

Staff Report of Public Comment Proceeding

GNSO Policy Development Process on IGO-INGO Access to Curative Rights Protection Mechanisms Policy Recommendations for ICANN Board Consideration

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Public Comment Proceeding

Open Date:	11 July 2019
Close Date:	20 August 2019
Staff Report Due Date:	3 September 2019

Important Information Links

Announcement
Public Comment Proceeding
View Comments Submitted

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Section I: General Overview and Next Steps

This public comment period was opened in accordance with transparency requirements under the ICANN Bylaws, which mandates the provision of a reasonable opportunity for the public to comment on proposed policies being considered by the ICANN Board that substantially affect the operation of the Internet or third parties.

The four recommendations approved by the GNSO Council include the following points: no substantive changes to existing rights protection mechanisms are needed for International Non-Governmental Organizations (INGOs); no specific new dispute resolution procedures should be created for International Governmental Organizations (IGOs); and clarifying policy guidance is to be developed as to the filing of complaints by IGOs under the existing procedures.

The fifth and final Policy Development Process (PDP) recommendation was not approved by the GNSO Council and as such did not form part of this public comment proceeding.

Section II: Contributors

At the time this report was prepared, a total of twenty-nine (29) community submissions had been posted to the forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
Organisation for Economic Co-operation and Development	Jonathan Passaro	OECD
European Patent Office	Heike Wieland	EPO
Nordic Investment Bank	Heikki Cantell	NIB
WIPO Arbitration and Mediation Center	Brian Beckham	WIPO
International Civil Aviation Organization	Arie Jakob	ICAO
International Bank for Reconstruction and Development	Sandie Okoro	IBRD
European Molecular Biology Laboratory	Philippe VORREUX	EMBL

International Telecommunication Union	Preetam Maloor	ITU
World Health Organization	Joris Auert	WHO
Multilateral Investment Guarantee Agency	Ankita Singh	MIGA
United Nations Industrial Development Organization	Behrouz Moradi	UNIDO
European Bank for Reconstruction and Development	Andrei Gheorghe	EBRD
European Organization for Nuclear Research	Jonathan Drakeford	CERN
Internet Commerce Association	Zak Muscovitch	ICA
Business Constituency	Steve DelBianco	BC
Universal Postal Union	Ricardo Guilherme Filho	UPU
United Nations	Jay Pozenel	UN
International Trademark Association	Lori Schulman	INTA
Digimedia	Jay Chapman	DM
Swiss GAC	Jorge Cancio	SG
Governmental Advisory Committee	Fabien Betremieux	GAC
IDB Invest	Andres Consuegra	IBD
Leap of Faith Financial Services Inc.	George Kirikos	LFFS
International Finance Corporation	Kaizer Karachiwala	IFC
Intellectual Property Constituency	Brian Scarpelli	IPC

Individuals:

Name	Affiliation (if provided)	Initials
Syed Iftikhar H. Shah		SIHS
Alexander Lerman		AL
Reg Levy		RL

Section III: Summary of Comments

General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

Support for the adoption of recommendations 1-4. (ICA, BC, DM, AL, RL, GK)

Opposition to the adoption of recommendations 1-4. (OECD, EPO, NIB, WIPO, ICAO, IBRD, EMBL, ITU, WHO, MIGA, UNIDO, EBRD, CERN, UPU, UN, INTA, SG, GAC, IBD, IFC)

Mixture of support and opposition to recommendations 1-4 (INTA, IPC)

While not in scope for the ICANN Board's consideration, support for the referral of recommendation 5 to the GNSO All Rights Protection Mechanisms in All gTLDs PDP WG (RPMs WG). (ICA, BC, DM, AL, BC, INTA, GAC, IPC)

Section IV: Analysis of Comments

General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.

Comments in Support of Recommendations 1-4

Some respondents reiterated deliberations and rationale for conclusions reached by the Working Group (WG) on recommendations 1.4. They noted that input received, notably from the IGOs, was duly considered. However, they believe that existing measures, with some areas of clarification (e.g., particularly on standing to file under the UDRP and/or URS), adequately serve the access needs of IGOs. (ICA, BC, DM, AL, RL); One respondent provided a response largely in line with the preceding elements, but provided a substantial amount of detail and analysis to support his position, believing that important elements were excluded from the Final Report. This respondent noted his personal opposition to recommendation 4, but acceptance of all recommendations overall. (GK)

One respondent noted its support and opposition to recommendations 1-4; support was provided for recommendations 1a and 1b, 2, and non-objection to 3b and 4. Opposition was provided against recommendation 3a. (IPC)

Comments in Opposition to Recommendations 1-4

Some respondents reiterated points made previously about the findings of the WG regarding IGO's claims of unique legal status, which they believe affords privileges and immunities under international law. They indicated their continued opposition to the recommendations formulated by the WG and stated the preference for an IGO-specific dispute resolution mechanism. They noted that recommendations 1-4 fail to provide adequate protections and further, appear to make things worse for IGOs. In addition, it was noted that recommendations 1-4 are in conflict with existing Governmental Advisory Committee (GAC) Advice. (OECD, EPO, NIB, WIPO, ICAO, IBRD, EMBL, ITU, WHO, MIGA, UNIDO, EBRD, CERN, UPU, UN, SG, GAC, IBD, IFC)

One respondent expressed their concern over the process and overall representativeness of the WG, mostly in regards to recommendation 5, but also applicable to recommendations 1-4. Because of these concerns, the respondent supports the rejection of the Final Report and its recommendations. However, in the event the ICANN Board does consider a resolution on these recommendations, the respondent did provide analysis on each of the recommendations, which included support, partial support, and opposition. (INTA)

One respondent, "advises the ICANN Board to abstain from taking a decision on these Recommendations inter alia to allow the parties sufficient time to explore possible ways forward." This respondent expects that future work on recommendation 5 may overtake recommendations 1-4. (GAC)

Other comments, beyond the scope of recommendations 1-4

While not in scope for the ICANN Board's consideration, some respondents provided their rationale for recommendation 5, while also supporting the decision to refer to the issue to the RPMs WG. These respondents noted the importance of IGOs participating in the subsequent policy development process. (ICA, BC, DM, AL)

One respondent reasserted its preference for its minority position on recommendation 5 (i.e., "in those rare instances in which a losing registrant seeks judicial appeal and the IGO subsequently successfully asserts its immunity to the court's jurisdiction...the decision rendered against the registrant in the predecessor UDRP or URS may be brought before a to-be-determined arbitration forum for de novo review and determination".) (BC)

One respondent supported the GNSO Council's treatment of recommendation 5 and asserted its preference for option 3 for recommendation 5, that the PDP WG originally considered. (*INTA*)

One respondent reaffirmed its willingness to participate in a future policy development effort on recommendation 5. (*GAC*)

One respondent believes that recommendation 5 should have been included for approval and also provided extensive detail about the discussions conducted by the WG about all of the recommendations. The respondent also wrote about procedural concerns, especially as it relates to a section 3.7 appeal process initiated by the respondent, and concerns as it relates to the role staff played in the PDP WG. The respondent also wrote regarding a number of other areas, several of which go beyond the scope of the ICANN Board's consideration of recommendations 1-4. Following, you can find the table of contents from the comment, which provides an overview of the scope of the comment: (1. ICANN PUBLIC COMMENT PERIODS ARE A SHAM. ALL PUBLIC COMMENT PERIODS SHOULD BE SUSPENDED UNTIL A FULL INVESTIGATION HAS OCCURRED (page 3); 2. THE ICANN BOARD SHOULD ACCEPT ALL 5 RECOMMENDATIONS OF THE WORKING GROUP REPORT, NOT JUST THE FIRST 4 RECOMMENDATIONS (page 4); 3. IGOs HAVE WASTED THE RESOURCES OF THE COMMUNITY FOR MORE THAN 15 YEARS ON DEMANDS THAT ARE UNREALISTIC (page 10); 4. DESPITE PERSONALLY OPPOSING RECOMMENDATION #4, I ACCEPT THE FINAL REPORT'S RECOMMENDATIONS AS A WHOLE (page 11); 5. FINAL REPORT WAS RUSHED TO COMPLETION, IN ORDER TO UNDERMINE THE REASONING BEHIND ALL RECOMMENDATIONS (page 12); 6. IMPORTANT ANALYSIS AND EVIDENCE EXCLUDED FROM FINAL REPORT DUE TO ICANN STAFF SABOTAGE (page 14); 7. IMMUNITY IS A DEFENSE TO A DISPUTE, AND NOT AN ISSUE WHEN IGOs INITIATE A DISPUTE (page 17); 8. FUNDAMENTAL BUT SUBTLE DESIGN FLAW IN THE UDRP CAUSES ROLE REVERSAL BETWEEN PLAINTIFFS AND DEFENDANTS WHEN TAKING MATTERS TO COURT (page 18); 9. HISTORICAL GRAND BARGAIN WHICH REQUIRES ACCESS TO THE COURTS FOR A DECISION ON THE MERITS WAS THE FOUNDATION OF THE UDRP, WHICH SOME WANT TO UNDERMINE (page 20); 10. IT IS POSSIBLE TO REDESIGN THE UDRP/URS WITHOUT THE ROLE REVERSAL FLAW (page 24); 11. IGOs ROUTINELY MAKE FALSE AND MISLEADING STATEMENTS TO SUPPORT THEIR FAULTY POSITIONS (page 27); 12. CONCLUSIONS (page 32)) (*GK*)

One respondent believes that recommendation 5 should be considered separately and under Phase 2 of the RPMs WG, on a fast track basis. (*IPC*)

One respondent expressed concerns about the amount of public community feedback, especially from GAC members (*SIHS*)