

ICANN Transcription
IGO-INGO Curative Rights Protection Mechanism PDP WG
Thursday, 22 September 2016 at 16:00 UTC

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<https://community.icann.org/x/pwS4Aw>

Audio is also available at:

<http://audio.icann.org/gnso/gnso-igo-ingo-crp-access-22sep16-en.mp3>

Coordinator: The recordings have started. You may begin.

Michelle DeSmyter: Great. Thank you. Good morning, good afternoon and good evening.
Welcome to the IGO INGO Curative Rights Protection Mechanism PDP Working Group call on the 22nd of September at 1600 UTC.

On the call today we do have Petter Rindforth, George Kirikos, Osvaldo Novoa, Philip Corwin, Paul Tattersfield, David Maher and Jay Chapman. We have apologies noted from Mason Cole. From staff we have Steve Chan, Dennis Chang, and myself, Michelle DeSmyter.

I would like to remind you all to please state your name before speaking for transcription purposes. And I'll turn the call back over to Philip Corwin.

Phil Corwin: Thank you. And good morning, afternoon and evening to our participants.
Let's wait for the screen to come up. Anybody have any changes to their

statements of interest? Okay, so we're going to continue to wade through the Draft Section 6 of the working group report. Could staff remind me where we left off last time?

Steve Chan: Sure. Thanks, Phil. This is Steve Chan from staff. And so I believe what we intended to do this week was to continue discussions on Recommendations 4, 5 and 6. Actually I can walk you through some of the updates that we made for this document that's being displayed now?

Phil Corwin: Okay.

((Crosstalk))

Steve Chan: I'll go ahead and sync it right now for a second. So what is in there now is a new section that's in brackets here that tries to explain some of the background on Options 1 and 2. In my agenda email I noted that it's not necessarily in a pluses and minuses format at the moment, it's sort of factors that need to be considered – should be considered. I guess in my head I was thinking that whether it's a plus or a minus might depend on your perspective so just was hoping to lay out the arguments that I've heard.

It's not conclusive at the moment; it's presented as an option to consider how to present the information. So that is how it's displayed here right now. Actually it wasn't synced. Sorry, it's synced now. So this section right here under Recommendation 4 is what I was discussing.

The other thing that I believe was agreed to last week was to start incorporating some of the GAC history for Recommendations 5 and 6. Let me find it. It's right here. The text has not been inserted but staff did look at some of the research or I guess some of the GAC advice. The specific GAC advice are now listed here. But we still need to turn this into text. Apologies for sort of an incomplete draft here. Mary was on vacation and then on a conference

and then admittedly I'm still actually trying to get – well let's just say I feel like I missed a month of work and I'm still trying to catch up on that so.

Phil Corwin: That's because you did miss a month of work, Steve, for medical reasons. And it's fine, you know, it is a work in progress, and it's been updated from last week and it'll continue to evolve.

Steve Chan: So that's all I had to say about that. Back to you, Phil. Thanks.

Phil Corwin: Okay. So then let me scroll back. So we should be starting with Recommendation 4, which is on Page 6. And let's just start from it. That's the one where we recommend that, A, no change be made to the mutual jurisdiction clause of the UDRP and URS; and, 2, that IGOs be notified – it's not clear how – who's going to notify them. Maybe we should be more explicit about that, that we have ability to elect to have a complaint filed under the UDRP or URS on their behalf by an assignee, agent or license.

There's a comment from Steve that he doesn't see an explanation of how we reached that conclusion. I think that might be have been while you were out, Steve. But we can certainly fill in – put a sentence of explanation based on that. I forget if we found – I believe we found some precedence for that.

Then there's new language, In presenting Options 1 and 2, the working group acknowledges that it has yet to uncover a perfect solution. This is all new language from you, Steve? Is that correct?

Steve Chan: I didn't actually change any of the text in the Recommendation – sorry, this is Steve from staff. I made no changes in the actual recommendation. The text below...

Phil Corwin: No, I'm talking about this new language that starts, In presenting Options 1 and 2 above. Are you the author or is someone else the author?

Steve Chan: Apologies. Yes, that was my text I added as a – to get the conversation started.

Phil Corwin: Okay. Okay. Well let's – all right so let's read through all this new red text and I'll make some comment on it then we can open it up for comment – further comment from the working group members. Okay.

In presenting Options 1 and 2 above, the working group acknowledges that it has yet to uncover a perfect solution. By the way, I have yet to see a perfect solution in the policy area so that's not exactly unusual.

As such, the working group has identified a number of different factors to consider when examining the two options. Accordingly, the working group would like to solicit input from the community to aid in developing its final recommendations.

“For context, the working group anticipates that the circumstances under which this scenario would occur,” I think saying this scenario we ought to be a little more descriptive there. But or more explicit. But then, dash, “where an IGO files a complaint under the UDRP or URS, the IGO succeeds in the dispute resolution process, and the losing respondent then seeks out – seeks relief against the UDRP or URS decision – will be extremely rare.”

I might suggestion saying rare rather than extremely rare. I don't – it's – turn out to be extremely rare but I don't think we should go that far out on a limb.

Option 1, By vitiating the decision against, okay and this is about Option 1 and 2. By vitiating the decision against the registrant in a UDRP or URS in the circumstance where an IGO has successfully claimed jurisdictional immunity, would we avoid creating a situation that would not otherwise arise in the absence of the UDRP? I think that one needs some tightening. It's a little amorphous as to what we're talking about.

By vitiating the decision against the registrant in a UDRP or URS in the circumstance where an IGO has successfully claimed jurisdictional immunity, would we encourage the losing registrant to seek relief in the courts, leaving the IGO with minimal choices, either waive jurisdictional immunity or seek jurisdictional immunity and thereby have the decision vitiated? Is the registrant provided adequate paths for recourse? Other?

Option 2, would an IGO be deemed, so just referring back for everyone's clarification and for the record, Option 1 is that if there's an appeal to court of mutual jurisdiction the decision rendered against the registrant will be vitiated. And that's where the IGO succeeds in asserting its claim of jurisdictional immunity. Or, 2, the decision rendered – Option 2, may be brought before some, as of now, unnamed arbitration group. So those are the two options. Either go back to the status quo ante as if the UDRP or URS had never taken place; or provide an alternate means of appeal.

Would an IGO be deemed to have already waived immunity by utilizing the UDRP or URS and accordingly submitting to the mutual jurisdiction clause? Well, you know, on that one I'm going to comment right now with they brought the action through an agent, licensee or other third parties they clearly were trying to protect their immunity so this may need further parsing.

Two, is the provision of a de novo review similar equivalent in the scope of relief it would offer registrant that sought relief via the courts? I'm not sure that's the right question because the court review is de novo. The court is not required and the courts do not generally look at, certainly not in the US, they don't really care what happened to the UDRP. They're looking at the situation fresh under the statutory provisions, parts of which may differ from the UDRP standards.

So, okay, the working group has not achieved full consensus for either option. I don't think we're at the point where we're ready to say that. We may get full consensus before this drafting process is over. In fact, it would be my hope

that we get a good consensus for this, though we've reached rough consensus in support of Option 1. I think we should put any statement about what consensus we've reached and where it is until we put it on hold until we finish our discussion.

I think I've said enough and I open discussion to the working group participants in regard to this additional language which simultaneously tries to explain how we got to offering up these two options and what we're seeking – what more specifically what kind of feedback we're seeking from the community. So I see Petter's hand up so I welcome comments from my co-chair.

Petter Rindforth: Thanks. Petter here. As we are in fact setting up recommendations and although this Recommendations Number 4 has two possible options, I would rather, and I have to admit that I don't have a clear reply to what I'm asking for, but I would rather see some kind of plus or minus on the two options rather than a lot of questions. Because it's – I got the impression that it leaves it a little bit too much open and it's – it doesn't give any indication on what we have concluded as a working group. Just throwing out a number of questions under each option.

I'd rather see – but I think some of the questions we can actually rephrase as more of a conclusions that Option Number 1 has this – it could solve the problem in this and this and this way. But there are also questions or some limits of the use in this and this way. And Option 2 has this plus and minus. And then it's up to each reader to make conclusions and come in with some more plus or minus and support for either Option 1 or 2. Thanks.

Phil Corwin: Yes, thank you, Petter. So I guess you want a little more assertive language, rather than just asking questions?

Petter Rindforth: Yes, I mean, people reading – sorry, Petter here again. People reading this would like to also see why we had come up with two options and what we as

a working group think about it rather than just at this stage still throwing out a number of questions to the readers. And I'm fairly sure that we have – we can rather easy set up a list of plus and minus for both options.

Phil Corwin: Okay, yes, I like that approach more and then invite comment from the community. I think the community can figure out what they want to say and commenting but I think laying out the pluses and minuses of each option is probably a better way to go. I want to comment in the absence of any hands being raised, comment on a couple of things in the chat room.

George had said that “Options 1 and 2 wouldn't come into play if the IGO brought the action indirectly through an agent, licensee, et cetera.” Possibly, George, although I remember there was a provision and passage in Professor Swaine's memo where he indicated that in some countries they wouldn't recognize an action brought by an agent rather than a party directly. We can't control every national jurisdiction how their courts – what their courts require for bringing an action.

Yes, Mary states “As initial report indicating open questions can be helpful.” I agree, Mary, I think but I also agree with Petter that it'd be more helpful to frame – to tee up those questions by first setting out, as Petter suggested, pluses and minuses of each approach. And we're going to have to try to seek more of a consensus on which one we favor if we can reach a consensus before we issue this.

Okay, so Petter, is that a new hand?

Petter Rindforth: Yes, that's a new hand. Just a quick reply. I think that we can get a mix of what Mary and I said. I still think that it's good to come up with some conclusions under each option what we think is plus and minus. But these could, especially the minus, could also be phrased as a question like but would that solve a problem with, etcetera, etcetera. So although if we consider further these options, the 1 and 2, and I'll do some thoughts about it

during this week and then come back at the beginning of next week with some suggested rephrasing based on what we have talked about today.

Phil Corwin: Okay. Thank you, Petter. Yes, we can all work on that over the next week. I think I'd like to defer any further discussion on where the group – where the center of gravity is in the group in favoring Option 1 or 2 until we have better language and that sets out those pluses and minuses more explicitly framing up any questions we want the community to specifically address and then we can – I think it'd be better to circle back to that discussion after we have more specific language if that's okay with the group.

So that would bring us down to – after that new language there's a paragraph about that we – we request that ICANN engage an external legal expert and maybe we ought to put in a note of thanks for ICANN to – for helping us find that expert and funding the effort might be nice to put that in there in that paragraph would be – that goes under my general policy of it's never – you can never say thank you too often.

And then the next page launches into a discussion of Professor Swaine's expert opinion. And the excerpt – there's an excerpt from that up front in italics, noting that there's no single universal rule applicable to IGOs' jurisdictional immunity globally. That different jurisdictions apply the law differently. And even within the same jurisdiction different IGOs may be treated differently. Then there's some further parsing on those points. Again, the language from this report.

And then he notes that under the UDRP and URS a complainant compelled to consent to a mutual jurisdiction. And we can't modify any of this language, this is his language, we're just quoting directly from this report. And he explains that.

And then, let's see, how long this section goes. All right, let's do everything up to Letter A on the next page and then I'll make some comments and we can open it up.

Okay, next paragraph. "According to Professor Swaine, under current international law principles as understood generally, there are three types of jurisdictional immunity which an IGO might claim – absolute, restrictive and functional." I'm not going to read every word here. The next sentence explains absolute immunity. Then the next sentence explains the restrictive immunity approach, which is an exception for litigation concerning commercial activities, however with the notable exception of the US relatively few states.

I'd like to add a sentence in there noting that the UDRP and URS concern basically trademark or trademark related disputes and that trademark is usually – trademark disputes are usually viewed as commercial disputes. So just tying the type of dispute we're looking at more closely to that restrictive approach even though it's not used much outside the US.

Last sentence, so could we note that in the action items? Is someone taking notes on all of this – on suggestions? Thanks. Let's have that done.

Finally, under a functional immunity approach, an IGO's immunity with respect to a particular jurisdiction is limited to the functions of the IGO in question. For example, certain jurisdictions may have legislative language which limit the extent of IGO jurisdictional immunity to the privileges and immunities as are reasonably necessary for the fulfilment of their functions. While a functional immunity approach can overlap with a restrictive immunity approach, the distinction may be critical – for instance, a non-infringing use of its domain may be necessary for IGO to carry out its mission regardless..." I'd like that last sentence, and again this is open to discussion, to be a little more open-ended.

I don't think we ever reached a conclusion as to whether domains were necessary for an IGO to carry out its core mission or preventing infringement of their name by another domain was critical. I think it's a bit more open question what the current language indicates. I think overall we need some more fleshing out in this paragraph relating how we viewed the URS and UDRP to this.

Obviously under absolute immunity IGO can't be brought into a court of mutual jurisdiction but that's not the overwhelming view, consensus view, in the world. Then we got this restrictive approach. We need some language – additional language there regarding whether or not copyright disputes are commercial activities, though I think the weight is that they are.

And finally, under functional immunity a little more language on whether or not infringement of identity on the Internet would impede an IGO in carrying out its core mission. Yes, it might allow a scamster to I guess, divert some funds from them or otherwise impinge their reputation, but it's a bit more of an open question I think than what the current language indicates.

And I think, overall, we need one clear sentence here, maybe in the – preceding this paragraph – but right after the excerpt from Professor Swaine indicating that after reviewing – receiving his memo and reviewing the information he conveyed in it that the working group concluded that there was no single approach to IGO immunity under the current state of law.

And therefore it would have been inappropriate for this working group to set a hard and fast rule, which is why we did not really – we decided there was no hard and fast rule indicating that IGOs could not be brought into court for this type of dispute and therefore – and that influenced our decision not to declare the mutual jurisdiction provisions of the UDRP and URS inapplicable to IGOs, which would have compelled us to try to create a new CRP.

I think we need that paragraph that's not there right now to tie this all together at the top level. Let me stop there. I've been talking a lot. Does anyone have any comments on that paragraph and my suggestion that we need some intervening paragraph kind of given a view from 10,000 feet before we go onto the next one? I don't want to be the only one monopolizing the conversation here. I see Mary's hand up. Go ahead, Mary.

Mary Wong: Hi. Hi, Phil. Hi, everybody. This is Mary from staff. So just to add onto what you said, Phil, that obviously we will fill out these paragraphs with the suggestions that have been noted in the notes pod. One thing that we thought we should mention is that there is also going to be a section in this report that talks about the deliberations of the working group.

So as and when Steve and I get the draft out to everybody with a fuller report one thing to think about is whether some of the background material fits here in what we're considering as Section 6 or maybe some of it could also move to the deliberations section.

Phil Corwin: Sure.

Mary Wong: So just a little note for that point.

Phil Corwin: Well, yes, thank you for providing that, Mary. It's good to know. Since we haven't – we're just looking at part of the total overall document it's good to point out there'll be that other section and we can just cross reference those sections rather than repeating them if that's the case once they exist.

Also this something I want to say, I think it's going to be very important giving what I anticipate will be the reaction of WIPO and some other IGOs to our initial report and recommendations, that that deliberations section describe in some detail our review, which was pretty early on, of the previous working group work on this. And, you know, and on those WIPO declarations from

back a decade ago and how we considered them so it's clear that we took all of that into account early on in our work and didn't ignore it.

Okay, no one else has comments so I'm just going to continue then. And again I'm just making comments on the fly here and there – you're welcome to shoot them down or elaborate on them; nothing I say as a co-chair is determinative of our final report, I'm just giving my own thoughts – personal thoughts as I go through this language with you.

Next paragraph, "Professor Swaine also analyzed how, outside the domain name arena, IGOs are generally able to waive their jurisdictional immunity, and he noted that there seems to be two main ways to accomplish this. One, through the governing instrument." And then there's a parenthetical that the exact scope of this can be unclear. I'm not quite clear on what that parenthetical means. I think we might want to make that a bit clearer in describing the lack of clarity.

Or, "2, by way of agreement or pledging," and then there's a beginning parenthetical but not an ending so that's clearly a typographical situation, for which option the case law is not well developed but Professor Swaine has expressed the thought that an IGOs agreeing to mutual jurisdiction under the UDRP or URS could be interpreted as a waiver.

That brings up a question. I don't think this working group has ever taken the position that an IGO, by electing to file a UDRP or URS, which in which it agrees to mutual jurisdiction, has waived its immunity and is barred from asserting it if there's a subsequent appeal from the decision.

Clearly, you know, if it loses – if its complaint is not upheld, the only appeal right it would have would be to – unless we create an arbitration mechanism and I think we, you know, that's back to Option 1 and 2, but I think we're only open to arbitration if a court declares that the IGO can't be there. But I don't think we've ever taken a position that an IGO by filing under the existing

CRPs is barred from asserting immunity in a court of mutual jurisdiction afterwards. I think we should make that – unless people disagree with that position, I think we should make that clear by adding a sentence to this paragraph that I just read. Because I think it's very relevant.

And even if that's in the deliberations, I don't know if it is or not, I think key points like that it's important to just restate them in this narrative.

Going onto the next – I see George has his hand. And I welcome the fact that someone else will be speaking for a minute. Go ahead, George.

George Kirikos: George Kirikos for the transcript. Yes, I think though that when the IGOs do file the UDRP and agree to mutual jurisdiction that they do waive the immunity. That's, you know, one of the main reasons they claim to not want to use the UDRP because that waiver or explicit – something explicit perhaps.

The thing is nothing stops them from trying to assert that claim of immunity if it goes to court, you know, the loser in the UDRP, the domain registrant sues in court. But, you know, the judge might well decide against them based on the fact that they brought the UDRP. So that's what I think Mary's writing in chat to that effect.

Phil Corwin: Okay, let me see what Mary – Mary wrote, "George, as I recall as well that agreeing to mutual jurisdiction and filing equals a waiver from the IGOs perspective." Well that's from their perspective. I'm more interested in stating what our consensus perspective is.

George Kirikos: It would be my...

((Crosstalk))

Phil Corwin: Let me just finish this statement and then you can react, George. I think a more accurate description would be to say that we recognize as working group that IGOs may be reluctant from directly bringing a UDRP or URS and cross referencing the fact that we've now recognized that they can bring it through an agent, licensee, etcetera, if that's a concern. And that this could be viewed as a waiver but the fact is that there's no way that ICANN policy can prevent a IGO from making that assertion of sovereign immunity if there is an appeal by the complainant.

Obviously, if they choose to appeal on their own to a court they're waiving their immunity for that purpose. And that it's up to the court to decide whether, you know, that constituted a waiver and different courts could go different ways on that question. So there's only – I think this sentence should be – should recognize that we recognize their concern. We provided a way around it with the ability to file through a third party, and that there's nothing we can do to bar them from subsequently asserting immunity, and that that's really up to the court at that point.

And I'll stop there and invite further comment from George or others.

George Kirikos: Yes, I agree that we provide the workaround. I think just with – if the workaround didn't exist I think the path would be that, you know, if the IGO were to lose and if the UDRP panel actually got to a decision they would actually, from a registrant's point of view it would actually be optimal to not wait for the decision. It would make more sense to bring the UDRP – sorry, bring the lawsuit challenge immediately rather than waiting for a panel to make the decision. But that's neither here nor there.

If the UDRP went adversely against the registrant, then the registrant would go to court. The IGO would try to assert immunity but then the court might say that, you know, the act of bringing the UDRP with the agreement of the mutual jurisdiction clause constitutes a waiver of that immunity. If that immunity even existed because, you know, depending on the circumstances

they might not even have had immunity. But if they had immunity they would have lost it by the act of filing the UDRP and agreeing to the mutual jurisdiction.

But I agree with you that we've identified the workaround so that the whole problem – the whole concerns on the IGO's part could, you know, could disappear because they could bring it through the agent or the licensee who is a totally separate party and thereby insulate the IGO from a direct attack.

In the case of, you know, the assignee or the licensee or the agent lost – or sorry, won the UDRP and the registrant used in court of course the agent or the licensee themselves, you know, would not be able to assert immunity because they're not the IGO themselves and so it wouldn't be a, you know, a big concern from the IGO's point of view. Of course the licensee would have to consider, you know, whether they want to take on that risk, but usually the most that a court will do is, you know, award legal costs or things like that or, you know, give back the domain name to the registrant.

Phil Corwin: Yes, thank you, George. And, you know, thinking out loud, I'm not sure that we need to note this in the report although it's possible. But there's a certain symmetry in that this working group has recognized the limits of its ability to shape some of these questions and the answers and the fact that ICANN is a private party can only have so much impact on judicial decisions.

Just as we decided we weren't going to deprive – that it wouldn't be appropriate to deprive a registrant of its existing legal right to bring a dispute to court, which it has anyway, we're not going to take a hard and fast position that an IGO, which has brought a UDRP, absolutely directly rather than through an agent, has absolutely given up its right to assert immunity in a subsequent appeal. There's only so much we can do and then for our process, and the parties aren't happy with that process and want to bring it back to the courts that's their right whether it's a registrant asserting its rights

in an appeal or an IGO asserting its immunity. That was a personal statement.

Next paragraph, “In essence, Professor Swaine’s legal conclusion in relation to an IGO’s jurisdictional immunity for purposes of a domain name dispute under the UDRP or URS was that allowing an IGO that prevailed in the UDRP process to avoid its waiver and rest on the UDRP result by invoking immunity, while allowing it to waive that immunity by initiating judicial proceedings if it loses to a domain-name registrant, will likely seem asymmetrical and unfair.”

And again, we might add a sentence there saying that it was, you know, while there’s no perfect solution here, the working group has striven for a – dare I say – fair and balanced resolution.

Next paragraph, “Professor Swaine’s opinion was largely focused on the question of what might happen in the case where an IGO files a complaint under the UDRP or URS and wins at the administrative proceedings phase, in which event a losing respondent would then be able to file a de novo appeal in a national court against that initial determination. In view of this focus, various policy options were identified for addressing the IGOs’ concern over losing the possibility of jurisdictional immunity for this type of proceeding. The working group discussed the following options.”

Okay so that paragraph is just teeing up what follows. Any comments on this or the previous paragraph before we launched into the various options and the discussion thereof? Hearing none and seeing none I will continue to speak.

“A, make a distinction among different types of IGOs.” Bullet, “This option would maintain the existing mutual jurisdiction terms in general, but permit particular IGOs to elect instead to submit to arbitration. An option for such arbitration would be the arbitration rules under the United Nations

Commission for International Trade Law, or some similar, internationally recognized procedure.”

Bullet, “In line with Professor Swaine’s analysis, the most likely IGOs that would be able to elect an arbitration option would be the United Nations and its constituent bodies, WIPO, WTO, WHO.” Okay. So we’re just discussing the options here. I’m just scrolling ahead to see – okay, we do then have to listen and discuss our considerations. So let’s just keep going.

“Rewrite the Mutual Jurisdiction clause under the UDRP and URS, but without prejudging the outcome where an IGO pleads jurisdictional immunity.”
Bullet, “Adopting this option would mean that IGO immunity is not to be assumed in circumstances where the relevant jurisdiction would not be inclined to afford it.” And then there’s a parenthetical about functional restrictive approach. “Essentially, this option would leave the determination of an IGO’s jurisdictional immunity from domain name disputes in any particular jurisdiction to the judgment of that particular national court.”

Bullet, “If this option were to be adopted by the Working Group, Professor Swaine suggested that additional language in the form of an exception could be added to the UDRP and URS as follows.” And then it quotes it.

“In the event the action depends on the adjudication of the rights of an international intergovernmental organization that would, but for this provision, be entitled to immunity from such judicial process according to the law applicable in that jurisdiction,” and then there’s a parenthetical that’s in his language, “The challenge must be submitted instead for determination ((by UNCITRAL in accordance with its rules.”

There’s no close of the parenthetical there. I don’t know if that’s a typo or in the original text.

Continuing on, “The working group also noted that Professor Swaine also highlighted the possibility that any hardship endured by a respondent as a result of submission to an arbitral process should be alleviated, for example, by the IGO’s agreeing to bear a proportion of the costs incurred.”

All right, I’m not going to comment on any of this until we get to the next two paragraphs, which are under the heading, The working group’s consideration of Professor Swaine’s suggestions and the available policy options.

The Working Group spent considerable time reviewing Professor Swaine’s notes and final memo, including in open sessions at the ICANN Public Meetings in Marrakech and Helsinki. It also considered the applicability and scope of the UNCITRAL Arbitral Rules to domain name disputes between IGOs and registrants, and noted that the issue of immunity is likely to arise only in those limited cases where a losing respondent, against an IGO complainant, who would presumably have agreed to the Mutual Jurisdiction clause...

I’m just going to make an editorial comment, it’s not presumably. They would have agreed to it by – when they file the UDRP or URS you’re agreeing to mutual jurisdiction. I think the word presumably doesn’t belong there. I’ll continue. “Files an appeal against the UDRP or URS determination.”

“Ultimately, the working group concluded that, given: 1, the limited instances of a scenario where an IGO would assert immunity against a losing respondent in a national court, having already filed and won a UDRP or URS complaint; 2, the need to preserve a registrant’s right to appeal to a court of competent jurisdiction; and 3, the lack of a single, universally applicable rule in relation to IGO jurisdictional immunity, the most prudent and advisable approach would be to not recommend any changes to the UDRP or URS at this time.”

Yes, I would just off the top of my head, and then let's open a discussion, I would flesh that out a little by noting that we also discussed and determined that even if we had said that in – for all IGOs or for the UN IGOs or whoever, that there is no court option, that the option was to arbitration, we really had no power to compel any national court that would have – that the registrant – the losing registrant had access to from just ignoring that, that ICANN is a private body that such a rule is not – not being adopted by an IGO much less by treaty, and there was really no way to enforce that decision if a court wanted to just ignore it.

And again, I think yes, making clear that because there's a lack of single – of any single universally applicable rule on IGO jurisdictional immunity, the only way to know what immunity an IGO has is to let it go to a court proceeding where the IGO is then free to assert immunity and the court can decide yes, you shouldn't be here and no, you lack immunity for the purpose of this adjudication.

I'm going to stop there and I see George's hand up. And I invite other working group members to join the conversation. But go ahead, George.

George Kirikos: George Kirikos here. Just wanted to point out what I noted in the chat room that Options A and B are just really variations of Option Number 2 that we discussed earlier in the document. So I don't really see them as standalone options, they're more supplementary to Option Number 2. And for the reasons long discussed, you know, on the Option 1 Number 1 side that, you know, IGOs can definitely waive immunity and, you know, since they're the ones bringing the dispute it should be handled in the courts ultimately. That we shouldn't be setting up...

Phil Corwin: Okay.

George Kirikos: ...arbitrary panels to decide these things.

Phil Corwin: Let me just raise a question here unrelated to what you just said, George. Do we need more discussion here about why we didn't go for distinguishing against – between different types of IGOs, particularly the UN and its agencies? I think the UN itself is widely recognized as having immunity for most purposes. There's really no discussion here of why we did not do that. Mary, go ahead.

Mary Wong: Thanks, Phil. And I'm glad you brought it up because as we were starting to write this section and the general report we note that this has come up in several calls, but to be honest, we don't know that there's been extensive discussion. And so it may be something that's worth noting again here and asking the working group if, as you have just done, whether they feel the additional discussion is merited on this point.

Phil Corwin: Right. Yes, I don't recall, did – I can look back, but did Professor Swaine indicate that despite the difference in national courts that there was any general recognition that the UN or its agencies were always entitled to immunity, had absolute immunity? Or do you remember if memo spoke to that at all?

Mary Wong: And having raised the question I'm going to call on Petter and then on George again. Petter.

Petter Rindforth: Hi, it's Petter here. Yes, first of all I don't think we have discussed it at least not more than briefly. But I think our conclusion is rather clear. And I definitely don't want a system where we split up our conclusions and suggestions on – depending on the IGO – the type of IGO, so to speak. We certainly need to reach a conclusion that refers to all IGOs.

And I think that if we can – if we go back to both what we have specifically, from our protocols, I think we can find some arguments from the discussion that we can use. And I said, for – I think each of our recommendations, it must be very clear what we – how we have discussed it and how we have

come to any specific conclusions. So if we go back and find some arguments for not splitting it up, I think that's possible and that's really needed. Thanks.

Phil Corwin: Yes, thanks Petter. And again, unless we look back at the Swaine memo, and I don't remember this, but he indicates that just about every national jurisdiction recognizes the UN much less its agencies, to have absolute immunity. The reason would be the same is that we don't know how a particular national court would treat the UN or its agencies. So we don't have a crystal ball to tell us how they would regard the question of immunity for what's essentially a copyright infringement dispute, which is why we didn't go that route.

I do think that even regardless of that discussion, but back in relation to that Option 2, we're going to need some more discussion of the UNICTRAL rules and our views of them if there were to be an arbitration option once an IGO successfully asserted immunity in a national court. Even if the consensus within this group is not to favor that option, I think we need more similar discussion in the report.

See both Mary and George up. George, would you mind if I just let Mary intervene and then we can get back to you?

George Kirikos: No problem.

Phil Corwin: Okay. Mary, go ahead.

Mary Wong: Thanks, Phil and thanks, George. So just following up on your point, Phil, about the UN and the specialized agencies, although we haven't had a chance to go back and look in the last few minutes at the exact language of Professor Swaine's memo, our recollection is similar to yours. And what we wanted to point out is that we also recollect in the memo I think Professor Swaine pointed out the specific treaties and the approach that would apply to

certainly the UN and potentially also specialized agencies. And that may be something we want to note in our report.

Having said that, we thought we should also note further, and I think this is what the group remembers, so this is more for the record, that nevertheless, in the list of IGOs that was provided by the GAC there was no specific singling out of the UN or any of its agencies on that basis. Thanks.

Phil Corwin: Okay, well with that good comment, I'll get to George in a second. But we need to flesh this out a little more. I think Petter's concern is valid. You know, we didn't want to start creating a bifurcated system here where different IGOs had different approaches on this. And again we expect that this will be a rare instance where there is any appeal to a court of mutual jurisdiction at which point the UN or any of its agencies are free to go in and say, judge, we're the UN or UN agency and it's widely recognized under previous decisions and under these treaties and etcetera, that we have immunity and can't be subject to adjudication here. So, George, go ahead.

George Kirikos: George Kirikos. I just wanted to, yes, agree with Petter and yourself in your latest comment that, you know, we want to keep it simple. We want to keep it uniform. We want to have it, you know, be principles-based and not prejudging what would actually happen in the national court. If we tried to, you know, make a distinction now it's kind of making a decision, you know, taking it out of the judge's hands and saying, you know, we're going to decide now instead of letting it go to the judge.

I would rather just leave it to the judges because they're the ones that create the law. Like we're not the ones that are – supposed to be creating any new law. We're supposed to just leave it to be consistent with existing law.

Phil Corwin: Right. And just adding onto that, I think another reason, you know, remembering our discussions is that we realize that if we had any rule which said all IGOs or these IGOs get to go straight you can't bring an action

against them in court. That would essentially be telling a registrant, who had not initiated the action, that they had – that we were trying to strip them from existing legal rights that might exist in the nation in which the court was situated and we were very uncomfortable with doing that. Just as we're uncomfortable in saying that IGOs didn't have immunity or couldn't assert it.

Okay, I don't see any hands up so I'm just going to continue droning on. I hope you're enjoying my narration.

The net heading, Other research and... oh, we do have some footnotes down here that are new. Let's just – George just said I had three minutes left. Rather than launching into the other research and documentation, which is another long section leading up to Recommendation 5, let's just go over this Footnote 10, which is to the section – no, well the long one is to – is the next section. It's Footnote 11. So let's just – it's 12:58, there's two minutes' left. Well it's 12:58 where I am. I think rather than trying to get into this next section, which is several paragraphs long, this would be a good time to break.

And is there any comments on anything we've discussed today, anything people want to add in regard to the sections we've reviewed during this session? Oh Steve Chan is noting that Footnote 11 is not new, it was just an issue in extracting a Google doc language to this Word doc. So it's just new on what we're looking at on screen, not to the document.

But I don't see or hear any requests for comments. So at one minute before the hour, when is our next call? It's next Thursday I believe? And we're going to continue reviewing this document. Does staff anticipate that any of the other sections you've told us like what's the timetable for the sections on things like working group deliberations? And I ask that question realizing that staff is under many, many burdens from many different ICANN processes at this time.

Mary Wong: Thanks, Phil. This is Mary and I note Steve has his hand up as well so he may have...

Phil Corwin: Okay.

Mary Wong: ...additional things to say. So in terms of the draft, the other important section for the group to look at we feel would be the deliberations of the working group, which describes, you know, what we did, when we did it and what we consider, what we didn't consider. And we will try to get that draft to you by the end of next week, but if not in time for next week's meeting certainly in time for the meeting after that, which would be the first week of October.

That would still give you two more weeks at least to look at those two important sections and, you know, we'll then fill in the blanks of the other things like executive summary, attendance list and so forth. If that helps.

Phil Corwin: Okay. All right that would be very helpful. So looking at what's left to go, we're now on Page – the bottom of Page 10 of a 14-page document. We may be able to complete initial review of this document on the next call. Then of course there will be changes to this document based on various comments made and then we'll have new language.

I'm just looking ahead, it's already – how did it get to be the third week in September? Of course our aim was to try to get a preliminary report out before Hyderabad. I guess that's still possible, though that's pushing it a bit given everything left to do. But I think even if we aren't there with an official release before Hyderabad we will have close to a final draft document available for discussion when we meet in Hyderabad with publication soon after that. So we're pretty close to the schedule we wanted to be on.

Steve, did you have an additional comment before we wrap up here?

Steve Chan: Thanks, Phil. This is Steve from staff. Yes, I had one quick question or clarification. Under the action items, I had noted that Petter and others would review the language, the pluses and minuses in regards to Recommendation 4. And I just wanted to clarify if that meant that staff should hold off on doing any modifications there and wait for the edits from Petter and others or if we should also try and...

Phil Corwin: Yes, let's ask Petter. Petter, were you planning to do some drafting?

Petter Rindforth: Yes, Petter here. Yes, that's – probably I can have something to send out at least on Monday if not during the weekend. And maybe from that we can see if there is any need for the staff to make any amendments on that. But I will base it on what we discussed today and my suggestion there on the Option 1 and 2.

Phil Corwin: Okay.

((Crosstalk))

Phil Corwin: That's great. And, you know, for myself, at some point when we're a lot closer to a final draft report I plan to give it an extensive review on my own and make any suggested editing changes before publication. But I just think it's too – we're way too far from your final document to do that kind of final edit yet. But just want to alert everyone I plan to give some sense of review prior to publication beyond the type of review that we've already engaged in.

So with that we'll be back same time, same place next Thursday and there should be some exchanges of new language between now and then. So thank you all for participating today. And enjoy the rest of your day, whatever it holds for you. Bye-bye.

Petter Rindforth: Bye, thanks.

Mary Wong: Thanks, Phil. Thanks, everybody.

Michelle DeSmyter: All right, thank you so much again. The meeting has been adjourned.
Operator, please stop the recordings and disconnect all remaining lines.
Have a great remainder of your day, everyone.

END