

**ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG Meeting
Thursday, 14 September 2017 at 16:00 UTC**

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Attendees:

George Kirikos
Mason Cole
Paul Tattersfield
Phil Corwin
Jay Chapman
David Maher
Osvaldo Novoa

Apologies:

Petter Rindforth
Paul Keating

ICANN staff:

Mary Wong
Steve Chan
Berry Cobb
Dennis Chang
Julie Bisland

Julie Bisland: Thank you. Well good morning, good afternoon and good evening everyone. Welcome to the IGO INGO Access to Curative Rights Protection Mechanism Working Group call on the 14th of September, 2017. On the call today we have George Kirikos, Mason Cole, Philip Corwin, Paul Tattersfield and David Maher.

We have apologies from Paul Keating and Petter Rindforth. From staff we have Steve Chan, Berry Cobb, Mary Wong and myself, Julie Bisland. I would

like to remind all to please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid background noise. And with this I'll turn it back over to Phil Corwin.

Phil Corwin: Okay, thank you and thanks to everyone joining today's call. As we move towards the conclusion and moving toward a final report there's some additional details we have to look at. And if staff could please put – paste into the chat room the updated flow chart that's been developed over the past week, that'll be the focus of our discussion today and some related – some questions that are related to it. Okay, thanks.

So unless there are objections what I would propose to do is spend the next five minutes or so taking working group members through this flow chart which is - been the developed through a lot of work by staff and the cochairs over the past week. And we think is simpler to understand; the one we were dealing with last week had two different tracks to facilitate discussion, but after that discussion we think we've – would simplify further consideration to combine everything into one unified flow chart.

So you'll see here that this is the Option 2 flowchart, but that there's some color coded stuff that relates to the so called Option 3 and 6. So let me take you through this and then we'll get to the questions and that the chairs have raised and we can consider any questions or queries that other working group members have.

So we start at the top which is that an IGO files a UDRP contending that a domain name is being – was registered and is being used in bad faith. Then the registrant is notified that the UDRP has filed. And I'm going to ignore the stuff on the side here and get back to it and just take us straight down the arrows right now and then we'll get to the stuff on the side which relates to the questions.

Then let's – this obviously if the complainant loses the UDRP that's the end of the story for our purposes. They of course would have the option of bringing a trademark infringement suit in a relevant jurisdiction but they'd have to clearly not – they couldn't do that and assert judicial immunity simultaneously. But so our flow chart only continues if the IGO's complainant wins the IGO.

And then subsequent we're considering first – if the registrant – and this could happen with the registrant has been a default registrant and did not respond to the initial UDRP and lost the UDRP, which is likely, but registrants sometimes win UDRPs even if they file no response because panelists are required to view the facts favorable to them in rendering decision that they have before them.

Or even a default – a registrant which hasn't replied to the UDRP has not lost their right to file an appeal. It may be less likely but it's still within their right. So whatever the situation, whether the registrant has or hasn't participated in the UDRP they decide that the UDRP decision against them was flawed and within the required time period they file a lawsuit in a court of mutual jurisdiction.

I want to note for the record that of course a registrant could have filed that lawsuit while the UDRP was in process; it'd be up to the panelists to decide whether to continue the action to conclusion or suspend it once the lawsuit was filed. But it wouldn't affect our flow charter materially if – where an IGO is concerned whether the registrant had filed the litigation during the UDRP process or after an adverse decision.

Then, we get to the question we've all be wrestling with, it's what happens if the registrant files – initiates litigation in a court of mutual, jurisdiction, the IGO appears, says I'm here, I'm observing procedurally, the mutual jurisdiction but substantively I'm raising an immunity defense and the judge agrees that the court does not have jurisdiction over the IGO.

Now, at that point if the – the registrant under what we've been considering would have the right to file a follow up arbitration action – and by the way, we haven't dealt with it but we're going to have to decide on what time period the registrant would have to do that. Obviously we couldn't – they're going to have to think about it, we can't require them to file the next day after the court agrees with the IGO. And we've also – haven't considered whether the registrant would have any appeal of that immunity question. I'm not sure a registrant would take that to a higher court. It would depend on the jurisdiction whether that's even permitted because that would be appealing on a legal issue, not a finding of fact.

But let's say the registrant decides to file an arbitration action within whatever time period we designate and assuming the during that time period the enforcement of the original UDRP decision would continue to stayed while the registrant decided whether to proceed to arbitration. So by the way, over on the right side if the – we really – it really should read, "IGO raises immunity defense in court of mutual jurisdiction." If it's successful it would proceed down to the registrant considering whether to file an arbitration. If the IGO failed in that defense, that's the No column over to the right. And then the court would resolve the case and that would be the end.

Whatever the court decided it could decide under the relevant laws that infringement, cybersquatting, had taken place and do whatever it was entitled to do under the relevant law in awarding to the IGO. But if it – it could say no, under our law there was no infringement here, and the registrant would keep the domain.

The – if the registrant doesn't file an arbitration action, going back to the center column, if it doesn't exercise the arbitration right that we've considered creating for it that doesn't exist today under UDRP policy, that would be the end. The situation would be the same today as if it lost a court appeal. The staying of the UDRP decision would be lifted and the existing – and the underlying UDRP decision would be enforced in favor of the complainant.

If it did file the arbitration action, then it would be resolved via a binding arbitration under the types of rules we've discussed where the relevant national law would be the basis for deciding the decision, where we'd observe relevant civil procedure in that national jurisdiction, where the panel would – we've talked about a three-person panel where one of the panelists would be a retired judge familiar with the trademark law of the jurisdiction. But under those conditions it would be resolved via binding arbitration.

So let me stop there and see if there's any questions about what I've gone through so far before we get to the sticky questions. Okay, well I don't see any hands up or hear anyone so I guess that part so far was clear.

So the cochairs have asked the members of this working group for today's discussion to consider two questions, and they relate to the parts of the chart we haven't discussed yet. The first question, "Should there be limitation of either the court review and/or the arbitration to disposition of the domain name," that is whether the registrant gets to keep it or whether it's extinguished or transferred to the complainant.

And should that require mutual – should a restriction to that as opposed to other issues, for example, the Anti Cyber Squatting Act in the US permits pursuit of monetary damages in certain circumstances. Should we try to limit either the court review or the arbitration to the disposition question? Should that require a mutual agreement of the two parties, the registrant or the IGO? Or should we recommend as a policy matter that it be limited for one or the other or both of the appeal forums, that is the appeal from the original UDRP?

And the other question is if the registrant wants to, for reasons that might range from faster decision, less expensive than litigation, etcetera, in this unique circumstance where an IGO is the complaint, should the registrant have the option to proceed to arbitration directly rather than to court if it decides that arbitration best fits its needs?

So let me – I think we should start with the second question because it's probably simpler than the first one. And I see George just typed that in. My personal view would be why not? If we're creating this unique arbitration option for IGO complaints brought within the UDRP, if the registrant – since IGOs like arbitration, we know that, they wanted arbitration only, and no option for judicial review, we didn't go with that, we didn't think that was appropriate for ICANN to try to limit a registrant's options under existing statutory law.

But the IGOs wouldn't seem to have a reason to object. And if the registrant himself or herself decides that this is the better course and they want to skip the judicial review, should we permit that? So I open that to discussion by the working group. And then we'll get back to the first question. Surely someone must have an opinion on this. George, you didn't disappoint me. Go ahead.

George Kirikos: George Kirikos for the transcript. Sorry, I had to unmute myself and raise my hand. Yes, I'd be in favor – well I just wanted to clarify the question first. When you say directly to arbitration do you mean after the UDRP panel has weighed in or before the UDRP panel has weighed in?

Phil Corwin: It would be after. This would be as the cochairs conceived it, well one, I can't think of any reason why an – why a registrant would want to jump to arbitration during a pending UDRP. We're not – they of course always have the right to bring an action in a court of mutual jurisdiction right after a UDRP is filed and before any decision is rendered. But we're – the question as we posed it is, after the adverse UDRP decision, is the registrant required to go to court first or can they choose this arbitration option in the unique circumstance of an IGO being the complainant?

George Kirikos: Okay. George Kirikos again. If it's just limited to that scenario, then yes, I would be in favor of it because it would seem to allow people to save on legal costs of arguing the mutual jurisdiction – sorry arguing the immunity question

in court. So it's a – conceivably a way to, you know, kind of decide that in advance and then just go for arbitration instead.

But back to my earlier question, I think some domain owners or respondents might find it appealing to go directly to arbitration as an option instead of the UDRP because the rules of evidence are slightly different under a court case – sorry, under court rules which the arbitration would be following in terms of discovery and potentially also in terms of the remedies. So that's why I put that out there as an option in terms of what the domain owner might want.

Phil Corwin: Yes. And thank you, George. So we're in general agreement on that. Steve Chan noted in the chat that there is this blue box tied to the center box saying, "UDRP is concluded in favor of the IGO which says registrant can elect to go directly to arbitration." Now that would be after the UDRP decision.

What you're advocating, George, is that we give – we add to the registrant's options once they receive notice which is the box above, "Registrant is notified that UDRP is filed," that you're advocating that a registrant would have at that stage the option where an IGO is the complainant to go straight to arbitration. They already have the right under existing UDRP policy to file a court action at any time. So I haven't thought about that. I don't have a strong opinion either way. It'd be useful if other working group members could indicate their views on the original question as well as the new option that George is proposing.

Well I'm not seeing any further response here. So given that we haven't heard any objections to the view that the registrant could go directly to arbitration following the adverse UDRP decision, I think we can tentatively decide that that's something we may recommend.

On the other one, it's a new idea. Personally I'd like to think about whether that creates any kind of undesirable precedent, although I don't see one at first notice. I'd like to park that – maybe park that recommendation and return

to it later in the call or next week. And I see George said, "Send it to the mailing list for further thinking." Yes, I think that's a good idea.

So on Question 2, having heard no objections, the working group seems disposed to say yes, following an adverse UDRP decision, the registrant only – and we're talking about only where an IGO is the complainant, we're not creating any broader precedent here for the UDRP as a whole, that the registrant could choose to go directly to arbitration rather than their judicial route.

I'm presuming that – let me ask you, George, if the registrant lost that arbitration, would that be the end of the story? I mean, by – is it forgoing its judicial rights by going straight to arbitration? We haven't considered that question but I think to close the loop we have to think about that.

George Kirikos: George Kirikos to answer your question. Yes, that would be their – the cost of that strategy. So in some sense they lose the right to look at the UDRP panel decision to kind of perhaps give a preview of what, you know, panelists might have thought. But on the other hand they might gain in terms of the process because the rules would be perhaps more rigorous in terms of the arbitration compared to the UDRP, which is a little bit less formal.

So it would be a calculation that any domain owner would have to make depending on the circumstances. So it's not always going to be in their best interest to do so but it'd be nice if they had the option, so, that's what I just wanted to point out.

Phil Corwin: Okay, so you're saying – and I think I agree that if the registrant chooses to go directly to arbitration which would be decided under the same national law as if they had gone to court, they're basically forgoing their judicial appeal right in favor of the potential benefits of arbitration in terms of cost and speed of the decision.

George Kirikos: Right. Right.

Phil Corwin: Okay. I'm personally comfortable with that but do we have any other views on the working group? And I see in the chat, Paul Tattersfield has said, "Paul K," – that's Paul Keating who'd sent an email very early this morning my time, and I'm just going to read it aloud because it's a short email. But since Paul T referenced it we might as well bring it into the discussion now.

Okay, and the email reads, "Phil, as I'm traveling I'll put my thoughts here. I am opposed to the entire aspect of a separate arbitration process unless it is open to all losing registrants as a post-UDRP remedy." I'm going to read the full email and then give a personal response.

"Assuming the Option 4 is adopted," and I'm not – right now we're looking at Option 2 in combination with 3 and 6 so I'm not sure – get some staff input on that. But Paul says, "Assuming the Option 4 is adopted, A, if the respondent agrees to limit post-UDRP litigation to possession and control of the domain name, registration, then the – I guess should not be able to force arbitration and respondents should retain all current rights of litigation."

"B, the registrant should always have the option of litigation or arbitration before, after or during the UDRP. I see no reason to change the current process." I'm going to address – Paul – and then he says, "Thank you." I'm going to address his comments, his email, in reverse order and then other working group members can chime in.

We're not – what we're proposing, everything we're considering in no way changes the current policy where the registrant has the option of litigation before, after or during the UDRP. That is a registrant can get a cease and desist letter from trademark owner and smell a UDRP coming, and file a preemptive litigation. That happens sometimes.

They can get the notice of the UDRP and file litigation, which may or may not stop the UDRP process, that's discretionary with the panelists, but we're not changing that. And they have always the right to appeal an adverse UDRP decision to a court of mutual jurisdiction, we're not changing that. So we haven't changed that. So Paul K's concern on that seems somewhat off target.

If the – then he said, “If the respondent agrees to limit post-UDRP litigation, to possession and control of the domain name, then the IGO should not be able to force arbitration and respondents should retain all current rights of litigation.” I'm interpreting that to mean that the IGO shouldn't be able to – the only way the IGO under what we're considering could force arbitration would be to raise an immunity defense in court.

So I guess what Paul – I can't speak for him but as I read this he seems to be advocating that we should state that if a registrant says okay, in my judicial appeal I'm forgoing any monetary damage, injunctive relief of anything else that might be available under the law, other than whether I get to keep the domain name.

My comment on that is that just as we didn't think we could stop a court from hearing litigation brought by a registrant, even had we adopted the IGO's policy of saying any appeal from a UDRP should be to an arbitrator, that access to the court should be blocked, I'm not sure we can stop a court from saying that an IGO can't raise an immunity defense. But let's leave that one open for working group discussion.

And then so far as opening arbitration to all losing registrants as a post-UDRP remedy, I have to say I think that's outside the scope of our working group charter which is solely to address trademark disputes between IGOs and domain registrants. That may well be a topic that's within the scope of the charter of the RPM Review Working Group when it gets to the UDRP. It

may wish to consider availability of arbitration as a separate option from litigation, just as we're considering it here.

But I don't think we can – we have any charter power to recommend changes in the UDRP broadly for cases that don't involve an IGO complainant. So those are my comments on Paul Keating's email. I'd be happy to open up discussion to others who want to address what he said.

Yes, and I'm reading the chat. Paul Tattersfield wrote, "They would have to close the judicial rights if it went to arbitration," I'm not sure what that means, Paul, but you can always clarify that. George said he wouldn't expect to make that choice for himself. I guess he's talking about the arbitration instead of litigation option. But it might be an option for someone else.

And then George said, "We'd not be able to change the arbitration for all respondents, that's something the RPM PDP might be able to do but beyond our scope." So I think we're in agreement on that, George, that's what I just said. And that the IGO can't raise an immunity defense in an in rem case since they're not actually being used, which is why Option 6 is interesting.

And Jay is concerned about any type of arbitration appeal. Yes, that's possible, Jay, but I guess it could arise in the RPM working group but again, we're trying to create it here to improve the situation that would exist today if an IGO successfully asserted an immunity defense. And staff agrees that recommending arbitration is likely beyond the PDP scope. I assume, Mary, that that's going beyond IGO complainants. So I've read all the chat, I welcome further discussion on this.

Okay, well no one's – we have a very quiet group today. So other than in the chat so we'll take the chat under advisement. But where we are so far in this call is we've agreed that the registrant should have the option post-adverse UDRP decision to go directly to arbitration and forego permanently their judicial appeal rights if they decide that's a better option for them. We're

considering – and we'll put a question out to the full working group whether a registrant respondent in a UDRP case initiated by an IGO should have the option to go straight to arbitration before the UDRP is concluded as they could go to litigation in such a circumstance today.

So that was the easy part. Now we're going to go back to the more difficult question which is, the – if there's going to be a limitation on either the court review of the UDRP decision or the arbitration review, whether it's post-UDRP decision or post-successful raising the immunity defense by the IGO, should that narrowing the scope of the review require the mutual agreement of both the registrant and the IGO, or should we recommend as a matter of policy that we say that it's limited to that for either the judicial forum or the arbitration forum?

Let me say, this is a strictly a personal view, just to kick off discussion. I think if the two parties to a dispute, whether it's in court or an arbitration, want to limit the scope of what should be considered by the judge or the arbitrators, that's always an option they have. We don't create that option, that's always available to participants in such decisional forums.

My own view is that if we try to say well, a registrant brings a case under the Anti Cyber Squatting Act in the United States, which permits monetary damages against the complainant in some circumstances, I'm afraid that, you know, as we've decided in regard to other proposals to prohibit or constrain rights under national laws, that the court – it wouldn't be very effective, that the court might just say well that's nice but the courts wrote this statute and I'm not going to tell this litigant that they only have access to part of it and not all of it.

So I think it might be – we could it but I'm not sure a court would respect it. You know, on the other hand if we limited judicial review to just disposition, I guess some registrants might complain saying I'd like to pursue monetary damages. On the other hand it might quell the concerns of IGOs to the extent

where they didn't bring up the immunity defense but were content to have the matter settled in court.

On the limitation of the arbitration review, I'd be more open to us recommending that its review following a successful invocation of the immunity defense be limited solely to the disposition on – for two reasons. One, again, that creates a better option for domain registrants than exists under the current policy where the original adverse decision would be affected once an immunity defense was successfully raised.

And also it recognized that court – a court of law – a national court would have a hard enough time enforcing a monetary judgment or an – some type of injunction against an IGO particularly if it was a UN agency, particularly if it was domiciled in a different national jurisdiction, say Switzerland. And an arbitration forum would have an even tougher time doing that. So it might be more appropriate to limit the arbitration to strictly deciding whether the registrant gets to keep the domain or whether it gets transferred to extinguished.

So those are personal views. I'm not trying to impose them on the working group. And the subject is now open for discussion. And I would hope that someone has an opinion on this because this is a key question. Yes, George.

George Kirikos: George Kirikos for the transcript. Yes, I just wanted to clarify that if we, as a group, decide to change the policy to require the – both the registrant and the domain name registrant – the respondent in the UDRP case, and the complainant, in this case the IGO, to limit any appeal only to the fate of the domain name, is that going to ensure that the court, I mean, to the jurisdiction court, will not hear an immunity argument? Or will the court still be – in other words, is the IGO giving up something to get that change? Are they giving up the immunity question entirely or are they still being able to assert immunity?

Because if they're still being allowed to assert immunity, then the registrant it seems to me hasn't gained anything by agreeing to this bargain, like they basically limited their options and given something to the IGOs for free. If on the other hand the registrant, you know, is giving up the, you know, the legal costs and any other damages that they might be able to get from the IGO, in exchange for the guarantee that the IGO can't assert immunity, i.e. the appeal will be heard in the court, then that's something that would be, you know, a tradeoff that might seem more acceptable. But I'm just asking for some clarity on, you know, well what exactly would happen if the – that limitation is agreed to? Thanks.

Phil Corwin: Yes, and George, let me – thank you, George. Let me respond as best I can. I think, you know, one option for our report might be a passage that recognizes that it's unlikely that ICANN via any policy could effectively limit a court's ability to look at all available remedies under a relevant national law in a court of mutual jurisdiction, but recommend that – but recognize that the parties to the dispute can so limit it simply to the disposition of the domain name and that it would seem reasonable that if they do so then an exchange for the registrant foregoing any additional remedies that the IGO should simultaneously agree that it won't raise an immunity defense and will submit to the substantive jurisdiction of the court. That's one way we might handle it.

There's also something – that's my response to you on that. There's also something else important that I haven't mentioned so far that I just want to get on the record. In all of this, whether the IGO files a litigation in a court of mutual jurisdiction, or whether it files to have the UDRP decision reviewed via arbitration either directly or after successful assertion of IGO immunity, if the IGO does not participate in the court decision, or if – in the court procedure or if it refused to participate in the arbitration, I think we should make clear that in that case it doesn't get to have its cake and eat it too.

That the UDRP decision should be permanently stayed; that the IGO has to participate in these follow ups to the UDRP if they're chosen by the registrant

and that it can't get the UDRP decision that was favorable to it as complainant enforced by stonewalling and not participating in either the litigation or arbitration. That's my understanding. I think that should be in our final report but I wanted to get it out there.

Okay, so circling back on limitation of what's going to be decided, right now the discussion seems to be that we may not be able to limit the scope of judicial review but we can encourage the parties to limit it to disposition of the domain name in exchange for the IGO agreeing not to assert immunity and have a final decision from the court.

But that it might be appropriate in the arbitration action recognizing reality in terms of ability to enforce any part of a national law other than disposition of the domain name which is something ICANN can enforce because the domain is held by an accredited registrar and they're going to do with it what they're directed to do by ICANN policy that we could limit the arbitration to simply deciding whether the domain name should stay with the registrant or be extinguished or be transferred to the complainant.

Do we have further comment on that? Yes, George, go ahead.

George Kirikos: George Kirikos. What's interesting is that Option Number 3 and Option Number 6 have slight differences in that Option Number 3 talks about the IGO voluntarily limiting its immunity argument, it's like having the limited waiver, whereas Option Number 6 doesn't actually require the consent of the IGO to do anything. It would allow for the in rem or the quasi in rem action, you know, with or without their consent.

So in some ways we can still get to where we want to be, i.e. having the court have full control over the case without arbitration if we go the Option Number 6 route, allowing the, you know, registrar to consider the in rem action and freezes the outcome of the domain name regardless of whether the IGO participates or not in the in rem court case. So there's – they're kind of

intertwined but there is that subtle difference between the two where the Option Number 3 kind of requires that we change the policy slightly whereas Option Number 6 only requires that we change the rules surrounding the policy without actually changing the policy itself. Thanks.

Phil Corwin: Okay. Yes, thanks for pointing out that distinction. George, are you recommending that we go with Option 6 for the whole process or are we talking about Option 3 for the court action and Option 6 for the arbitration action?

George Kirikos: George Kirikos again. Well I would recommend Option 6 in order to clarify the process in case the registrant decides to file the court case in rem or quasi in rem without the IGO's consent. But Option Number 3 would still kind of be needed if we're going to allow the arbitration. So Option Number 6 can seem to survive without arbitration being on the table so this is covering more of the basis in terms of this flow chart because this flow chart is somewhat obviously incomplete compared to all the options was there in terms of the types of court cases that can be brought.

Phil Corwin: Okay. Great. And I guess the in rem action, as we've discussed, is available in some jurisdictions but not all. So, you know, we're dealing with a situation where some jurisdictions have no statute under which a registrant could file an appeal and that brings up another interesting wrinkle that I'll circle back to in a minute. Some jurisdictions have relevant statutes but don't permit in rem actions and some jurisdictions have the statute that permits an in rem option.

I also want to point out if we create an arbitration option as we've seemed to have tentatively agreed to, that well I guess this raises a question – I'm going to pose a hypothetical, and I hope I don't take us too far astray but I think we need to consider everything to be comprehensive in our decision.

We've already tentatively decided that a domain registrant should be permitted, if it wishes, to go directly to arbitration rather than to an intervening

judicial stage if it wishes to. What about the registrant which because of its domicile and it doesn't have nexus with any jurisdiction in which there's a statutory right of judicial appeal, should it have some arbitration option? Should we create a right of appeal from a UDRP decision that in an IGO situation that it doesn't currently have?

Or would that be inadvisable because we've said up to now that the arbitration should be under the same national law that would have applied in a court – in the relevant court forum, here there would be no relevant court forum, so if we went that way I'm not – we're going down an entirely new path and we'd have to create a separate arbitration rules and procedures rather than just going with the national law standards and the civil procedure for that jurisdiction. So I hope that doesn't confuse things, but I don't want to leave any rocks unturned as we move toward final decisions here.

George, do you still have your hand up?

George Kirikos: Oh that's a new – George Kirikos, that's a new hand. Yes, just addressing your last question, that seemed to not be a scenario that would necessarily need to be counted for because if the IGO is the one that's appealing the adverse UDRP decision where it lost – it would necessarily have to give up immunity to sue in the mutual jurisdiction so I don't think we need to create an arbitration option for that because it couldn't file an appeal in court while simultaneously arguing it had be – it would have to give up that immunity. If I understood that scenario correctly.

Phil Corwin: Well I was talking about the scenario where the registrant loses the UDRP but wouldn't under the rules today, have any option for follow up litigation. You're right, if the IGO loses the UDRP, it can file – it has the right under the current UDRP rules to file follow up litigation in a court of mutual jurisdiction. It can't do that and then go into court and say you can't hear this case because I have immunity. And of course it would be ridiculous for it to even do so. There'd be no point to the original filing.

So, okay I don't see anything else on the flow chart or in the questions that we haven't raised yet. So do members of the working group have any further comments on any of the issues we've discussed so far? Or are there any other issues relating to a potential final report that members want to raise now?

George Kirikos: George Kirikos, can I raise a point?

Phil Corwin: Yes, go ahead, George.

George Kirikos: Yes, I noticed that we had both David Maher and Mason Cole on the line. And they might be able to share experiences as registry operators because I noticed that the new gTLD agreements with ICANN have that binding arbitration clause with the International Chamber of Commerce. I'll copy a link to the chat room. It's Paragraph 5.2. I know Donuts, for example, has an issue whether that clause is actually binding or not in their lawsuit with ICANN regarding dotWeb, which might limit their ability to comment on it. But I was curious if they find that, you know, the ICC rules might be something that were worth talking about or whether it's not a path that we want to take if we go the arbitration route. Thank you.

Phil Corwin: Yes, I don't know if either of them want to comment, particularly Mason since his employer is currently engaged in litigation with ICANN about the enforceability of the clause that bars direct litigation against ICANN which is being disputed. That's my understanding of the case, I don't want to – I'm not – I haven't read every document there so but it's just based on news articles I've read.

My understanding of the ICC procedures is that it's rather – and I may be mistaken and maybe staff knows, but that arbitration within the ICC is really designed for commercial disputes and can be quite expensive and may not be an appropriate model for what we're contemplating for here which is a

rather narrow question of trademark law and where one of the parties at least is a private – generally going to be a private individual, could be a company that owns the domain but it's not the type of complex commercial litigation that the ICC process is usually used for. As to whether their rules are fair not I have no idea.

Anyone have any comments on ICC process? I don't know if it's actually been used between any registry operator and ICANN to resolve a dispute, maybe staff can take a look at that and report back to us by next week. They should be able to just ask – make a simple query of Global Domain Division and find that out or if ICANN Legal would certainly know. Both of those parties should know if that ICC procedure has been used by any new TLD registries.

Okay, well I don't want to – we're at the 53 minute mark into our call. We're scheduled for 90 but we've covered today's agenda, we've had some discussion, we've reached some tentative conclusions, we've agreed to query the working group on whether the – a domain registrant should have an option to go directly to arbitration right after – either before or right after a UDRP is filed, certainly after the UDRP has been filed but before a final decision has been rendered, just like they can today go straight to litigation in those circumstances.

So if there's – I don't see any need to prolong this call for another 36 minutes if we've gone through the agenda and there's no other business that members want to bring up. So the floor is still open but if in the next minute I don't hear from anyone or see any hands I think what I'd propose is that we – the cochairs work with staff to prepare a letter to all working group members summarizing whatever progress we made today, posting that question on going straight to arbitration prior to rendering of the UDRP decision, kind of summarizing the discussion we've had on limitation of the – either the judicial review or the arbitration review solely to disposition of the domain name.

And then put that out to the working group in the next day or two and then look at an agenda for next week but we're getting close to the end of reviewing the details of going down this path and approaching the point where we're going to have to survey all working group members and get their feedback on contents of a final report because we're getting – running out of things to discuss and we do want to file a final report before ICANN 60 in Abu Dhabi, which if at all possible, which means filing a report within about the next four weeks, four to five weeks.

So that's where we are. So last call for any comments by working group members or questions about anything we've discussed. And if not we're going to give you back 34 minutes of your time. Okay, thanks, everyone. Thanks for your participation. We'll get that email out in the next 24-48 hours. And we – the chairs have to decide on an agenda but right now you should tentatively plan on having this call take place same time same day next week. And with that I'll say good-bye. Thank you.

Julie Bisland: So today's meeting is adjourned. Thank you, all for joining. And (Cindy), can you please stop the recording?

END