

ICANN
Transcription ICANN Copenhagen
IGO-INGO Curative Rights PDP
Sunday, 12 March 2017 at 09:00 CET

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James Bladel: Okay, good morning. Let's get started. I'll look back to the staff table and see if we get any indication that we're ready to go? It is. Okay, good morning. Welcome to Copenhagen and the GNSO Sunday Session, formerly known as the GNSO Weekend Sessions.

Before we get started, let's go around the table and have a roll call, starting with the staff side here, if we could.

(Lisa Phifer): (Lisa Phifer), ICANN staff.

(Steve Chan): (Steve Chan), ICANN staff.

(Mary Wong): (Mary Wong), ICANN staff.

(Marika Konings): (Marika Konings), ICANN staff.

Woman 1: ...ICANN staff. Sorry.

Susan Kawaguchi: Susan Kawaguchi, GNSO Counselor for the BC.

Philip Corwin: Philip Corwin, BC Counsel.

Cheryl Langdon-Orr: Cheryl Langdon-Orr, Daily Liaison for the At-Large Advisory Committee.

Michele Neylon: Michele Neylon, Registrar, GNSO Counselor.

Darcy Southwell: Darcy Southwell, Registrar Stakeholder Group

(Valerie Tan): Good morning. (Valerie Tan), Non-Com Appointee to the Contracted Parties' House.

Johan Julf Helsingius: Julf Helsingius, (DNO) Non-Com Appointee.

Heather Forrest: Heather Forrest, Intellectual Property Constituency.

James Bladel: James Bladel, Registrars' Stakeholder Group.

(Emma Ulster): (Emma Ulster), Registry Stakeholder Group.

(PIERS): (PIERS), here.

(Broderick Knoblen): (Broderick Knoblen), ISPCP.

Stefania Milan: Stefania Milan, Non-Commercial Stakeholder Group.

Stephanie Perrin: Stephanie Perrin, Non-Commercial Stakeholder Group.

Avri Doria: Avri Doria, Alternate Counselor, NCSG.

Marília Maciel: Marília Maciel, Non-Commercial Stakeholder Group.

Carlos Gutierrez: Carlos Gutierrez, GNSO Liaison to the GAC.

Erika Mann: Erika Mann, Non-Com.

Keith Drazek: Keith Drazek, Registrars' Stakeholder Group.

Edward Morris: Ed Morris, NCSG.

James: Thank you. And do we have anyone participating remotely on the phone, any Counselors? No? Was that 100% of Council?

Great. Okay. Thank you, and welcome. And just a reminder. Please just speak your name, before speaking, so that the transcripts can be identified and useful. And then, we'll also pause at the end of each Agenda item so that we can start and stop a new recording session.

First up, if you haven't had a chance to look at our Agenda, the first is — got an echo coming from that speaker over there.

The first up is a discussion of the IGO-INGO Curative Rights PDP. And I know that one of our Counselors, Phil Corwin, is one of the Co-Chairs of that PDP, and that we have recently put out a document for public comment. So, Phil, if you don't mind, would you like to give us an update?

Philip Corwin: Sure. I'll look at the screen, because this is not loaded in my Chat room yet. It's been a long — this Working Group's been a long journey. And as you can see, we were initiated in our work in June, 2014, so God, has it been that long? Two-and-a-half years ago.

We made good, rapid progress. At one point, we decided that International Non-Governmental Organizations needed no special treatment, because they are essentially private enterprises without any judicial immunity issues. So, we requested and received from the Council permission to revise our Charter to take them out.

And then, when we got more than halfway through our work, we realized that we could not make informed decisions about what to do in regard to appeal from a CRP to a Court of Mutual Jurisdiction without getting advice from an expert on International Law.

And that's pretty much paused our work for about a year while we obtained funding — very modest funding from ICANN to secure the advice of such an expert.

Did a search for the expert, and secured the assistance of Professor Edward Swaine, formerly legal advisor to the U.S. State Department, and now Professor of Law at George Washington University Law School.

And Professor Swaine provided us with a very complete 25-page legal memo of more than 100 footnotes, advising us on the current views on the scope of IGO immunity in domain-name disputes, which he was basically ploughing new ground there. There wasn't much to look at. No one had really addressed that question before.

We published our initial report for public comment in late January. The original comment close date was March 1st, and at the request of the GAC, we have extended the comment period for 30 days, so that GAC members and other parties will have the benefit of whatever discussions go on here in Copenhagen on this subject before having to file their report.

And then, so we expect a staff report on the comments by the end of April. We've already received fairly extensive comments, both agreeing and disagreeing with our recommendations from a wide variety of parties, and they continue to come in. This isn't one where everyone's waiting until the last day to file.

And so, I think that covers the timeline. So, next slide, whatever it is. And now it's on my screen, so I can read it from here, which is easier.

Okay. And there is this ongoing Board-facilitated GAC-GNSO dialog on the IGO issues, which involve both the Permanent Protection Recommendations, which are the result of much earlier PDP work and conflicting GAC advice dating back, I believe, about three years now.

And as well, the current work of this Working Group, and I'm delighted to say that there will be a facilitated discussion on that subject from 6:30 to 8:30 tonight, so I'm looking at a very long day.

And however things work out on the permanent protections, I and other members of the Council have made clear that while these discussions on curative right processes in this facilitated discussion may certainly provide some useful function in terms of further examining the issues and enabling both sides of the issue to better understand the positions of the other, and this facilitated discussion is not to be an attempt to negotiate an outcome.

That we have an ongoing PDP, and that the proper way for any party, GAC Members, IGOs, or others to influence the final report and recommendations we'll be coming out with this summer is to provide input directly to the Working Group.

So, we need to – that is the process laid out in the Bylaws, for as this facilitated dialog is a hopefully useful, but ad-hoc exercise that is not based in the Bylaws.

And we don't know how the GAC or IGOs will — well, we don't know what the final report and recommendations will be until we review all the comments and decide if we need to adjust our initial report and recommendations.

But we do anticipate getting that delivered — I don't want to promise it by Johannesburg, but certainly we expect to get that done before the fall – by sometime this summer, to deliver that final report to Council, and then all of you will have a chance to look at it.

So, we did receive recommendations from the IGO Small Group, and I will stress that we did extensive outreach to the GAC and IGOs from the beginning to encourage them to participate in our Working Group. We did not get any formal participation as Members from either.

We did have occasional input and presence at a few face-to-face meetings by Counsel to certain IGOs, but they made clear that their presence was in a personal capacity and not as an official representative of their organization.

The Small Group proposal is basically the IGOs requested a completely new and separate CRP process — separate and apart from the UDRP and URS — in which domain registrants would have no right of appeal to a Court of Mutual Jurisdiction, as they have under current CRP; that the appeal would be to another arbitration body.

That was the main issue we asked our legal expert to look at, and his answer to the question of what is the scope of IGO, and what would be the scope of

an IGO's immunity from judicial process in an appeal from a domain name in dispute. And his answer was, "It depends."

It depends on the IGO, the Charter basis to the IGO, the facts and circumstances of the case, and the National Court of Mutual Jurisdiction, because there's different courts and different nations and different views of what the scope of IGO immunity is and what analytical method to follow in determining that.

So, our recommendation is basically that we expanded the grounds for an IGO to bring standing – the kind of standing to bring one of these disputes based upon not just trademark rights, but assertion of the protection under the trademark laws of signatory nations to Article 6 Tier of the Paris Convention, which also includes World Trade Organization Members.

And that, in the rare case where a domain registrant lost a CRP, and felt it had been wrongly decided, and should wanted to appeal, it would be the judge who would decide whether or not the IGO would be immune if they asserted immunity as a defense.

We also recommend that IGOs be permitted to file a CRP through agents assigned to the Licensee, which would avoid them having to directly concede their immunity and consent to mutual jurisdiction by filing through a third party on their behalf.

So, I've kind of been extemporizing. Let me see if I missed anything. Yes, I think that pretty much covers what I just said. So, the slide after that.

How can you assist? Well, file comments. We're going to have this facilitated discussion tonight, and you're welcome to miss all the great parties, and sit in

that room from 6:30 to 8:30. And just, you know, participate in the process, going forward.

But we are encouraged; we've gotten a lot of comments so far and expect a lot more by March 30th, and some of them, I think, are bringing new information forward we were aware of before. We may have to make some adjustments.

But unless we see a compelling case that our legal expert was incorrect, and that there is, in fact, a sound legal basis for ICANN granting IGOs kind of blanket immunity from judicial appeal in these types of cases, we're probably going to stick with our main recommendation. We may adjust things around the edges, and we'll just see how it goes going forward.

But I do want to emphasize that the effect of our report is to make it substantially easier for IGOs to have standing to file claims under the current UDRP and URS and to do so without any upfront concessions on the immunity issue by filing through a third party that's authorized to file on their behalf.

And we've left the jurisdiction question up to the judge, in those rare cases where there is an appeal filed. And we do have one outstanding question, which is what should happen if the judge says, "Yes, in fact you should not be in this courtroom. You have immunity." And we've laid out two options, and asked for a community comment.

The first option would be that the underlying UDRP would be vitiated, and everything would return as if there had been no UD(RP) decision in the first place.

And the other would be that, in that rare instance, there would be an appeal to Arbitration Board when the Court determined that it did not have jurisdiction over the appeal. And we're getting varying responses on those options.

So, I'll stop there. Are there any more slides, (Mary), or are we done? So, I'd be happy to answer any questions, but we're very proud of our work. Our initial report and recommendations is more than 100 pages in length, between Professor Swaine and our own footnotes, it has more than 200 footnotes.

So, this is a project where we put in a huge amount of work, and because we knew this was a politically sensitive issue within ICANN, we wanted to be very sure that we had a very sound and documented basis for our recommendations. Thank you.

James: Thank you, Phil, for that update, and certainly appreciate that last bit about building a solid foundation. We have two folks in the queue. First up is Donna.

Donna Austin: Thanks, James. Donna Austin. Phil, just a question in relation to the Small Group proposal. And I know that PDP Working Group has considered that.

But is there any element of the Small Group proposal that you consider falls outside the scope of your PDP? So, what I'm thinking are, I think from that proposal, there's an idea of a notification element to the proposal, which I'm not sure actually fits within the scope of your PDP, and I'm just wondering whether you've kind of looked into that at all?

Philip Corwin: Yes, I'm trying to remember. (Mary), do you remember exactly what that element was? Notification?

(Mary Wong): This is (Mary) from the staff. So, in terms of the notification, when a registrant registers a domain name matching the IGO acronym — that's your question, Donna?

The Small Group proposal is that the notice of registered name — or NORN, I guess, as the contracted parties know it — that is the notification in question.

Previously, the GAC had asked for both the NORN as well as the pre-registration claims notice to the potential registrant. But the IGO's Small Group proposal dropped the potential registrant claims notice and focuses only on the notice of registered name.

Philip Corwin: Yes, I'll have to think about...

Donna Austin: Sorry Phil. So, if I could just clarify. So, what I'm trying to get to here; if that is outside the scope of your PDP, do we still have a responsibility as the Council to consider that element of the Small Group proposal, if you think that it's actually outside the scope of what your PDP Working Group is?

Philip Corwin: Well, I wouldn't — if Council wants to consider that, I wouldn't object, but we didn't — under our Charter, we were charged with dealing with the question of their access to curative rights, and not this type of notice, which would be similar to a trademark claims notice.

There is one element in the Small Group proposal that we do address in our report. Which we felt — clearly felt — outside the scope and authority of our Working Group and the Council generally, which was a request that the filing of CRPs is by IGOs should be at no or very low cost.

And that we felt we had no authority that would require some subsidy from ICANN or some other organization we had. That was not in our Charter and we have no authority to obligate ICANN funds for this.

So, our report addresses that and makes clear that that's something the GAC and IGOs should take up directly with ICANN Corporate — that it was not something we could deal with.

James: Marília is next, but I noted that, (Mary) – is that an old hand, or did you need to respond to? Okay, Marília, if you don't mind.

Marília Maciel: Thank you, James. Marília...

James: Marília, (Mary) is going to follow up on this one.

Marília Maciel: Sorry, (Mary). Go ahead.

(Mary Wong): Not at all, Marília. Thank you.

This is (Mary) from the staff again. So, if I may, just an observation. Not so much as a response to Donna's question, but just for the Council and Community's information.

Having observed and assisted with parts of the Small Group discussions, as the GNSO process person, so that they would understand what the GNSO process is, it's possible that if we separate out the process issues of how the GNSO would deal with these two different aspects.

And so, one is out of scope of Phil's Working Group. If we look at the actual recommendations themselves, it's possible that from the IGOs and/or the GAC's perspective, that that question you had about the notice, regardless of

how that comes up, that should be accompanied by meaningful curative rights protections.

So, leaving the process issues aside, it may be appropriate from some perspectives to look at that as a holistic, I guess, suite of protections.

James: Thank you. Marília.

Marília Maciel: Thank you, James. Marília speaking. Actually, just a small suggestion with regards to our interaction with the GAC. We seem to come back to the point of how we can better communicate with the GAC several times. And I think that may be because this PDP is so sensitive to GAC members, we have multiplied the opportunities of interaction, such as a facilitated dialog today.

So, maybe, I think that one way forward, in terms of improving our communications, is to identify in practice when we engage with them what works well and what works less well, in terms of the dialog.

And maybe the PDP that Phil is facilitating is a good laboratory to identify what works well and what doesn't, in terms of communications, so if we start to sort of note this down, and sort of collect these good practices, in terms of our interactions with the GAC, maybe this will be something more interesting than trying to think about, you know, frameworks of interaction or a one-size. And we can learn from our own lessons, our own interactions.

Phil Corwin: Well, thank you. And of course, in our dialog, we'll try to be as forthcoming, and cooperative and as constructive as possible, and see if whatever we're able to accomplish in terms of finding common ground on this can be a precedent for other Council-GAC interactions. Thank you.

James: Wolf-Ulrich.

Wolf-Ulrich Knoben: Thank you. Wolf-Ulrich Knoben speaking. So, my question is more related to the process right now, rather than to some details I'm not involved in this matter.

But I understand yesterday morning, you had to start on this facilitated discussions, and it's going to continue tonight, as well. So, what is the real expectation from this facilitated – more facilitated – discussion?

Is it to find a solution on this issue that we have between the GNSO and the GAC at the end here? Or is it more to find out from the details, what are the real issues with regards to that PDP and the problems the (odd) court and others may have?

I wonder — and this is because I write this question, if you look at this time, this schedule, so I think it's for years it's on the table. And the question is here, is there a compromise to be seen, or what is really the target of that? Thanks.

Philip Corwin: Well, let me answer that in several ways. The discussion yesterday — and I'll defer to James to describe what came out of the final outcome of yesterday's discussion — was focused strictly on Red Cross/Red Crescent issues. At the end, Bruce Tonkin made a fairly narrow suggestion for a way forward, which I don't have all the details of, but I know James does. He can fill in the blanks on that.

But that, of course, was a longstanding disagreement between Council and the GAC of several years of duration. The discussion tonight – there's two separate IGO issues, which stand in two very different places in terms of process.

One is outstanding disagreement between Council recommendations and GAC advice on permanent protections for IGO names and acronyms in new TLDs. And that may lend itself to something similar to what occurred with the Red Cross yesterday.

I can't predict what will happen, but that's something where Council recommended one thing; GAC had contrary advice. The Board has, so far, not made a decision to accept or reject either of those positions.

But it's something where the Council process is long past, and the recommendations were final, and the issue is whether Council can – there's some path for Council to reopen some narrow set of issues, following the dialog.

That's very different from the curative rights, which clearly is the subject of an ongoing PDP. And I've made clear, personally, that I'm happy to be part of this facilitated discussion, for the purpose of better mutual understanding and exploration of the issues, so long as it doesn't attempt to become a negotiation outside the PDP process.

If it becomes a negotiation, I will cease to participate in it, because this – the process set out in the Bylaws for policy recommendations – is the PDP process, and I don't want to be part of anything that sets a precedent that in the middle of a PDP, some members of the Council and GAC will go off on the side and try to then negotiate something outside the Bylaws-sanctioned process.

On the possibility of a compromise, I wouldn't say nothing is possible, but the really tough issue, on which it's very difficult to identify any middle ground compromise, is what happens in that rare case where an IGO brings an action against a domain registrant, the domain registrant loses the action, and the

IDRP or URS feels that they have then unfairly treated and that the decision is wrong, and wants to appeal it.

And they either have a right to go to a Court of Mutual Jurisdiction, or they don't have that right. And would it go to arbitration.

And again, had our legal expert said that the consensus view on the scope of IGO immunity in this type of dispute is generally very broad — that they would generally win on a defense of sovereign immunity — we would have had to go with that arbitration route, but in fact, we got a very different answer.

And we were – given the uncertainty, we did not feel it was appropriate for ICANN to basically prejudge every possible legal dispute, and place itself in the place of the judge, and grant an advance complete immunity to every IGO in every potential domain situation. And in the process, would be stripping domain registrants of their legal rights under applicable national law. We also question the efficacy of that approach.

Now you can imagine if I was a domain registrant, and I had a domain that said, “WhoWantsToStayHealthy.com”, and it was a Web page devoted to advice (how on) good health, but because it started with the word, “Who,” which is the acronym for the World Health Organization, a UDRP was brought against me. And I lost.

And I'm in the U.S., and I file an appeal under the Anti-Cyber Squatting Consumer Protection Act, which is the applicable statute in the U.S. And the IGO comes in and says to the judge, “Well, there's this rule that says this citizen is barred from access to this Court under that statute.”

The judge might well say, “Well, I really don’t care about what some non-profit corporation said about this person’s rights. I’m not going to strip them of their statutory rights.”

Now, you can imagine that, if you’re in a foreign jurisdiction in Europe or Asia or somewhere, they’d probably give even less deference to the policy determination of the California Non-Profit Corporation.

So, we’re faced with the issue of do we have a clear situation that would justify advance stripping a registrant of their – whatever – applicable legal rights they have ,and would it even be effective if we tried to do so?

James: Thanks, Phil. And we’re just running a little short of time for this session. And the last speaker is Paul McGrady.

Paul McGrady, Jr.: Thank you. Paul McGrady, for the record. I just hope that, in this process, we’re able to convey to the GAC that what we’re seeing here is a procedural problem and not a substantive one. I don’t think anybody around this table wants anybody to be able to abuse domain names containing IGO or NGO marks or names – whatever we’re calling it, based upon the law that it’s based on.

And we all have, I think, we have the same interest as the GAC, which is to solve the problem. And I’m hoping that we’ll be able to explain to them that because we don’t have a mechanism to resolve this kind of — when policy coming from the GNSO is different from what the GAC wants, there’s really not a mechanism in the Bylaws, anywhere, to do that.

Now, to the extent that there is a conflict with the GAC, it’s, again, not over the substance of this. I think we all want this to be healthy. It is simply a procedural issue that we haven’t been able to sort out yet, and hopefully, that

will deescalate this with the GAC, because I think this is an area where we really are probably all in substantial alignment.

James: Yes, that point was made — thanks, Paul — that point was made yesterday in our discussions with the Red Cross, that I don't think anyone questions the, you know, the good works of those organizations and societies and the kind of particularly heinous nature of folks preying upon disasters and relief efforts, you know, to commit fraud.

I also think that we do have a process, in that the Board, ultimately, becomes — takes a decision. They either vote — one, they say no to one, they say yes to another. Something like that. And what we were trying to emphasize yesterday was the unprecedented and, hopefully, singular nature of those facilitated discussions. And yet, we are still expecting the Board, ultimately, to trigger some, you know, some future action by actually making a decision.

And whether that decision is to say no to parts of the GAC advice, or to ask the GNSO to go back and narrowly review some aspect of our recommendations, all of those things are going to have to come from the Board. It's not something that we're just going to, you know, kick off unilaterally. So, but I take your point about making sure that that's clear that we're not really questioning the substance of their claims.

Philip Corwin: And just to add to that, briefly. I certainly intend this evening to stress that while our Working Group did not adopt the Small Group proposal, we do believe that our recommendations make very substantial improvements in the ability of IGOs to access the existing curative rights process.

And I have no doubt that if an action abroad is against the domain name that is identical or confusingly similar to an IGO name or acronym, where the content of the domain is trying to mislead the public into believing it is, in

fact, that IGO, that it will be very quickly shut down and transferred to the IGO.

So, it's not as if we have done nothing here. We've recommended a number of steps that substantially improve access to those processes for IGOs.

James: So, thank you, Phil. Thanks for everyone who weighed in.

Just a couple of points. Again, this is an open discussion, not a formal Council meeting, so if anyone from the floor, from the audience, from the room, would like to join in the discussion, we have a floor microphone. We just ask that you please queue up there and state your name before speaking.

And thanks to Phil, and I see Petter in the audience, and all the folks who are working on this PDP, doing the heavy lifting. Really appreciate your work. So, let's pause the recording and get ready for the next session.