

To: James Bladel
Heather Forrest
Donna Austin

From: Philip Corwin

Petter Rindforth

Re: GAC-Communique-Hyderabad, India

We are providing this memo in our capacity as Co-Chairs of the GNSO Working Group (WG) addressing Curative Rights Processes (CRP) for International Intergovernmental Organizations (IGO). It addresses that portion of the Governmental Advisory Committee's (GAC) Communique issued at ICANN 57 Hyderabad referencing our WG. The relevant portion of the GAC advice is reproduced at the conclusion of this memo, with the language regarding our WG highlighted in boldface.

In regard to the GAC's advice, we wish to convey to you in your capacity as GNSO Council Chair and Vice Chairs the following information—

- Shortly after the Council's approval of our WG Charter we proactively engaged with representatives of IGOs as well as with the Chair and Vice Chairs of the GAC to urge that interested IGOs and GAC representatives contribute to our efforts by participating in the WG. Unfortunately, such engagement was infrequent and sporadic for IGOs and nonexistent for GAC members.
- The IGO small group proposal arrived late in our WG's deliberative process, after we had initiated drafting of the recommendations section of our preliminary report. However, prior to its receipt three legal counsel for IGOs engaged, in their personal capacity, in our working session at ICANN 56 Helsinki, so we already had broad familiarity with their proposed remedies. Further, after receipt of the proposal our WG spent two full sessions reviewing and discussing it, so we have taken it fully into account as the GAC wished us to.
- We anticipate that our preliminary report and recommendations will be published for public comment prior to the end of 2016, at which time all members of the ICANN community, including IGOs and GAC representatives, will have an opportunity to fully evaluate it. In particular, one key issue for our WG has yet to be fully revised and the preliminary report will invite specific comment on two separate policy options.
- Our report is based upon expert outside legal advice on the generally recognized scope of IGO jurisdictional immunity in disputes arising from alleged misuse of

their names and acronyms. Indeed, our WG suspended its efforts for an extended period as we sought to obtain this input to assure that our recommendations would be consistent with contemporary legal views.

- Overall, we believe that our draft recommendations add substantial clarity regarding the ability of IGOs to utilize CRP mechanisms and to safeguard their claimed immunities while doing so, and if adopted will better ensure that IGOs have clear standing to access effective and low cost relief when their names or acronyms are abused in the domain name system.
- Respectfully, our WG does not agree with the GAC's rationale that the "small group compromise strikes a reasonable balance between rights and concerns of both IGOs and legitimate third parties" in regard to its recommendation that any appeal from an initial CRP decision should be through an arbitral process and not to a court of mutual jurisdiction. Such a policy would seek to deny domain registrants of their legitimate rights under statutory law. Our WG did not believe it was appropriate for ICANN to establish such a policy of replacing rather than supplementing existing legal process, and also believed that many courts in different countries/jurisdictions around the world would not abide by it.

We would be happy to answer any further questions regarding this subject. Please feel free to share this memo with all Council members.

Appendix –GAC ICANN 57 advice on this subject

4. Protection of IGO Names and Acronyms

a. The GAC advises the ICANN Board:

I. To take action and engage with all parties in order to facilitate, through a transparent and good faith dialogue, the resolution of outstanding inconsistencies between GAC advice and GNSO recommendations with regard to the protection of IGO acronyms in the DNS and to report on progress at ICANN 58.

II. That a starting basis for resolution of differences between GAC Advice and existing GNSO Recommendations would be the small group compromise proposal set out in the October 4, 2016 letter from the ICANN Board Chair to the GNSO, namely that ICANN would establish all of the following, with respect to IGO acronyms at the second level:

- a procedure to notify IGOs of third-party registration of their acronyms;

- a dispute resolution mechanism modeled on but separate from the UDRP, which provides in particular for appeal to an arbitral tribunal instead of national courts, in conformity with relevant principles of international law; and
- an emergency relief (e.g., 24-48 hours) domain name suspension mechanism to combat risk of imminent harm.

III. That, to facilitate the implementation of the above advice, the GAC invites the GNSO Working Group on Curative Rights Protection Mechanisms to take the small group proposal into account.

IV. That, until such measures are implemented, IGO acronyms on the GAC-provided list remain reserved in two languages.

RATIONALE

IGOs undertake global public service missions, and protecting their names and acronyms in the DNS is in the global public interest.

IGOs are unique treaty-based institutions created by governments under international law.

The small group compromise strikes a reasonable balance between rights and concerns of both IGOs and legitimate third parties.

ICANN's Bylaws and Core Values indicate that the concerns and interests of entities most affected, here IGOs, should be taken into account in policy development processes.