ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG Meeting
Thursday, 20 April 2017 at 16:00 UTC

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AC Recording: https://participate.icann.org/p7itd16kw48/

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

Attendees:
David Maher – RySG
George Kirikos – Individual
Jay Chapman – Individual
Paul Tattersfield – Individual
Petter Rindforth – IPC (co-chair)
Poncelet Ileleji – NPOC
Kathy Kleiman – NCUC

Apologies:
Osvaldo Novoa - ISPCP
Phil Corwin – BC (co-chair)
Mason Cole – RySG
Mary Wong - staff

ICANN staff:
Evin Erdogdu
Steve Chan
Dennis Chang
Berry Cobb
Terri Agnew

Coordinator: Your recordings have started.

Terri Agnew: Thank you. Good morning, good afternoon, and good evening and welcome to IGO-INGO Access to Curative Rights Protection Mechanism Working Group call on the 20th of April 2017.

On the call today we have Petter Rindforth, George Kirikos, Paul Tattersfield, and David Maher. We have listed apologies from Phil Corwin, Mason Cole and Osvaldo Novoa. From staff we have Steve Chan, Evin Erdogdu, Dennis Chang, and myself, Terri Agnew.

I would like to remind all participants to please state your name before speaking, not only for transcription purposes, and in addition to please mute your microphones 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. Okay so let's start with the traditional any new statements of interest? I see nothing there. So we go directly to point two to discuss specific additional comments from GNSO members and from other community participants with suggestions. And may I first say a deep thanks to Mary and Steve for fantastic work on the summaries that they sent out. It was very helpful.

So before we go back to some of the IGO comments, I want to proceed with the overview of comments filed by some other organizations, as well as individuals, and then we go back to the IGO comments to see what they have on specific topics. And if - I'm not 100% sure what we have on the other organization comments other than I know that the Internet Commercial Association we didn't have time to go through last time and I don't know if you have their comments available, but otherwise I'll - I can just give a quick summary on that.

So the Internet Commercial Association, ICA, they stated initially that they support all five recommendations made by the working group, particularly because the recommendations recommended necessary adjustments and arrangements of existing UDRP and URS practice. That's also, again, very important. This is my personal view that if not - we're not suggesting any changes of the policies as such but it's the recommendation of the practice that will enable IGOs and INGOs to more readily access these existing

expedited and low cost curative rights mechanism to effectively respond to misuse of their names and acronyms in the DNS.

Let's see where we have this. I think it's there somewhere. The ICA supports - oh yes, such an incremental approach is preferable when compared to the uncertainty and implementation-related difficulty of the alternative of developing a completely separate set of curative rights mechanisms that would only be used by a small number of IGOs.

And they also state that creating additional rights protection seems that apply to only an extremely small subset of Internet users is impractical and would only be justified if the new jurisdiction appeals clause to current DRPs would always affirm the degree of judicial immunity that is generally recognized for IGOs.

They also said that there is no such universal absolute immunity for IGOs in the name-related disputes, referring to our professor's support. And (unintelligible) they are especially in favor of option one for (unintelligible). Yes, we'll parse that later on.

On question two, they refer to Article 6ter, the Paris Convention. This recommendation eliminates the need for IGOs - let's see where I am there, so that - eliminates the need for IGOs to trademark domains and acronyms as a prerequisite for seeking UDRP and URS protection.

And finally we note that Article 6ter protections are recognized not only all by nations that have signed the Paris Convention but also by all members of the World Trade Organization. These two groups comprise the vast majority of national governments.

And on point three, they say that UDRP and URS should take into account their limitation and (unintelligible) in the Article 6ter of the Paris Convention in determining whether a registrant against from an IGO has filed a complaint

relative to the use of the domain and in bad faith and supporting that. This recommendation will align the scope of Article 6ter protections with this use as a basis for IGO standing.

And on point four, clarifying that an IGO may avoid any concession in a matter of jurisdictional immunity by electing to file a UDRP or URS through an SME agent or licensee. This clarification greatly respects the views of some IGOs in regard to the question of immunity. And they also said that although ICA's generally supportive of attempts made by recommendations four to seek an acceptable resolution through the jurisdictional exceptions of IGOs within the context of contemporary international law. And those are rare instances in which a low single registrant seeks judicial appeal and the IGO is subsequently successfully (unintelligible) if immunity to the court jurisdiction, our preference is for option one, as set forth in recommendation four.

What's interesting here, I also think it's - a give to further recommendations if ICANN were to pursue option two and require rotation in situations when an IGO successfully asserted immunity against the registrant appeal, then that option should be amended to bar an IGO from seeking judicial review when it loses the initial DRP.

As Professor Swaine observed, allowing an IGO that prevailed in the UDRP process to avoid its labor and rest on the UDRP result by invoking immunity by allowing it to waive that immunity by initiating new judicial proceeding in the round it has lost for the main registrant will likely be perceived as asymmetrical and problematic. Second, if the working group should decide that option two is preferable, then WIPO should be barred from being the appeals arbitration forum, as well as any other UN-affiliated or nonaffiliated entity that itself is an IGO.

Interesting note there. So that's what I have on their comments. And I see Steve's hand. Yes, please?

Steve Chan: Thanks, Petter. This is Steve Chan from staff, and this is actually a comment from quite some while ago. It's just a procedural comment for you to note that the comments that are available and ready to be loaded into the AC room are all on the left-hand side in the note pod. So the one you just went over, along with UN, that International Atomic Energy Agency, et cetera are all loaded and ready thanks to Terri.

And then if you give us a little heads up, a little forewarning if there are other things that we'd like to look at, we can probably get those into a PDF and available for review as well. Thanks.

Petter Rindforth: Yes. Thanks. That's excellent. I saw that. I just wanted to quickly also go through some of the personal comments that have been sent out because - and I'll go through just a few of the personal comments and then since George is on the line today, I'll give you a couple of minutes to summarize your own comments because they are - it was rather long but if you could summarize it on the topics.

But first I'd just note that we have one comment from Jay Chapman stating that I generally support all five recommendations. I also echo the comments made by ICA on the ICANN ecosystem process concerns section of IT Coalition's comments.

And then we have (John Peppin) stating that I wish to enter my comments and objections to IGOs being allowed any rights to domains over and above existing rights and certainly they should not have any higher rights than granted by a properly registered trademark. If someone has a properly granted trademark, then they should be entitled to enforce that right when anyone seeks abuse where it says trademark rights but that's as far as it should go.

And then we have also comments from (Richard Hill), referring to the proposals made in 2004. And I'll just go through quickly his final part of the

comments of some ideas for a way forward. As I understand the situation, at present, IGOs do not agree to the current mutual jurisdiction clause in the UDRP and there is significant opposition to the proposal to create the UDRP-like process that would force non-IGOs to agree to an arbitration clause. Unless there is a change in those positions, it might be better to explore the option of making it easier for IGOs to file a complaint through an SME.

And then he has attached a follow up. "I will give some ideas on what such a mechanism might be." That file does not contain an actual proposal. It's just in stronger language that might be helpful in triggering further discussions.

And we also have a comment from Mr. (Ronald Edge), who's retired from Indiana University saying that one of the worst goals of the current forge of corporations is to destroy access to the national courts by litigations. Instead the corporations want to remove any liability for themselves from courts and due process and law and enforce arbitration as their only means of recourse. So it's - I'm totally against a movement which heralds legal rights of domains and remove the access to the U process of a legal structure of the court of the nation of residence. (Unintelligible) want to - would be the possibility to do it through a court.

And we also have a comment from (Russ Smith), saying that the commenter of the United Nations says to understand the difference between the UDRP and the court review and in the USA a court review is not an appeal of the UDRP decision. The UDRP matches the case based on the UDRP while the courts review the matter. That's more of a comment on what the United Nations noted on that.

And then I'll give it over to George, if you want to make some summarized comments on your comments, a summarized presentation.

George Kirikos: Thanks, Petter. George Kirikos for the transcript. Yes, I think these were points I made during our working group's work, so there's probably nothing

very new here. I did point out though that for example that WIPO hasn't been posting all the court challenges to their decisions and to National Arbitration Forum's decisions.

And I know that they've been reading all the comments so it's kind of sad that they haven't even added those cases, you know, since I posted them. So it's not clear, you know, if they're kind of like not presenting a true picture of how their decisions are, you know, getting overturned in courts. So that's something that this working group should be aware of, and that's one thing I did want to highlight.

And then I just commented on other people's comments, which I've already kind of done during our calls, so nothing particularly exciting or new but I did want to have at least my comments on the record. Thank you.

Petter Rindforth: Thank you. And then let's proceed to some of the IGO comments and I don't know if we - I think the public comment review tool where the stuff - my section summary is a very good document and perhaps it's more practical to go through that on this point, where we can also see the -- thanks -- where we can also see the differences. And it's both a general note that we had 46 comments and where we noted on the previous meetings that a lot of the IGO representative comments supported comments from WIPO and from OECD but also from the United Nations and the World Bank.

So if we look at the - some of the initial general comments, and as you know, WIPO has stated that our recommendations does not address the problems for which the working group was chartered and they have in many times also pointed out that IGOs have a special position and that needs to be considered in a different way than traditional trademark owners and that the correspondence from IGO legal counsel, as well as the GAC advice is clear, both in the terms of the scope of rights to support standing to file a case in the mutual jurisdiction, the UDRP does not accommodate IGO's specific

needs and circumstances as the separate mechanism model on the UDRP would.

And that's also what we have seen both in our formal and informal further discussions with WIPO representatives that they definitely want to see a separate dispute resolution policy. And if that is created, the specification identification of IGOs by Article 6ter can be accepted. But otherwise they also state that even if we include some recommendations in not making specific changes in the policy, that would open up too much for other organizations with some kind of name protection that is not covered by the UDRP or the URS today.

And as we know, there is also - there is some other working group dealing with - well will soon start on that process to also have another view of the URS and then by on the UDRP. But I think that WIPO will want to avoid to open up any changes of the dispute resolution policies. And again, when we talked to WIPO on a separate dispute resolution policy, I have only heard references to the UDRP but I presume that they mean that also there is a need for a specific URS version for IGOs.

They also have, as we've seen, some organizations, unfortunately none of them are IGOs, but they're organizations and representatives have supported all five recommendations, and we talked just a few minutes ago about ICA. We have the business constituency and also GC and the general support from RSD and from ITC qualified support but they were more - they were supporting but they also wanted to see the comments filed by IGOs. So we'll see what will come up later on in the process. But I take it so far that ITC is generally supporting.

And also GP entered comments around reactions to IGOs being allowed any rights to domains over and above existing rights. GAC affirms its position expressed in the hereto above communiqué we have heard. And DK generally agreed with the findings in the report. (SICP) also generally

agreeing when it comes to possibilities for the court position on mediation and arbitration. It particularly refers to what representatives on GAC would see as the best way, but otherwise (SICP) is generally supporting.

So anyone that would like to make any specific comments on this part? I think we may on the follow-up meetings go through more in detail what some of the IGOs have stated but I would like to go through the recommendations by numbers now so that you can see what kind of questions we still have to deal with.

And when it comes to recommendation one, there's actually none that have stated anything against it. Everybody supported it, although IPC doesn't support policy guidance document. But otherwise it seems that what we have stated on - and suggested on recommendation one is acceptable. And as you know it's - we recommend that no changes to the UDRP and URS be made and a specific new process be created for INGOs. And I think that's what all - everybody that says that they support it, that's what they talk about.

Then when we have recommendation two for IGOs in order to demonstrate standing to file a complaint under UDRP and URS, it should be sufficient (unintelligible) and separately from an IGO holding trademark rights on its name to demonstrate that it has complied with the requisite Article 6ter. And here of course it's rather split up. We can see that those that are against it is WIPO, as we know, GAC. Both wants to see a separate mechanism. USC, YB and IPC that doesn't support policy guidance document.

While I think it's interesting to see that those that support it it's not just organizations for Internet users and lawyers and commercial use, we also have OECD supporting it, as you can see from the summary. And when it comes to recommendation three - Steve, please, I see your hand.

Steve Chan: Thanks, Petter. This is Steve from staff. And I know you're on your own here so it's hard to look at the chat and the attendees list. So I was wondering if

the working group might want to consider - so staff's understanding of this exercise is to try to determine if there is - there are new arguments or new evidence to review.

Towards that purpose, the comments that were highlighted in the left-hand notes pod were ones that were not necessarily just simply in support of perhaps the WIPO or OECD comments. So those are the one that we highlighted for that reason that they may have possibly new arguments or things for the working group to consider.

And so for the review of the public comment review tool, one of the things that we thought might be useful for that review is again to try to - well I guess it's twofold. One of the first things is to try to determine if there are comments that the working group needs to review in that exhaustive manner to try to find out if there are new arguments but also towards what you're doing to make sure that they're classified correctly. And then, as George pointed out, we might not have gotten all the designations of support for the recommendations correctly too. So we look forward to help from the working group members to make sure we get that right.

So I guess two comments I guess is whether or not we want to maybe look at some of these individual comments and then continue the exercise of trying to find if there are new arguments to look at, and then the second is if we're looking at levels of support, if we want to look at the Excel sheet for a little bit to try to see what the macro level might look like first and then go through the individual exercise of looking through this review tool to try to make sure we got those classifications right. Hopefully that all makes sense. Thanks.

Petter Rindforth: Yes thanks. And if - so if we go back to that part of the - there are two recommendations that I think we have enough support that we just don't have to discuss so much further. Of course it's the recommendation one, stating that we'll be dealing with this - it's for IGOs and not INGOs, and then also when it comes to recommendation five that we could see that everybody

except for RSD is in support of the recommendation. But that's the simple part of it.

As we know, we have the recommendation to just enter some recommendations in the current policies. It's a little bit about 50/50 on - depending on the interest of the groups that have replied. And those say that generally if it takes to IGOs, they want to see SI take it -- reading this summarizes their comments -- they want to have a separate dispute resolution policy.

And we discussed briefly last time, and that will probably come in more detail next week or in a couple of weeks, but in order to have a finalized recommendations and comments on that, we need to look again at the draft IGO UDRP, if I can call it so. That was created some years ago. And that, if you remember, we discussed it briefly in one of our initial meetings but we didn't come to - we come to the conclusion that it was not a practical way to pursue it and we also wanted to find a more, as Steve put it, a more simple solution by not creating a completely new dispute resolution procedure.

But as you all know, the IGOs, specifically WIPO, that has also been supported by other IGOs, want to see a separate dispute resolution procedure and - so we need to go through that old draft again and see if - I'll leave it open. I don't say yes or no at this stage, but to see if there was something in it that could be used if we, so to speak, modernize it or if we still think that it's not the best way to proceed to creating a separate policy.

And as we also have seen from those that support recommendation two, referring to the fact that the probably number of IGO dispute would be very limited and then it could be much more practical and better to actually continue with our recommendations to just use the URS and UDRP as it is today but with some further clarifications.

Steve Chan: Petter, this is Steve from staff. I just wanted to note that George has his hand up.

Petter Rindforth: I saw that, yes. Yes, George, please?

George Kirikos: George Kirikos for the transcript. Yes, we've heard the call. We went through the ICA's comment in detail just to see if there was anything new. Were we going to do the same for the UN, the International Atomic Energy, World Bank, UNESCO, Universal Postal Union and the International Finance Corporation? Those were the links in the e-mail that Steve had sent out on Tuesday that everybody had - was supposed to have read for today.

Like, were we going to do a deep dive into them like we did for the ICA or are we just going to rely on the summary? Like, I was under the impression, I think Steve was trying to make the point that we should go through them just to make sure that there weren't any new arguments that we might have missed in the summary. (Unintelligible) until later?

Petter Rindforth: I think we…

George Kirikos: Or did we already go through some of that? I can't remember if I…

Petter Rindforth: We did that the last time but we can - I'll just check it out against the…

George Kirikos: Did we go through all those last time, or maybe I missed?

Petter Rindforth: So I have noticed. But so there - for today it was more to see what kind of specific notes they had on some of the topics. But let me see what we did. We went through…

George Kirikos: George again. I'm just looking at the agenda that we had started with today. Actually it's in the roll call note - sorry, the notes on the top-left pod were just the comments for review. They were going to be the United Nations, the ICA,

and we had already completed the International Atomic Energy Agency, World Bank, UNESCO and so on. So I think most people at the meeting had read all those and we're prepared to go through them just to make sure. Steve Chan wrote in the chat that we hadn't reviewed them individually as a group yet, so we might want to go through them quickly.

Petter Rindforth: Okay yes.

George Kirikos: Most of them had - were pretty short so we could probably go through them really quickly.

Petter Rindforth: Yes. So if we start with United Nations then. And the UN they talk about specifically the mutual jurisdiction clause and they say that, "We suggest that the agreement in the mutual jurisdiction clause refer the dispute to a national court within the state and the proceeding should remain in place." And they focus on the status of IGOs and also say that an IGO cannot waive their immunities from national jurisdictions by agreement in advance as is required by the UDRP and the URS. This does not mean that IGOs are above the law.

The forum selection clause provides an expression of concern by the participating parties to submit to a given jurisdiction and the mutual jurisdiction clause of the UDRP and URS does this exactly. So they say leaving the jurisdictional clause of the UDRP and URS in place would require an IGO to have already agreed to appear from a course of national jurisdiction and therefore to have agreed in advance to waive its immunities. Should IGOs subsequently assert its immunity, the IGO could be perceived as remaining on that agreement.

And then they give an example from the US Supreme Court. Further, they say that arbitration has become a method for dispute resolution. It may not be a proper alternative to national court as a means to appeal the UDRP or URS. Arbitration is a common method for dispute resolution and especially popular between entities that comes from different national jurisdictions since

the awards are valid in any country regardless of where the decision was made.

They also say that the UDRP itself (unintelligible) arbitration multiple times as a recognized dispute resolution method. Their conclusion is that they have noted on multiple occasions a simple means of allowing IGOs to benefit from the UDRP and the URS processes is to eliminate for them the obligation…

Terri Agnew: This is Terri from staff. It looks like Petter's line just dropped. Perhaps we could give him a moment to see if he can get it reconnected. If not, we can have the operator try to dial out to him as well. One moment, please.

George Kirikos: George Kirikos here. While we wait for Petter, I can note perhaps that the GoDaddy argument is a newer one that we haven't seen before but it's kind of distinguishable from other examples because there the registrant actually has legal relationship - sorry, a contractual relationship with GoDaddy and selects them as a registrar, whereas IGOs and registrants have no relationship whatsoever. Also, other registrars don't require arbitration. I'm pretty sure that Tucows open SRS agreement specifies Ontario courts as the venue. Perhaps if anybody else has comments, they might want to speak up while we wait for Petter to rejoin.

Terri Agnew: And Petter's rejoined us.

Petter Rindforth: Yes, I'm here again. Okay. So yes, what I said they're light on the reasons and (unintelligible) by the OECD and the further elaboration offered above by the United Nations, we urge all relevant parties to adopt effective mechanisms that will protect the public and prevent the misleading use of the names that can involve intergovernmental organizations. So I don't see anything specifically new here. It's very - I think that's - as I take it, they want to see a separate dispute resolution procedure. And that was United Nations.

And let's go for the next, which is the International Atomic Energy Agency. And I'll just make it a little bit bigger here so I can see it myself. They say that these interests on the IGOs are best protected by excluding the registration by third party domain mechanism protected under Article 6ter of the Paris Convention. As and IGO, the IAEA is entrusted by its member states with important functions to promote nuclear safety, nuclear security, et cetera.

However, if a curative mechanism to protect IGO rights is considered, the IAEA submits that it is preferable to find one that IGOs may effectively use. Well that's what we are working on. In effect, the real question facing the working group is whether we - it wants IGOs to resolve domain name-related disputes within the framework of an ICANN sponsored mechanism akin to the uniform rapid suspension or the uniform domain name dispute resolution policy mechanism, well, all other IGOs to work outside the framework.

On recommendation two, they said that it is a welcome step forward in this regard, as it formally recognizes the legal reality that IGOs (unintelligible) protection of the names and mechanism from Article 6ter of the Paris Convention. So thanks. It's interesting to see that this is one of those that seems to support our conclusion in reference to Article 6ter. Like many IGOs, IAEA does not register its names or acronyms as trademarks with domestic authorities. So the pursuit of such protection will be superfluous in the light of Article 6ter and therefore an inefficient use of public resources.

And despite this recommendation, IAEA would still not be in a position to use the current order proposed URS and UDRP mechanisms because of their mutual jurisdiction provisions. They said that acceptance of these clauses would likely require the IAEA to waive their immunity under international law. And they also then refer to their status, saying that the IAEA shall enjoy immunity from every form of legal process in its member states. This immunity facilitates the operations of the IAEA by allowing it to operate under the unified legal framework that its member states have created for it.

And they say that the dispute resolution of rapid relief mechanisms proposed on the points two and three of the IGO small group proposal would allow IGOs like IAEA to participate in ICANN curative rights - curative mechanisms because time and resource to a national court will be replaced by arbitration. And they also refer to the WIPO comments and the UN comments that arbitration is the standard mode of dispute settlement used in disputes between IGOs and other parties.

Regarding the possibility raised in the initial report that IGO proceed through an agent or SME in the current URS or UDRP mechanism, they are in general agreement with the comments (unintelligible) that raised concerns that such an assignment might not be effective and may weaken an IGO's right in the name - in its name or acronym. And that is a comment we have seen from other IGOs also.

So they summarize that in light of the above, recommendation four should be revisited to better reflect the realities (unintelligible) and the need for curative rights mechanisms that do not require submission to the jurisdictional national court and the waiver of immunities.

I see George says that the immunity actually seems to be functional according to their website. The agency shall enjoy in the territory of each member such legal capacity in such privilege and immunities that are necessary for the exercise of its functions.

(Unintelligible) personal comments based on that. I also base what George wrote. When an IGO refers to this kind of immunities that is necessary for the exercise of its functions, that's one thing, and I think, if I remember correctly, that we have discussed it in a previous meeting that what we're talking about now on domain name and dispute resolution policies that is not the same as - it's not so closely connected to the exercise of the organization's functions. So I'm not sure that the immunity - claim of immunity reason is the same strength when we talk about domain name disputes.

Let's see, Paul is typing something here. It's coming up in the chat. I'm waiting for that. We may proceed to the next comment. Paul says, "It's not even defending them, it is looking to see if others have said for whatever reason."

The next is a comment from the World Bank, International Bank for Reconstruction and Development. And they say initially that the GNSO should reconsider its initial ideas regarding IGOs. The World Bank supported the comments from the other IGOs, including the OECD and they also have some personal comments.

They say that the World Bank name is often misused in frauds and scams and these scams can be perpetrated or assisted by the misleading registration of domain names, of course. And the resources that the World Bank has to expend to address such fraudulent domain name abuse must be diverted from the development assistance the bank has to offer for the world's sponsor nations.

They say that our initial report refuses to make any accommodations for IGOs and seeks to force the IGOs to choose between protecting their acronyms or protecting their immunities that allow them to operate internationally without constant grief of lawsuits in every member country. Well then quickly, recommendation one, of course they don't have any comments, as they are not an INGO. As to recommendation two, they believe that the GNSO seeks to require too realistic and technical a test before many IGOs would be able to even access the UDRP or URS.

They say that the dispute resolution procedure has generally required a claimant to prove that it has the right to assert protection for a name or acronym and convening short term is to require evidence that a valid trademark or service mark in the name or acronym a claimant seeks to protect. For IGOs, such a requirement is often disqualifying since they don't

register domains as trademarks. Well, yes, we know that. And they're also generally stating how expensive it will be to register the trademarks in all 189 countries.

And they ask the GNSO to allow arbitrators in the UDRP and URS to apply international law, which may include Article 6ter of the Paris Convention. So again, this is not a note to our suggestion of Article 6ter as the identification, it's in fact somewhat supportive of it, one of the easy ways to identify. And I think that it's interesting to see that the World Bank stated that it would be so expensive to register their trademarks in all countries around the world so they state that IGOs needs to have a more easy way for identification and we have found one in Article 6ter.

So then to recommendation three, they say that the GNSO tends to mandate a second technical legalistic limitation. The GNSO proposes, yes, that we should take into account the limitation in the Article 6ter in determining whether a registrant against whom an IGO has filed a complaint registered and used the domain name in bad faith. And then they refer to Article 6ter.

They say that the GNSO failed to decide the limit an IGO ability to argue that a fraudulent website is fraudulent unless the IGO provides the website is of such a nature as to mislead the public as to their existence or a connection between the user and the organization. Such formulistic preliminary determination is not currently required for any commercial claimant before the UDRP or the URS.

I take it that they are not so familiar with the UDRP procedure. I mean everybody has to prove that they have some kind of name protection that is, as today, trademark related. But a complainant would lose a case if it's not some kind of evidence or arguments in supporting that the domain name has been registered and used in bad faith and that the domain holder has no interest or agreements. So.

And they say that Article 6ter was not drafted with ICANN or the UDRP in mind. No, we know that. And an attempt to use it to limit an IGO's claim that its acronym is being used in bad faith is unwarranted. An IGO should have the same ability to argue and prove bad faith as a commercial claimant. Again, my personal notes here, I don't see any problems with that.

As we have noted, some IGOs may well have the possibility to state that even if their trademarks or names are not registered as trademarks that they have created some kind of trademark protection by using it. So Article 6ter is one example of what they can provide as evidence of name protection, but of course it's not - we don't say that IGOs thereby are limited only to Article 6ter, they can of course state that they have trademark protection.

And it may be that when we come out with our final comments on suggestions, we must be more clear with this that we of course accept each - both INGOs and IGOs that can prove the traditional trademark protection that is either at least when we talk about the UDRP. It's either based on registration or use. And I mean trademarks is also - it can be used for services and I'm pretty sure most IGOs can show that has be used for some of their service clauses. So I don't see that as a problem. It's more of those IGOs that may not have compared with trademark rights.

So they - and they also are referring to Professor Swaine, his conclusion that granting mutual jurisdiction via initiation of a complaint or for that matter registration would likely be understood as a waiver or any immunity of the IGO might otherwise assert. The GNSO has no reason or basis to ignore this advice. It's only by departing from Professor Swaine's analysis and conclusions can the GNSO justify its preliminary recommendations on this issue.

And we have discussed also before that we have seen some comments stating that we have read the Professor Swaine's analysis in our way, and I would say that as - taking any kind of court action, any evidence with two

parties and each evidence will be rated in two different ways. But I think that we have clearly referred to what Swaine has concluded.

And as we also noted in most of these issues, he - his conclusion was that there's no clear reply, there's no clear answer to that. It's not just a yes or no to the questions. So if an IGO would see it in one way, they're free to do that, but I don't see that we have misused or misread the Professor Swaine's report. But that's also very good that we have it in the full in our public comments.

So as I said, alternatively, the GNSO said yes that an IGO could sidestep any immunity issue by simply filing through an SME licensee or agent. They say that this suggestion is of course impossible to implement if a third party brings a case, well founded or not, directly against an IGO which will be left to defend itself in the UDRP proceeding at the risk of waiving - having waived its immunity in a later appeal.

And in addition, even where an IGO is considering filing a claim itself, the GNSO completely fails to explain how this assignment trick will work in practice. Again, it's - it might be that have to be more clear on that point, as this is more - I see this as more of a general question on this topic. I've seen other comments from IGOs stating that it's not possible at all to give a case over to some kind of third party or agent.

So overall the World Bank does not accept the GNSO statement that its present recommendations will result in substantial improvement and the clarity regarding IGOs access to curative rights protection mechanisms. And they say that -- let's see if I have a good summary here -- if the GNSO is unable to come up with any level alternative recommendation on this issue - okay, so they refer to the small group recommendations and saying that it should simply be adopted by the ICANN board.

And we have seen some other comments from the non-IGO commenters on the small group, the work compared to our open work. And then finally, recommendation five, the World Bank agrees that the prior GAC advice IGO rely on public funds from their member countries and should be allow to spend those funds on the public missions and they should not have to divert those funds to protect their acronyms against fraud and abuse in ICANN's domain name system.

And I think that's nothing we have to comment on when it comes to recommendation five. It's more of a decision by ICANN board rather how to make it sure that IGOs can use the dispute resolution procedures without spending - having to spend too much money on it.

Okay? Seeing no hands up right now, so we'll take the next one. And these are the UNESCO comments. They initially state that they fully concur with the comments submitted by the OECD and United Nations and they say that it's worth recalling the IGOs are particularly exposed to fraudulent registrations for domain names. And when it comes to the recommendations, they go directly to recommendation 4a, the mutual jurisdiction clause of the UDRP.

And they said that the working group recommends that no change be made to the mutual jurisdiction clause accordingly. Under the mutual jurisdiction IGO wishing to initiate proceedings under the UDRP would be forced to agree in advance to submit to the jurisdiction of a national court. In case of an appeal, UNESCO submits that the mutual jurisdiction clause as it stands is inconsistent with IGOs jurisdictional immunity and they further state that of course IGOs generally enjoy jurisdictional immunity.

They refer to the United Nations privilege and immunities under the Article 5. The United Nations immunity from jurisdiction and execution is also set out in Article 2 of the convention of the privilege and immunity for the United Nations, which provides that. And then they refer to that.

Let's see this concludes. Well then by treaty, the international immunity has therefore granted IGOs full immunity from legal process to ensure their independence from any state and allow them to fulfill their objectives of public interest for which they were established. And they also say that an IGO would enjoy immunity in the case of UDRP appeal under every legal approach to immunity.

Yes, I'll come to you, George, just in a minute. And they also say that national courts have no jurisdiction to determine the extent of the immunities enjoyed by IGOs and IGOs would have immunity from jurisdiction under any of these three legal approaches. They also refer to Professor Swaine and his memorandum stating that the jurisdictional immunity claim from IGO in this context would prevail under an absolute immunity approach but also under a functional immunity approach.

So UNESCO therefore submits that it's contrary to the recommendation of the working group that mutual jurisdiction clause should be amended to take into account the nature of IGOs and their full immunity from the legal process by also respecting a registrars right to have an unfavorable UDRP decision reviewed. Again, they're referring to Professor Swaine. IGOs typically resolve the tension between immunity and the UDRP processes by referring to arbitration.

And they have recommendation 4b that they say that IGOs are not able to file complaints through an SME licensee or agent without waiving their immunity. So recommendation 4c, we'll see if they - yes if IGO should raise a claim of immunity directly before a court, the mutual jurisdiction clause as it stands will leave no chance for this claim to succeed. For these reasons, there is no need to discuss the two options proposed by the working group. UNESCO reiterates that the best solution will be to avoid the termination of the IGOs immunity altogether by automatically referring to the (unintelligible) or arbitration.

And, George, please?

George Kirikos: George Kirikos for the transcript. Yes, I just want to note that the arguments in the document appear to be almost contradictory. In Section 10b they said, you know, with certainty that the IGO would enjoy immunity in the case of UDRP appeal under every legal approach to immunity. So they're kind of saying that they already have immunity for an appeal. Then they say even though we have this immunity we still want - can you give us a mutual jurisdiction clause. That doesn't make sense.

You know, our approach is, you know, let the court decide whether, you know, the nature of the immunity. And we have Professor Swaine's memo, which, you know, disputes the IGO's claims of the nature of their immunity to begin with. But the fact that UNESCO is saying, you know, they automatically get a win but even though we get an automatic win, we want to change the rules to eliminate the possibility, you know, that we might lose seems very strange.

Also there seems to be something that's simply not true on point number 21, where they say that their immunity from legal process prevents them from appearing before a national court at all, even if it is to raise a so-called immunity claim. That's simply not true. You can find many cases where people go to a court and make a limited appearance only, you know, to dispute jurisdiction or to raise immunity concerns. And all the immunity cases in the courts are because, you know, the IGOs showed up to assert its immunity. So it's very odd that they would make that assertion. Thank you.

Petter Rindforth: Thanks, George. And, yes, I agree. The way I read it is that they - let's just say you can take - you're free to take or try to take every case to court and then it's up to the court to decide whether there is immunity or something similar. But what - if I read them correctly, I think that they - what they refer to is that, yes, they are protected but they want to avoid the risk of having the case in a court where the extra costs and time spending there and also,

depending on which nation and which kind of local or regional court that would handle the case, it may even be that the court decides to actually deal with the case.

So as I read them, they say that we have already a clear immunity and to avoid the risk that immunity that will be questioned in a local court even if we are sure that the court will make the right decision and say that I have immunity so we can't deal with the case, it will take time and money. It's better to go directly to the arbitration.

Okay, (unintelligible) on immunity the United Nations convention on jurisdictional immunity, yes, it may be worth further study. I don't remember the working group looking at it previously. Frankly we have it - I don't have it in front of me now but I think that Professor Swaine had discussed it and we looked at it initially. And from what I remember is that he once stated that, yes, it's immunity but every organization's free to refrain from claiming that immunity.

And we took it at that time, if I again remember it correctly, that if you register a domain name or if you start a domain name dispute you are thereby also taking away your jurisdiction immunity in that case. But, Paul, I agree we can, at least in the chat afterward, have a check again on the UN. George?

George Kirikos: George Kirikos for the transcript. I just posted a link to the document that Paul Tattersfield mentioned in the chat room regarding the United Nations convention on jurisdiction immunities, their states and their property, 2004. And he mentioned that Article 14 places restrictions on foreign states seeking to invoke immunity.

I was just browsing through it. It also notes that Article 8 says effective participation in a proceeding before a court, it says a state cannot invoke immunity from a jurisdiction in a proceeding before a court of another state if it has itself instituted the proceeding, which is kind of supportive of the notion

that, you know, they're the ones that started the dispute. So it's, you know, (unintelligible)…

Petter Rindforth: Thanks, George. So that was something I had in my back head as a memory from what we had discussed on this topic some time ago. So that's good. Thanks.

Okay, I presume we have another - we have ten minutes left. So we have time to go through at least one more. And this is the Universal Postal Union. That made it more simple. They, being the members of the small group, are referring to members of that. It's interesting to see that WIPO, OSB, (unintelligible), et cetera.

And they say in that regard we would once more emphasize the fact that the protection afforded to IGO names and relations under international law in various domestic status still from public policy considerations and goes beyond the concept of trademarks. Yes, we know that, especially since such IGO designations are as a matter of principle are not subject to the trademark registration requirements.

However - or moreover, the UPU must express its clear and unambiguous position to certain litigations that arbitration procedures would constitute denial of due process or that arbitration would reflect a playing field that is tilted unfairly in favor of IGOs or playing by poor judgment. I'll tag this is a comment on some of the personal comments that was made.

They say that indeed the unsubstantiated character of these allegations can be easily demonstrated by the fact that even the UPU itself was a subject of a negative ruling rising from the (unintelligible) e-mail cases. And it's evident from the relevant international law provisions that have been given to IGOs that each organization shall make provision for appropriate modes of settlement such as arbitration in the light of their immunity from every form of domestic legal process.

Such allegations also seems to ignore the fact that even in a hypothetical scenario where an IGO expressly decides to waive its immunity, such a waiver shall never extend to any national execution. And they say that they strongly urge ICANN to carefully consider an appropriate deal with a longstanding legitimate concerns expressed by various IGOs over the last years and to adopt without further delay a fair and effective mechanism that shall recognize the unique status of IGOs in the DNS.

If I read this very - in my way, I take it as it is support of what we are doing. We actually carefully consider the IGOs and have recommended a fair and effective mechanism that shall recognize the unique status of IGOs with our proposals. I see no other specific - I take it as these are the only comments that they have filed. I see no other suggestions or in fact referring to any other suggestions. It's just to state the importance of coming up with a clear solution for IGOs.

Okay. Shall we take quickly one more? And here we have IFC - no. Comments on the - yes. The International Finance Corporation. And again they say that as the initial report suggests, IFC relies on its Article 6ter protections and maintains national trademark registrations and related domain names both for its organization name and acronyms and for key initiatives undertakes to achieve important developmental outcomes.

And these registrations and activities are essential at achieving our developmental mandate. So they have - they refer to Article 6ter but I should say as I take it they also have trademark - traditional trademark protection. I would say in particular we emphasize our continuing concern regarding recommendation four. They refer to Professor Swaine. They say that Professor Swaine's analysis does not fully reflect and is not fully consistent with their immunity analysis. And, accordingly, we are not bound by its analysis or conclusions.

In particular we note that IFC enjoys other privilege and immunities, including (unintelligible) immunities and considers none of these waived by any submission to the judicial process or otherwise. These immunities are accorded to IFC by implementing legislation such as the International Organizations Immunities Act, the IFC Act, similar legislation in the jurisdiction, as well our articles of agreement and principles on international law.

And my note on that is that I take it that they say that they think that they have complete immunity. And yes, please, that's their conclusion and they are free to take it to a court and have it considered there. What Professor Swain is saying that it's not so clear on this topic. So I presume that many of the IGOs themselves of course think that they have clear immunity.

Second, they note that Professor Swaine's counsel that granting mutual jurisdiction will likely be understood as a waiver of any immunity the IGO might otherwise assert. The working group's assertion that its proposed outcome respects and preserves an IGO with mutual jurisdiction immunity, et cetera, is therefore incorrect on the working group's own terms. The working group is proposing rather that the IGO would participate in a curative mechanism that per legal expert is engaged requires an expansive waiver of IGO privilege and immunities of unclear scope and impact.

Finally, we note that whatever the substantive concerns, by declining to consider the recommendations supported by the small IGO group, the GAC or perhaps the ICANN board, the working group is recommending an approach that impedes rapid or efficient resolution of domain name disputes by registrants.

And to the contrary, it is effectively proposing that where IGOs are complainants they pursue actions outside ICANN mechanisms to consider a burden to both IGOs and registrants in order to preserve legal rights where established and recognized under international and national laws, claiming

that we are overriding Professor Swaine's analysis and saying that we are also incentivizing on IGOs complainants to pursue frivolous claims against IGOs within the UDRP URS mechanisms with a few overriding national courts asserting arguments inconsistent with the principle of preservation of rights.

To conclude, IFC is committed to a fair and efficient curative mechanism. We believe the working group has arrived at recommendations that do not achieve its stated claims and impractical effect infringe the established roles of IGOs in the international system. Accordingly, we join the World Bank in requesting the working group to reconsider the advice. We're happy to offer any help or cooperation you might reasonably request in this regard.

Okay. So time check. Yes, thanks, Steve. We are one minute over the time and this is so far as we can go today. So let's - I think we can use more or less the same agenda for the next week going through the other IGO comments and then also see what - on the specific issues that we need to deal with. And thanks, Terri. I will take - our next working group meeting will take place on Thursday next week for 90 minutes. So thanks for today.

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

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