

Julie Bisland:Welcome to the IGO-INGO Access to Curative Rights Protection Mechanisms meeting on Thursday, 07 December 2017 at 17:00 UTC

Julie Bisland:Agenda wiki page: https://urldefense.proofpoint.com/v2/url?u=https-3A_community.icann.org_x_ZBJyB&d=DwIFaQ&c=FmY1u3PJP6wrcrwlI3mSVzgfkbPSS6sJms7xcl4I5cM&r=QjF-05YzARosRvTYd84AB_UYInlydmFcjNmBM5XgySw&m=SZ95RchZqhsmm22FNgG30tR4pxuOtL4ImNSkrxUnLIY&s=nEfz0M3_i4wH07FC_0fAE46Vn5Y0hx1QU_QrCDQ7s6Y&e=

George Kirikos:Hi folks.

Philip Corwin:Hello all

George Kirikos:I'm waiting for a courier, so if it comes during our call I might need to jump away for a couple of minutes.

Poncelet Ileleji:Hello All

George Kirikos:That workaround is very elegant, and hopefully the IGOs rethink their opposition to that advice.

George Kirikos:It provides a procedural path for them that still shields them, but preserves the domain name owner's full legal rights.

Jay Chapman:That's just a "we don't want to" conclusion, not an argument

Julie Bisland:Welcome Nat Cohen

George Kirikos:Zak has a hand up.

George Kirikos:Volume is a bit low?

Julie Bisland:@George-I can have the operator add some volume, but mine seems good

George Kirikos:Thanks Julie. It seems better now.

George Kirikos:(I maxed it out on my speakers)

Julie Bisland:super, thank you

George Kirikos:Neither Option A or Option C are solutions for IGOs, though.

George Kirikos:They're addressing the issue of the "bug" that affects registrants, due to the unanticipated scenario in the UDRP related to mutual jurisdiction, etc.

Paul Tattersfield:Exactly George it's a quirk of process

George Kirikos:+1 Paul

Paul Tattersfield:You can't reasonably expect to build a complex arbitration process on a quirk of process - the answer is simple fix the quirk

Mary Wong:@Zak, the Charter for this Working Group does specify that if the group finds it justifiable to amend the UDRP or URS to address specific IGO/INGO concerns and needs, the group should also recommend what those changes may be. The rub is if the group's proposal is to amend the UDRP/URS beyond just the narrow scope of applicability to IGOs.

Zak Muscovitch:Indeed, Mary. I am concerned with the rub.

Mary Wong:So while it's open to the group to recommend modifying Para 4(k), the answer to your question will depend on what, exactly, that amendment is (and its scope - just specific to IGOs or new language that applies to other complainants too).

Paul Tattersfield:It's clearly in ICANN's remit because they are responsible for administrative proceedings to expediate disputes that would otherwise end up in a judicial forum

Mary Wong:As noted previously, Option A can have the effect of worsening the situation for IGOs than what it is under the current regime. At the moment, if they win on immunity in court, the original UDRP decision stands. Option A would reverse that.

Paul Tattersfield:Exactly Prof. Swaine was wrong on this

Philip Corwin:I don't think this is about helping either the IGO Complainant or the domain registrant respondent. I see it as trying to best balance the preservation of the registrant's right to seek de novo court review with the IGO's ability to raise an immunity claim in that judicial forum

George Kirikos:@Philip: But do you agree/acknowledge that the underlying root cause is the same, i.e. the reversal of plaintiff/defendants roles, i.e. X suing Y is not the same as Y suing X?

Julie Bisland:@Zak, mic is muted

George Kirikos:*6 to mute/unmute

George Kirikos:And that reversal is identical to the "cause of action" issue for the UK example?

Mary Wong:We may want to be somewhat cautious in relying on the US tribal immunity case that was just handed down, as federal US law about tribal sovereignty is very different from State sovereign immunity and IGO jurisdictional immunity.

George Kirikos:I think most of us are also members of the RPM PDP, so none of the "knowledge" here would be lost.

George Kirikos:@Mary: I did mention that in the email. :-)

George Kirikos:<http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-December/000960.html>

Philip Corwin:@Zak--with all request, we are the ones who have engaged in the comprehensive review. The RPM Review WG is not going to give the same attention to this issue. Its plate is already overflowing.

George Kirikos:@Mary: It also wasn't "just handed down" --- it was actually a while ago; just discovered today

Mary Wong:ok thanks George

George Kirikos:@Phil: but it is interrelated to the UK cause of action issue; exact same underlying root cause.

George Kirikos:i.e. a solution to a problem due to X suing Y being different than Y suing X is a global solution for all these edge cases.

George Kirikos:I think Paul is right.

Mary Wong:@Paul T, what was the specific question? (if you don't mind repeating it)

Zak Muscovitch:Will it be a success for the WG to have a near even split amongst options A and C?

Mary Wong:@Zak, if there is no consensus ultimately, then there is no recommendation. That's totally possible, as there are other recommendations on other issues that the WG has agreed on.

Paul Tattersfield:I draft it Mary as this continue

Paul Tattersfield:continues

Mary Wong:@Paul, thank you - that will be very helpful and staff can try to help find an answer if we can.

Zak Muscovitch:It may be that the lack of consensus on the options is due to the fact that the mandate of this WG is incapable of dealing with issues that are inextricably related.

Paul Tattersfield:George +1

Mary Wong>Note that the GNSO procedures allow for Full Consensus, Consensus, Strong Support but Significant Opposition, Divergence and Minority Views. Generally, only proposed recommendations that receive either Full Consensus or Consensus (most agree, a small minority disagrees) are adopted by the Council and Board to become Consensus Policies.

Mary Wong:So, as Phil has just noted, if this group attains Consensus or Full Consensus for the other recommendations (not under discussion today) but no consensus for this possible Rec 3 (e.g. if we end up with Strong Support but Significant Opposition or Divergence) then the result is that we just don't have a policy recommendation on this topic for eventual Consensus Policy.

George Kirikos:Do we all agree at the root cause of the problem that Rec 3 is trying to address, though?

George Kirikos:(even if we don't agree on the solution, do we agree on the cause?)

George Kirikos:And the URS, since we're doing both.

George Kirikos:i.e. root cause is the same

Paul Tattersfield:This where I believe Prof. Swaine did not correctly "disaggregate" the 1st issue

Paul Tattersfield: In 3. Discussion (Page 8) Swaine says: "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. 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 potenti

Paul Tattersfield: Absent UDRP there are two possible ways the immunity question could come before a court: (a) A TM owner seeks to acquire a domain which an IGO has registered (b) An IGO seeks to acquire a domain which a domain registrant has registered In (a) the IGO would be entitled to raise an immunity defence In (b) the IGO would be required to waive immunity for the court to consider the matter.

Paul Tattersfield: If the IGOs are not "entitled to immunity" after initiating proceedings in any other forum why should they be in UDRP?

George Kirikos: +1 Jay

George Kirikos: Echo

George Kirikos: It would be nice to hear from David Maher or Poncelet.

George Kirikos: And Nat.

George Kirikos: Option B is a hybrid === Option A for existing domains, and Option C for newly created domains

Paul Tattersfield: Option B is an even bigger fudge for a subset of quirks lol

Mary Wong: @Paul T, thank you. Staff can't speak for Prof Swaine, of course, but we presume that he wasn't directly addressing the fundamental question you posed, so it may not so much be a question of whether he is wrong as whether the assumption (result?) that submission to MJ can amount to waiving immunity makes a difference.

Paul Tattersfield: ABC are solutions but we haven't answered the questions I raised that is why there is no progress

George Kirikos: That's Zak speaking for the transcript.

George Kirikos: I think we have consensus on the identification of the underlying problem.

George Kirikos: And I think (I've not seen Phil or Petter's view) we recognize that there's a direct linkage amongst other types of issues (the UK cause of action, etc) due to that underlying problem.

Paul Tattersfield: I hope so George can we get the working group to look at this issue alone setting aside the A, B & C options as people get very wedded to those

Paul Tattersfield: to be heard

Philip Corwin: I remain somewhat unclear as to what the issue is that this WG might wish to recommend the RPM review WG look into in depth and would appreciate a succinct statement in writing as to what the ask would be of that WG.

George Kirikos: Where we're getting stuck is proposing solutions only for IGOs, instead of the entire underlying problem (judicial access, de novo review on the merits) for all situations.

Jay Chapman: +1 Zak

George Kirikos: In some sense, referring this to the RPM PDP doesn't affect our timing, either. Because even if we adopted A or C, it'll take 2 or 3 years for it to even get through an Implementation Working Group.

George Kirikos: The RPM PDP would likely be done BEFORE that implementation working group.

Paul Tattersfield:It would be better if we can get it right sunset it once the All RPMs recommendations are implemented maybe they'll come to the same conclusions

George Kirikos:+1 Phil --- there is that bigger issue.

George Kirikos:i.e. as a group, we've gone deep into the UDRP, and identified these underlying problems that are inextricably linked.

Paul Tattersfield:The point is ICANN SHOULD require an IGO to waive immunity if it initiates proceedings

Zak Muscovitch:Sure Phil.

Paul Tattersfield:it has nothing to do with individual jurisdictions

Poncelet Ileleji:Great

Zak Muscovitch:@Paul, I look forward to further reviewing the issue you identified with regards to the professor's report.

Paul Tattersfield:ICANN needs to say to IGOs if you want to bring a UDRP you need to waive immunity because you are the initiators

Paul Tattersfield:there are no ifs no buts that's the price of initiating an action

George Kirikos:+1 Paul

Jay Chapman:+1 Paul

George Kirikos:That's the underlying legal rights situation, that UDRP should not be interfering with.

Mary Wong:@Paul, all, I think that was something Prof Swaine noted in the context of IGOs, i.e. that in agreeing to submit to MJ, some courts will likely hold that as a result the IGO has indeed waived its immunity.

George Kirikos:I think the UDRP wasn't supposed to interfere with the rights --- that was the intent.

George Kirikos:+1 Zak.

George Kirikos:So, we need to not "provide direction to the court", but make the policy itself be drafted better, to not interfere.

Paul Tattersfield:@Mary and the working group has said that mutual jurisdiction clause should stand

George Kirikos:"And if those expectations aren't met, then _____" (UDRP would explicitly say what would happen, rather than leaving it in limbo)

George Kirikos:Comments on Option C begin on Page 6.

George Kirikos:But, undeveloped countries --- that affects non-IGOs and IGOs equally.

George Kirikos:It's not specific to IGOs.

Zak Muscovitch:Indeed

Jay Chapman:right, George. Affects every/any organization or person

George Kirikos:Parties can always voluntarily agree to arbitration, though. What we're discussing is "compulsion", i.e. what the policy forces people to do.

Zak Muscovitch:We currently have

Zak Muscovitch:...neutral three member panels of experienced IP lawyers. And people still appeal from there on occasion...

George Kirikos:+1 Zak

George Kirikos:*6 to unmute

George Kirikos:We can hear you.

George Kirikos:Countries might assert immunity.

George Kirikos:Parvi.org (I doubt Paris ever paid up damages)

George Kirikos:+1 Nat

George Kirikos:If we want, we can defer Option #6 to next week, or can tackle today (but might better spend the time talking about those root causes that are in common with RPM-related issues).

Nat Cohen:My comment was intended to mean that developing the arbitration proceedings could take years.

George Kirikos:True, Nat.

George Kirikos:They used the UDRP 10 times, though.

Paul Tattersfield:they are not entitled to immunity when they are initiating the proceedings to intervene as a third party in a private contract

Paul Tattersfield:did we get any further with inviting nominet to attend our meetings?

Paul Tattersfield:have we scheduled time to look at mediation?

Jay Chapman:"They say it's a problem, so it's a problem" - that's not a convincing argument., it's a conclusion. This wg has worked tirelessly and delved deeply into this for several years and have discovered little (any?) evidence to support that "because we say so" conclusion.

Philip Corwin:On Option 6, if it is to be subject to a final consensus call we will need specific language for it -- just as we have specific language for Options A, B, C

Zak Muscovitch:@Jay +1

Jay Chapman:we have continuously requested the IGOs to come alongside and explain - they have chosen not to

Paul Tattersfield:that's the other side of the issue Jay I don't believe they have not really provided anything of any substance

Jay Chapman:even when we say "use an agent, licensee - it works perfectly!" - the response is "It won't work - because we say so"

Philip Corwin:@Jay -- legislatures act all the time to address problems that are claimed to exist by one side and denied by the other. That's inherent in any policymaking process.

Nat Cohen:I believe that a couple of solutions to lack of de novo review in the court of Mutual Jurisdiction have been proposed in the RPM Working Group. If this problem is resolved in the RPM WG then that removes the need for arbitration. A couple of ideas that have been raised include having the location of the registry as a mandatory MJ, and/or having the location of ICANN as an available mandatory MJ.

Paul Tattersfield:that's the other side of the issue Jay I don't believe they have really provided anything of any substance [again without typos]

Jay Chapman:understand, Phil. The point is that one side's reason/rationale is solely "because we say so"

Zak Muscovitch:Thank you to everyone for the call today.

George Kirikos:+1 Nat

George Kirikos:So, is Nominet coming next week for sure?

George Kirikos:Tony Willoughby is very knowledgeable, if he's the guest.

George Kirikos:I think Tony Willoughby is or was the Chair.

George Kirikos:(chair of the Experts of DRS)

Mary Wong:I believe Paul Keating reached out to Mr Willoughby but we have not received any response

George Kirikos:Option C's language isn't that specific at present, though.

Jay Chapman:Thanks, everyone

George Kirikos:i.e. "arbitration" left a lot to be done by an Implementation Working Group.

Paul Tattersfield:Thanks all, bye

George Kirikos:Bye folks.