ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG Meeting
Thursday, 15 June 2017 at 16:00 UTC

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Coordinator: Recording has started.

Terri Agnew: Thank you. Good morning, good afternoon and good evening. Welcome to the IGO-INGO Access to Curative Rights Protection Mechanism Working Group call on the 15th of June 2017.

On the call today, we have George Kirikos, David Maher, Jay Chapman, Paul Tattersfield, Petter Rindforth and Phil Corwin. We have a list of apology from Mason Cole.

From Staff, we have Berry Cobb, Mary Wong, Steve Chan, and myself, Terri Agnew.

I would like to remind all to please state your name before speaking for transcription purposes, and to please keep your phones and microphones on mute when not speaking to avoid any background noise.

With this, I'll turn it back over to our co-Chair, Petter Rindforth. Please begin.

Petter Rindforth: Thank you; Petter here. First question, of course, any new Statement of Interests? I see no hands up, and just seeing the purpose on the agenda.

As you have all seen, we have got from Staff an updated Pros and Cons document regarding Options 1 and 2 for the Preliminary Recommendation #4. And we have also got a little bit of sampling of the date of the main registrations relating to the IGOs currently on the GAC List of 2013.

So if we start with going through the - I'll see if I can just make a little bit. There we go; my screen. We'll start with the reviewing of the Pros and Cons.

And you all know the text of their Recommendation #4. And I scrolled it down to - I can go quickly through the summary -- what I think is interesting to see and evaluate -- is the Impact Analysis of Option 1 and 2.

We have discussed this initial thought several times, but the benefits of Option 1 that preserves the rights of registrants/respondents to fundamental rights of access to national courts -- and the disadvantages, not consistent with a request from GAC and the IGOs.

The benefits, also court decides case on de novo basis. This is not strictly speaking an appeal from a panel determination. The disadvantages, what would be the advantage of vitiating the initial panel determination of such case.

We have seen that - scrolling down. I hope that you're not seeing the same one.

Steve Chan: Hey Petter, this is Steve. I was wondering if I might be able to jump in here for a second.

Petter Rindforth: Yes.

Steve Chan: Sorry, I had my hand up.

Petter Rindforth: Sorry, yes.

Steve Chan: Thanks. This is Steve Chan from Staff. And I - before we get into the details of the document, Staff wanted to provide a little bit of context and high level of understanding of what has changed in this document since the last time the working group has reviewed it.

Petter Rindforth: Oh yes. That would be very good, thanks.

Steve Chan: Sure. Thank you very much.

So what you'll see is that Staff has added a limited set of assumptions for the working group to consider as they review this document. As you move into the benefits and disadvantages, we've incorporated the suggested changes from the working group members as well as what has been discussed in the previous working group calls.

We've also integrated or added in the new calling for our working group discussions and comments. That's been added on the far right in the table for each of the options; also, again, to incorporate discussions from previous calls.

And then, so the new thing that we've added that we've talking about conceptually is the Impact Analysis. So you'll now see the actual example of what that looks like here.

Some of the issues have been suggested here, it's not intended to be exhausted but more illustrative, and so that relates to the impact analysis of the recommendations -- one of the things that's suggested under the GNSO's procedures and is intended to better access the working group's recommendations.

And so at the very end of this document - well, sorry, just to take one step back. There's an impact analysis for each of the two options.

And then, so finally, just wanted to say that the last thing is we've put in an exclamation for the foundation of impact analysis framework -- that we suggested as Staff. This is one example of the methodology to do the impact analysis. The working group is, of course, free to utilize a different model if it so pleases, but here's one example that you as a working group could consider as an option.

So I think that's the high level we wanted to add. Barry, Mary, if you want to add anything, please go for it. Thanks.

Petter Rindforth: Thanks, Steve. Did Mary have something to add? Okay.

So then, I'd rather - because we have seen the benefits of (unintelligible) before, I don't think we have so much new there. We'll concentrate on the right column with the discussion comments. That is good summarizing there.

So we talked about the benefits of this (unintelligible) here. With vitiating the UDRP, the decision only takes place if the IGO successfully asserts immunity thereby terminating the lawsuits. And vitiating the UDRP decision thus maintains the status quo if the UDRP has never been filed. The IGO can then decide whether to pursue other kind of actions -- voluntary arbitration, mediation or intervention by national authorities.

And we also have a comment that says -- sorry. The second sentence doesn't make sense. Filing the lawsuit preserved the status quo, registrar lock/hold with the registrar, and kept the registrant the same -- that of the domain name registrant who was the respondent of the UDRP and complainant in the lawsuit. Nothing happens until the lawsuit is concluded and any and all available appeals.

And there's a note from the Staff, "Original second sentence amended and rephrased." Okay, thanks.

And then we have the next comment that creates certainty for a losing registrant in terms of the consequences of filing a complaint in a national court. The negatives are what are the implications of saying that a court complaint of holding an IGO's immunity claim automatically means an otherwise legally-valid panel determination is now void and has no legal effect?

And the comments here we have summarized. "The mere filing of a court complaint doesn't do anything. IGO has to make a decision as to whether to assert immunity and await the court's determination as to whether to accept that defense to the court action. Registrars must wait until the court has made a final determination as only the court can order a transfer of the domain name."

And a note from Staff, "Original text rephrased to clarify that it is not the filing but the determination by the Court that triggers vitiation."

And as we have discussed before, also, and we know that at this stage, the court will make the decisions. And it could be a clear case where the thing is handled by the court, or it could stop there at the first initial phase, and thereby the (unintelligible) decision by the panel will stand.

Mary, you're answer.

Mary Wong: Yes and thank you Petter. So first of all, you know, apologies if initial language was misleading or inaccurate. Hopefully, the updates that we've made in response to George's and other comments make it much clearer now.

But secondly, I guess more substantively, I think what we were trying to say from the Staff side is whether or not there are potential legal issues that may be created by the fact that in a court proceeding -- not on the substance of the merits but basically on whether or not an IGO can claim jurisdictional immunity -- that based on that, you know, non-substantive on the merit-type of proceeding and (unintelligible), that we are able to say automatically that an initial panel determination is now void and has no legal affect.

And we raised this because we are not experts in this kind of procedure, but we just thought it's something that the working group might like to note and if necessary, get some advice on.

Petter Rindforth: Thanks Mary. Phil?

Phil Corwin: Yes, thank you; Phil for the record.

As we discuss Option 1 and Option 2, given the fact that this working group has been at this for quite a long time; I believe we're - are we at three years now? But I know we've been going quite a while on this and we'd like to see something concrete result from our work because our work is the first step in a process, and whatever we finally report out will go to Council for its review and hopefully its approval.

And we're all aware that the original request of the IGO's forth for a process that did not find support in this working group -- which was for a totally separate DRP not related to the UDRP which it wasn't clear from their ask, but it seemed like it would be based both on Trademark law -- Trademark law rights -- and other rights stemming from their special status -- claim special status which would/could lead to broader rights then complainants in a UDRP.

So in that context and in anticipation of questions or objections to either of these options, I think we just should openly explore them. And in that context, I want to raise two issues that concern me -- and I've pursued to some extent.

The first is we haven't changed -- and Option 1 in no way would change -- the current UDRP. Option 2 would change it slightly for very narrow circumstance that may or may not ever occur.

But Option 1 would say that if the IGO successfully asserts an immunity defense in a courtroom and, as we know from Professor Swain, the things that are in our report and in Option 1 are nothing new. An IGO today could file through an agent, assignee or licensee that will need error and paramount to do that. We're simply noting that they have that possibly to take that path if they wish to further insulate their claim and jurisdictional immunity.

And under Professor Swain's memo, if an IGO brought an UDRP today and if the domain name registrant lost and decided to file a judicial appeal, the IGO today would be free to assert immunity. And per Professor Swain's memo, they might succeed in that argument notwithstanding the Mutual Jurisdiction Clause or the argument might fail.

In my own mind, you know, if immunity is a defense, it would be whether they had waived that defense by agreeing to mutual jurisdiction.

So that leaves to - I've engaged with a number of UDRP panelists and other attorneys who notice the (unintelligible) and said if today an IGO asserted successfully asserted immunity -- if there was a judicial appeal from a UDRP decision -- and if the court granted that immunity, what would happen the underlying UDRP decision. And a number of them have said, "Well, it would be reinstated and the domain would be transferred."

So I don't know what the answer is, but I think if that's a possibility, we'd be changing that outcome with Option 1.

The other concern that I think will come up with Option 1 is that our whole approach up to now has been to say we're not going to have ICANN grant IGO's immunity in advance of judicial determination. If that situation ever arises, it's up to the judge.

But the import of Option 1 is essentially to tell the IGO, "Well, your free to assert your immunity, but if you're successful in that claim, the cyber-squatting that found by the panel -- you know, and the panel could be wrong, but in many cases, they're right in the defining of cyber-squatting -- will be permitted to continue."

So I'd like a little more discussion on those two points of what would happen if our working group didn't exist and a scenario arose today where an IGO brought a UDRP -- registrant appealed under a national law, IGO successfully asserted immunity -- what would happen today to the underlying UDRP decision, and is Option 1 consistent with our kind of hands-off approach where we're saying, "We're not going to have ICANN interfere with any determination on the immunity issue; we're going to leave that to the judges and national courts."

So I'll stop there. I hope that's helpful and leads to some beneficial discussion. Thank you.

Petter Rindforth: Thanks Phil. And as Paul also correctly noted in the Chat, if there is no court action, domain (unintelligible) because that's the decision that is made. And there's a limited time where the losing party can take the case to a court and be handled there.

But there's only a very limited time to act. And if nothing happens within that time, the decision -- the written decision -- will be the one that is the legal issue. So transfer or whatever, the decision (unintelligible).

Mary, please.

Mary Wong: Thanks Petter, and I think you did say some of what I wanted to follow-up with based on Phil's comments. And thanks for explaining it so clearly. So I think that really is the nub of it.

That at the moment, if a registrant or anyone were to take the matter to a national court after there has been an initial panel determination, that panel determination isn't necessarily vitiated in any way. You know, it basically is what it is until the court rules one way or the other, and as we know, I guess the court does do it de novo. But the court rule that the initial determination stands, or it could rule that the initial determination was wrong, and therefore the contrary remedy applies.

So our concern here -- and again, I'm precise that none of us on the Staff are experts on this kind of procedural question -- by saying in Option 1 that there is vitiation, we are concerned that that creates some kind of legal implication or consensus that we may need to consider further. Quite a side from the fact that the question that Paul has raised as to whether or not we do need to make an additional change to the UDRP as a result -- if we were to go with Option 1. Thanks Petter.

Petter Rindforth: Thanks Mary.

As we are now in this discussion, I am tempted to make this example (unintelligible). But I put out now just to explain how I see it.

Let's say that there is someone -- not me -- but let's say there is someone who had the fantastic idea to start a Web site where you could easily sign all kind of goods from different countries in the world. And it's simply called The World Web Site. And then in social media, it's highly appreciated and someone is saying the world is perfectly organized. And then the person who owned the World Web Site thought, "Okay, that's a good slogan."

However, the world is perfectly organized is a little bit too long to register the domain name, so register this at the short version -- the WIPO (sic). And as it's dealing with CHELPS, I use, let's say, a new top-level to buy; so WIPO to buy.

And for a while, there's a parking site because the person needed some more time to create the Web site.

And then WIPO is taking the case to a UDRP case. And I would say that it's probably likely that the domain owner would lose that case.

And let's say I've seen a lot of comments from the U.S. based legal view when it comes to arbitration in court cases. So let's say this is in Europe and the case is taken to a Swedish court. And WIPO claimed immunity and the court just noted that they can't take the case.

So Option 1 for the domain holder, the case ends there and he loses. Or Option 2, the possibility to take it to a (unintelligible) panel of neutrals and have it decided there in arbitration.

And I'm not - yes. As Paul said, "This UDRP case, maybe it will be handled by WIPO."

And I don't know if we have discussed that in detail yet, but in a normal arbitration case in civil disputes, each party can choose a member of a three-member panel -- even if the panel are neutrals. They can choose a person that understands their specific issue. So each party has that possibility -- which is the same when it comes to a three-member panel in the UDRP dispute. And then either cooperate and choose in the chair, or the organization offering dispute procedure will choose one from their list.

And I will say that as I see it, in a case like that, of course the decision -- the arbitration decision -- can be in favor of the domain holder or the complainant. But still, the case will dealt with fully (unintelligible). And also, the domain holder has possibility to actually take one panelist from the list that they think can better understand their situation and their use situation of the domain name.

So that's one example I've thought about that also shows that also the domain holders actually have benefits of Option 2.

Okay, if we proceed with the analysis, I think we were on the same UDRP/URS process applies all the way through. Yes, (unintelligible).

Paul Keating: Can you hear me Petter?

Petter Rindforth: Yes.

Paul Keating: Petter?

Petter Rindforth: Yes, I hear you.

Paul Keating: Can you hear me? Okay, good.

Well, at least let me know. I understand everything about Option 1 that's here. I don't know if everybody wants to continue going through it line by line. But otherwise, we could skip to the conversation of Option 2 and kind of get us moving forward.

If we would like - yes, I'm sorry. This is Paul Keating speaking; sorry Terri.

There are a lot of issues to deal with if we were going to consider Option 2 -- which is the arbitration provision -- and they go well beyond the general comments that you raised.

So if we're there, please let me know. I'd like to make some comments to address those issues. If not, I'll just go back and mute my microphone and listen until we get to that point.

Petter Rindforth: Thanks Paul. I think that it's a good idea if we can perhaps more quickly go to the Impact Analysis of Option 1 and 2, and then a step further to discuss Option 2.

But I'll leave it and see if there are any hands up to further analyze the comments we have on each option. I see no hands up. Thanks then.

I just - Paul, yes. Paul?

Paul Keating: Can you hear me know?

Petter Rindforth: Now I can hear you.

Paul Keating: This is Paul Keating for the record.

If we're now discussing the pros and cons of Option 2, I think we ought to discuss those in depth. Some of the issues that present themselves is - in addition is who, obviously, is the arbitration provider. Uh? What language is the arbitration going to be in? Are there going to be - where is the arbitration going to be deemed to take place for the purposes or oral testimony which all arbitration provisions provide for? To what substantive law is going to be applied by the arbitrators?

Those are all issues that I didn't see them in any of the pros and cons discussion for Option 2. And those need to clearly be described.

And in my opinion, if we're going to suggest that Option 2 exists and should be given any credible thought, then we have an obligation to present what the

constraints of that Option should be and why those constraints have been adopted as a recommendation by the working group.

Petter Rindforth: Thanks Paul. Before I reply to that, let's see, Phil's hand is up. So please.

Phil Corwin: Yes, Phil for the record. Yes, Paul, thank you for raising those issues -- though I think you're getting a little bit ahead of where we are in today's call.

I did note you are raising those elements in an email on the list recently and there's an effort going on with Petter and myself to prepare a paper for review by the entire -- review and discussion -- by the entire working group of what the - because beyond considering that the high level pros and cons of Option 1 and Option 2 -- which is what we're trying to wrap up today -- any further consideration of Option 2 would be to get into the ways it wouldn't have to be a full implementation review, but it would certainly have to set what the policy should be for an Option 2 of the key elements that you've identified.

So there's work going on by the co-Chairs to develop a proposal. The intent of which is to keep a post-UDRP arbitration, again, in the very rare circumstance where the registrant appeals from the UDRP, and the IGO successfully asserts immunity in the judicial form -- which we don't know if that will ever happen. But Option 1 or 2 are all about what would happen in that probably rare circumstance.

And the intent of the outline we're working on is to keep the arbitration that would occur under Option 2 upon successful assertion of immunity in all of its elements as close as really is possible to what a judicial proceeding would have been under the national law in which the arbitration - in which the appeal or de novo appeal was brought.

So that effort is ongoing, but we don't have that document for working group review and discussion yet. We have just shared that with Staff for their comments.

And our intent would be after today's meeting to share that with the entire working group and possibly to discuss at our next meeting which would be the face-to-face meeting which is taking place in Johannesburg in two weeks.

So to sum up, the elements, the need to be very specific about what the elements of an arbitration procedure under Option 2 is a very important point. I thank you for raising it. But I think we're probably a meeting away from having a straw man document to discuss -- to flesh out those comments.

Okay? Thank you.

Petter Rindforth: Thanks. And also some comments from George that - well, point out some of the issues that we are considering -- when it comes to that draft way of Option 2. One, of course, question is also why don't decide the provider in the (unintelligible).

Okay, Paul?

Paul Keating: Thank you; Paul Keating, again, for the record.

That's fine, but I just want to be clear that for me to support the final report, if Option 2 is going to be suggested directly or indirectly, then I would insist that there be actually procedural rules that are set forth and explained to just why those are.

I know that's a big ask, but if we don't do it that way, then I think we're just leaving this whole Pandora's box open for someone else to come in and just create whatever rules they want. And all of our work has been for naught.

The other point raised is that there's been a couple of people that I've been reviewing this matter with, and the idea came up for an Option 3, okay. And an Option 3 is basically let it go to the Judicial authority, but obligate the

respondent to waiving any monetary claims that they may otherwise have against the NGO.

It seems to me that the only issue here is who gets to keep the domain name. I don't think that the NGOs are concerned about a decision that is limited to that extent. What they're afraid of is some sort of monetary damage that is set against them.

So I think that Option 3 should also be considered. It's also a benefit to being of an extremely streamlined approach to things because you keep everything the way it is. You simple just have the respondents waive the right to receive any other remedy other than the retention of the domain name, okay.

Most potential respondents that I know of -- that I've discussed this with -- are in favor of this because they know that they're never going to recover any damage judgment anyway. And that's not what they're in for; they're in there to recover and keep the domain name. So I think that would satisfy the concerns of the respondents on that side.

From the NGO standpoint, I would fully expect that notwithstanding or going all the way through Option 2, they're still going to insist the remedies available be limited to the issue of the domain name possession, and that the arbitrators be prohibited from granting any award -- monetary award or other form of remedy.

So if we're going to go all the way through, you know, production of creating a separate arbitration system which essentially gives that same remedy. That remedy is easily obtained just by requiring a waiver from the respondent.

So that what I would like to also be considered, okay. I propose this, you know, often -- early and often. And I'd like to have it re-raised because it seems like we're going down the same pathway and we're going to get to the same conclusion eventually. Thank you.

Petter Rindforth: Thanks Paul. And if I understand you correctly, what the base of your suggestion is that the remedies are the same as in the traditional UDRP dispute so that the losing party does not have to pay any remedies. Yes, thanks.

I see no - we can discuss it but it should still be possibilities, actually, to consider that when it comes to Option 2 to find a way that's decent and convenient and safe for both parties.

(Unintelligible) so what Paul was saying though was keep it (unintelligible). But still the problem areas, if the Court will not take the case.

Paul?

Paul Keating: Well, Petter, if the Court doesn't take the case and dismisses it because there's no cause of action recognized, for example, then the respondent is just out of luck. Okay, that's how things work now. I'm not changing anything there.

What I'm saying is it seems to me from everything that I've heard and read about the NGO's concerns here; they're concerned about any remedy which extends beyond near possession and control of the domain name. Right? They don't want to be on the receiving end of a judgment that has anything to do with other than - that grants any remedy other than possession of the domain name.

That's fine. The respondent can waive that. We can require that the respondent waive that as a condition to proceeding against the NGO. And therefore, you don't need this complex arbitration process.

So it's not quite a part of Option 2; it's actually between Option 1 and Option 2. A separate option but it's very simple.

Petter Rindforth: Okay, thanks. George?

George Kirikos: George Kirikos for the transcript. Yes because I think one of the things that the IGOs raised in one of the meetings and perhaps on their own IGO mailing list is that, for example, a disgruntled employee might create an MPIGO Web site. And then if the IGO was to proceed - and that employment issue could only perhaps be solved by binding arbitration.

But if the IGO, you know, created a UDRP against that employee's domain name or former employee's domain name, then the waiver of immunity in the EDRP might mean that the employee could then, you know, go to court and then challenge the IGO -- not just on the domain name dispute -- but also raise the issue of, you know, the employment dispute.

So I think that's what Paul's proposal helps to meliorate, and it also meliorates the concern of the IGOs in that regard. So I think that's a very big win-win if that approach is incorporated into the Option 1. Thanks.

Petter Rindforth: Thanks. And you said one specific word here. That is the problem with Option 1; may. (Unintelligible) is a system that leaving it clear to both parties involved. That's the case will actually be considered and dealt with, so have a final decision.

That is also in another way but still can be accepted by IGOs as not dealt with by a national court, but also can be accepted and workable for the domain holder that will be a physical, personal, small company that deals with the resident domain name in good faith and have this dispute and actually want to have their legal case to be considered in a decent way.

So, okay. And George says, "Feel the same that the scope of the UDRP waiver is only with the respect to the domain name aspect. If someone wanted to raise the damage issue, the idea could probably serve immunity.

They would argue that they didn't waive that issue for immunity. (Unintelligible)."

I just wanted to think quickly (unintelligible) so that we have actually discussed or analyzed the Impact Analysis for both options although we haven't done that today. And I guess (unintelligible) Option 1 mediating the decision, thus not improve access for IGOs to the UDRP/URS.

We have been talking about the idea of being able to use as an EN licensee. My comment on that is that from, yes, there is that possibility. But from the comments we have got about (unintelligible) where we met IGO representatives at ICANN meetings, they state that they - they see a problem to use an SNE or licensee for their specific names. And they also somehow also said that it's not the way that they normally deal with these kinds of cases. They want to be forced to use that way to have a dispute being solved.

I know that we initially -- at least we discussed -- if there were other kind of business disputes where this was actually used. But when it comes to domain dispute, this is the comments we have got.

And IGO must assert its jurisdictional immunity in national courts, possibly establishing a precedent for waiving immunity. And the mitigation site, IGOs can selectively waive immunity in certain circumstances.

Yes, so that's a possibility. I mean there could be, actually, some IGOs that will perfectly accept to have the case taken to a firm decision in the national court which would be good for both parties involved.

But we see that there's a risk that they would refer to the immunity and the court -- which is also not clear how the court would deal with that. We've heard it from the same report, but some courts, they will accept the immunity and thus handle the disputes at stake.

That's also why I think Option 2 -- and specifically in the version that Phil and I are working on -- with Option 2 taking in some of the aspects of some of Option 1 could be a descent solution for this topic to be solved by an acceptable (unintelligible).

Then on Issue 3, may establish precedent of UDRP/URS decisions being vitiated without the court decision on the merits of the case relying on finding of jurisdictional immunity. Yes, absolutely; that's what we talked about; could make carve-out provisions here narrow in the scope and very specifically targeted.

And Point 4, we have no notes on that. Vitiating the decision may encourage losing respondents to challenge the decision.

I will not go through all the discussion comments on Option 2, so I go with 2 the Impact Analysis of Option 2.

But I'll give the word to George first.

George Kirikos: Yes, George Kirikos for the transcript. I just wanted to make a comment on Issue number 4 where there was no real discussion.

Petter Rindforth: Yes.

George Kirikos: I think Number 4, the likelihood that somebody would, you know, knowingly file a frivolous lawsuit, you know, is a very low probability. You know, where the lawsuits tend to be filed is, you know, when there is a very high-value domain name that's under dispute. And, you know, the person, you know, the decision isn't correct and the respondent feels that, I think, to get justice, their only recourse is to the courts because there are no other options.

And so to say that, you know, it encourages them to challenge the decision hoping that, you know, the IGO is going to make this immunity argument doesn't necessarily, you know, carry the respondents or the domain name owner will have to spend a lot of money to go to court. And there, you know, in most jurisdictions, there would be, you know, very serious penalties -- monetary penalties -- for filing a frivolous lawsuit as well.

So those would mitigate the idea that that's going to be a strategy for domain name registrants. Thanks.

Petter Rindforth: Thanks George. Phil?

Phil Corwin: Thanks; Phil for the record.

In regard to the Impact Analysis for Option 2, I think Issue 1 is just incorrect. Option 2 in any - you know, we haven't discussed whether that one might be - does not deny registrants access to national courts.

What we're talking about with both Option 1 and Option 2 would be - and again, this could happen today. We're not creating the new opportunity for this to happen.

IGO brings UDRP, IGO wins UDRP. Domain registrant appeals. IGO asserts immunity -- which it could do today. We all know that; we're not creating some new right to the sort of immunity that doesn't exist now. And the judge in the national court grants immunity to the IGO.

Both Option 1 and 2 are about what happens after that granting of immunity when the judge finds that that IGO descent is valid.

So there's no denial of access to national courts under either option. They're both about what happens after a sitting judge in a national court grants immunity descent.

So that's just incorrect and we should be clear on that with other options.

So far as special precedent, I would note - this working group has broad leeway to define what the impact of our final report should be -- whatever it is.

And I note that in the comment of the Business Constituency -- on our initial report -- a comment in which I had some input, that while they support Option 2 over Option 1, they're quite clear in their official comment that they view this as a very narrow circumstance that should not create any precedent for any entity other than an IGO to have some kind of special treatment -- whether it's Option 1 or Option 2 -- in the case of immunity descent.

And I think our final report can be just as specific and final about limiting any precedential value of whatever we recommend in the end.

So far as inconsistent with UDRP/URS, both options are as we've discussed. You know, Option 1 appears to be a variation of what would happen under current UDRP practice if a court case was thrown out for whatever reason including acceptance of immunity descent.

Under current practice, the consensus view seems to be that the UDRP decision would be reinstated and the domain name would be transferred to the IGO.

So whether we're talking about that not happening -- about vitiating the UDRP decision which is Option 1 or about going to an arbitration which is Option 2 -- both of them are different than current practice. There's no different in that regard. It's just what the difference is going to be.

And my last statement on that point is that if the consensus view of the UDRP expert attorneys I've consulted with is correct that the decision would be reinstated, then Option 2 actually would provide some benefit for a domain

registrant that is not available today. Whereas today, if an IGO asserted immunity and the court case was terminated based on that descent, the registrant would not have an opportunity for a de novo hearing, and Option 2 would provide that opportunity -- which if the analysis is correct, does not exist today.

Option 4, I mean Issue 4 about agreement of the respondent to the adjusted terms, we'll need to look at that. I agree that's something we shouldn't pass over lightly.

And the final issue I want to raise -- it's not addressed here -- is what IGOs are we talking about. As we know from our comments received on the initial report, at least some commenters -- including the government of the United States -- are concerned that some organizations that assert to being IGOs are not in fact "real" IGOs.

So I don't know if we should try to define who's an IGO that gets Option 1 or Option 2 treatment or Option 3 treatment -- whatever we come out with -- or whether we should just leave that to the judge if there's an immunity descent raised and where the litigant domain registrant could say, "You can't assert that immunity descent because you're not a real IGO."

I'm not sure who should make that decision of what IGOs are authentic and which are inauthentic. But I think it's one more thing we need to check the box on before wrapping up our work.

So I'm going to stop there and get out of the way. And I see Mr. Keating has his hand up.

Petter Rindforth: Thanks Phil; Petter here. Just a quick comment on the education of IGOs.

We have our own (unintelligible). We have identified our own way to see the legal protection of an IGO, but I should also note when it comes to the

clearing house and other aspects, we have the GAC list of IGOs that is created in another way with not the same identification as we have.

So I think that was a good note that we also have to be clear on how, at least, some kind of recommendation on how to identify the complainant as an IGO. And perhaps that's - well, probably that will be (unintelligible) already on the first base in the URS or the UDRP case because that will be the first part when the complainant -- the IGO -- raises its (unintelligible) and identify its rights.

I see your hand is up, Paul, but I also see that Mary's hand is up so I'll give it first to Mary.

Mary Wong: Thanks Petter, and actually my hand went up to follow-up on one thing that Phil noted about when Option 1 or 2 might kick in. and in that regard, for folks who are not in Adobe and not following the Adobe Chat, there's also a comment that Paul Tattersfield put into the Adobe Chat that's on a similar line to what I'm about to say.

And it is that as the recommendation currently stands -- Recommendation 4 -- before we even get to Option 1 or Option 2, the IGO does have to successfully appeal immunity in national court.

And in that regard, we recall that Professor Swain in his memo had noted a couple of things. One, obviously, is that the law on the waiver of immunities by IGOs is not very well developed. But in that regard, he had also noted that granting mutual jurisdiction -- such as by initiating a complaint -- would likely be understood as a waiver of immunity.

So we're not raising that as something to say, we should not consider Option1/Option2. But to the extent that we're looking at our recommendations as a whole, if the working group were to go down a path of, say, arbitration in

Option 2, it may be worth reviewing or recollecting this particular part of Professor Swain's advice as well. Thanks Petter.

Petter Rindforth: Thanks Mary, and sorry Paul. Just two sentences about that.

As I see it or another way to see it, in fact, is that Option 1 will be the first step in each case. But if the immunity is successfully claimed, then in Option 2 the case is not closed there. So then it will be Option 2 with the arbitration part.

So affected, they are not so on a coalition course -- Option 1 and Option 2. I first see Option 2 is more of the next step so to speak if the court says no.

Yes, Paul.

Paul Keating: (Unintelligible) use of option numbers.

So I just want to describe what I think the process is that we're talking about. The procedure is first, the respondent loses the UDRP. Then they file a legal action in a court of mutual jurisdiction.

Then the entity IGO has the option to come in and contest the jurisdiction of the court based upon sovereign immunity. That leaves the respondent available to counter that argument however that respondent wishes to do so, and it leaves it to the court to make a determination. Is this defendant an IGO and is it entitled to sovereign immunity?

If the answer to that question is it's whatever it is, it's not entitled to sovereign immunity, then the court proceeds. Right? And we're not discussing any options. The court proceeds, issues its judgment and be done with it.

If the IGO is successful in that the court says, "Yes, you're an IGO and yes you're entitled to sovereign immunity," then we're talking about one of these

options; either Option 1, the UDRP is vitiated and the matter stops because the respondent doesn't have to do anything for it, okay.

Option 2 is then, on that case, the respondent is obligated to pursue the matter in arbitration -- or one of the parties is. And we have to decide who the party is. Who is going to be the claimant in the arbitration process, right.

So that's the procedural posture of what we're talking about. That's what I want to clarify. That's my understanding of the procedural posture, okay. So that we never get to Option 1 or 2 decisions until the judge makes a decision about whether or not sovereign immunity exists.

Okay? I'm just asking for clarity on that point.

Petter Rindforth: Yes, thanks Paul. That's great.

So if I rephrase what I said, Option 1 is a no and the first step is a no. Option 2 gives the complainant that collected to be the domain holder a possibility (unintelligible) to have the case considered by mutual panelists.

And although I saw some of the chat communication and email information about what some people are thinking about that kind of panelists in arbitration courts, my experience is that it's actually a very good way to deal with disputes that, for once, may not want to have everything -- information -- official. And that also depends on the country and the legislation there -- how much is possible to be public in the civil court action.

But, I mean in arbitration we can be sure that the parties are leaving with a dispute between themselves and the panelists, and also the possibility, actually, to choose one panelist that you think have experience and could better understand your specific legal issue and your specific business that could solve the case -- in the neutral way of course.

Paul?

Paul Keating: Sorry, I didn't realize my hand was still up.

Petter Rindforth: So (unintelligible) (unintelligible).

George Kirikos: George Kirikos here.

The other problem with Option #2 is that the IGO and the domain owner have no contractual relationship. So the idea is that, you know, what's going to bind the IGO to even accept arbitration. They could say, you know, "We're complete strangers. What claim do you have against us?"

You know, normally, when the arbitration option exists, IGOs and the other party have some form of contract. And it's specified in that contract that, you know, any event or dispute, you know, we agree to arbitration. That's like very explicit.

IGOs could simply turn around in this case and say, "We have no contractual relationship because, obviously, even under the UDRP, the domain name owner and the IGO have no contractual relationship." It's the contract between the registrar and the domain owner (unintelligible).

So there's, you know, a big possibility that the IGOs could turn around and say, you know, "Who's this guy? You know, he has no relationship to us. There should be no arbitration."

It's kind of saying that the RAA or the Registrant Agreement would have to be changed or the fact of even responding to a UDRP would require that the registrant agrees to that or it would have to be in the UDRP.

You know, what happens if the registrant doesn't even let the UDRP pal decide. You know, he or she goes to court immediately and seeks a court ruling. You know, what happens in that scenario?

So I think, you know, it's not clear that, you know, these options are necessarily capturing all these things.

Petter Rindforth: Thanks George. And good point that we need to follow in the final document to make sure that IGOs also find that binding in Option 2.

What makes that more (unintelligible) to be accepted by IGOs if that - that kind of sets them if that does not get separate -- completed separate dispute resolution procedure -- which was their first option. It seems that is something they can accept.

So I presume that we can - if we formulate one of the topics in that regulations or recommendations, it will be - they have to find a way to make it clear that an IGO that starts or getting involved in a business from the beginning, also accepts that as the final step if the court doesn't take the case.

Paul?

Paul Keating: Thank you. This is Paul Keating for the record.

I - actually, George, great point; I had not thought of a preemptive litigation matter in this context.

But both UDRP litigation context can be resolved contractually if we put into the - I mean I don't want to write a paragraph or five pages of an arbitration proceeding in rules to be appended to the RAA agreement that's going - I think the RAA agreement is already exceeding 20 pages. I don't think it should be any longer.

So what we could deal with is we could say that if the UDRP is presented and the decision is that the domain transfers to complainant -- the IGO. The respondent still remains available - it has its available remedies going to court.

If the IGO asserts immunity, then the IGO has an obligation following that assertion. It's the IGO that must go to then file the arbitration claim -- in the designation arbitration location -- and it must do so within a fairly short timeframe because we have to remember that this domain name is still locked up, okay.

If the IGO does not commence the arbitration preceding the specified time limit, then the UDRP is initiated and the domain name stays with the respondent.

So I think that's a fair balance because it places the obligation on the IGO to initiate the arbitration -- if it so desires. If it doesn't, then it's going to have wasted its UDRP efforts.

And that way, George, I think you can get at least a post-UDRP decision rectified in a contractual manner so that everything will stick.

Now as to the pre-UDRP decision -- a preemptive litigation matter by the respondent -- I don't think that there's any way that we can control that because that preemptive litigation strategy would exist from the moment that the IGO sent me a cease-and-desist letter.

I could -- on the basis of that cease-and-desist letter -- immediately initiate litigation; I don't have to wait for a UDRP. And then in the court text of that litigation -- wherever I happen to file it, wherever the jurisdiction was proper -- that court would have to determine whether or not the IGO was an IGO, and if so, whether they had immunity.

But I don't think we can address that issue at all, George. There's just no legal foundation upon which to build that house.

Petter Rindforth: Thanks Paul. Phil?

Phil Corwin: Yes, Phil for the record; two quick comments.

On the preemptive litigation strategy, I'm not sure -- and I'm hoping that we don't have to address that. I don't see that as part of our charter mandate. To me, that's - we're dealing with - we were asked under our charter to determine whether or not IGOs had access to effective dispute resolution procedures -- curative rights process, whatever. And we basically decided that they do based on their trademark rights whether they're registered or they're common law as evidenced by Article 6 Tier Filing with WIPO.

So we haven't changed that. We're dealing now with what happens if there's a final decision in a UDRP and the registrant -- the domain registrant -- files a judicial appeal to a court of mutual jurisdiction and there's immunity defense raised.

I'm not really sure that it is our responsibility or even within our charter to address the preemptive situation. And I don't know that ICANN has any authority where it's not based on a UDRP final decision to say anything to the national court that gets that preemptive suit, or why that national court would even be interested.

What we're really talking about is what happens with the UDRP -- if this is a successful assertion of immunity. Option 1 -- which we've discussed -- may be a change from current practice would say, well, that underlying UDRP decision against the domain registrant is vitiated as if it never happened, and the domain continues to be in possession of the registrant.

And we've discussed that that might not receive the best reception within certain quarters of ICANN that are going to review our final report.

Option 2 says, hey, in that case, the domain remains frozen and the registrant gets an arbitration appeal. And as we'll discuss when we get to elements, an arbitration appeal based on the national law under which the appeal was brought -- the de novo appeal.

So again, I just don't see that as our right our responsibility to speak to the preemptive.

So far as a mutual jurisdiction clause, we've determined so far not to touch that because to exempt IGOs from that clause would basically be to say that there'd be no court hearing because they hadn't agreed to be in court. It would be granting, in a way, granting their immunity -- which we determined we weren't going to do.

So again, you know, in an Option 2 scenario -- or any other option -- if the IGO asserts immunity, it's going to be up to the judge as to whether they, you know, they waive that immunity. And they can certainly argue to the judge, "Well, here we are judge. We're acting consistent with that mutual jurisdiction. But when we agreed to that, we didn't agree to waive our defenses, and immunity is defense."

I don't know what the judge would do. Professor Swain wasn't sure what a judge would do in the current scenario, but that's where we've left it.

So I'll stop there but I'll circle back and say I don't see that it's under our charter that we have a mandate to look at preemptive litigation. And as a practical matter, I don't know why any judge in any national court would care what ICANN said about that scenario.

Our responsibility is to determine what happens to the underlying UDRP decision and is there a further process within the UDRP context if the judge grants immunity. Thank you.

Petter Rindforth: Thanks Phil. And let's see. That's Mary - well, it's actually - at least inclined to agree with you in respect to ICANN's limited authority on UDRP statues and actions.

And also, I think you're perfectly right, Phil. I mean what we have seen here is that any party afraid to take a case to a national court, and it's up to the court to decide if they can deal with the case or not, and that's the organization we have today for both the URS and the UDRP.

Again, what we're trying to solve is to find a way that if the court says, "No, we can't take the case," is there still a possibility to have the domain holder to have the case to say that finally -- with all full details and discussions and such -- in (unintelligible) procedure.

I see on the agenda that we also have the - Phil, your hand is up. Okay, thanks. I see that we have on our agenda, also, the review of illustrative sampling of data.

Although we have ten minutes left today, I think it's - I thank the Staff (unintelligible) for getting together that document. It was very interesting and very illustrative.

But I think we will leave that for today and have a further look on it and then proceed to Point 4 -- ICANN59 Planning.

So, Mary, do you have anything to say about our agenda there?

Mary Wong: Hi Petter and everyone, this is Mary from Staff.

So I guess that was actually our question for the working group although it does seem from the tenor of the discussion today, that one potentially major issue that we would take to the community in Johannesburg is the continuation of this discussion on Option 1 versus Option 2 with specific focus on the arbitration question -- what that might look like and some of the points that Paul brought up that we've taken note of.

Then the question would be what else should be on the agenda noting that we are also, you know, in a position where we can share with the community, some of the conclusions that we've reached on other points. For example, on 6 Tier, the fact that there might be some changes to the preliminary recommendation.

We don't -- on the Staff side -- know where things stand on the discussion of the separate dispute resolution process whether that be something like the UDRP or much more narrow and focused like a URS type of thing.

But off the top of our head, we would think that if the group wishes to present for discussion some of its initial conclusions on 6 Tier and standing, conduct the continuation of the discussion and arbitration in Option 1 and 2 -- and perhaps a separate DRP -- that would probably make for a rather lively session that would potentially fill up the time we have allocated -- which I believe is 90 minutes.

Petter Rindforth: Thanks Mary. And I think I hope that we can also discuss what we are considering now -- the amended version of Option 2 -- to present there.

Phil?

Phil Corwin: Yes, just to chime in. And in basic agreement with what Mary outlined, but of course, you know, what we do is subject to the will of the working group.

We're not having a meeting next week because Staff will already be traveling to Johannesburg. I'll be leaving one day later next Friday.

But it's just a 90-minute session, so relatively short. I think start by just a brief update to the community members -- who are not members of this working group or who may be in the room -- about where we stand in our deliberations. The fact that we're probably going to dial back the import of Article 6 Tier filing from being a separate basis for standing to rather being evidence of common law; trademark rights responding to many of the comments we received.

Hopefully, the chart prepared by Berry will be reformatted and we can review that -- which is, I think, useful for the likely universal potential cases brought that might be brought by IGOs.

And then after sharing it well in advance with the working group and taking feedback before the meeting, discussion of what the elements of an Option 2 Arbitration might be -- all the important elements as identified by Paul and others.

So that will certainly easily fill 90 minutes. If there are other things that working group members believe we should address in Johannesburg, I think both co-Chairs are open to that. You know, I think that's probably the logical place to go next with our work. Thank you.

Petter Rindforth: Thanks Phil; Petter here.

I think it's, yes, of course, we need to give a summary and introduction. I think we can do that fairly quickly to use our 90 minutes as efficient as possible because it's also a good opportunity to maybe get some input also from other participants in Johannesburg.

So I hope that we can have enough time for the topics that we discussed today and have a possibility to move forward on this in Johannesburg.

And Phil, your hand is up. You want to say something more? Oh, okay, thanks.

And although I see that we have four minutes left, I think that we are fairly clear with the topics of today. As said, we will send out before Johannesburg, a new version of the second solution so that we can study it and have a good base for further discussions in Johannesburg.

And if I don't see any other topics or hands up, I think we can end the meeting for today.

Terri Agnew: Thank you.

Petter Rindforth: Thanks.

Terri Agnew: Once again, the meeting has been adjourned. (Darin), the Operator, if you could stop all recordings. To everyone else, please remember to disconnect all remaining lines and have a lovely rest of your day.

END