

Terri Agnew:Welcome to the IGO-INGO Access to Curative Rights Protection Mechanisms Working Group call on Thursday, 28 September 2017 at 16:00 UTC for 90 minutes

Terri Agnew:meeting agenda page: https://urldefense.proofpoint.com/v2/url?u=https-3A_community.icann.org_x_M4JEB&d=DwIFaQ&c=FmY1u3PJP6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmkXhFzL7ar9Qfqa0Algn-H4xR2EBk&m=Yn3EhVWI4fdtITyWqYbRqhO6P3THHtCftvdxWcKVI08&s=1pclmyA9WDnewP1tL2GUAtPRgIIPc4hzAf2D6dZ4rKI&e=

George Kirikos:Hi folks.

George Kirikos:<http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-September/000847.html>

Philip Corwin:dialing in

Osvaldo Novoa:hello all

Paul Tattersfield:Hi everyone

George Kirikos:No Mary, Steve, etc. today?

George Kirikos:Here's that other mailing list: <http://mm.icann.org/pipermail/discussion-igo-rc/2017-September/date.html>

Mary Wong:Hello everyone - apologies for my lateness; I was running another meeting. Steve is also in another meeting so he will not be joining till later.

George Kirikos:No sound from Mary?

George Kirikos:Phone is more reliable than VOIP.

George Kirikos:Here's a list of people attending:

https://registration.icann.org/reg_disp.php?id=abudhabi60

Paul Tattersfield:Hi Mary, thank you for posting the Secretary General's letter, it is really appreciated. Things are a bit mad here at the moment and I haven't had chance yet to respond on the mail list, but I think it raises some important issues which hopefully our final report will be able to clarify.

Mary Wong:No worries, Paul - thanks for your patience, and I'm glad it was informative.

Petter Rindforth:...and the fact that they are attending in Abu Dhabi does not automatically mean that they will be at our meeting.

George Kirikos:Of note, the recent Brazil position on ICANN, GAC, and "public interest", see:

https://urldefense.proofpoint.com/v2/url?u=https-3A_www.theregister.co.uk_2017_09_27_brazil-5Fdot-5Famazon-5Fgtld_&d=DwIFaQ&c=FmY1u3PJP6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmkXhFzL7ar9Qfqa0Algn-H4xR2EBk&m=Yn3EhVWI4fdtITyWqYbRqhO6P3THHtCftvdxWcKVI08&s=Rm226blqK5CIS3wUmrPiiRWk8TXwMZVRnilW_DQiV1o&e=

Mary Wong:Link to the Board scorecard that Phil just read from:

https://urldefense.proofpoint.com/v2/url?u=https-3A_www.icann.org_en_system_files_files_resolutions-2Djohannesburg59-2Dgac-2Dadvice-2Dscorecard-2D23sep17-2Den.pdf&d=DwIFaQ&c=FmY1u3PJP6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSFpClgmkXhFzL7ar9Qfqa0Algn-H4xR2EBk&m=Yn3EhVWI4fdtITyWqYbRqhO6P3THHtCftvdxWcKVI08&s=7qsP4cg-z5W9NURyWz7NFA2T-vxec9SEuDKneyI7Lo&e=

George Kirikos:"It is the right and duty of governments – and not of Amazon the company, nor any panel constituted by three nationals of a single country in their individual capacity, nor even of the ICANN Board of Directors – to identify the public policy issues that may justify the Board to adopt certain decisions," Filho said."

Mary Wong:The Bylaws actually specify the GAC's role in identifying public policy concerns.

George Kirikos:Perhaps, Mary. But, identifying "concerns", vs. making analysis and policy choices, is quite different.

Paul Tattersfield: Brian is very good at working political narratives when the substantive facts don't support his position

George Kirikos: Isn't it 30, not 28? https://urldefense.proofpoint.com/v2/url?u=https-3A_community.icann.org_pages_viewpage.action-3FpageId-3D48347895&d=DwlFaQ&c=FmY1u3PjP6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSfPcIgmKXhFzL7ar9Qfqa0AIn-H4xR2EBk&m=Yn3EhVWI4fdtITyWqYbRqhO6P3THHtCftvdxWcKVI08&s=z6WK3YDnAIrh3ZF2LJqik9NYU9YZ8W5GV_P75eCftsl&e=

George Kirikos: We had submissions from many constituencies in the comment period.

Mary Wong: Staff has contacted all members who have not been attending our calls and received several responses. We can speak to that if you like. We also updated a few email addresses, and two responded asking to be removed.

George Kirikos: Would be great to hear about that, Mary.

Paul Tattersfield: That would be good Mary

Paul Tattersfield: Did the two who left give any indications as to why they wished to be removed?

Mary Wong: Griffin Barnett and Thomas Rickert

George Kirikos: 30 at: https://urldefense.proofpoint.com/v2/url?u=https-3A_community.icann.org_pages_viewpage.action-3FpageId-3D48347895&d=DwlFaQ&c=FmY1u3PjP6wrcrwl3mSVzgfkbPSS6sJms7xcl4I5cM&r=DRa2dXAvSfPcIgmKXhFzL7ar9Qfqa0AIn-H4xR2EBk&m=Yn3EhVWI4fdtITyWqYbRqhO6P3THHtCftvdxWcKVI08&s=z6WK3YDnAIrh3ZF2LJqik9NYU9YZ8W5GV_P75eCftsl&e= (but 2 dropped?)

Mary Wong: We will continue to update the list as we hear back from people one way or the other

George Kirikos: Do we have any comparison on past PDPs, as to how many participants there were, as a baseline?

Mary Wong: @George, that's a difficult comparison because different PDPs attract different participants/interests.

George Kirikos: Plus, we had the independent legal expert from Professor Swaine, which is separate from any "constituency" being able to influence the outcome.

Paul Tattersfield: It's a very niche topic which requires a lot of time (years) and people are busy so they have to choose which interests to dedicate their time to

George Kirikos: The prior PDP to his on IGOs had the participation of the IGOs. They made a strategic choice to not be active in this PDP.

George Kirikos: *to his = to this

Paul Tattersfield: why?

George Kirikos: @PaulT: presumably so they could criticize the outcome, if they didn't get what they want, and so they could try to get the sympathy of the GAC behind the scenes.

George Kirikos: Especially since GAC makes statements without any well-reasoned analysis, so perhaps IGOs thought that would help them, if they didn't have to justify their positions.

Mary Wong: Staff just did a quick look back - it looks like we've generally hovered around 30

Mary Wong: For members who have signed up, anyway (not necessarily active on calls)

George Kirikos: Steve just joined.

George Kirikos: Welcome Steve.

Steve Chan: Thanks George, just rolling off another call.

Mary Wong: Unregistered rights

George Kirikos: <http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-September/000849.html> (response of earlier today)

Mary Wong: Thanks for spotting that, George - yes, it was Option 5

David W Maher:@George Could you speak a little louder thanx

Paul Tattersfield:I have an overarching question, Are the IGO's actually entitled to immunity given that they are initiating the action? In any other forum they would have to waive immunity to bring an action.

Mary Wong:@Paul, I believe Prof Swaine mentioned that in his memo as well; the question being whether agreeing to Mutual Jurisdiction amounts to a waiver of their jurisdictional immunity. Some courts may view that as the case.

Jay Chapman:Valid point, George

Paul Tattersfield:I think Prof. Swaine wasn't quite right when he considered immunity, When he tried to "disaggregate" - his thinking is wrong. The comparable case is where a TM holder initiates a UDRP against an IGO. If the TM holder went to court the IGO could claim immunity. I believe it is incorrect to reverse this when the IGO initiates an action in court the IGO has to waive its immunity for the court to determine the case and so the process is fair it has to waive its immunity from execution.

George Kirikos:Right, it doesn't have to be the full implementation. But, sufficient details to know what one is supporting, imho.

Mary Wong:@Paul, I think the discussion was about whether agreeing to Mutual Jurisdiction by filing a UDRP/URS complaint amounts to a waiver of immunity should there be a court case.

Mary Wong:Abu Dhabi session currently scheduled for Wednesday 1 November, 1700-1830 local time.

Paul Tattersfield:That was a separate issue Mary, just a sec I'll get the paragraph with the error

George Kirikos:Were we going to have another comment period??

George Kirikos:(that topic was broached last week, but it's still unclear to me)

Mary Wong:@George, I don't believe so - with the current plan Phil is describing.

Paul Tattersfield:@Mary it is in 3. Discussion (Page 8)

Paul Tattersfield:"The core question is whether an IGO is "entitled to immunity," but the baseline assumptions may be disaggregated. An IGO's immunity would be most clearly at issue if the IGO had not itself initiated any related judicial proceeding—since that would risk waiving any immunity to which it would be entitled, including to counterclaims¹⁸—and the UDRP's Mutual Jurisdiction provision were absent. This might be the case, for example, where a domain-name registrant has sought a declaratory judgment in relation to some actual or potential infringement by an IGO.¹⁹ Although that is not the scenario of principal concern here, imagining that scenario usefully isolates the question as to whether an IGO has a legitimate expectation that it would be entitled to immunity absent the UDRP and its concessions. If such immunity is minimal or uncertain, then any compromises required by the UDRP loom less large; if the IGO would otherwise be entitled to immunity, however, its potential sacrifice seems more substantial.

George Kirikos:@Mary: I thought he was arguing *for* it last week, (I was arguing against), but maybe he was just trying to illustrate the other side of the argument, without support of either one.

Mary Wong:@George, without answering for Phil, the co-chairs and staff had a post-call discussion after last week's meeting, where this path forward was discussed. The staff understanding is that it will be in lieu of a public comment period.

Paul Tattersfield:@Mary Technically if we wanted to reflect the immunity an IGO enjoys in the judicial system we should as a working group look at affording the IGO immunity when a TM holder brings a UDRP dispute against an IGO as this is what a court would do.

Mary Wong:@Paul, thanks for the clarification

Mary Wong:Re what Phil is describing - the Working Group discussed these elements some time ago, and there is a paper that outlines all of them

Paul Tattersfield:I believe it is incorrect to reverse this when the IGO initiates an action in court the IGO has to waive its immunity for the court to determine the case and so the process is fair it has to waive its immunity from execution.

Petter Rindforth:Good summary

Mary Wong:@Paul, we may need to think about this further but these topics may be beyond the scope of this PDP.

Mary Wong:It isn't really a defense - it is to object to the suit

Mary Wong:Doesn't a defense mean a substantive defending against a substantive claim, and not a procedural disposal of the suit?

George Kirikos:@Mary: it's a defence against the action.

Mary Wong:Maybe we can just say "succeeds in asserting jurisdictional immunity" :)

George Kirikos:Right, that's fine.

George Kirikos:<http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-September/000849.html> and <http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-June/000769.html>

Mary Wong:It may be more appropriate to say "conduct a review to assess the effects of implementing Option C".

George Kirikos:5 years, or 10 disputes.

George Kirikos:Given that there have never been any in the past, probably 5 years is sufficient.

Mary Wong:On the need to clarify what "created" or "registered" means, it may be easier to put a footnote there to explain it the way Phil has just described.

George Kirikos:But, the "10 cases" handles things if there's a flurry of new cases.

George Kirikos:I explicitly said "the earlier of those".

Paul Tattersfield:Can we have some explanatory text to introduce the reasoning behind each of the options? I.e brief reasoning cost benefits etc.

Paul Tattersfield:George +1

Mary Wong:We can add a footnote to explain "Create Date"

Paul Tattersfield:no

Paul Tattersfield:it has a new creation date

Paul Tattersfield:snapnames is not a good example they have names which go through both routes

Paul Tattersfield:1st Jan after the board approval?

George Kirikos:I think that also applies to Option A or C too, though, i.e. the date would be when it's published and approved.

George Kirikos:(i.e. in the implementation, etc.)

George Kirikos:i.e. status quo until the new policy is in effect.

Paul Tattersfield:What happens if the number of cases is zero after 5 years?

George Kirikos:I actually recommended in the Option 4 that **all** these arbitrations need to be documented, as part of the policy

George Kirikos:@Paul: It'd be like that PDDRP review. :-)

George Kirikos:"(c) All UDRP/URS providers must flag **all** of their disputes involving IGOs as complainants, sending the information to ICANN which will maintain a public record of them (like they used to do for UDRPs, but stopped doing). Not only does ICANN have to track any arbitrations invoked in point (b) above, but ICANN must also track any/all court disputes invoked and subject to point (a) (i.e. the grandfathered domain names), and obtain (at ICANN's expense) all the relevant public court documents/filings/evidence."

George Kirikos:<http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-June/000769.html>

Mary Wong:@George, staff has concerns about requiring ICANN to track all court cases filed - we are just not sure we can do that with any accuracy.

George Kirikos:@Mary: ICANN already does it for its own litigation.

George Kirikos:@Mary: registrars would have to be notified of litigation, naturally.

Mary Wong:@George, if we are party to a case, yes of course, but we cannot track all courts to find out whether any registrant has filed against an IGO anywhere.

George Kirikos:So, it's just communication between the registrars and ICANN.

George Kirikos:i.e. the registrants is REQUIRED to notify the registrar, in order to not have the UDRP/URS decision be followed.

George Kirikos:*registrant, rather

Mary Wong:If it is to be an additional obligation on registrars as a result of Consensus Policy, it will need to be spelled out very expressly as that is not currently an obligation on them under a Consensus Policy or the RAA.

Terri Agnew:next call: IGO-INGO Access to Curative Rights Protection Mechanisms Working Group call will take place on Thursday, 05 October 2017 at 16:00 UTC for 90 minutes

Petter Rindforth:I'll send you what we have discussed in the passed regarding General Principles for Binding Arbitration - to add to Option C

Jay Chapman:Thanks, all.

George Kirikos:Bye folks.

Mary Wong:I believe the answer is no - i.e. courts do not order parties to arbitrate as it has to be voluntary.

Paul Tattersfield:Thanks all, bye

Mary Wong:Thanks Phil and all.

George Kirikos:@Mary: google "court ordered arbitration". There are some hits.

Osvaldo Novoa:bye

Mary Wong:Thanks, George - will do

George Kirikos:Same for "court appointed arbitrators", etc.