

**ICANN
Transcription
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Coordinator: Recordings have started.

Terri Agnew: Thank you. Good morning, good afternoon and good evening. Welcome to the IGO INGO Access to Curative Rights Protection Mechanism Working Group call on the 24th of August, 2017. On the call today we have George Kirikos, Petter Rindforth, Jay Chapman, Paul Tattersfield, and Phil Corwin. We have no listed apologies for today's meeting.

From staff we have Mary Wong, Steve Chan, Berry Cobb, Dennis Chang and myself, Terri Agnew. I would like to remind all to please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid background noise.

With this I'll turn it back over to our coleaders, Phil Corwin, please begin.

Phil Corwin: Yes, thank you, Terri. And thanks to everyone who's joining today's call. I'm glad to see that Mary has joined. I'm glad to see that my cochair, Petter, has joined during his holiday. My understanding he's only on computer, not a phone line but hopefully that was my situation on the last call, I participated

in. I think that was one where I had some audio difficulties, I can't remember. But at any rate, we're going to get into a revised discussion document today, which is not setting forth any positions, just putting forth different perspectives on the remaining issues to facilitate our discussion.

I do want to note that once we get through this document we're really in the final stages of this working group. We will not be spending the rest of our natural lives on the fascinating subject of IGO immunity. Our aim remains to deliver a final report back to the ICANN community prior to the ICANN 60 meeting in Abu Dhabi which is in late October, so our window for delivering that final report is in the next two months.

My understanding is that staff is already starting to work on a draft final report, much of which will remain unchanged from our initial report and they already have some pretty clear guidance on some areas where we're going to make some changes such as dialing back the import of asserting immunity - asserting WIPO 6ter protections to WIPO.

So we're really down to this final issue about what to do in the - will probably be the rare case of a domain registrant appealing to court of mutual jurisdiction and the IGO successfully convincing the judge that even though it has consented to mutual jurisdiction that it has retained an ability to raise defenses and the judge agrees under applicable law that it's immune from the power of the court in that particular national jurisdiction, and of course that's limited to the relatively handful of countries where statutes exist that allow a domain registrant to bring such a judicial - I won't use appeal but a reconsideration which can set aside the original UDRP decision.

So with that introduction, why don't we get into this document? It's a 16-page document. I'm not sure we'll be able to get through every issue it presents today. I do want to note for the record that on next week's call, I will not be on next week's call, I will be on an airplane at that time and in transit and unable to join but Petter will be chairing that call.

And once we complete the discussion facilitated by this document, we're going to start basically seeking indication from all members of the working group through both meetings and email, since we don't get full participation in the weekly calls, of where consensus may or may not exist on the remaining issues to facilitate proceeding expeditiously to preparing a final report for the working group's review.

So with that, let's dive into this document. On the first page we've got the original text of our preliminary Recommendation 4. I don't think - I think we're all very familiar with that. And there's no need to read it again online; our time is better spent on other issues. So that really takes us to Page 3 of the document which is the discussion of Option 1 with some updated commentary here.

So I think Option 1, and that was one of the two options in our original initial report was that the decision rendered against the registrant and the predecessor UDRP or URS shall be vitiated. And so let's go to the first benefit - reported benefit that it preserves the right of registrants' respondents to fundamental rights of access to national courts.

Disadvantages, not consistent with requests from GAC and IGOs. Of course much of what we've already recommended falls in that category. Unclear if this option is feasible whether ICANN has legal authority to nullify a substantive decision rendered in an administrative proceeding as distinct from staying a proceeding or allowing remedies such as cancellation of transfer.

And subsequent information provided to the working group indicates that a successful immunity plea - and this is under the current practice under the current UDRP rules - would actually preserve the initial panel decision. And then on the discussion and comments, is that while UDRPs can be mistaken, there have been court cases that have reversed initial findings of UDRP

panels, violation of a correct UDRP determination of cybersquatting would continue if the initial determination was correct, the cybersquatting would be permitted to persist.

So let's stop there and I see George has his hand up and but comment on these discussion points. Go ahead, George.

George Kirikos: George Kirikos for the transcript. Under the disadvantages, I'm not clear that Number 2 makes sense because ICANN created the UDRP as a process for the registrars to basically shift the decision making as to cybersquatting to a panel. And it's the registrars who act with regards to implementing the decision of the panel or deferring that to the courts if there's an appeal or if there's an independent court access by either party during the UDRP or URS.

And so to say that it's - whether ICANN has the legal authority to nullify a decision, ICANN isn't here overruling a court, it's overruling a panel that it itself empowered. So it's not - in my view ICANN certainly has the authority to say that a registrar need not implement the decision of a UDRP panel in the event that the entire process, i.e. the court oversight was not permitted because of the IGO's assertion of immunity.

So it doesn't make sense that - to say that ICANN can't change its rules to make clear that if the IGO you know, violates its undertaking to allow the court process to occur by, you know, challenging the court's authority, then that undermines the entire UDRP bargain that was made in the first place. So ICANN certainly has the ability to make sure that its rules recognize that in essence a violation of that undertaking by an IGO, you know, negates the decision of the panel. Thank you.

Phil Corwin: Yes, thank you, George. And speaking just personally, I'm - tend to be in agreement with you. I think we could make this change the way I view it if we - and I favor Option 1 personally, for many reasons, but I think we could do this essentially it could be viewed as a way to say to any IGO look, you

agreed to mutual jurisdiction when you brought the case and if you nonetheless assert an immunity defense, if there's a judicial - I don't want to use the word "appeal" - judicial action related to the UDRP decision, you'll essentially be - if you're successful in that plea you'll be really depriving yourself of any opportunity to have that decision enforced. It'll go away.

So I think we probably could do it, whether we should do it is a different question. So the second reported benefit is that the court would decide the case, and this is already current practice, the court decision is de novo, we know it's based on the national law, not the UDRP standard so it's not strictly an appeal which is a point I've been making on today's call.

And so disadvantages, unclear the vitiating the initial panel determination in such a case as opposed to merely staying enforcement, would provide greater benefits. Unclear also whether remedies that a court can or will order if it finds in favor of the IGO are limited to the original UDRP URS remedies.

Well, you know, in some cases the court, for instance under US statute, I think the court also has the ability to award monetary damages against a party found to be cybersquatting. It has the same options as a UDRP panel in terms of being able to transfer a domain. I see your hand up, George, I'm just going to finish this discussion before calling on you.

Discussion, vitiating the decision only takes place if the IGO successfully asserts immunity, which would terminate the lawsuit and thereby maintains the status quo as if the UDRP had never been filed. The IGO can then decide whether to pursue other kinds of actions such as voluntary arbitration, mediation or intervention by national authorities.

Personal comment on that, I'm not sure once all this had taken place that the - authority of the court had been found to be nonexistent and the underlying UDRP decision was vitiated that you could get a registrant to do anything voluntary that might restrict their use of their domain. As to whether national

authorities would intervene, I have no idea. I think it would have to be pretty high profile dispute. Those are all personal views. George, go ahead.

George Kirikos: George Kirikos for the transcript. For Point Number 1 on that row, somehow it suggested that staying enforcement of the remedy would provide greater benefits. That doesn't make sense to me either because staying enforcement means that there's a UDRP decision out there that still exists but the registrar is not implementing it but it's kind of waiting for something to happen, like to stay on something means that the domain would be in limbo and there'd actually be no court case so what would be moving the process forward?

So to me staying enforcement of the remedy would provide no benefit, it would just keep the domain name in limbo forever, which obviously would have harm to the registrant because they wouldn't be able to transfer the domain name, they wouldn't be able to unlock the domain name. The IGO would have no benefit because the alleged cyber squatter could still keep on doing what they're doing. So I'm not clear where staying enforcement of the remedy has any benefits to anybody. Thank you.

Phil Corwin: Okay. Thanks, George. And if the remedy is - I'm not sure if there's a realistic difference between permanently staying the UDRP remedy or vitiating the decision. In the end the domain continues to operate so I'm not sure - that may be a distinction without a difference in my personal view.

Third point, creates certainty for losing registrant in terms of the process. Expectations of filing a complaint in national court and subsequent information provided to the working group indicates that a successful immunity plea will preserve the initial UDRP panel decision. So it's unclear how vitiation will provide greater certainty.

I'll just say personally I've looked at the UDRP and the rules and it's pretty clear to me that under current practice if a IGO - if there was a case today and an IGO asserted an immunity defense in a national court and the court

agreed, notwithstanding the agreement to mutual jurisdiction, when the original UDRP was filed by the IGO's complainant, the dismissal of the court case would result in the stay on the UDRP decision being listed and the decision being permitted to go forward. So I think that's the certainty today if we made this change it would be a different certainty. And open to comments from working group members.

Okay, let's go onto the next one. Same UDRP URS process applies all the way through the initial administrative proceeding. No special treatment or process just because it is an IGO name or acronym at issue. Further commentary, since the mutual jurisdiction clause remains unchanged in this scenario, the option does not deal with the risk that the court could rule that the IGO has already waived its immunity by agreeing to the mutual jurisdiction clause in the first place.

And then going further, the risk exists for both scenarios, for both options 1 and 2, they only discuss what happens after successful assertion of immunity. If immunity is not asserted or the immunity defense fails, neither alternative is in play. Neither option proposes to touch the existing mutual jurisdiction clause.

And personal commentary by the cochair, I think that's an important point to emphasize. We are not proposing any change in the language of the UDRP. A complainant still agrees to mutual - the entire policy including mutual jurisdiction when it files an action. So we're not doing anything in our report right now unless we went for option 1 that would - that's taking any position on whether an IGO has forfeited the ability to assert immunity as a defense if the losing respondent decides to file a judicial appeal.

So and it's the same UDRP URS process under initial and probably final recommendations for all complainants, not - we're not making any changes for IGOs other than for this successful immunity plea, if that ever prevails in a court. Go ahead, George.

George Kirikos: George Kirikos again. Yes, strictly speaking, we're not changing the legal task that exists from the UDRP panelist's point of view. From their point of view we're not changing anything through option Number 1 or Number 2. Where we are changing the UDRP, we actually are changing the UDRP but it's only basically a modification of Section 4K, what happens, you know, in the event of an appeal.

And that would obviously have to be reflected in the UDRP rules itself in the Section 4K. But it doesn't affect it from the panel's point of view in terms of what the rules are for deciding a dispute. So it's more deciding what happens post-dispute. So technically we are changing the UDRP under both options and probably all six options but - I mean, option 5.

Phil Corwin: Well...

George Kirikos: But we're changing it in very minor part with relation to what the registrar does and under the various scenarios. So that's in 4K basically or Section 5.

Phil Corwin: Yes. George, just to parse it out, I think we're all agreed that nothing we're proposing or contemplating changes the standards by which panelists would decide a complaint brought by an IGO, it would be the same standard as - that would apply to any other complainant. We basically have three different scenarios before us, if there's a subsequent judicial appeal.

One is to leave the UDRP unchanged, and I think there's general agreement that if there - if an IGO asserted immunity and was successful under the current rule, the UDRP decision would be allowed to proceed to completion. Under option 1, which is the second scenario, successful assertion of immunity would vitiate the original UDRP decision as if it had never taken place. And under the proposed option 2, which we're still discussing if the judicial forum was not available the registrant could proceed with an appeal in an arbitration forum.

So I think that's just a factually correct description of the three different possibilities we're contemplating with some additional twists which are - we'll get to discuss further on as we consider this paper. Did you have further comments, George?

George Kirikos: Yes, George Kirikos again. I just put a link to the policy so we actually are changing the UDRP but we're doing it not in a manner that is changing the standard by which the cases are decided, just how they're interpreted afterwards so it's that Section 4K that's going to change under option Number 1 or option Number 2.

Phil Corwin: Right, yes.

((Crosstalk))

Phil Corwin: I think we're all agreed on that point. So with that, seeing no other hands up, next point it ensures that applicable national laws including case law precedence are interpreted by judges qualified and experienced in those laws. Further point, ICANN is to follow the law and not make up its own laws to replace the courts. Choosing anything but option 1 creates a dangerous precedent which will encourage others to come to ICANN to create policies consistent with that or that override the laws.

And I'm going to add some personal commentary here. When we get to option 2 we have discussed to in a way where if there was an arbitration procedure, if the court was not available the judicial forum was not available due to successful assertion of an immunity defense, we could - we could say that the arbitration would be decided under the same national laws and procedural rules as - if it were a judicial proceeding and even require that a retired judge from that jurisdiction be one of the panelists.

So we can ameliorate that to some extent. And that's all the cochair has to say on that point. Any further discussion? Okay, next point, may discourage forum shopping by IGOs. Discussion point, unclear how the possibility of vitiation would discourage forum-shopping when weighed against the potential risk of losing the initial complaint by not choosing a UDRP URS provider perceived as complainant-friendly.

Yes, my only comment on this is that the ability for the respondent to file a judicial appeal is unaffected by whatever accredited UDRP or URS provider the IGO would choose to use to file an action. So I'm not sure it relates to this consideration but that's a personal viewpoint. Anybody have any comment on that? And then we're going to scroll down to the impact analysis for option 1. Okay.

I'm just going to go through these quickly. Point 1 seem to contradict what the working group has been informed would be the legal outcome now if an IGO successfully pleaded immunity. Point 2, vitiation the decision does not change the access by the IGOs to the UDRP URS. And some mitigation IGOs - and this is in our initial report and will still in our final report, can use an assignee or a licensee. And IGOs can selectively waive immunity in certain circumstances.

And certainly an IGO would at least be knowing of the possibility of judicial immunity, and this is a personal comment, would be risking a judge in a subsequent proceeding deciding hey, you can - when you consented to mutual jurisdiction, you not only consented to show up in this court room, you forfeited your defenses to try to get out of being subject to this court's jurisdiction. So that risk remains for the IGO.

IGO must assert its jurisdictional immunity in national courts, possibly establishing a precedent for waiving immunity. Again, IGOs can selectively waive immunity in certain circumstances and I remember in Professor Swaine's memo he said there is an argument for requiring IGOs to waive all

immunity when they file a UDRP because they're gaining its benefit. So we haven't gone that far yet, though option 1 would essentially lead to the same conclusion, I think, it would certainly discourage any assertion of immunity if the success in that regard would result in vitiation of the initial UDRP decision.

Possibility of vitiation may encourage losing respondents to challenge the initial panel decision. I'm going to make a personal comment. I guess maybe at the margins but, you know, if it's not a really valuable domain and if the registrant doesn't really think a grave error was made in the initial UDRP proceeding, that is likely to be reversed by a court and that justifies the expense of going to court, I'm not sure this would encourage a lot more respondents to go to that appeal stage. I'm not sure that's kind of a - my personal judgment.

Yes, vitiating the decision is potentially a worse outcome for IGOs and the currently understood - I think it's a legal status quo reporting to - referring to. I think that's clearly true. The quantity of complaints filed by IGOs could increase. I'm not sure I understand that one - why going for option 1 would encourage more filings by IGOs than otherwise. I don't know if anyone wants to speak to that point. Personally I'm kind of scratching my head.

So that's the end of the impact analysis for option 1. And yes, Berry has his hand up. We'll take final comments on option 1 before proceeding to option 2 discussion. Go ahead, Berry.

Berry Cobb: Hi, Phil. Can you hear me?

Phil Corwin: Very well. Go ahead.

Berry Cobb: I just wanted to point out on this Number 7, it's really kind of an example, a starter example for filling out the likelihood and impact. If you take a look at the text it says, "The quantity of complaints filed by IGOs could increase." But

looking at the likelihood and impact scale says the opposite, that it's not very likely that the number of complaints could increase and that it does seem to be a low impact. Again, this is just an example, it's up to the working group to see whether that is a correct assumption or placement of the likelihood and impact scores .

Phil Corwin: Okay. So, Berry, can you remind me what our number system goes from? I was - 1 seems to be the lowest probability. What's the highest number in this ranking system?

Berry Cobb: So yes, this is Berry. At the very bottom of the document is the legend for the likelihood scale and impact likelihood. A score of 5 is a high level of risk or that it's almost certain to show up whereas a 1 is an exceptional risk or not very likely to happen. And the same for impact. The impact of the scale of 5 is, you know, a high degree of impact where a score of 1 is very low impact.

And, you know, we - right now this is just a draft so if the way the scale is structured we can flip them around, you know, where a 1 impact or change it to high, medium and low. Again this is really just a sample and...

Phil Corwin: Okay.

Berry Cobb: ...as Mary alluded to on the list, you know, this is kind of a result from another working group that data and metrics for policy making, this particular working group is kind of the first one to start this exercise. So we do have a lot of room for adjustment and improvement.

Phil Corwin: Okay so this impact analysis we're kind of the guinea pigs for this new evaluative process, correct, this working group?

Berry Cobb: Yes, Phil.

Phil Corwin: Okay. Yes, so we really haven't filled - are we - let me ask Berry or Mary, are we required to fill in this grid as part of our final report? Are we obligated to assign likelihood and impact numbers for each and every point in these charts? Or is this simply to help us reach a conclusion? I'm going to call on Berry first just to respond to my question and then on George. Go ahead, Berry.

Berry Cobb: This is Berry. It's not specifically required, however, the exercise of understanding you know, this analysis, this risk analysis is (unintelligible) required. Again, we do have a - I think a high degree of flexibility on how to best approach this when the Data and Metrics Policy Making Working Group came up with this, the original intent was you know, this is to be more structured from a data perspective, that is, you know, much more tangible and certainly easier - or has higher applicability to when you're talking about maybe policies about transfers and when you get into quantities of things clearly the draft recommendations that this working group is working on is a lot less quantitative and much more qualitative.

So if the working group feels that this particular likelihood and impact analysis isn't a proper fit, you can agree to maybe scrub this. But, you know, at some - at the end of the day I think it is required by the working group to come up with some sort of impact analysis; exactly what that looks like and how it's framed is kind of again, up for debate.

Phil Corwin: Okay. Hey, thank you. And my personal view, I think using this impact analysis grid is useful in facilitating our final decisions, but if it's not required for us to assign a number to each and every one of these issues, I don't think that'd be a very good use of our time debating whether issue 4 for option 1 should be assigned a 3 or a 4 or a 2 for likelihood. I think just going through the exercise is helpful, but spending time on assigning scores to these qualitative - mostly qualitative factors would not be a good use of time. And with that personal comment I'm going to call on George.

George Kirikos: George Kirikos again. If you look at all these examples, these are all tending to weigh the costs only upon the IGOs. It's only looking at the impact on one party. It's - none of these are actually looking at the impact on the registrant, which would actually be positive impacts. So it's not even attempting to weigh the benefits and costs on all sides; it's only looking at the negative impact on IGOs in this example.

So to some extent this impact analysis isn't capturing the full picture, to capture the full picture you'd actually have to look back at the previous detailed analysis. And so this impact analysis isn't even a summary of the above analysis, it's kind of a one-sided look at the picture.

Also looking at some of these examples that are left blank, for example, Number 5 and Number 6, the IGOs can still mitigate by using the assignee, licensee, so those are mentioned in Number 2 or - as mitigation measures. They could still do the same for this other issues. For Number 5 they don't even have to assert immunity, like asserting immunity is a choice, they don't have to make that choice, they could simply agree to have the case heard and not apply that defense so that's a mitigation strategy if they felt they had a really strong case of cybersquatting. Thank you.

Phil Corwin: Yes, thank you, George. And I think we're all agreed that our final report just as - and our initial report is going to highlight the fact that IGOs wishing to avoid any action that could be interpreted as waiving immunity can - we may clear that - we will communicate to the dispute providers that they should accept complaints brought on behalf of an IGO by an agent, assignee or licensee.

So that's going to be retained in the final report regardless of where we come out on this immunity defense issue. So with that let's move on to option 2, which also is the one - the alternative that was in our initial report that the decision rendered against the registrant and the predecessor UDRP or URS

may be brought before the - some arbitration entity or entities to be designated for de novo review and determination.

And that was kind of the high level option. When we prepared our initial report we hadn't thought about such factors, strengthening factors such as having the case in arbitration decided under the national law, that would have been applied and judicial procedures that would have been applied in a judicial action and/or requiring a retired judge from the jurisdiction to be one of the panelists. So let's go through the benefit, disadvantage and discussion columns.

Benefit 1, more consistent with requests from the GAC and IGO. Disadvantage, it's inconsistent with current UDRP URS provisions. Will require amendment augmentation of the exiting process. My personal comment on that is that it's well within the authority - this working group's been very careful about not making wholesale changes in the UDRP or the URS but it's certainly within our remit under our charter to recommend policy changes in either dispute resolution process. So I just wanted to note that, we're not doing anything impermissible under our charter if we make such a recommendation. Just as option 1 would be a change in the one aspect of the UDRP policy.

Discussion, we need to discuss the specific administering institution as well as specifically applicable arbitration rules such as UNICTRAL, should be recommended as part of the policy if this goes forward.

Okay, next purported benefit, it's familiar and commonly used in commercial transactions including many IGO bilateral contracts. Disadvantage, unclear at which point registration or appeal for the registrant filing or other point, agreement to arbitrate should be sought. You know, I think - thinking out loud I think if the UDRP is changed in any way, people registering domains would be bound. I don't know, let me take an aside here.

Staff, do we know when a typical registrant registering a domain agrees to the registrant's - the ICANN accredited registrar's terms of service? Do they agree solely to complying with the UDRP exists today or does the standard language usually just refer to the UDRP as is and may be amended? That would get to whether we would need any consent from existing registrants for any future UDRP changes. Does anyone know that point?

And, George, you just typed something in the chat. "Does it handle that?" Okay, you just put in the - okay, so basically I'm just scanning this very quickly, not parsing each word. It looks like registrants already agree to the policy as it is today and as it may be modified to be in the future and complainants of course would be bound by the policies as it exists at the time they file a complaint.

Mary, you've got your hand up. Welcome your intervention.

Mary Wong: Thank you very much, Phil. And hi, everybody. This is Mary from staff. I hope you can hear me. I'm actually outside because there's work being done in my house so apologies of any outside noise. But so (unintelligible) this call that probably familiar than I am, but from the staff perspective, there's two things to look at. One is the UDRP that George has posted helpfully into the chat, and the other is registration agreement where there's certain terms that one agrees to when they register. And that would incorporate you know, agreeing to the UDRP and whatever changes.

We just thought we needed to note this because typically for any kind of arbitration that is in the contract, you know, between the two entities that are part of the contract and in this particular scenario, there is no contact between the IGO and the registrant. So we just thought that's something to note for the working group and it's something that would need to be clarified in the report if we go forward with this.

Phil Corwin: Okay. Yes, thanks, Mary. But okay, the discussion comment on the second reported benefit is that the working group is going to review the WIPO secretary 2003 paper on minimum requirements designed to ensure adequate protection for registrants and robust process as well as cochairs elements paper based on suggestions from Paul Keating to ensure that specific guidance and safeguards are built into the arbitration process.

And then George Kirikos had added to that, "I disagree that this is a benefit. Lawsuits are also familiar and commonly used." My personal response to that, George, is that we're only discussing this in the context of where it's gone to judicial forum and the judge has been convinced by the IGO that one, when they accepted mutual jurisdiction they didn't waive the ability to assert defenses, including immunity, in the judicial process; and two, that under the national law, they in fact did have judicial immunity. So we're only discussing this not as an upfront alternative but as a consequence of a judge agreeing that the court has no jurisdiction.

Purported benefit 3, it does not trigger difficult legal questions about the legal implications of vitiating a panel decision as in option 1. And then George has put a comment, he doesn't understand the point at all, there's no difficult legal issues. And then a staff note, we are merely raising the question as to whether disposition of a preliminary procedural matter can substantively have the effect that an otherwise valid UDRP or URS determination is automatically void.

I'll just, again, I've already stated I think we can probably - if we want to say that's the result of successfully asserting immunity in a judicial process, ICANN could probably change the UDRP to do that. It's different from the question of whether we should do that.

I see there's some additional - are these additional points relating to this or just additional considerations? Let's just go through them, however they relate to option 2. Lack of public scrutiny, transparency and accountability

due to lack of full access to arbitration pleadings, documents unlike courts which operate under open court principle.

Decisions under option 2 create no precedence that can be cited in national courts and could require a high degree of transparency to ensure public availability and scrutiny. Appeal panels could be urged to act consistently in any future cases. So I think that covers it and we can require a high degree of transparency and public access to any appeal decisions in this rare scenario we're considering.

Lack of multiple appeal privileges, as exist in national courts. This cochair says absolutely unless we built an arbitration process with an additional layer of appeal, but compared to what would happen now, under a successful assertion of immunity scenario, it would provide an avenue for the respondent that wouldn't exist today under the existing UDRP rules. So it's not perfect but it's from the registrant's point of view, better than the existing situation. All personal comments on my behalf.

Potential divergence between arbitration decisions and those of the underlying national courts, with no opportunity to reconcile. And we do know that courts routinely overturn UDRP decisions demonstrating that access to the courts is essential to protect registrants and concern about rogue extremist panelists to - okay.

So next point, UDRP URS would become de facto law. And then that's fleshed out by courts free to award money damages, grant injunctive relief, etcetera, according to its own national law there's a crucial point. And I think the only thing I'd say, and I know these are yours, George, and let me - let's get through the rest of these and then open it for discussion is that if we say the national law is the standard for the arbitration panel decision, I'm not sure how the UDRP or URS would become the de facto law.

If we're saying that the other - the national law under which the appeal was undertaken should apply as the standard for decision. Take away rights for existing domain name registrants, and then that could be reduced somewhat if option 2 only applied to new TLDs. Personal opinion, I'm going to disagree with that this option 2 takeaways rights compared to the current scenario, I see it as expanding registrant rights by assuring some appeals process where a court grants immunity and says it has no jurisdiction over an appeal brought by a registrant which would be the current scenario.

And then the last purported benefit, may provide IGO domain holders with an additional recourse option after an IGO successfully asserts immunity. And I think I'm the one who inserted this and I already said it so there's no need to say anything further about it.

So that's the narrative discussion of the purported benefits of option 2. Anyone want to speak to any of that before we look at the impact analysis grid? Okay.

Issue 1, denies registrants access to national courts after an IGO successfully asserts immunity. And then mitigation de novo arbitration require elements of mutual agreement about the mechanism to be used, jurisdiction, forum, et cetera.

You know, I got to - I'm going to disagree with the likelihood score here which is 5. Option 2 doesn't do anything to deny registrant's initial access to national courts. And we have no ability to tell a judge whether or not they should find - they should consider an IGO's immunity defense much less grant it. So I'm not sure how option 2 denies access to national courts. This would happen after they're already in a national court. I think the wording on that needs work, personal comment.

May set precedent to create special cases in the UDRP URS for other parties. And mitigation could emphasize unique nature of IGOs and the

international treaties that create them and could make the carve-out provisions here very narrow in scope and specially targeted .

Point 3, inconsistent with the UDRP URS. Mitigation could establish a separate narrowly targeted DRP mechanism based on the UDRP or more narrowly the URS in relation to remedies, burden of proof, et cetera. I'm going to make a personal comment here, I'm not sure option 2 - while it would change one element of the UDRP URS, we have the ability to do that so I don't see how anything we do in that area can be viewed as inconsistent. It could be viewed as a recommended change but of course any change would be inconsistent with the current terms of the UDRP and URS because it's different.

And mitigation, unless we're going to create a narrow separate DRP just for IGO complainants, which is a position we rejected in our initial report and don't seem to want to revive in our final report, I'm not sure that comment is relevant, personal commentary.

Moving on to point 4, requires adjustment by the respondent to the adjusted terms of the UDRP URS. Could require agreement by the respondent only upon initiation by an IGO INGO. Not clear this assertion is correct; need to check language of standard registrar registrant agreement. I think we just covered this in discussion a few minutes ago. I don't know if there's need to discuss it further.

Point 5, arbitration might be an additional step relative to what would occur if an IGO were to successfully assert its immunity under the current system. Well, yes, it would be an additional step because what would happen now is that the registrant would lose access to the court. The court would say I can't hear this appeal and the UDRP decision would be reinstated and affected.

Quantity of cases filed by IGOs could increase. I'm not - well, this is just - I think the low probability ratings assigned here by staff are probably correct. I

don't see why that would - and I see your hand up, Mary, I'm going to call on you in a second.

Final point, may establish precedence creating exceptions for certain parties and that's a note I had put in that seems to be the same point raised in issue 2, so we probably should eliminate point 7.

Mary, did you still have something to say? I saw your hand go down.

Mary Wong: Phil, all, this is Mary. I think you actually did mention it but I believe that that last point where we had, you know, pre assigned a ratings with similar - was put in there for the similar purpose that Berry explained for the earlier impact analysis.

Phil Corwin: Right. It's just illustrative. We haven't really debated these ratings yet and we've already said we may not go through the time involved in particularly since these are mostly qualitative policy decisions, in debating what score to give to each of these points that going through this exercise may be sufficient for our purposes understanding that we need some narrative impact statement in the final report under the new standards.

And I see a quote - let me review the chat room now, see if there's anything we need to get into. And from Jay Chapman, he can't find the dial-in number. Phil, additional arbitration existed, before assessing even the merits of registrant rights versus IGO immunity, I have little doubt that a court would be at the very least tempted and inclined to use the additional arbitrations existence as a basis to punt the case away. That's a legitimate concern for registrants and a disadvantage for option 2.

Okay, point taken Jay. I'm not - you know, who knows what a judge is going to do. I'm not a litigator but in my impression is that judges are generally not inclined to say I've got no power here, unless they really have to. And the fact

that an arbitration alternative exists, I'm not sure how that would weigh on a judge. I guess anyone could argue it either way. But point taken and noted.

And Paul Tattersfield put, "Emirates case in the UK," I'm not familiar with that case. Paul, did you want to speak to that and explain it to us or not. But I'm not sure what that reference is to.

Okay I'm not hearing from Paul Tattersfield so we'll just note that in the chat. And Paul is typing. While he's typing let's go onto - oh, bars UK citizens from bringing cases. Are those domain related cases, Paul? I'm still not quite understanding the relevance here. If UK registrants don't have access to courts by which they could quote unquote appeal UDRP decision, nothing we're discussing changes that. This whole discussion only relates to registrants who have either reside in a mutual jurisdiction where they have such rights or have used a registrar in a jurisdiction where such rights were available.

Okay. So let's move onto option 3, this is a new one. Wasn't in our initial report. Amend the mutual jurisdiction clause to clarify that for IGOs their agreement to submit to mutual jurisdiction is strictly and only in relation to courts disposition of rights in relation to ownership of the domain names in dispute and not in relation to any other claim or remedy.

Purported benefit, it seeks to address was perceived as a key concern from IGOs of having agree to mutual jurisdiction which I think is about possibility of some type of injunctive interference or monetary relief rather than just the decision as to the disposition of the domain name.

Disadvantages, unclear if it's legally feasible or it would hold up in courts. And personal comment, that's a problem we've been dealing with throughout this PDP and that we really can't dictate to a court how it's going to deal with any of the issues relating to theoretical IGO litigation - litigation involving a domain and an IGO.

And discussion comments, while ICANN cannot enforce this on national courts, judicial notice is such limitation might influence the scope of any court decision regard to an immunity defense. So, yes, the court might say, okay, IGO I'm going to take judicial (unintelligible) and my decision will be limited to what happens with the domain name and not whether you should be subject to monetary penalties, etcetera.

I guess one could - would - could assert that that's a disadvantage of option 3 for the registry, might have other - the registrant who otherwise might have a right to monetary relief. But on the other hand, it might keep the case in court and not through it to an arbitration forum if we go with option 2. So impact analysis, not all jurisdiction may recognize the litigation, the limitation or comply with it, I'd add.

Would require amendment to the UDRP URS. That's an issue for a lot of what we're discussing now. And again, here it's within the scope and authority of our PDP and it's up to the Council and Board to decide whether to implement any proposed changes after review of all further impact including GAC advice, noting that we haven't decided whether our final report should be put out for another round of public comment but whether or not we do so, all the GNSO constituencies and stakeholder groups will have an ability to essentially comment to Council when Council considers whether to adopt our report.

And if Council adopts - sends some form of our final report onto the ICANN Board of course that's where the GAC has the ability to forward GAC advice to the Board on whether the Board should adopt some or all of the final report assuming Council adopts it. So there is some further input from the community regardless of whether we have a second round of public comment on the final report.

Final issue, may establish precedence of creating exemptions for certain parties. And again, the final report could emphasize the narrow nature of this exception and the working group's view that it should not be the basis of any broader action for non-IGO parties. And so we'll leave it to that. And, George, you have your hand up so go ahead and comment.

George Kirikos: George Kirikos here. Yes, I think option Number 3 is kind of raising the issue of the - of quasi in rem jurisdiction so it's saying that the dispute should only be limited to the outcome of the domain name and to that extent when it interfaces and interacts with options Number 1 and 2, because this wasn't necessarily meant as a standalone option, it could be used in conjunction with option 1 or option Number 2, it kind of affects the probability that the court will end up in the outcome of saying yes, you have immunity because here you'll say yes you have immunity for other non-domain name dispute related issues but in terms of immunity for deciding the domain dispute, if we change the language according to option Number 3, then the court would continue to hear it.

So it kind of reduces the path to that situation where you have to go to arbitration or have to vitiate it. So and that's kind of interacting with the other options. Thank you.

Phil Corwin: Yes, George. And at the top of option 3 there is a note that it could be a standalone element or added to option 2. I think you're correct, it could be added to option 1. I think it's probably - it's mostly been considered as an additional element rather than standalone.

In my personal view, you know, you can't predict with any certainty how a given judge and a given judicial appeal might act. But by providing - it would give the - I think the registrant who brought the judicial appeal would have the ability to request that the court take judicial notice of this additional element and it might influence the court to keep the case within its - within the courtroom rather than grant full immunity to the IGO if it said, okay, IGO, you,

you know, you're agreement to mutual jurisdiction was not for monetary damages or injunctive relief, but the way I'm reading this you did agree to have the disposition of the domain decided by a court.

So it would still require the court not to grant those monetary damages but there's no - just because monetary damages are in a statute doesn't guarantee that a court is going to award them in any given case. So that's all personal commentary. You had further comment, George?

George Kirikos: George Kirikos again. Yes, Petter in the chat room mentioned that a court might not accept it and I think - I'm not sure which aspect of accepting it he intended, but we do know that IGOs are capable of waiving their immunity so option Number 3 would clarify that the language of the waiver so it would make sure that it's a waiver of immunity in clear and unchallengeable language but then limit that waiver of liability to only affecting the outcomes of the domain name. So I'm pretty sure that IGOs are capable of waiving immunity, we've got that from the legal expert already.

So this would just clarify the existing language where it says, you know, mutual jurisdiction which doesn't actually use the word "waiver" but I'm assuming that if we go with option Number 3 as an add on to option Number 1 or option Number 2 we would make the language more bullet proof. Thank you.

Phil Corwin: Yes, thank you, George. And I think, you know, personal view, I think option 3 has considerable merit. I'm going to think about it some more but I think it's kind of got some - it shows a desire to limit the potential impact of any national court decision on IGOs. That's a benefit for the IGO and I think it may at the margins incline a court to keep a case within its jurisdiction rather than say we have no jurisdiction here and grant full immunity. So I think there may be some mutual benefits to both parties by using option 3 as an add on.

And I note Petter's comments in the chat room. I'm going to move on to option 4. I notice we're making good progress. I don't know if we'll complete

this discussion today but we've got 20 minutes left and we're on Page 10 of the 16-page document so we've completed more than half the document in our first hour.

So I appreciate the cooperation of all the working group members as we try to expedite this process. And yes and noting that Petter agrees in the chat room that adding it to option 2 would likely make the arbitration possibility more rare. Whereas Paul Tattersfield doesn't think option 3 really adds anything that's not already there. I'm not sure I agree but let's move on. This is just initial discussion. We're going to get back to all of this when we start taking the temperature of the group as to which way we should go in our final report.

Option 4, try out option 2, just for newly created domains. I assume that's for domains created after final adoption of whatever is recommended if it gets all the way through the ICANN process by the Board and is - goes through the implementation stage. There's a lot in this working group that has to happen before any of this becomes operative.

While preserving full legal rights under option 1 for grandfathered domains. Thus we impose the obligation on ICANN the UDRP URS providers, etcetera to provide a future review working group, the ability to go back and double check, no negative consequences if we try out option 2 as an experiment.

And note this option contains elements of option 1 and 2. So has similar benefits and disadvantages as identified for 1 and 2. So just to clarify, I think I'm reading this correctly, Option 4 is basically saying let's implement option 1 for all previously existing domains and option 2 for all domains that come into existence after the date of implementing our final report and then mandate a review of the impact of option 2 at some future date before it could be considered for imposition on older domains.

So let's go through the benefits and disadvantages purported benefits and disadvantages. Seeks to allow for conservative introduction of a new

mechanism by building contingencies. Category mechanism may disadvantage some registrants based on an arbitrary cutoff date. Creates undesirable complexity and uncertainty especially in regard to grandfathered DNS acquired by a new registrant after this policy was implemented.

That's language I put in, I think it just points out that I think we need to grapple with the issue of what happens with a domain registered before the implementation domain but transferred - but that either goes back, that's dropped and goes back into the pool and then is reregistered in the future or that's transferred to another registrant after the implementation date.

It seeks to reserve judicial options for a so called grandfathered domains. Disadvantage, unclear why grandfathered domains should have this additional option, not available to new registrations. I guess that's why should we have two different policies based on date of registration?

And comment, judicial option not eliminated by option 2. Option 2 addresses what should occur after amigo successfully asserts immunity in a court of mutual jurisdiction, which could occur today. And that this grandfathering provides no certainty to domain name registrants or IGOs in regard to that scenario. I authored this language so I'm going to say mea culpa, I don't think I understood that this was proposing to implement option 1 simultaneously. So that probably needs correction in this commentary.

So I think it is correct to say registrants with grandfathered domains would have no appeal mechanism if the current rule for losing respondents was maintained in a successful immunity assertion scenario. Noting that the author of Option 4 has proposed to provide option 1 for such older domains.

It - George, I see your hand, I'm just going to read this last box and then we'll call on you. Builds in data driven review of the new mechanism. May be - comment - may be perceived as creating inconsistencies in existing procedures. And further comment, this element could be integrated into other

options and review of the policy is envisioned as part of the GNSO PDP Manual actions.

So let's stop there and take comment from working group members. Go ahead, George.

George Kirikos: George Kirikos. Yes, I appreciate you recognize that error for Row 2, the working group discussion. That contingency is accounted for in terms of options Number 1. Going back to the first row, the second disadvantage, it actually - the proposal doesn't say it in the summary above but the proposal itself said that we would go by the creation date and so the transfer of a domain name doesn't affect the creation date at all.

So it's only if a domain name is deleted that there would be a difference. So that complexity doesn't really exist because similar rules are in place, for example, different versions of the RAA for registrars depending on what date they - what version of the document they agreed to, different imposition of the URS only on new gTLDs and not on legacy gTLDs and so on. So it's not as complex as some of the other policies that already exist at ICANN. Thank you.

Phil Corwin: Okay. Points noted, George. Impact analysis for Option 4, noting that it contains both option 1 and 2 as elements so some of the issues identified for those options may also be applicable here. So these are additional issues related to Option 4, with no score or mitigation - no score assigned to them or mitigation noted. Different registries treated differently based on registration date. Consequences for IGOs asserting its jurisdictional immunity differ based on the registration date of the domain. I think that's intended in Option 4.

And it creates inconsistencies within the process. Taking George - what George just said, maybe the word should be differences, rather than inconsistencies but there would be different treatments for different domains.

And we're down to 13 minutes left and two pages left so I'm going to go into sprint mode here and see if we can't at least get through initial reading of what's left and then open it for discussion with the understanding that there can be further discussion on the next call which, as noted, I won't be participating in. And then we'll start trying to gauge the temperature of the working group on which way we should go.

And Option 5, do nothing since the current UDRP requires that complainants waive any claims to ADR provider but there is no similar provision for respondents. And the purported benefit is that it does not require any change to existing mechanisms and the impact analysis is that the fundamental premise is inaccurate. I'll note for the record that this Option 5 came from Paul Keating. We've repeatedly held out to Paul to please explain it further to us and he has not taken advantage of that opportunity and noting George's comment which is also in the impact analysis that the underlying premise is incorrect, so we don't need much discussion for something based on an incorrect premise.

And unless Mr. Keating joins us again by email or on a future call and argues for Option 5, I'm not sure it's going anywhere further other than being noted as having been presented to the group.

Option 6, change the text of the UDRP rules to clarify coverage of in rem, in personam and quasi-in rem actions. And benefit for in rem or quasi-in rem cases the only issue is the fate of the domain name. Disadvantage is the limited evidence that courts internationally recognized in rem or quasi in rem actions.

I know they exist in the US under the Anti Cyber Squatting Consumer Protection Act, I have no idea whether that's a fairly unique feature for US law. I'll take - so I'll take the disadvantage on its face as having some credibility. And benefits, successful assertion of IGO immunity is assumed to

only result in the dismissal of the personam aspect of the lawsuit allowing the in rem portion to proceed in the courts.

And disadvantage could result in a policy where registrants whose domain name disputes are litigated in certain jurisdictions have greater advantage than those elsewhere. You know, I'm not sure that registrants who - I'm just thinking of the US example, that registrants residing in foreign jurisdictions who are dragged into a in rem case in the US because it's a - the registry operator is domiciled in the US or they chose to use a US registrar, would view in rem jurisdiction as an advantage since without it they wouldn't be in the case in the first place. But that's a personal commentary.

Mary, your hand was up first and then I'll - so I'll call on you and then on George.

Mary Wong: Thanks, Phil. This is Mary from staff. So just to follow up on the introductory comments, Phil, that in terms of the international recognition of in rem or quasi in rem actions, what we meant to include here, and please note that we aren't legal process experts on this, but that there is some research that shows that there are a lot of jurisdictions that have not yet considered this question. So it actually is an open question whether a number of jurisdictions besides the US and Canada would in fact recognize and allow for these actions.

And the second point to that is what we have not investigated is whether or not even an in rem action might be treated differently in a civil law jurisdiction versus a common law jurisdiction. So that was the point we were trying to make in the first bullet point here.

And in terms of the I guess the distinction between jurisdictions, again, we were thinking about registrants who would not be able to file in a US or Canadian court potentially because they registered in a gTLD or - and/or, you know, they're domicile and/or registrar just does not have the jurisdictional

connection to the US that - or Canada that would be necessary. I hope this is helpful. Thanks, Phil.

Phil Corwin: Yes, thanks, Mary. And I see George's hand up. I'm going to call on him. The thought I had is that would this - and it's talking about changing the UDRP rules, I don't know if we can - if that would suffice or whether we'd need to get into the - change the text of the policy as well. But would this be viewed as saying if a registrant - let's say US registrant, a registrant with access to the US courts files an appeal to an adverse UDRP decision under the Anti Cyber Squatting Act, I know that currently some US registrants who feel that the original decision was wrong, and that the filing was abusive, the complainant was abusive, seek monetary damages in an ACPA case.

So would this be saying to registrants that you know, you can not only seek to overturn the underlying decision to transfer the domain but you can't go after the monetary damages? That's what we'd be getting at that might - should probably be added as a disadvantage for the non-IGO party.

George, your hand is up.

George Kirikos: George Kirikos again. Yes, the summary option of Number 6 is kind of a scan and one would have to go back to the original email to the mailing list. But basically this is clarifying the language again in 4K, we're talking about the availability of court proceedings because under the language of 4K it says that we will then implement the decision unless we received from you during the 10 business day period. Official documentation, blah, blah, blah, that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted.

So what this would do it would change the language slightly so it doesn't necessarily have to be a lawsuit only against the complainant, it could also be an in rem or quasi in rem lawsuit. And it probably also involves an in personam lawsuit as covered by the existing language. So that in the case

the IGO asserted immunity it would only eliminate the in personam aspect of the case and so the quasi in rem and/or the in rem aspects of the case would still survive that kind of immunity defense.

And so this would further reduce the number of cases that would go to option Number 1 or Number 2 because it limits the scenarios in which you actually get there because it clarifies the immunity question. It allows the case to proceed in the in rem scenario. So it kind of interacts with option Number 3 as well but it's obviously an option that can be added on to the other options to kind of limit the number of cases that actually arrive at Option Number 1 or Option Number 2 or Option Number 4 if we go that way. Thank you.

Phil Corwin: Thanks, George. And noting that we're down to the last five minutes, looking at the impact analysis not all jurisdictions recognize in rem or quasi in rem actions, we've just discussed that. Will require amendments to the UDRP URS. Again, we have that authority. Although our authority - I'm not sure - as I read this proposal it seems to be proposing that we change this as a general matter for all UDRP cases and not just for IGO cases. I think we'd have to look at whether we have the authority to make such a general recommendation rather than an IGO-focused recommendation.

And could establish precedent creating exceptions for certain parties or different - I guess different rules for certain parties. Well, a lot of what we're looking at falls in that category. So we've got four minutes left on today's call. I'm delighted to note that we've completed initial review of the impact analysis for all the final options before us and combinations thereof.

George, you have a final statement on this?

George Kirikos: Yes, I just wanted to address Mary's points earlier about the applicability of international law. I think a lot of this in rem and quasi in rem action actually descends from admiralty law from my reading, like the laws of boats and things like that. And so I think a lot of the nations actually would have those

kinds of laws on their books and those could be massaged to be applicable to domain names if they're relatively immature legal systems. But I think all the nations whose laws descend from British common law which would include Canada and the United States, it would naturally apply there.

And for the largest registrars that are either based in the United States, for example, dotCom, dotNet, dotOrg, it would obviously cover a huge number of registrants. The availability of this kind of action would not just necessarily be limited to the mutual jurisdiction but it would also apply to any good jurisdiction. So for example in the case of a Canadian registrant like myself, the IGO might agree to the (anterior) jurisdiction, but conceivably I could sue in Virginia, you know, the location of the registry and that would be as valid a jurisdiction as any other. Thank you.

Phil Corwin: Okay. Thanks, George. With about a minute and a half left, we have completed our review of the impact analysis which is great. I wasn't sure we'd make it all the way through today. And so I guess in our next meeting we're going to start discussing taking the temperature of the group as to which way we should go with these options and recognizing that we have not had full participation from all working group members in our calls. We're probably going to be trying to reach out to poll the working group to see where consensus lies on these.

And I believe our next meeting - our meeting is next Thursday at the same time and as previously noted, I will not be able to join that call and Petter will be chairing it. So do we have anything, Mary I see your hand up, anything else to cover before we adjourn for today?

Mary Wong: Thanks, Phil. Actually you did make one of the points that staff wanted to make in that in terms of coming to a conclusion on this particular topic with the multiple options and manifestations, we have not had full participation on these calls. What we can do as staff is to send a note to the mailing list to

note that this was an important discussion and that folks should review the transcript and the document and weigh in if they can.

On that note, it really would be helpful from our perspective to get some kind of clear indication from the group as to where the group wishes to go with this topic because I will say that the one part of the draft final report that we are finding it really hard to finalize on the staff side as a draft for everyone to review is because this particular topic is still not yet resolved so it's kind of a gap at the moment in the report.

Phil Corwin: Yes, thanks Mary. The one - thanks for that. The one thing I'd add is that on some of these, particularly Option 6, if there's serious interest in Option 6, I think we're going to need some further research and discussion to peel back a few more layers of the onion because we don't have full understanding of this in rem and quasi in rem actions as to what's involved and what jurisdictions do or don't recognize such actions. And whether we're doing this just for IGO cases or for all cases. And if it's for all cases whether it's within our remit under our charter.

So that's it. Thanks, everyone, for participating today. And I won't be on the next call but I hope it's productive. I'll continue to participate by email on these matters. Thanks very much. Bye now.

Terri Agnew: Thank you, everyone. Please remember to disconnect all remaining lines and the meeting has now adjourned. Operator, (Darrin), if you could please stop all recordings? To everyone else, please remember to have a lovely rest of your day.

END