

**ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG Meeting
Thursday, 08 June 2017 at 16:00 UTC**

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at: <https://audio.icann.org/gnso/gnso-igo-ingo-crp-access-08jun17-en.mp3>

AC Recording: <https://participate.icann.org/p5mr9ivogrq/>

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar <https://gnso.icann.org/en/group-activities/calendar#jun>

Attendees:

George Kirikos
Petter Rindforth
Mason Cole
Paul Tattersfield
David Maher
Phil Corwin
Osvaldo Novoa
Nat Cohen

Apologies:

Jay Chapman

ICANN staff:

Mary Wong
Steve Chan
Berry Cobb
Dennis Chang
Terri Agnew

Coordinator: Recordings are started.

Terri Agnew: Thank you. Good morning, good afternoon and good evening and welcome to the IGO INGO Access Curative Rights Protection Mechanism Working Group call on the 8th of June 2017. On the call today we have George Kirikos, Petter Rindforth, Mason Cole, Paul Tattersfield, David Maher, Phil Corwin

and Osvaldo Novoa. We have no listed apologies for today's meeting. Also joining on audio only at this time is Nat Cohen.

From staff we have Steve Chan, Berry Cobb and myself, Terri Agnew. I would like to remind all to please state your name before speaking for recording and transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this I'll turn it over to our co-chair Phil Corwin. Please begin.

Phil Corwin: Okay, just kind of want to bear with me a minute. I want to find the email I sent to staff at 2:00 am my time last night after the RPM Working Group call concluded which I was also chairing just to make sure that the agenda accurately reflects what I communicated. So okay hold on. Apologize for doing this on the fly but want to make sure we're going to cover everything.

Petter Rindforth: And take - Petter here. We can take point one first and the new Statement of Interest.

Phil Corwin: Yes go ahead if anyone has updates on that. No hands up. Okay let me just again apologies for doing this on the fly. What I had gotten back to staff with last night there was a draft document on the pros cons - pros and cons of our Options 1 and 2 and it simply needed more work before it was ready to be shared with the full working group. But we do want some discussion today of why that to review is important to having a really solid final report that stands up to any criticism on what is a controversial issue within ICANN as a whole. So we're going to discuss why it's - and also the staff's going to explain the scoring system for potential risks and benefits and why it's useful to perform such scoring and how it's expected to inform our final decisions in this working group.

Also I don't see it on the agenda that staff has posted so far but they informed the co-chairs they've done some initial research in regard to the actual incidents of IGOs utilizing curative rights process although I think we have to

recognize that that may be suppressed where the IGO doesn't want to get involved with the immunity issue so they can fill us in on their research. And also the - yes that number three was - that's on the agenda with separate DRP which I know that there's a little inclination within this working group to go the separate DRP just for IGO route.

But again this is pretty much a matter of crossing our - dotting our eyes and crossing our Ts to have a - as bullet proof a final report as possible as it's launched into the waters of further ICANN consideration after we hand off to council and they decide whether to send our report on to the ICANN board. So why don't we - can staff on Item 2 we don't have that document to review yet. We expect to have it for our next meeting but can staff take us through a bit what the - just describe the format of that document, the scoring system and why the - why other working groups engage in that kind of final analysis and how it can be useful and inform our final work product? So let's start with that and so a brief overview from staff and then we can get into any discussions or questions about that. Thank you.

Steve Chan: Thanks Phil. This is Steve Chan from staff and I would note Mary is having some difficulty getting into both the AC room and audio. Her connectivity is not very good right now. So just to...

Phil Corwin: (Unintelligible).

((Crosstalk))

Steve Chan: Yes so just a brief walk-through of what staff had put together as a draft. So it's a furthering of the work on the pros and cons document for Recommendation 4 and the Options 1 and 2. As Phil noted still obviously a work in progress in regards to the language and ultimately whether or not the working group thinks that this is something that's valuable and worth pursuing.

So the genesis of this was it was mentioned last week as the possible direction and something that might help the working group. And so for at least in the broad concept of doing this work you're seeing that there was support from the participants at least for last week. So staff made an initial attempt at that in while it does need some work and some further review by co-chairs we thought we'd at least walk through what we're trying to accomplish or why we thought it might be useful for the working group.

So the changes what they're anticipated to do is to lay out a set of assumptions to help ground the risk analysis so we're all sort of working from a common understanding. So for instance some of the things that were included in those assumptions are to the - I guess to the degree of whatever solutions that this working group ends up recommending the likelihood of IGOs using the UDRP URS or some separate mechanism in the grand scheme of things is a relatively small portion of those - of that usage.

Staff had actually done a little bit of initial plenary research into understanding the scope of the issue so to speak so at least under some like pseudo-names. So I think Berry would be much more equipped, better equipped to talk about this research but I think his audio's not connected right now but I'll just try to explain a little bit of what that research is doing. And it's looking at how many IGO names are registered by third parties, how many of those third-party owned domains could be and are remotely construed to be used in a misleading fashion. And so it's really trying to look at the scope of when an IGO might see a likely need or even a remote need to possibly use a dispute resolution mechanism. So looking at the data or having that data might be instructive to this working group to determine what might be the best solution.

So the other assumption that we had is essentially that Options 1 and 2 are essentially antithesis of each other. One is better supported by registrants and the others by - better supported by IGO. And at least from staff perspective it seemed or its appeared difficult for those parties to really support the opposite option. So the concept of why a risk and likelihood

analysis and the circumstance might prove beneficial is that it's intended to try and quantify their respective harm from each of the options and to see which is less risky so to speak.

And to the extent that the options are riskier are there mitigating steps of the working group that can suggest that can be taken to make the potential risk less likely to occur and less likely to impact either registrants or IGOs? So for instance one of the potential risks that staff identified in Option 1 is that by (vitiating) the decision that may be considered to not improve access to the UDRP or a US - URS for IGOs. And so potential mitigations to this, you know, regardless of whether it's deemed sufficient or not can be the suggestion the working group made of using an assignee or licensee or noting that we have - that the working group has already noted that IGOs have selectively waived their immunities to file UDRPs under the current rules (unintelligible). And so that the - that sort of analysis be carried forward for all of the risk that we could identify for both Options 1 and 2.

Phil Corwin: Okay.

Steve Chan: And...

Phil Corwin: Steve let me ask we don't need to go since we don't have a document to display but we expect to have one approved by the co-chairs hopefully by over the weekend or early next week and then circulated well in advance of our next call rather than getting at the substance of what's in there or might be in there it's basically to lay out the pros and cons of the two options. And of course see the - what an Option 2 might look like in terms of actual elements is also up for discussion. That's not fixed in stone yet.

And so it's able - it's basically for the purpose of a final comparison by the working group between the pros and cons are the two options, some scoring of the risks to various parties and then so we can all take that into account

before taking a final poll with the working group on which way we should go.
Is that a correct characterization?

Steve Chan: Thanks. This is Steve. Essentially but if I could just conclude a little bit with...

Phil Corwin: Sure.

Steve Chan: ...a few more comments. And yes I don't want to get into detail anymore. And I was actually - that was just one example and I wasn't intending to go into further detail but...

Phil Corwin: Okay.

Steve Chan: ...the overall purpose of doing something like this is to try to inject some element of a data-driven analysis to these two options. You know, whether or not it's helpful is to be determined. But I think the working group has already acknowledged in the initial (port) for instance that neither option would be considered ideal for all parties. SO this data-driven approach is intended to help the working group determine whether it can adequately address the risk and potential harm that it's able to identify by either registrants or IGOs. It could also help determine that the risk, the working group thought were impactful. And just speaking about it, it helps them possibly try to quantify how big of an impact on how likely it's expected to be. And then so in the circumstance where it's not as impactful or not as likely that they - that the working group initially thought maybe it's a risk that could actually be lived with.

And so as I mentioned that because the two options are really sort of opposite to each other it might be evidence that we need to search for that mythical third option that possibly exists that falls somewhere in-between and is maybe a compromise between the two. So just a little more context and a little more into why this may or may not be helpful to the working group.

Phil Corwin: Okay and my understanding is that this type of analysis is somewhat standard procedure for working groups as they reach the final stages of their work. Is that correct?

Steve Chan: I think - this is Steve again. I'm not sure that it's something that's always done. I think in the circumstance that where we're looking at two options that are the - they are essentially opposites as I mentioned it helps to may be quantified between the two of them, you know, which is doing more harm essentially. It's not something that's always done but where it seems like the work is having some difficulty in reaching conclusions on which is the best option and this is just another tool in the tool kit that might help us reach that decision.

Phil Corwin: Okay.

Steve Chan: So like I said it's not always done but it's something that might be helpful.

Phil Corwin: Right. So there's precedent for taking this kind of approach on - in this type of situation. So I'm going to call on Petter in just one second. I noted that Mary was in the chat room momentarily and seems to have been lost again. And again the documents Steve was alluding to just and part of it's my fault for getting to a late review of it but it just wasn't in good enough shape yet for the basis of detailed discussion by the working group. But we expect to have it out in the next few days and give working group members several days to review it and then go over it on the next - during the next call. Petter go ahead.

Petter Rindforth: Hi. It's Petter here, just wanted to add to that it's - I've seen at least one example before back in the years where working group passed on to the council to decide about like Option A or Option B. And that's definitely not a good solution and way to work forward. So I think it's good to have that base that the staff is preparing and not just having the pros and cons but also what I appreciate. The other one I've seen so far is also the - some kind of relation

of the risk and potential harms because there will be some other points here that we may not have 100% agree upon. But it's good to also evaluate what are the risks, what are the harms, what are the positive things with one solution where we waive them against each other.

So I certainly look forward to have this possibility to get full agreements or at least a decent majority decision in a working group. And I think that we will have a good base for that once you have - once we have seen the final summary from the staff. Thanks.

Phil Corwin: Okay and thanks Petter. And I note that Berry Cobb who's done some of the research on that Steve alluded to on actual use of UDRP and URS by IGOs and I know the quality of work that Berry always does has put in the chat that it's now part of the GNSO op procedures as part of the - and this is a brand-new ICANN acronym for me. I don't know what it means DMPM recommendations. Maybe Berry can type in what DMPM means.

But if that's now a part of our operating procedures and something that we're expected to engage in we probably should engage in it particularly we're all aware that IGOs are particular politically sensitive issue within the broader ICANN community and that no matter what we recommend in our final report it's probably going to take some incoming. So we need to as I said we need to dot all the Is, cross all the Ts and have the strongest possible final report where we can say we've gone through all of the required processes and then some in reaching our final conclusion because that will put the final report in the strongest position.

And I see Berry has now explained that data and metrics for policymaking. And it was recommended by a working group that concluded in 2013 to which was focused on the use of data-driven analysis in policy development. So thanks. In regard to the staff review of the actual use of CRP by IGOs is there anything - is there a document to go over today or is that something we're holding in abeyance for a later meeting?

Yes and it sounded like someone needs to mute their line if they're using a straw. It sounded like liquid through a straw though it could have been some electronic noise. So are we waiting for - oh Mary I see you're in - back in the Adobe chat. Good for you. Steve your hand is up. Go ahead.

Steve Chan: Thanks Phil. This is Steve Chan again from staff. And I guess similar to the pros and cons document for Recommendation 4 I think it'd probably be useful for the co-chairs at least to take a look at the data and determine at least whether they think it's useful before we share with the full group.

I would note actually that Mary's still unable to speak even if she appears to be in the AC room. She's still having some connectivity issues. But just to clarify on my research it's not how often the (IGS) have used the UDRP or URS so it's not a consolidation of the cases. It's more about the use of the domain names themselves.

So as I mentioned earlier it's, you know, whether or not the IGO itself has registered its respective domains, whether or not a third-party has registered that domain instead of the IGO and then to some degree which is a - sort of a subjective exercise whether or not that third-party usage might be construed to constitute some usage that might be confusing or of some sort. So I'm sorry I can't speak to this as well as Berry would be able to because he did the research.

Phil Corwin: Yes well you know let's not belabor this. That's another document that hopefully the co-chairs can obtain for review ASAP and we can get it out to the full working group and proceed with an informed discussion as soon as possible. I note that Mary at least while unable to being involuntary muted in terms of audio is able to type into the chat room and I see that George Kirikos goes hand raised and I call on George.

George Kirikos: Yes, George Kirikos for the transcript. Yes I'm a little bit concerned about, you know, staff doing independent research. That, you know, seems to be self-directed. The data like as Paul mentioned in the chat I don't know what they're talking about their domains. Are they talking about exact match domains and, you know, comment org? Are they talking about variations because, you know, in the RPM working group we spent a lot of time talking about all the different variations that like mark holder or a rights holder feels might be infringing upon their claimed string. So it's not just an exact match that matters.

You know, the reserve list for ICANN on IGOs has maybe what is that 140 names or so, can't remember the exact number. But the variations can be, you know thousands if you just make, you know, very small changes can start adding hyphens and things like that. So and then multiplied by 1000 or not 1000 but say 700 TLDs, you know, we're talking about a survey of you know, over 1 million domain names. So I don't know whether Berry's looking at that whether he's looking at a very small subset. So I'm kind of, you know, wondering what's going on. Thanks.

Phil Corwin: Sure. Yes let me - I can't speak knowledgeably to that because the co-chairs haven't seen the document yet. And when you say this co-chair believes we should particularly if it's recommended by operating procedures go through all the suggested hoops for on a subject as sensitive as this one is within ICANN on the other hand we don't want to unnecessarily extend this working group which has been at it for close to three years. We want to get the closure as soon as possible.

So I don't know if Berry wanted to add anything to our discussion or if we shouldn't just move on. But the co-chairs will carefully review that document and evaluate it for usefulness for subcommittee review before its disseminated. And I don't see Berry's hand up so I'm guessing he doesn't want to - he wants to defer to next week. He's not dialed in. He's just in the chat room.

So yes let's put that one aside for next week and so working group members can expect hopefully before the next meeting to receive two documents that have been fully vetted by the co-chairs, one on the pros and cons of Options 1 and 2 and related risk analysis and the other one on some data about IGO domain registrations and use of CRP and we'll see exactly what's in that document.

And that brings us to Item 3 which is the Pro Cons document on separate DRP. I hope we have that one ready for review. And let me start the discussion by saying that this co-chair personally would be extremely surprised if after all our work and consideration we reversed course and agreed with the IGO desire to have a totally separate DRP just for them and separate from the established UDRP and URS. So our review of this document is not done, not undertaken for the purpose of any expectation of reopening that debate and changing our minds but it's just again to have a record that shows that we did one final check off on each of these issues before getting to final report. And that's it. So maybe staff can take us through this document just a little bit in terms of the format and then we can open discussion of any of the substantive points in it. So I'm looking at staff for short no more than three to five minute description of the format of this document.

Steve Chan: Thanks Phil. I - this is Steve again from staff. And I think Mary is still not with us on audio. So I'll take a first swing at this but to be perfectly honest she developed this document. So I'll do my best to speak to a but we'll see how that goes.

So I think you had also asked at some point Phil about what why we would be looking at this again. And so just to speak to that briefly you can construe this as sort of new facts or arguments to close out some of those discussions in the sense that a separate DRP is something that the IGOs and many other

commenters had seen benefit in. So to that extent it's something that the working group may want to conclude it's discussions on.

So the format of this document is pretty similar to the one that we did on the recommendations - the Recommendation 4 Options 1 and 2. It's simply a set of benefits and corresponding disadvantages. And then obviously the third column is going to be filled out and completed as the working group conducts its discussions. I, you know, I'm not sure if you want me to go through each of the benefits and disadvantages. I think that's probably something that's better done by you. But I mean that's essentially the format of the document simply benefits versus disadvantages.

Phil Corwin: Okay so, you know, what I'm going to do Steve at this point we've got a 2-1/2 page document. We've got about an hour left. I don't think our review of this will even take an hour. What I'm going to do is go through it quickly point by point, go through each point what's on the table here. I'm going to add my own personal commentary and we're going to stop at the each end of each point and see if anyone has any further comments to add.

And I would expect we can get through that fairly quickly. So this is on reviewing the summary of potential benefits and disadvantage of an entirely separate DRP just for international intergovernmental organizations. Point one wouldn't require any modification or amendment of the existing UDRP or URS. My personal comment is that so far we haven't recommended any modification of the UDRP or URS. And even in terms of guidance to panelists if we're going to be dialing back the import of notification to WIPO of Article 6 Tier protections if we're going to dial that back based on the comments we received from being a entirely separate basis for standing to bring an action and just to juts being evidenced of common law trademark rights filled by an IGO we wouldn't - that even reduces the amount of guidance we have to provide.

So considering scope and applicability of a separate DRP need to be very clearly and narrowly defined to make clear that there's no relationship to trademark law or dependence on the UDRP and URS and second point need to determine are the separate DRP would be similar to the UDRP URS in terms of burden of proof and remedies, in terms of substance scope what would be the grounds that would replace the current three prongs of the UDRP URS. I would be more appropriate if we limit it to something akin to a URS type proceeding with a higher standard of proof and limited remedies. On that one, you know, right now we've always talked about access to two separate proceedings, one being like the UDRP which can lead to domain extinguishment or transfer and the other one being similar to URS which is a faster less expensive process that only results in domain suspension.

On the disadvantages entirely new process to existing ICANN DRPs for only one specific groups of complainants. And we need to be clear as to the exact public policy or legal ground on which this is based and minimize the risk that other parties might be in due course petition the GAC or ICANN for their own special and separate treatment. So let me sum up here personally and then open it up for any discussion on point one.

Yes it would be a very large amount of additional work for us to defined, to create an entirely new DRP. I'm not in terms of description we'd have to debate on whether it would be based on rights separate from trademark rights or on trademark rights plus other rights. And I'll comment here that in the continuing discussions of the IGO discussion group established by the board there's been some discussion but there's not yet really any identified clear and separate body particularly on a uniform basis that creates rights for IGOs other than the trademark rights and the suggestion by the chair of that discussion group that perhaps it needs another legal expert to try to locate such rights is not getting a great deal of support from the IGOs themselves.

So I'm not sure what the direction of that discussion group is but they are on notice from, you know, they're aware that we're continuing to do our work and

that if they decide to go ahead and engage a separate legal expert we'll take note of that and possibly suspend their - our final work. But so far they're - they don't seem to be going in that direction. And in fact the pressure to do so seems to be dissipating.

So yes to sum it up we don't know - we'd have to create that new and separate DRP from whole cloth. We're not sure what rights other than trademark rights it would be based upon. And if trademark rights are the only rights begs the question of why create it when we have a UDRP and URS based on trademark rights. And not noted here and maybe noted later in the chart but it - the IGOs have always asked not just for a separate DRP but for a DRP in which there's no right of appeal for a de novo judicial determination. And that's something that has not found support in this working group.

So I'm going to stop there. I see George has his hand up and after and Petter. So let's talk about Point 1 and then we can move on to Point 2. George?

George Kirikos: George Kirikos here. I'll let Petter go first because I already spoke so I'll defer until after Petter has spoken. Thanks.

Phil Corwin: Okay Petter?

Petter Rindforth: Okay thanks. Petter here. I'll be short time and perhaps this is not just cumbersome, the first topic but general - generally on its specific issue. When we talk about separate dispute resolution policy and the first thought is of course oh yes that's an EC and of course the most natural way to solve the problem with it that we're working with.

But as we've seen when we started to deep a little bit in on topic and as they also can see on the - this disadvantages list here there are a lot of problems that hasn't been solved. It's in fact not an easy topic because it has been up and discussed long before we had it on our table. And I also have the feeling

both reading the replies from IGOs but also when talking to some of them that if - that even if they were (unintelligible) the old claim to have a separate dispute resolution policy it seems that they can in fact accept the work that we are doing if we can solve the appeal part in a way that can be acceptable both for IGOs and of course also for the domain holders. So sorry that was a - more of a general comment on this but again it's - we need to go Philip and to show the pros and cons to also show that we have actually discussed it again and why we does not support that as a way to solve the problem because I had a feeling that this is a topic that we can have 100% common decision on. Thanks.

Phil Corwin: Okay hey thanks Petter and thanks for conveying. I wasn't aware that at least some IGOs had indicated that if we can square the circle on the appeals issue and what happens if they successfully assert immunity that they might be inclined to accept where we've come out generally I think that's very useful information. George go ahead.

George Kirikos: Thanks. George Kirikos for the transcript. Yes I think it helps to perhaps step back and go over the history of why the UDRP was developed back in the 1990s, late 1990s. There was a rash of cybersquatting and the Wild West kind of scenario where people were upset that, you know, all the cybersquatting was happening and, you know, it was clogging up the courts. And the idea was that with the UDRP would come in as an alternative resolution mechanism designed for the clear-cut cases.

And in a sense it was very, you know, it didn't undermine anybody's rights because the court could get involved at any time. So the price of entry of this UDRP was that, you know, everybody agreed on jurisdiction for that the court that the decision of the panel could be handled in the courts afterwards or during or even before the dispute was heard.

So that's where the genesis of the UDRP is so to speak that there was, you know, a rash of cybersquatting. And so the policy was developed to handle,

you know, to take a load off the judicial system. So where are we today? We have a lot, you know, the Internet, you know, the last 20 years has grown substantially and people use domain names a lot more. But there's obviously a whole rise of, you know, a whole slew of different, you know, disputes that can occur on the Internet.

You know, you have spam, you've got copyright infringement. You have disputes between registrants and registrars, disputes between registrars and registries. For example, you know, the registry slide debacle. You've got, you know, disputes between registrants and registry operators. For example this past week some people were concerned about some .XYZ domain being clawed back by the registry operator due to so-called mistakes. And, you know, you've got price increases by, you know, VeriSign and Uniregistry and so on.

So there's all kinds of parties on the Internet that touch upon the domain name system that have disputes. You know, we don't have - we don't develop a separate mechanism outside the court system for each of those disputes. You know, there's no dispute policy if I have, you know, an issue with TruAL's building or Donuts' policy and so on. You know, that would be, you know, taking away of their rights and imposing in an arbitration system where that, you know, their rights are somehow lessened compared to the existing judicial system.

And so actually this could be IP constituency for example they - they're supposedly in support of the separate mechanism. I would wonder if, you know, the tables were turned, you know, would it - they be in support of a system where, you know, I could challenge a trademark that's been used in the trademark clearinghouse by a separate arbitration system. I think that would not be the case. You know, they would say, you know, go to the national authority that granted that trademark and cancel it there, you know, if it's in Pakistan or Benelux. You know, otherwise, you know, the trademark is assumed valid and so there's a huge minor hypocrisy on the system.

Same for the GAC. You've got, you know, the United States government supporting this separate, you know, arbitration procedure proposal that is extrajudicial. You know, if I wanted to have a lawsuit against the US government or the French government or whatever I could not force them into a - I cannot compel them into a binding arbitration. They would say, you know, come to our country, sue us in our courts and, you know, that's your only recourse.

And so there's a huge disconnect between, you know, what they want to do to registrants and how they view their own rights. So I think that that needs to be kept in mind because we know that, you know, all these abuses that occur for all kinds of other parties, you know, registrants and, you know, trademark holders the validity of, you know, all of these Benelux and minor jurisdictions that are actually being, you know, used UDRPs.

So if we don't say to them that no, we're going to have some panel decide what your real rights are and we're not going to let you decide, you know, that, you know, you have rights that exist in the courts. And even outside the domain system, you know, you've got people like Barclays who committed a huge fraud or fined. We don't allow the Barclays customers who were defrauded to take them to an ICANN sponsored arbitration in order to, you know, to see if the domain name is, you know, part of their damages perhaps or some other bizarre, you know, alternative dispute mechanism. The same for Wells Fargo with all the, you know, the scandals and all kinds of, you know, different companies that commit scandals.

So but what we really have is, you know, a set of busybodies with an agenda that's really inconsistent with the underlying, you know, rule of law. They want their own forum shopping to occur. And why this is so important? You know, why does it matter? You know, for an IGO with a very strong case, you know, what - it comes down to immunities. You know, if we can set up this

alternative dispute resolution mechanism which I oppose the same immunity question still arises. It just arises in the form of a different mechanism.

So it doesn't actually simplify anything so - but, you know, for an IGO with a really strong case there immunity isn't going to make any difference to the outcome. They'd still win in court and they'd win in the UDRP. So the idea that immunity actually buys them anything is silly, you know. They would win in either forum.

When it does matter is when the courts would make a different decision for the IGOs then they would get a an UDRP arbitration. This happens, you know, when the IGOs are bringing the iffy cases, the ones that are in the gray area. But, you know, for example they managed to squeak out a win under the UDRP that they shouldn't have won. And rather than have that bad decision overturned in a real court, you know, they want to play the immunity card so that they can hope for another, you know, a favorable outcome for them, you know, a bad decision for the registrant in the binding arbitration.

So in other words this is all about forum shopping. And we've seen that forum shopping does exist. You know, the e-resolution UDRP provider went out of business because complainants weren't winning enough. So the IGOs here are complainants. They want to choose the forum where they, you know, the odds are stacked in their favor because, you know, IGOs can waive immunity, bring, you know, things in court. They're the ones that choose the initial forum for the dispute.

If, you know, if IGOs really had a strong case for fraud why aren't the national governments bringing all those cases in courts and arresting the fraudsters? You know, there's actually a big policy reason to actually not allow them to have access to the UDRP, force these people to take these criminals to court and get them to stop what they're doing.

You know, a court can say, you know, you may not register any domain name that violates, you know, an IGO acronym and if you do you're going to go to jail, you know? They can make them do a lot more penalties than just simply handing over a domain name and allowing the cyber squatter too, you know, become a serial cyber squatter and, you know, infringe on somebody else's domain name. So the fact that, you know, we have got these minor, you know, really ridiculously low penalties for the clear-cut cases is, you know, perhaps against public policy. So...

Phil Corwin: George...

((Crosstalk))

George Kirikos: ...that could (unintelligible). Yes (unintelligible) for a minute.

Phil Corwin: Yes could I ask you to just kind of, you know, wrap up and...

George Kirikos: Yes.

Phil Corwin: ...so we can get on because I know, you know, these are good points. You've made you may many of them before and again this group doesn't - it's probably not...

George Kirikos: I don't see any...

Phil Corwin: ...inclined to reopen...

George Kirikos: I'd like to just finish what I'm saying.

Phil Corwin: Okay.

George Kirikos: The - you know, so we're not really talking about the easy slam-dunk cases. You know, the IGOs want this so they can bring the iffy cases and face no

downside risk if they manage to squeak out an undeserved victory of the UDRP or before an arbitration panel. So it's really that simple and, you know, we've been at it for years but that's really what it comes down to.

And in terms of, you know, weighing the risks, you know, we have to look at this as, you know, a nuisance level thing or whether it's really an existential threat. And, you know, over the last three years, you know, the IGOs haven't presented any data on, you know, huge existential threat from, you know, massive amounts of the cybersquatting on their names. You know, they keep harping on, you know, cases of, you know, fraud and things like that. But, you know, where are all the fraud cases that are clogging up the courts that they need this, you know, system as a release mechanism for what they can't do in the existing judicial system? That's what the rationale was in, you know, the 1990s. Where's that rationale today?

And so what they're really seeking, you know, is forum shopping, a customized justice system that's outside legal system. And so, you know, this second separate DRP process it's really trying to, you know, reinvent the wheel or reinvent the actual judicial system. And it's not going to be equal to the judicial system. You know, it's going to be less than the judicial system. You're not going to have real judges real courts deciding things if, you know, we won't go down that route. And so that was the gist of what I wanted to point out. Thank you.

Phil Corwin: Okay. Okay thank you George. We're going to move on to Point 2. As we're at 15 past the hour. We have 40 minutes left. We have four questions the last two - four points left to review.. So I'm going to ask that as we continue discussion of these I'm going to try to be as brief as possible. And I'd ask members to be as distinct as possible in any future comments with the aim of getting through this today. And if you have more to say, want to provide more detail to put that in an email to the full working group.

So Point 2 yes what the IGOs asked for is supported by the GAC and other community groups. And the IPC has cited IPC has been on record for a number of years as opposing an amendment to the UDRP and supporting a separate DRP. Again I have to note we're not proposing any amendments to the UDRP that I'm aware of. So their concerns are satisfied on that. I'll also personally editorialize I'm not quite sure why the IPC is taking that position in regard to our work because not the IPC, I'm not familiar with their official positions but certainly many trademark owners were very distressed that the .Amazon and .Patagonia top-level TLD applications were rejected on the basis of GAC advice when there was no reason under trademark law to reject them.

And within our separate RPM Review Working Group the trademark owners have not been disposed to allowing geographic indicators which are not also registered trademarks to be asked for to be eligible for entry into the trademark clearinghouse database. So generally other than this working group and the issue it's dealing with trademark owners have not wanted to see other basis for disputes established other than those that are clear under trademark law.

Turning to the other column all the GAC at - although the GAC and ICANN supports are separate DRP for IGOs the issue of a separate DRP whether it's for country names or IGO identifiers has been a difficult issue in international circles including at the WIPO general assembly level. And I note that that's very important if it's not even agreed to within WIPO discussions. What are the implications of ICANN being the first to adopt one?

And I think that gets to the general question and again referring back to the ongoing ICANN discussion group as opposed to trademark rights which are pretty much universal and recognized around the world despite variations in national trademark laws they're much more similar than different and they're almost every nation has a trademark law regime. And even geographic indicators or at least they're more widespread there hasn't been any

identification so far of rights that are recognized broadly among nations that protect IGO names and acronyms other than trademark rights. So if we were to go to a separate DRP what - if the right protection mechanism what are the rights other than trademark rights other that would justify such a system? I haven't seen them identified. And why should ICANN be the one to step out and this working group taking another six months to a year to try to establish the policy and procedure for entirely separate DRP when we're not even sure what the right spaces for it underlying it would be?

I'm going to stop there. I see George. And George let me ask you to be as succinct as possible so we can finish the rest of this list today. Thank you.

George Kirikos: Yes George Kirikos for the transcript. And just do a follow-up on that point on the other IGO small group mailing list that's public. They have been talking about things like, you know, consumer protection laws and things like that. But in those cases it's national authorities that are bringing the action on behalf of the IGOs. And I think, you know, we have made that kind of clear, sorry, maybe not as clear as we can that the assignee, licensee and agent when - the agent bringing the action could in theory be, you know, those national authorities.

So, you know, the government of Canada or the government of Australia could bring a - an IGO dispute on their behalf perhaps, you know, in some form of consumer protection mode. So perhaps, you know, that could be made clear in our recommendations that, you know, that the agent could in theory be a national authority. Thanks.

Phil Corwin: Yes thanks George. And thanks for bringing that point up. I know that I commented on that list that the only national laws aside from trademark laws we should be looking to as the basis for a separate DRP which would of course be a supplement to existing national law would be those national laws which gave an individual right of action to bring litigation, not those which are basically regulatory schemes and require are based upon government

agency enforcement. And again so far those haven't really been identified to any broad extent on that discussion group including by the IGOs. And if those laws existed they should certainly know about them.

Any further comment on Point 2 or can we proceed to Point 3? Okay Point 3 separate DRP may address the public policy concerns have been raised by the GAC and the IGOs. US government notice supported for the IGO small group proposal. And yes we don't want to exacerbate any GAC GNSO conflict but we want to have a sound policy proposal. And the counterpoint this will tread entirely new legal and policy grounds which is similar to the discussion we just had. And there are big implications for creating a separate DRP that's not based on very clear and broadly accepted across nation specific legal rights. That was my editorializing just now. The UDRP and URS are based on trademark law and that's it.

And I would add two things to this. One the UDRP and URS being based on trademark law another reason why they - why I think it's appropriate for ICANN to have the UDRP and URS and may be inappropriate to establish other DRPs. And this is a personal view is that it's the Internet Corporation for Assigned Names and Numbers. And it's the names part. And ICANN involvement with names that may be trademarks that is the basis for the UDRP protection established at the onset of ICANN. It's not clear that other protections would clearly be related to ICANN's mission and remit. So far as the US government position my recollection of the US government comment is that most of it was expressing concern about the use of WIPO notification of 6 Tier protection as a separate basis for standing. And it's been the preliminary conclusion of this working group in regard to that comment and others that were similar that we will probably dial that back and just have Article 6 Tier notifications the evidence of common law trademark rights. So I think we've addressed that name concern of the US.

Frankly the endorsement of the IGO small group proposal was kind of a throwaway line in the last paragraph of the US government proposal. I've had

subsequent private conversations with the US GAC representative on that point where I've emphasized that that would - the IGO proposal would deprive US citizens of their rights to file an appeal under the Anti-cybersquatting Protection Act. And I'd also note that there is no current confirmed Head of the NTIA that the US comment was proposed at a time after Larry Strickling left and before the new nominee David Redl was in place.

And in fact today Mr. Redl is having his confirmation hearing in the Senate Commerce Committee. I know that was this morning. It's probably concluded by now. I haven't had a chance to look at the video that yet. But we should have a permanent new head of the NTIA confirmed hopefully before summer in the US and we can continue these discussions with the US GAC representative in Johannesburg.

I'm going to stop there, see if there's any comment on Point 3. Okay moving on to Point 4 separate DRP not based on trademark rights is not likely to cause potential issues such as scope creep in relation to the scope and future of the trademark-based UDRP and URS. Okay on the other side as noted above implication of creating a brand new non-trademark law based DRP needs to be more fully examined. Again what personal comments? We're not recommending any change to the UDRP so far in our initial report or our likely final report. And again if I were an IP owner, trademark owner I'd be more concerned about creating rights that were based on trademarks for governments and government created organizations particularly in view of the other issues that are percolating in ICANN.

And I'll stop there and see if there's any comment on Point 4. Yes George?

George Kirikos: Yes for the Point 4 I didn't really understand the benefit column or the separate DRP that was not based on trademark rights is not likely to cause potential issues scope creeps. You know, there's a double negative in their so perhaps that could be maybe be made more clear.

Phil Corwin: Yes thank you - and I also as I read that wasn't quite clear of the import but based on my knowledge of the IPC comment I think it's based on concern about any amendments we might recommend to the UDRP or URS. But again we so far we haven't recommended any changing a single word of the policy so I'm not sure that's a valid concern.

And that brings us to Point 5 which is a separate narrowly tailored DRP could help resolve the jurisdictional immunity problem filing for arbitration as an option for appeal considerations. It - the arbitration would have to provide at least the same level of due process safeguards as going to a national court they would have to be de novo, couldn't be more costly or have more procedural requirements. The arbitrator would have to be neutral and independent and we'd need to consider if the arbitration should be ad hoc or institutional.

And in the other column if arbitration pursuit is a sole option for losing priority what are the implications of removing a party's right of recourse to a national court versus preserving the jurisdictional immunity rights and privileges in those jurisdictions? I'll say here is that, you know, we got a - the heart of the IGOs request for a separate process has always seemed to this group to be based in concerns about jurisdictional immunity. For IGOs we took the step of engaging an outside legal expert to inform us on the generally accepted scope of that immunity. He came back with a memo that said it really depends on the facts of the case and the jurisdiction it's being heard in. So we recommended in our preliminary report that the immunity question that the registrant's right to appeal to a court of mutual jurisdiction should be preserved, that ICANN should not be in the business of depriving individual domain registrants of their statutory legal rights and that that wouldn't be a good precedent to set and that the immunity claim should be since it's a defense to being brought into court that it should be heard if the IGO raised the defense it should be decided by the national court and not by ICANN in advance.

And so that's pretty much it. And of course the remaining question we've been wrestling with is what would happen if an IGO raises the immunity defense and is successful? What should happen then? Should that be the end of the story? Should the UDRP decision be reinstated or vitiated or should it go to an arbitration that in my view if there was an arbitration if the court appeal was shut down the arbitration would have to be as similar as possible to any court review other than the fact that it was taking place outside a courtroom and being heard by an arbitrator rather than a judge.

Of course we could require that the arbitrator retired judge. So but that's getting into the basic is that on Point 5 is that it would resolve the jurisdictional immunity problem by depriving domain registrants of their statutory rights and we've questioned whether that would be appropriate or even enforceable whether a - we couldn't stop a registrant from filing a lawsuit. And it would be up to the court then to decide what should happen at that point. So I'm going to shut up and call on Petter who has his hand up.

Petter Rindforth: Thanks Petter here. I just wanted to add that frankly I think with if you decide on our Option 2 I think we have solved this Point 5 and in a way that could be acceptable for IGOs.

But as I personally see it it's also the best way for the domain holder. So that said we in the draft we are discussing, we are in fact -- and I'm not talking about this document now but we are in fact as I say then solved the problem in a fairly good way. We are not creating a new dispute resolution policy. We are not creating, we are not suggesting any amendments of existing URS and UDRP. But we are showing a way to use the assistance and then also to have a second phase that will be dealt with in I think in a fairly neutral way for both parties. So having said that we have sold this point as well. Thanks.

Phil Corwin: Okay. And thank you Petter. I'm going to call on George but I just want to note that while Petter mention Option 2 our current discussion is on reviewing

and making taking one final look and the pluses and minuses of a separate
DRP for IGOs and that we're going to be having a very in-depth discussion of
Options 1 and 2 based (unintelligible) the staff document that we're going to
have before us probably on our next call. So with that preface let me call on
George.

George Kirikos: Yes George Kirikos for the transcript again. I just want to respond to Petter
decided that Option 2 being better for the domain owners that's, you know,
not an accepted fact. That, you know, people can choose Option 2 on their
own. Without going to court, you know, they can choose binding arbitration.
Imposing Option 2 on a registrant is that necessarily a worse option than the
present?

Going back to Point Number 5 I don't think it really resolves the jurisdictional
immunity issue by having a separate process. It could still be handled within
the current process, you know, with the relevant changes. All it does is if we
have a separate DRP just, you know, moves the discussion to a different
place but it's still the same issue. Thanks.

Phil Corwin: Thank you George. So I'm going to ask the person sharing the - my
prerogative. We've completed our collective review of this staff prepared
document which we're - is really our final chance to decide whether we want
to stick to our original initial report conclusion that there's no - we have not
been able to identify any separate broadly recognized body of law other than
trademark law that if it could be the basis of a separate DRP and that a
separate DRP with no judicial right of appeal wouldn't unduly disadvantaged
domain registrants and is not a desirable precedent for ICANN to set any
more than it would be desirable for ICANN to say that domain registrants in
the EU should be deprived of EU privacy protections vis-à-vis registrar
operations.

So let me ask the question having completed this review is there anyone on
this working group - and if you believe so use that green checkmark agree

thing. Is there anyone who thinks we should reopen our initial conclusions and embark on a further discussion of creation of a separate DRP to - for IGOs alone? And then George just put an X if you - I was just asking to see if there was support. I suspect there 'snot support but I wanted to make sure that anyone who felt - wanted to - felt we should give further consideration to that.

But okay if you think we should stick to our - if you're against a separate DRP put an X and if you're for further consideration of a separate DRP put a check and let's get a sense of where this working group is at.

Okay we've got five Xs so six Xs and I did not see any support from any member of this working group for considering the creation of a separate DRP for IGOs which is not a surprising result. So I think we've done our due diligence here. We've given this all due consideration and I think this subject is probably closed between now and preparation of our final report.

So it's 13 after the hour. We're 73 minutes into our 90 minute call. Is there any other - Petter go ahead.

Petter Rindforth: Yes sorry just a formal thing. I mean we are - I don't know how many signed up members we are in this working group but as Mary said in the chat room should we also take the question to the mailing list? And I think that's something we need to do for pure formality so that we can have a clear full member list voting on this topic. Thanks.

Phil Corwin: Yes I agree with that. And I was remiss in not mentioning that. I'm not sure how many - what the full - our full membership is but I'd asked staff to prepare an email to go out to the full membership, the working group subject to co-chair review before it goes out informing all the membership of the discussion we had today, the result of our informal straw poll on the call and asking whether any other member of the working group who is not on the call

believes we should give further time and commit further work to creation of a separate DRP for IGO.

So thank you Petter for pointing that out. Is there any other business that anyone wants to bring up on today's call? George that's a question. That's a checkmark. Do you have any other business to raise?

George Kirikos: Oh sorry. Oh yes George Kirikos. I missed with my mouse. Actually I tried to change it and it made the status incorrect. Yes at the ICANN meeting in Johannesburg is coming up. Do we have any discussion about what's going to happen there because just to, you know, to the scheduling so...

Phil Corwin: Yes I know the final schedule was put up the other day. If members of this working group haven't seen it yet perhaps staff can forward that final schedule for Johannesburg. Of course it's also available on the ICANN Web site. I know we're scheduled for a 90 minute meeting of this working group in Johannesburg. I'm not - I don't recall what day it is but there is going to be a meeting there. Time difference I know it's probably six or seven hours ahead of the US East Coast in Johannesburg and so we will have a meeting and so those who are in Johannesburg should be there and those members who are not can participate through ICANN's excellent remote participation technology.

Today's the eighth. I know we're planning to have a meeting next week on the 15th. We can - the 22nd there's just a few days before the start of that meeting I'll be heading - I'll be leaving the US the following day the 23rd to get Johannesburg. It's quite a long trip from East Coast US, even further from the West Coast.

And so we can make a decision next week about having a meeting on the 22nd and whether we should just skip it and have our next working group meeting after next week's in Johannesburg. I know Terry Agnew's noted in

the chat room that the working group meeting takes place in Johannesburg at 10:30 am to 12 noon local time on Tuesday, June 27.

Steve has just said that Mary and he will both be traveling on the 22nd. I would say that probably - hold on I have to switch phones. I'm about to lose power. Okay I hope you can all hear me now.

So if we're not going to have staff available on the 22nd there's no point in having a meeting. So as schedule will be a meeting next week at our usual time of 1600 UTC and then the following meeting will be the Johannesburg face to face meeting at 10:30 am to 12 noon local time which I know George is not enthused about what time that is in North America but we don't control the final schedule for the ICANN meeting. And no matter what time we schedule those face to face meetings for it's always inconvenient for someone who's participating remotely.

So that's it. So I think we're done for today. We're ending 12 minutes early so I'm happy to give you back those 12 minutes. And again next week we'll probably be having a very robust 90 minute discussion of two new documents that you'll be receiving in the next few days. Okay. Bye all.

Terri Agnew: Thank you. Once again the meeting has been adjourned.

END