

ICANN Transcription
IGO-INGO Curative Rights Protection Mechanisms Working Group
Thursday, 29 September 2016 at 16:00 UTC

Note: The following is the output of transcribing from an audio recording of IGO-INGO Curative Rights Protection Mechanisms WG call on the Thursday 29 September 2016 at 16:00 UTC. 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. Attendance may be found at:

<https://community.icann.org/x/Bgy4Aw>

The audio is also available at:

<http://audio.icann.org/gnso/gnso-igo-ingo-crp-access-29sep16-en.mp3>

Coordinator: Recordings are now starting.

Michelle DeSmyter: Fantastic, thank you. All right well good morning, good afternoon and good evening to everyone. Welcome to the IGO INGO Curative Rights Protection Mechanisms Working Group call on the 29th of September at 1600 UTC. On the call today we do have George Kirikos, Petter Rindforth, Paul Tattersfield, Jay Chapman, Philip Corwin, . We do have apologies from Mason Cole.

From staff today we have Mary Wong, Steve Chan, Dennis Chang, Berry Cobb, Emily Barabas and myself, Michelle DeSmyter. As a reminder please state your name before speaking for transcription purposes. With this I'll turn the call back over to Petter Rindforth.

Petter Rindforth: Thank you. Petter here Well let's start with is there any new statements of interest? I see no hands up. Okay good and well I've had to start with excuses. I'm a little conference and there is some I - at least I have some noise in the background. But they showed me a room which I could at least could close the doors. So I hope it will not disturb so much.

So as we - as I promised on the meeting last week and also from other participants that we got some further comments. We - we'll start with the draft recommendation on Number 4. And as - what I've checked on especially trying to fill in some new active text on Options 1 and 2. So we can have it on screen thanks. I - so we start with Recommendation 4 in relation to (unintelligible) jurisdictional immunity which IGOs may claim successfully in certain circumstances but not INGOs. The working group recommends that. A, no change be made to the new jurisdiction clause of the UDRP and URS and B, IGOs be notified that they have the ability to elect to have a compliant file under the UDRP and/or URS on their behalf by an SME or agent or licensee such as such that C claims of jurisdictional immunity made by IGO in respect of a particular jurisdiction will fall to be to be determined by the applicable laws of that jurisdiction.

And I - I'm aware of that we may need to put in some further comments and clarifications on the B note there. But I proceed now with the ration I sent out. So when IGO succeeds in setting the claim of jurisdictional immunity in a court of mutual jurisdiction then and then we have two options. I thought it may be more visually clear if we separated those two options, just get something that may be more readable and no changes in the sentence.

The working group recommends further that the policy guidance document be prepared and circulated by the Government Advisory Committee and the IGO representatives who have been active on this issue at ICANN that all times the specific options available to IGOs to suspend counsel or transfer a registrant's domain name.

In presenting Options 1 and 2 (unintelligible) the working group acknowledge that it has yet to uncover a perfect solution. 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.

And next sentence for context to participate that in circumstances under which the scenario would occur. When an IGO files a complaint on the UDRP or URS the IGO succeeds in the dispute resolution process and the losing respondent now seeks to relief against the UDRP or URS decision will be - and here I don't think that's on my note but I have changed it afterwards. We decided to delete the word extremely. Oh sorry Mary, I see your hand's up. Would you like to...

Mary Wong: Yes Petter and apologies. What we have on screen is a slightly different version and you may be reading from an earlier version which we're happy to put up if you believe that that will be a preferable option to discuss. I just wanted to be sure that we're all on the same document. So...

Petter Rindforth: Okay yes.

Mary Wong: ...this is the one that we put out to the list a little bit later so let us know what you'd like to discuss?

Petter Rindforth: Well it's better to use the one that everyone can see. Just let me see if I also can read it in my small - give me just a sec here. We've had some notes on what we had at which page is it on this...

Mary Wong: Hi Petter and everyone. It's Mary again. I think this would be the bottom of Page 6 and the top of Page 7 and I think George has put the same thing in the chat.

Petter Rindforth: Okay.

Mary Wong: So what we did here was to take much of your language, add to it in terms of consistency of expression with the rest of the draft and also put in a couple of things from a call from last week. So essentially it's very similar to what you sent but there are some changes including in the language itself.

Petter Rindforth: Okay good yes. Now I have it. So I'm with you. So see when I - if we go back to the initial to the recommendation so B a policy guidance document as further described below we prepared that outline options available to IGOs. DO they have the ability to elect to have a complaint filed on the UDRP or - and/ or URS on their behalf when it's in the agent or licensee such as and there's no further changes there.

And I scroll down to next, see IGO succeeds in success in the claims jurisdiction immunity record or new jurisdiction the working group recommends that in that case. And then we have the Option 1 or Option 2. And in Option 2 the decision (unintelligible) against the registrant in the predecessor UDRP may be brought before and then name of the arbitration entity for the de novo review and the termination.

And here I'm not 100% clear if on the Option 2 there shall we still have - shall we more generally refer to before the selected arbitration entity or shall we still have it this calls name of the arbitration entity because that I presume that we cannot put in a specific name at this time? So it may be read it as a little bit confusing mixing some specific names there but that's my suggestion that we may. Yes Mary?

Mary Wong: Thanks Petter.

Petter Rindforth: Mary?

Mary Wong: So just - yes I'm here. Just a couple of notes one on the point that you've just raised. I think, you know, that there is two possible discussion options here. One is the name of the entity itself and as you pointed out whether this is something that the working group wants to go ahead with, whether it's appropriate to specify an entity. The other which is slightly different is to consider the rules that might be applicable, for example the (Insa) trials rules that your text also mentions further down.

And we mentioned this because I believe that in the last call the previous call it had been noted that the working group had, you know, discussed briefly the (Insa) Trial rules but had yet had a fully comprehensive discussion. And the staff recollection is that on that point that's something the group might need to come back to perhaps say next week or at some appropriate time. So that's one follow-up from staff site.

The other is if we go back slightly further in the document one of the staff additions in the text is to note that in addition to Option 1 and 2 there may be a third alternative which of course we haven't considered but the reason we put that in the document was to not limit the community to only considering the two options if in fact there is another option out there that someone knows about that might be helpful so just two interventions from us for now. We hope that's helpful.

Petter Rindforth: Okay thanks Mary for that clarification. Well I can except if there's a general reference to that there may be another option in case that we - so that we make a note to their organization and people that make comments that they're free to suggest whatever they believe would be better. But I think it's the red one that's just looking at the chat room it's the red one that's putting new text.

As to the Option 2 I still think it's better to have at least at this stage and then we'll see if we finalize with a specific recommendation for an arbitration entity but that we face it in more general they're brought before an arbitration entity or an arbitration entity that will be finally identified. Phil yes your hand's up.

Phil Corwin: Yes hi Petter, Phil here. I wasn't sure when an appropriate place to intervene was but before we get too far I have a couple comments on the language we've reviewed so far. Back on Page 7 just in the paragraph just above Option 1 where we note that we anticipate that the circumstances where this might arise will be rare. I would think we should add a sentence to that paragraph noting that our decision to recognize the ability of a complainant to bring the complaint through an agent assignee or licensee should be - should - is one significant factor that will make it rare by ensuring that any appeal would be - that the person that the entity in court would be the entity appointed by the IGO rather than the IGO itself. I think we need a sentence there.

Got down on Page 8, well at the bottom of Page 7 the bullet point on the other hand would introducing this possibly ensure that a registrant has adequate paths for recourse? I'm not sure what that means. I think that needs some work. Here it's the registrant - we're envisioning a situation where the registrant has appealed and the complainant has asserted sovereign immunity successfully so I'm not sure it's the registrant who has brought the appeal. They've exercised their recourse. And I think on the last bullet point besides the legal implications of setting aside we need to note the legal implications of binding the registrant to a UDRP decision in which they may have no effective root of recourse.

On this first bullet point I think it should be such as the UN commission, the (Insa) Trial rules. And I think, you know, in all of this I think we want to invite community input on what the community thinks of Option 1 or 2? Is there another option we've missed and are the (Insa) Trial rules a reasonable

framework if there's going to be an arbitration option? And if not is there something better out there? So I'll stop there but I just wanted - I had those specific comments on the language we've already covered.

Petter Rindforth: Thanks. Well...

Phil Corwin: Thank you.

Petter Rindforth: ...so I presume that we can work further down on the document. I have noticed the suggestions. But thereof after the general description of the two options the working group recommends further that the policy guidance document be prepared, published and which new as I see and circulated to the Government Advisory Committee. And I think that's a good addition that it's not just prepared and circulated but we have actually published it and send out what we see as more or less a final version to GAC that outside the specific procedure options available to (IGO)s who seek to suspend, cancel or transfer a registrant's domain name.

And then it's a new - in addition to your filing a complaint of a UDRP and URS question. I think that's in general we should have the same description when we refer to UDRP and URS. And it's still this refers to both of them so under the UDRP and/or URS I suggest that we change it to through an (Isini) agent or licensee.

Okay thanks Mary. That was the intent of adding publish just to make it clear it's publicly available document, not just something sent to the GAC. Good.

And then next in presenting Options 1 and 2 about the Working Group acknowledge that it has not yet to come to consensus as to which is the optional approach or if a third alternative is preferable where it comes to third alternative. As such the working group has (unintelligible) a number of different factors including possible policy benefits and problems to consider when examining the various options according to working group, welcomes

specific input from the community on the question to add it in developing its final recommendations.

And before I put on to George I - if it's okay with (group) I prefer to have initially in the sentence, the first sentence to come to a conclusion rather than consensus because there's still - it's too early to say if we have come to consensus. And I don't want in this initial report that write it in a way that indicates that we have different opinions.

I'm thinking in case we have different opinions at this stage it's because we don't have enough input and information on certain issues. So I would rather say conclusion than consensus there. Yes George, you're hand's up.

George Kirikos: George Kirikos for the transcript. The document draft currently says we've not reached full consensus. And I was just wanting to kind of maybe elaborate on that. I think the PDP defines different levels of consensus and there was talk about rough consensus in that paragraph as well all.

If we have a strong majority but just have a couple of people against Option 1 wouldn't that be properly characterized as consensus without the word full without the word rough? Maybe Mary or somebody with ICANN staff has the current definition.

Petter Rindforth: No Mary?

Mary Wong: Thanks George and thanks Petter. This was something that the staff wanted to bring up as well for by way of background this - at this stage of the PDP this is an initial report, not the final report. Typically we would not do a formal consensus call which would then involve the different levels of consensus in the working group guidelines that George mentioned. That formality is usually done at the final stage for the final recommendations. That said that doesn't mean that the initial report we can't use those characterizations if we're

comfortable that they are accurate. It's just that a formal call would not have been done.

So two things. One is in relation to your earlier comment Petter in terms of using conclusion or something like agreement rather than consensus. That seems to make sense to us. The point about rough consensus was the second point we wanted to raise here which is that if we're going to use words that are in - that sorry we're going to use words that actually have a specific meaning particularly for the PDP we want to be pretty certain that that is indeed the case.

So bearing in mind that while we've circulated these documents we don't have full participation on the call we might want to consider either rewording something like rough consensus or actually going to the list and saying specifically while we're not doing a formal consensus call we need to know if anybody, you know, objects to this or has any problems with the language. Thanks very much and I see a bunch of hands have gone up so I'll cede the floor.

Petter Rindforth: Thanks. George is that a new hand or was from before? Oh, okay. Jay please go ahead.

Jay Chapman: Thanks Petter. This is Jay Chapman for the record. I just want to - I appreciate Mary's explanation and I think, you know, based on the - at least the recent calls that we've had and the participation that we've had in the calls and, you know, with the emails that have been passed around to call it a rough consensus seems to fall far short of where we've been.

In fact based on recent calls it seems to me that, you know, if we've been just going between Option 1 and Option 2 I would say that consensus is just short of unanimous for Option 1 at this point. So I don't know, you know, could adjust the language to reflect that. And perhaps, you know, having language

like that might actually, you know, allow other people or maybe provide more impetus for other people to participate.

But again at least again on the recent calls it's certainly been, you know, maybe short of - and again I'm not fully recollecting everyone but it seems like maybe one person, maybe two at least on the calls, you know, have expressed some objections against Option 1. but short of that I think it's been like I said just something just, you know, take unanimous and back it off a couple of steps and that's where it seems to have been up to this point at least. Thank you.

Petter Rindforth: Thanks Jay. And before I flip it over to Phil I see Mary's almost in the chat and we can say consensus without the word rough and ask for specific objections from the list questionnaire. Any comments on that specifically? All right, hand it over directly to Phil.

Phil Corwin: Yes thank you. Phil for the record. Let me first speak on this consensus issue and then address some of the language we have before us and under Option 2 in the explanatory language. I don't but, you know, I'll tell you I don't know which way I come out on this because I can argue either way and that's unusual. I can usually - if we're debating if we were proposing that an appeal from a decision in which the registrant loses when the UDRP or URS is brought by the - an IGO would only be to an arbitration group. I would definitely be against that.

But we're not talking about that. We're talking about when the IGO wins the initial case the registrant appeals by utilizing the right to go to a court of mutual jurisdiction and then the IGO successfully asserts sovereign immunity.

If you go with Option - there's is no perfect answer here. If you go with Option 1 if there's really infringement going on than the IGO is put in a somewhat intolerable position where they have to either surrender what they think is a valid claim to immunity that a court has agreed with. We're talking about a

case where they've asserted it and the court has agreed or never asserting it a right that they think they have. And if they assert it successfully they're then left with a situation where they have no remedy other than waving the immunity they've already successfully asserted and the infringement could continue to their detriment and to the detriment of the public.

In the second case if the - so the second case gives them that option. The question becomes is the arbitration fair to the registrant to have it shifted out of court to an arbitration forum? And that depends on the forum and the rules. I have some uneasiness about (Insa) Trial being (unintelligible) because (Insa) trial is an IGO. It's a UN agency and there's got to be a question about bias there.

So I think debating the degree of consensus here I believe is secondary. I - and the - Lori Schulman who's not on the call today who does represent the trademarking in (Insa) she was pretty adamant as I recall on a previous call as not favoring Option 1 and we can't just ignore the trademark community on this stuff.

So, you know, let's not debate, spend too much time debating the degree of consensus. My view is that this is a very sensitive decision here and we shouldn't come down one way or the other without getting significant input from the broader ICANN community. On the language under Option 2 the - there is some language that concerned me. Okay and where is it?

Petter Rindforth: Phil...

Phil Corwin: Yes. I'm looking for - why don't we - why don't you continue and I'll come back with some specific comments on the language. Sorry I lost my train of thought there.

Petter Rindforth: No problem. Just got from the chat is Mary had pointing that consensus in the working group guidelines is where the most agree and only a small minority

disagree. And based on that it's of course so that from last meeting and from what we also have discussed today I'm not so sure that we can say that it's a majority for Option 1 and a minority for Option 2. It seems that the more we discuss the two options we come up with more and more plus and minus for each option. So in that aspect it may be good to still use or this description that we don't have a consensus...

Phil Corwin: Okay.

Petter Rindforth: ...even if well I personally meaning the same but written in a more perhaps diplomatic way I would add preferred to conclusion. But if the (unintelligible) yet not to come to a consensus it's the well, generally acceptable and fully understandable for each one that read these kinds of documents and I'm okay with that. Phil?

Phil Corwin: Yes. I now am focused on the specific comments I want to make on these bullet points. The first and the second bullet point where it says after the dash in the first sentence requiring registrants to agree to such an appeals process could lessen a legitimate registrant's, I don't know what a legitimate registrant is. First of all I don't know what that phrase means. I think maybe they mean legitimate right. Legitimate should be modifying right rather than registrant.

To seek release from the court I don't agree with that sentence. We're not - the registrant's first option remains appeal to a court of mutual jurisdiction. We're focused only on what should be the extremely rare situation and a situation that I don't believe creates a broader precedent because if I did believe that I'd be very concerned about it where the IGO successfully asserts immunity. So I think that sentence is just wrong that it's not lessening the registrant's right to seek relief in a court. We're dealing with a situation where they've exercised that right and then the IGO has blocked by successfully convincing the court that it has immunity which prevents the case from going further.

Two bullet points down, the fourth bullet point where it says consideration will also need to be given to the possible risk that a limiting appeals to nontraditional avenues well again that's factually wrong. We're not limiting it. The first recourse is to a judicial avenue. This comes into play only at the judicial - the judiciary has says we can't be involved because the IGO is not subject to our jurisdiction on the basis of its successful assertion of immunity. So that too I think needs to be rewritten to be factually correct.

And the last bullet point where it says because an IGO may be deemed to have already waived this immunity by utilizing the UDRP or URS and submitting to the mutual jurisdiction clause well yes we might have to consider some, recommending some minor amendment of the UDRP and URS to address this very narrow specific situation. But all of this I think we need to note that the question of whether the IGO has waived immunity by utilizing the UDRP or URS is going to be one of the elements before the court when the IGO asserts immunity if it does because the first thing the registrant's going to say is court they utilized a mechanism that requires them to submit to a court of mutual jurisdiction. So the waiver occurred back when they utilized the procedure and it shouldn't - you shouldn't hear there - it shouldn't be valid for them to assert it now.

All of this is going to be up to the court one whether they've waived and two even if they haven't waived it whether they have immunity in that particular jurisdiction because as Professor Swaine instructed us in his memo there's no universal rule on sovereign immunity for IGOs. So I think that also needs to note the fact that that's going to be a key issue before the court that's going to decide the immunity question. So those are my comments on the specific language and the bullet points. Thank you.

Petter Rindforth: Thanks Phil. Okay so that makes its natural way to proceed to the further description of the two options. And as we discussed last meeting it's - it may be better to have a mix of information, conclusions and questions in order to present the plus or minus for each option and the risks and possibilities.

So while we - what's (started) here based on our previous discussions in Option 1 is the by- the first point my recollection that this decision against the registrant in the UDRP or URS in the second stance when IGO has successfully claimed jurisdiction immunity. This will put the parties in a situation as if the UDRP did not exist or as if a UDRP complaint had never been filed. In other words the court proceedings would be the sole mechanism to resolve the disputes.

And then however would the possibility that a decision against the registrant in the UDRP or URS may be violated in the circumstances and the circumstances where an IGO has successfully claimed jurisdictional immunity? Must equate incentive focus - those in registrant from seek to relief in the courts while at the same time doing that the IGO with the minimal choices in case and either waive jurisdictional immunity or seek jurisdictional immunity and thereby have the decision. I'm looking at very small picture. Violated, okay.

Okay and on the other hand would introducing the possibility ensure that a registrant has at a (unintelligible) for recourse if that was - and in addition consideration may be needed to be given to the legal implications of setting aside a panel determination on the basis of result of an unrelated proceeding carry out successful claiming or jurisdictional immunity by an IGO.

But that's more of a mix of comments and questions. And of course there may well be other conclusions and questions that we have raised during the time or (work). But I think that's a good start at least to better describe the two options. And then Option 2 yes Phil?

Phil Corwin: I'll be brief this time. Phil for the record. I would add one bullet point under Option 1 was what consideration - something along the lines of what consideration should be given to the fact that this option might place an IGO

in the position of either having to yield on immunity it thinks it's entitled to or permit or assert its immunity and permit ongoing infringement to continue?

Petter Rindforth: Thanks.

Phil Corwin: And I think we need to list that because that's what I anticipate will be the first objection of the IGOs to Option 1.

Petter Rindforth: Yes perfectly right there. Then Option 2 which is more or less the one that IGOs at least they represent that is so that we have discussed with and have been on a couple of our meetings at least indicated as much as they could from their own point of view that this could be acceptable. But of course even Option 2 is plus or minus on risks and possibilities.

So one advantage of the options I'll argue so an (arbitrar) or other third party non-judicial process is that the mechanism is familiar to IGOs the use of arbitration in contractual disputes or proceedings under the - and here we have the reference to UN set of rules and United Nations commission on international trade law. Well I think that's the reference to that that we have discussed before and it might be good enough to have it in that point of the Option 2.

However the main and disputes on all contract agreements, arrangements requiring registrants to agree to such an appeal process would lessen a - eliminated registrants right to seek relief in a court. The registrant's agreement to such an appeal mechanism would presumably take the form of a new provision in the domain area station agreement and this would - it said state the consensus policy decision which would obligate all ICANN accredited registrants to amend their registration agreements accordingly.

A critical question in this regard is whether the provision of a de novo review in the form of an or arbitrary law or other third-party non-judicial mechanist is similar or equivalent in terms of excess fairness and the scope of relief it

would offer a reticent compared to seeking relief with the other courts. And consideration will also need to be given to all possible risk that limiting appeals to non-judicial avenues could be challenged in some courts as creating a further exception to IGO immunity as we heard also from our professor's report.

Nevertheless the UN (unintelligible) rules and the US of (arbitrationists) mean to resolve commercial disputes are well-established because an IGO may be deemed to have already waived its immunity by utilizing the UDRP or URS and accordingly submitting to the mutual jurisdiction clause consideration clause will also have to be given to amending the UDRP and URS to allow for this new appeal mechanisms. So that's the two that - the further description of the two options. Yes Phil? And Phil?

Phil Corwin: Sorry. That was left over from earlier.

Petter Rindforth: You're free to come with any comments on this. Personally I see this as this is not the final description but it's - we're on a good way to put in all the comments and plus or minus on each topic. And as far as possible I also think that it should be close to each other when it comes to the number of comments so that we can send it out as a more neutral definition and a description on the plus and minus.

But I see new - no comments or hands up when it comes to the points as they are right now. So okay let's proceed here, make it full screen here. So the working group has discussed both options extensively but has not achieved a full consensus on either option. However at the time of publication of this initial report there is a rough consensus in support of Option 1. And based on what we have discussed today I'm not so sure anymore that we should have that comment pointing on what on the - on the options but I look forward to any comments from other participants on that aspect.

But as I take it from what we have said today it's - it may be better to be more neutral there and take that indication on what we specifically support as a majority and just follow-up with following community feedback on this point. The working group will conduct consensus call to try to determine the level of consensus on a particular approach rather than indicating what we think today.

Okay in considering options such as recommending that on limit but for appeal of a UDRP or a URS decision is to be arbitration a working group recognize that it lacks the authority to compel a national court to accept such a policy. The court could ignore ICANN's policy and lawfully consideration of the appeal. Jay hands up.

Jay Chapman: Thanks Petter. This is Jay Chapman. Just to backup I just want to be clear. So a moment ago we were talking about, you know, when the - I guess this version originally called it a rough consensus. And I just again based on previous calls and discussions had had some concerns with describing that as a rough consensus. And now you are proposing that that is - and actually my point was that we've actually gone, you know, well beyond a rough consensus at least based again on calls and things of that nature.

Now you're saying that we should go more neutral. I just want to clarify to make sure exactly you said and Mary made a comment about how that should be changed. So what is your proposal about how that particular language should be changed? And I respect Phil's comments about, you know, he doesn't want to get bogged down on what consensus is but I do think I do believe that this language does matter. So I'm curious as to what exactly you had in mind here Petter. Thank you.

Petter Rindforth: Thanks, Petter here. Well I - may I go back to and ask Mary to cite again what we stated on the consensus reference earlier in this document? So I may have reminded it the wrong way. Mary please.

Mary Wong: Thanks Petter. So as we discussed earlier using words like consensus as well as full consensus and rough consensus has implications because as George pointed on the chat as well these are defined in the working group guidelines. So not so much rough consensus but basically full consensus and consensus. So when you have full consensus it basically means unanimous. And I think Jay's point here is that based on the discussion on the calls and lack of any, you know, significant concern on the list that this seems to be almost where we are practically speaking.

The next level down is consensus where only a small minority disagrees but most agree. And I think this is roughly what - well pardon the pun what a lot of people might consider rough consensus but the phrase rough consensus actually doesn't appear in the working group guidelines. So in terms of clarity I think what we would suggest as staff is that if we are going to use words like consensus that we would follow the terminology in the working group guidelines and that secondly noting what Jay and others have said that we want to be as accurate as possible in reflecting that usage. Thanks.

Petter Rindforth: Thanks Mary. Before I reply pass on to Phil.

Phil Corwin: Yes thanks Petter. Two comments here, one on the consensus. Let me suggest one. It's a factual statement that we haven't achieved full consensus. I'm still on the fence. I know Lori Shulman was very concerned about Option 1. She's not on the call today so we don't have full consensus.

Do we need to characterize the degree of consensus or could we just say however at the time of the publication this initial report a greater number of working group members had voiced support for Option 1 which is a factually correct statement without pinning us down on the degree of consensus. And is it really that important? We're going to take the community input on this and then we're going to make a decision for the final report. We can't lay out two options in the final report. We've got to recommend one of the others at

that point so I hope we don't get all tied up in knots over a situation which will occur extremely rarely in our consideration.

Switching to the next paragraph, the one that starts in considering options I'd like to expand that to make clear that we - we'd never considered the option of taking away appeal to a court mutual jurisdiction and providing only arbitration because we had agreed that that would only need to be considered if there was universally or near universally recognized immunity for IGOs in the judicial context and Professor (Swaine)'s memo laid out that that was not the case. So I don't want to imply that we ever consider taking away this right of appeal to a mutual jurisdiction court and replacing it solely with an arbitration because we never did so and I think that paragraph has to reflect that reality. Thank you.

Petter Rindforth: Thanks Phil. Just to be fair I would gladly say that we are in consensus of Option 1 but looking at both the discussion we're having and those same inputs import from working group members that they're not spot today I prefer at this stage to maybe describe it in a more neutral way. Maybe if Phil's suggestion is acceptable on a formal way I'm - I can I am agreeable about that. Mary your hands it off to clarify. Thanks.

Mary Wong: Thanks Petter. Not so much to clarify but actual if we may from the staff side and given what you and Phil have just said our recommendation is to be more neutral as perhaps what you've called it. So Phil's formulation or something similar would still be factually accurate without getting us into questions about exactly what level of consensus and that we take a poll, et cetera, et cetera.

So essentially it seems to me that what we're looking at is wording along the lines suggested by Phil that, you know, Option 1 seems to be favored by a majority of the group. We have in the past for initial reports used distinctions like majority and minority while avoiding usage of the word consensus. So something like that might be still accurate and would still solicit some

community input to aid us in making a decision one way or the other. I did have one different point Petter. I don't know if it's okay to speak now about - it is about Option 2.

Petter Rindforth: Please go ahead.

Mary Wong: Thank you. So in running through the operational side of how this would work in Option 2 we just wanted to get a little bit of clarity because the way we have it now is that the losing registrant would bring his case or her case to a national court. Given that it's against an IGO the IGO would then be forced to go into that court to say actually we have immunity and therefore this court has no ability or authority to make a determination on the issue. What we're saying for either Option 1 or Option 2 is that if that argument were then to prevail so the IGO succeeds and the court says yes you have immunity then for Option 2 we are then saying that in that particular case having made its case in court the appeal then goes to arbitration.

We just want to be clear that that actually is the path for Option 2 and we wanted to ask if consideration should be given to I suppose either the time or the sort of I don't know what the right word is but in terms of, you know, having to basically go through proceedings twice. Whether that's something we should either note in our report I don't know. If that's something that the IGOs and other commentators may have some questions about so we thought we would raise it for the working group to consider at this point.

Petter Rindforth: Thanks Mary. And I look forward to see that suggestion and a specific draft text. And I think all further information and clarifications on each issue. It's just positive to make it easier for our side commenters to understand the issues and come to suggestions and comments. Mary please?

Mary Wong: Thanks again Petter. And so to return to the question of consensus I noticed that Phil has asked a question of staff in the chat as to what level of consensus is required to adopt a recommendation in the final report. And we

thought it might be best to speak our answers so that it's in the transcript and the recording for others. Essentially for the final report at the working group level which is what we're doing during this PDP we just need to document for all recommendations whether we're full consensus or consensus. We can also document other proposals that did not receive consensus because for example some of those proposals may have strong support but significant opposition which is actually a level in the working group guidelines and others may well have minority support but not consensus. So for purposes of the report itself we just want to be sure we document all the recommendations and proposals and the level of consensus support for each.

At the council level when they receive our report typically what happened is that the council will only vote on those recommendations that received either full consensus or consensus. In other words the council generally does not consider a vote on proposals that were discussed but did not even reach consensus report. They can but typically they do not. Hopefully this is helpful.

Petter Rindforth: Thanks Mary. And as I said definitely think it's important for us and for each working group to come up with its final report. And we're not on that stage yet but to have - that's is not just possible full consensus or definitely a majority on the suggestions and at least not come out with in the final report with option A&B to be decided by the council. That's - it's for each working group to come up with - with a specific (unintelligible) on each topic they work with.

Okay time is running and we are more or less finished with this part just I think it's we should go on to what's left for our next meetings. And apart from this specific topic we had a lot of - see if I can get that out from last meeting. I note that - give me a second. The additional oh yes, so additional language needed around absolute immunity section. So the - when it comes to the immunity we need to be more clarified and due some of these suggested edits that reside in the deliberation section of the report. So can I cross-reference in the Recommendations Sections part of the bottom Page 5 starting Professor Swaine should better explain the working groups position.

ICANN policy cannot establish immunity will be wide-held language in the UDRP of this workaround by (unintelligible) agents, et cetera.

So we have some - we have a number of further topics, details to discuss. Well I'm not so sure if apart from this clause that we have discussed today is there any - and I turned to Mary again. Is there any major topics that we - that also need a full meeting or are there more of specific detailed language to decide on? Mary?

Mary Wong: Petter I noticed that Phil has his hand up. So maybe I can defer to him before answering your question?

Petter Rindforth: Okay thanks.

Phil Corwin: Yes thanks Mary. My question will inform your potential answer. We've been reviewing and discussing in great detail draft Section 6. There are at least five others sections of the report. I don't recall giving them the same degree of scrutiny but I think at some point we need a full draft report in front of us to review it as maybe not review it in this detail but so everybody gets time to look at the complete draft final report and then we can all have maybe a week to review it and see if we think there are things that are wrong anywhere in it, there are things that have been neglected that need to be addressed in some part of the report. So this is just Section 6 but we need to eventually sign off on the entire report with all of these sections. Thank you.

Petter Rindforth: Thanks Phil. And yes Mary?

Mary Wong: Thanks Phil and Petter. That's absolutely right. And so going back to I think the discussion last week what the staff aims to do is to provide the group with the other significant part of the report. That's not to say that, you know, there are some parts of the report that are completely unimportant but based on I think what many of you know is community experience it is the

recommendations and the actual language of the recommendations that people will pay the most attention to and that is our Section 6.

But in order to provide context to this Section 6 there is that deliberation section that describes what the working group considered, you know, how it went about it and potentially other proposals. And you see in some comments even under Section 6 that the staff have noted that some of the things may be expanded in the deliberation section. So our hope is to get you a draft of the deliberation section in time for the next meeting. And as you noted Phil there are the other sections of the report. Customarily what happens is that a full draft report is circulated to the full working group for comments and review. It isn't usually necessary to have calls to go over the language itself because that kind of a wordsmithing by committee tends not to be terribly efficient or effective.

So what we would suggest is to finalize the language of the Section 6 as well as discuss the deliberation section because that's the context. And for the full report itself we would circulate it hopefully in a couple of weeks' time, let the working group take it's time to review it and so that when we come up to the Hyderabad meeting we actually are in a position to actually present the language of the recommendations themselves. Does that help?

Petter Rindforth: Thanks Mary. It sounds very good. Phil is that a new hand? Was that - okay so thanks. My watch is four minutes past so thank you all for the meeting today. And unfortunately I will be on traveling next week but I'll give you a good luck on the meeting within a week and then we see each other in two weeks again. And in the meantime we'll have the draft and the comments. So we're coming closer to our final document. Thanks all.

Michelle DeSmyter: Thank you. Today's meeting has been adjourned. Operator please stop the recordings and disconnect the line. Enjoy the (unintelligible).

END