

INTERNATIONAL GOVERNMENTAL ORGANIZATION (IGO) WORK TRACK: BRIEFING PAPER Draft as of 29 January 2021

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Scope of Work:

In April 2019, the GNSO Council approved four out of the five Policy Development Process (PDP) recommendations from the IGO-INGO Access to Curative Rights PDP Working Group, but specifically did not approve the fifth PDP recommendation¹. Instead, the Council decided to amend the Charter of the Review of All Rights Protection Mechanisms (RPM) PDP Working Group, to seek to determine “*whether an appropriate policy solution can be developed that is generally consistent with Recommendations 1, 2, 3 & 4 of the [Curative Rights] PDP Final Report and:*

- accounts for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances;*
- does not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction;*
- preserves registrants' rights to judicial review of an initial [Uniform Domain Name Dispute Resolution Policy] (UDRP) or [Uniform Rapid Suspension] (URS) decision; and*
- 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.”*

Subsequently, the GNSO Council approved an Addendum² to the RPM PDP Charter that established this IGO Work Track, for the purpose of “*focus[ing] exclusively on the specific issue referred by the GNSO Council [as noted above], in accordance with the scope as specified by the GNSO Council and described in the Problem Statement [in the Addendum].*”³

In brief, this Work Track has been formed to discuss and potentially propose a policy solution in accordance with the GNSO Council’s instructions as reflected in the Council’s April 2019 resolution and echoed in the RPM PDP Charter Addendum.

¹ See the full text of the GNSO Council’s April 2019 resolution at:
<https://gns0.icann.org/en/council/resolutions#20190418-3>.

² See the final Addendum, as approved by the GNSO Council, at:
<https://gns0.icann.org/sites/default/files/file/field-file-attach/rpms-charter-addendum-09jan20-en.pdf>.

³ See the full text of the GNSO Council’s January 2020 resolution at:
<https://gns0.icann.org/en/council/resolutions/2020#20200123-2>.

The Curative Rights PDP recommendation that was not approved by the GNSO Council (Recommendation #5) reads as follows:

“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).”

The Problem Statement in the RPM PDP Charter Addendum noted some concerns the GNSO Council had raised about the potential effects of this recommendation, if approved. For example, it will have the result of placing the parties to the dispute in the original situation, i.e., as if the UDRP or URS proceeding had never been commenced. Implementing it will also require a substantive modification to the UDRP and URS and could potentially result in reducing the existing level of curative protections currently available to IGOs.

In approaching its task, the Work Track will have to take into account these concerns as well as the scope of its work as spelled out in the GNSO Council’s explicit instructions from its April 2019 resolution. These instructions specify that any recommendations developed by this Work Track must be “generally consistent” with Recommendations #1 - #4⁴.

Collectively, the GNSO Council’s instructions, the effect of the four GNSO Council-approved PDP recommendations and the Council’s concerns as noted in the Addendum mean that the Work Track’s task must be conducted within the following boundaries:

1. The Work Track **cannot recommend the creation of any specific new dispute resolution procedures** (see Curative Rights PDP Recommendation #1b).
2. While substantive modifications to the UDRP and/or URS are not prohibited (Recommendation #1a), **an IGO filing a complaint under either the UDRP or URS must nevertheless still demonstrate that it has a trademark or similar substantive legal right** (Recommendation #2, which seeks to allow an IGO with unregistered trademark rights to fulfill the UDRP/URS standing requirement by relying on its compliance with Article 6ter of the Paris Convention for the Protection of Industrial Property).
3. The Work Track’s recommendation(s) **must not affect or limit a registrant’s right to file suit in a court of competent jurisdiction** (including but not limited to the ability to request that the court review the outcome of a UDRP/URS panel decision).
4. The Work Track’s recommendation(s) **cannot supplant the role of a court in determining the question of an IGO’s immunity** from the jurisdiction of that court, which is a matter of law to be determined in each case by the relevant court.

⁴ For the full text of Recommendations #1 - #4, see pages 4-6 of the Curative Rights PDP Final Report and the accompanying sections detailing how that PDP Working Group arrived at those final recommendations: https://gns0.icann.org/sites/default/files/file/field-file-attach/igo-ingo-crp-access-final-17jul18-en_0.pdf.

As such, the Work Track may wish to consider an early discussion as to the likelihood of it reaching consensus on an appropriate policy solution within the above framework that is also likely to be acceptable to the GNSO Council and the GAC, such as to be a solution that can be adopted by the Board as being in the best interests of ICANN or the ICANN community (as required under the Bylaws).

Current Status of IGO Protections:

The current status of protections for IGO names and acronyms at the second level of the domain name system are as follows:

- Pursuant to an ICANN Consensus Policy⁵, the full names of all IGOs on a 2013 list prepared by the Governmental Advisory Committee (GAC) must be withheld from registration by all gTLD registry operators (with transitional provisions to cover existing registrations made prior to the effective date of the policy.)
 - This Consensus Policy went into effect on 1 August 2018.
- Pursuant to ICANN Board resolutions passed in 2013, the acronyms of the IGOs on the GAC's 2013 list have been withheld from registration in all gTLDs launched under ICANN's 2012 New gTLD Program, on an interim basis pending resolution of the overall question of IGO protections.
 - These interim reservations will therefore remain in place during the course of work of this Work Track.
- In relation to dispute resolution processes, all IGOs (regardless of whether they are on the GAC's 2013 list or not) may commence judicial proceedings or file complaints under the UDRP or URS in respect of identical or confusingly similar domain names that have been registered by third parties.
 - As noted during the IGO-INGO Curative Rights PDP, filing a complaint in court may in some circumstances jeopardize an IGO's immunity from jurisdiction in that court.
 - To have the requisite standing to file a UDRP and URS complaint, a complainant must have legal rights in a trademark or service mark in respect of which it is asserting that a registrant filed an identical or confusingly similar domain name.
 - UDRP or URS filings require the complainant to agree to submit to the jurisdiction of a court in at least one Mutual Jurisdiction (defined as a court in the location of either the principal office of the relevant registrar or the registrant's address.)

Potential Outcomes of the Work Track:

The potential outcomes of this Work Track can include:

- Recommendation(s) to modify either the UDRP or the URS (or both), within the framework of the concerns and limitations noted above; or

⁵ The full text of the Consensus Policy can be found at <https://www.icann.org/resources/pages/igo-ingo-protection-policy-2020-02-18-en>; the specific IGO names and corresponding DNS labels can be viewed at <https://www.icann.org/resources/pages/reserved-2013-07-08-en>.

- Recommendation(s) to maintain the current scope of the UDRP and URS, with no additional recommendation(s) for a policy solution; or
- No recommendation(s).

In the latter two cases, the effect will be that the status quo remains, with the only changes to the existing second level dispute resolution procedures being any additional clarity to their scope that may be provided through implementation of the proposed policy guidance contained in the recommendations already approved by the GNSO Council from the Curative Rights PDP (assuming these are adopted by the ICANN Board).

The Work Track's recommendations could also include either affirming or rejecting Recommendation #5 from the Curative Rights PDP.

Reference Materials, Resources & Operating Principles:

To avoid re-opening or revisiting previously concluded policy deliberations as much as possible, the GNSO Council has instructed the Work Track to base its recommendations (if any) on analysis of the following specific materials:

- Relevant historical documentation and prior community work conducted by the IGO-INGO Curative Rights PDP Working Group (in particular, Sections 3.1 and 3.2 of the PDP Final Report⁶);
- Relevant GAC advice on the topic of curative protections for IGOs;
- The 31 October 2016 letter from IGO Legal Counsels to the GNSO Council leadership team⁷;
- The external legal expert opinion⁸ commissioned by the IGO-INGO Curative Rights PDP Working Group (included in its Final Report as Annex F); and
- The IGO Small Group Proposal⁹ (included as Annex D in the IGO-INGO Curative Rights PDP Final Report).

At the direction of the Work Track Chair, ICANN org support staff for this Work Track will also make available other historical material that the Work Track considers relevant. In addition, the GNSO's PDP Manual allows for the possibility of soliciting additional expert assistance. However, as such requests have budgetary and resource impacts, they must be submitted to the GNSO Council for approval and the group is expected to demonstrate how it considered the budgetary impacts, implementability, and/or feasibility of its proposed information requests beforehand.

⁶ See https://gns0.icann.org/sites/default/files/file/field-file-attach/igo-ingo-crp-access-final-17jul18-en_0.pdf.

⁷ See <https://gns0.icann.org/en/correspondence/igos-to-gns0-31oct16-en.pdf>.

⁸ See Annex F of https://gns0.icann.org/sites/default/files/file/field-file-attach/igo-ingo-crp-access-final-17jul18-en_0.pdf.

⁹ See Annex D of https://gns0.icann.org/sites/default/files/file/field-file-attach/igo-ingo-crp-access-final-17jul18-en_0.pdf. The proposal can also be viewed at <https://gns0.icann.org/sites/default/files/file/field-file-attach/2016-12/crocker-icann-board-to-council-chairs-04oct16-en.pdf>.

As with all other PDP efforts launched under the auspices of the GNSO Council, a staff support team from the Policy Development Support function has been assigned to support the discussions, meetings, drafting and other work of the Work Track. Where it is deemed necessary by the Work Track, information from other ICANN org functions (e.g., Legal, Compliance, Global Domains) may be requested to assist with the Work Track's deliberations.

As specified in the RPM PDP Charter Addendum, the GNSO's Working Group Guidelines¹⁰ – including decision making methodology, consensus levels and norms of participation – apply in full to the Work Track. However, the Addendum makes it clear that the IGO Work Track Chair is not considered a Member of the Work Track and hence does not have a vote and cannot participate in formal consensus calls of the group.

Deliverables:

The first Work Track deliverable is a detailed work plan, including a timeline describing specific and manageable deliverables. In establishing the Work Track, the GNSO Council had specified that the work plan must be based on the model used for the Expedited PDP on gTLD Registration Data, considered a matter of priority and submitted to the Council within four (4) weeks of the first Work Track meeting (currently scheduled for 15 February 2021.) ICANN org staff supporting this Work Track are preparing an initial proposal for discussion during one of the first Work Track meetings.

In addition:

- The Work Track Chair (or, alternatively, the GNSO Council liaison to the Work Track) is expected to deliver a written monthly update to the GNSO Council, tracking the group's progress in accordance with the milestone and timelines in the work plan;
- All appointed Work Track Members are expected to provide regular progress reports to their appointing organizations, to ensure that any positional or voting directions are developed and received in a timely fashion; and
- The GNSO liaison to the GAC is expected to provide regular progress reports to the GAC, to allow for any appropriate opportunities for the GAC and GNSO Council to engage in open and constructive discussion that may assist with the work (but does not supersede the role) of the IGO Work Track.

As is the case with all PDP outputs and recommendations, the Work Track must publish its preliminary recommendations for public comment and prepare a Final Report that (among other things) demonstrate how it considered and accounted for relevant comments received in coming to its final recommendations¹¹.

¹⁰ See <https://gns0.icann.org/en/council/annex-1-gns0-wg-guidelines-24oct19-en.pdf>.

¹¹ See the GNSO's PDP Manual for a full description of the expectations and scope of each of these reports (<https://gns0.icann.org/en/council/annex-2-pdp-manual-24oct19-en.pdf>) and the PDP Working Group Guidelines for how proposed final recommendations are to be designated as having varying levels of consensus (<https://gns0.icann.org/en/council/annex-1-gns0-wg-guidelines-24oct19-en.pdf>).

ANNEX: GAC ADVICE ON IGO CURATIVE RIGHTS

ICANN51 ([Los Angeles](#), October 2014):

... Concerning curative protection at the second level, and noting the ongoing GNSO PDP on access to Curative Rights Protection Mechanisms, the GAC reminds the ICANN Board that any such mechanism should be at no or nominal cost to IGOs; and further, in implementing any such curative mechanism, [the] GAC advises the ICANN Board:

- That the UDRP should not be amended;
- Welcomes the NGPC's continued assurance that interim protections remain in place pending the resolution of discussions concerning preventative protection of IGO names and acronyms; and
- Supports continued dialogue between the GAC (including IGOs), the ICANN Board (NGPC) and the GNSO to develop concrete solutions to implement long-standing GAC advice.

ICANN58 ([Copenhagen](#), March 2017):

The GAC advises the ICANN Board to:

Facilitate continued discussions in order to develop a resolution that will reflect (i) the fact that IGOs are in an objectively unique category of rights holders and (ii) a better understanding of relevant GAC Advice, particularly as it relates to IGO immunities recognized under international law as noted by IGO Legal Counsels; and

Urge the Working Group for the ongoing PDP on IGO-INGO Access to Curative Rights Protection Mechanisms to take into account the GAC's comments on the Initial Report.

ICANN59 ([Johannesburg](#), June 2017):

The GAC reiterates its Advice that IGO access to curative dispute resolution mechanism should:

- I. be modeled on, but separate from, the existing Uniform Dispute Resolution Policy (UDRP)
- II. provide standing based on IGOs' status as public intergovernmental institutions, and
- III. respect IGOs' jurisdictional status by facilitating appeals exclusively through arbitration.

The GAC expresses concern that a GNSO working group has indicated that it may deliver recommendations which substantially differ from GAC Advice, and calls on the ICANN Board to ensure that such recommendations adequately reflect input and expertise provided by IGOs.

ICANN62 ([Panama](#), June 2018):

The GAC advises the ICANN Board to:

Work with the GNSO and the GAC following the completion of the ongoing PDP on IGO-INGO access to curative rights protection mechanisms to ensure that GAC advice on protection of IGO acronyms, which includes the available "small group" proposal, is adequately taken into account also in any related Board decision.