

**IGO-INGO Access to Curative Rights Protection Mechanisms Working Group
TRANSCRIPT
Wednesday 2 March at 17:00 UTC**

Note: The following is the output of transcribing from an audio recording. Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record:

Attendees:

David Maher - PIR
George Kirikos - Individual
Jim Bikoff - IPC
Paul Tattersfield - Individual
Petter Rindforth - IPC
Phil Corwin - BC
Jay Chapman - Individual
Paul Keating - NCUC
Rudi Vansnick - NPOC
Reg Levy - RySG

Apologies:

Oswaldo Nova – ISPCP
Mason Cole - RySG
Mary Wong

ICANN staff:

Steve Chan
Mary Wong
Nathalie Peregrine

Woman 1: Thank you very much (Christine). Good morning, good afternoon, good evening everybody. And welcome to the IGO-INGO (unintelligible) Working Group Call on the 2nd of March of 2016. On the call today we have George Kirikos, Jim Bikoff, Bill Cohen, (Patrick Heinsworth), David Maher, (Jake Chapman), (unintelligible), Paul Keating. We received the (unintelligible) from

Mason Cole and Osvaldo Novoa. From staff we have Mary Wong, Steve Sheng and (unintelligible). I'd like to remind you all to please state your names before speaking for transcription purposes. Thank you ever so much and over to you (Phil).

(Phil): Okay, (Phil) here and welcome all. I don't know how you want to proceed. We've all received the synopsis -- which is a very brief condensation of a long draft memo that Mary, and Steve, and (unintelligible) and I reviewed -- we're not able to share it with you at this time, the professor doesn't want something floating around with his name on it that's not final and we respect that, that's why we asked for a synopsis. But let me start just by, you know, summarizing kind of a synopsis of the synopsis.

Basically he set the question of ideal immunity is complicated, it depends on a multiplicity, a factor - I think that in itself is helpful because the feedback we've gotten from the IGO and the extent we've gotten anyway has pretty much been - it's a black-and-white issue and there's nothing to discuss. I think to self-refute that position, there's not even a clear stand on this in the United States -- it depends on which circuit you're in. And then he gets into the UDRP issue and, you know, whether or not the waiver that's inherent was found a UDRP where you consent to mutual jurisdiction, is a violation of sovereign immunity if it exists for that case.

So, and then he gets into alternatives. I'm not sure we - there seems to be some feedback on the list, we really don't want him to get into proposing alternatives unless we, I guess, the only alternative this group has thought about would be if we found that the waiver that's inherent in filing a UDRP is clearly violative of established sovereign immunity rights, and we'd have to think seriously about establishing a different curative rights protection mechanism for IGOs. But I'm not sure we want the professor - at least we've gotten feedback about him proposing kind of compromises within the existing system.

But I'll stop there, you've all read the synopsis, it's only two pages. You know, most of you are lawyers or a good impersonation of being a lawyer in this field and why don't we open it for discussion? Not just what you think of the synopsis and where it's taking us, but how we should frame Wednesday's discussion in Marrakesh in the most useful way for advancing the work of this working group which now we may have a path to finishing that work by ICANN 56 -- which will be somewhere, it won't be in Panama City but will be somewhere probably in June maybe in July, who knows. But it's a few months away - three to four months off. So I'll stop there and if you're - is there anyone who is not in the chat room who is on the phone line?

Jim Bikoff: I'm just on the phone line (Phil), it's Jim Bikoff.

(Phil): Okay, so Jim if you want to say something, just chime-in, anyone else please raise your hand and we'll will set up the queue.

Jim Bikoff: Thanks.

(Phil): And does Peter have any introductory remarks? I don't want to monopolize the intro.

Peter Dengate Thrush: No, I think isn't good as you did and it's also coming from the initial discussion when we sent out this memo. As you pointed out, this is not his full expert comments. It's just the summarizing that we asked him to send out. We have seen a number of interesting and also useful notes in his draft report. But I hope we will have to - when - do you remember when we will have it ready to discuss and look at it? Will it be for next week?

(Phil): Well, (unintelligible) he didn't give us a firm date but, you know, what I heard from when we talked to the professor about 10 days ago, you know, with the feedback we give him from whatever happens in Marrakesh, I think we certainly expect a final draft before the end of March.

Jim Bikoff: (Phil) it's Jim Bikoff.

(Phil): Yes.

Jim Bikoff: Just one comment, until we receive the full opinion, I assume that the synopsis - you know, that there may be changes to the opinion even though this is a very brief synopsis. How can we really discuss, you know, what he's going to provide us with in final until we see it? You know, there may be changes in it. He may change some conclusions. He's got some hypotheticals in here and he also has some things that, I think, are beyond the mandate in terms of alternatives. So, I wonder how much we can do until we have a whole opinion.

(Phil): Well, you know, we got the synopsis, you know, it was the professor because of his academic (unintelligible) was not to be able to complete the draft -- which is as I remember 23 to 24 pages right now, heavily footnoted -- it's a very good resource document on this subject. (Adam), you know, may be the best thing ever written because it's such an obscure subject, you know, the interplay between IGO immunity and this ICANN arbitration process.

So, my sense -- and Mary and Pat jump in if you think I'm wrong -- is that it's not likely that's going to change much. What was missing from that document were upfront the summary conclusions in a more full pledge, you know, fleshed out conclusions portion at the end. So, I don't expect any significant deviation from in terms of major conclusions from what you see in the document. And in fact if we get back to him and say, "Hey, you know, this idea of proposing some other arbitration system, that's beyond what were asked for and paying for and the working group really decided they don't want that." That makes it a lot easier for him to finish up quickly.

Jim Bikoff: Thanks.

(Phil): Okay, I see hands up Paul and then followed by George. Go ahead Paul.

Paul Keating: Hi, just Paul (unintelligible), you can hear me fine?

((Crosstalk))

Paul Keating: Okay good. So, I guess, partly in answer to two-part comments. From my standpoint, I'm glad we saw the synopsis because I think it does allow us to guide him, to make sure that you receive something that (unintelligible) is useful and on point. In reversal (unintelligible), I think we should tell him that -- suggestions as to the arbitration methodology are way outside the scope of -- what I thought we asked him -- and I really want to eliminate that discussion because it's premature, right? And I think that that is an issue for another day. Is it (unintelligible)?

The second point that I wanted to get to was, I would very much -- having read the synopsis -- I think that it suffers from a lack of detail, right? I mean, obviously, it's a synopsis but based upon your comments (Phil) that you don't expect there to be any changes. And one of the things I think I would appreciate if he went back and told him was, "Listen, for guidance purposes please give the essence," of the cases that he's referring to. And why he believe that they supported one way or the other.

For example, the qualified immunity, where's the threshold in these cases? Because that will allow us to discern the nuisances that predict based on his synopsis is going to come up with. You know, it's kind of there are three - you know, there's absolute immunity, there's qualified immunity and there's no immunity, right? So, I would like to see him deal with the case law more -- or other authority more -- in dealing with those three options, so that we can then assess what - which of them apply and whether we agree with his assessment of which of them might apply. And that's my comment. I'll go back on mute. Hello? Did I lose everyone on the call?

(Phil): I'm sorry I was talking on mute, this is (Phil).

Paul Keating: No, I just didn't hear any response at all, it's just...

(Phil): Oh, I was responding but...

Paul Keating: It's not uncommon to my comments...

(Phil): ...with the mute button on. I think when you see the final memo it is very documented with case law, to the extent there is case law and it's more nuanced -- so, I think that's addressed. But again, you know, we're going to get a final draft and I think -- as I understand Mary -- you know, certainly I wanted this group to have a chance to comment on the final draft, and get some feedback to the professor before we actually published his paper to a wider audience. So, next George, please enlighten us George.

George Kirikos: George Kirikos here. I wanted to agree with the points that Paul raised and that Jim had raised earlier. We don't want the professor to be a policy member of our group. We wanted to consult as an independent person, providing us with facts from doing the survey of, you know, international law. So, what I was expecting -- I don't know if these appear in the footnotes -- would be, you know, explicit citations of case law in, you know, the various top countries that are available -- you know, Canada, the United States -- we want to read some from Canada and the United States before the research. But presumably he'd be doing a more a broader survey of those kind of decisions in different countries.

Like, when we originally proposed doing the research ourselves, you know, supposedly one of the ICANN lawyers would've done, like, a search on West law or some of the other legal databases but, I guess, that never worked out. And that's how the idea rose to farm that out to an independent expert. Having seen those, the 22 pages, are those the kinds of things that he's been doing?

(Phil): Kind of - George, what kind of things are you referring to? Just so that I'm clear on the question.

George Kirikos: For example, the Supreme Court of Canada decision talking about that the sovereign immunity isn't absolute and so presumably there are similar decisions in other countries that support that kind of view. And perhaps there are decisions in other countries that are, you know, variants of that decision and so there wouldn't be a consensus as to what that view might be.

(Phil): You know, I don't recollect whether he cites a specific Supreme Court of Canada case. But there's a lot of cases cited in the memo, there's a lot of footnotes.

George Kirikos: Are they international cases or are all from the United States?

(Phil): No, they're from - they're not just US cases. But again - again, when we get the final draft, if we think he missed an important case that we know of, we'll have a chance to provide that feedback.

George Kirikos: Okay, I guess the other - it's George speaking again -- I guess, the ultimate question we want him to allow us to help decide is, you know, let's say a hypothetical example, is I walk by the World Bank and throw a rock their window and I break it -- and let's say there's a videotape -- and everybody knows I broke it. What could the World Bank do? Could they forced me into an international arbitration? That's essentially what (unintelligible) asking at the policy group for the UDRP to say that some person that they want to initiate a complaint against must be forced into arbitration?

And I think the answer from what he said (unintelligible). So, it could take on that kind of a hypothetical, but the person who would throw the rock might be liable in a criminal case, you know, brought the government in the jurisdiction he's located bring. But to bring a civil case to, you know, repair the cost of the window I would think that naturally the IGO would have to give up their

immunity in order to go to the Court to seek those civil damages. And otherwise, we'd to make a new law if we did anything at variance with that kind of existing standard. And, you know, some might say, "Too bad," you know, that's what the (unintelligible) lies and, you know, it's as though they said, "Well, we think we can do better than that."

But, you know, if that's (unintelligible) the law we shouldn't go beyond that because I just don't have a - (unintelligible) sorry, I just actually (unintelligible) a disadvantage from not being able to pursue that case. But it's kind of symmetric because like they did something bad, like let's say a worker at an IGO commits a crime, they're actually immune from justice -- so, it's kind of off that. So, there might be - they might have sympathy that they may not be able to pursue a certain claim for, you know, you'd appear whatever without weighing their immunity but, you know, the fact that they're able to assert their immunity in cases that cry out for justice, I think kind of counter balances that.

(Phil): Yes, well George, if you were on the sidewalk in Washington DC and threw a rock through the World Bank window, you'd be immediately arrested by the numerous police who are around there. I'm not sure if they're Federal or DC and whether you'd be tried in DC Municipal Court and rendering some Federal Court -- I get it. You know, the civil thing which (unintelligible) in the civil where there, you know...

George Kirikos: That's my point that...

(Phil): Yes.

George Kirikos: ...the World Bank can't force me to pay them \$10,000 (unintelligible) to replace the window?

(Phil): Well, I don't know about (unintelligible) procedure...

George Kirikos: (Unintelligible).

(Phil): ...that would allow that kind of claim. So I think in that case, they'd have to bring an action, you know, in a Court of Law. But let's move onto some others. Paul, I'm just going to let Peter jump in here since you already spoke and then go back to you. So Peter, why don't you go ahead.

Peter Dengate Thrush: Peter here, I just wanted to note that he actually in his draft has realized that national law may determine the immunity of nationalizations. And he gives some examples of that. So as said, once we have the full report, I think that you can - some of the questions and additions you want to have are more or less in there. But it's good to have feedback from what he may clarify more of that.

(Phil): Okay, thank you Peter. Paul?

Paul Keating: It's Paul Keating. I think we have (unintelligible) from the concept of criminality that just mucks up the water. But I think I read -- and reread -- when I first passed through this - his synopsis, that he does deal with the distinction of the domain registrant being forced into this process by contract. But I think he might, you know, he might - his research report might benefit from setting forth in the beginning the clear set of facts that we are all dealing with, yes?

So, in his domain name registrant registers, the domain name, he agrees to the terms of the registration agreement which incorporates (CDRP) and that's the facts on his side, the facts on the IGO-INGO side is, they've obtained a trademark or are asserting a common law trademark or service mark and they are utilizing the third-party beneficiary, this contractual provision to attempt to take away this domain name on the grounds of the - that are set forth in the UDRP.

That's really the only factual scenario we're dealing with, and then the issue is the assertion of mutual jurisdiction within the context of UDR complaint is that waiver, right? That's really what - that's the factual scenario we're dealing, we're not dealing with anything else. And I think, George, we have to stay away from, you know, things that are factual patterns that a little bit more insightful like, you know, throwing rocks at people's windows. I mean, that just comes up with a wrong idea.

And we should stay away from, you know, cyber squatters and things like that, it's a neutral fact pattern. The domain name could be anything, and they could be good things and bad things, it doesn't matter. I think he would benefit from setting that forth. And, you know, I'll go so far as to say I think -- in response to what Peter said -- I think that he's going to come out or he has pretty much concluded that whether or not there's a waiver of immunity depends upon where the action is brought, you know.

And if that's the case, then I would like the group to consider an, you know, alternative approach to the recommendations -- which is that the UDRP - when and if the UDRP amendment process comes about, that serious consideration be given to beefing up the language of the UDRP concerning the mutual jurisdiction to actually include an assertion that it's a waiver of immunity, and it's a waiver of forms non-convenes in jurisdictional issues. Because that's what the intention of the original drafters was, is to provide the registrant with a clear path.

If you go (unintelligible), your domain will not be taken and you will be able to proceed under those national laws that state whatever claim you have, right? So, those are my two cents worth. But I think that he would benefit - we would all benefit in reading his final report if the clearly set forth the factual synopsis, which would be (unintelligible) and that's it.

(Phil): Yes, thanks Paul. (Phil) here, and just before getting back to Peter. I haven't looked at the full memo in a while, so I forget exactly how he treats that. But I

can assure you that both my initial face-to-face meeting with them and then in the call we had with him about 10 days ago. He understands, that not only that the registrant must accept, you know, submit to a potential UDRP filing and - under the registration contract. But he understands that ICANN is not a government agency or an international agency, that it's a California nonprofit corporation.

And I've certainly raised with him the issue of - we are - even if ICANN said, you know - even if I can't adapt to some procedure that said to registrant, you know, if an action is against - brought against you by an IGO in general or by this type of IGO, you don't have access to Court, any appeal as to, you know, this arbitration proceeding and whatever. That, you know, that ICANN one doesn't have power to, you know, extinguish any nationalities' law. It's bound to respect legal rights but it can create them.

And that the registrant could readily go to a court when there's an applicable law like the (ECPA) in the US and say, "Hey, I've got these legal rights, they're trying to transfer my domain and I'm asserting my rights under US law and this, you know, nonprofit corporation in California has no power to deny me access to statutory law as a US citizen." So, he is aware of that scenario and the issues it raises, so. Back to Paul. I see Paul's hand up.

Paul Keating: Yes, this is Paul Keating again. I might agree with you but this - if that were said and stated in the context of a revised UDRP, every single registrant who could renew a registration after that date would certainly be bound by that waiver. Because it's a contractual obligation, I can contractually throw away my rights and then you'd have to go in and analyze it under typical browse wrap, quick wrap type contractual analysis to see whether or not that provision is binding or not.

But I think conceivably it certainly could be done -- depending upon how they did it. I mean, you me have to remember that this whole domain process, everything we talk about domains is all based entirely upon contract. It's not

based upon any legal statute whatsoever, it's all contractual -- all the way down to ICANN, you know. So, we have to be careful about saying what legal rights we do and we don't out have.

We have legal rights but they're pursuant to contract, they're not pursuant to anything else -- other than general principles of property law to the extent that that contract that we all signed as registrants deviates from what the legal standard is. Then, unless we're dealing with something that is - cannot be waivable in a foreign jurisdiction as a matter of public policy, I think you might have waived it under the contractual analysis.

(Phil): Yes, I'm going to disagree a little bit, Paul. At least in the United States, there are statutory rights. There's the Anti Cybersquatting Protection Act, and any potential complainant could decide to go directly to Court and not bring a UDRP. And any registrant who feels that a UDRP decision is trying to unfairly, you know, is trying to take their domain away in a way that violates that statute has access to the Courts. So, I'm not - you know, I'm not - there's other arbitration laws in the US and then the memo doesn't deal with them.

But I'm not sure if this is a type of consent that would be recognized by the US Courts and enforced against the registrant. That's a different legal issue. But again, I think for our working group, the question boils down to is whether - when an IGO files a UDRP and consents to mutual jurisdiction, is that waiver of immunity -- which is part and partial to file UDRP -- so violative of clearly recognized sovereign immunity rights, that it would justify establishing a separate curative rights procedure just for them. And I think we ought to stick to that issue, that's the reason we contracted with an outside expert. Peter?

Peter Dengate Thrush: Just want to mention one interesting thing I saw in this report, was in reference to the United Nations and Article 105. The charter that says that United Nations shall enjoy immunity from every formal legal process, except in so far as in any particular case it has expressly waived its immunity. So,

that's actually for United Nations and I think we can - I mean, if we take it in the more easy way, we can - may be able to use it as if you are an IGO and you have either registered a domain name or you file for a UDRP, that means that you have expressly also accept that the you have waived the immunity.

(Phil): Okay, thank you Peter. George again.

George Kirikos: Yes, if you go back to the email (unintelligible) yesterday, the World Bank even recognizes that they can explicitly waive their immunities. I don't think that that's big issue. We have the example of Argentina, for example, a sovereign countries waving their immunity in regards to their bond offering. They explicitly recognize New York Courts, and of course there was the big lawsuit that ensued when they defaulted on their obligations. And the thing about getting settled this month.

So while it would be a very odd situation where creatures that are created by treaties IGOs, would have immunity that the sovereign nations themselves don't have. Like if, you know, the government of Brazil or some other country, wanted to after a domain name, they would have to waive their immunity in the same manner. But why would the IGOs have a higher immunity than the actual sovereign countries that created.

Peter Dengate Thrush: Effectively, that's what (unintelligible) stated in a formal way to us as well.

George Kirikos: Right. And think of it as a slippery-slope -- George Kirikos again. It's a slippery-slope, if this - if there is something special that's carved out for the IGOs, the question is who's next? Obviously the governments would want that. Who else would want that and then you see a whole scenario where brand-new laws being created that doesn't exist for any other (unintelligible) in the real world, or sorry in the offline world or whatever, non- domain named world.

(Phil): Yes, okay. Thank you George. I going to take Chair's privilege here and make a comment. It's interesting to me - again, I'm general agreeing with the group that we don't - we didn't ask him to propose and design a separate arbitration procedure and we probably -- for this -- we don't want to go there and for the sake -- again -- the memo finalize as soon as possible we'll probably going to ask him not to work not to extend any effort, any further effort on that.

But I found it very interesting in the last paragraph in the synopsis, which kind of begins to talk about, you know, if you're going to design a separate (CRP) just for IGOs or certain types of IGOs, what would be required? And I think, you know, that has to be considered as well that what that task would entail. And, you know, it would involve such factors as whether or not it was a UN affiliated IGO or a non-UN IGO. So we could have one of procedure just for the UN affiliate but not for the other IGOs. I can imagine the dispute within ICANN and the (unintelligible) net. It might depend where the register resided or the registrar which would in turn determine the mutual jurisdiction.

And whether or not the immunity would be recognized there, but that would put ICANN in a position of somehow trying to prejudge -- and as he puts it -- potentially misconstrue immunity in a particular jurisdiction. So I think, it's just - that last paragraph -- and there's more the full memo -- points out that the myriad policy issues and complications of going toward designing a new (CRP), if we ever decided that was necessary. And probably the result would be something that the (unintelligible) and IGOs wouldn't be happy with because it would be so complicated and depend on a multiplicity of factors.

Okay, here's some comments in the chat. Rudy's put in a couple about the interplay with national law. Of course, I just referred to that and, you know, as the synopsis and the full memo points out, there's no uniform consensus view globally on the scope of IGO immunity. It's different in different national jurisdictions based on their own case law. And there's probably a bunch of

words never been considered. Okay, and George, yes, you asked - you wanted to - I don't know that we want to vote here.

This meeting wasn't for taking votes, I think we want this to be a preliminary discussion to get initial reactions to the synopsis and get an idea of how we want to proceed in Marrakesh. The way I envision it, is that after we have that fuller discussion in Marrakesh, where hopefully some GAC members and IGOs will be present as well. Then we can give him consensus feedback from the working group as to how we'd like him to finish the memo. Is that acceptable to the working group? I think will probably wind up telling him not to go down the road of trying to construct an alternative arbitration process. That wasn't the question we asked him to (unintelligible) we asked him to entertain. I see (Miller) their hands up. I'm not hearing anyone speak, so it's 12:37.

Before we end this, do people feel - have anything to say about thoughts about how the meeting should proceed at Marrakesh? I believe, you know, we'll distribute or have available the synopsis for participants physically at the meeting and we'll display it for those remotely participating. We'll review the synopsis, we'll make clear that this is just a very boil down summary of a much more on Wednesday and heavily footnoted draft memo. And then try to talk about where folks think that these findings should take the working group and completing it's work.

And that George was asking, the meeting next week is - right now, Mary had indicated that it may be changed to a somewhat - to a mid-morning time slot, which actually be advantageous. It would not conflict with GAC meeting taking place. But right now it's scheduled for 9:00 am local time in Marrakesh next Wednesday -- which I'm not sure the time difference in Marrakesh and East Coast US. I think it's at least 4 to 5 hours. So it's in the middle of the night on the East Coast. Sorry about, but nothing - we have no influence over the scheduling of these things.

- Jim Bikoff: (Phil), Jim Bikoff, do you think it might be advisable to remove point two from the synopsis? Since, from what I've heard, we're saying that this may go beyond the mandate. And just (unintelligible) people, the synopsis as that one.
- (Phil): Yes, Mary and Pat, what do you think about that? To me, you know, my initial reaction is that we would need -- since the professor's name is on this -- we would need his permission or at least discuss it with him before we would have - you know, I don't feel like we have the authority to edit a synopsis that has his name on it. We could tell him that the initial reaction of our working group is that they don't want to him to go down the road trying to draft a provision for arbitration for certain types of IGOs. We're not at that point yet of even deciding that's necessary. But I think we need his consent to do that.
- Jim Bikoff: I didn't mean, (Phil), to do it without consent. My thought was that we would ask him to remove that from and have him revise the synopsis. I think it's misleading to distribute something to people who may attend that meeting in which they think that this is part of what his going to be giving a full opinion on if he's not. Since it hasn't been decided yet, you know, it might - people may think this is part of the mandate.
- ((Crosstalk))
- (Phil): Yes, well certainly at a very minimum I'd like to see the last sentence of that where he promises to provide a draft provision for an arbitration system. I think that's putting the carrot in front of the horse. There's no reason to start designing such a system unless this working group decides that sovereign - the scope of sovereign immunity requires it for at least some IGOs. I see Paul and then Peter after Paul.
- Paul Keating: I agree with Jim completely. I think that we ask him just to end it after the last paragraph of one -- for a number reasons. One, it's outside of the scope -- number one. And number two, more importantly if I were at that meeting and I

was not involved in this work group, that's the only thing (unintelligible). I mean and there would be 45 (unintelligible) conversation about the possibilities of number two. I mean and to backpedal and say, "No, we haven't. We have asked him not to do that exactly, et cetera."

I think it's easier if you just send him an email or talk to him on the phone and say, "Please just resend it but just without paragraph two." Right? Just cut it short, two paragraphs and a sentence. I think you're just leading people on in a misleading (unintelligible) subject matter for the working group but I don't believe it is. It's going to expand the nature of conversations, overwhelm the concerns of people that maybe (unintelligible) and this caused a lot of problems that don't need to be caused. So I would ask you that you go back to him and ask him just to reprint you one, you know, and take the (unintelligible) that would take to cut out the last two paragraphs.

(Phil): Well, I'm going to be a bit contrary on this and, you know, waiting for feedback from you and from Peter. But I think the first paragraph to us is somewhat beneficial, it could be recast a bit, such as any alternatives would require a consideration of, you know, multiplicity of considerations. But that first paragraph, is the one that notes the involuntary submission to the UDRP by the registrant -- it brings that in.

So, I'm more bothered by the second paragraph which gets into more detail about (Unser Trail) arbitration and then goes on the promise, a draft revision. I think putting that out there, and then not having that draft revision creates problems down the road, or maybe we just eliminate two and then the first paragraph of one is - of two was recast a bit just to point out the multiple considerations that would arise in constructing any unique CRP for IGOs.

Jim Bikoff: (Phil), it's Jim Bikoff, I think that's the preferable way to go rather than (unintelligible) two in. I think you may want to just to add a sentence in one, if the professor agrees.

(Phil): Okay. Okay, I still see Paul's hand up. Paul was that an old hand or a new one? And then I also see Peter's hand up. Okay, Paul is gone. Peter.

Peter Dengate Thrush: Yes. I just (unintelligible) if it could be a possibility to still have some part of paragraph two. Whether - maybe just three or four sentences very summarized to mention that there are alternatives and short (unintelligible) for them that could even be in - I mean instead of having point 1 and point 2, it could have one point so to speak but that number two was like some addition to the initial. I don't know if it's possible without confusing readers that haven't been involved in this discussion before. But it stated - for him as an expert, outside expert it could be good to provide just a quick output on what kind of alternatives there are. And then for us to decide what's the best way to proceed.

(Phil): Yes, again, I'm not that bothered - I agree Peter, I'm not that - the first paragraph of two basically notes that, you know, IGOs generally deal with the immunity issue by - in bilateral contracts asking the other party to can consent to another arbitration process. Many know that this situation is different because it's a tripartite arrangement, where there is also a registrant who was forced into submitting to UDRP jurisdiction when they registered and would be compelled to -- if there was something - another arbitration other than access to their Courts -- would be compelled to do that.

And then he also notes that the going down that road would require a much greater compliance efforts by ICANN than it presently has. I think all of that is just a discussion of what - you know, that is in the memo where he discusses what IGOs do now, and that's what we asked him to look at that. So, my problem is more with the second paragraph or two, where he starts going down the road of proposing an alternative and promises that the draft memo will include the, you know, suggests recession alternative and to me, until this group decides whether or not anything along those lines is justified -- based on our reading of existing law on sovereign immunity -- that's, you know, that we shouldn't be even hinting at going down that road before we made that

decision and we can't make that decision until we see the full memo, the full final memo after we comment on it. So it's really important, that last paragraph is the one that puts the cart before the horse and promises things that we don't want him to engage in at this time.

Jim Bikoff: (Phil), I got to get off the call. I'll just make my last comment and that is that I disagree with having two in there at all. I think you can add a sentence to one, but starting to get into alternatives at a point where that is beyond the scope, I think either two has to - if you want to have a sentence in two, it has to be completely rewritten or you should add it one. There's no reason to have a separate two and this point. I think it's premature until we see the full report, I think, you know, there will be adjustments made based on what I heard today.

I just think it's wrong to have that two in there. So, with that I'll leave and leave it to the rest of the folks to comment.

(Phil): Thank you Jim. I appreciate it.

Jim Bikoff: Thank you, bye. Bye all.

Mary: (Phil), this is Mary.

(Phil): Yes, Mary. Go ahead.

Mary: I just wanted to chime in here and to say a couple of things that given the time where we are and that meeting is coming up -- and in fact Steve just boarded his plane and I'm leaving for the airport in 15 minutes -- that it might be easier to let the professor know that subject to his consent we will be circulating more broadly this synopsis without the paragraph two or with only part of paragraph two to actually move in in the numbering -- as Jim had suggested.

Completely (unintelligible) it might be quite difficult for you Peter or any of us to do much more back and forth in the next couple of days. I think that having him re-draft or amend the synopsis at this stage might be more complicated, it might take longer than we need. So, that would be my suggestion to circulate a shortened version of this memo.

Secondly, in terms of the scope, I think that what we could see from the longer draft memo, the professor does go into some detail about why he approached it the way he did and why he's so (unintelligible) to answer our central question, and hopefully working group members will see when that memo is finalized that what he talks about here in paragraph two, isn't perhaps as excluding or as unexpected as it might appear in the three-page document. So, (Phil), those are my suggestions and a comment. Thank you.

(Phil): Thank you, that's helpful Mary. You know, just (unintelligible) the logistically, you're leaving for the airport in 15 minutes, you'll be arriving in Marrakesh about the time I'm leaving tomorrow. Then, I get there Friday afternoon, I'm not sure when Peter gets there we can hear from him in a minute. So, just logistically, the first time that the Co-Chairs and staff would have a chance to all discuss a potential edit of two and then have to propose to the professor and get his permission would be over the weekend -- when I'll be up to my elbows in Council meetings.

So we can - it may just be easier to ask the professor if it's okay that we - for our discussion purposes in Marrakesh, we decided it'll be better just to provide his synopsis with section 1 and delete section 2 at this time, because the working group has not reached any decision to pursue an alternative process.

Paul Keating: (Phil), this is Paul Keating...

(Phil): Can I just (unintelligible) just before you (unintelligible). Peter, when do you - okay, Peter you get there Saturday afternoon. So you won't be there with me Saturday morning, I present the update to the Council.

Peter Dengate Thrush: (Unintelligible).

(Phil): What's that?

Peter Dengate Thrush: No, that's right, yes.

(Phil): So again, that is - the - so, that's further logistical complications for trying to propose an edit of all of two to the professor and get it approved. So, we may just ask him - tell him, you know, that we're going to delete all of section 2 for purposes of our working group meeting next Wednesday, and just make sure that's okay with him. Yes, go ahead now Paul.

Paul Keating: Yes, sorry (Phil) for jumping in before, this is Paul Keating. As a (unintelligible) due, you know, it's fine with me if you just delete the last paragraph. You know, it starts, "ICANN could also adopt." As you suggested, I'm willing to live with number two because it has (unintelligible) in it that clearly allows you to the state anybody in the audience that, "Listen, there's no way you could do this without (unintelligible)," because of those contractual issues. So, if you wish I'm fine with you keeping in the first paragraph of number two and deleting the remainder. But if you want delete the whole paragraph two, that's your program as well.

(Phil): All right, well, you know, that would be - that's what I voiced before, we just heard Jim say he wants to see all of two go. I thought that first paragraph was useful because of the reference to the domain registrant impact and also because it does discuss what IGOs do now why in bilateral contracts but then points out how this is different. And it doesn't go that extra mile that the last paragraph does in putting on the table are more sophisticated compromise cooked up by ICANN.

Can I ask, can we - so, my vote if we were - I don't want to say vote, let's get a sense of the room if I can just before we hear further comments. How many would favor deleting the second paragraph of two but leaving in the first paragraph? And then just check the gray if you agree. So I see, four agrees and three out. And how many -- I don't know if the others feel strong -- let's clear the agrees for that. How many want to see all of paragraph two deleted for the document that's before the participants in - so, like, George are you voting to eliminate all of two?

David Maher: (Phil) this is David Maher, I vote to eliminate all of two.

(Phil): Okay, and I see George eliminating all of two. And we have Jim, so that's four to three. The sense of those in the - on the call though. So, I'm not sure what - we have a split with a slight majority for keeping two.

Paul Keating: I don't think we have a majority being called a consensus so (unintelligible)...

(Phil): What's that?

Paul Keating: This is Paul Keating. I don't, you know, with a vote of 4 to 3 I don't feel comfortable keeping in any of two.

(Phil): Okay, now...

Paul Keating: I mean, we go on a consensus basis not on a (unintelligible)...

(Phil): And now I think Kathy Kleinman and Rudy just chimed in to delete all of two. If I'm incorrect on that chime and on the phone. Rudy prefers keeping all of 2 in. And Kathy supports David, who wants it all out.

Paul Keating: I think you take it -- this is Paul again -- I'm sorry (unintelligible)...

(Phil): We don't have a consensus.

Paul Keating: ...if you want to talk about first paragraph of number two at the meeting talk about it.

(Phil): Yes, we certainly have consensus - we have probably a unanimity to remove the second paragraph, the only place that we have a split is removing the first. I don't know what we're going to do on that. I need to confirm my Co-Chair, the decision falls to us. All right, are there (unintelligible)...

((Crosstalk))

Peter Dengate Thrush: We have three options here. For those of you that wants to delete paragraph two in the total, would it still be okay for you at this stage to delete the second part of it as an alternative of are you still hardly asking for the full deletion of paragraph two?

George Kirikos: George Kirikos speaking here -- sorry to jump in. I would also support deleting the entire thing because the (PDP) is really (unintelligible) with deciding first whether there should be and alternative and expert report is of kind of a part of our analysis of whether there should be an alternative. And then, you know, once we decide whether there should be alternative that supportable by but the law state of the law in the world, we could say yes or no.

If the answer is no know then we stop -- imagine a flowchart. If we then go on to say then there should be alternatives, I don't think we should (unintelligible) a few that, you know, thinking of because or (unintelligible) the discussion for the (unintelligible), you know, spotting on what those alternatives might be because it kind of, you know, puts the (unintelligible) to people that do want alternative that that's what the expert is kind of suggesting. It's really (unintelligible) group to define that.

(Phil): Okay, and Mary just put - (unintelligible). Yes, I don't think we can ask for rewording at this point. I think it's either, strike it or not strike it, is my sense. There's two minutes left, as Co-Chair - the strong sense of the group is that the second paragraph of two, for purposes of having a document as a focus for discussion in Marrakesh should definitely go -- I'm in agreement with that. There is a split in the working group, on whether the first paragraph or two should go on. I'm going to - I think Peter and I would just confer after the decision - after the call make a Co-Chairs decision.

There's simply no time at this point to do any extensive rewriting of this with the Mary traveling today, I'm traveling tomorrow, Peter is traveling tonight - the next day and then we're up to our eyeballs in work. So I think what we're going to send a very simple ask to the professor and with his consent either delete the second paragraph or all of two. I think either way, whether or not this is the first paragraph in there in the course of that discussion what IGOs do now with - in bilateral contracts and how that differs from the UDRP situation is unlikely to come up in the Marrakesh oral discussion.

So, any final comments since we hit 1:00 pm Eastern and that we draw to the magic hour. George?

George Kirikos: Just really quickly here. I previously sent the link of what the four questions were that the expert was asked. Is the format of his document actually addressing those in order or is he just running a general document which answers them generally but doesn't go specifically 1, 2, 3, 4?

(Phil): I'd have to look back at that? Do you recall Peter or Mary? I know he lists the four questions at the beginning of the memo all.

Peter Dengate Thrush: Peter here...

Mary: This is Mary.

(Phil): Go ahead Mary, we don't want you to miss your plane.

Mary: He does list them (unintelligible) to the four questions. But at the moment the form on which is written doesn't go question by question for reasons that he actually does explain in the draft memo, if I recall correctly.

Peter Dengate Thrush: Peter here. I just (unintelligible) had it in front of me and I agree with that. As you said, he start with introduction of the questions and then he goes through. There are -- as I see it -- there are replies to the questions within his support but not that clear as question 1, 2, 3, 4. But he has dealt with the subject.

(Phil): Okay, all right, it's 1:01, so unless there is a burning question or statement that anyone on the call feels they absolutely have to make. I going to propose that we end the call. I will have a back and forth with Peter we'll decide what the request should be to the professor, and we'll advise all of you. And if there's -- right now the working group meeting in Marrakesh is next Wednesday at 9:00 am local time -- which I think is the same as UTC, I'm not sure but, yes, it's a five hour difference. And we don't to turn the clocks back in the US at least until the following weekend -- or put them ahead until the following weekend.

So, thank you all for your participation. I think this was a very useful call, I'm glad we had it because it certainly -- I think of nothing else -- change in the document in regard to section 2 is something that came out of this discussion. So, thanks all and we look forward to having you participate next Wednesday, either live in Marrakesh or remotely. And the we can stop the call now. Stop the recording.

Woman 1: Thank you very much everyone, (Christine) please stop the recording and this concludes today's call.

(Phil): Thank you.

END