IGO-INGO Curative Rights Protection Mechanisms PDP Working Group

Section 3.7 Appeal, Reply to Co-Chairs, February 12, 2018

By: George Kirikos

A. INTRODUCTION

In December 2017, I initiated an appeal of the actions of the Co-Chairs of the IGO-INGO Curative Rights Protection Mechanisms PDP Working Group, as permitted by Section 3.7 of the GNSO Working Group Guidelines ("WGG")[1].

This document is a reply to the January 16, 2018 response[2] from the Co-Chairs, which responded to my first appeal document dated January 11, 2018[3]. Conference calls were held on January 11, 2018 and January 18, 2018 to attempt to resolve all issues directly with the Co-Chairs. Ultimately, those settlement discussions proved unsuccessful. Out of an abundance of caution, this document also addresses communications subsequent to the January 18, 2018 conference call.

I repeat and reiterate all points made in the January 11, 2018 document, whose arguments remain valid. The remedies sought then continue to be sought now, namely:

(a) Proposed use of second anonymous poll by Co-Chairs shall be disallowed, as it is inconsistent with the WGG;

(b) Past use of first anonymous poll by Co-Chairs shall be declared null and void, as it was inconsistent with the WGG; and

(c) The GNSO shall appoint a completely neutral and independent Chair as allowed for under Section 6.1.3 of the WGG. In the alternative, that the GNSO use a professional facilitator to help ensure neutrality and promote consensus as allowed for under Section 6.1.3.

This reply addresses any new issues or points the Co-Chairs have raised in their response and subsequent communications. Since the Co-Chairs have not numbered their paragraphs or sections of their document, this reply follows the general order of their response.

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1 See: https://gnso.icann.org/en/council/annex-1-gnso-wg-guidelines-01sep16-en.pdf
2 See: http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-January/001057.html
3 See: http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-January/001035.html

B. DISCRETIONARY AUTHORITY TO CONDUCT THE PROPOSED POLL

1. On page 2 of their response, the Co-Chairs quote Section 3.6 of the WGG, but then claim:

> "While the co-chairs believe that all issues relating to our final report have been thoroughly raised, understood and discussed, the co-chairs believe they are not in a position to perform their responsibility under point i absent a poll for several reasons."

The Co-Chairs appear to misunderstand the guidelines. If in fact "all issues have been thoroughly raised, understood and discussed," as per Section 3.6 of the WGG, then they *would be* in the position to "make an evaluation of the (consensus level) designation" which would then be published for the group to review. Instead, they are not prepared to make that designation because the emerging consensus conflicts with their preferred alternative, and they wish to deviate from the WGG to attempt to add supporters to their preferred option via a poll (anonymous or non-anonymous), rather than through discussion. They would replace "discussion" with polling, with all the dangers inherent in that which have been previously discussed.

2. If they sincerely want to get input from additional members of the working group, those members can be encouraged to engage in the discussions, via email or via the weekly conference calls, just like everyone else, as per the WGG. Doodle polls can be used to schedule a new meeting time to facilitate greater participation by those unable to attend the current time slot. Failing that, they should respect the consensus that has been established by those who've chosen to engage in the discussions.

3. Polling, as per the WGG, is only at best a last resort, if and only if there is *disagreement* about the level of the consensus designation, only after it has iterated through the Section 3.6 process several times. The Co-Chairs instead want to use polling incorrectly in order to establish the *initial designation*. The Co-Chairs fail to recognize that if those silent members disagreed with the initial designation (set without use of a poll), they already have ample opportunity under Section 3.6 of the WGG to voice their disagreement with the initial designation.

4. The circumstances the Co-Chairs describe are not the type of "rare case" ever contemplated by the WGG, and are an attempt to misapply alleged discretion, to game the outcome of the PDP. As noted in the January 11, 2018 document (section 14), options consistent with the WGG include greater outreach and/or a second Public Comment period.

5. The Co-Chairs also claim that opposition is focused only on the proposed anonymity of the poll. That is not correct, as per section 11 of the January 11, 2018 document.

6. The Co-Chairs do not even address (and presumably concede) section 16 of the January 11, 2018 document, noting that they only want to have a poll regarding a single recommendation, rather than all of the recommendations, which exposes the weaknesses of their arguments. If their arguments were true, they'd need a poll for every recommendation. But, their arguments are not true, that's why they

sought a poll only for the recommendation where the emerging consensus differs from their preferred outcome, where they hope a deviation from the standard WGG processes can change the natural policy outcome.

7. Buried in a footnote (footnote 2 at the bottom of page 3 of the January 16, 2018 response), the Co-Chairs attempt to blame a "jet lagged and sleep deprived co-chair" for admitting that the first poll was a "vote" (which would be in violation of the WGG). That's a very weak excuse, given that the quote (section 17 of the January 11, 2018 document) shows the term was used multiple times. Indeed, if there was jet lag or sleep deprivation, it would cause a person to be more truthful, as their defenses would be down. It is during these *unguarded* moments that the true intentions of the Co-Chairs are revealed, rather than in overly polished, edited, and reviewed documents.

C. TRANSPARENCY

8. The entire argument on page 3 by the Co-Chairs is incorrect, as per section 9 of the January 11, 2018 document. Any "opt-out" only takes place *after* the consensus has been established via the fully transparent procedures, and is completely unrelated to polling (i.e. it's related to potential retaliation by oppressive governments in rare circumstances, which are not present in this PDP's work).

D. RATIONALE FOR ANONYMITY

9. As per section 8 above, the Co-Chairs misconstrue the WGG, attempting to misapply post-consensus "opt-out" in rare circumstances as the justification for pre-consensus anonymity.

10. The Co-Chairs attempt to justify anonymity as a response to alleged "capture", as per their December 21, 2017 letter[4] to the GNSO Council seeking guidance. This was fully addressed in sections 14 and 15 of the January 11, 2018 document. Indeed, anonymity *increases* the risk that capture would take place, by obscuring it and thus making it harder to detect. The Co-Chairs don't even attempt to name the alleged "six most active members" that they claim have captured this PDP, consistent with their overall lack of evidence and diligence in their response (contrast the 2 footnotes in the January 16, 2018 document prepared by the Co-Chairs with the 28 supporting footnotes diligently prepared for the January 11, 2018 document). The true capture risk is that of *procedural capture* by the Co-Chairs themselves in misusing alleged discretion in working group processes.

11. The Co-Chairs then resort to an unfair personal attack on myself, the author of the appeal, in a further attempt to justify their desire for anonymous participation. It is noteworthy that they did not use this as a reason for the first anonymous poll, or as a reason **prior** to their attempt at the second anonymous poll. This is a desperate and last minute attempt to manufacture a brand new reason to *ex post* justify anonymity that they had already desired. That new reasoning is entirely without merit. Sections 2.2.1, 3.4 and 3.5 of the WGG have specific procedures in place in the event any behaviour *actually* breached the WGG and/or Expected Standards of Behavior. The fact that I've not been given a

4 See: https://mm.icann.org/pipermail/council/2017-December/020781.html

formal warning, private or public (see Section 3.5 of the WGG), by the Co-Chairs in this or any other working group speaks for how weak and unjustified this brand new reason is, and how they're desperately scrambling to justify anonymous participation regardless of the ICANN principles of transparency and accountability. Their weak reasoning, taken to its logical conclusion, implies that each and every PDP I'm involved with (and even those I'm not involved with, but decide to comment on publicly!) should have anonymous input/polling, lest folks have their positions be criticized and scrutinized (an important accountability mechanism). Indeed, Mr. Graham Schreiber, an individual who has expressed concerns regarding CentralNic, continues to criticize members of the RPM PDP on social media (*LandcruiseLtd* account on Twitter) despite no longer being a member of that PDP. There has not been any call for anonymous participation in the RPM PDP, nor could such a change be credibly put forward. There are also defamation laws in place to hold accountable those who damage another person's reputation based on false statements. I'm sure most folks are aware of why free speech exists, and I need not waste people's time repeating the standard reasons.

12. The Co-Chairs' specific examples cited as evidence of foul play are without merit and not worth responding to in detail, and can certainly be justified if required in a longer response in a proper venue. Allegations/accusations are not proof of "guilt." Briefly, the circumstances of the first conference call on January 11, 2018 are public and archived[5] for all to see and decide for themselves. As for the tweet[6] of December 19, 2017, I will note that the Co-Chairs quoted a mere fragment of an entire thread of tweets (the hyperlink shows it's a thread), in which the very first tweet stated:

> "An #ICANN PDP is completely ignoring requirements of #transparency, using anonymous polls to guide important decisions. Very wrong, in my view. See: http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-December/001005.html and http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-December/001002.html… or the **entire mailing list archive**." [quote edited slightly to expand hyperlinks, which get truncated on Twitter; emphasis added]

which importantly encouraged people to read the entire mailing list for the ***context*** of statements in the thread. As for the tweet they claim is "misleading and inaccurate", I fully stand by it as true and/or fair comment/opinion. Without going into too much detail on the policy options of the PDP (one can review the working group mailing list to "catch up" on that discussion), the Co-Chairs misstate the implications of the various policy recommendations under consideration. In particular, the working group discovered what can be described as a "bug" or an "edge case" in the existing UDRP whereby a domain name registrant that lost a UDRP but sought judicial review via the courts might have that judicial review dismissed if an IGO (complainant in the UDRP) successfully asserted immunity before the courts. Thus, under the *status quo*, if this PDP accomplished nothing to correct that "bug" (or if that issue wasn't sent to the RPM PDP to address), domain name registrants are at risk of not having their disputes be decided on the merits in courts. The "merits" constitute the actual underlying legal dispute (i.e. whether there was actual trademark infringement, cybersquatting, etc.), whereas any dismissal due

5 See: https://community.icann.org/display/gnsoicrpmpdp/2018-01-11+Discussion+Call
6 See: https://twitter.com/GeorgeKirikos/status/943266050837114880

to IGO immunity prevents that dispute from being heard on its merits (it's dismissed on a "technicality", instead of being decided on the merits). Thus, the tweet that is "concerning" to the Co-Chairs is actually an entirely fair representation of the situation, because the Co-Chairs' preferred policy option is to **preserve the "bug"** (but add an additional arbitration step, outside the courts) instead of **eliminating the "bug"**. It is entirely clear that registrants would be deprived of full due process to have the dispute decided on the merits **via the courts**, if the Co-Chairs' preferred policy option was adopted, or indeed if nothing at all was done (maintenance of the status quo), instead of eliminating the "bug" by actually solving the policy problem correctly – arbitration **outside the courts** is simply not equivalent to full due process via the courts.

13. I'm a very experienced ICANN participant and certainly know where to draw the line at criticism. I have never stepped over the line. Indeed, that criticism has been effective. To give one example (I can provide others), I openly criticized Vint Cerf, the former Chairman of ICANN, in a 2006 blog post[7] at CircleID regarding the policy implications of removing price controls from a proposed .biz/info/org contract renewal, which would have permitted tiered/differential domain pricing. Given Dr. Cerf's continued position at Google, he appears to have survived that fair criticism without the repercussions feared by the Co-Chairs. Of course, my concerns led to an immediate and huge public outcry with thousands of comments that compelled ICANN to rewrite those draft contracts. The Co-Chairs certainly must know my history of not stepping over the line, and being an effective critic of misplaced policies. Their feeble attempts now to mischaracterize my good faith participation should be ignored.

14. We need only look at the writings of one of the Co-Chairs, Phil Corwin, to see that he too fully exercises his rights to free speech (yet would attempt to censor or find issue with my attempts to do the same). In a 2011 blog post[8] at CircleID titled "ICANN and Ethics", he openly gave or repeated examples written by others of conduct and the "revolving door" criticism that might seem unflattering or have negative impacts for the individuals involved, and ICANN in general, in a good faith attempt to improve processes. In another blog post in 2014[9] he criticized ICANN staff for attempting to:

> "impose their own proposal for the process that will determine what overall new ICANN accountability measures should accompany the proposed IANA functions transition"

15. Mr. Corwin has been critical of ICANN, claiming "ICANN is MIA on .XYZ" in a 2014 blog post[10] on CircleID., where he rightly stated (ironic, in light of his unproven claims about me) that:

> "allegations are not proof of guilt"

In a scathing article[11] in early 2017 titled "ICA Files .Mobi Comment that ICANN will Ignore" back when Mr. Corwin was involved with that organization, not only was there the headline criticism that

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7 See: http://www.circleid.com/posts/icann_tiered_pricing_tld_biz_info_org_domain/
8 See: http://www.circleid.com/posts/icann_and_ethics/
9 See: http://www.circleid.com/posts/20141110_accountability_group_charter_sets_the_bar_too_low/
10 See: http://www.circleid.com/posts/20140612_icann_is_mia_on_xyz/
11 See: https://www.internetcommerce.org/ica-files-mobi-comment-that-icann-will-ignore/

their comment would be ignored, but the ICA stated that:

> "So why does ICA keep beating its head against the ICANN wall in decrying this **seamy** GDD practice? Because it's the right thing to do on behalf of our members, and because **ICANN needs to be called out every time GDD staff improperly use their superior leverage to push policy decisions through contract negotiations and usurp the role of the community**." (emphasis added)

which is ironic, given that this is exactly what this appeal is all about, namely calling out the Co-Chairs for improperly using their "superior leverage to push policy decisions" without following the WGG. The word "seamy" also has a very unflattering definition. Arguing about:

> "the unseemly appearance that the registry was bribed to adopt the URS"

and that

> "ICANN is seemingly incapable of embarrassment"

is not complimentary language. Certainly the ICA's ability to make such highly provocative statements has not been used to attempt to portray their participation in ICANN in the manner that the Co-Chairs have done with my own statements.

E. ROLE OF THE CHAIRS

16. In this section (on page 6), the Co-Chairs attempt in broad terms to respond to the issues I raised in section 18 of the January 11, 2018 document, regarding their non-neutral September 27, 2017 document and subsequent posts on the mailing list. They fail miserably. That document and their conduct is indefensible, and is inconsistent with the neutrality required of Co-Chairs.

17. While the Co-Chairs have not responded to all of the points raised in the January 11, 2018 document, one startling omission is the lack of any response to section 19, where one of the Co-Chairs clearly talks about their proposal as being a "new protection for registrants, not IGOs", and thus inconsistent with this PDP's charter. This highlights the need for new leadership of this PDP, to ensure that the PDP recommendations do not violate the charter.

F. JANUARY 18, 2018 CALL AND SUBSEQUENT EMAILS

18. One of the outcomes of the January 11, 2018 call between myself and the Co-Chairs was that they would be permitted a single written response to the January 11, 2018 document (which they delivered on January 16, 2018), and that I would be permitted a further reply (this document), which would be delivered only after our January 18, 2018 call, if need be (i.e. if there was not a full resolution). There was no agreement that any further documents would be delivered or considered (otherwise it would lead to an unending series of replies, responses, further replies, etc. as each side sought "the last word").

19. Despite this, on February 3, 2018[12] the Co-Chairs requested that even more documents be sent to the GNSO Council Chair by ICANN staff, making incorrect claims such as:

> "the issue of an anonymous poll is no longer in dispute, and that the appeal is now confined to an objection to the co-chairs' exercise of their discretion to utilize a public and transparent poll"

While such further submissions were not agreed to, it appears[13] that ICANN staff has disregarded the January 11, 2018 agreement on documents, and delivered these further submissions to the GNSO Council Chair. As I noted[14] on the IGO PDP mailing list, those further submissions should be disregarded for that reason alone, namely that they went beyond the submissions that had been agreed to on January 11, 2018. If the GNSO Council Chair (or her designated representative) accepts this argument and disregards those submissions, then the further arguments below are not necessary. (I sought a clarification from the GNSO Council Chair on February 5, 2018 in a private email as to which documents I needed to respond to, but no such clarification was provided as of the time of this document's creation, which needed to be prepared in advance of the February 12, 2018 deadline for documents for the upcoming GNSO Council meeting, where this appeal might be considered.)

20. If instead the GNSO Council Chair (or her designated representative) does consider the additional documents submitted by the Co-Chairs, my brief reply to those documents follows below.

21. The Co-Chairs wrongly assert (as per the quote in point 19 above) that the nature of this appeal has changed, due to their rejected offers to settle this matter. Such an incorrect statement is surprising, given their background as lawyers. They should certainly be aware that failed settlement negotiations have no impact whatsoever on disputes. This appeal has not been extinguished or changed in any manner.

22. The January 11, 2018 document sought three specific remedies, including appointment of a new Chair. That (third remedy) still stands, for their past violations of the WGG. Also, the first anonymous poll violated the WGG's transparency requirements (the second remedy). As for the first remedy, regarding the use of a second anonymous poll, that too is an open question (see below).

23. In particular, there's a changing narrative by the Co-Chairs regarding the polling. In their January 31, 2018 proposal[15], the third paragraph seems to tie the removal of the anonymous poll to acceptance of censorship of members on social media. That's obviously not something that has ever been agreed to, or would even be an appropriate topic of conversation. That third paragraph is also just a solicitation of feedback/input as to whether transparent polls would be acceptable, and not a permanent unequivocal and unconditional withdrawal of their past plan. It says nothing about their first poll, either. On page 2 of their January 31, 2018 proposal, it's similarly unclear, and not an unequivocal and

12 See: http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-February/001084.html
13 See: http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-February/001085.html
14 See: http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-February/001086.html
15 See: http://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-February/001079.html

unconditional withdrawal of their past plan.

24. Even if there was an unequivocal and unconditional withdrawal of their past plan, my January 11, 2018 appeal document had other objections to even the use of fully transparent polls. For example, section 17 (misuse as votes). Section 16 attacked the justification for a poll (transparent or non-transparent) by the Co-Chairs. Section 15 too remains relevant, regardless of whether a poll is anonymous or not. Section 14 on capture is still relevant, regardless of the type of poll (transparent or non-transparent). Most importantly, section 11 remains highly relevant, as it talks about the correct timing for polls, and even their latest (rejected) settlement offer violates that guideline. They would hold the poll *prior* to the "several iterations", rather than *after* there is some ongoing dispute as to the correct designation. There are also obvious questions regarding who would construct any poll, to avoid manipulation of the outcome.

25. I am personally very disappointed that the good faith effort to resolve this matter on January 18, 2018, via the proposed use of a facilitator (which would have limited the future procedural roles of the Co-Chairs) was unsuccessful. It appeared at first to have been a successful compromise, causing this appeal to be suspended. Yet, thirteen days later (an inexplicable long delay), the Co-Chairs fell back into their pattern of attempting to manipulate the process going forward, requiring continuation of this appeal.

26. Lastly, to the extent that the Co-Chairs have deviated from agreements made during the January 11, 2018 and January 18, 2018 calls, in attempts to manipulate procedures to their advantage, this further reinforces the need for the appointment of a completely neutral and independent Chair (the third remedy sought in the January 11, 2018 document) to replace the existing ones.

G. CONCLUSION

27. In light of the above, it is respectfully requested that the three specific remedies sought in the January 11, 2018 document be provided in an expeditious manner, so that the work of this PDP can be concluded according to the WGG and ICANN/GNSO principles of transparency and accountability.