOs**, in line with the PDP Charter.

## Process Background

Three options for handling the issue of IGO jurisdictional immunity had been the subject of a poll of Working Group members in early October, for which members had been asked to indicate which of the options they supported or did not support. The poll required members to provide their names when responding, but no member names were associated with specific results, and the results were published without members’ names being disclosed[[2]](#footnote-2).

Section 3.7 Appeal:

Disagreement between the Working Group co-chairs and a few active Working Group members emerged after ICANN60, concerning whether or not the three options polled in October constituted the final options for the group, how these were arrived at, and the appropriate methodology for determining consensus[[3]](#footnote-3). Three additional options were presented for Working Group discussion on 14 December 2017. On that call, the co-chairs noted that they were not certain that there would be Working Group consensus for any of the six options, though there may be strong support (but significant opposition) to one or more of them. Specific disagreement with the co-chairs’ proposal to use an anonymous poll to designate initial consensus among the Working Group was recorded on this call.

On 19 December 2017, following confirmation that the co-chairs intended to proceed with an anonymous poll, Mr. George Kirikos filed an appeal under Section 3.7 of the GNSO Working Group Guidelines[[4]](#footnote-4). In January 2018, two calls took place between Mr. Kirikos and the Working Group co-chairs (Mr. Philip Corwin and Mr. Petter Rindforth) pursuant to Section 3.7. As a result of the calls, the Working Group was requested to provide feedback on whether or not they believed a facilitator (permitted under the Working Group Guidelines) should be used to assist with the consensus process. Two Working Group members responded in opposition to the suggestion. On 1 February, the co-chairs also proposed the use of a non-anonymous poll to aid with consensus designation[[5]](#footnote-5). Mr. Kirikos believed this proposal to contradict the understanding reached on his calls with the co-chairs, and invoked the second step of the appeal process, which was a discussion with the GNSO Chair or her designated representative. This call took place on 20 February[[6]](#footnote-6), and was attended by the GNSO Chair (Dr. Heather Forrest), the GNSO Council Liaison to the Working Group (Ms. Susan Kawaguchi), one of the two GNSO Council Vice-Chairs (Mr. Rafik Dammak), Mr. George Kirikos and ICANN policy staff supporting the Working Group.

Guidelines for Designating Consensus:

On the topic of designating Working Group consensus, the GNSO Working Group Guidelines contain the following provisions, in Section 3.6:

*“The Chair will be responsible for designating each position as having one of the following designations:*

*Full consensus - when no one in the group speaks against the recommendation in its last readings. This is also sometimes referred to as Unanimous Consensus.*

*Consensus - a position where only a small minority disagrees, but most agree.*

*Strong support but significant opposition - a position where, while most of the group supports a recommendation, there are a significant number of those who do not support it.*

*Divergence (also referred to as No Consensus) - a position where there isn't strong support for any particular position, but many different points of view. Sometimes this is due to irreconcilable differences of opinion and sometimes it is due to the fact that no one has a particularly strong or convincing viewpoint, but the members of the group agree that it is worth listing the issue in the report nonetheless.*

*Minority View - refers to a proposal where a small number of people support the recommendation. This can happen in response to a Consensus, Strong support but significant opposition, and No Consensus; or, it can happen in cases where there is neither support nor opposition to a suggestion made by a small number of individuals.*

*In cases of Consensus, Strong support but significant opposition, and No Consensus, an effort should be made to document that variance in viewpoint and to present any Minority View recommendations that may have been made … In all cases of Divergence, the WG Chair should encourage the submission of minority viewpoint(s).*

*The recommended method for discovering the consensus level designation on recommendations should work as follows:*

*i.* ***After the group has discussed an issue long enough for all issues to have been raised, understood and discussed, the Chair, or Co-Chairs, make an evaluation of the designation and publish it*** *for the group to review.*

*ii.* ***After the group has discussed the Chair's estimation of designation, the Chair, or Co-Chairs, should reevaluate and publish an updated evaluation****.*

*iii.* ***Steps (i) and (ii) should continue until the Chair/Co-Chairs make an evaluation that is accepted by the group****.*

*iv****. In rare case, a Chair may decide that the use of polls is reasonable****. Some of the reasons for this might be:*

* *A decision needs to be made within a time frame that does not allow for the natural process of iteration and settling on a designation to occur.*
* *It becomes obvious after several iterations that it is impossible to arrive at a designation. This will happen most often when trying to discriminate between Consensus and Strong support but Significant Opposition or between Strong support but Significant Opposition and Divergence.*

***Care should be taken in using polls that they do not become votes****. A liability with the use of polls is that, in situations where there is Divergence or Strong Opposition, there are often disagreements about the meanings of the poll questions or of the poll results.*

***Based upon the WG's needs, the Chair may direct that WG participants do not have to have their name explicitly associated with any Full Consensus or Consensus view/position.*** *However, in all other cases and in those cases where a group member represents the minority viewpoint, their name must be explicitly linked, especially in those cases where polls where taken …*

*… Consensus calls should always involve the entire Working Group and, for this reason, should take place on the designated mailing list to ensure that all Working Group members have the opportunity to fully participate in the consensus process.* ***It is the role of the Chair to designate which level of consensus is reached*** *and announce this designation to the Working Group.* ***Member(s) of the Working Group should be able to challenge the designation of the Chair as part of the Working Group discussion****. However, if disagreement persists, members of the WG may use the process set forth below to challenge the designation.”*

## A Path Forward: Evaluating the Six Options[[7]](#footnote-7)

The GNSO Chair requested that staff review the six options against the text of the Working Group Charter[[8]](#footnote-8). The Mission and Scope of this PDP is 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”*. In the Issue Report scoping out this PDP, potential challenges that an IGO might face in using the existing UDRP and URs were the current requirements under the UDRP and URS that an IGO must have a trademark in order to have standing to file a complaint, and the need to submit to the Mutual Jurisdiction of a court in either the principal office of the registrar or the domain name registrant's address as shown in the WHOIS database at the time the complaint is submitted[[9]](#footnote-9).

In assessing each of the six options currently in front of the Working Group, it is therefore necessary to determine whether any of them will be effective in addressing specific IGO needs in relation to using the UDRP or URS, vis-à-vis the status quo where IGO complainants are treated the same as non-IGO trademark owners. While the Working Group has discussed the scope of each of the six options, it is not clear that all members agree on one option being the most effective one. It may therefore be useful – as the Working Group returns to consider the options again – to focus the deliberations on whether, and the extent to which, each option enhances accessibility to the UDRP and URS for IGOs.

The GNSO Chair and Council Liaison are aware that the group has already engaged in an impact analysis of previous versions of several of the options, and this effort is not intended to be an exhaustive or conclusive analysis of the six options nor as a critique of the Working Group’s efforts to date.

## A Path Forward: Resolving Procedural Issues

As discussed on the Council leadership, Liaison and Working Group co-chairs’ call of 1 March 2018, it may be worthwhile considering a more active and specific role for the Council Liaison. Given that there has been little support from the rest of the Working Group for deploying a facilitator, and that the Working Group Guidelines specifically delinenate the initial (and subsequent) designations of consensus as the responsibility of the co-chairs, it should be made clear that having the Council Liaison step in at this stage does not displace the co-chairs or their authority. Rather, the Liaison will have the responsibility of receiving, and reporting on, the views of all Working Group members on each of the six options. Private consultations with Working Group members can be held in the form of “office hours” – possibly commencing at ICANN61 and with the ability for members not physically present in San Juan to communicate directly with Ms. Kawaguchi. To ensure accuracy, ICANN policy staff supporting this PDP can be present at all these consultations, and can be tasked with working with Ms. Kawaguchi to ensure timely and accurate reporting of members’ views.

One potential benefit of this approach is that Working Group members who may have felt disengaged from the PDP will be given the opportunity to engage directly with the Council liaison, separate from the issue of whether and how the current Section 3.7 appeal will be resolved. However, ICANN staff may still need to reach out individually to each Working Group member to set up the consultations.

Following the consultations, a report can be compiled and published, on which basis the Working Group co-chairs should develop their initial designation of consensus levels for all the various recommendations discussed in this PDP, following the iterative process outlined in Section 3.6 of the GNSO Working Group Guidelines. As part of her consultations with individual Working Group members (including the co-chairs), Ms. Kawaguchi can also seek feedback on the desirability and perceived need to use a non-anonymous poll at some point in the final consensus process.

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1. See <https://gnso.icann.org/en/council/annex-1-gnso-wg-guidelines-30jan18-en.pdf> for the full text of the latest version of the GNSO Working Group Guidelines (as at 30 January 2018). [↑](#footnote-ref-1)
2. See <https://community.icann.org/download/attachments/74584676/Options%20A-C%20Prelim%20Consensus%20Call%20Results.pdf?version=1&modificationDate=1512659325000&api=v2> for the results of the October poll. [↑](#footnote-ref-2)
3. See, e.g. the transcript of the Working Group meetings following ICANN60, available at <https://community.icann.org/x/nQRyB> (for 16 November 2017), <https://community.icann.org/x/ZBJyB> (for 7 December 2017) and <https://community.icann.org/x/7xZyB> (for 14 Deecmber 2017) – these being the three Working Group calls where the issue was fairly extensively discussed. There was also a Working Group call held on 12 December, where participating members heard from Nominet legal counsel on the Nominet appeal procedure, including the possibility of mediation as a required step. [↑](#footnote-ref-3)
4. See <http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-December/001005.html>. As this Paper is not concerned with the scope, substance or conduct of the appeal, please refer to the following resources for additional information: (1) Working Group mailing list exchanges on the topic in December 2017: [http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-December/date.html and January 2018](http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-December/date.html%20and%20January%202018): <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-January/date.html>; (2) a request for guidance to the GNSO Council from the Working Group co-chairs: <http://mm.icann.org/pipermail/council/attachments/20171221/f1447370/LTRtoCouncilfromWGchairs-21Dec2017-0001.pdf>; (3) supporting documentation provided by Mr. Kirikos for the initial call between him and the co-chairs on 11 January 2018: <http://mm.icann.org/pipermail/gnso-igo-ingo-crp/attachments/20180111/c89edbb8/igo-appeal-section37-20180111-final-0001.pdf>; and (4) the co-chairs’ written response to Mr. Kirikos dated 16 January 2018: <http://mm.icann.org/pipermail/gnso-igo-ingo-crp/attachments/20180116/c00a5074/WGCo-ChairsResponsetoGeorgeKirikos-16Jan2018-0001.pdf>. Recordings of the two calls that took place, pursuant to Section 3.7, between Mr. Kirikos and the co-chairs can be found at <https://community.icann.org/x/AwC8B> (for the 11 January 2018 call) and <https://community.icann.org/x/iAS8B> (for the 18 January 2018 call). ICANN policy staff supporting the Working Group and Mr. Herb Waye, ICANN Ombudsman, attended these calls as an observer. [↑](#footnote-ref-4)
5. See <http://mm.icann.org/pipermail/gnso-igo-ingo-crp/attachments/20180201/e7158342/IGO-Co_Chair-SuggestedPathForward-31Jan2018-0001.pdf>. [↑](#footnote-ref-5)
6. See <https://community.icann.org/x/IBa8B> for the recording of this call. On 12 February, Mr. Kirikos submitted a reply to the co-chairs’ 16 January response to his appeal: <http://mm.icann.org/pipermail/gnso-igo-ingo-crp/attachments/20180212/54044f71/igo-appeal-section37-reply-20180212-final-0001.pdf>. [↑](#footnote-ref-6)
7. See the separate Annex that was prepared in relation to this topic, circulated at the same time as this Straw Man Paper, and including the text of all six options as well as a brief analysis of each option at this stage. [↑](#footnote-ref-7)
8. See <https://community.icann.org/download/attachments/48347887/WG%20Charter%20-%20as%20amended%2016%20April%202015.pdf?version=1&modificationDate=1483721507000&api=v2> (the Charter was amended by the GNSO Council in April 2015, to allow the Working Group to consider all IGOs and not be limited to the list of IGOs that had been developed by the GAC in 2013). [↑](#footnote-ref-8)
9. The Issue Report also discussed previous community work on this topic, and referred to a number of ICANN and external reports exploring the issue: see <https://community.icann.org/x/DrvhAg> for the Issue Report and related materials. [↑](#footnote-ref-9)