

SUMMARY REPORT FROM THE GNSO COUNCIL LIAISON ON THE CURRENT STATUS OF CONSULTATIONS WITH THE IGO-INGO CURATIVE RIGHTS PDP WORKING GROUP (12 April 2018)

Background:

On 9 March 2018, as the GNSO Council liaison to this PDP Working Group, I wrote to the Working Group and circulated a Strawman Paper that had been prepared by staff at the request of the GNSO Chair, Dr. Heather Forrest (<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-March/001093.html>). The message and paper outlined the approach that Dr. Forrest and I recommended be followed by the Working Group, following the filing of an appeal under Section 3.7 of the GNSO Working Group Guidelines by Mr. George Kirikos, a member of the Working Group, relating to the consensus designation process within the GNSO.

Accordingly, at ICANN61 (on 14 March 2018) and subsequently, on 28 March 2018, I held “office hours” where individual Working Group members could speak privately with me and provide their views about any of the six policy options currently under Working Group consideration concerning IGO jurisdictional immunity. A total of 8 Working Group members responded to the invitation to meet with me and 2 other members sent input via email.

Summary of Office Hours Discussions:

A few members noted that the Working Group appeared to be spending a long time on, and evolving potential solutions to, a problem that, to them, had not definitively been shown to be a serious problem. This was attributed in part to there being no participation by the IGOs as members of the Working Group. To the extent the question arose, members agreed that a solution to address problems encountered by IGOs needed to preserve the right of a registrant to take a case to court.

Feedback on the six options (each outlined in the Strawman Paper) was as follows:

- 5 of the 9 members who responded to the invitation to “office hours” favored Option 4, i.e. referral of the matter to the Review of All Rights Protection Mechanisms (RPMs) PDP Working Group. The main reason given was that the issue under consideration is closely linked to the topics under review by that PDP (which was initiated 2 years after this Working Group began its work and will be considering issues relating to the Uniform Dispute Resolution Policy (UDRP) in Phase Two).
- Of this group of 5, 2 members stated specifically that they can support any option except Option 3 (which includes the possibility of an arbitration mechanism, to be triggered if a court duly finds that an IGO is immune from its jurisdiction).
- However, of the remaining 4 members who provided feedback, 3 supported Option 3, with 2 specifically stating that they can only support Option 3, as that includes the possibility of arbitration (which had been requested by the IGOs) while retaining a registrant’s right to go to court and giving the court the authority to decide on the legal issue of immunity.
- The remaining participant felt that considering the Nominet model – which incorporates mediation as a step early on in the dispute resolution process – was a better option than any of the others suggested to date.

In the course of the discussions, a number of potential additional avenues of discussion were suggested, including:

- First consider if it is within scope for this PDP to determine options that do not clearly improve access to dispute resolution for IGOs; if the answer is No, then Option 4 may be the only alternative;
- See if there is a way for IGOs to bring a UDRP proceeding without being exposed to court action (noting, however, that IGOs already are able to file through proxies); and
- Work further on Option 3; see if it can be refined e.g. have a standing panel of expert arbitrators or make it a separate voluntary track.

Several members also described or alluded to divisions within the Working Group, including the dominance of current discussions by a few members who largely belong to one specific set of industry interests, and the strong possibility that the Working Group will not be able to reach consensus on even a smaller set of options.

Recommended Next Steps:

Following the “office hours”, Dr. Forrest and I met with support staff for this PDP to review the feedback provided and consider possible paths forward for the Working Group. Subsequently, we discussed our proposal for moving forward with Mr. Philip Corwin and Mr. Petter Rindforth (the Working Group co-chairs).

PROPOSED: This report to the Working Group and a summary of the recommendations of the group (differentiating those in which consensus was reached from those presented in the form of options on which consensus has not been reached) to be confirmed by the Working Group and presented to the GNSO Council through its Council liaison. Under the ICANN Bylaws, the GNSO Council is responsible for managing the policy development process of the GNSO; input from the Council is appropriate at this stage in the Working Group’s work as a vehicle for broader community input and timely consideration of next steps.

The current intention is for me to provide a brief update to the Council at its next meeting (on 26 April), with the Council taking up fuller consideration of the matter at its May meeting (based on a draft report¹ to be prepared by staff in time for that meeting).

Dr. Forrest and I make this recommendation based on the following observations and conclusions:

- It is highly unlikely that continuing with further Working Group deliberations at this stage, in order to either reduce the number of options from six to fewer or to attempt to reach consensus on one of the current options, will result in clear consensus.
- The number of active participants is extremely low, there is an obvious division of strongly-held opinions, and it will be difficult to justify the result of a consensus call amongst such a small number as either a Consensus or even a Minority View reflective of the entire Working Group.

¹ It is likely that the structure of the report will modeled on the Final Report of the Cross Community Working Group on the Use of Country & Territory Names as TLDs, i.e. with several consensus recommendations (being those agreed on previously by the Working Group) and one remaining topic on which there is no consensus recommendation (being the IGO jurisdictional immunity question).

- None of the options currently under consideration align with the most recent GAC advice on the substantive topic of curative protections for IGOs². Although Option 3 includes arbitration as a possibility it is different in structure and process from the GAC advice, and it is also an option to which a few Working Group members are very strongly opposed.
- While it is not the objective of a PDP to accede to GAC advice, the likelihood that any consensus on the issue of IGO jurisdictional immunity will be based on only a small number of participants' views coupled with the fact that any consensus recommendation on this topic will likely conflict with GAC advice means that the GNSO Council and the ICANN Board will each ultimately have to consider whether and how to reconcile the outcome with GAC advice. Bringing this possibility to the attention of the GNSO Council sooner rather than later fits within the Council's role under the ICANN Bylaws, and will allow the Working Group the benefit of a full consultation with the Council at this critical stage of its work.
- Another reason for bringing the matter to the Council at this point is that the option preferred by those members opposed to an arbitration option, i.e. to refer the matter to the PDP Working Group reviewing all rights protection mechanisms (RPMs), will require a Charter amendment for that other PDP. Charter revisions require a vote of the GNSO Council; as such, it will be appropriate for the Working Group to discuss and report sooner rather than later with and to the Council and, possibly, with the RPM Working Group as they are already reviewing the Uniform Rapid Suspension procedure and plan to wrap up that work within the next few months.

² In its June 2017 Communique issued in Johannesburg, the GAC reiterated previous advice stating that curative protections should "be modeled on, but separate from, the existing Uniform Dispute Resolution Policy (UDRP); ... provide standing based on IGOs' status as public intergovernmental institutions, and respect IGOs' jurisdictional status by facilitating appeals exclusively through arbitration".