

ICANN Transcription
IGO-INGO Access to Curative Rights Protection Mechanisms WG
Thursday, 01 December 2016 at 1700 UTC

Note: The following is the output of transcribing from an audio recording of IGO-INGO Access to Curative Rights Protection Mechanisms WG call on the Thursday, 01 December 2016 at 17:00 UTC. Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. Attendance may be also found at:

<https://community.icann.org/x/15LDAw>

The audio is also available at:

<http://audio.icann.org/gnso/gnso-igo-ingo-crp-access-01dec16-en.mp3>

Attendees:

David Maher – RySG
Gary Campbell – GAC
George Kirikos – Individual
Jay Chapman – Individual
Mason Cole – RySG
Nat Cohen - BC
Paul Tattersfield – Individual
Phil Corwin – BC

Apologies:

Petter Rindforth - IPC

ICANN staff:

Mary Wong
Berry Cobb
Michelle DeSmyter

Coordinator: Excuse me, the recordings have started.

Michelle DeSmyter: All right, great. Thank you so much. Well good morning, good afternoon and good evening to all. Welcome to the IGO INGO Access to Curative Rights Protection Mechanism Working Group call on the 1st of December at 1700 UTC today.

On the call we have George Kirikos, Jerry Campbell, David Maher, Philip Corwin, Mason Cole and Paul Tattersfield. We have no apologies at this time. From staff we have Berry Cobb and myself, Michelle DeSmyter.

As a reminder, please state your name before speaking for transcription purposes. And I'll turn the call back over to Phil Corwin.

Phil Corwin: Okay thank you, Michelle and welcome, everyone. This is Phil, your co-chair. Petter will probably not be with us today, he had an irreconcilable client conflict. And so if anyone has a chance to their Statement of Interest, please speak up. Thank you. No changes.

ICANN 57, let's get into that. And the – on that – hold on one second. Okay, so IGO was the – both our working group and the broader issues were the topic of quite a bit of discussion in Hyderabad. I was able to have a – early on in the meeting I was able to have a 20-minute private face to face conversation with the GAC Chair to provide, I think, a somewhat different perspective than what he had heard to date on the issue.

But we were dealing with the situation where there was conflicting advice on permanent protections that went back several years between the GNSO and the GAC. The Board had not resolved it. Then the Board started talks with the GAC, closed-door talks with the GAC and the IGO small group didn't hold equivalent talks with the GNSO. And that resulted in the proposal that was forwarded to us, the IGO small group proposal that was forwarded to us and to the GNSO in October, but without Board endorsement.

And we're all familiar with what their position was on CRP matters, pretty much the same position we had seen from the IGOs we had heard from previously. And then in Hyderabad, our working group session I thought was well attended, went well, got some good comments. We reviewed and took questions on the draft findings and recommendations section which we're able to unveil for broader discussion in Hyderabad.

And subsequent to that, the – Petter and I forwarded a memo to the chair and co-chairs of the Council responding to the GAC advice relevant to our working group. And I don't know if staff has that available, that communiqué, that memo that Petter and I sent to the Council, if you have it to put on display. Do you have that or not? Let me ask.

What do we have displayed here? Okay yes, that's it, and that actually – that document, the appendix is the relevant GAC advice. So, again, just to quickly review the point that Petter and I made to the Council to inform them of the perspective of the co-chairs of this working group, that first point, that shortly after our charter was approved we proactively engaged with IGO and GAC representatives to urge their engagement as members in this working group. Unfortunately, that didn't happen.

Second, that the small group proposed arrived very late in our deliberative process. In fact, while we were beginning to draft our preliminary report and recommendations. But there wasn't that much new in it so we're familiar with the – with what the IGOs were requesting and that we spent two full sessions of this working group reviewing that proposal in detail to the extent it impacted and related to our work.

Third bullet point we made was that we anticipated that our preliminary report and recommendations will be published for public comment prior to the end of 2016. Now for that to hold true we have to finish up in the next four weeks. That's ambitious but possible. But certainly if we can't do that we can get that

posted by January, I believe. If anyone believes contrary we can discuss that. And that's going to be out for comment.

Fourth point was that our review – our report is based on expert outside legal advice on IGO jurisdictional immunity. And that was very important to our efforts. Fifth point, that we believe our draft recommendations will add substantial clarity regarding the ability of IGOs to utilize the existing CRP mechanisms and safeguard their claimed immunities they have while doing so. And if adopted, will provide them with better access to effective and low cost relief.

And finally, we had to say that our working group did not agree with the GAC's rationale that, quote, the small group compromise strikes a reasonable balance between the rights and concerns of both IGOs and legitimate third parties, unquote, in regard to their desire to eliminate the possibility of appeal to a court of mutual jurisdiction.

And also that our working group did not believe it was appropriate to establish that policy of no court appeal or of that courts would abide by that. We didn't get into it in this memo but of course we also have some dispute what their contention that their rights have nothing to do with trademark law and our discussion over Article 6ters informed our views on that.

So let me stop there and see if anyone – and by the way, the Council will be holding a call this afternoon on the schedule, on the agenda, there's supposedly a vote for a full GAC response to – full – Council response to the Hyderabad GAC communiqué. I tend to think that'll probably be deferred because Council members have not yet received a draft document on that. So I don't think it's ready.

But we do – that'll probably take place next month. And that will cover the IGO issues and all the other issues that were subject to GAC advice in the Hyderabad communiqué.

Let me stop there and see if there's any further questions or comments on that. And looking up, I'm happy to welcome Mary Wong who is now joined our call. Welcome, Mary. We've carried on so far without you but I'm sure we'll call on your assistance shortly. So any further comments or questions about anything that happened in Hyderabad at the working group meeting or at the GAC meetings with Board or Council or elsewhere on the IGO issue?

Okay, so items – okay so let's go onto Item 3 on our agenda, which is to confirm the working group comments concerning its review of the IGO small group proposal. And do we have language on that to look at?

Berry Cobb: Phil, George had his hand raised.

Phil Corwin: Oh George, sorry.

George Kirikos: George Kirikos for the transcript. I just wanted to ask whether we actually had any further input from the Board or the GNSO Council since the GAC communiqué went out? Has the Board kind of agreed that this could be a maintenance of the status quo until our final report and conclusions are...

((Crosstalk))

Phil Corwin: Yes, we got signals from the Board in Hyderabad that they were not going to – continuing their position that they were not going to – that whatever happened with the permanent protections that they were not going to take any action on curative rights protections before our working group had completed its work. So I didn't hear anything to the contrary in Hyderabad. So right now I have no concern about the Board trying to do something.

And I think that would still go around the normal process that it would be subject to immediate objections and possibly exercise of accountability

powers because it would be the Board making policy on an area that's the subject of an ongoing PDP.

George Kirikos: Thanks, Phil.

Phil Corwin: Okay, so we now have some – is there any way to get individual scrolling control for this document? Thank you. All right, so this is a draft Section 4, I believe Mary circulated this the other day in her email of Tuesday. Okay, let's see what was in – what did you circulate Tuesday, Mary? It was the – yes, it was the initial draft of this section and a clean updated Section 6 circulated on Tuesday reflecting all the comments received from working group members to date.

So this is the first time we're looking at this new language on review of existing materials. Given that we just got it from Mary two days ago I'm presuming other working group members may not have reviewed all of this. So maybe the best thing would be for Mary to quickly take us through what's in here and then take any comments on it and then with the understanding that following this meeting working group meetings will review it in detail and provide the co-chair – provide other working group members and staff with any suggested changes in this section. So I turn it over to you, Mary. And hoping that your connection in Malaysia holds up for the meeting.

Mary Wong: Yes, I'm hoping so too and hope that everybody can hear me. Is that okay?

Phil Corwin: We hear you fine.

Mary Wong: Thank you. And, Phil, as you know, I had a similar problem from yesterday when we were doing the RPM Working Group call. So first of all, you know, we apologize for not being able to get this draft Section 4 to everyone before and hopefully between now and the next meeting everybody will have a chance to look through it.

As you all know by now, this part of what is going to form the draft or at least the initial report. And what we had been looking at between I think last month and the Hyderabad meeting was a draft Section 6. And I know that I think about a month or so ago it circulated a skeletal outline of what the whole initial report would look like and what each (unintelligible) would consist of.

So this Section 4 really tries to describe the deliberations of the PDP working group in you see in the heading. And so it should be read in tandem with the draft Section 6 that we've been working on. And so essentially the scope of this Section 4 covers really a history and a narrative, if you like, of what the working group has been looking at, the sort of documents that we've been reviewing, the work that we've done on those documents, and the process that we have engaged in with respect to those previous documents...

Phil Corwin: Mary, just so you know, you're breaking up quite a bit suddenly.

Mary Wong: ...work historical documentation, treaties, research and, you know, previous ICANN work on the issue. So you see that basically documented in 4.1, the process of engaging Professor Swaine, and, you know, what we did with Professor (unintelligible) actually talk about the conclusions that the working group (unintelligible). So I'm going to try to (unintelligible) that we would like the working group to review about Section 4 is the last part, which is 4.4, which given the discussions in Hyderabad, may be one of the most salient section that is the process with which we engaged with the IGOs and how we considered the small group proposal and our conclusions based on it.

So, Phil, at this point maybe I could just hand it back over to you and hopefully that's a reasonable enough description of what this new draft Section 4 (unintelligible).

Phil Corwin: Yes, thank you, Mary. And we heard about 2/3 of what you said but I got the gist of it. And thank you for that initial review. So let me scroll through this with the group and we can take a look at what's in here. But we're not getting

– if there’s any kind of high level comments we’ll hear them after this quick review. Detailed comments, of course, let’s aim for – I think everybody wants to finish this working group’s work on this preliminary report as soon as possible and get it out before the end of this month if possible and if not certainly in January. And then solicit public comments.

So I’m going to ask everyone to give this really close attention and get back with any written comments by early next week so that when we have our next call, which I presume will be one week from today, we have a revised document reflecting detailed comments whatever they may be, from the working group and hopefully can approve a draft Section 4 at the next call.

Procedurally, does anybody have any concerns or questions about that plan, to wrap up Section 4 within a week? Okay, hearing none I’ll assume it’s acceptable.

All right so we got Section 4.1, which is a review of all the materials we went through and there was quite a bit that we reviewed early on. We may – I think on some of these four – we may want to comment a little more rather than just saying we looked at this, say a little bit about, you know, what we took away from that review.

But we can all take a look at those background documents and suggest any language on that, for example, I think, you know, to say well we agreed or disagreed with the 2001 WIPO report or the Secretariat paper or the 2007 ICANN staff report. I think those were the three most sensitive in kind of terms of suggesting approaches that we didn’t agree with. So we might want to say a paragraph about each and, you know, that, you know, we respectfully reviewed them but went off the way we did for this reason.

Then 4.2, status of previous ICANN work, that’s just a historical narrative on what’s been done on IGOs in the past. We probably won’t have much, if any, change on that. Then the review of legal – Section 4.3, review of legal

instruments and the legal expert opinion and other external source materials, and that – I think this section overall will demonstrate to anyone who reads the preliminary report and recommendations that even if they don't agree with all our recommendations, they certainly can't say that we didn't act very deliberately and with a great deal of knowledge and review of all the relevant background work and legal issues on this.

So that's Section 4.3, which also gets into the Swaine report. And my understanding is that the Swaine report will be an appendix to the preliminary report and recommendations so the full legal memo is there as – for anyone to look at when they're commenting.

And then Section 4.4, as Mary observed, very important to relate and establish that we had – that while IGOs did not join the group as members, we did extensive outreach, we had some meaningful exchange of views, and we certainly were not – we were very accommodating in terms of wanting to get their perspective and their input and suggestions. And continue to do so from the beginning of this working group to the end.

And then the last section I see here is our – describes our review of the small group proposal. So – and then has a chart which contrasts our preliminary recommendations to their proposal with explanatory notes. So certainly for internal ICANN politics, this is – that Section 4.4 is very important given what happened in Hyderabad and sensitivity of this issue within the GAC. So that's it.

So let me stop there and see if anyone has any high level comments about this draft report just from that quick review that – and I see George has some comments in the chat. But whether – think it's complete? Have we missed anything? But again, we're going to really ask members of this working group to take the time, I think it can review and comment on that draft section certainly in less than an hour, we're not talking about a lot of time here.

But let's all do that, flesh it out, make any changes and have what we hope is a final draft to look at and approve at our meeting next week. So any comments right now on Section 4? Okay, so I want to thank staff. And really, you don't have to apologize, I think we're all – those of us who were in Hyderabad are just like fully recovered and I know Mary, that you, for whatever reason, decided to stay on in India and try to live without rupees where accepted as cash. So and we're glad you made it back given the situation.

So what's the next topic on our agenda? Hold on, I'm trying to scroll up here. Which is the confirm - the intended date of publication for the initial – well, do we want to – do we want to take a look at Section 6 here, the amended one? Or should we simply – I think on that one, since it's already been subject to comment rather than – if people want to discuss it now, I'm open to that. But the more efficient way might be to simply look at the new version that Mary circulated on Tuesday and also be ready to say at the next meeting whether you think that's final. What do people think about that approach?

Yes, George, why don't you speak up if you have a concern about Section 6?

George Kirikos: George Kirikos for the transcript. On the second to last page, right above Recommendation Number 5, there's a sentence that says, "The working group recognizes that IGOs may not welcome the fact that adoption of this recommendation by ICANN will mean that IGOs will still have to submit to the mutual jurisdiction clause of the UDRP and URS when filing a complaint."

I think, you know, we should be able to soften that because they don't necessarily have to submit because they can do it through the agent or licensee or assignee, etcetera, so we might want to rephrase that slightly because it makes it harder than it because there are the workarounds.

Phil Corwin: Okay, well I would suggest that I think...

((Crosstalk))

Phil Corwin: ...that's a valid, you know, a valid comment. And I'd ask you and everyone else, I'm going to do the same, I submitted extensive comments and proposed revisions on the first draft of 6. I haven't fully reviewed the new draft. But it looks like we're going to get out of this call early today probably so in exchange for getting back some of your time, let's devote that time between now and next Monday to reviewing in fine detail, Section 4 – the draft Section 4.

And then a final review and final comments on draft Section 6 circulate them to the working group and staff by next Monday or Tuesday so staff in particular in Section 4, has time to incorporate them and circulate a new draft before our next call.

And then we can be prepared to hopefully sign off on both those sections on the next call. And also my understanding is that staff will be – is preparing some other sections of the draft report that we'll be receiving over the coming week and we can begin discussion of those.

So, Mary, besides Section 4 and 6, I know some of this stuff is kind of boilerplate and is just – it's the charter and other stuff in the report. There's not really much to comment on or to change. Besides Section 4 or 6, how many other non-boilerplate substantive sections need to be prepared and reviewed by this working group before we're ready to publish?

I see your hand up so go ahead, please.

Mary Wong: Thanks, Phil. And that's a good question. I don't have on hand the skeletal outline that we circulated a while ago, but, you know, we fully expect that the most attention will be paid to these two sections, 4 and 6.

Phil Corwin: Okay.

Mary Wong: Particularly 6 because that's the (unintelligible). I think the other sections are things like, you know, a history of the issue report, attendance lists, and of course the annexes that you already mentioned. So by and large is somewhat boilerplate. And not as substantive comparatively speaking to the two (unintelligible) circulated in draft form.

Phil Corwin: Okay. So I'm looking at the – with that background, I thank you for that, I'm looking at the calendar right now for the month. If we meet next week and can sign off on Section 6 and hopefully on Section 4, we can look at other sections that are more boilerplate sections on the 15th. I don't know – it'll be up to the group whether we meet on the 22nd, which is three days before Christmas and on the 29th which is – that's two days before New Year's Eve.

You know, I understand we may want to skip one of those meetings, given holiday considerations. But if we can finish 4 and 6 next week and review the boilerplate ones on the 15th, I would think that it's possible that we can have an informal vote by the last meeting in December on a draft report to be published. Am I being over optimistic or is that – does that seem feasible?

Mary, what do you think?

Mary Wong: Thanks, Phil. So that's kind of the staff thinking as well because we do realize that, you know, we've been working on this as a group for a long time and that folks really want to just get this out and see what input we might get. So from the staff perspective, barring any, you know, anything else coming in or any further questions by the Council, given as you noted earlier, Phil, that there is a Council call and a potential Council response to the GAC communiqué from Hyderabad, that does include some advice on IGOs.

Barring any of that, it does seem workable to us. And as George noted, what we will do also obviously is make sure that we do circulate all the documents to the mailing list and we make it clear that folks should indicate any, you

know, discomfort or suggestions via that way even if they can't attend these calls.

One thing I would want to note is that because this is a initial report, and I think everybody on this call knows this for the record, that it is not necessary for us to do the full consensus call that we would do when we actually come to the final report, which of course we would prepare after reviewing the public comments that come in. So in terms of the timeline, Phil, we think it's doable on the staff side is the short answer.

Phil Corwin: Okay, yes good. Good. So I think – well I think everyone on this working group will be happy that we're seeing the light at the end of the tunnel, that we can wrap up. It seems feasible that we can agree on a final preliminary report by our last call this month. And then we would put it out for public comment and probably wouldn't – and during that 40-day period there's probably no need for any meetings of this working group that I can think of offhand.

But then we'll need to reconvene probably in – if we put out for 40 days comment, around the end of this month or early January, the comment period will end in the first half of February and then we'll reconvene the group and we'll – I have no idea how many comments we'll get but we'll review all the comments, we'll take them all into consideration and then start working on adjustments to a final report which I would think we could probably – unless something really contentious crops up – can probably – we might get it out before departing for the Copenhagen meeting in March.

If not, it would be later in March, but I think we can look toward publishing a final report by the beginning of spring. So we're on the down slope here. So, yes, and George, I see your question, yes, of course members of this working group can submit comments in the comment period.

Just because you're a member of this working group and have done all the work on this doesn't mean you can't comment, although clearly, you know, anybody who's been a regular in this group your views are known and have been incorporated or at least not incorporated, have been very well considered as we develop this preliminary report.

And so on Item 4 I'm confirming that we intend to shoot for publishing this – I don't know what staff work has to be done between final approval by the working group and publication for comment, how much time lapses between that. But we're looking toward final decisions on this draft report in our final meeting this month. And publication for public comment immediately thereafter and then the group coming back together in February to review the comments and prepare a final report based on the comments.

And we're going to ask staff to recirculate Section 4 and 6, which were sent out on Tuesday, to all members of this working group and informing them that that's the plan and that we're asking everyone to make that schedule. It means devoting an hour of your time over the next five, six days to reviewing that draft Section 4, that near final draft Section 6, submitting any comments or suggestions for revision, and then looking toward approving them, certainly Section 6 and hopefully Section 4 on our call next week.

So that's all good news. Our call next week – are we at the same time, which is 1700 UTC now with the time change in the US?

Mary Wong: Hi, Phil and everyone. It's Mary again. I believe so because we haven't rotated these calls and we haven't had any pushback on the time. So indeed unless anyone has any different opinions, we're looking at the same time next week, Thursday, 1700 UTC.

And if I may, you know, obviously the latest that we would reconvene the group would be, as you said, probably around early February when we would review the final – the public comments, but depending on whether we get

comments early on in the cycle, say in January, versus typically, you know, kind of all in a rush at the end...

Phil Corwin: Right.

Mary Wong: ...the working group can also reconvene before that as, I think, everyone knows, to review the comments that have already come in.

Phil Corwin: Yes, and we'll monitor the comments. If by, you know, mid to late January there's a significant number of comments we can always schedule a call to review those and start taking them into consideration. We don't have to wait for the close of the comment period. But we can't predict when or how many will come in. And the typical pattern is for most of them to be dumped in on the last 48 hours.

And, Mary, I just wanted to note, I think you were not on the call yet when I said, you know, in regard to the overall GNSO response to the GAC communiqué, while it's on the schedule for a vote on today's call, at least as of the time this call had started, no draft response had been circulated to Council members. So I don't think that response is ready yet. And it'll probably be deferred to the next Council call, is my impression.

Okay. So with that I think we're wrapped up. Does anyone have any other business or any comments or questions they want to raise before we end this call early? And again, I'm giving you back 20 minutes of your time today, which I expect to be devoted to reviewing Section 4 and 6. We really – we've done a good job here and we already have strong draft sections but we need to make them as strong and credible as possible given the politics around this issue.

I think we have a draft product that we can all be proud of that reflects all the hard work that everyone on this working group has put into this project. But let's not drop the ball at the end; let's put in that extra hour of review and

make sure we have the strongest possible preliminary report and that we haven't missed anything important in it.

So I don't see any hands up or hear anyone. So I'm going to call this call to a close. And again, your homework assignment is to review Sections 4 and 6, get comments back to the working group and staff by the early part of next week so staff can incorporate them at least 48 hours to revise those documents before the next call. We expect some other – the boilerplate sections to be coming from staff over the coming week. And we will convene again one week from today at the same time. And with that I bid you adieu. Bye-bye.

Michelle DeSmyter: Thank you. Again, the meeting has been adjourned. Operator, please stop the recordings, disconnect the remaining lines. Everyone, have a great remainder of your day.

Man: Thank you. Good-bye.

END