ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG Meeting
Thursday, 11 May 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-11may17-en.mp3

AC Recording: https://participate.icann.org/p23uuk35dy3/

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page http://gnso.icann.org/en/group-activities/calendar

Attendees:
George Kirikos – Individual
Jay Chapman – Individual
Paul Tattersfield – Individual
Petter Rindforth – IPC (co-chair)
Phil Corwin – BC (co-chair)
Mason Cole – RySG
Paul Keating - NCUC

Apologies: none

ICANN staff:
Mary Wong
Steve Chan
Dennis Chang
Berry Cobb
Michelle DeSmyter

Michelle DeSmyter: Fantastic. Well, thank you so much. Well, good morning, good afternoon, and good evening to all. Welcome to the IGO INGO Access to (unintelligible) Protection Mechanisms working group call on this 11th of May at 16:00 UPC.

On the call today, we do have Petter Rindforth, George Kirikos, Phil Corwin, Paul Tattersfield, and Jay Chapman. No apologies at this time. From ICANN staff we have Dennis Chang, Steve Chan, Mary Wong, Berry Cobb and

myself, Michelle DeSmyter. I would like to remind you all to please state your name before speaking for transcription purposes. Thank you and I will turn the call back over to Petter Rindforth.

Petter Rindforth: Thanks, Petter here. I thought it was since then today, but I'm happy to lead the discussion. You can start it and we'll definitely mix it up.

Phil Corwin: Bounce it back and forth. Anybody have any changes or statement of interest? Well, hearing none, I did have one quick item I want to report on to the group. It's not on the agenda but we've already informed the group of this continuing discussion group made up of the leadership of the GNSO Council, and Petter, myself, and some board members, and some GAC and IGO representatives. That gup continues to discuss the concept of retaining a new legal expert to look at other laws, national laws, which may provide IGO protections, whether they could be the basis for some other CRP approach for IGOs, the IGOs have not endorsed that.

They've indicated some concern about that while also indicating that they want a high degree of input into the selection of the expert and the design of the study if that was to go forward. The latest development is that a number of -- (Bruce Tonkin) who is chairing the group has identified one national one in Australia, which may give some additional protections to IGO, names and acronyms. There's now been identification of another Swiss law. The Swiss law was in French so I have no idea what it actually says or what the enforcement mechanism or penalties are. And the Council chair has raised some concerns at the discussion group that's going beyond discussions and into some deliberations.

And I just chimed in noting that we will be happy to, if they go forward and select an expert, I don't know if there's a call from leadership for us to delay delivery of our final report to take whatever new information comes out of that into account. We'll give it serious consideration, but I've pretty strongly indicated that we're not -- this working group is not taking any of that

conversation that's going on there into account. We have a very prescribed process. Our comment period is closed. We couldn't take comments from this discussion group without taking additional comments from anyone in the ICANN community and that's kind of where things stand right now.

It's still very unclear to me what if anything that group is going to do in terms of actual action, but I thought this working group should know what's going on there. And I see George has his hand up. I know he's been monitoring that discussion. I see Petter's hand up as well. So George?

George Kirikos: Thanks, Phil. George Kirikos for the transcript. I just wanted to note, as I pointed out on our own mailing list, but they seem to be getting misled on the other mailing list as to strength of the national legislation that they're pointing to. There's been a lot of selective quoting of the national legislation both by the OECD member back in April when hardware quoted a part of the Canadian trademark Act, but he left us a very important section, which mirrored the Article 6 (TER) 1C, which allows for coexistence and the same for (Risonkin) who posted recently to the emailing list about the Australian legislation.

He pointed to a very small snippet of the legislation and then claimed that there is very strong protection in Australia for IGOs, but if you actually read the full legislation, it only just mirrors the Article 6 terms because it has the same exceptions for coexistence when there's not confusing use. So I hope that that gets pointed out to the small discussion group because this is the second time they've been misled on this point claiming that there is special legislation, which is going beyond Article 6 terms. And if you actually look at the text, it's only mirroring, reflecting the existing treaty obligations and going no further than that. So I think that's an important point that they're going in the wrong direction in that group. Thanks.

Phil Corwin: Thanks for the views, George. Petter?

Petter Rindforth: Petter here, and also thanks, George, for that. I just wanted to add that as we also discussed last week, I read the communication in the small group that we have together with GAC as it's not even the small IGO group support to reach out to a new investigation with a new expert. So as you said, it's better for us to continue with the work as we're doing right now and then we'll see later on if there will be a more formal question for an additional (unintelligible) expert opinion.

And then of course, we're open to invite active members, active participants from IGOs to identify that expert and the questions so that they can be satisfied with that additional documentation so to speak. Thanks.

Phil Corwin: Thank you, Petter, and that's pretty much what I just indicated to the discussion group this morning is that our working group is continuing with our job, with our responsibilities and pushing forward as expeditiously as possible of to get to a final report. And while Petter and I are on that discussion list and we're certainly monitoring it, it's is not additional input this working group is going to consider unless we're asked to reopen a new comment period that everyone can comment on as far as I'm concerned. Otherwise, we'd be giving one select group bites of the apple that no one else on ICANN has to influence our work.

So I'll stop there and let's get to this updated table of facts, arguments, and new sources that Mary has worked to edit to some extent. And then we get into discussion.

Petter Rindforth: I see that Steve's hand is up.

Phil Corwin: Steve, go ahead.

Steve Chan: Thanks, Petter. Thanks, Phil. This is Steve Chan from staff and I was trying to pull in my Outlook, but it has a spinning wheel of death, but I recall in your email, Phil, I believe, that you mentioned something that it's perhaps not

within the procedures of a working group to have additional public comments and so I just wanted to clarify that there's no rule within the operating procedures that would prevent an additional public comment period if the working group was to deem it necessary. So just a point of clarification.

Phil Corwin: Okay. Well, thanks for that clarification, Steve, and I appreciate it. This discussion group, in my personal view, and looking toward my co-chair and the other members of this group, if that discussion group at any point says that they collectively or that individual members want an opportunity to provide us with additional new data or new arguments to consider before finalizing our work, I think we'll give it every consideration.

The point I was making is that if we do that, we should reopen it for everyone, not just take input from that group, but allow the entire community to provide additional input, including to comment on whatever new proposal might be coming from that group or individual members of that group that that would be the transparent and fair way to engage with the entire community in regard to our work.

But right now we don't have any such request to take additional input. We don't have any advisement that the discussion group has decided collectively it wants to hire an additional legal expert to new look at new issues. So until we get that, I think we just continue our work on the schedule we have now.

Okay, and can we unlock this document so folks can scroll through it? Thanks. So we've got a 16 page document here. I don't think we want to right now given our limited time today scroll through the entire document noting new additions or changes. Does staff want to point out any new material in this document they think is particularly noteworthy to draw to our attention?

Mary, go ahead.

Mary Wong: Hi, everyone this is Mary and I'm not on a great connection so please let me know if I break up or can't be heard. Essentially, what we have here is the red line. So you can see the changes in, I think it will come out in blue on this screen, and the main changes are that we've updated that last column on the right side. Thanks, George. Okay, that means my regular connection isn't great but hopefully this is working for the moment.

So on the right most column, we've updated it to try to reflect the status of discussions from last week. So basically, this right hand column will keep changing as we go on, both as a placeholder and also for those who weren't following the discussions today to catch up. The other change is so we've added the level of support for recommendation four and option one, as discussed last week.

So those are the only two changes. They may not necessarily be directly relevant to what you want to talk about today, but today, I guess what we can do is pick up where we left off last week. So that won't be in the red line and I'm kind of scrolling down to see what number that might be. We certainly were talking about the options one and two, and recommendation four. And so some of the things that came up there, and in the public comment, included maybe taking a deeper look at the arbitration question, including the New York Convention that was suggested by the OECD and thinking through some of the potential institutions and rules.

Then the other major issue that we hadn't quite discussed yet was support by some commenters for a separate dispute resolution procedure. So basically, those two points were the ones that we didn't cover last week.

Phil Corwin: Okay. All right, so we've -- does anyone want to -- in regard to item two on our agenda, does anyone have any further comments or questions about this updated document? Okay, seeing none, seeing no hands up, I think we're just going to thank staff for their continued excellent support for this working group and for their work on updating the document. We probably should get

into item there, discussion of arbitration as an option and staff, on what page of this document is there material relating to that question, just to assist the Chair in this duty, so I don't have to scroll through all 16 pages and find the right references.

I see George saying Page 10.

Mary Wong: Hi, Phil. This is Mary again. So I think as George noted, most of the substance that may be useful to discuss can be found in Page 10. I think this is -- well, actually, on Page 8, we note at the bottom of Page 8, we note the New York Convention that I mentioned and then Page 9, we have the support for option two. So maybe we can start there to see if that's something that we want to discuss further in terms of Page 9 and Option 2. And then at Page 10 that's when at the bottom we see the point that we could consider further review of arbitration as an option.

Phil Corwin: Okay, do we have any further background on this New York convention, which is obviously not a New York State Law. Like the Paris convention, it's just -- it's a broader -- who was signatories to this? What does it cover and how is it relevant to our work? I think we need some background on that. I know we may have looked at it somewhat in the past, but for purposes of this discussion, I think we need to refresh our recollection so we can properly reference it as we go forward with the discussion.

Anyone want to comment? Anyone have knowledge of this New York Convention on its substance and want to talk about it? Yes, Mary, go ahead.

Mary Wong: I'm not an arbitration expert or an expert on the convention. I don't know that we've actually looked at this in detail and it's basically the -- possibly the most recognized international treaty on the recognition and enforcement of foreign arbitral awards, and I believe it's been around for several decades. There are ae number of signatories and the website that we linked to in the document does provide links to the texts, some of the background, as well as the

signatories. And for the members (unintelligible) the signatories does include the United States.

So I do have the text of the convention as well, but Phil, I don't know if it would be helpful to just circulate that on the mailing list and see if folks have any questions that staff can go ahead and maybe find some additional information on or have some discussions on.

Phil Corwin: That would be very helpful if you could do that. Obviously, that won't inform today's discussion but I think it would be helpful. But is this an agreement relating not to the conduct of arbitration processes, but to the enforcement of their judgments in regard to -- well, obviously, foreign arbitral awards, is this convention specific to IGOs or specific to any foreign party that may wish to enforce an arbitration award in a given nation?

I'm just probing to kind of…

Mary Wong: I see Petter has his hand up.

Petter, go ahead. I'm just probing to try to figure out what the relevance of this is to our work. I haven't formed a judgment on that. I'm just trying to get a better handle.

Petter Rindforth: They referred to the United Nations Commission of International Trade Law and what I think is important to point out here is they just have a specific arbitration regulation -- it's not a regulation but an arbitration practice that can be used. But they are very keen to point out that they do not offer legal advice, or nominate arbitrators, or (unintelligible) arbitrators, or certify any arbitrators, or even recommend or offer anything when it comes to arbitration.

They have this specific document that can be used and I presume that it is used as a basic for some of the more well-known arbitrational bodies that we use when it comes to disputes, like ICC and Swiss Chamber of Commerce, London Court of International Arbitration, and also believe it or not, but we

are a neutral country here in Sweden. The Stockholm Chamber of Commerce that is kind of quite often used as a neutral part, specifically when there are disputes between U.S. based companies and companies from, say, Asia, People's Republic of China, Russia, to meet in an acceptable neutral part of the world.

And when it comes to a pure neutral part of (unintelligible) that either (unintelligible) that the Stockholm Chamber of Commerce is rumored to be a little bit cheaper. But as I take it, I think the commission on the international trade law, they have some kind of general policy that can be used when it comes to disputes. It's not specified to -- none of these chambers of commerce offering arbitration specified for internet or domain name disputes. Thanks.

Phil Corwin: Okay, and Mary, I see your hand up. Do you have anything to add there? And I've also read your comments in the chat.

Mary Wong: Thanks, Phil. Only to point out that we've posted or pasted in the notes part on the left side a couple of the main provisions of the convention. As has already been noted, this is not specific to IGOs. It is not something that provides for rules of arbitration, but really, it is the rules and conditions by which a national court will recognize an arbitral award. And the convention includes the requirements for having that recognition done by the court, as well as grounds on which that recognition may be received.

Phil Corwin: Okay, another good comment in the chat from Paul Keating. My reaction on the fly to all this is that we can return to this if we go further down the bath of arbitration. Generally, as an appeals mechanism, we're strictly where the IGO has successfully asserted its immunity in an appeal to a national court. But I'll just observe here, I'm not sure, while it's interesting to know about this New York Convention, it's not IGO specific. With some irony, I note that it requires if there's a party that won't abide by the result of the arbitration, the way to enforce it in another nation is to go to the courts, which would involve

an IGO winning a domain dispute and not being -- getting relief with an arbitration award, having to go to a national court to get it enforced.

But I'm not sure it would ever come to that because whatever we do, if it becomes GNSO policy for GTLDs, the party that must comply with the decision of a UDR pay panel or with a subsequent court decision or with a new arbitration decision, if we authorize such a thing, is the registrar, and the registrar is obliged by its RAA with ICANN to abide by those rules and can be deaccredited if it doesn't comply. So I'm not sure we would ever to get the point where we'd need a separate enforcement mechanism to enforce an arbitration award and that (unintelligible).

Whether or not the UDR (unintelligible) arbitration or a different species of dispute resolution, it's never needed to go to the New York Convention to get a UDRP decision transferring domain enforced because registrars just do that because they're obligated to by their contracts. And if they didn't do that, they would be at risk of losing their contracts and being put out of business. So those are my thoughts on this just as off the top my head as we -- and those are all personal views, of course.

Anybody else want to comment on the New York Convention and its possible application on our work before we get into a more direct discussion of arbitration? All right, well, then we'll move on. So Petter, go ahead.

Petter Rindforth: Just a quick comment on that. I think it's good if we kind of have some kind of general relations to refer to when it comes to arbitration if we decide on that. But if we also have stated before, if we decide to recommend option two with arbitration, we also have to make some note on -- to avoid, not mention any specific names, but to avoid an IGO itself can be offering these services and thereby there can be questions about the neutrality so to speak.

Phil Corwin: Yes, and Petter thanks for that and thanks for posting some of the organizations that offer this type of arbitration under (Ensatril) rules I'm

presuming. I agree with you that it would -- and I believe I've expressed this view personally prior to this that if we endorse any type of arbitration for IGOs in any conceivable scenario that it would not be appropriate to have an IGO being the forum for hearing such an action. There could be a perception of bias and we would want to rely on other types of trusted arbitration organizations, which are not in the IGO family, to provide that service.

And the co-chair is going to briefly take a sip of water and then continue.

Petter Rindforth: May I take the opportunity just to mention one. I don't say that I prefer it, but just one example that came up, which we were talking about neutrality. And in Europe still, and someone that actually have knowledge about domain name disputes. We had the Czech arbitration court that (unintelligible) both with detailed lead disputes, otherwise, and also with the .eu disputes. So they should have people that have knowledge about the topic, but maybe also have the possibility in a neutral way and independent from being an IGO, doing -- offering this kind of service.

Just one example. I don't say that I prefer this or agree with this. Just an example. Thanks.

Phil Corwin: Thanks for that additional input. The one caveat I'd add to my earlier statement is that just as I want an IGO to be the arbitration forum, if we decide on permitting that in any conceivable scenario. But we wouldn't want an existing UDRP provider to hear the "appeal" from its own decision. We would want a separate party from the original decision forum. That would be my view that I would -- the working group can get into it. So let's look starting here at item C on Page 8 where it says the option of arbitration should be further reviewed and existing examples, for example the New York Convention which judges weren't -- the New York Convention is not an arbitration process. It's an agreement on the getting national court enforcement of foreign arbitration decisions.

So the U.N. disagree that arbitration may not be a proper alternative and they say arbitration is a common method for dispute resolution and especially popular for between entities that come from different national jurisdictions. Let me say personally, I think we took note of all that and the fact that IGOs generally in their commercial agreements insist on arbitration clauses. Our concern was that this, unlike those arrangements, were not bilateral agreements but UDRPs involve a party who has no contractual relationship with the IGO, that is the domain registrant. And so there's that to consider.

Several IGOs said arbitration is standard mode of dispute. Settlement used in disputes within IGOs and other parties, and that's what I just noted and that we had considered that. The IPC supports and notes the importance of the arbitration entity handle such case for de novo review and determination and looks like that was in support of option two. Okay, OECD referred to the New York convention. They thought option one would curtail any rights the IGO does have to its immunities and that by successfully asserting its immunity in the court and vitiating the earlier UDRP decision, it might encourage a greater number of appeals to court if registrants knew that was a potential result. They strongly supported option two as the only viable proposal.

The FICPI said option one corresponded more closely with traditional trademark domain name disputes and likely to be more practical, but option two may be more acceptable from the perspective of IGOS, which I think is clear. That's a personal aside, as the final decision would not be restricted to specific national court. So they recommend the working group should reach out to the GAC and representative IGOs to obtain their views on relative merits of the two options.

Well, I think we've gotten input on that in the comment period and I'm not sure. Again, my concern is that if we reach out to one group, we should reach out to the entire community, and not favor one group in terms of providing an opportunity for additional input. The business constituency noted that it's within the very narrow circumstance and not setting a broader

precedent that if we're swayed to adopt option two, it will be extremely important that its implementation be a carefully balanced selection of arbitration forum, applicable rules for the de novo determination. BC noted that option one would essentially compel an IGO to waive its potentially valid claim of jurisdictional immunity after prevailing on a UDRP.

IPC thought option one was harsh and draconian, puts an IGO complainant in an untenable position. It offers a free pass to the losing registrant. Option two is consistent with the general practice for appeals of UDRP cases. And it would simply (unintelligible) an arbitrator for the court where -- and I assume that's in cases where the IGO had successfully asserted immunity. Then this sub-clause A, working group should consider further review of arbitration as an option. Okay, so there's a U.N. comment. I'm not going to read all of this. You all have eyes and can read it as -- and some of this is repeating what we already saw from the EUN.

Okay. The registrar stakeholder group recognized the complex legal considerations raised with recommendation four. However the registrars don't believe it's within the remit of ICANN or GNSO consensus policy to grant or limit the scope of immunity as applied to some IGOs. I don't think we're really trying to limit the immunity. We wanted to not have ICANN prejudge the immunity question. George, I see your hand and welcome your brief intervention here as we continue. Go ahead.

George Kirikos: I think most of these arguments have already been discussed within the working group so they're not really that new. I think the starting point for the analysis should be that the existence of the UDRP should not interfere with any parties existing legal rights and that's how it stands at present. Making any change to impose binding arbitration would definitely take away some of these existing legal rights. And when we hear all these parties talking, they're always talking about removing the rights of a registrant. I doubt the trademark holders are presented by the IPC would agree that their members

would voluntarily agree to give up any legal claims if their trademarks were being attacked by an IGO and be forced to go into a binding arbitration.

Some of the arguments I was interested in is that the recourse to course doesn't only exist at the end of the UDRP decision, when a decision has actually been reached. The recourse through the courts can happen at any time. So if we were going to go to arbitration, the UDRP panel might not even have made a decision. The proper strategy for many registrant is to go to court immediately and tell the UDRP panel not to make a decision. So I don't know how that would be handled if binding arbitration was imposed, but there would be no appeal whatsoever discussed. The registrant would be trying to put the dispute into the court immediately. So too many grey areas and problems are introduced through arbitration. So I think we should stick to our first principles, namely that UDRP is a supplement and shouldn't interfere with the person's existing legal rights. Thanks.

Phil Corwin: Thank you, George. I'm going to try to short-circuit this discussion, shorten it so we can get to actual some discussion within the group in our remaining -- if we end at the top of the hour, we have 20 minutes left. So just quickly scanning through what's left here. There was some support emerging for option two. Well, we got through that on Page 8, 9. Let me get back to -- we're up to Page 10. We just read the registrar statement and then on how arbitration works, an OECD comment. Richard Hill pointed out that the arbitration entity doesn't have any role regarding distributing any decisions made where its arbitrators. Of course, they could choose the arbitrators and select ones for a particular case but I'll accept that as a basic premise that the decisions are not influenced by the specific arbitration forum operator.

And also noting his case that an arbitration clause in the contract between a private party and an IGO protects the private party and ensures the IGO will not invoke immunity. And again we've noted as a group that if this was about accepting arbitration in disputes between ICANN and IGOs, this this working group would have been over two years ago. I think we all would have signed

off on that. The problem here is that there is a third party involved, the domain registrar with no direct contractual relationship between it and the IGO, and the registrant having additional rights under certain national laws.

So we got some other minor comments here at C&D. In four, we have further discussion of a separate DRP, which would be completely establishing a whole new process separate from the UDRP and URS just IGOs, a request that was based primarily on the immunity assertion by the IGOS. We've got the IPC recommendation. We reviewed the IPC and the other comments in some details earlier in this process that we're going through.

So I'm going to stop there and certainly if anyone in the group -- and I see your hand up, Paul. Just let me say something and then I'll call on you. If anybody in this group wants to bring up, and revive, and discuss establishing a completely separate DRP just for IGOs, we will (unintelligible) that discussion. But unless we hear that, I think really we're talking about option one and option two. And right now, this working group does not have a recommendation as to what should happen.

If the registrant loses the UDRP, appeals to a national court, IGO goes to the court, asserts immunity and the court says yes, you're immune from this process. We asked for input. We got input from a number of parties on option one and two, but we don't have official position on one or two yet and if we can reach a consensus on either one or two, or some combination thereof, or a third option we haven't thought of, we can recommend that in our final report. If we don't get consensus on that, frankly we're going to be leaving it to the full council for a decision on that question of what happens in that probably rare, but nonetheless foreseeable scenario.

So I'm going to stop there and call on Paul Keating and then Petter after him.

Paul Keating: I guess I'm confused, Phil. So we are not discussing the pros and cons of arbitration here because there are not enough people to raise the issue?

Can you answer that one first because otherwise I have a shorter comment. I'm not in favor it. I think it's beyond our remit and I think if someone wants to -- that issue needs to be raised. It's so convoluted and so complex that it really should be pushed off to the working group that's dealing with the UDRP context. You have so many issues to deal with here. Whether or not it is really an IGO that you're talking about because there were comments that came back in that said, well, there are IGOs and then there are IGOs. Some are really not IGOs or some have been objected to. How do you deal with those?

I think us recommending a methodology for dealing with this is way beyond our remit. We'd be still here for another four years, okay. And I think that I don't think we should get side tracked on the issue personally, okay. In terms of recommendations, I think we should come straight out of the box with a recommendation about what happens if and IGO assets and is granted immunity but has the domain name awarded to it under the UDRP. I think that's a failure of consideration under the agreement.

The agreement was I have the right to raise this before the Court and have my matter heard. The IGO in the context of the UDRP is a third party beneficiary of the registration agreement. They are the beneficiary of rights which are granted to any applicable complainant. So if there's a failure of consideration, there's a failure to the basic elements of the agreement and the UDRP decision should be nullified, period.

Those are my feelings. So if we're going to go, I guess if we're going to put the arbitration issue kind of either aside and deal with the issue of what happens when immunity is asserted, let's do that. But we should deal with one before we deal with the other. I don't know if I'm making much sense.

Phil Corwin: No, you are Paul and maybe I wasn't clear on my remarks. What I was saying is that given this working group's decision so far not to establish a separate dispute resolution process solely for IGOS and where appeal would

be to an arbitration board and not to a court of mutual jurisdiction that I didn't think there'd be much point in focusing on that because we've already dealt with that. But I wanted to make clear that if any member of the working group, based upon on the comments we received from the UN, the IPC, IGOs, or any other party wanted us to revisit that key decision that we would be open to having that discussion.

What I was saying is that the discussion I think we need to have on arbitration is what should happen in the rare case where there is a registrar on appeal and the IGO successfully assert immunity in the court of mutual jurisdiction. Clearly, we thought it was within our remit to ask the community to comment on options one or two and we haven't reached a decision on that yet. And that's the one option two, if we had consensus on that, would be the one place where we would need to discuss what arbitration process would be appropriate if we decide that's what should happen if immunity is successfully asserted.

So I wasn't trying to encourage reopen the entire key question that we've grappled with. I was just making clear that if somebody wanted to raise that, we would hear them. Okay?

Paul Keating: Would you let me know for clarity please or let everybody know if there is -- I'm still a little confused. If we're going to close out the arbitration as an alternative to the UDRP, can we just -- let me know if we're closing that out and then moving to whether or not we're discussing option one or option two, which is the enforceability of the UDRP award in that particular case that you described, which is the post-UDRP decision litigation and a successful assertion of immunity on behalf of the IGO. I would like to discuss that.

Phil Corwin: Yes, and that's what I want to discuss, Paul, and let me hear from my co-chair at this point, who has his hand up.

Petter Rindforth: Hi, Petter here. First, what I would say that when it comes to option one or option two, and also based now talking both in my personal views, my personal summary of the comments we have received, but also from what was discussed within (FICBY), I think that if we are going to get also acceptance from IGOs, we can stick to a conclusion that there is no need for a separate new dispute resolution policy. We have these recommendations and they are based on some kind of what we call known trademarks that may not be registered in the traditional way. But one examples of them could be that they are actually registered according to Article 6 (unintelligible). And then we take option two.

I just also wanted to, because we have to discuss it briefly and obviously it seems that we can conclude that we don't recommend a separate new dispute resolution policy. But what's interesting to see is that the 2007 draft text for a possible IGO dispute resolution procedure is a little bit different from the UDRP and from those that have, like WIPO, and GAC, and IPC, that talking about the separate dispute resolution policy. They are not referring to that one. They, as I summarize it, they in that case want to see something that is very similar to the existing UDRP, just adding the IGO identification instead of the traditional trademarks. Thanks.

Phil Corwin: Thank you, Petter. Okay. So now in our remaining time, I'd like to invite the group to opine on whether we should recommend in our final report, based upon the comments we received and our own analysis, comments, and our own views, whether we can that -- are going to have a consensus position on either option one or option two.

And I'm going to start off the discussion with something I know George is going to disagree with and I want to say at the outset, again, I previously noted that I had a major role drafting the ICA comment, which was for option one. And I also had input into the business constituency comment, which favored option two. I think both groups are very reasonable. I think people

can reasonably disagree on option one or option two. I'm very familiar with the arguments for and against each of them.

I will only say this as a personal view. I'm not arguing for either one right now but it is clear -- we all know that while this working group has been operating that there was a separate closed-door discussion group between the board, the GAC, and small group IGOs that in part addressed the very same issues we're looking at. And we've been given the IGO small-group recommendation that came out of those discussions with that board endorsement of those recommendations. We know that there is an ongoing discussion group talking about hiring a new legal expert and requesting that we defer delivering our final report until that new expert opines.

So all I'm saying here is that within -- we'd be blind not to see that within the world of ICANN, the issue we've been given to deal with is highly politicized, that if we deliver a final report pretty much along the lines with some modifications of our initial report, we would be foolish not to expect quite contrary GAC advice going to the Board, assuming the Council basically signs off on our recommendations. My concern is that if we go with option one and I see George saying we shouldn't let politics decide our analysis.

I'm going to disagree, George. I think I feel it's my responsibility as a co-chair to look at the support we're getting from Council, which is good so far. 100% support for our general initial report from the contracted parties. Support from the BC for our initial report, some opposition from the IPC. I think we're likely to get support from the non-contracted house four our basic thrust.

I am concerned that if we go with option one, and give GAC and IGO members the argument that they recognized that we may have a valid claim to immunity but the consequence of successfully asserting that immunity will be to vitiate an initial determination that cybersquatting is occurring and permit that cybersquatting to continue without any further recourse for us,

unless we waive immunity, could be used to attack and discredit and cause our entire report to not be embraced by the Board.

So I think we have to be cognizant of the process that follows our delivery of the report where it has to get reviewed and approved by Council. And then the Board receives it and the Board has to consider any contrary GAC advice. So if this is not just about delivering a report that we feel is sound. It's about. Delivering a report that we can reasonably expect to be implemented. So I'm going to stop there. I can see, as I said, I see good strong arguments for those option one or two. I think in terms of safeguarding the ultimate implementation of our report that option two would better ensure that, while recognizing that if we go with option two, we'd have to get into much more discussion of how that arbitration would work in that rare instance and that that would cause some further delay in delivery of our report.

So I'm going to stop there and I see Petter's hand up, and Paul's hand up, and George's hand up, and I'm going to recognize Petter. And I'm going to have step away in four minutes, but he can -- if he can continue, if there are others who want to keep speaking and he can continue moderating, the discussion can go on. So Petter, go ahead.

Petter Rindforth: Thanks, and I will be very short. As I said in the chatroom, whatever we decide, it's much better that we have come together on some recommendation, whether it would be option one or two that we can put forward to the GNSO Council, rather than give still two or three open (unintelligible) for the Council to decide upon. We have so far worked, as I said, very well in the working group and come to conclusions together. And also, I agree on option two even if there are strengths and weaknesses with both options.

But I think that option would be the most practical one that could be accepted by the majority of the groups of interest. Thanks.

Phil Corwin: Thank you, Petter. Mr. Keating?

Paul Keating: Thank you. So as a practitioner, I can definitely see the benefit of option two, provided that we have selected the governing law that applies both substantively and procedurally to the arbitration. The reason I can see a potential benefit is I know for a fact, as a matter of my personal experience, there are very few jurisdiction that actually recognize a post-UDRP claim by a respondent. Most courts will take the action out of court, per se, because there is no basis to form a claim. So that said, I'm willing -- I'm open to discussing option number two.

Now, the other side of my…

Phil Corwin: Paul, can I ask a quick question, just a clarification?

Yes.

Phil Corwin: Both option one and option two presuppose that the registrant has a claim in a jurisdiction either through residents or by the location of the registrar that allows them to (unintelligible) an additional national law. So my concept is that if it went to arbitration, if there was an essential immunity claim would be under that -- the same law that they had -- that the registrant had originally sought the appeal under. Wouldn't that be logical?

Paul Keating: No, because ICANN -- let's say for an example I have an IGO that wins an UDRP, takes my client's domain name. That IGO has an office in New York, but the jurisdiction of the IGO, where it was formed is actually Geneva, Switzerland, okay. My registrar, my client's registrar is in Australia, fabulous dot com, okay. Now, the mutual jurisdiction provision says that assuming that that's the same process that is adopted in the complaint, et cetera, mutual jurisdiction language only applies to me really because as a registrant, the losing registrant, I can go to Australia and file a claim and deliver that

complaint to the registrar and have an automatic freeze or injunction against the transfer of the domain name. It's automatic.

If I go through any other jurisdiction, which again, then I have to get a court order to enjoin the transfer, you understand. So if I were to file in the United States, I'd have to go in ex parte to the court. I'd have to -- in other words, short notice, everybody who's not a litigator. I'd have to do in short notice. I'd have to convince a federal or state judge that one, he has jurisdiction over the defendant and two, he should issue an order of injunction because there's irreparable harm.

Now, possible I could do that. Unlikely, given the ten day window, okay, and the delays in receiving the notification and talking to the client.

Phil Corwin: Paul, I'm just going to interrupt briefly to note that I must leave the call now. I apologize to all the working group members that I have to leave early but I will trust that Petter can continue moderating for at least a little while and let this very good discussion continue. Thank you.

Paul Keating: So the choice of law is actually material and it's not automated as Phil had suggested, Petter. So if we can identify the governing law and the procedure that works, and actually provide a remedy, then I'm okay with that. Part of me is okay with it.

On the other side of this coin, I have a real problem because let's say instead of a domain name here, we're actually dealing with a registered trademark and that trademark is being used, and the IGO believes that it's being used in a manner that infringes upon their rights under (six tier). What options do they have? They have only one option. They can sue me for infringement in a court of law in -- wherever I am or wherever my trademark is registered seeking invalidity of the trademark, to void the trademark or to seek damages for infringement.

That's their only remedy. So the question that I have coming back is what makes a domain name any more special than that? Why do we have to go out of our way again to create yet another shortcut, to create a specific set of rights that don't otherwise exist in the real world only because we're talking about a domain name as opposed to a trademark. I don't understand that. I can go register a trademark that has the IGO's name or initials in it because the criteria for refusing my trademark registration in the Paris Convention memberships registry, so for example the US PTO, is whether or not it's confusingly similar, not whether or not it incorporates a text by text comparison.

So that involves a whole other analysis of what goods and services are being used, et cetera, et cetera. The other side of me has a big problem, which is irrespective of the politics involved, I have a fundamental philosophical problem with carving out yet another procedural hiccup for the owner of a domain name just because it's a domain name as opposed to any other form of intellectual property. I'll take my hand down.

Petter Rindforth: Thanks, Paul. A quick question. If I understand you, you were just talking about the pros and cons regarding both possibilities we have. And if that's the case, I fully agree with you that none of these two options are 100% clear and the best ones for all parties. But as said, I think we should come out with some kind of final recommendations that have the possibility to be accepted by most of the parties of interest. Still, arbitration would be the best so to speak way to deal with it. And of course, we need to add some comments and recommendations on that, how it would be dealt with in a practical way.

Paul Keating: I'm sorry, George, I just want to finish one part. Petter, my entire problem with the use of arbitration in lieu of the litigation, okay, wherein the IGO wants to assert its sovereign immunity, my only problem is I believe in my heart and based upon my reading of that same document, I believe what they intend to create is another version of the UDRP in which there is no "governing law." There's this universal concept of what's good faith, and legitimacy, and

trademark, and whatnot. And that will not fly because that is not what the opt out provision for a court of law was intended to deal with.

The court of law opt out was intended to say, wait a minute, this universal concept of what is and is not -- no. We're going to go to a specific jurisdiction. We're going to ask under specific laws what is and is not the right -- what are or are not the rights of the various parties here. So for me to even consider the option two, we're going to need to have a concrete determination and recommendation as to what is the governing law and what rules, what substantive law and procedural law is going to apply, which includes who's the arbitrator, the arbitration service. And if that arbitration service is not available for some reason, a secondary one. But we can't have this unspecified because otherwise it will grow its own little set of laws and rules around it.

You've read as many UDRP decisions as I have and panelists come right out and say it, well, we're not going to be bound by any particular rules or laws, even if both parties come from the same jurisdiction and notwithstanding the fact that every one of these registration agreements has a governing law provision in it. So I won't even discuss option two unless we're in agreement to get to that point. I'm very clear about it. Thank you.

Petter Rindforth: Just a quick comment on that. I think it's -- we more or less agree, if I understand you correctly. We cannot just throw out option two as the one we recommend without any further comments and specifications on it. I think that Steve's hand has been up for a while. Steve?

Steve Chan: Thanks, Petter. I actually believe George was before me, so I don't mind letting him go.

Petter Rindforth: Okay, over to you, George.

George Kirikos: Yes, I agree with all the comments made by Paul Keating that the important questions of which governing law would apply, which remedies would apply, because the UDRP has very specific remedies that aren't necessarily consistent with the national laws that might be applicable. There's also various procedural aspects that are important. For example, in court cases, at least in most of the civilized nations they're governed by what we call in Canada as the open court principle, where public records of court cases are reviewable by the public.

We can look at the evidence of both sides and not just the decisions and that's an important thing that's not present in arbitration systems. Most of the arguments and evidence are kept secret and even the judgments are often kept secret. So that public accountability is not necessarily going to be present in a system of arbitration.

Also, the system would not necessarily be simpler because let's suppose that an IGO successfully asserts immunity in a court of first instance after a registrant take it to court. So let's say I'm the registrant and I take it to the Ontario Provincial Court. If the IGO successfully asserts immunity that's not necessarily the end of the story. It wouldn't necessarily go to the arbitration immediately because then they would be the Ontario Court of Appeal. And then depending on what decision of the interior court of appeal would be, it might even go to the Supreme Court of Canada. And then after the Supreme Court of Canada decides, then and only then would it go to binding arbitration.

And even we look at the New York convention, there are various aspects of when the binding arbitration itself could be challenged, if the arbitrators didn't necessarily reflect the national laws that were supposed to have been applied and that would be left open to the courts again. So we're talking about a very complicated procedure, which is not necessarily going to be helping anybody compared to option number one, which does pretend the UDRP doesn't exist and go with what would have happened in that scenario. Because we're not

vitiating the decision. We're saying pretend the UDRP decision didn't exist at all, that would mean that procedure that is.

And that's consistent with what the bargain that brought the UDRP into existence in the first place was, that the existence of the UDRP shouldn't take away anybody's rights. Either party could go to the courts before, during or after the decision. And so the UDRP was something that in some sense, people opted into by continuing with it and they could both opt out of it at any time. So option number one is the option that I would support.

The only scenario I would support option two is if all of Paul Keating's concerns were met. But also, if existing domain names were grandfathered so that any existing domain name, going by the creation date, not the registrants -- so there could still be a registrant change -- any existing domain name would be unaffected by any imposition of option number two. So option number two would only apply if the registrant, when they created the domain name in the first place, knew that they were going to be giving up their rights to court action. Thank you.

Petter Rindforth: Thanks, and before I try to make some summary notes on this, I'll turn it over to Steve.

Steve Chan: Thank you, Petter. Steve Chan from staff and we just wanted to remind the working group members of documents that we had shared previously. One was a document prepared by the WIPO secretary. It was actually published in 2003 and so that document is specifically focused on geographical indications but it also acknowledge its relevance I believe to IGOs as well.

So as I mentioned, this document was shared before and I think it actually goes into some of the discussions that were brought up today by Paul. And so forgive me, I'm not a lawyer so if I get the words wrong, I apologize, but it actually talks about how it chooses the jurisdiction. It talks about the need to establish the rules under which the arbitration would take place. It also I

believe talks about the need to establish providers. It talks about the need to balance the rights of registrants, countries. It also recommends that complainant's arbitration -- what staff would suggest is perhaps that this document be shared again for consideration by the working group.

Also related to this document perhaps it is the GAC proposal, I think it was developed in 2007, where it actually puts forth a draft of a modified dispute resolution proposal. I think that was probably inspired by this document and we would suggest that might be a good thing to share as well for consideration. Thanks.

Petter Rindforth: Thanks, Steve. Petter here and actually, Steve's comments was kind of a good step over to what I was going to say. But first of all, it seems that we are not so many on the participants list today but thanks for all the good input. I suggest that we try to summarize the pros and cons on both option and option two and send it out to the full list. And also, the documents that Steve referred to that we can send out as a reminder to read. Because as I understand it, we will not have a meeting next week as many of our are traveling and I'm not so sure if we will have it the week after. I'm free to participate then but I understand that some of us will not have that possibility.

So we have maybe a couple of weeks that we can proceed to work by email communication and read through these documentation to come up to some sort of agreement on option one or two. And if we choose option two, what further specifications we should add to that. And my personal point of view is still that option two is likely the one that is -- will be most acceptable, but I also agree that we need to combine that with recommendations.

And then before we end today, just briefly wanted to pass onto, as Steve mentioned, that the 2007 draft text for a possible IGO dispute resolution procedure. And you had it -- I think it was sent out last week. I can't see it on my screen but if I just read it out on the Point 3B, the rules for IGO domain name dispute resolution policies when it comes to the definitions. I'll read it

out with (unintelligible) because that's a little bit of what we have (unintelligible) before today.

Mutual restriction means an arbitral tribunal constituent under rules of either the American Arbitration Association, ICDR, the International Chamber of Commerce, the London Court of International Arbitration, or the World Intellectual Property Organization Arbitration or Mediation Center. The domain name holder may choose the arbitral institution from the above. If no choice is made, or if both parties are IGOs, the institution shall be the World Intellectual Property Organization Arbitration and Mediation Center. Well, WIPO. That's again, my personal point of view, WIPO being an IGO that may not be the best choice.

But it also says that jurisdictional such arbitral (unintelligible) shall be limited to determining whether or not to uphold the remedy decided by the administrative panel. The place of arbitration shall be the residence of the domain name holder except that if that residence is in a country that has not ratified the New York Convention for the recognition of enforcement of foreign arbitral awards than the place of arbitration shall be Geneva, Switzerland.

And then I presume that it meant as Switzerland is a neutral country rather than pointed directly to WIPO. The domain name holder may choose whether there are one of the arbitrators (unintelligible) choice is made, there shall one arbitrator. So that's what is stated in that 2007 IGO dispute resolution procedure. Also an interesting note there is that it's quite different from the current UDRP. The talking point four, mandatory administrative proceeding, it's mentioned applicable disputes and they say that you are required to submit to a mandatory administrative proceeding in the event that an IGO, a complainant asserts to the applicable provider that the registration or use as the domain name of the name or abbreviation of the complainant that has been communicated Article (Six Tier) of the Paris Convention.

So here, Article (Six Tier) of the Paris Convention is the way to identify the IGO and to suggest to the public that the connection exists between the domain name holder and the complainant or to mislead the public as to the existence of a connection between a domain name holler or a complainant, or on the grounds that the registration or use as a domain name, (unintelligible) name or abbreviation of the complainant protected under an international treaty violates the terms of that treaty.

So thanks. I see it on the screen also. So just shortly wanted to point out that as I read it here, they first identify the name or abbreviation of the complainant as something that has been communicated under Article (Six Tier) of the Paris Convention. But then, they also say that that name, that abbreviation could be protected under an international treaty. So there is more of a general description of the name protection so to speak, not just to Article (Six Tier). And I don't know if I read it there the correct way, as it were mentioned. But that's how I read it as Article (Six Tier) on that basis, not specifically mentioned again.

And as George said, this (unintelligible) report was reacted by the community in the past. And no circumstances has changed but as we have seen on some comments from WIPO, and GAC, and IPC that they prefer a separate dispute resolution policy. We thought it was interesting to go back and see what had been actually prepared for ten years ago on that specific topic. And whatever we decide in the main topic, I think what we can learn from this is that Article (Six Tier) is in fact already here mentioned as the identification of an IGO, the name or abbreviation of an IGO. So that seems that we are on the right way still.

But I think in our meetings, we have discussed this. We discussed this initially, specifically this 2007 draft and we decided that it was not the right way to proceed. And I thought it was important to take it up and just reconsider to see if anything has changed in our minds since then. And obviously, I think that we're still have the same decision and the same view

that this is nothing to proceed with. And also, this was a specific dispute resolution policy that was, as I said, different from the UDRP. But I think we also agree at this stage that there is no need to create, even if it's based basically on the current UDRP procedure, to create a separate dispute resolution policy for IGOs.

So we had it on the agenda and I think we don't have time today to point down the reasons why we think that this is not the best way to go forward. But as I see no specific hands up from someone that wants to state anything different from that, I suggest that we try to summarize in our lists the reasons why this is not the best way to proceed so that we can go back to our suggestions to keep the UDRP as it is today. And said that, George in the chart say that can we have a short poll on option one versus option two at this point. I think that's, yes, as Mary also said, it's only five members on the call right now. So it's a little bit too small.

But as I suggested, we send out our proposal with -- based on the comments we have received and discussed today, and also from comments we have received during the official comment period and from other members on this group. I think we need a longer list of plus and minus for each options and then we can have a vote on which option there is a majority to proceed with. George?

George Kirikos: Sorry, didn't really have my hand up. I was just voting for option one if that was available through the check mark.

Petter Rindforth: Okay. It's noted for the future poll. Mary?

Mary Wong: Thanks, Petter. So in terms of the action item, what we can do as staff is we can start that document that you had noted about the pros and cons of option one and option two. Seeing as there's no meeting next week, we will try and get that to you as soon as possible sometime next week via the full working group mailing list if that works?

Petter Rindforth: Thanks, Mary. That's perfect. As we don't have a meeting next week, so you don't have to stress to do it before this weekend. But it's good to have it in the nearest base so to generally speak so that we can have something to read on our planes or wherever we are spending our time by this time next week. Excellent. Okay, then we had on the agenda also some -- I think it was our next steps, next meeting. Our next steps, I think we have decided on to have this summarizing of the comments and pros and cons for the two options. And also, if we can try to work on a list of why we don't specifically consider -- well, we have considered -- but we are or are not for a separate dispute resolution policy. Because even if we vote no for that, we need to have good space and comments on it.

So that comes to the next meeting. Mary, how is it, the week after or (unintelligible) next week? Or shall we wait for the week after that? Yes, Mary?

Mary Wong: I'm sorry to interrupt. So if we have no meeting next week than the following week would indeed, as George has noted, be May 25. I believe that Phil had mentioned that he might not be available because of traveling back from the INDA meeting. But I think he had said earlier in this call that you might be available. So it may well be possible to have the meeting on the 25th. What we can do perhaps is to confirm with Phil is that's the case and if you indeed are available, we can just go ahead with the meeting on the 25th.

Petter Rindforth: Yes, thanks. I'm available and it would be good to not wait too long until we have our next meeting. I don't know if we should also perhaps make a straw poll on how many that can participate on that meeting just to see that we are enough number of people there. But I think the meeting we had today, we have very active members on the call today, even if we were not so many. So if we have that kind of number, it's completely workable. And I think that's -- yes. Thanks, Mary.

So it's -- the 90 minutes has exactly passed on so thanks all of you for today and we will communicate by email online between now and the next meeting. Thanks.

Michelle DeSmyter: Thank you everyone. Today's meeting has been adjourned. Operator, please stop the recording for us and disconnect all remaining lines.

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