
ICANN72 | Virtual Annual General Meeting - GAC Discussions: IGO Protection Matters
Monday, October 25, 2021 – 14:30 to 15:15 PDT

JULIA CHARVOLEN: Good morning, good afternoon, and good evening. Welcome to the ICANN72 GAC meeting on IGO Protection Matters and DNS Abuse Mitigation on the 25th of October at 21:30 UTC. We will not be doing a roll call today for the sake of time. GAC members' attendance will be available in the annex of the GAC communique and minutes.

May I remind GAC representatives in attendance to indicate their presence by updating the participant's name to reflect their full name and affiliation.

If you would like to ask a question or make a comment, please type it by starting and ending your sentence with <question> or <comment> to allow participants to see your request.

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Finally, the session, like all other ICANN activities, is governed by the ICANN expected standards of behavior. You'll find the link in the chat for your reference.

With that, I would like to leave the floor to the GAC chair, Manal Ismail. Manal, over to you. Thank you.

MANAL ISMAIL:

Thank you very much, Julia, and welcome back, everyone. We will use the coming 90 minutes to discuss IGO protections and then DNS abuse mitigation, allocating 45 minutes for each, and we will start with IGO protections. During the session we will review recent developments from the EPDP, discuss relevant developments on the GAC ICANN Board consultation, and discuss the potential process to manage the GAC IGO lists of IGO names to be reserved in new gTLDs.

So without further ado, allow me to hand it over to Brian Beckham, our topic lead from WIPO. Brian, please.

BRIAN BECKHAM:

Thank you, Manal. Good evening, colleagues. And I would note here my name is Brian Beckham, I am from the WIPO intellectual property organization, and I'm joined by other IGO colleagues in case questions come up, we're happy to answer those.

So I think most GAC colleagues will be well familiar with this issue but just a little bit of background on the three topics, particularly we will start with the first, the EPDP. This was formally a Work Track of the rights protection working group. And because that group has wound up, this was changed purely on a procedural level to what is now an EPDP.

So I'm here for IGOs. We've been asking for protections for IGO identifiers in the domain name system for a very long time. In fact, the background for this file goes back to at least 2001 when WIPO issued a report on the protection of IGO identifiers in the DNS. That was followed by a 2007 ICANN staff report and in both of those reports, some of the harms that are occasioned on the heels of IGO identifiers in the domain name system were identified. Those are often scams, unfortunately, where donations meant for humanitarian causes don't reach the intended beneficiaries.

We saw a New York Times article where WHO identifiers were abused on the heels of the Ebola crisis. That of course is happening today with COVID scams. And there was a 2016 letter

from the United Nations secretary general to member states seeking assistance at this ICANN file.

So why is this an issue? Under the rights protection mechanism that is mainly meant to deal with trademark abuse on the Internet, the UDRP, the uniform domain name dispute resolution policy, there are two requirements that pose issues for IGOs. One is the need trademark rights and the second is the need to submit to a court jurisdiction.

I will talk more about the first one. With respect to second, the submission to a court jurisdiction, because of their nature under international law, IGOs are granted privileges and immunities which render them immune from suit in international court, and that is frankly seen as core to the existence of IGOs so that they're not subject to undue influence in one jurisdiction so that they can really undertake the humanitarian work that governments task them to do.

I mentioned that we are in currently in an EPDP. There is a report that was put out about—I guess it would be 40 days ago for comments for which closed over the weekend, and we will talk a little bit about the particular comments, including the GAC comments that have been submitted, momentarily.

But I want to mention that one of the reasons we're here is because there was a prior effort by ICANN, a prior working group

that tried to address this issue, and in issuing its report just prior to issuing the report for that working group, the working group chair stepped down and issued a lengthy minority statement rejecting the core recommendation which in fact the GNSO Council opted not to adopt. So that is what put the current work in front of us.

I would like to read a quote from the minority statement from the former co-chair who resigned prior to issuance of the report of the prior working group, which states, “Having utterly failed to provide a policy recommendation that reasonably resolves the central challenge it confronted, instead, it has produced a policy recommendation that grants excessive favoritism to registrants.”

So that was the core issue in front of us, was how to provide access to the UDRP for IGOs and still give due process for registrants. It was interesting earlier to listen to the Board session with the NCSG. There was a lot of discussion on interoperability of the Internet, global Internet. Of course, a lot of that comes down to trust and security and stability.

I mentioned earlier that the comments on this current EPDP closed over the weekend, and on a very quick review, an unfortunate majority of those comments take the position that IGOs shouldn't have access to UDRP and proposed to reject the initial report. Which was an interesting footnote because it's an

initial report which actually teed up options to seek community input, so that does beg the question whether commenters have actually read and digested and commented on the report or whether these are more kneejerk reactions.

A lot of those comments raised the question about rights of registrants. Of course that was central to the work of the EPDP, and I think the thing that is missing in a lot of those comments is the question of what about the rights of the IGOs and their intended beneficiaries who as it stands today are left without recourse to the UDRP.

And fundamentally, this boils down to a choice, and this is a choice of the EPDP currently, of the GNSO Council, of the ICANN Board, of the ICANN community, fundamentally, the choice is to come up with a solution to provide access to rights protection mechanisms like the UDRP for GNSOs or to insist on roadblocks and fail to deliver a solution here.

I mentioned earlier the working group had proposed a new definition for—one of the problems is IGOs don't typically have registered trademark rights, which is a standing requirement to file a UDRP case. So the working group proposed definition to allow IGOs to get into the UDRP based on an assertion of what we would normally call common law or unregistered trademark

rights. And that was a pretty well accepted agreement within the working group.

The other question had to do with the court jurisdiction question, and that was a little bit more difficult, although it looks like we may have figured a way out of that to allow an IGO waive being bound to a court jurisdiction. That of course raises the question of, if there's a case filed by an IGO and a registrant wishes to appeal that, where do they take that if courts aren't open to them?

The proposal was that that should happen through arbitration, which is a globally accepted process for resolving disputes. And one of the benefits of arbitration which I think was frankly overlooked in a lot of the comments that, again, on a quick skim, was that the arbitration operates across borders. Whereas it may be terribly inefficient to have to go through courts in different jurisdictions. Arbitration cuts through that and allows parties from different jurisdictions to resolve their disputes in a more efficient manner.

So the GAC comments on this EPDP largely endorsed the definition of an IGO that would meet the trademark registration question, endorse the waiver of the court jurisdiction, and propose that arbitration should be a means of resolving disputes. And if the Working Group would not accept that as the sole basis

for resolving appeals from a UDRP decision, that at least there should be a default for arbitration where the registrant could opt out and try take the case to court.

We tried in the working group, and I mentioned earlier, IGO colleagues including one of our colleagues from the World Bank who are much more familiar with the intricacies of these jurisdictional immunity questions is on the call, but we had tried to sketch out some of the complexity of the route of potentially going to court, really tried to encourage the working group and the public commenters to understand this wasn't meant to somehow short circuit due process. In fact, we discussed all number of safeguards to protect due process for both registrants and IGOs, and really this was an attempt to meet in the middle. And we hope we've delivered there, and we of course were very grateful for the GAC's support in submitting those public comments.

Maybe I will just briefly pause to see if there are any questions. As I mentioned, the public comment period just closed, so this is still very much still a work in progress, so this will be something we can come to a deeper discussion, if useful, at a later date as well.

The second item was the Board consultation with the GAC, and this goes back to GAC advice going back a number of years now. The overall picture was that in the kind of run up to the launch of

the new gTLD program, IGOs had engaged with the GAC and with ICANN asking for protection of the rights in the DNS. And one of the initial questions was because IGOs often operate under their acronyms as identifiers, so rather than spelling out the full name of World Intellectual Property Organization or World Health Organization, we would normally refer to those publicly as WIPO or WHO. You have UNHCR, UNICEF, things like this where these acronyms are really how the public knows IGOs.

At the same time, there was a recognition that acronyms and short domain names can be very attractive for a lot of other users who share those acronyms. So rather than request a block, which would be unfair to third parties, IGOs requested that they be notified once the registration was undertaken that corresponded to their rights.

So in shifting from what is the current status quo, which is a block of those acronyms following the launch of the new gTLD program, the GAC had advised the Board to place a moratorium on lifting that block until the curative rights protection mechanism work, which I just mentioned, was concluded.

There was a little bit of confusion around what exactly was meant by concluded, so we tried to iron that out in a number of phone calls and documentary exchanges with the Board, and it might be

something that could be the subject of a small follow-up to prior advice on the topic.

There was most recently a letter of October 7th, 2021, from the GAC responding to some questions from the Board. But basically the Board and the GAC were trying to get on the same page in terms of the Board was mindful of not having this moratorium stay in place indefinitely. The GAC of course having issued prior advice seeking protection for IGOs was trying to see if that moratorium couldn't stay in place until this work was concluded.

And I would note that the work has been undergoing quite rapidly. We have been hard at work during the course of this year. As I mentioned, we just issued the initial report and the public comment period closed. We have our first meeting next Monday following this ICANN meeting. There were I think 31 comments submitted. A number of those were fairly high level, and then a smaller level which go into more legal details. But it still looks like that work should be on track to wrap up, if not at the end of the year, very shortly thereafter. I know the Chair and staff and the working group members are keen to put this behind us.

So the Board consultation is something that is still active. Like I said, there was a letter sent from the GAC to the Board just a few weeks ago which tried to answer some questions that were put to the GAC, and I think the core thing to be ironed out was really this

moratorium, and hopefully once the working group has its output, this can be put behind us on both a procedural and substantive level.

The next item to cover today was the idea of a list. There was a list of full names of IGOs in two languages and a list of the IGOs that was being managed by the GAC. And there was a question about how this list would be maintained going forward. It was created, I believe, by ICANN staff a number of years ago, and the idea was to turn that over to the GAC to sort of own this list and own the process for making any additions or removals to the list.

In terms of additions, it's worth noting that there is a finite number effectively of IGOs. I think it was around 200. So this is something that's not requiring a lot of bandwidth. The number of additions should be minimal and infrequent.

So what is on the screen there a basically kind of a high-level overview of how this list can be owned and managed by the GAC going forward. So the criteria are already in place for a number of years now. One of the things that needs to be ironed out was the process for removal.

In particular, there was a request coming in a number of years ago to remove one particular IGO name from the list, and one of the dilemmas was the making sure that the IGO was aware that if the name was removed from the list—because in this instance they

wanted to register their identifier in a new gTLD—that this was not a guarantee that they would actually get that registration. This was a removal from the list. Once off the list, then the registries would be able to allocate that domain name to any registrant who requested it. So there was a concern to make sure that any IGO requesting to be removed from this list was aware of the potential repercussions.

And then like I say, there was a discussion about a process for adding IGOs to the list and how that would be managed and communicated. It's a pretty straightforward process. You see on the screen a high-level overview. The next step here is basically to take this high-level overview and put a little more flesh on the bones, circulate that to the GAC for any comments and to action it. So it's a pretty straightforward process. It's just something that needs to be taken forward. So this was sort of the furthest iteration that you see on your screen here. So if this is agreeable, we can work with GAC colleagues and support staff to take this high-level process forward, and then the GAC would be the owner of the list going forward.

That is it from me on the updates. I don't know if there are any questions. Of course, there is a session with the GNSO and with the Board later, mainly on the EPDP for curative rights, that is a work in progress. So again, we have to see how the process works out. Individual IGOs and the GAC have provided input. We will be

looking at the public comments and see what the end result is in short order.

MANAL ISMAIL:

Thank you very much, Brian. Any comments or questions on the things that Brian has already covered, the EPDP, the consultation with the Board, and the broad lines of a mechanism to update the IGO list? I see no hands up.

As Brian mentioned, we're working on this proposed mechanism, and it will come ultimately to the GAC for approval, but please, if you have any early comments on the broad lines, please share them with us. And it might sound trivial to remove from the list, but even removal from the list has its own implications, so we should have a process in place for additions and removals. I see Kavouss' hand. Kavouss, please go ahead.

KAVOUSS ARASTEH:

Yes, thank you very much, Brian. You have been very active in the IGO group. I was also with you, and I know how enthusiastic you are and how much energy you have spent. I am a little bit concerned about the process. The chair of the group has done whatever he could, but the problem is the public comments.

I have a bitter experience from the previous cases. The last one I am dealing with is an IRP IOT, implementation oversight team. It's

about one and a half years, we are dealing with public comments, and we have not yet finished anything.

My question to you, Brian, do you see any light at the end of this tunnel when we get to the beginning of the end? Thank you.

BRIAN BECKHAM:

Thank you, Kavouss. It's a good question. And this is what I was alluding to earlier when I mentioned about the choice to provide a solution here or the choice to throw up our hands and stand on roadblocks.

I can only say we believe that the IGOs have made reasonable compromises along the way. Initially, one of their requests was to simply block all IGO acronyms. There was the recognition that that wasn't a tenable solution, so we came together in the current working group.

To be frank, judging by some of the public comments, it will be interesting to see how the working group looks at those. I would say a large number of them simply stood on positions that didn't actually reflect careful reading of the options put forward in the report. The report asked the community to help us choose between option A and option B. And when you have comments simply saying, "I don't accept the work of this working group," or "IGOs shouldn't have special protection," or "this is designed to

steal domain names,” or “this is designed to create work for arbitration providers,” it's difficult to know what to do with those because they're not responsive to the questions that were asked.

There were a number of comments—again, this is just doing a quick scan, but for example the Registries Stakeholder Group comments seem to really acknowledge that this was an issue that merited the community's attention and there were some compromises and choices to be made and tried to help, I think, the working group through answering those questions.

So it will of course be down to the working group members and the chair how to address some of the nonresponsive comments. There were also a number of comments that raised procedural questions about the work of the working group, about its representativeness. These are groups, of course, that were invited to participate in the process and then complain about their views not being represented in the process.

So again, it's difficult to know how the rest of the working group would view those, but in my personal view, given that there was an open opportunity for stakeholder groups to join this, it seems the moment has passed to complain about not being represented in the working group. So it's not clear how those comments will be taken on board.

In terms of a solution, that's really for the working group. In terms of timing, of course, we have a pretty fixed schedule in front of us. I don't recall with specificity, but I think by the end of the year, we should have our eyes on a final report. So hopefully that works out in a way had that works for everyone. But in any event, I think sometime around the end of the year or the beginning of the new year, then we would have a report in front of us.

MANAL ISMAIL: Thank you very much, Kavouss, for the question and Brian for the answer. I have Nigel Hickson next, UK. Please go ahead.

NIGEL HICKSON: Yes, thank you very much and good evening. Really, I just wanted to say two things. Some of us are new to the GAC but not necessarily new to this issue. And certainly I would like, having been around this issue for a while, to congratulate Brian and other colleagues at various IGOs including the World Bank, of course, and the OECD as well for their perseverance and articulation of this problem over many years.

I'm not trying to comment on the individual questions that are left, but I think essentially if one looks at the history of the development of the policy on curative rights, we've come a long way. And thanks to the working group and Chris Disspain and

others, I think my judgment call is that progress has been made. There are some details to be tied up, but I think indeed a lot has been done. So thanks to Brian for doing that. That's it. Thank you.

MANAL ISMAIL: Thank you, very much, Nigel. I see Jorge, Switzerland. Please go ahead.

JORGE CANCIO: Thank you very much, Manal. I just wanted to note our support and really our appreciation for the work that has been done by our representatives in the working group, Brian, Kavouss, OECD, World Bank and others, and USPTO, of course, and also the work of all the other members of the working group which I have been following as an alternate member of that working group amongst others.

The work of course of the chair of that working group, Chris Disspain, who is in this meeting. So if perhaps he wants to share some general remarks with us. And also of other representatives of the community, be it from constituencies of the GNSO or ALAC who have been really—as Nigel eloquently put it—trying to strive for consensus.

So I hope that we may follow in that constructive vein and try to find consensus, a compromise proposal which is really responsive

to the needs of the community, including the GAC and the IGOs, as the preliminary report was aiming at. Thank you.

MANAL ISMAIL:

Thank you very much, Jorge. Any further questions or comments from any GAC colleagues? Okay. Seeing none, I thank you very much, Brian, for the presentation. I see your hand is up. Please go ahead.

BRIAN BECKHAM:

Yes. Apologies to keep us on this topic. I'm just getting some messages about the moratorium and the list and the process for removal, so I thought I would take a moment to address those.

One of the specific examples that came up was the Africa Union which would have the acronym AU. And of course, this was at the time, a couple of years ago, IGOs and GAC colleagues had corresponded with the representatives, and this was when I was mentioning making sure that IGOs that would request to be removed from the list in order to obtain a particular registration were aware of the potential repercussions of being removed from the list would not necessarily mean they would get the registration they were seeking.

There may be others that were in the same boat, but this was one that was specifically brought to our attention. So again, just

wanted to respond to some messages that were directed to me to mention a specific example.

MANAL ISMAIL:

Thank you very much, Brian. And indeed, worth noting the African Union example in that respect. Any further comments or questions? We still have 11 minutes, by the way. But if not, then thank you again very much, Brian, and thanks to all IGOs involved in this longstanding process, and thanks to everyone. We will be starting our following session at 15 past, so if you would like to stay in the room, we will be using the same Zoom room, just changing slides and we need to stick to our start time. So ten minutes, and we will start our discussion on DNS abuse mitigation.

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