# Transcription ICANN Helsinki

## GNSO-IGO INGO Access to Curative Rights Mechanisms Policy Development Process WG

## Tuesday, 28 June 2016

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Petter Rindforth: I'd like - good idea that we'll start with (Greg) welcome and roundup presentation. So having said that welcome to the IGO NGO Access to the Rights Protection Mechanism Working Group. I'm Petter Rindforth, co-chair with Phil Corwin representing IPC and next?

Man: Since we're going around the room (unintelligible).

Bruce Tonkin: Bruce Tonkin observing from the board.

(Garrick Campbell): (Garrick Campbell). I am from Jamaica.

Mary Wong: Mary Wong, ICANN staff.

Marika Konings: Marika Konings, ICANN staff.

Mason Cole: Mason Cole with Donuts.

David Satola: David Satola, The World Bank.

(Jonathan Batero): (Jonathan Batero) from the Organization for Economic Cooperation and Development.

(Ty Grain): (Ty Grain), WIPO.

Brian Beckham: Brian Beckham also World Intellectual Property Organization.

Kathy Kleinman: Kathy Kleinman. Non-Commercial.

Petter Rindforth: there are three of you sitting around as well we have three spaces here so you're welcome. And also (Mike) just state your name and position and interest. Thanks.

(William Shepard): (William Shepard) just joined from the seats in the back.

Farzaneh Badii: I'm Farzaneh Badii, NCUC member.

(Ben Franco): And (Ben Franco), NPOC.

(Gongish): (Gongish). I am a member of the NCUC from the Center for Communication Governance.

Nigel Hickson: Nigel Hickson, ICANN staff.

(Dalov Chang): (Dalov Chang), ICANN staff.

Petter Rindforth: Okay then welcome everybody. Are you connected?

Man: I was just entering the chat room.

Petter Rindforth: Yes, okay. Yes.

Woman: (Unintelligible).

Petter Rindforth: Mary?

Mary Wong: Thank you. Hello everybody. This is Mary from staff again. I just want to acknowledge that we also have remote participants including several members of this working group. And for the benefit of those on the low participation it would be helpful if you're on the phone bridge to also be on the Adobe Connect if you wish to speak because if you're only in Adobe Connect you will not be able to be heard. So if you are on the phone bridge please get into Adobe Connect if you can. And if you wish to speak please wave your hand and we will alert the chairs or if you wish you could also type your question and comments into Adobe Connect for us to read out. Thank you.

Petter Rindforth: Thanks. And I see George Kirikos is one of the members that's on the Adobe Connect so welcome.

Man: I'm (unintelligible).

Petter Rindforth: Okay I'll start. Well on the agenda really part of a brief update on the Working Group and the issue around the topic. And I can just start in saying that we – this Working group was actually - we had our first meeting in August 11, 2014. But the topic as such is definitely not new. It has been discussed previously during the years. And there are - there is one report from 2007 for ICANN issues report on dispute handling for idea names and abbreviations. And I was glad that (Malcolm) is here because WIPO has been active during the years facing the need for separate dispute resolution policy. And as you note the full name of working group is leading also with IGOs and INGOs. But

it's a rather early stage. We made the initial conclusion that INGOs actually could handle and have handled in efficient way the current dispute dissolution policies. So we decided to put that parked on the side so to speak and proceed with handing the IDO topics. And we discussed initially the possibility to not creating – well I would say there are three possible solutions for this if there is a necessity to do anything at all could be just the clarification on the IDOs protection and using the policies they have today or to amend the UDRP and the URS or to create new separate dispute resolution policy to cover these topics.

And although we have not made any 100% final conclusions but on a very early stage we come to the conclusion it's not the best way to make amendments to the current UDRP procedure. And as you know there is also another working group now dealing with the review all the rights protection mechanisms and all gTLDs. And they will deal with the UDRP on a phase two starting in February 2018.

So that gives us two possible solution set as we said before. We reached out to Professor (Swaine) to get expert opinions. And that was either to make some clarifications or recommendations when it comes to IGOs that they could actually use the present dispute resolution policies or to create something that well similar to the UDRP but the second phase maybe another neutral panelist, three-member panelist or so will deal with a second phase of dispute policy. Yes please?

Philip Corwin: I just want to jump in here. I'm Philip Corwin. I'm the co-chair of this Working Group and I'm a member of the Business Constituency in the Commercial Stakeholder Group and one of their – one of the BCs to GNSO councilors.

I just want to add some further background to what Petter had said and I'll put this in a more of a context. Then we get into discussing the final memo received from Professor Swain at George Washington University in Washington DC. The – this working group is one piece of a broader attention

being given by the ICANN organization to concerns of IGOs and backed up by – backed up in those concerns by the Governmental Advisory Committee regarding protections for names and acronyms of international intergovernmental organizations. So I just to help put this in context the – yes, the GAC advice on IGO acronyms was for second-level protection.

That is level protection not at the registry level but at the registrant domain level in the form of a permanent fit those notifications to both the potential registrant of a matching domain and the relevant IGO. This would be pretty much similar to what goes on now in new TLDs at the trademark clearinghouse, allow the IGO a timely opportunity to effectively prevent potential misuse and infusion, allow for a final and binding determination by an independent third party to resolve any disagreements in the IGO and a registrant which relates most directly to this working group be it no cost or of a nominal cost only to the IGO.

I will state on that one that this working group after the GAC adopted that position there communicated I believe at the Buenos Aries meeting last year we sent the letter to the GAC asking if they had any subsidy mechanism in mind because this working group has no authority to commit ICANN funds to subsidize dispute resolution actions brought by IGOs and also what they consider to be a nominal costs and whether they consider the current cost of bringing a UDRP or URS to be nominal.

And frankly we got back an answer which was not entirely clear complete. So we still don't quite know the answer to that question. And in terms of the - let me just make sure I'm - the PDP recommendations of the GNSO Working Group that wrapped up in November 2013 was that at the second level there should be a 90 days trademark clearinghouse claims notice for acronyms of IGOs that were on the GAC list as of March 2013. And they issued a report to on the other issues.

Now what's pending is and what the board has done is a temporary matter. So I want to make sure that we just have a small piece of this total picture. The board adopted a second level reservation of IGO acronyms on the March 2013 GAC list that was done by the board. And the board also so as far as permanent protections the board provided none for acronyms but provided top and second level reservation only for the names of IGOs, the full names that were on the GAC list.

And that's - I'm not sure if that's been completed because there was a letter sent that just came to our attention last week on 17th of June to the chairman of the GAC, Thomas Schneider from Akram Atallah, Head of the Global Domains Division say that in order to implement these permanent protections the GDD would require additional information.

And what they required was the full name of each IGO in up to two languages to be chosen by the IGO. So that's kind of where things stand and I'm – I hope that somewhat clarifies the distinction between some of the broader issues that have been articulated by IGOs and the GAC is back them up. And the narrower issuer, narrower issues that we were looking at in this working group which is basically two questions. One does an IGO have standing to bring an action in an existing curatives rights processes, the UDRP and the URS.

And our - while we haven't come to permanent conclusions and recommendations we've pretty much reached the conclusion that IGOs would have standing either through trademarking their names or acronyms or by asserting the protections available to them under Article 6 tier of the Paris prevention which provides protections and national trademark law through a notification to WIPO.

And the issue that's held up and basically put this group on hold for a year is whether or not using those existing curative rights processes which permit an appeal from a decision to accord a mutual jurisdiction would violate any

sovereign immunity rights of IGO. And not being international law experts we had no idea what the sovereign immunity rights of IGOs were.

And it took some considerable amount of time to both one, secure some very modest funding from ICANN to hire a legal expert and two to locate a legal expert who was willing to undertake the task for the amount of funding available and had the requisite expertise. And that has led to the final memo received from Professor Edward Swain of George Washington University Law School about two weeks ago.

And Mary I looked in the schedule session information that links to the Adobe chat room there is not a link to the Swain memo. I don't know if in the chat room staff can provide a link to that link for individuals. I haven't seen it yet and I would like to obtain a copy and review it. So I just wanted to add that to put everything in context.

So where we are now is we've received the Swain memo which is 32 pages in length. So this is the answer to the four questions posed by the working group are rather complex. And the answers are not black and white as in many things in the law the answers are it depends. It depends on the specific disputes and it depends frankly different courts and different national jurisdictions handle sovereign immunity issues in different ways. So there's no standard answer that covers every potential nation in the world.

So I'll stop there and hand things back to Petter to lead us to the next stage of this discussion. Thank you.

Petter Rindforth: Thanks. Just a quick question. When we talk about the history and this topic that leads us to this place Brian do you want to say something?

Brian Beckham: I'm sorry could you repeat that?

Petter Rindforth: Well when we're talking about the history and the topic that leads us to this working group before we went into the expert do you have any initial comments?

Brian Beckham: Yes thanks Petter. This is Brian Beckham for the record. I apologize, I was just reading that chat transcript. But I think in the simplest terms the question of the need for a curative rights protection mechanism for IGOS arises from two aspects in particular of the UDRP, the Uniform Domain Name Dispute Resolution Policy. And those are that the complaining party have trademark or service mark rights that they can evoke to bring a UDRP claim. And then if a UDRP claim is successful if there's an abusive registration found by an external panelist then under the UDRP there's the possibility - and I'm using air quotes -- of an appeal to a court of what's called mutual jurisdiction.

So this is a jurisdiction that the registrant has signed up to when he registered the domain name and the complainant has agreed to in submitting a claim under the UDRP. So that requires submission to a court in some jurisdiction around the world where either the registrar or the registrant is located. And because of complex questions about privileges and immunities for intergovernmental organizations that was seen as problematic for IGOs to submit to court jurisdiction which would waive those privileges and immunities.

And I – so I just want to highlight one thing. I've just looked at the revised draft of the Swain report. And I think two things that are stated very clearly in the outset might be helpful for the work of this group going forward. The first is there's a statement on the top of the second page which says IGO possessing rights in a name under the Paris convention. And I know there's been a lot of discussion in this working group about what's the scope and nature of rights under the Paris convention. But I think as a starting point or an assumption the professor has squared that off and stated quite clearly that IGOs would have rights under the Paris convention sufficient for a curative rights protection mechanism like the UDRP.

And secondly on the bottom of Page 3 it says IGOs might also volunteer a non-judicial substitute such as arbitration. And that's in lieu of the submission to a court jurisdiction.

Philip Corwin: Yes I would just (unintelligible). I think the first one you cited kind of backs up what I said a moment ago which is that in regard to the standing our preliminary conclusion not yet final is that an IGO which has either trademarked its name or acronym or has a – has not trademarked but has asserted rights under the Paris convention would have standing. So the existing procedures would work.

The remaining question is does it offend the scope of sovereign immunity in the rare instance where an IGO would bring a UDRP or a URS win and the registrant would then say I don't agree with the result and I'm going to an available court of mutual jurisdiction for a so-called "appeal" which is a de novo action.

Man: Yes thanks Phil and thanks for that explanation of the jurisdiction issue. It occurs to me like I guess there's two quite separate cases there. There's the case where the NGO actually has a domain name and someone is raising a complaint given that they had their own trademark presumably. And that would be challenging the NGO's right to have that name and hence, you know, having that name canceled. That's one scenario. It may not be a scenario that's thought about.

The scenario I think you're typically talking about is the scenario where there's a registrant of a domain name and the NGO wants to undertake a dispute mechanism to overturn that domain name and then there's a court as a fallback. But it occurs to me that if that second case goes to court essentially the registrar and registrant that are subject to the jurisdiction of the court because it's an action against them. It's not an action against the NGO.

In other words if the NGO has the name and so the question is, you know, the courts giving in order for that name to be removed from that registrant or not. It's not actually giving any direction to the NGO. So I just think it's probably worth understanding those two cases.

Brian Beckham: Maybe I can certainly clarify. This is Brian again. So what would happen is if a registrant had registered a name that was found to be abusive of an IGO's rights and the registrant felt that that wasn't supported by law in some jurisdictions they would actually go to a court. So they would actually be bringing the IGO into court if you will to have a declaratory action in their favor that they weren't infringing. So it wouldn't – so in other words it's not the registrar or the registrant that's being brought into court but they're bringing – they would be bringing the successful UDRP complainant into court.

Man: Yes but understanding that the action, the actual action of either registering or canceling the domain name that's what would be the subject of the court finding surely. So it's a direction to the registrar most likely to say either cancel this name or keep this name.

Brian Beckham: Right.

Petter Rindforth: All right I had a possibility to read the expert report (unintelligible) any specific comments on his conclusions there?

Philip Corwin: Let me jump in here and, you know, we don't have a very structured agenda for this meeting other than since we just received the Swain memo very shortly prior to leaving home to travel to this meeting. But, you know, Brian focused on two key things. Let me get to another one that's refers to something I brought up a few minutes ago. And that begins at let's see yes, at the bottom of Page 8 in the Swain memo. Yes Mary?

Mary Wong: Apologies, so just a note that George Kirikos had raised his hand so he wishes to speak.

Philip Corwin: Okay I'll step back and let George speak and then I'll get back to what I was saying. Go ahead George.

George Kirikos: Hi George Kirikos for the transcript. Generally - oh, I can hear myself. There's an echo on this (unintelligible).

Petter Rindforth: We can hear you.

George Kirikos: I can hear myself twice (unintelligible). Anyhow (unintelligible) memo and he made most of the cases (unintelligible) on the earlier draft. Over on Page 9 which was a comment I had previously regarding Page 8 he seems to have missed that point which was the part about the scenario whether it isolates the question of whether an IGO has legitimate expectation that would it be entitled to immunity as the UDRP. He missed a point that I made in the earlier draft that that scenario doesn't actually isolate the question because there's a asymmetry whether an IGO is defending an action or whether it's bringing an action in court. And so he kind of missed the mark on that point.

But in general I agree with the report in that from a legal point of view I believe the status quo has supported that nothing requires us to change the UDRP. If we imagine a thought experiment of the UDRP not existing at all an IGO would necessarily have to waive immunity in order to bring an action against a registrant for a domain name in court. And that was backed up by the State Department's memo which the author of this report referenced in the footnotes and in the document itself. So that's my comments for now. Thank you.

Petter Rindforth: Yes, thanks. (Bruce) I saw you added some comments in the chat room. If it's more or less what you said before? Oh yes. Okay thanks.

Philip Corwin: Okay. Why don't we just speak a second then we can get into those slides you have on immunity. But what I wanted to just briefly refer to here is that at

the bottom of Page 8 of the memo -- and again apologies for those of you who haven't yet seen the memo but we'll – it is available now in final form -- he starts I said the core questions of whether an IGO is "entitled to immunity." And then he goes on at the top of Page 9 and this illustrates the lack of black and white answers to the questions we've answered. And it says, "As explained the answer depends. IGOs generally enjoy immunity under international law but different jurisdictions apply the law differently." That is to say that -- I'm speaking for myself here not quoting -- that a court in one nation might say that an IGO has broader or narrower scope of immunity than a court of another nation.

And then he goes on to say but different jurisdictions apply the law differently. And even within the same jurisdiction different IGOs may be treated differently. And then he goes on in the full memo to document that that is indeed the situation in the United States where different courts of appeal have comment the issue differently. And the Supreme Court has never resolved the differences between them.

And then says Part B of the memo introduces the complication of any such immunity may be waived every – even nations can waive sovereign immunity if they wish to -- that's my comment there, not his language -- through the mutual jurisdiction prevision. So I'll stop there quoting but just kind of the things we've been struggling with in this working group on one hand but for the UDRP and the URS IGOs would have no recourse in regard to a domain name that they've viewed as infringing other than to bring a judicial action in some national court. And it will be up to them whether they wish to waive their immunity if they thought they were entitled immunity to get that relief.

So the UDRP and the URS provide a much less expensive faster and non-judicial alternative to bringing that court action. But they are bound by the rules of the UDRP and URS to if they win the registrant has the option. That may be exercised in only rare cases because it's kind of a slam-dunk case. It's likely that a registrant would spend the time and money for the appeal if it

looks like a losing argument but still that does exist. And so it's whether by essentially waive it - being compelled to waive their unity to bring UDRP they've – we've offended their immunity in some way.

And then the other thing we've been struggling with is that if this was simply a situation between ICANN and an IGO it be very simple to solve. It could be solved in the same way that the professor discusses the IGOs solve this issue all over the world in commercial contracts which rather than if there are disputes say it's generally a clause that says rather than going to court we'll go to a non-judicial arbitration form and agree to a binding decision there.

But we do have in this case a third-party the domain registrant who when they register they agree to be bound by the UDRP and now in a new TLD by the URS as well. But in their involuntary accession to that possibility of bringing brought into the dispute resolution policies they were told that they had a right to go to court if they were unhappy with the result. So that's kind of this four corners of the dilemma we've been struggling with.

And now if you had anything to say Petter why don't you go ahead and Mary has some slides on the immunity question that she's going to display for us after that.

Petter Rindforth: Thanks. Just was a comment. When we're talking about both the US and the UDRP and there are some interesting differences between these two dispute resolution policies especially when it comes to the topic we are discussing. Within the URS I mean there are three steps. It's still in the process and it's still panelist that decides on the topic as compared to the UDRP. And I would just throw out the question both to Brian if you have any initial reply to that but also to others here in the room if you see the same need to change or add when it comes to the URS compared to the UDRP in this aspect?

Brian Beckham: Thanks Petter. To be perfectly honest I don't think it's a topic that's really received much attention. I do know that in several times over the years in

GAC advice there's been a request for a more rapid resolution mechanisms so something to address similar to the abuse point of contact in the ICANN registry agreement where there's eminent risk of harm for an infringing registration could be addressed in a rapid time frame along the lines of 24 to 48 hours. So I think that maybe have – maybe has overtaken discussion on whether the same modifications to the URS would be desirable.

Petter Rindforth: I'm sorry I'm not suggesting that the same modifications would be decided before the UDRP because I say I think we're still on the same line that we should try to not change the UDRP at least not just for this specific topic. I mean we're as I said initially there is another working group that sometime in the future we'll also look at the UDRP and see if there is any changes that are needed. But in – still we need – we talk about this aspect what I meat was is if it's enough - if the URS is enough as it is today is although after the three steps of panelists you can still take the case to a court I presume that then we will still have the same formulation as with the UDRP. But I understand that when it comes to the UDRP it's just one step and then there's the position that maybe they can see or the case was - maybe take it to the second step to the court directly.

Brian Beckham: All right so we have the slides now. Let me - why don't we go – yes? Sir, go ahead sir. State your name please.

David Satola: Thank you, David Satola from the World Bank. I propose a last question in exchange I agree with Phil's conceptual – contextualization of the discussion we're having today. I would also add that when the IGOs were first confronted with the issue of the new gTLD registrations what we asked for were preventative rights. And in the absence of those rights being granted it was suggested that existing curative rights would be sufficient and applicable. And I think that the discussion that we're having now including the analysis in Professor Swain's memo results from that sequence of events.

So I think the question I think that you asked Petter was did the IGOs ask for this? No, we asked for preventative rights. And we're still – that discussion is still ongoing in other contexts as Phil has rightly said. So, you know, the question of how to address curative rights is an interesting one. And it's one that we're interested in pursuing if our original requests for preventative treatment as some other international organizations have received is not granted. Thank you.

Petter Rindforth: Thanks.

Brian Beckham: Thank you David. And again I – at the beginning of this discussion I tried to lay out that this is – there's more to this IGO issue than this working group is looking at it. And I did discuss what the board has done and what the board is still continuing and those talks between the board and the GAC and the small IGO group and going on for a very long time without a final conclusion and, you know, I don't know if they'll finish first or this working group will finish first but we're going to move forward with all deliberate speed.

And I want to say now I'm – I don't – (unintelligible) to apologize but just explain that the reason that this session may seem a bit disorganized is that the final Swain memo was received so close to this meeting that there was simply no opportunity for the Working Group to go through the final memo and identify the key conclusions and maybe the key disagreements that we had with it prior to getting there to Helsinki. But we will be doing that and then moving on toward trying to formulate final conclusions and recommendations.

And if this meeting or if anyone not here reading this transcript believe that Professor Swain has gotten anything wrong on the legal considerations or missed any important considerations we want to hear from those folks as well. We want to hear all points of view before we get to the final stages. Let me go through these slides quickly because I think they're in some extent redundant but maybe there's something here that I – that hasn't been said yet.

So the nature of IGO immunity from national jurisdiction there are different approaches and different courts to IGO immunity and which is derivative of the immunity accorded to nation states sovereign immunity IGOs being organizations created generally by treaties between nation states or created within the United Nations system which enjoys it's own immunity under international law.

So the immunity's contextual. IGOs generally enjoy immunity under national international law but different jurisdictions apply it differently. Their - the decisions are often based on an organization's specific treaties to which not all states are a party. And as we found out in worrying about Article 6T - why don't you just let me finish this statement? I'll let you talk in a sec? That while Article 6T well notification of WIPO generally provides protection international trademark regimes to all signatories of the Paris convention and all nations that are members of the World Trade Organization each of those nations reserves the right to not recognizing immunity asserted by a given IGO if they wish to. So there's – there can be a nation state which has its own immunity can refuse to recognize the assertive community of a particular IGO and go ahead with your comment or question please.

(John Passaro): This is (John Passaro) from the OECD. Just so we don't lose the forest through the trees here I just wanted to zoom out a little bit and point you to Professor Swain's text on Page 15 just above Section B where he says that, "little may ride on the distinction between absolute and functional immunity and ultimately little may depend on the potential scope of immunity at all." So while he did in the memo discuss that there are different approaches to IGO immunities he said that in most context it wouldn't actually impact the final immunity analysis at all. Thanks.

Brian Beckham: Well that may be true. Different courts may arrive at the same destination through different analytical tests. We were just trying to give folks the context here. The - so as noted states interpret the obligations under treaties in

various ways and every jurisdiction, that is every national court system results in immunity questions under its own law which is informed by but not dictated by international law.

Then it goes through the as we've discussed that the UDRP and URS provide either party if they're happy with the panelist decision to if they are available law in a mutual jurisdiction as defined find under the UDRP and the URS they can bring a de novo court action to question the action of the panelists. And can we get the next slide please? I don't have any way to scroll here?

Okay so there are different approaches to immunity. There's absolute immunity which is comprehensive immunity from judicial process irrespective of the nature of the activity in question in the absence of an express waiver by the IGO. There's restrictive immunity which is provides exception from absolute immunity for litigation concerning commercial activities like those undertaken by private parties.

And then we get into the question of whether the disputes that would be subject we'd be considering here are they commercial disputes because trademark is commercial law? Are they commercial disputes because they involve the assertion of a commercial law type right or are they disputes involving protection of an IGOs basic identity which would not be considered a commercial dispute? And you can answer that question whichever way you think is preferable.

And most states don't apply the restrictive immunity approach except the United States which is a rather significant jurisdiction particularly given the number of registrars and registries, significant ones located there and which mutual jurisdictions may apply.

Then you have functional immunity which is you're looking at the function of the IGO in question and trying to do decide whether the function is a critical one or that this allegedly infringing domain interferes with the core mission of

the IGO whether it's something not as - not essential to the IGO essential identity and mission. So next slide please?

And as noted outside the domain name area IGOs generally if they wish to waive immunity do so through their governing instrument which would give them the power to waive if they wish to and by way of an agreement or pleading. And generally if an IGO has a problem and there's no other avenue available other than a court proceeding it's up to them whether to live with the problem or to bring a court action and in a sense by doing so waive their immunity.

So and rather than search for it there is a passage later on in the Swain memo which essentially I'm assuming it survived in the final version kind of summarized all of this saying that for the purposes of this working group there's no clear black and while legal principle that says that agreeing to the mutual jurisdiction provision is a clear violation. And it becomes the policy consideration, or policy question for this working group where we have to balance all the separate considerations. And that's what we're going to be doing going forward as we review in detail the Swain memo and then try to reach final recommendations solutions on the questions posed under our charter.

Petter Rindforth: Just Petter here. Just add from the (unintelligible) question from George Kirikos while we have the university World Bank folks here do they intend to respond to written questions from months ago, your written questions sent by the PDP Working Group asking for formal feedback, data, et cetera? My first question to you is have you seen this documentation? Yes please?

(John Passaro): (John Passaro) again from the OECD. This seems to be a favorite question that comes up at these meetings. The IGOs answered a number of questions for a number of different parties in a number of contents. I believe that he's referring to the last set of questions that were received some time ago. We found that those same questions repeated much of the content that was

asked in earlier questions. And also the weight of the questions we're afraid just made it totally clear that, you know, everyone was looking for a very specific type of answer from us. So we decided it just wasn't fruitful to respond. And in any event now you have most of the answers to your questions in this Swain memo which it also sounds like people are reading much differently than the IGOs have read it. Thanks.

Philip Corwin: Okay. And I have found the passage I was thinking of from the prior memo. It's at the top of Page 26 and in the section UDRP and its alternatives. And I'll just read it. It's a very short passage.

The question of IGO immunity may be resolved at least in part outside ICANN. To the extent that national courts were inclined to find that the matter lies - that is the matter, the domain dispute lies outside a particular IGO's immunity or that any immunity was waived by the IGO's governing instrument. But in other cases though a national court might find that the mutual consent affects the waiver of – and that is a waiver of the immunity that would otherwise exist even though it otherwise be inclined to recognize the IGO's immunity from judicial process. And so that's the case where the IGO has immunity and basically has been compelled by following the UDRP to waive it when they would rather not. And he says with respect to this latter possibility ICANN confronts a policy question infused with legal principles. So that's what we're going to be dealing with in the final stages of this working group was how do we answer that policy question given the fact that the answer on sovereign immunity would be viewed differently within different jurisdictions.

Brian Beckham: Thanks Phil, Brian Beckham again for the record. I think just to sort of zoom out a little bit the question of jurisdiction and immunity is a complex one. I think that's underscored very clearly in the Swain report. But I think something that may be important to bear in mind and Professor Swain ends with the suggestion that there's a policy decision to be made by ICANN. And I just want to remind folks that yesterday I sat in a session where there was a

discussion of the trademark clearinghouse. And there were different ideas about how to improve it for the future.

And an individual from the registries or Registrar Stakeholder Group -- I don't remember -- suggested that whatever was looked at in terms of making improvements or changes to the clearinghouse or suggested would be that the parties that were impacted and that in that case the registries or the registrars were asked how this would look to them and what types of changes would either be problematic for them and would make things more streamlined for them.

And I think here it's useful to bear in mind that the questions like my colleague (John) from OECD mentioned IGOs via the GAC had been asked some very detailed questions on a number of occasions and IGOs have provided answers.

So when there's a policy question being put to the ICANN community I think it's important that people who are making the decisions bear in mind the feedback from the very impacted parties. And, you know, the truth is if there's a reluctance for members of the working group or for the - from the community to provide a curative rights protection mechanism for IGOs that addressing these mutual jurisdiction and addressing these scope of rights protection issues is desirable. And of course there's a way to get there. But let's be clear about one thing, it ignores the feedback from the impacted parties.

Petter Rindforth: Maybe just rephrase your conclusion there. How did you come up with that story?

Brian Beckham: Yes the point is this. IGOs - just to step back a little bit further. So IGOs intergovernmental organizations are created by governments via treaties. These are organizations that are conducing activities on behalf of governments on behalf of global citizens that governments have deemed to

be in the public interest. These are funded by governments. These are funded by citizens. IGOs have time and again expressed concerns about certain aspects of their rights protection mechanism in the ICANN new gTLD context. And what I'm suggesting is that when there are policy questions for ICANN for the community to decide the feedback from the IGOs from the impacted parties is taken into account.

Philip Corwin: Let me respond which is that we - we're very happy to see you here in the OECD and the World Bank and we take this whole question very seriously. I think – I'm thinking for myself now but I think generally there's some reluctance to given the history of creating the UDRP and creating the URS which took several years it is if we do decide that weight the different factors that there was a need to create a curative rights policy solely for the use of the few hundred IGOs in the world it would take – that would be some considerable additional undertaking to create that - what would be a– what would have to be shown by the complainant, what would be the burden of proof, what would be the POs mechanism and to which arbitrator, arbitration organization, organizations in the absence of going to a court of mutual jurisdiction if there was a disagreement with the initial decision.

So that weighs on us but we take the concerns and the viewpoints of the IGOs very seriously but we are so – and the reason we've held – been on hold for a year and reached out to a legal expert was to make sure we really understood what the law on sovereign immunity was. We weren't going to make it up.

And just to try and finish so we take IGO views very seriously. We also have to be cognizant that registrants that sometimes there are wrong decisions by panelists. Most of them are right but there are some situations where reasonable people can disagree about whether a panelist reached the correct decision. And those are the ones where, you know appeals are made to the courts under the current system.

I think it's a very rare instance, it'd be very rare to have a situation where IGO brought an existing DRP action won it and the registrant really thought that he had been so mishandled by the panelist that they would expend a very considerable amount time and money to bring a "court appeal." But we want to – so we're talking about a very tiny subset of potential complainants which is the small, relatively small number of IGOs in the world compared to the work that (unintelligible) to say of trademark owners which is much, much larger, the number of actions that might be brought and the very tiny subset or an appeal of some kind might be made.

So we take the IGO's viewpoints and interests very seriously but we also can't just ignore the legal rights of registrants. And that's - we're going to be attempting to balance all of that as we proceed to the final conclusions in this working group. Yes sir?

(John Passaro): (John Passaro) from the OECD once again. I'd just like to respond to a couple of questions at the same. First so one question from you when you talking about or statement that you made about the importance of making policy decisions with regard to GTO's requirement to submit to a mutual jurisdiction provision.

But the thing is that our member state governments when creating us already made a policy decision. and that decision was that we were entitled to immunities. The immunities are inscribed in conventions, it is an essential part of our existence, it allows us to get our work done. And part of that is because, as (Prof. Flaine) points out in this memo, that because we are forced to operate in a jurisdiction of a given state, we are more vulnerable than a state.

And then also responding to a statement made by (Mr. Caritose) saying that IGOs are asking for rights that even governments don't have. No, we have rights that governments have given us and those governments have given us

those rights. Again, with an element that we need in order to be able to get our work done. Thank you.

Petter Rindforth: Just have a little quick comment on that, first of all as he mentioned, we are discussing dispute resolution, sorry for that, may not be used very often but still it will exist when it's needed and another working group where we are - be considering carrying (unintelligible) and others. We have the (PDDRP) that has not been used at all so far but still it is there when a topics came out. My comments on the IGOs is that, so far what I've seen from the report and what I have seen from some of the IGOs own policies, there may be a difference on how they deal with legal issues. I mean, as we've seen from their report, (UM) for instance, they're having their - section that they can accept to set accordance in a civil court action in a country.

And we also had some example of (unintelligible) court in some countries that state that IGOs can still - they can be a patch in a normal dispute resolution. So, correct if I'm wrong, but what I see from the report is a big gray zone, it's not completely 100% sure that an IGO automatically cannot take the case to a civil court in a country or be sued by a counterpart in some country. So that's also why we are not, even with the support, we don't have a final conclusion or suggestion so every comment from you and these organizations and from other patch are much welcome before we make our initial report.

Philip Corwin: Okay, I have two other comments and then take any - Mary at what time did we schedule to wrap up here?

Mary Wong: This session is scheduled to end at 3:00 PM today.

Philip Corwin: Okay, so it's 20 to three, we can keep it going as long as people want to keep talking. But just two comments to add, one, you know, early in this discussion, when this session began, I referred to - I tried to put this in context, trying to define what this working group was doing and what the

board was doing separately in conversations with the (GAC) and the IGO group. Whatever - we have to wait to see what the Board's final decision there is but the extent of the Board provides any permanent protection, whatever they might be, to IGOs at the top and second level.

The broader in scope those protections are, the less possibility there would be of any dispute arising at the second level, we have to wait to see what those are. So this is - it's kind of difficult for us to - we can't really balance that factor until we know what the Board's final action on that is going to be when frankly we have seen that about a year ago. If those - if names and acronyms (M through C) rather brought protection at the second level through board decisions that would substantially limit the possibility of disputes rising that would ever go to any type of curative rights process but we don't know yet what the Board decision -- which certainly be nice for this working group to know that before we reach final conclusions.

And while we take very seriously that IGOs are created by governments and are given immunity, to me that's - the immunity is not absolute and we've been trying to figure out - it's like me saying, "Well, I'm a citizen of the United States, I have constitutional rights and I - and particularly the ones given to me in the Bill of Rights." But as we know from Court decisions, none of those constitutional rights is absolute, each of them is subject to limitations. And what we found from (Prof. Flaine) is that while courts will defer, number one, different jurisdictions will be with the scope of that immunity that's been given on IGO to be a broader narrative depending on how they look at the law in a specific factual case -- just let me finish and you can respond.

And -- I lost my train-of-thought there -- that - oh yes, that IGOs always have the option, if it's to their benefit to waive the immunity for a specific situation if they wish to. So I'll stop there and welcome responses. We have - yes, go. Go ahead, we have number of - I see (Phil Sheppard), (Jenna) with (UCD), (Brian), were there others who wanted to speak? So.

Petter Rindforth: Let me jump in, our (unintelligible) suggest (unintelligible) toward the end of (Prof. Flaine's) report, he's making a concrete suggestion about a minor change -- as I read it -- to the existing (EDRP) to allow for an arbitration option. So…

Philip Corwin: What page is that on at? It's…

Petter Rindforth: It's right towards the end, I think it's the penultimate page. And I just thought that might something worth airing to see if that was thought to be a concrete and useful suggestion or if that had problems.

Philip Corwin: And which suggestion is it specifically?

Petter Rindforth: Basically saying that - I mean, he quotes early in the report an example of Apple who allow for arbitration in their causes in case of IGOs. Basically suggests that as mechanism also that we could think of as a - if you're an IGO then you could go for arbitration option as an insertion to the existing (EDRP) -- at least that's how I read it. And I just thought it would be quite an interesting proposal that could (unintelligible) all this good work.

Philip Corwin: Yes, that's what I'm saying response and let the other folks speak. The two challenges with that are one, as I noted before, this would be an easy issue to solve if it was just a relationship between ICANN and IGOs but this is third party, the domain registering. The other thing we don't know is whether - let's say hypothetically we decided that the possibility of being brought into a court case in a court of mutual jurisdiction so offended, would we view it as the recognized scope of IGO immunity that it shouldn't be permitted and said that for IGOs there should be either a new curative rights process or if the existing ones the appeal, "Should not be to a court but should be to a designated arbitration bodies."

That would not prevent a domain name registering from nonetheless filing an appeal, for example, (unintelligible) filing a suit under the anti-cyber squad

and protection - we don't know whether the US Court would say, "Sorry, you're out of luck under the policy created by this organiza - this California non-profit organization in ICANN, you've lost your rights to file a case in this case - in this dispute under the (ACPA)." Or whether the Court would say, "We're not going to let some California nonprofit corporation strip you of your statutory rights under US law." We just don't know what the answer would be in that hypothetical.

Petter Rindforth: It may not matter.

Philip Corwin: What's that?

Petter Rindforth: I said, "It may not matter." I think, you know, we do what we can as this organization and you find out what happens in the real world later.

Philip Corwin: I'm not saying that should determine that we shouldn't take an action just because we don't know how a hypothetical legal situation, I'm just saying we might take that action and find out that in some courts it hasn't effectively stopped the IGO from being counter-party in a judicial action.

Man 5: I'd just like to echo the point you made earlier Phil, when you were stating that, you know, we're talking about an evidently small number of acronyms here - (unintelligible) some of our names as well. So we're talking about a really, really, really small subset of disputes. So yes, I also agree with you that it's - we were just granted full protection at the second level as one (unintelligible) away with this problem but it would also, again, get away with a need for this incredible amount of energy that everyone is expending for what's going to be a relatively small number of (unintelligible) which however I do have disproportionately large impact on us.

I'd also like to echo what was just said previously regarding the arbitration option. We've been saying since the start that that is a potential solution. Also, with regards to the question of absolute immunity, that is not the

question here, that was never the question here. The question was, do - does the scope of IGO immunities mean that we would be entitled to immunity in this very specific context? And the answer from (Prof. Flaine), (unintelligible) to be pretty clear, as you know -- Phil who's also a lawyer -- there are no slam-dunks in law, this is pretty close to a slam-dunk as I've seen in long time. This is a very complex issue. Thanks.

Philip Corwin: Let me (unintelligible) you're oral input but I'd hope that organizations like (LECD) and other IGOs would submit some written comments on this (unintelligible) and tell us what you think is important, our conclusions with - you think we should (unintelligible) and tell us if you think there's anything wrong or anything we missed that should be taken into consideration. We want to get feedback from everybody on this memo before we move to final decisions plan.

Brian Beckham: Thanks Phil, Brian Beckham again. I just want to come back to something that my colleagues from the (OECD) and World Bank mentioned earlier is that in very practical terms there's a simple way to prevent abusive IGO names and acronyms in domain names and that's simply borrowing the registration by third parties of those names. Now, IGOs are cognizant of the fact that when comes to trademark principals there's legitimate coexistence by actors around the world in different classes of bits and services. So in an effort to appreciate that and compromise and come to a solution, we've come to the proposal for a curative mechanism to address abuse, if it and when it occurs.

But I just want to mention something, I think there's a generalized concern and I see it coming (unintelligible) in a lot of the comments in the chat and of course we've been monitoring the discussions of this working group that registering right in domain names which IGOs appreciate, in some cases, the very valuable assets would be put at risk. IGOs are focused on providing services to the public, during the ebola outbreak there were domain names registered and Web sites put up and emails sent out that were specifically

intending to install malware on users' computers. IGOs operate for the public benefit, they don't have trademark enforcement budgets, they don't have monitoring services.

But in the rare case where there is abuse, where there's a risk of public harm all that the IGOs are asking for is a means to address this. They're not after domain names. And I just want to offer maybe as a very practical solution when it comes to in the (UDRP) context, a registrant who's facing a (UDRP) claim has the option to elect a three member panel in which case they can elect a panelist who they feel would be sympathetic to their rights and to their views and maybe one practical option would be in this context, if there are legitimate concerns about domain names being taken from registrants.

Maybe one way to address that would be to address at the outset the option for registrants to elect, even in a single member panel case, a panelist or if it's a panelist via appeal to arbitration who they thought would accurately reflect the view of the law in specific terms of coexistence in their favor, because I can assure that the intent here in IGOs being here is not to displace the rights of domain name registrants; it's solely to address harm to the public and harm to the reputation of IGOs. And it's one practical way to address that would be to vest the registrant with some ability to impact the panel composition, that might be a practical way forward.

Petter Rindforth: Just to make it clear. When we talk about this possible solution, are we still talking about a new sort of big IGO (UDRP) or do you think it can be added to the present (UDRP) where we also have to identify what IGOs are?

Brian Beckham: I think, first of all, it's not necessary to amend the (EDRP) for this purpose. There's a separate process in ICANN going on right now to look at rights protection mechanisms which include the (EDRP), that's a process that will run it's own course. And more to the point, there's advice from the (GAC) and the Los Angeles Communicate, which is very clear on this point, that in

providing a curative mechanism for IGOs that this should not require amendment of the (EDRP), this should be a stand alone mechanism.

Philip Corwin: Okay, and again, as I noted before, that - if it is the conclusion of this working group that a new curative rights (unintelligible) for use by IGOs should be created and we're going to have to deal with all the questions of what has to be shown by the complainant by what evidentiary standard and all the rest of the considerations that come into creating a (CRP) at a whole clause.

Brian Beckham: Thanks Phil, and this is (Brian) again for the record. I don't mean to shortcut all of the thinking that would go around that but people might be aware that -- I don't recall the exact date, someone from ICANN staff or from the council might refresh my memory -- but about a decade ago there was actually a draft produced by ICANN staff for precisely this type of mechanism.

Philip Corwin: Yes, Mary.

Mary Wong: Thanks Phil, this is Mary from staff. So just to follow up on (Brian's) point that I believe you're referring to the draft - they made up in 2007, produced by staff. Just a note for the record, that that was one of the background documents for this working group and it is available for review. And presumably when the working group gets to the point of discussing which option it might pursue and what mechanisms and language, then it might return to that document. Thank you.

Philip Corwin: Good. Multiple times during this discussion reference has made to the other working group that just started in March of this year, that's revealing all right protection mechanisms and all (DTLDs). I'm very familiar with that working group because I'm one of the three co-chairs and just for people not familiar with it, that working group has a very lengthy projected timeline of these one-whirl review. The rights protection mechanism created for the new (TLD) program, the (PDDRP), which is the only one at the registry level and then at

the trademark clearing house, sunrise registration rights for trademark owners, trademark claims notice and the uniform rapid suspension.

We project completing review about mid-year 2017 and producing a final report on a new (TLD RPMs) at the end of next year. And then, just be initiating the (EDRP) review and the (EDRP) has never been reviewed. It's the only ICANN consensus policy that has never been reviewed. That will kickoff in early 2018, and we haven't even dared to project how long that will take. It's because given the fact that there's - well, just walking at the rightful guidance to panelists, there's so many potential issues in the (EDRP) that could it be even longer than the new (TLD) reveal and it's, as with all ICANN work, everything is done very deliberately and every potential question is addressed from both sides before.

And then if you circle back around after you've done them all and revise preliminary conclusions. Now, the treatment of IGOs is not on the agenda for that working group and I don't - you know, I'm presuming that this one will be finished well before the conclusion of that one and we'll recommend whatever we do. But again, it would be - and just going through this exercise, I think it would be useful for this working group to query the Board as to - and there was a discussion yesterday between the (GNSO) and Board members, specifically on Red Cross and IGO protections kind of saying, "When are we going to have a final decision by the Board? You've been looking at this stuff for over two years."

And there's been indications before that they're close to a conclusion and it's frustrating for this working group, I'm sure it's frustrating for the (GAC) and the IGOs that there's no finality in that other process that relates directly to ours because the extent of the protection finally decided upon by the board will basically narrow or expand the scope of potential second level disputes that would be the subject of either disputes in the existing curative rights processes or in a new one if we went - go down that road.

And it's five to 3:00 now, so I'm going to stop talking and see if Petter has any final thoughts and then if any of the participants in the room or on the chat, on the phone have final comments to make and then we're going to wrap it up here. And thank you for your participation and hope that you continue to work within our working group as we move on to the most important stage of our deliberations.

Petter Rindforth: Thanks. To make a quick summary of the meeting today and the comments we have got so far, we will definitely in our report, one of the suggestions would be not to make changes in the current (EDRP) but if possible to - one of the possibilities would be to create something similar but added that it relates to identify IGOs, the protection of IGOs in that policy system. And also to add an arbitration procedure. That said, I think what we also concluded today is that even if that kind of dispute resolution policy for IGOs is created, it cannot be 100% sure. Cases can be taken further to national courts anyway, but then at least there is a specific system to use.

And as someone said, when there is a dispute resolution procedure or when a specific name protection is mentioned in some regulations, hopefully it will also have some limitation ratio on even organizations that plan to misuse this kind of name protection. So Mary, what can we say about the next steps?

Mary Wong: Thank you Petter, this is Mary Wong from ICANN staff. So the next steps, I believe, will be for the working group having had a chance to review (Prof. Flaine's) opinion with input from the community, included all affected parties to look at the various options that it may have and those would include options for either modify existing procedures or potentially creating additional procedures amongst other options, some of which were highlighted today.

I believe that the intent is to have that discussion immediately following this meeting, at the next working group meeting or commencing the next working group meeting and following that then the working group would have to go back to other preliminary discussion and conclusions and work out language

for proposed preliminary recommendations which, I believe, the plan is to have that done certainly before the next ICANN meeting in November.

Philip Corwin: Great. So Mary am I correct that our projected date for the next meeting of this working group is - one meeting on Thursday, now we've been moved to Thursdays would be best (Field Day)July 14th?

Mary Wong: This is Mary again. I believe that's correct.

Philip Corwin: Thank you. So again, if you have an interest in following the continuing discussion and deliberations, mark your calendar for July 14th, that's our next meeting after this one of the working group where we'll be going very carefully through (Prof. Flaine's) memo, his final version, and debating exactly what it means and what conclusions we should draw from it and what our next steps are and then start to move forward in whatever direction we decide to go.

Petter Rindforth: With that we end for today. Thanks.

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