

**ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG
Thursday, 07 September 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: <http://audio.icann.org/gnso/gnso-igo-ingo-crp-pdp-07sep17-en.mp3>

Adobe Connect recording: <https://participate.icann.org/p6ylzsp6f6r/>
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The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page <http://gnso.icann.org/en/group-activities/calendar>

Coordinator: Recordings have started.

Michelle DeSmyter: Great. Thank you so much, (Darrin). Well good morning, good afternoon and good evening to all and welcome to the IGO INGO Curative Rights Protection PDP Working Group call on the 7th of September. On the call today we do have Petter Rindforth, George Kirikos, Osvaldo Novoa, Phil Corwin, Paul Tattersfield and David Maher. We do have apologies from Mason Cole. From staff we have Mary Wong, Dennis Chang, Berry Cobb and myself, Michelle DeSmyter. (Unintelligible) if you're speaking, for transcription purposes.

Thank you and I'll turn the meeting back over to Petter Rindforth.

Petter Rindforth: Thank you. Petter here. Well first, of course, is there any new statement of interest? And as usual, I see no hands up so let's proceed. Before we start, I have two specific issues. First is just a question to Mary. I know you have sent out I think twice to the full working group, but I presume that there is no response or comments that has been provided from people that still formally members of our working group but not participating in our meetings.

Mary Wong: Hi, Petter and everybody. This is Mary from staff. That is correct. And as you noted, staff did send a note after last week's call specifically asking for feedback especially from participants who haven't been able to join the calls. But we have not received anything on the list or off the list.

Petter Rindforth: Okay, thanks. Yes, just wanted to have that confirmed. Which is sad because, I mean, we are in the definitely final stage and we have come out with a lot of good comments and interested inputs from our active members and it should be quite easy to comment on that if people are still interested in the topic.

Okay, I know that we have an agenda. And we shall follow it. But having read through the GAC advice, I just wanted to initially spend maximum 90 seconds just with couple of more personal reactions on that and conclusions because I think that will be interesting when we go through the proposed – proposal relating to arbitration etcetera.

So just give me a few seconds, I'll see what I noted that. Well first of all, the main part of the documents and communiqués during the years they have been focused on preventative protection and not disputes, as such. But what's interesting when we talk about the identification of IGOs that is that already in the Toronto communiqué, the GAC stated that they believe that the current criteria for the (unintelligible) under the dotINTA top level domain was the right way to identify.

And that's according to IANA's explanation on this. They said that in brief the dotINTA domain is used for registering organizations established by international treaties between or among national governments. So that was the first identification.

And then I noted that in the February 2015 communiqué from Singapore, they stated that they continue to work and is willing to work with a GNSO PDP working group on IGO INGO Access to Curative Rights Protection

Mechanism. And as we know, we have not seen so much of this cooperation, but basically only a rephrase of what they have stated before on the importance of IGO protection.

But I also noted that in Helsinki, they said that concerning curative protection at the second level and noting the ongoing access to curative rights protection measures, and (unintelligible) mechanism should be separate from the existing UDRP offered parties an appeal through arbitration and (unintelligible) or nominal cost. And even if we have not suggested separate dispute resolution procedure, we have definitely put in arbitration and we will further discuss that.

And also in the Hyderabad communiqué they stated again that dispute resolution mechanism is modeled out but separate from the UDRP, which provides in particular for appeal to an arbitral tribunal instead of national courts in conformity with relevant principles of international law.

So having said that just initially, it's interesting that to see that GAC is supporting that kind of after all – whatever we have national court case at the first step or not after the UDRP proceeding but arbitration is actually suggested and supported by IGOs and by GAC. And we think also that this could be a good general solution.

Okay, so then let's start with our summarizing and go back to Point 2. And...

Mary Wong: Petter, I think Phil has raised his hand.

Petter Rindforth: Yes, okay, sorry. Phil, yes.

Phil Corwin: Yes, thank you, Petter. Great review. And I just want to add a couple of things for perspective. One of course, all this GAC advice is to the Board. As we've seen in the review, the advice did change over time particularly as the IGO small group ramped up. Perhaps it became altered because the GAC and the

IGO were under some mistaken impression that the Board could deliver on its requests and didn't have a full understanding that this had to come through the bottom up process from this working group.

And we've certainly – the GAC at some point seems to think we've ignored their advice where in fact we took their advice very seriously, devoted a great deal of time to analyzing it, discussing it, but found ultimately that the request for a separate process just for IGOs in which domain registrants would have no access to national courts where in effect they'd have to renounce their ability to bring a judicial action, either during the tenancy of a UDRP or after it, was not a good precedent to set or supportable.

And also, we while somewhat separate from this, we know from the informal working group of GNSO, GAC and Board members, which seems to have – is quite inactive now, but that both – that the IGOs in response to Board requests and response to requests made in that group when we were permitted to participate in it, have never been able to identify a discrete source of rights to their names and acronyms other than trademark rights they have generally referenced their rights under treaties, but none of those treaties are specific to rights and names or acronyms.

And many of those treaties differ in their substance, and some may, you know, maybe more persuasive than others regarding protection of those rights. So that's all I had to say, I just wanted to add that context for these several years of GAC advice we've been receiving, but without active participation by IGOs in our working group, despite repeated requests and despite real involvement by the GAC, despite some indications they had made early on that some GAC members would be participating in our work. Thank you.

Petter Rindforth: Thanks, Phil. And I think what they have been actively involved in is more of the pre-registration and sunrise protection part of it is another working group that have been dealing with and which also involved the Red Cross and

Olympic Committee. So it seems that that specific practical part of the topic is what they have focused on. And when it comes to our own topic, it's more through the years a general comment and reminder of that they want to see a separate dispute resolution policy with kind of international arbitration as the way to solve a dispute.

And as we all know, we have through the years actually taking part of those general inputs from IGOs and from GAC members. And we have also consider it, and that's why we now are working with option 2 to see what kind of summarizing solution we can find there, that can also fit all relative parties in the dispute.

So and what I would say that this – well we still try to do is not to change the policy of the UDRP, but whatever we come up with here will need some small changes of the rules. But still will not creating a new dispute resolution policy, we think that the current one can actually be fitted in and there are already today some words in the – both the policy and the rules that actually make it easy for us to – to make these amendments.

For instance, the paragraph – the other policy states today that the registrar will cancel transfer otherwise make changes to domain name registrations on the specific circumstances that as is written today actually can be an order from a court or arbitral tribunal in each case of competent jurisdiction requiring such action. So it's actually included already today both the court part and if the case is taken to an arbitral tribunal and another panelist or mediators as the final part.

So it can in fact also be, I mean, the court order or arbitrators that will have a clear order of transfer or cancel their disputed domain name. The rules as they are today doesn't say anything about monetary damage, so I also think that we may not have to change so much in the policy to make sure that the case is still just dealing with the domain name dispute as such and no other connected disputes and monetary damages.

Okay, so shall we, as said, go to Point 2? And look at how we can – this is actually, as you have seen and also read in the example of combining option 2, arbitration with elements of other options. And although this may not be the – this is not the final version, but at least it's something to work on. As you see, the first part of course is the IGO decides to file a UDRP case. And thereby also agree to, well, what we can say is arbitration, if we call the Uniform Dispute Resolution Policy that way.

And let's see if I can make my – and there – we have this – somewhere here we also need to decide where if the IGO selects limited scope of court action, and that was – trying to explain previously that as I read the regulations as they are today, both the court – the court decision or if there is a second arbitration phase, the registrar will only take part of the – part of dispute that relates to the transfer and cancellation of the domain name.

So I think we actually have here a base already that there's no monetary damages included. But we – in some way we have to make sure that this can be accepted by both parties. Phil.

Phil Corwin: Yes, Petter, thanks. And I just want to emphasize to all the working group members that this flow chart is something cochairs just saw last night as it not a final proposal, but I think is a very good template for discussing each potential step and its pros and cons. And so at that first diamond, the one right below where the IGO decides to file the UDRP, I'd ask one question and raise two points for consideration.

The question is, do we need to have the IGO elect it? Or could we simply put that in the policy or the rules that if it's the will of this working group that the judicial action would be focused only on the disposition of the name. And Question 3 issues with that, however we do it, can we realistically expect to limit the scope of an action under a national law? You know, or would the court – would the court respect that or blow past it? Would registrants object

if they thought a UDRP had been particularly egregious to not having the opportunity to seek monetary damages if that was available?

But on the other hand, would the fact that the – I think a countervailing consideration would be that if the IGO knew that the – the court decision initiated by the registrant after an adverse UDRP decision for the registrant, if it was limited solely to the disposition of the domain, the IGO might be much less likely to assert immunity if it knew that the potential consequences of a court decision were limited solely to whether or not the domain would be transferred or extinguished.

So those are the issues which is, do we need to give the IGO an election or can we just write that into the policy as something – or the rules as something that happens naturally? And what would be the registrant and IGO reactions to that limitation? And I'm not taking a position on any of that, just trying to frame the questions. Thank you.

Petter Rindforth: Thanks, Phil. And before I leave it over to George, I agree with your comment that – and also as we've seen from IGOs own comments and suggestions during the years, they really want to – they want to skip the court part and go directly to arbitration. And I think it may be somewhere on this stage of the procedure this is just a suggestion I throw out and I would maybe more convenient to have the domain holder, the respondent to agree to some kind of yes or no if they accept to skip the court proceedings and go directly to arbitration.

Which of course could – will definitely speed up if the decision in the first instance – in the domain name dispute is putting over to a court or arbitration. That will speed up the process and also unlocking the domain name whatever it will be or yes or no on behalf of the respondent or the complainant. George.

George Kirikos: George Kirikos for the transcript. Yes, I'm just looking at these options and trying to put myself in the shoes of the IGO when they're being asked to make this choice of whether to limit the scope of the court action. That's the triangular box right below the first oval in the chart. And it seems to me that the answer is always going to be yes, so I don't know why we want to necessarily complicate things by pretending that it's actually a choice.

They're always going to say, sure, I don't want to give unlimited waiver of my immunity, I'm happy to have the court action be focused only on the domain name. So I don't know why the false kind of choice is being presented. You know, we could present it as a choice but they're always going to say yes to that. Thank you.

Petter Rindforth: Thank you, George. And then I think we all agree on that part. So okay as the schedule looks like – or the picture looks like now, there is a yes or no part that will probably be more or less the same. But the registrant is notified, that the UDRP is filed. And again, if (unintelligible) the registrant lacks limited scope of action, and as I said, I think somewhere here it would be good and probably necessary to put in some kind of possibility for the registrant to proceed as it is today with if they lose the case to take it to a court or – and now we're talking about not the limited scope but the process and then proceeds or proceed directly to arbitration.

The registrant of course may have more interest in getting some economic feedback from the court in a domain dispute process. But on the other hand, at least having the possibility to have the case actually dealing with and finalized by panelists, I think that's more important than if they lose the case and then just going to a court where there is a possibility or rather risk for the registrants that the court will say that we cannot take the case because it's a neutral IGO that having the case. So rather it's better to have the possibility to have a full judicial process on the case than to get some economic feedback from a decision.

Okay, yes, Phil.

Phil Corwin: Petter, Mary's had her hand up quite a while...

Petter Rindforth: Oh sorry, yes.

Phil Corwin: ...before I put mine up again so let her go first then I have a quick comment.

Petter Rindforth: Yes. Mary.

Mary Wong: Thanks, Petter and thanks, Phil. This is Mary from staff. So I wonder if it might be helpful to explain some of the context for this flow chart that you're looking at? First of all I think as is quite obvious as folks have looked at it, this is an attempt to present for discussion the basic option 2 which is an arbitration element to be introduced into the process but to try to incorporate other elements from some of the other options that this group has discussed.

As George notes in chat, primarily this would be option 3, which is a limited jurisdiction or limited waiver, depending on how you look at it. So in that context, there are two things that you might want to bear in mind. One is that we worked on the assumption that in order for an arbitration proceeding to go ahead, you need mutual agreement from both parties. In other words, it's a voluntary agreement to arbitrate, hence, right at the beginning, when the IGO decides to file a UDRP, it would be asked to agree to arbitration.

Under the limited circumstances we've already discussed, so not a wholesale skip ahead to arbitration. And similarly, and we haven't gotten there, but similarly later on, the registrant is given an opportunity to provide the same agreement. And that opportunity comes at the first point at which the registrant enters the process.

Secondly, in terms of the limited scope of court action that's elected by the IGO, and Phil, this is kind of a follow up to your questions and comments, as

staff, we're not able to answer the question of whether legally this is doable or what problems might be caused by that or even whether this is something that we can impose at the start. So this may be a question for us to go out and try and get some better insight on from folks more familiar with this kind of process that then staff is at this moment.

But as a result, we then worked on the assumption, again, that this is something that requires agreement from both parties. And so again, you know, we have tried to work into the process the earliest point at which the IGO could agree to it, and the earliest point at which the registrant might agree to it.

Then to George's question about why would the IGO ever elect not to agree to it, obviously we don't have any insight into that. But if it helps, if you take a sort of overall bird's eye view of this process, you really have two paths. Going down the left hand side and going down the right hand side. And going down the left hand side is more akin to the steps that we have been discussing to date. So the losing registrant goes to court, the IGOs successfully asserts immunity and then at that point the arbitration would come in.

On the right hand side, the agreement to limited waiver or limited jurisdiction actually would not allow for an arbitration option there because once both parties agree to the limited action, it goes right into the court, there's no need to talk about the immunity, and the court just resolved that limited scope, which is the ownership and disposition of the domain.

So again, we're not sure how legally or practically workable this is, but as a model, those are the assumptions and those are the two paths that are possible if we try to fuse these different options together. I hope that's helpful. Thanks, Petter, and thanks, Phil.

Petter Rindforth: Thanks, Mary. And sorry, Phil, just squeeze in there and saying that again, I see the possibilities to make clarifications or minor changes of the rules in this aspect, but also having a domain name process also in a civil court action, I mean, it's not a criminal case, it's a civil court action, and even if when it comes to arbitration, that will be definitely based on what the parties have agreed upon but – and basically as I see it in civil court actions, it's also based on what are parties' claims and what kind of agreements they can refer to.

So I presume that this may be possible also in civil court action, but there is the risk, I mean, we're in fact talking about global legal issues here and there may be countries where the court has the possibility independent on what the parties have actually agreed upon to also put in some monetary damages.

Phil.

Phil Corwin: Yes, thank you Petter. And Mary, thanks for that very helpful explanation. And actually it goes right to the point I was going to make where responding to George, the one – as you've explained it, the right hand flow chart as we're looking at it, essentially the IGO elects limited scope of court action; it's also implicitly waiving any immunity defense if it goes down that road and the registrant agrees to the limited scope of the court action.

So that was the point I wanted to make was that the one circumstance in which an IGO might defy George's logic and say no to that rather than yes, would be if it felt so strongly about immunity and that the court should have no jurisdiction over it, that it wouldn't want to essentially by agreeing to the limited scope of the court action waive its immunity, although in doing so it would also be limiting any potential – really taking monetary damages off the table if the registrant agreed to the limited scope.

The one other thing I'd add, not to jump ahead, but down at the bottom of the – at the left hand chart, we've put – we need one more thing where if after

going through that the IGO refuses to participate in the arbitration, that the registrant has agreed to, that should vitiate the UDRP decision. I think we need to provide that just to be complete. I don't know that it would ever happen that an IGO would do that, but we have to include that possibility in the flow chart. Thank you.

Petter Rindforth: Thanks, Phil. And I see Mary's hand is up again. But as a quick comment on that, as you said, Phil, I don't think that it's a risk that they will refuse to accept the arbitration phase as I started with in the summary of the comments, that we – and the Board has received from IGOs and from GAC during the years, are always talking about arbitration as the final way and acceptable way to dissolve a dispute. So frankly I would be very surprised if they change their mind on that aspect.

Mary.

Mary Wong: Thanks, Petter. And thanks, Phil. On Phil's point, and maybe this is not the best or only way to address it, but again, the assumption here that we started with right at the top of the chart is that in order to even file the UDRP or URS, as the case may be, the IGO would have to agree to arbitration at that point. So that would work similarly to how the current mutual jurisdiction clause works, you know, in other words, your complaint doesn't go ahead if you don't check all the boxes and say I agree to mutual jurisdiction.

So this arbitration element would be added to the thing that the IGO as a complainant would have to agree to at the beginning of the action. So hopefully that addresses that point. As I said, I'm not sure that's the best or the only way to deal with it but in essence, what this would mean is that in even starting a UDRP, the IGO would have agreed to arbitration in the, you know, limited exceptional circumstance that we go down the left hand side. Thanks.

Petter Rindforth: Thanks, Mary. And if we add that I presume that we can limit it to the rules and not the policy as such, because as I read the policy on these aspects, they are luckily so generally note that on decisions from courts or arbitration. So if we put in that specification it – as I see it, must be in and can be easily be put in the rules. Again, would not be necessary to change the policy.

George.

George Kirikos: George Kirikos again for the transcript. Stepping back for a second, this proposal or example is trying to load all the possibilities with regards to amending option Number 2 in order to incorporate elements of options Number 3 and Number 6, is that basically correct?

Petter Rindforth: Yes, as we have gone through the last meeting that we saw that there was a lot of good inputs on the added option that could be used in option 2 to make that system workable and acceptable for both kind of parties.

George Kirikos: George Kirikos...

Petter Rindforth: And, if you – if you question why we're not discussing option 1 here, so it's fairly clear that that will not be accepted and we haven't discussed before also it will not be accepted by IGOs and by GAC. And so what we need to come up with is some kind of mediated version that is not – this is just my personal thoughts, but nothing will be 100% accepted by any parties involved, but we try to come as close as possible to a solution that actually more or less ends this problem and can be solved so that also domain holders as well as IGOs think that there is a workable system for these kind of disputes.

George Kirikos: George Kirikos again. Actually that wasn't the point that I was going to raise though but just to address quickly, you know, my first option obviously was option Number 1, then option Number 4 and then option Number 2 last, but what we're attempting to do is try to reach a full consensus of everybody by

modifying option Number 2 to incorporate elements of options 3 and 6, which is something that might if we can get the full consensus.

The point that I was actually going to raise was if we look at the box on the left hand side where it says "Registrant appeals," there's all these typos – it says "registant" instead of "registrant" – but that box is a little bit simplistic because if we think about the quasi en rem versus in personam, there's actually two different types of appeal that that registrant can do and it's now – right now it's assuming that the appeal is only in the in personam aspect, what it needs, well this is going to conflict with the chart, but that box kind of needs to be made more complicated having registrant appeals using in personam or registry appeals quasi in rem, because what can happen under the circumstances is going to be different because the ability for the IGO to assert immunity only happens in the in personam aspect, it's not going to happen if the appeal using the quasi in rem or the in rem approach.

And actually what would probably happen is that they would appeal using both, you know, the – you appeal under multiple causes of action to try to make a full defense of the domain name. But so the box gets more complicated in that place. But then there's actually another place where we need to add something in that the registrant can go to court at any time in the process. So it's not only after a decision but there's going to be a box somewhere else, somewhere on this chart, higher up where the registrant immediately goes to court and that's even going to be before the UDRP panel makes a decision.

So we need to make sure that we've got all the potential paths that are available to both IGOs and to respondents reflected in these flow charts in order to make sure we've covered everything. Thank you.

Petter Rindforth: Petter here. Thank you, George, for taking that up, you're perfectly correct that as it is today, any of the parties actually can proceed before or during the case, or after, in a court or in other legal proceeding. And if they take the

case to a court when the UDRP proceeding is ongoing, it's in fact up to the panelist to decide if he or she will make a break in the work or actually decide on the case.

But as we said initially, this PDF with examples is just to show the possible ways. And if – when we put it down in a clear script it must be noted that this could actually be also even during a domain dispute, not just after a decision that any of the parties can make the decision to take the case to another instance.

Phil.

Phil Corwin: Yes, thank you, Petter. Phil for the record. Two quick points, one, this chart, which is of course is likely to change before its final, if we adopt this approach, is put in to kind of give a simple overview but any additional complexities will of course be described in full in accompanying text in a final report.

And second, while in no way wanting to revive any discussion of option 1 at this time, I think we need to stay focused on this. I just wanted to comment, Petter had noted that option 1 would be objected to by GAC and IGO. I just want to say personally, that's not a problem that weighs against it for me, because frankly no matter what we come up with may be objected by the GAC at the urging of IGOs simply on the basis of hey you didn't give us what we asked for.

My concern is that I feel strongly based on scoping it within Council that a final report containing option 1 would not likely pass Council and be sent on to the Board whereas I feel with a fair degree of confidence, can't provide guarantees, that some variation of this approach could get through Council with majority support and even has a good chance of getting super majority support which would – if we get that that sets the bar very high for the Board not to accept it. So that's it. Thank you.

Petter Rindforth: Thanks. Well I just add that also as said, the parties have the possibilities to take the case to a court during the process. I have to say that counting on the cases I've done as a panelist during the years, I've seen none of those that the parties have decided to go to – take it to a court action before the – actually the UDRP procedure is finalized with the decision.

What I've seen sometimes which is not so common either but that is when a case is started and the parties also start to communicate with each other to find a solution. And that's of course also a possibility but nothing we have to consider here because both parties are free to make any non-court or non-arbitration negotiations as they want to. So sometimes you have to start a dispute or in this case a UDRP, just to have the other parties to wake up and start the negotiations.

Okay, where we more or less – yes, Phil says that, "I think we can certainly discuss including in the final report a recommendation that results or whatever recommend be reviewed in the future either after the passage or over a set of amount of time or set number of arbitrations, whichever come first." Yes, that will I think that will definitely be in our final report and we can further see if we can come up with some specific recommendation either if we – if you find it's maybe more easy to make it a specific time.

I don't know how many years that can be acceptable normally. You know, I mean, that is the UDRP has been around for some years and we're still not in that working group, haven't come up with the work on that topic. So I presume that there is already today some recommendations from ICANN on what is the acceptable or practical time limit to set up another working group and see how a specific solution has been worked and done with during the years that past.

We also discussed the possibility actually to have some kind of data on which case, you know, that involves IGOs that have been passed on to courts

and/or arbitration in the second phase, and I think what we discussed was the most easy way would be to actually reach out to those IGOs that have participated in a UDRP to get information on if they have passed on the case to a court or an arbitration.

Of course we could also reach out to registrars but my personal initial view of that is that I don't want to give them additional work to do and keep actions on another topic. So I think that the most convenient way would be to actually get that information continuously from IGOs.

And just looking at the chat room, Phil said, "Providers will know when a UDRP decision has been stayed because (unintelligible) or post decision judicial action has been filed." Yes, I know, but, yes, I'm not working at – as a provider so I don't know if it could be acceptable for them and easy to keep that. But of course it's – they have also clear information because the party that of complaint and put further the case to a court actually had to inform on that. And Phil said, "It's very hard to get registrants to comply with data requests." Yes.

Okay, so I forgot where we were. I think we have more or less gone through this slide. As said, the registrant agreed to arbitration, existing UDRP decision stands or resolved via binding arbitration in the end. We also have the – staff has provided that written summary with more text. And I think we could just go through that as well.

Let's see, if (unintelligible) I don't see it on my screen, but...

Mary Wong: Hi, Petter. This is Mary from staff. I think it is on the Adobe screen, so maybe other members can let us know if...

Petter Rindforth: Yes.

Mary Wong: ...they're seeing it or not seeing it. If you're not seeing it you might want to relaunch your Adobe.

Petter Rindforth: Yes, I have it here in another format.

Mary Wong: Okay. And a note also that there's really nothing new in this text piece because it really just is mostly an explanation of the different steps that you saw in the flow chart...

((Crosstalk))

Petter Rindforth: Yes, I just wanted to...

Mary Wong: ...here to follow the graph.

Petter Rindforth: Thanks, yes. I think we have, as said, gone through that. It's more of an explanation that we already have stated. So if we are actually done with that – I said that based on what we have discussed here today and we will work a little bit more with the suggested version of alternative 2, with the inputs from the other steps, and then hopefully we can come up with some final suggestions solution that we can accept fully in the working group.

And again, as said, it's hard to find something that we all 100% agreed upon, but I appreciate that even if we may have some smaller difficult inputs and thoughts about some of the topics here, that we can actually find something in this respect that we can – so that we have one solution to communicate as in our final report.

And then back to again what GAC has said about arbitration, and as I said, you saw that this started in Toronto 2012 where GAC by then referred to the current criteria for registration under the dotINT top level domain and thought that – concluded that that was a basis for an IGO to file a legal rights

objection. And obviously something that they thought was the best way to – the best initial way at least to identify what is an IGO.

And the dotINTA as it says in – is a specialized for solely for intergovernmental organizations, that is basically identified as registered organizations established by international treaties between or among national governments, which could be the Paris Convention, as we have as one examples of identification.

Then of course this was the start and the GAC has then created their own list that was based on this and added a little bit other cases also. And if you look at the domain and that are registered at the dotINTA – INTA is not exactly 100% IGOs, there are also other organizations that registered especially those that registered initially that are still there and that are more of INGOs, I think. But I also seen comments from (IANA) during this that they will not do anything for those that are registered there.

And then in Los Angeles communiqué, again, basically the GAC advises the Board that the UDRP should not be amended. And if we're talking about the UDRP and focused on the P in that, the policy as such, we agreed. What we are trying to do here is to avoid amendments of the policy and more of the – see what we can add to the rules.

And then in the Singapore communiqué, they again stated that well that was the first time they referred to our working group. And they – then indicated that they would work together with us on this topic. And as you know, we had a couple of meetings with representatives from GAC and IGOs, and initial proposal that we would be informed of the ongoing work in the then created Small Group, so that we could – because our goal was to actually get more practical inputs during our work and not just rephrasing old general statements once we have produced our report.

But unfortunately, that corporation and information didn't work and we have reached out and reminded both GAC and IGO representatives during the time to get some more specific inputs, but as said, it has not worked.

And then in Buenos Aires, it was the Small Group that was formed. And in Helsinki in the communiqué they basically GAC recalls its advice since 2012, new things there stated to the Board concerning curative protection at the second level and noting the ongoing GNSO PDP on Access to Curative Rights Protection Measures that any such mechanism should be separate from the existing UDRP, offer parties an appeal through arbitration and be at no or nominal cost to IGOs.

And as I said, we – and as you know we have not created a separate policy but we are not – we are not changing the policy either; we're rather changing the rules that refers to the UDRP. And we are also coming up with sort of appeal even if it's not a real appeal, it's a separate part when you go to a court after a decision in the UDRP but arbitration.

So that's what we can clearly show that we have listened to IGOs and their proposals and actually and added what they suggested. When it comes to costs, that's I think more of something for ICANN and ICANN Board to decide upon if there is anything that can be dealt with that when it comes to IGOs.

Again, we – if we talk about our suggestion that both parties can agree about just dealing with the case, the transfer or the registration of a domain name, either whether it is in the court decision or in the second arbitration phase, then it should be also much less costs involved in such case. But otherwise and apart from that I think the cost aspects is perhaps something for the ICANN Board to finally decide upon and find a solution.

And then we also had the Hyderabad communiqué, dispute resolution mechanism modeled on but separate from the UDRP, which provides in particular for appeal to an arbitral tribunal instead of national court and as

said, instead of national court, but again we have I think we have come up with an acceptable midway that even if it's our suggestion seems – as it looks today it's not 100% what they have communicated and asked for. It's fairly close enough and the possibility actually to have the dispute finally settled by arbitration instead of a national court. If of course the national court says that they can take the case.

And then we had the Copenhagen communiqué from March this year. And then they just stated to the Board that they urged our working group to take into account the GAC's comments on the initial report. Yes, we have done that.

And in Johannesburg they basically just reiterated its advice that IGO access to dispute resolution mechanism should be modeled on but separate from the existing UDRP, provide standing based on IGO status as public intergovernmental institutions and respect IGO's jurisdictional status by facilitating appeals exclusively through arbitration.

So, yes, they have in short, as I read it, the GAC comments on behalf of the IGOs during the years have been that they want a separate dispute resolution policy and they want to avoid any cases taken to court having the cases finally decided by arbitration.

And as said again, this is in fact what we're dealing with here, some kind of mediation between two parties. And as I see it, I think we have come up with something that could be acceptable if not perfect for both IGOs and the domain holder that will be part of these disputes.

And we also have to have in mind that there will be probably very limited number of UDRP cases during a year and even more limited number of cases that will then be taken to the next phase because if there is actually a bad faith registration, it's rather rare that a real bad guy that holds a domain name even replies in the dispute. So will be more of the complicated disputes

where someone actually have at least what the domain holder I think purely legal rights to that specific domain and that will be taken to the next phase if they lose.

Phil.

Phil Corwin: Yes, thank you, Petter, for that very thorough review of the evolving GAC advice that's gone to the Board over the years related to IGOs. I wanted to raise one issue that I think we need to consider in the period between this call and next week's with the anticipation that cochairs will work with staff to narrow and refine the proposal for next week and that we'll also be taken comments and questions from working group members over the next week to focus discussion.

But unless I missed it, the only time the GAC actually stated any position on what was a bona fide IGO was in the October 2012 Toronto communiqué in which they refer to the current criteria for registration under the dotINT top level domain cited in the Applicant Guidebook as a basis for IGO to file a legal rights objective – objection.

I was hoping – but since then the GAC has in fact adopted an official GAC list of what they believe are bona fide IGOs, and I'm not sure whether that includes every organization that purports to be an IGO that's used the dotINT, it probably does because that requires certain registration criteria. But it may include others that don't have dotINT. I think we need staff to check on that.

But the point I'm getting to is that our general position has been after learning that at least some GAC members thought that IGOs had invoked Article 6ter protections were not in fact bona fide IGOs, is that we were going to leave that determination to the court if the IGO asserted immunity and the registrant could then object and say, hey, judge, that's not even a real IGO.

But given some of what we're considering, do we need some definition of IGO that would be able to or required to be subject to the policy we're going to propose or be asked to make certain decisions under our recommendations? Or could we dodge that fairly touchy issue? I don't have an answer on that but I think we need to consider it before filing a final report. Thank you.

Petter Rindforth: Thanks, Phil, and before I leave it over to Mary, yes, I think what we – when we started trying to identify IGOs, we focused on Article 6ter, but then in our working group and definitely when we had the response from the first official comments we more – we amended it to Article 6ter as one way to identify as an example.

And I haven't studied the (IANA) regulations – formal regulations for dotINT but as they said on their Website, basically it seems more of a general reference to organizations established by international treaties between or among national governments. And it may be that they have done it also for themselves a more simple way to identify and then have to, in each case, see if that treaty that someone that registered – or want to register on the dotINT can be acceptable. But I presume that they at least have some facts and statistics during this that we may - can use.

And then over to Mary.

Mary Wong: Thanks, Petter. And thanks, Phil. So the short answer I believe, Phil, to your question is that we have not had any formal definition of IGO or what is an IGO from the GAC. What we do have is a list of IGOs from the GAC dating from 2013 which as we know from the public comments that we got to our initial report, I think in particular the US government comment is that that was something that was hammered out within the GAC.

So on top of that, there is no definition even within Article 6ter of what an IGO is. And I so far as the dotINT criteria is concerned, that's a volunteer

registration. So it really doesn't mean that an IGO who doesn't registry in dotINT isn't an IGO even if it does mean that someone who registries in dotINT is an IGO. So I'm not sure that would be any kind of I guess comprehensive reliable list.

Then finally, our understanding of at least the limited research we've done into international law when researching the immunity question is that there was or is some I guess disagreement in international law circles about what would be an IGO for certain specific purposes including for immunity. This is not something I'm an expert in, I'm happy for anyone to correct me, but if that is the case, then the staff advice at this point would be that if we do not need to come up with a definition of IGO then we probably ought not to. Thank you.

Petter Rindforth: Thanks. And I also see in the chat room about the GAC list and I fully agree with – both George and Phil's comments that there's nothing special about the GAC list. I think it was the – it was created by the GAC for certain identification purposes and it of course the list is there so it has been easy to use for ICANN for instance when it comes to the pre-registration and Clearinghouse issues. But as I said in that group, whatever is used to identify IGOs for that purpose it cannot be and should not be generally accepted to fit into for instance that we're dealing with here when it comes to dispute resolutions.

And also as said, the INT list as Mary said, not all – not all IGOs are registered there as (IANA) stated themselves, there is also already registered names there that are actually not pure IGOs but rather INGOs. But it could be that some kind of formulation or part of their registration document that could be – that we can use as again, as an example and specification of that can be identified as an IGO.

George.

George Kirikos: George Kirikos for the transcript. Yes, you know, Phil raises a very important point, and as folks have been discussing this, if we go back to that flow chart, what are the criteria for somebody – for an IGO even to, you know, assert this entire flow chart because as you said, one, they might not even be an IGO, and two, the nature of them being an IGO doesn't necessarily mean they're an IGO everywhere. I think if we look at that flow chart, I don't know if everybody has it in front of them still from the document that was sent earlier, but there's something that says "Registrant elects the limited scope of action" in order to basically invoke the – our option number 3 and go along the right hand side of the flow chart.

I'll give you an example, let's suppose that the IGO in question is NATO, that's an IGO that everybody knows exists. But let's suppose that the registrant is Brazilian, like NATO is a treaty organization for North Atlantic countries like Canada, United States and various European countries. And obviously Brazil would obviously not be a signatory to that treaty and presumably doesn't necessarily recognize them as an IGO.

That'd be the best example, one could take, for example, you know, various African countries forming an IGO and then an IGO from – that IGO filing a dispute against a Canadian domain name holder, that doesn't recognize that IGO.

So they might want to choose option Number 3, going through the limited form of immunity to go through the (unintelligible) appeal, but there's no reason to say that that would have actually been viable. It's kind of like giving them more than they necessarily might have been entitled to under the law. So I don't know whether we need to append to this flow chart something where an IGO that actually tries to invoke these procedures needs to file a separate document to the UDRP setting out its arguments as to why it believes it's an IGO because otherwise you know, the respondent is put into a position where they're making all these decisions, you know, whether to

agree to that limited jurisdiction before they've even seen the arguments that would have been made in court.

So it's like kind of putting a registrant at a disadvantage because depending on how we scope out these rules they could have deferred that decision until later, whether to go to arbitration or whether to have that limited immunity waiver. But the respondent, i.e. the domain name owner might be forced to make that decision earlier than they have to if they've not seen the relevant arguments. Thank you.

Petter Rindforth: Thanks. Petter here. And if I hear you correctly, what you suggest is that an IGO has to initially identify – well referring to some kind of documentation identifying itself as an IGO. And I think that's definitely something that they need to do when they start a dispute in the same way as a trademark owner has to identify in some way that can be acceptable for the panel that is actually the owner of the trademark that the dispute involves.

And again, Article 6ter is one possible way to identify itself that also gives out some kind of documentation that they are registered and accepted as an IGO, but as there are – also other ways to identify an IGO, I think what we have to do is to make a couple of examples on how to – how they can properly identify themselves. And then it will be up to the first part, the panelist dealing with the UDRP and then and second part even if it has been accepted in the UDRP case they still take the case to a court, it will be up to the court, again, to decide is this really an IGO and as such can we take the case or not.

So it's – I think that's something we need to have and that all IGOs need to do when they start these kind of disputes that some kind of identification that – and it must be some – for each of these groups it must be some kind of documentation that they can provide also normally when they do agreements and that kind of case and refers to their identification as IGOs so they can use that.

I saw Phil's hand up, I think before Mary's but I put Mary first.

Mary Wong: Oh okay, thank you, Petter. And to this question of IGO and a definition and George's comment earlier, just thinking out loud and following on his suggestion, one of the things that we can consider is when the IGO files the complaint, you know, and that's the step 1 in that flow chart, that the IGO has to also declare that it is an international governmental organization, formed by governments under treaty, or, you know, maybe name the treaty under which it's formed or the members of its governments.

That's similar to, you know, how some other mechanisms do it. I think even on the trademark side for some entries to the Trademark Clearinghouse you do have to provide information that can be validated. One additional sub point to that is you know, this maybe a way to fold in, you know, the GAC's – I suppose attributes of an IGO, you know, creature of treaty created by governments and possibly even the IGOs on the GAC list.

So in other words it's not an insurmountable problem, it's probably something that procedurally can be handled and we could consider including that into our report. Thanks.

Petter Rindforth: Thanks, Mary. Phil.

Phil Corwin: Yes, thanks. And real briefly because I know we're at the end the call, I absolutely agree that we need to propose amending the rule so that an IGO has to identify itself if it's going to, you know, seek the special treatment in the event it's going to seek immunity or limited court action and state the basis for that assertion of its IGO status and the registrant needs to get that information conveyed along with the asserted trademark rights when they receive the UDRP notice.

Beyond that, and again I'm seeking to avoid us trying to define something that neither the GAC nor international experts have agreed upon. It seems to me the registrant, once they have that notice and have that information they can protect themselves if they don't believe it's a bona fide IGO, they're under no compulsion to agree to the limited scope of judicial action, if there's an adverse ruling that they want to appeal.

And if you go down the left hand chart and they lose the UDRP and want to seek court action they can challenge the bona fide nature of the IGO if the IGO seeks to assert immunity, that could be part of their objection to that immunity defense. So I think – thinking that through we can probably and thankfully avoid while referencing, as Mary says, some of the different criteria the GAC has set forth for helping to identify an IGO, avoid adopting a set definition which I think we want to avoid at all costs if possible. Thank you.

Petter Rindforth: Thanks, Phil. And although I see some comments in the chat as well, I also note that we have one minute left so I refer again to point 4 of the agenda, our next steps. We have already just briefly but we're trying to – up to next year's meeting see what we can come up with as some kind of conclusion summarized on this meeting and the comments we have received before that.

And then just finally I turn over to Mary when it comes to time, our time schedule and when we need to be fairly clear with our final report.

Mary Wong: Thanks, Petter. This is Mary from staff. So I think you know, we basically are aiming still for the ICANN meeting in Abu Dhabi which is the last week in November where we have a 90-minute session scheduled. I suppose at this point some questions are whether you want to have a draft final report published for public comment and if so, whether you want to have it out before that meeting.

More critically it is that by then, and I think at the pace that we're going we should be quite in the clear there, by then you want to have text of draft final recommendations that you can share with the community at the very least. So for next week's meeting, unless told otherwise, we are looking at continuing the weekly meetings for 90 minutes every Thursday at the 1600 UTC, though bearing in mind that we may need to give people time to review text and to do consensus calls so there may be weeks where between now and Abu Dhabi where you might not need a meeting. But that to staff seems to be the game plan going forward.

Petter Rindforth: Okay, thanks. Well it seems I'm – again I'm glad that we had a very good meeting today. And it seems that we can come up with a conclusion so we can finalize our report on time for Abu Dhabi. So having said that, thanks for today and see you more or less in one week from now. Thanks. Bye.

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