

ADDENDUM TO THE CHARTER FOR THE REVIEW OF ALL RPMS PDP (Draft as of 26 September 2019)

Deleted: 27 August

Section 1: Date & Effect of GNSO Council Approval

This Addendum to the Charter for the Review of All Rights Protection Mechanisms (RPMs) in All Generic Top-Level Domains (gTLDs) Policy Development Process (PDP) was approved by the GNSO Council on [DATE]. As a result, this Addendum has been incorporated by reference into the original RPM PDP Charter and forms an integral part of the scope of work of the RPM PDP.

Section 2: Chartering Principles & Guidelines

In approving this Addendum, the GNSO Council took into account:

- The **Terms of Reference developed for Work Track 5** of the GNSO PDP on New gTLD Subsequent Procedures:
https://community.icann.org/download/attachments/79430726/Work%20Track%205%20Terms%20of%20Reference%2020Dec2017_Final.docx?version=1&modificationDate=1516285849000&api=v2;
- The recommended improvements approved by the GNSO Council in October 2018 as part of the PDP 3.0 Improvements Project: <https://gns0.icann.org/en/council/resolutions#20181024-3>;
- Discussions between and among the GNSO Council, the ICANN Board and representatives of the Governmental Advisory Committee (GAC) and International Governmental Organizations (IGOs) on the topic of appropriate policy protections for IGOs, including at ICANN65 in Marrakech; and
- Advice from the ICANN Organization concerning **Enforcement of the ICANN Expected Standards of Behavior**: <https://www.icann.org/en/system/files/files/expected-standards-behavior-advice-enforcement-09mar19-en.pdf>

Section 3: Problem Statement, Objectives and Scope

Commented [MW1]: Structured similarly to the WTS Terms of Reference, esp. with inclusion of a Problem Statement.

Problem Statement:

One of the final recommendations from the GNSO IGO-INGO Access to Curative Rights Protection Mechanisms PDP Working Group was that, in the admittedly rare case where:

- (i) an IGO has prevailed in a Uniform Domain Name Dispute Resolution Policy (UDRP) or Uniform Rapid Suspension (URS) proceeding; and
- (ii) the losing registrant files suit in a court of competent jurisdiction; and
- (iii) the IGO successfully claims immunity from the jurisdiction of that court; then
- (iv) the original UDRP or URS panel decision is to be set aside.

The effect of this recommendation is that the parties to the dispute will be placed in the original situation as if the UDRP or URS proceeding had never been commenced.

During the GNSO Council’s deliberations over the final PDP recommendations, concerns were expressed as to whether this particular recommendation will:

- (i) require a substantive modification to the UDRP and URS (notwithstanding that these two dispute resolution procedures are currently under consideration in the RPM PDP); and
- (ii) result in 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”).

Consequently, the GNSO Council did not approve this particular recommendation and has tasked the RPM PDP Working Group 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” (see <https://gns0.icann.org/en/council/resolutions#20190418-03>).

Objectives & Scope:

This Addendum establishes a new and separate Work Track for the RPM PDP that will focus exclusively on the specific issue referred by the GNSO Council, in accordance with the scope as specified by the GNSO Council and described in the Problem Statement.

This new IGO Work Track is being structured to encourage broad and balanced participation from interested groups within the ICANN community; in particular, from affected IGOs.

The IGO Work Track will work in parallel with ongoing work in the RPM PDP, in accordance with the timeline, work plan, deliverables and methodologies outlined in this Addendum. Unless expressly specified in this Addendum or otherwise stated in any subsequent amendment of the main RPM PDP Charter, no provision of the main RPM PDP Charter (as of the date of approval of this Addendum) will apply to the IGO Work Track.

The IGO Work Track is expected to take into account the review of the relevant historical documentation and prior community work conducted by the IGO-INGO Access to Curative Rights Protection Mechanisms PDP Working Group (see Sections 3.1 and 3.2 of the [PDP Final Report](#)), the

Commented [MW2]: The Council resolution said “Phase Two”, but since the issue also touches the URS, it’s something the Council can consider launching sooner (esp. since this will be an independent Work Track).

external legal expert opinion commissioned by the PDP Working Group (Annex F) and the IGO Small Group Proposal (Annex D). However, the GNSO Council specifically directs the IGO Work Track not to re-open or re-visit the policy proposals (including on Recommendation 5) that were discussed by the PDP Working Group; instead, the GNSO Council instructs the IGO Work Track to base its recommendations on its analysis of the materials cited in this paragraph and its deliberations as to whether there is a need to develop appropriate policy recommendations to address identified IGO needs in respect of the specific issue that was referred to the RPM PDP by the GNSO Council.

Section 4: Deliverables & Reporting

Deliverables:

As one of its first tasks, the IGO Work Track must develop a detailed work plan, including a timeline describing specific and manageable deliverables during the course of and at the end of its work. Unless expressly approved by the GNSO Council:

- (i) The IGO Work Track must publish its initial recommendations for public comment prior to delivering its final recommendations to the full RPM Working Group;
- (ii) The IGO Work Track must consider all public comments received in developing its final recommendations and, to the extent that it does not accept specific policy proposals raised in a public comment, it shall document its rationale for such non-acceptance in its Final Report;
- (iii) The IGO Work Track must consult with ICANN org and Contracted Parties to ensure that its final recommendations are technically feasible.
- (ii) The RPM Working Group must consider the final recommendations from the IGO Work Track as a matter of priority;
- (iv) In considering the final recommendations, the RPM Working Group is expected generally to approve them unless a broad cross-section of the Working Group objects on the basis of information not previously raised to the IGO Work Track or in the public comments, and documents the rationale for such objection(s);
- (v) In the case of such broad, documented objection(s), the IGO Work Track shall specifically and expeditiously consider the objection(s) and either provide a detailed written explanation of how the concerns raised were addressed in its recommendations, or decide whether or not to amend its recommendations in light of the concerns raised (such amended recommendations to be referred to as Supplemental Recommendations);
- (vi) Where the IGO Work Track has provided the required explanation or Supplemental Recommendations (as applicable), the RPM Working Group shall approve the recommendations or Supplemental Recommendations, except that where the original recommendations are approved, the RPM Working Group may elect to include written statements from Working Group members for the attention of the GNSO Council; and
- (vii) The RPM Working Group must submit its final recommendations on this topic to the GNSO Council no later than three months after the close of the IGO Work Track public comment period.

Deleted: The GNSO Council recognizes that, while it wishes for the IGO Work Track to develop recommendations that are “generally consistent” with Recommendations 1-4 from the IGO-INGO Access to Curative Rights Protection Mechanisms PDP Final Report, it is possible that the final recommendations may supersede or affect the scope of those four previous recommendations. If the IGO Work Track’s final recommendations constitute a rejection of Recommendation 1, 2, 3 or 4 from the IGO-INGO Access to Curative Rights Protection Mechanisms PDP, however, the IGO Work Track must explain and document its rationale in its report. In such an event, the GNSO Council acknowledges that any new Consensus Policies that it may approve from the IGO Work Track will replace any Consensus Policies formerly approved by it.¶

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Commented [MW3]: These suggestions are likely to prove controversial; staff is proposing them merely as a starting point for further discussion.

Membership and the applicable methodology for determining consensus in the IGO Work Track is further detailed below.

Reporting:

The IGO Work Track chair must provide a written [monthly] update to the GNSO Council as well as to the leadership teams of any other ICANN Supporting Organization and Advisory Committee (SOAC) that has appointed Members to the Work Track.

All appointed 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.

In view of the Governmental Advisory Committee's (GAC) requests to engage with the GNSO Council on the topic of IGO protections, **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.

Section 5: Members, Observers & Leadership

Membership Criteria & Team Composition:

All Members of the IGO Work Track must:

- **Possess a working understanding of international intellectual property law, public international law, international arbitration or alternative dispute resolution;**
- Be responsible to their appointing organization, seeking input as necessary and keeping the appointing organization informed of progress;
- Agree to respect the GNSO PDP and other applicable GNSO rules of procedure;
- Be willing to work, in good faith, toward consensus;
- **Commit to Terms of Participation, to be set by the GNSO Council prior to the first meeting** of the IGO Work Track;
- Provide an updated Statement of Interest in accordance with Section 5 of the GNSO Operating Procedures; and
- Be available to actively contribute to the discussion and activities of the Work Track on an ongoing basis.

The IGO Work Track will consist of Members (who must comply with the criteria noted above) and Observers. Membership will comprise:

- **Members appointed by GNSO Stakeholder Groups and GNSO Constituencies, as follows:**
 - **The Registries Stakeholder Group may appoint up to 2 Members;**
 - **The Registrars Stakeholder Group may appoint up to 2 Members;**
 - **The Commercial Stakeholder Group may appoint up to 4 Members; and**

- The Non-Commercial Stakeholder Group may appoint up to 4 Members.
- Up to 2 Members from each interested SO and AC.
- Up to 2 Members appointed by and representing IGOs.

Commented [MW4]: This does not cap a Constituency, e.g. NCSG could appoint all from 1 of its 2 Constituencies; and CSG could do the same with 1 or 2 of its 3 Constituencies.

Commented [MW5]: This is likely to be controversial, but I put it in for discussion on the basis that the GAC members should represent the GAC's interests and not necessarily IGOs.

Members do not need to be current members of the RPM PDP Working Group. For the avoidance of doubt, it will be up to each SO, AC or GNSO Stakeholder Group or Constituency to decide if it wishes to appoint any Members.

Interested individuals may sign up as Observers to the IGO Work Track. In accordance with GNSO custom and practice, Observers will not be able to participate in Work Track discussions, whether at meetings or on the mailing list. Observers will only be subscribed to the Work Track mailing list on a read-only basis (i.e. they cannot post to the list).

Appointment and Role of the Chair:

The GNSO Council will appoint a single, qualified Work Track Chair. Expressions of Interest will be widely solicited for a neutral and independent Chair. The call for Expressions of Interest must include: (i) clear criteria relating to knowledge, expertise, skills and experience that the GNSO Council believes is necessary for the Chair; and (ii) a list of expected responsibilities (including the anticipated time commitment) of the Chair. Past and current members of SOACs, GNSO Stakeholder Groups and Constituencies will be eligible to apply, but if appointed he/she must expressly acknowledge his/her willingness and ability to act as an impartial Chair.

The Chair does not count as a Member of the Work Track and does not vote or participate in consensus calls other than to preside over the discussions and outcomes.

The GNSO Council may appoint a Vice-Chair to assist the Chair with managing the work of the group. The Vice-Chair may be appointed from amongst the then-current Work Track Membership, although this is not necessary.

The GNSO Council may, in addition to the provisions in the GNSO Working Group Guidelines describing the role and expectations of a Working Group Chair, specify other responsibilities and obligations for the Chair, Vice-Chair (if any) and GNSO Council Liaison.

Role of the GNSO Council Liaison:

The GNSO Council Liaison is a member of the Work Track Leadership Team and must be included by the Chair in planning and decision making, in addition to the liaison's customary responsibilities to the GNSO Council (such as regular reporting).

Section 6: Consensus, Decision-Making & Appeals

Member participation is required for establishing consensus. If a Member is not able to express a position on a consensus call, this will not hold up the consensus call if another Member representing the

same appointing organization is able to express a position on behalf of that group. Observers do not participate in any type of consensus calls.

For the avoidance of doubt, any SO, AC or Stakeholder Group that does not fulfil its entire Membership allowance must not be disadvantaged as a result during any assessment of consensus.

Commented [MW6]: Taken from the EPDP Charter.

Unless otherwise specified in this Addendum, the GNSO Working Group Guidelines apply in full to the IGO Work Track. Consensus designations are therefore the responsibility of the Work Track Chair and are to be made in accordance with the consensus levels described in Section 3.6 of the Working Group Guidelines.

Similarly, Sections 3.4 and 3.7 of the Working Group Guidelines apply in relation to any appeal by a Work Track Member in relation to any perceived violations of ICANN's Expected Standards of Behavior, or a belief that a Member's contributions are being systematically ignored or discounted, or a decision of the Work Track or the GNSO Council regarding this Work Track. In addition, if there is conduct that appears to be in violation of the Expected Standards of Behavior, any individual serving in a Chair role (such as the Chair or, in cases where the conduct in question is that of the Chair, the GNSO Council Liaison) has the power to remove the violator from the discussion for a short period of time. A temporary removal could include silencing from participation in meetings/chats, silencing on the Work Track mailing list, as well as silencing on other communication channels officially used for the Work Track's activities. For conduct that is questionable, but not necessarily a violation, the Chair might wish to only make a record of warnings, but not escalate to removal.

If a Member is temporarily removed, they can immediately refer that issue to the ICANN Ombudsman, who will consider the issue with urgency. All participants are expected to abide by the Ombudsman's ruling. If a violator persists in their behavior, any individual serving in a Chair role may refer to the Ombudsman the issue of whether the violator should be permanently removed from Work Track participation. The Ombudsman may then make a recommendation to GNSO Council leadership regarding permanent removal. For clarity, this possible course of action does not alter or affect the Ombudsman's general authority or any other recourse or complaints mechanism that might be appropriate in the circumstances.

Commented [MW7]: This is taken from John Jeffrey's written advice that was sent to the Council leadership in March.

NOTES

The PDP3.0 Improvements approved by the GNSO Council are:

- Working Group Terms of Participation
 - i.e. "Require those joining a WG to sign up to a WG member terms of participation outlining the commitment expected from WG members as well as the expectation with regards to multi-stakeholder, bottom up, consensus policy development »;
- Alternatives to the Open Working Group Model
 - i.e. flexibility to adopt models that "balance representation, inclusivity, expertise, empowerment, accountability and participation »;

- Criteria for New Members Joining after the Formation of a Working Group
 - i.e. “Limit disruption as a result of members joining after the WG has already been engaged in deliberations for quite some time but allow for flexibility in case new volunteers bring new perspectives or are currently underrepresented in the WG”;
- Capture vs Consensus
 - i.e. “Empower WG Chairs with additional tools and support to ensure effective and efficient leadership”;
- Active Role for the GNSO Council Liaison
 - i.e. “Ensure optimal use of [and] clear understanding with regards to the role of the Council liaison”;
- Documenting Expectations of Working Group Leadership, Roles, Responsibilities, and Required Skills and Expertise
 - i.e. “Ensure clear understanding of what the role of a WG chair entails as well as what are considered some of the qualifying skills and criteria”;
- Further Guidance on Working Group Appeals Process & Standard Methodology for Decision Making
 - i.e. “Ensure there is clarity around how consensus is established and what tools can be used in that regard”;
- Enforcing Deadlines and Ensuring Bite-Size Pieces
 - i.e. “Ensure clear expectations concerning deliverables as well as a manageable scope of work. A PDP should have a narrow scope and, in those cases where a subject is broad, it needs to be broken into manageable pieces to make the deadline pressure more understandable and achievable”;
- Notification to the Council of Work Plan Changes
 - i.e. “Enhance accountability of PDP WGs and oversight by GNSO Council”;
- Reviewing Working Group Leadership
 - i.e. “Allow for regular review of PDP leadership team to be able to identify early on potential issues”;
- Making Better Use of Existing Flexibility in PDPs to Allow for Data Gathering, Chartering and Termination When It is Clear No Consensus can be Achieved
 - i.e. “Ensure that each PDP is set up for success from the outset, and provide regular opportunities for Council to evaluate a PDP’s progress ... [and] flexibility with regards to work that is undertaken upfront, such as data gathering to establish whether there is really an issue that needs to be addressed ...”;
- Independent Conflict Resolution
 - i.e. “Provide additional mechanisms for conflict resolution for those cases where existing tools have not delivered results”;
- Criteria for PDP Updates
 - i.e. “Ensure standardized set of information provided by PDP WGs”;
- Resource Reporting
 - i.e. “Allow for [regular] resource tracking and oversight, enhancing accountability”.

