Transcript ICANN Marrakech
GNSO Session Saturday, 05 March 2016
IGO-INGO Access to Curative Rights Protection Mechanisms Working Group
Note: The following is the output of transcribing from an audio. 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.
The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page:
http://gnso.icann.org/en/group-activities/calendar

James Bladel: Okay thanks. Welcome to ICANN 55 and the GNSO session. We're going to go around the table for introductions and then we can go around the back of the room as well.

Just want to note that we – if you look over here to my left we have a wall of windows. So the joke about the windowless conference room does not apply, for those on the phone. You'll just have to picture it. But we are still in a basement so tell me how that works. Windows in a basement.

So we'll start down at the end with Rubens. Go ahead.

Rubens Kuhl: Rubens Kuhl, NIC.br, Registry Stakeholder Group.

Mason Cole: Mason Cole with Donuts. GNSO liaison to the GAC.

Jennifer Standiford: Jennifer Standiford, Registrar Stakeholder Group.

Volker Greimann: Volker Greimann with Key Systems, Registrar Stakeholder Group.

Sara Bockey: Sara Bockey with Go Daddy. Registrar Stakeholder Group.

Wolf-Ulrich Knoben: Wolf-Ulrich Knoben, ISPCP Constituency.

Edward Morris: Edward Morris, Non Commercial Stakeholder Group.

Carlos Gutierrez: Carlos Gutierrez, the homeless councilor.

Johan Helsingius: Julf Helsingius, the homeless but not houseless.

Stephanie Perrin: Stephanie Perrin, Non Commercial Stakeholder Group.

Donna Austin: Donna Austin from the Registry Stakeholder Group.

James Bladel: James Bladel, Registrar Stakeholder Group.

Heather Forrest: Heather Forrest, Intellectual Property Constituency.

Marilia Maciel: Marilia Maciel, Non Commercial Stakeholder Group.

Keith Drazek: Keith Drazek, Registry Stakeholder Group.

Olivier Crépin-LeBlond: Olivier Crépin-LeBlond, ALAC liaison.

David Cake: David Cake, NCSG councilor.

Susan Kawaguchi: Susan Kawaguchi, Business Constituency.

Amr Elsadr: Amr Elsadr from Non Commercial Stakeholder Group. But since we're in an Arab-speaking country I should probably pronounce my name the proper Arabic way which is Amr, in case any of you were wondering. Thanks.

Mary Wong: Mary Wong from ICANN staff, unable to say my name or really anything in Arabic. And I want to just pass this over to the newest member of the ICANN Policy staff, and the GNSO team. We're very, very, very happy to have him and we hope that you will take the opportunity to get to know – and I'll let him introduce himself – him – throughout this week.

David Tait: Good morning. My name is David Tait. I'm with ICANN staff.

Steve Chan: Steven Chan, ICANN staff.

James Bladel: Thanks. And do we want to also give the folks on the phone the opportunity to weigh in or does everyone have the ability to speak? We have a couple of councilors at least I believe that are participating remotely. Yeah, Steve.

Steve Chan: I just wanted to note that Paul McGrady is online – on the call remote as he noted in the AC room. Thanks.

James Bladel: Yeah, right. Paul, if you can hear us would you like to test your audio and make sure that you're able to speak and be heard?

Paul McGrady: That'd be great. This is Paul McGrady. Can you hear me?

James Bladel: We can. Thanks, Paul.

Paul McGrady: Terrific. Thank you.

James Bladel: Okay excellent. Well welcome. And as you can see we have a very full agenda today and tomorrow. But before we get going here we wanted to note that the schedule did say we were starting at 9:00m in fact the agenda item began at 9:30 so apologies for any inconvenience or folks who were maybe chilling out in the room for 30 minutes.

                The first topic, if we're ready to kick off. I note that we are still waiting our presenters. Phil just went to get a cup of coffee. And I believe we're also – or a bottle of water, great. We're also waiting for Petter and Petter is not attending. Okay thank you.

                And this would be a presentation on the IGO NGO Access to Curative Rights PDP. And I think Phil, the last we'd heard that we were waiting for a report from an independent expert. But it looks like we've had some developments so I'll

turn this over to you and you can give us some of the latest if you're ready to go.

Phil Corwin: Good morning. Good morning all. Good morning, James. I'm as ready as I'll ever be. And I think Mary has a few slides to bring us up to date here. And Petter Rindforth, cochair of the working group apologizes, he won't be in until this evening so could not be here for this presentation. But he will be present at our working group session on Wednesday morning, for those of you who want to take a deeper dive into all of this.

And why don't we have the first slide, Mary, with content. Okay, as you know, our working group has kind of been stuck in the mud for about half a year now. We made very rapid progress up to the point where we encountered the question of what is the recognized consensus view of the scope of sovereign immunity for international intergovernmental organizations.

It certainly wasn't anything that the working group had great expertise in so we – with the assistance of ICANN staff we arranged to contract with – we did a search. We found an expert who was available to do this, Professor Edward Swain of George Washington University Law School.

A few weeks ago Professor Swain delivered to us an – very good 23-page draft memo with lots of footnotes, which was probably the leading document on this subject, probably because it's the only document on this subject, the interplay between IGO immunity and the UDRP.

And the professor was not going to be able to complete that memo in a form he felt comfortable about distributing public for this meeting but he did provide us – this weekend with a two-page synopsis of his findings so far. And our working group had a one-hour call this past Wednesday to discuss that synopsis and potential steps forward.

There's also this IGO small group, which is working with the ICANN Board and the GAC on related issues. We – they had a meeting last July, we finally got a

written update on where that stood from Chris Disspain but there's still nothing official out from that group in terms of a proposal. And we're hoping that we get some GAC and IGO participation in our Wednesday meeting.

So why don't we go to the next slide, Mary, and see what we've got there. Okay the key thing we found out from this memo is that there's no simple black and white rule regarding sovereign immunity for IGOs. It depends on the type of IGO, whether it's UN affiliated or non-UN international governmental group formed by treaty or something else.

It depends if you ask the question in different national jurisdictions you'll get different answers. It also relates to the type of immunity whether it's absolute, which would be absolute, or whether it's functional or whether it's limited in scope in some ways. And there are different views around the world on this. And a lot of it depends on the particular activity you're asking about and whether – what category you would put it in. We can have disputes about that as well.

And also IGOs for all kinds of purposes often waive their immunity when they need a particular service or something and they don't feel that the waiver is sensitive to what they believe is the scope of their immunity. So that's where we're at. And so now we – all of those cases of course deal primarily with bilateral relationships – relationships between IGOs and private sector providers of goods and services in which the IGOs will often negotiate a clause where if there's a dispute instead of going to a national court they'll go to an agreed upon arbitration agency so there's no a court jurisdiction.

But of course the UDRP is a very unique situation, it's a tripartite relationship where you've got the IGO, you've got the – well you've got the registrar who required them to do this. You've got ICANN policy. But you've got a registrant who has existing legal rights in their jurisdiction and signed a registration agreement that says if they don't like the result of a UDRP they have a right of access to appeal in a court of mutual jurisdiction.

So we haven't reached any conclusions yet. But the near term delivery of the report I believe will give us all the legal background we need to move rather rapidly to conclusion.

The key question here is whether – and we're dealing with a very rare case. We're dealing with a case where an IGO – a hypothetical case where they would bring a UDRP, prevail on the UDRP and the registrant would then appeal to a court of mutual jurisdiction. It's – this would be an extremely rare situation where the UDRP was so off somehow and the registrant felt it was worth the time and money to expend additional funds on litigation, which is quite expensive, to justify an appeal in a court. So we're trying to create a rule for what we would expect to be a situation that might result – arise just a few times within a decade if that much.

So the key question is going to be whether requesting this waiver of immunity and submission to potential, not actual, but potential litigation in a court of mutual jurisdiction is so unduly violative of an IGOs recognized sovereign immunity rights that we should not be comfortable with that and should go to create a separate curative rights process for IGOs and probably it wouldn't be for all IGOs but probably just the UN agency IGOs because they're the ones with the broadest scope of immunity.

So what's where we're at. We expect delivery of the final memo – final draft memo from Professor Swain later this month. Our working group will review it. We may ask some questions, suggest some clarifications. But there should be a final document available for full public viewing certainly by April. And we're hoping that we can get to a final draft report before the now announced Helsinki meeting, which I just read about last night.

So I'll stop there. The synopsis will be available at Wednesday's meeting. Have we made that available online, Mary, where people can look at it in advance?

Mary Wong: This is Mary from ICANN staff. We have not yet uploaded the document pending Professor Swain's confirmation of the exact format and content. But it

certainly will be available for everyone participating remotely or in person for the Wednesday morning working group session.

Phil Corwin: Right, but we'll get that final version locked in this weekend so it can be available before Wednesday. So I'll stop there and that concludes my report. Does anyone have any questions?

James Bladel: Thanks, Phil. Excellent…

Phil Corwin: Very welcome.

James Bladel: …update. And does anyone here in the room at the table or in the back have any questions for Phil? Anyone remote? I don't see any hands in the Adobe room but any – okay, Volker.

Volker Greimann: Hi, Phil, Volker Greimann speaking. Hello. Just one question not related directly to the report or the still missing piece of information that has not been published yet but rather a factual question of information. With the new gTLDs already live for over a year now have there been any report of any cases where an IGO or INGO felt that they weren't able to raise a complaint or have raised the complaint using the existing rights protection mechanisms so essentially my question is how realistic is the impact, the problem really, has there been already a practical problem reported to you?

Phil Corwin: I'm not aware of any. And I don't know if staff – but I'm not aware of any IGO bringing either a UDRP or a URS action in relationship to any domain registered at the one of the new top level domains. Our working group has uncovered a few past instances of IGOs bringing UDRPs against legacy TLD domains which indicated at least they didn't feel that submission to the mutual jurisdiction was a barrier. But we don't know if there are others who didn't do that because they didn't want to essentially sign on to that waiver.

But we don't know of any case involving a new TLD since they were launched where an IGO felt there was infringement going on. So, yeah, we're talking about a rare case – a rare exception to a rare case.

Volker Greimann: Thanks for that. Just thought it would be interesting to see if there's any complaints from IGOs or NGOs that said we weren't able to do this because the mechanisms weren't there or weren't right for us.

Phil Corwin: Yeah, we're not aware of any but we'd be happy to take such reports if they're available.

James Bladel: Okay next up is Heather.

Heather Forrest: Thanks, James. Heather Forrest for the record. Phil, given the timing of this we hadn't really anticipated, this is something I'm generally trying to get my head around in all of the various things going on in the ecosystem right now. How are of the work of this particular group feed in or will this work feed in to the subsequent rounds PDP and the pending RPM PDP, because there's an overlap here. Thank you.

Phil Corwin: You know, that's really up to those working groups. I mean, what we're going to have in the end is we're going to have a very interesting legal analysis by an expert in his field regarding interaction of IGOs and their rights with the existing arbitration processes that ICANN provides the UDRP and URS.

I'm not sure if it'll have general application to consideration by either subsequent rounds or the – I guess for subsequent rounds the fact that there have been no reported instances of abuse is a fact that can be noted for the RPM UDRP review. They can take that into account and whatever our recommendation winds up being in their work. But I think it'd be premature to predict how they might react since I'm not sure what our final recommendations will be.

James Bladel: Thanks Phil. Next up is Donna.

Donna Austin:	Thanks, James. So just in response to Volker's question about whether there's been any instances of IGO or INGOs having problems with the new gTLD round, so, Volker one of the reasons that probably is not the case is because IGO INGO names are currently reserved at the second level for all new gTLDs, including acronyms, so that may be one of the reasons why there hasn't been a problem yet.
James Bladel:	Thanks, Donna. Any other questions from the table, in the room or on the phone? I'm reading something out from Paul here. Paul, did you want to read your question or – no, just a chat comment, okay. All right so just to sum up, excellent report, thank you, Phil. It's good to hear that we've now received the findings from the legal advisor and expecting a delivery of a final report prior to the next meeting which is now targeted for Helsinki.
Phil Corwin:	Yeah, I'm very hopeful we'll meet that schedule. I'm not 100% promising because we've hit some, you know, we didn't expect the six-month delay or even longer on this issue. But I don't foresee any more delays of that length, I think it's just consider the report having an internal debate and reaching a consensus conclusion.
James Bladel:	It's too late to go soft now, Phil, you've given us a date, you're on the record. No, we'll look for it – we'll target that hopefully for the summer but understanding that there are always delays in these types of activities.
Phil Corwin:	That's right, that's our entire bottom up consensus policy process is built with the recognition of unexpected delays.
James Bladel:	Yeah, it's part of our culture. Okay thank you, Phil. If there are no other questions then we can start to move this session to a close and bring up the next topic. Okay thank you. Staff, if you could stop the recording and let me know when we're ready to go we'll get Rudi settled here at the table. There's a spot up here as well, Rudi, wherever you'd like. Okay, I got a green light from staff.

Okay, thanks. Thumbs up. Okay thank you. We'll move on down to our next session which is an update from the Standing Committee for Improvements. And this is going to be led by Rudi. And you have two main issues I believe that you're going to provide an update on so take it away.

Rudi Vansnick: Thank you, James. Rudi Vansnick for the transcript. Yeah, well the Standing Committee got two requests from the GNSO Council to consider. And in order to move forward with the work we have to accomplish we have been splitting up the work in two subteams, each team taking care of one of the two requests we got. And it worked well. We are making quite a lot of progress.

Next slide please. So the first request we got is practice relating to the amendments and motions. And the issues that were identified in the GNSO Council request are whether every motion must be seconded prior to discussion and/or vote. The second issue is whether the seconder should be a councilor from a different stakeholder group or constituency. The third one is the deadline for motions to be seconded. And the last one is the deadline for submitting amendments to the motions.

And the next steps that we have identified now is we had these discussions in the team. And actually we are close to agreeing on the definitions coming out of the discussions of the team and bringing this to the SCI, the committee itself, to consider. And (unintelligible) the revisions to the GNSO Operating Procedures.

Put the revisions out for public comment once we have got a green light from the SCI, we agreed on it. And then submit the recommendations to the GNSO Council. That will be the last stage of that request. So that's for the amendments and the motions.

The second – next slide please – the next request we had is a bit more complex. It's all about the chair and vice chair elections. And as we know that,

well it's something we need to have some clear visions on how to proceed in the future if the same case is going to happen.

The issues that were identified coming from the request are the eligibility for the new incoming councilors for elections. The second item that is on the table for discussion is the gap when the vice chairs' terms end at the same time as that of the chair and no chair is conclusively elected.

Third one is the matter for posting election results and finally whether to specify a timetable or a modality for setting one for the GNSO chair election in the Operating Procedures. This is handled by Subteam B. And I'm quite happy that we have Wolf-Ulrich as a councilor having experience with what's happened in the past. And helping us in defining the way forward.

This subteam is actually close to having a final report to the SCI. It will take place in the coming weeks. There's still some discussions going on. And once they have finalized their work and have done the report to the SCI we will then go into the next steps and determine the revisions of the GNSO Operating Procedures, and put also the revisions out for public comment. Once that's done, we will submit our recommendations to the GNSO Council. So I think that's where we are for the second request.

And I think I can end my report here and open for any questions.

James Bladel: Thank you, Rudi. Just a question, if we could go back to the slide that had the actual data on it. Thanks. So do you have any timeframe you said in the next couple of weeks, do you have any timeframe when either of these issues will be ready for review by Council?

Rudi Vansnick: Well the – for this specific request chair or vice chair elections actually I think that in two weeks from now there will be again a call for a meeting of that subteam, they will try to finalize the open questions as we have. And I hope that at the conclusion of that meeting we will have a final report to the SCI. And the next SCI meeting we'll then proceed to see if we can have agreements on

the proposals and then move forward. So timeline for bringing it to the Council I don't know if we have one yet but it will not probably be for the next month, will probably be a month later.

James Bladel: Thank you. Questions from the room or questions remote? Amr. I'm sorry I can't pronounce your name properly.

Amr Elsadr: That's okay James. Thanks. This is Amr/Amr. Yeah, I just wanted to confirm what Rudi has already said in terms of the timeline. The work being done here is still at a subteam of the SCI level. And as you all know the SCI operates on providing recommendations using full consensus so we have to have full consensus of the entire committee so once the subteams are done with their work then the full committee has to review, discuss and achieve full consensus before going out for a public comment period.

So as Rudi did confirm, I wouldn't expect anything before Council on this for at least two months.

James Bladel: Thank you, Amr. Did I get it?

Amr Elsadr: You got to roll the R at the end.

James Bladel: Okay.

Amr Elsadr: Amr.

James Bladel: Sorry. I'll practice on that. And I thank you for your patience. So thanks for that update. I think that the chief question I would have, and well I'll go around the room first, I guess I don't want to – Wolf-Ulrich.

Wolf-Ulrich Knoben: Thanks, James. Just to add on that, you know, to make it clear what is in question still, it's number 2 and number 4 of these issues. That means the question about the – how the vice chairs' terms is going to be handled. There

are some options. This is not really critical come up in the next meeting with a proposal I think so on that we discussed that.

The other question is with regard to the timeline because this is to be brought back to the various stakeholder groups because it impacts, you know, the actions within the stakeholder groups and that may take some more time so depending on their timeline. Thank you.

James Bladel: Thank you, Wolf-Ulrich. Other questions? My question regarding the timeline is since we had an inadvertent test or stress test of some of our election procedures last time around is whether or not these new changes will be in place for the next anticipated elections or is that too soon?

Rudi Vansnick: Rudi for the transcript. Well I think that we will get in time for the next elections. As far as we had our meeting this morning and as Wolf-Ulrich was mentioning it's only on 2 and 4 that we still need some clarification and finalize the process. And I think that there is quite a good agreement in the SCI about the process. So I think that we can bring this to conclusion before the next elections will happen. But, Wolf-Ulrich, you can…

Wolf-Ulrich Knoben: Just to let you know so the timeline has – it's a phase of – around 100 days before the election takes place starting from the first announcement of a timeline – election timeline and then including nomination periods within the various houses, constituencies, and so on, nomination periods within the NomComm because affecting the NomComm appointees and these are the 100 days before that meeting starting in June or so this year. So I think it should be ready by the next meeting, the next ICANN meeting. Thanks.

James Bladel: Okay, excellent. Thank you. Any other comments or questions from councilors at the table or on the phone or participants in the room? And for those in the chairs please join the conversation. This is not just a Council only conversation, if you have questions or comments particularly if you're participating on any of these groups. Okay thank you, Rudi. Appreciate that update. And we look forward to those reports in the coming weeks from the SCI.

Staff, if you could pause the recording. And we'll get set up for our next session.