

December 12, 2014

Dear Chair Schneider

We write as the Co-Chairs of the GNSO's IGO-INGO Access to Curative Rights Protections (CRP) Working Group (WG), which as you know was chartered by the GNSO Council to conduct a Policy Development Process (PDP) to determine:

- (1) Whether the Uniform Dispute Resolution Policy (UDRP) and/or the Uniform Rapid Suspension procedure (URS) should be amended, and if so, how; or
- (2) Whether a separate, narrowly-tailored dispute resolution procedure modeled on the UDRP and/or the URS should be developed, in either case to address the specific needs and concerns of International Governmental Organizations (IGOs) and/or International Non-Governmental Organizations (INGOs).

The origin of this WG lies in the work of the previous GNSO PDP Working Group on the Protection of International Organizational Names in All gTLDs, whose recommendations had been unanimously adopted by the GNSO Council at the GNSO Council meeting on 20 November 2013. One of those recommendations was for the GNSO Council to request an Issue Report on the question of curative rights protection for IGOs and INGOS, which led to the formation of this WG. The WG commenced its work in August 2014. The GNSO's PDP Manual mandates that each PDP WG reach out at an early stage to all GNSO Stakeholder Groups and Constituencies to seek their input, and encourages WGs to seek input from ICANN's Supporting Organizations and Advisory Committees as well.

We thank the GAC for its previous advice regarding the need to protect IGO names and acronyms at the top and second levels of new gTLDs, including its advice on the question of amending the UDRP and URS from the Los Angeles Communique. In that regard, we look forward to the GAC's input to some questions that our WG has requested be conveyed to you via Mr. Mason Cole, the GNSO-GAC Liaison. We understand this is being coordinated between Mason and Ms. Suzanne Radell of the United States Government. This letter is therefore being written to update you on our WG's activities to date, and to invite the GAC to provide further input to the WG in respect of the following general questions that stem from our Charter and the initial deliberations of the WG.

First, we wish to inform you that the WG has reached a majority decision that there is no principled reason to consider INGOS in general as a special category of protected organizations, for purposes of the specific tasks for which the WG was chartered in this PDP. The rationale for this decision is provided in Attachment A.<sup>1</sup>

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<sup>1</sup> This determination is made with due recognition of the special protections afforded to the Red Cross movement and International Olympic Committee. Although the International Olympic Committee and the International Red Cross and Red Crescent Movement have access to and have used the existing Rights Protection Mechanisms, they have been afforded special protection by ICANN to reduce their reliance on these RPMs due to the volume of cybersquatting on the desirable names of these beneficent organizations, which compounded their cost and burden of using these RPMs. *See*

***Question 1: What is the GAC's view on the WG's decision to exclude INGOs from further consideration in this PDP?***

The other questions for which our WG is seeking the GAC's as well as other ICANN Supporting Organizations' and Advisory Committees' feedback are essentially those that Mason has already conveyed to the GAC. Although phrased more generally when addressed to the other SO/ACs, we reproduce the questions to the GAC here with some further background and detail.

The WG has considered most of the background information available to it, including the documentation from the 2001-2 WIPO Process-2 and the previous scoping work done by the ICANN community (including the GNSO) in 2004 and 2007. It has also reviewed the various expressions of GAC advice concerning the issue of curative rights protection for IGOs, as expressed in several GAC Communiques. As one of the requirements (sometimes commonly called the "standing" requirement) under the UDRP and the URS is that the complainant must possess trademark or substantively similar rights in the word(s) for which the respondent has registered an identical or confusingly similar domain name, the WG is investigating the ability and practice of IGOs obtaining trademarks in their names and acronyms.

***Question 2: If it is the GAC's position that an entirely new curative rights mechanism must be created, is it the GAC's understanding that the protections afforded to qualifying IGOs under Article 6ter of the Paris Convention would be the criteria for establishing standing under any dispute resolution procedure that may apply to IGOs?***

Another specific issue involving IGOs is the requirement for the organization, both as a domain registrant, and as a complainant under the UDRP and the URS, to agree to submit to the jurisdiction of a national court for purposes of an appeal. This may be problematic for IGOs due to possible issues with sovereign immunity. The WG is currently analyzing the sovereign immunity issue and is conducting research on how various nations have chosen to implement Paris Convention Article 6ter protections within their jurisdictions.

***Question 3: In opposing [amendments to the UDRP and URS], does the GAC thus advise the GNSO to preclude any possible change to its "Mutual Jurisdiction" provisions to address specific sovereign immunity concerns of IGOs? How should a curative rights process appropriately deal with this problem while also ensuring adequate due process protections for registrants?***

Finally, the GAC has advised that any dispute resolution process relating to IGOs should be at no or nominal cost to the IGOs. The WG has noted that the fees and associated

legal costs for the UDRP and the URS are substantially less than for litigation involving the same matters. Although the WG's charter tasks it to analyze the issue of costs, the WG does not have the ability to create any fund or other subsidy mechanisms for IGOs who claim an inability to shoulder the costs of existing dispute resolution mechanisms.

***Question 4: Does the GAC consider the current fees charged by URS and UDRP providers to be nominal? If the GAC considers those charges to be in excess of nominal, then what source of funding or other support mechanism would the GAC suggest to fully pay or subsidize the fees charged by dispute resolution providers?***

In addition to the above questions, the WG Charter, which can be found at <http://gnso.icann.org/en/drafts/igo-ingo-crp-access-charter-24jun14-en.pdf>, requires the WG to discuss a number of other issues. We therefore also invite the GAC to consider providing feedback on any or all of these other Charter questions.

In particular, we would welcome input on the following topics:

- Whether the URS should be a Consensus Policy; and
- Considerations of applying policies formulated by this WG to both "legacy" gTLDs and the new gTLDs currently being delegated in this expansion round. (Note: This may potentially include the URS, which is currently mandatory only for gTLDs delegated under ICANN's New gTLD Program. The WG also notes that the GNSO is scheduled to examine the issue of the efficacy of all rights protection mechanisms (RPMs) in both the legacy and new gTLDs in an upcoming Issue Report in early 2015);

Thank you for the GAC's consideration of these questions. We look forward to any comments and any input that you and the GAC may be able to provide to our WG. If possible, please forward your comments and input to us by **Friday, January 23 2015** so that the WG may fully take GAC input into account in our further deliberations.

Best regards,

Philip Corwin & Petter Rindforth (WG Co-Chairs)

## Attachment A

### **Rationale for the Working Group's Decision to Exclude International Non-Governmental Organizations (INGOs) from Further Consideration in our Deliberations**

The WG has made an initial determination to exclude INGOs from further consideration for special curative rights protection procedures aside from the existing and un-amended UDRP and URS for the following reasons:

- Many INGOs already have, and do enforce their trademark rights, and there is no perceivable barrier to other INGOs obtaining trademark rights in their names and/or acronyms and subsequently utilizing those rights as the basis for standing in the existing dispute resolution procedures (DRPs) created and offered by ICANN as a faster and lower cost alternative to litigation.
- There is no claim of a “sovereign immunity” obstacle hindering INGOs from submitting to national jurisdiction in the appeals process from the existing DRPs, and some INGOs regularly use the UDRP to protect their rights.
- Given the above determinations regarding access to trademark rights and irrelevance of the sovereign immunity issue, the WG believes that there is no principled reason to consider any amendment of the UDRP or the URS to accommodate INGOs.
- Although some INGOs may be concerned about the cost of using the UDRP and the URS, because enforcement through these RPMs involves some expenditure of funds, this is not a problem for all INGOs nor is it unique to INGOs as rights holders; furthermore, the issue of ICANN subsidizing INGOs to utilize DRPs is outside the scope of this WG's Charter and its authority.
- The September 1, 2013 United Nations Economic and Social Council (ECOSOC) list of non-governmental organizations in consultative status with it consists of nearly 4,000 organizations, of which 147 organizations were in general consultative status, 2,774 in special consultative status, and 979 on the Roster. The WG also became aware that there might be many more organizations not presently on the ECOSOC list who might claim the right to utilize any new curative rights process (CRP) created for INGOs. The WG felt that the sheer scale of INGOs, in combination with the factors cited above, weighed against creation of a special DRP.
- While this is the “IGO-INGO Access to Curative Rights Protection Working Group”, its Charter (available at <http://gnso.icann.org/en/drafts/igo-ingo-crp-access-charter-24jun14-en.pdf> ) does not require it to develop a CRP mechanism responsive to any special legal status for all INGOs. Rather, the Charter only requires it to consider “*The relevance of specific legal protections under international legal instruments and various national laws for IGOs **and certain INGOs** (namely, the Red Cross movement and the International Olympic Committee)* (Emphasis added). The Charter also requires that this WG consider

“The distinctions (if any) between IGOs and INGOs for purposes of this PDP”. The WG has considered those distinctions and determined that they are sufficient such that a specially-tailored DRP for INGO’s generally is not warranted, and that the WG should focus its remaining time and attention on the complex issues relating to protections for IGOs.

The determination to suspend further consideration of INGO access to DRPs takes into consideration the special protections afforded to the Red Cross movement and the International Olympic Committee. The WG noted that although these INGOs are specifically highlighted by the GAC and the Charter provision cited above as enjoying international legal treaty protections and rights under multiple national laws, for the purposes of this PDP they have demonstrated that: (1) they have access to the UDRP and the URS; and (2) they possess trademark rights that they defend and enforce. As such, for the limited purpose of considering access of INGOs to curative rights protections, the WG determined there was no principled reason to distinguish them from other INGOs. The WG noted that legal representatives of the International Olympic Committee are active in the WG and fully support this conclusion.

The determinations cited above represent a strong majority position among all participating members of the WG. A minority view was expressed based on the viewpoint that the case for considering creation of a special DRP even for IGOs was too weak to justify further WG time and effort. That minority view did not prevail and the WG will continue to consider whether any special needs or considerations relating to IGOs justify amendment of the UDRP and the URS or, in the alternative, provide a rationale for creation of a DRP solely for use by IGOs.