

IGO-INGO Access to Curative Rights Protection Mechanisms Working Group TRANSCRIPT

Wednesday 16 December 2015 at 17:00 UTC

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Attendees:

David Maher - PIR
George Kirikos - Individual
Jim Bikoff - IPC
Kathy Kleiman – NCSG
Lori Schulman - IPC
Mason Cole - RySG
Paul Tattersfield - Individual
Petter Rindforth - IPC
Phil Corwin - BC
Jay Chapman - Individual

Apologies:

Oswaldo Nova – ISPCP
Paul Keating - NCUC
Mary Wong

ICANN staff:

Steve Chan
Berry Cobb
Glen de Saint Gery
Michelle DeSmyter
Nathalie Peregrine

Nathalie Peregrine: Thank you very much, (Leo). Good morning, good afternoon, good evening everybody and welcome to the IGO INGO Curative Rights Protection PDP Working Group call on the 16th of December, 2015.

On the call today we have George Kirikos, Petter Rindforth, Paul Tattersfield, Jay Chapman, Philip Corwin, Mason Cole, Jim Bikoff, Lori Schulman and

David Maher. We received apologies from Paul Keating, Osvaldo Novoa and Mary Wong from staff.

From staff on the call we have Steve Chan, Berry Cobb, Glen de Saint Géry, (Michelle DeSmeiter) and myself, Nathalie Peregrine. I'd like to remind you all to please state your names before speaking for transcription purposes. Thank you ever so much and over to you Petter.

Petter Rindforth: Thank you. Petter here. And welcome back all of you, it was a time since we last meet (unintelligible) and online. Is there any new statement of interest? I don't see any hands up. So I took the opportunity to take the first item on the agenda as the main interesting information we'll have today is from Phil. So I turn over to you, Phil, directly for the update on - work on the external legal expert.

Phil Corwin: Thank you, Petter. Phil here. Hope everyone can hear me. I'm - did provide members of the working group yesterday with a written report - excuse me - of my meeting last Friday with Professor Ed Swaine at George Washington University Law School. And I'll go through that in a moment for those of you who haven't had a chance to read it yet and then open it up for any questions or discussion of what's going on with that legal research.

I'm just going to take a sip of water here and then I'm going to proceed into the description. Hold on. Okay. Okay. Yeah, anyway as reported last Friday afternoon I went to George Washington Law School, which is in the Foggy Bottom area of Washington near the White House, and met with Professor Swaine in his office for a bit over an hour.

My main purpose was - well besides finding out how far he'd gotten and when he expected to deliver at least a draft report was to better acquaint him with the actual purpose and functioning of the UDRP and particularly the rules applying to appeal which I think he found very useful and he took quite a bit of note and in particular I acquainted him with the WIPO guidance for

examiners that that was available online and also the new book on domain name arbitration which is the best book I've ever seen explaining all the different aspects of UDRP decisions and the final chapter is - has extensive discussion of the appeals procedures under the UDRP.

I also talked to him about the history and purpose of our working group and some of the other things going on within ICANN related to IGO name and acronym protection. We discussed Article 6ter of the Paris Convention and the fact that our working group had found that notification of WIPO of - by an IGO asserting its rights under Article 6ter would in our view confer standing under the existing CRP.

So I think he found the meeting useful. I found it useful. He's just starting on the project. He hasn't reached any preliminary conclusions but he does think he can complete the report in January. He wasn't precise about when in January but, again, he was just getting into it. And I got the feeling he wants to do a pretty thorough job on it.

And I've suggested that when he has what he believes is close to a final draft he would share it so that we can review it and ask any questions or suggestion clarifications before it becomes final. So I hope he'll take that proposal under advisement and work with us in that way.

So that's pretty much it. It was a good meeting. It was mostly focused on the UDRP. He didn't offer any opinion on - at this point on the interaction between IGOs and the UDRP. He did note that many of the contracts that IGOs sign they make sure that if there's any dispute over compliance with the contract that it's subject to arbitration and not to court review but he also noted this is a different situation that it's not a - simply a bilateral relationship but there's a third party, the domain name registrant with its - his - its own legal rights and he wasn't sure how to factor that into his overall analysis.

So I'm going to stop there and see if anybody has any questions about that.

Petter Rindforth: Well Petter here. Thanks, Phil. Sounds like you had a good meeting. And considering the - all the upcoming holidays in between I think if he can make both the preliminary and hopefully the final report before the end of January that's perfectly acceptable process...

((Crosstalk))

Phil Corwin: Yeah, he didn't indicate that he foresaw any problems in delivering a final report to us by the end of January. So that's a good sign. He was just beginning the work as of last week but was planning to get into it over the holiday period.

And so I think once we get that - at least the draft and then the final report we can - we will have the basis for proceeding toward conclusion of our working group unless he tells us that they absolutely need - that we need to create a whole new CRP for IGOs which is a whole other task. But let's not prejudge his conclusions. I don't know that he'll give that finding at all.

So other questions or comments on my report?

Jim Bikoff: Phil, it's Jim Bikoff.

Phil Corwin: Hi, Jim.

Jim Bikoff: Hi, Phil. Phil, my only question - and I understand we're going to have to wait until we see the report before we can really comment on - further on the sovereign immunity issue. But has there been any development with regard to either contacts from the GAC or the IGO group?

Phil Corwin: No, there hasn't been, Jim. Since Petter and I along with supporting staff had a call with Chris Disspain, which I believe was just the week before the Dublin meeting, where he gave us a verbal report very broad stroke about where

things stood between the board, the GAC and the IGO small group. At that time he told us he hoped to get us something soon in writing, you know, at least a general summary of where they were. But we haven't received anything since then. We have no idea whether they've had further discussions, where things stand, where one will get an actual written description of what they're looking toward.

Of course it was no surprise the IGOs is always - are insisting that they cannot be required to enter into any process that has appeal to a court of mutual jurisdiction but we'll await Professor Swaine's opinion on that.

I believe - Steve, let me call on Steve, did Mary have any update on where things stood with that? I think I may have seen something from her in the last week or so on the status of those discussions. Do you recall? I know she's not with us on the call today.

Steve Chan: Thanks, Phil. This is Steve from staff. Yeah, I'm not privy to those conversations. But, you know, so as much as I know it's just been passed on to me from Mary. And from what I understand there hasn't been a lot of live or active discussions there so as much as we chase and push, you know, in particular Chris Disspain has been extremely busy with the CCWG Accountability as well as the CEO search, so from what I understand from Mary they're not seeing a whole lot of action in the small group. So...

((Crosstalk))

Phil Corwin: Yeah.

((Crosstalk))

Petter Rindforth: I have a broader recent note from Mary. And when she spoke about the meeting of today and the contact with the legal expert and just said that in addition we continue to - ICANN - continue to request updates from those

colleagues supporting the board and the GAC to see where things stands with the IGO small group. So as you say, that's where we are.

((Crosstalk))

Jim Bikoff: Petter, and Phil and Steve, I just - the reason I'm - one of the reasons I'm asking that question is because I had a telephone conference the third week of November with Mark Carvell who's a very active GAC member on these kinds of issues. And I told him at that point that we were engaging a professor to, you know, do some research on the sovereign immunity issue. And he said to keep - that I should keep him advised because he understands that there may be, you know, that our position may be that there is no special protection warranted to the IGOs.

But in the meantime pending that decision it wouldn't be wise for him to take any steps at this point. So I think once we have that opinion I should go back to him at some point and, you know, especially if that opinion, you know, vindicates the position that we tentatively adopted and then see whether he can be of some help because I think he understands that there are some issues with the, you know, special protection at this point.

Phil Corwin: Right, well thank you for that, Jim. And, you know, we'll see - we all know that we may wind up being in a position of strong disagreement with the IGOs; their position throughout this has been that they are entitled to - they cannot be subject to any procedure that could result in an appeal to a court when we've asked them for, you know, legal justification for that they've - haven't really provided it. But we'll have something from the professor next month and then we'll see what it is. I don't want to prejudge it.

I do note that in the chat room George noted that we have found that some IGOs have despite the potential for appeal to a national court have nonetheless used the UDRP and I did point that out to Professor Swaine when we met. I believe that was in my email report yesterday.

Jim Bikoff: Right. And I think that's true. I mean, going back - we can go back 10 or 15 years even and see - because I was counseling the World Bank at one point where they did file a UDRP...

Phil Corwin: Right.

Jim Bikoff: ...but I think that goes back to like - late 90s or maybe the early 2000s. So, I mean, people - IGOs have taken advantage of the UDRP, there's no question about that. And there's no question really about their right to take advantage of it. And they've done it I think with knowledge that there could be a court appeal because it's very clear in the rules that that procedure exists.

Phil Corwin: Yeah, and to that point, Jim, when I met with the professor we also noted that to the extent that any IGOs have registered domain names I don't know how they could have done it without signing a registrar agreement which requires the registrant to submit to UDRP. So I told him I didn't know of any case where a IGO had been a respondent rather than a complainant but that it was always possible that could happen. And we - we also discussed the fact that WIPO is working with the IGO small group but WIPO is not totally disinterested because it is of course an IGO in and of itself.

Jim Bikoff: Exactly.

Phil Corwin: Okay. Other comments or questions on my meeting with the professor?

Petter Rindforth: See no.

Phil Corwin: Okay well, you know, I thought it would still be useful to let all of you know what took place. We had a good conversation. He seems very interested in the project and doing a thorough job on it. And we're all looking forward to receiving his report which will permit us to finally put the gearshift back in drive and move forward with our project. So I'll turn it back to you now, Petter,

and I guess the final discussion is, you know, assuming we get a report in January, which seems quite likely, what do we do from that point on up to the Marrakesh meeting, what are our goals. So over to you, Petter.

Petter Rindforth: Yeah, thanks. Petter here. Well we have previously stated that we can't wait too long just sitting and waiting without doing anything for the IGO small group and GAC report. But from what I hear now it seems a good idea that once we have the report from the external legal expert to give GAC and IGOs the possibility to come up with comments but also give that a specific time for response because once we are in January February of next year we haven't actually proceeded anything for a year more or less in our working group.

And I was just - wanted to turn over to Steve on what comments you have on our upcoming next steps. I don't know if you - other in the working group would see it interesting to have an update on our initial detailed working calendar. But at least it would be interesting to - if you could send it out again to rephrase it and also maybe point some new dates for our initial conclusions. Steve, do you have any comments or information there?

Steve Chan: Sure. Thanks, Petter. This is Steve again from staff. I think it's probably good to take into consideration what Phil had already mentioned that, you know, we can try to plan towards certain dates but I think without knowing exactly what's going to be in the legal experts findings or the report, you know, we don't necessarily know how long it's going to take us to develop whatever recommendations this working group decides upon.

So in that regard I don't know exactly when we can pin down dates for things...

((Crosstalk))

Petter Rindforth: Now, sorry, just to interrupt you. My other question is do we have any official specific dates where we are supposed to come up with something? Or are we free to extend it so that we at least have enough information to proceed?

Steve Chan: To directly respond to that, I don't think we're beholden to any certain dates. I think we need to take the time we need to to come up with fulsome recommendations. So I don't think there's any predetermined dates that we need to meet. And, you know, I understand the working group's frustrations and the loss of momentum.

So I think once we hopefully get the report from the legal expert in January we can resume a more regular meeting schedule and attempt to recapture that momentum. And at the same time I think as much as possible try to seek to consider the proposal from the small group.

So I can put together or I guess update the work calendar to hopefully give us an understanding of when we might be able to try to reach some conclusions. But I think it'll be preliminary until we get some more formal understanding of the proposal from...

Petter Rindforth: Yeah...

((Crosstalk))

Steve Chan: ...both Professor Swaine and the small group.

Petter Rindforth: Thanks. Phil.

Phil Corwin: Yeah, Phil here. Yeah, I agree with what you said and, you know, there's two potential scenarios; that Professor Swaine comes back and said that the consensus view of sovereign immunity does not entitle IGOs to - does not require establishing a whole separate CRP for IGOs with no national court right of appeal.

I think we can proceed rather quickly. If he comes back and said that they do need a separate one I don't know if this working group is going to attempt to draft something, basically a UDRP just for IGOs and the handful of cases that might arise every year or simply report a conclusion and - but leave it to some other working group to take on that task. But we'll deal with that when we have to.

Any views on that, Steve? I forget what the scope of our charter is whether we would be required to take on that task.

Petter Rindforth: Steve, your hands are up anyway.

Steve Chan: Sorry, I was already moving on to a different point so I kind of missed exactly what you said. Sorry, apologize for asking, can you go ahead and repeat just the...

Phil Corwin: Yeah, just if Professor Swaine comes back and says that the recognized scope of sovereign immunity insulates IGOs and prohibits them from being required into any - into the UDRP or URS, which both have, you know, right to appeal to a court of mutual jurisdiction, and which would lead to the conclusion that they need a separate CRP just for the cases they might file, are we under our charter required to create that CRP or merely to report that conclusion and leave it to another working group to work on that rather monumental task?

Steve Chan: I think we'd probably need to go back and confirm but it's probably likely that the scope is more to recommend the DRP CRP...

Phil Corwin: Okay.

Steve Chan: ...rather than to actually create it. But I'll go ahead and take a look back at the charter and confirm that.

Phil Corwin: Okay. All right, well if - you know, if he does say that, you know, that the existing UDRP is fine for them, that there's no immunity problem and that - and we stick with our conclusion that Article 6ter filing gives them standing and work on that I think we can finish up rather quickly. I don't know - if we don't get a report until late January I don't know if we can get something final out before the Marrakesh meeting which is in early March but I think we can wrap up in the spring certainly.

But we'll just, you know, it's hard to - I think we'll schedule meetings as soon as we get at least a preliminary report back from him or if we hear - get something more substantial and final from the board GAC IGO discussions. But once we have his report we can go back to weekly meetings and wrapping up as quickly as possible.

Jim Bikoff: Phil, this is Jim Bikoff. I think - I understand the pressure on the group to do something. But I think frankly, we're in a position right now where everything depends on the opinion we get. And if we get it in late January and is not as simple as saying there is no grounds for any special protection then we may have months of work cut out for us because depending on how, you know, what those recommendations are that he comes out with it may - may be the subject of multiple conference calls going on through the spring.

So I think it's best to get it right and even though there's pressure I think we have to just wait, get the opinion, analyze it and then move forward in whatever way, you know, we can as per the report.

Phil Corwin: Yeah, to be clear, Jim, I completely agree with that viewpoint. I was just saying that once we get the report whatever it is we can have regular meetings again and move forward as quickly as possible. You're right, it's - he might well give us a report which is not black and white but which is many shades of gray and requires a great deal of consideration by us going forward. We'll just have to wait and see.

Jim Bikoff: Having looked at opinions in the past on points involving trademark law from academics, I can say that it wouldn't surprise me if we were to get an opinion that had a lot of gray points in it.

Phil Corwin: Me either. That's what lawyers are paid for after all (unintelligible) 1000 shades of gray.

((Crosstalk))

Petter Rindforth: Steve, is that a new hand?

Steve Chan: It's the same hand but it's just to make the point I wanted to make earlier.

Petter Rindforth: Yeah, please.

Steve Chan: Thanks, Petter. So the comment I wanted to make is just that in regards to process what we would be aiming to deliver is just the initial report which is still subject to public comment of 40 days and then the final report. So I guess I just wanted to be a little more precise when we're talking about wrapping things up, we still have a few steps to go at least.

So if we were to aim to get something by Panama - or sorry, Marrakesh, it would be at most the initial report I would imagine. So just wanted to put that out there. Thanks.

Petter Rindforth: Okay thanks. Well it seems that we are all think that we cannot schedule a precise date for our next meeting. But hopefully it will be somewhere between the middle to end of January when we have the initial report and where we also can have some kind of feeling on where the expert is going. And hopefully by then or close after that also some inputs from at least GAC.

I mean, okay they're waiting now perhaps a bit for our report from the legal expert but they also have ongoing work in their small group. It would be interesting to have some inputs on what they're doing there. So we will come back to you once we know which date that is useful in January for that meeting.

Okay, we don't want to keep your time unnecessary. I don't know if there's anyone else that have any specific comments or questions? Otherwise I think we are done for today. Thanks, Phil, for the - your report with your initial meeting with the legal expert. And I take this opportunity to wish you all an upcoming Merry Christmas and a happy New Year.

Jim Bikoff: And the same to you, Petter, and Phil, and everyone on the call.

Petter Rindforth: Thanks.

Nathalie Peregrine: Thank you very much, (Leo). This concludes today's call. You may now stop the recording.

END