

**Transcription ICANN Dublin
Thursday 22 October 2015
GNSO IGO-INGO Access to Curative Rights Protection Mechanisms PDP WG**

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On page: <http://gnso.icann.org/en/group-activities/calendar#oct>
The transcriptions of the calls are posted on the GNSO Master Calendar page

(Peter): Thank you. My name is (Peter) (unintelligible) and I'm representing now the Council of Europe, more precisely the TDP committee, which is an advisory committee to the (unintelligible) which is basically the data protection privacy convention of Council of Europe.

So I just for starting I wanted to also convey the message of the Council of Europe to get involved more in ICANN work and to bring our expertise, if needed, on the issues, as privacy and data protection can be very tricky issues especially in Europe. So that's basically why I'm here.

Petter Rindforth: Excellent. Thanks.

Phil Corwin: Good morning. I'm Philip Corwin. I'm a co-chair of this working group and also I represent the Business Constituency. I'm one of their two GNSO councilor. I'm also the interim chair of the Business Constituency.

Petter Rindforth: And I'm Petter Rindforth, the other co-chair, also representing IPC, the Internet Property Constituency.

Mary Wong: Mary Wong, ICANN policy staff supporting this working group.

Marika Konings: Marika Konings, ICANN staff.

Erika Randall: Erika Randall, ICANN staff.

Oswaldo Novoa: Oswaldo Novoa, Internet Service Providers Constituency.

Petter Rindforth: So that's all for formalities. So are there any new statements of interest? I presume no. So yes, for the protocol, Petter Rindforth here.

We have a very short agenda, most updating info. And even if I don't have it as a specific point, perhaps I turn over to you, Mary, to just give us a quick update on the status of the expert.

Mary Wong: Thank you, Petter. This is Mary from staff. And particularly for the benefit of those who are joining us, those fairly new to the work of this group and for the recording, the working is currently considering the issue of jurisdictional immunity for international governmental organizations.

And there's been some work done in terms of initial research by the working group and staff. And of course there's been some exchanges between the working group and the Government Advisory Committee, specifically including with the affected IGOs.

Nevertheless, this is an issue that is quite significant because one of the discussion topics is the claim from the IGOs that it is very difficult, if not impossible, for them to submit to the jurisdiction of the national court, and that is the - one of the requirements to file a complaint under ICANN's curative rights dispute resolution processes. So this is quite a central question to the work of this working group.

As a result, the working group, after thinking about it for some time and working on some potential questions that could be answered by a legal expert, has decided to proceed with engaging the services of an external legal expert. The working group reviewed a list of potential candidates which was obtained through solicitation through various networks, academic, professional, and amongst working group members as well.

And the candidates did include several from different jurisdictions. And ultimately in terms of availability and qualifications, the working group, led by the co-chairs, decided to proceed with a U.S.-based academic from George Washington University. And ICANN staff has now begun the contracting process with this expert, whose name is Professor Edward Swaine.

Phil Corwin: Phil Corwin here for the record. Let me give a little more background, particularly for those who were just joining us. This working group started up about a year ago. Frankly we thought we'd be done with our work by now. As you can see the full name is IGO and INGO Curative Rights Protections. That's for international intergovernmental organization, and then the INGOs are the nongovernmental.

We reached the conclusion early on that there was no real reason to consider special protection for nongovernmental organizations that they had full access to the existing curative rights processes of the UDRP and the URS so long as their names are acronyms who were trademarked. So we dropped them out of our consideration. There was no sovereign immunity issue.

For the IGOs, we did find that they have substantial protection under national copyright regimes through Article 6ter of the Paris Convention, which simply upon filing with the World Intellectual Property Organization gives them rather broad protections to all signatories to that convention, and all members of the World Trade Organization.

We have not determined up to now that they need a separate curative rights process, because we're not sure of the consensus view on - that exists today regarding the scope of sovereign immunity for such organizations. As Mary mentioned, we're in the contracting process with a U.S.-based expert. Let me assure our guests from the EU that we're asking for the global consensus view, not the American view on this. We expect to receive that report late November, early December, and then we hope to proceed rapidly.

We did get word on a call about a week and a half ago that in separate discussions between the board, the GAC, and the so-called IGO small group, which has chosen not actively participate in this working group, (unintelligible) IGOs, that they had reached an agreement in broad principle on a separate curative rights process which would not allow access to national courts.

We are awaiting the written details of that agreement and principle, but there is a recognition that particularly in regard to legacy TLDs that such a process has to be reviewed by the GNSO Council. And once we have our own academic input and those principles in writing, the council will be able to take up that question probably early in 2016. I can't predict how it will come up yet - how it will come out in the end.

But we're waiting to see both the broad outline of principles that's been raised, as well as whatever legal justification as for the creation of a separate CRP. It's been the inclination of our group so far and we have found besides the copyright regime protection provided in the Paris Convention as well as the fact that several IGOs have availed themselves successfully with the UDRP in the past do not feel that the potential appeal was a barrier.

Our general feeling within the working group is that we want only want to engage in the work of creating a sole - a wholly new CRP if the consensus view on sovereign immunity justifies such a step. And I have nothing more to add at that point. Petter, anything from you?

Petter Rindforth: Petter Rindforth here. Yes just to also go back a little bit in time, the initial conclusion we made when it comes to IGOs was that we thought that there was no need for creating a new dispute resolution policy, at that stage at least.

And I think it was already back in January that we came to the conclusion that we could merely add some references with the current UDRP, referring to that in the case the complainant is an international intergovernmental organization, that is IGO, meaning an organization with an international legal personality established by international agreement, the complainant may have trademarks rights in the formal names and acronyms protected under Article 6ter of the Paris Convention for protection of industrial property that had been duly communicated to the countries of the union through the intermediary of the international bureau.

That said, this Article 6ter protection, so to speak, or list of protected names are not the same as trademarks, but it's at least protected so that no one else can register identical acronyms and names.

And following up with a phone call we had, led by Chris Disspain last Monday, it was interesting to hear him kind of a very, very clear statement from his point of view that acronyms should not be treated as trademarks -- yes we can agree on that -- or be treated as trademarks, but maybe seen as similar or related.

And that ICANN board has stated for the group of IGOs that they don't have the same protection and should not get the same trademark protection in dispute resolution policies. So we'll see if - we have to come to the conclusion that we as the next step need to reconsider our initial position and perhaps create an IGO version of the UDRP but then also looking at the difficulties with these jurisdictional issues.

So we will wait for the result of the new expert to see his conclusions if we can proceed the initial way we decide or if we have to reconsider and then also see if there is any way to if the IGO loses a UDRP or an IGO UDRP quite next step with maybe neutral panels.

Phil Corwin: Let me - well first we have two new participants since we started. Could they just identify themselves for the record, and welcome.

(Colin O'Brien): Hi. (Colin O'Brien), (Partridge Garcia).

(Christine Duran): (Christine Duran), National Arbitration and forming member of this working group.

Phil Corwin: Great. I wanted to add there is - the GAC issued its communiqué for this meeting last night. There is a very brief passage in the communiqué under the general topic of gTLD safeguards for the current round. And item three under that heading, protections for IGOs -- this is the entire statement, it's one sentence -- "The GAC advises the board to: facilitate the timely conclusion of discussions of the 'small group' and the NGPC, which is new gTLD program committee, in an effort to resolve the issue of IGO protections."

I note that that GAC communiqué makes no mention of our group. They had recognized us in the past, but we've fallen off the radar screen for this communiqué. Let me just finish, Mary, and then you can jump in.

To add a little more background, we've - we did have a meeting with the chair and two vice chairs of the GAC in Buenos Aires. Previous communiqués from the GAC indicated that they did not want access for IGOs to the UDRP or URS. They wanted an entirely new CRP. They also indicated that should be available at free or nominal cost. We informed them that we had no ability to create a subsidy mechanism. That was something they'd have to take up.

Separately, we asked them to provide some background on why they thought an entirely new process was required and what they meant by nominal cost and specifically asked whether they considered the following fee for the URS, which is \$500, to be a nominal cost and we did not get clear answers from the GAC. So our - we have had interchange with them but it has not been wholly illuminating.

The NGPC could create a CRP for the new TLDs, but I would note that the Global Domain Division has been very keen on consistency of contracts to the point where they recently imposed the URS in contract renewal negotiations for legacy TLDs. I think it's be an unfortunate result if we had one process for IGOs and legacy gTLDs and a different one in the new TLDs, but we'll deal with all that once we get our legal advice.

Mary, go ahead with your comment and then we'll see if there's any questions or desire of our participants for conversational interchange.

Mary Wong: Thank you, Phil. And I think you probably know what I was about to say. This is Mary from staff. And far be it from me or from staff to guess how the GAC arrived at its language in the communiqué, I think for purposes of I think those new to our work I think it might be helpful to at least note for the record that the small group that's referenced in the communiqué is a small group of IGO representatives that's working with representatives from the board through the new gTLD program committee.

But I think the recent understanding we have is that -- and as you mentioned earlier -- that the proposal that's going to come out of this small group is going to be sent to the GNSO, including to this working group, for consideration.

Phil Corwin: Right. I do know it's going -- and I think I noted -- it's going to be sent to council. We don't know if council produces a recommendation contrary to

what that group has indicated they'd like, what they will do but it will go to council next for consideration once we get that in writing.

And I just want state -- this is a personal comment but I think it's fairly reflective of the views within the working group -- that what we've - the working group generally and I am particularly looking for a strong legally based rationale for creating an entirely new curative rights process.

I do note the - I don't think there'll be, I can't predict, but there have not been, at least in the past, a great number of filings. Perhaps that's because of the sovereign immunity issue. But there have been some under the UDRP by IGOs. But I don't know how many there'll be once they - this is addressed directly.

But the circumstances in which appeal to a national court would be likely would be in the very highly unlikely event that a IGO filed in a curative rights process, wanted the process, and the domain registrant exercised their right to appeal.

And I would note another issue that our working group has been dealing with is that while ICANN is tasked with enforcing relevant law, it has no ability and it would be inappropriate to create new legal rights, and the existing CRPs, the UDRP and the URS were created as a lower cost, faster alternative to litigation, not as a replacement that bars litigation.

So there is a question even if there were a new CRP solely for IGOs which had an internal appeals process and no access to national courts, any registrant who had rights under their national laws or other relevant laws perhaps or those of their registrar that provided court access, it'll be difficult - it would - there's no ability for ICANN to prevent an individual registrant from going to court and seeking to protect the suspension or transfer of their domain.

And it's not at all clear that a national court would give any credence to an ICANN policy that said that was not available. So that's another issue we're dealing with. But we're waiting to see what our legal expert says on that.

Petter Rindforth: So I think we've come to the -- if not anyone had any specific questions -- we come to number three on the agenda, which is kind of interesting, the next steps, what - we had it originally an agenda of a timeline where we were going to make decisions on certain points. But I think we have left that one since a long time ago. So, Mary, what can we expect in the near future?

Because I personally think both for the topic as such and for the working group that we need to make conclusions pretty soon once we have the result of the external expert. We can't sit and wait for input from IGOs. That will now come. So do you have any specific timelines there?

Mary Wong: Thanks, Petter. This is Mary from staff again. I don't know that we're able to be too specific about timelines. I think it's been noted previously by yourself and by Phil, including to the GNSO over the weekend here in Dublin, that the working group timeline as you've mentioned has been affected by a number of developments. And I think the initial hope was that we would actually be in a position to have recommendations by this meeting.

One of the considerations is of course the advice that we expect from the legal expert. And, Phil, you've noted the timeline for that. The other input would be the small group proposal, which this group would consider.

And I think as most people know, but maybe not everybody, the small group proposal encompasses not just the curative rights aspects of potential IGO protection but other forms of preregistration protection, if I might put it that way, that deal with mechanisms that could work like the trademark clearinghouse, which is out of the scope of this working but it would be something for the GNSO consider overall.

So in that respect, the hope had been -- and this is reflected in the communiqué from Buenos Aires -- that that proposal would have been sent from the small group to the GNSO by this meeting. It hasn't happened for a number of reasons, including a lot of other discussion topics within the GAC and also more broadly in ICANN.

So what we would do as staff is following this meeting to follow up with those that support that small group and to see if we can get more specific timelines from them so - because that will help you in planning the work of this working group for the next month or two.

Phil Corwin: Thank you for that, Mary. And just to add to that, this working group recognizes that certain aspects of IGO protections are wholly outside the scope of our charter, the ones that relate to whether IGO names and acronyms should be blocked at the first and second level of new TLDs or they should be included in the trademark clearinghouse.

Those are separate issue from what we're focusing on, which is strictly when an IGO believes that someone has registered a domain which is identical or confusingly similar to their name or acronym what arbitration process they have access to to address that.

Petter Rindforth: Thanks. Petter here. Does anyone have any questions on these topics? I hear no one.

I have one suggestion for myself at least. I would like to see as far as possible an updated agenda schedule for what's coming up, because I don't think we have looked at the original ones for a while now and it would be good to see. Obviously there's some decisions made during this ICANN meeting, so if we could just put them on the new agenda to send them out to the full working group so that we have some kind of conclusion what we can expect and when. Thanks.

Mary Wong: And this is Mary from staff. Just for the record and for those who are not physically in the room, yes staff will take that back and we'll prepare an updated work plan for the group. Again, it's been a little difficult because of the various developments, but we'll try our best to project ahead to Marrakech at the latest perhaps.

Phil Corwin: And I would add, it's our fervent hope that once we receive that advice from the legal expert, which should be no later than the first half of December, that we can resume the rapid progress that this working group made up to the point where we had to confront the sovereign immunity issue and hopefully deliver at least a preliminary report and recommendations by the time that ICANN meets in Marrakech.

Petter Rindforth: So that's it. I think we have done the agenda for today. And also I don't think there is any need for a meeting next week, so let's - we'll send it out once we know when we have something more to discuss.

Phil Corwin: And for those of us who are in the seventh of our eighth working day here in Dublin, there's no desire to deal with anything ICANN-related next week. We need a week's break from this, and there won't be much discussed anyway till we get the legal expert's work but we will...

Petter Rindforth: Make it two weeks.

Phil Corwin: I think two weeks. And so I think we're ready to adjourn. We're seeing no further questions in the chat room or in the room. Those in the physical room, once again there is food back here and it's going to go to waste if it's not eaten. So if you haven't had breakfast or you're still hungry, please help yourself.

Petter Rindforth: Thanks for today.

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