Adoption of the GNSO Council Review of GAC Communiqué for submission to the ICANN Board

Submitted by: Michele Neylon
Seconded by: Pam Little

Whereas,

1. The Governmental Advisory Committee advises the ICANN Board on issues of public policy, and especially where there may be an interaction between ICANN's activities or policies and national laws or international agreements. It usually does so as part of a Communiqué, which is published towards the end of every ICANN meeting.
2. The GNSO is responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.
3. The GNSO Council has expressed a desire to provide feedback to the ICANN Board on issues in the GAC Communiqué as these relate to generic top-level domains to inform the ICANN Board as well as the broader community of past, present or future gTLD policy activities that may directly or indirectly relate to advice provided by the GAC.
4. The GNSO Council hopes that the input provided through its review of the GAC Communiqué will further enhance the co-ordination and promote the sharing of information on gTLD related policy activities between the GAC, Board and the GNSO.

Resolved,

1. The GNSO Council adopts the GNSO Council Review of the Kobe GAC Communiqué (see https://gnso.icann.org/sites/default/files/file/field-file-attach/review-gac-communique-18april18-en.pdf) and requests that the GNSO Council Chair communicate the GNSO Council Review of the Kobe GAC Communiqué to the ICANN Board.
2. The GNSO Council requests that the GNSO Chair also informs the GAC Chair of the communication between the GNSO Council and the ICANN Board.

Motion in Relation to the Final Report From the GNSO PDP Working Group on the IGO-INGO Access to Curative Rights Protection Mechanisms

Submitted by: Keith Drazek
Seconded by: Pam Little

WHEREAS:


   Recommendation 1(a): For INGOs (including the Red Cross movement and the International Olympic Committee), no substantive changes to the UDRP and URS are to be made, and no specific new dispute resolution procedures are to be created.

   Recommendation 1(b): For IGOS, no specific new dispute resolution procedures are to be created.

   Recommendation 2: The Working Group notes that an IGO may seek to demonstrate that it has the requisite standing to file a complaint under the UDRP or URS by showing that it has complied with the requisite communication and notification procedure in accordance with Article 6ter of the Paris Convention for the Protection of Industrial Property. An IGO may consider this to be an option where it does not have a registered trademark or service mark in its name and/or acronym but believes it has certain unregistered trademark or service mark rights for which it must adduce factual evidence to show that it nevertheless has substantive legal rights in the name and/or acronym in question.

   In this regard, the Working Group recommends that specific Policy Guidance on this topic be issued by ICANN to clarify the following points: (a) this alternative mechanism for standing is not needed in a situation where an IGO already holds trademark or service mark rights in its name and/or acronym, as the IGO would in such a case proceed in the same way as a nonIGO trademark owner; (b) whether or not compliance with Article 6ter will be considered determinative of standing is a decision to be made by the UDRP or URS panelist(s) based on the facts of each case; and (c) the possibility that an IGO may seek to rely on its compliance with Article 6ter to demonstrate standing should not modify or affect any of the existing grounds which UDRP and/or URS panelists have previously found sufficient for IGO standing (e.g. based on statutes and treaties).

   Recommendation 3: ICANN shall create and issue Policy Guidance: (a) outlining the various procedural filing options available to IGOs, e.g. they have the ability to elect to have a complaint filed under the UDRP and/or URS on their behalf by an assignee, agent or licensee; and (b) advising IGOs and INGOs to, in the first instance and prior to filing a UDRP or URS complaint, contact the registrar of record to address the harms for which they are seeking redress. In addition, ICANN shall ensure that this Policy Guidance document is brought to the notice of the Governmental Advisory Committee (GAC) for its and its members’ and observers’ information, and published along with the procedures and rules applicable to the UDRP and URS on the ICANN website

   Recommendation 4: Notwithstanding GAC advice concerning access to curative rights processes for IGOs as well as the Charter language requiring the Working Group to consider “the need to address the issue of cost to IGOs and INGOs to use curative processes”, there was no support within the Working Group for a recommendation to provide subsidies to any party to use the UDRP or URS. Nevertheless, the Working Group recognizes that it has no authority to obligate the expenditure of ICANN funds, and it understands, further, that the feasibility of providing IGOs with access to the UDRP and URS at no or nominal cost to the IGOs is a question that must be addressed directly through discussions between the ICANN Board with the GAC and IGOs. The Working Group also notes that many Working Group members believe that a respondent should also be eligible to receive financial support for its defense in a case where ICANN has subsidized the complainant.
Recommendation 5: 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).

2. On 19 July 2018, the GNSO Council acknowledged receipt of the PDP Final Report, noted that, “[i]n view of the need to consider the topic of curative rights protections for IGOs in the broader context of appropriate overall scope of protection for all IGO identifiers (including IGO acronyms), the GNSO Council intends to review this Final Report ... with a view toward developing a possible path forward that will also facilitate the resolution of the outstanding inconsistencies between GAC advice and prior GNSO policy recommendations on the overall scope of IGO protections”, and confirmed its “intention to act on the recommendations that have been developed by the Working Group at the earliest opportunity following its review and deliberations on these topics”;

3. The GNSO Council has discussed the PDP Final Report on various occasions, including at a webinar conducted on 9 October 2018 and during the GNSO Council’s meetings in August 2018, October 2018, November 2018, December 2018 and January 2019;

4. As part of these discussions, the GNSO Council also reviewed the procedural options currently available to it under the GNSO’s operating rules and procedures (see, e.g.: https://gnso.icann.org/en/drafts/igo-ingo-crp-procedural-options-council-29nov18-en.pdf and https://mm.icann.org/pipermail/council/2018-December/022153.html);

5. At the ICANN63 Public Meeting held in Barcelona, Spain, the GNSO Council agreed to withdraw a motion to vote on the PDP Final Report submitted for the Council’s October 2018 meeting, in view of a number of concerns about the report that had been raised by several Councilors and stakeholder groups;

6. On 21 October 2018, the Chair of the Governmental Advisory Committee (GAC) sent a letter to the GNSO Council leadership requesting an opportunity for the GAC to engage with the GNSO Council “as a matter of urgency; and [asking] that the GNSO Council gives serious consideration to the option of deferring its decision on the named PDP final recommendations until a dialogue between GAC and GNSO Council has been conducted”;

7. On 14 January 2019, the GNSO Council leadership responded to the GAC Chair’s 21 October 2018 letter, welcoming the GAC’s wish to engage in an “open and constructive dialogue”;

8. At the ICANN64 Public Meeting held in Kobe, Japan, the GNSO Council leadership described the procedural options that the Council is considering and sought the GAC’s feedback on the GNSO’s willingness to participate in a targeted effort focusing on the issue of curative rights for IGOs and possibly drawing on the community’s recent experiences with the Expedited PDP on the Temporary Specification and Work Track 5 of the GNSO New gTLD Subsequent Procedures PDP;

9. The GAC’s Kobe Communiqué noted the GAC’s “fruitful exchanges with the GNSO Council regarding the possibility of restarting the PDP on curative protections, under conditions amenable to all interested parties, including IGOs and interested GAC members, with a view to achieving mutually acceptable results [with] a timeline with a targeted date associated with such a course of action”; and

10. As a result of the numerous discussions that have taken place since the submission of the PDP Final Report, the GNSO Council believes it has thoroughly considered all the available options and now wishes to proceed in the manner specified below.

RESOLVED:

1. The GNSO Council approves, and recommends that the ICANN Board adopt, Recommendations 1, 2, 3 & 4 of the PDP Final Report. The GNSO Council directs ICANN staff to prepare a Recommendations Report for delivery to the ICANN Board in accordance with the process outlined in the ICANN Bylaws.

2. The GNSO Council does not approve Recommendation 5 of the PDP Final Report and directs the Review of All Rights Protection Mechanisms in All gTLDs (RPM) PDP to consider, as part of its Phase 2 work, whether an appropriate policy solution can be developed that is generally consistent with Recommendations 1, 2, 3 & 4 of the PDP Final Report and:
   a. accounts for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances;
   b. does not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction;
   c. preserves registrants’ rights to judicial review of an initial UDRP or URS decision; and
   d. 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.

3. The GNSO Council intends to amend the charter for the RPM PDP Working Group to reflect this new instruction accordingly.

4. The GNSO Council affirms that it will take into account its approval of Recommendations 1, 2, 3 & 4 in considering the recommendations it receives from the RPM PDP Working Group.

5. The GNSO Council thanks all the members of the IGO-INGO Access to Curative Rights Protection Mechanisms PDP for their hard work in completing this PDP.

Explanatory Note/Rationale:

- The GNSO Council is of the opinion that Recommendations 1, 2, 3 & 4 do not constitute substantive policy recommendations, in the sense that they neither create new policies nor amend existing ones (including Consensus Policies). However, the GNSO Council acknowledges that Recommendation 1(a) and 1(b) propose that “no specific new dispute resolution procedures are to be created” and the Council’s approval of this recommendation should be taken into account when considering the final recommendations it receives from the RPM PDP Working Group.
- The GNSO Council recognizes that Recommendation 3, if approved, may be interpreted as precluding any potential changes being made to the UDRP and/or URS. The GNSO Council wishes to clarify that, in its view, Recommendation 3 is concerned with ways to avoid jurisdictional immunity problems and does not address the specific issue of jurisdictional immunity; viz., the respective Rules for the UDRP and URS, as currently worded, require a complainant to submit to the jurisdiction of a national court, which may be incompatible with the jurisdictional immunity that some IGOs may enjoy in certain circumstances.
- The GNSO Council does not approve Recommendation 5 of the PDP Final Report as it believes that approving this recommendation will effectively result in: (a) a substantive amendment of the Uniform Domain Name Dispute Resolution Policy (UDRP) and the Uniform Rapid Suspension procedure (URS), both of which are under review by the GNSO’s Review of All Rights Protection Mechanisms in All gTLDs PDP; and
(b) a potential reduction of the existing level of curative protections currently available to IGOs notwithstanding the fact that the PDP had been chartered to determine "whether to amend the UDRP and URS to allow access to and use of these mechanisms by IGOs and INGOs ... 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"