ICANN Transcription
IGO-INGO Curative Rights Protection Mechanisms WG
Thursday, 06 October 2016 at 1600 UTC

Note: The following is the output of transcribing from an audio recording of IGO-INGO Curative Rights Protection Mechanisms WG on the Thursday, 06 October 2016 at 16:00 UTC. 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. Attendance may be also found at:
https://community.icann.org/x/DBK4Aw
The audio is also available at:

http://audio.icann.org/gnso/gnso-igo-ingo-crp-access-06oct16-en.mp3

Coordinator: The recordings have started.

Michelle Desmyter: Thanks so much. Good morning, good afternoon, good evening. Welcome to the IGO-INGO Curative Rights Protection Mechanisms Working Group Call on the 6th of October at 16:00 UTC.

On the call today we do have George Kirikos, Jay Chapman, Philip Corwin, Mason Cole, and Paul Tattersfield. We have apologies from David Maher, and Lori Schulman will be joining us later in the call today. From staff we have Mary Wong, Steve Chan, Emily Barabas and myself, Michelle Desmyter.

As a reminder, please state your name before speaking for transcription purposes. Thank you and I'll turn the call back over to Philip Corwin.

Philip Corwin: Thank you. This is Phil. Welcome everyone as we continue to wind up our work. Anyone have any updates to their statement of interest? All right,

hearing none. By the way, Petter will not be with us today. He's traveling today and cannot join the call, so only this co-chair will be on. And we're going to be reviewing a new draft of section six of the report. This is the most important section of our preliminary recommendations. So the other sections laying the groundwork are also important, and we're waiting on drafts of those and then we'll start reviewing them as well.

So our agenda today is to try to complete discussion of the various policy options in the wake of receipt of Professor Swaine's analysis, the potential applicable use of the UNCITRAL rules and the issue of cost for IGOs to use curative rights processes. And so why don't we get going here? And there is a new draft in the window, which I believe was distributed prior to the meeting.

This new draft is completely clean. So. Can I see a show of hands how many working group members have had a chance to review this new draft, or is it something that most of us are - if you've had a chance to review it, raise your hand or check - George has had a chance. No one else. Jay has had a chance. And Mary, go ahead, Mary, you have something to say.

Mary Wong: Yes, Phil, thanks. And apologies that in the PDF conversion that it seems to have put everything as a clean copy. But what I wanted to note for the working group is that to the extent we're looking at the policy options, which are on Page 11 of the new draft, those have not changed in terms of the text from the last version that was circulated. We were awaiting further discussion before making any other changes to this section, or this subsection rather.

Philip Corwin: Okay. So Page 11, you say that hasn't changed. Okay. Why don't I do - why don't - let me suggest this as a way to proceed, and Jay, you can uncheck that now. We're - we've gotten not everyone has reviewed this. Why don't we just read the current - had any - Mary, is any of the text in the actual recommendations one, two, three, et cetera, has that been changed from prior drafts?

Mary Wong: Phil, I am looking back right now and I believe that the actual text of the recommendations, that is the parts in bold, those have not changed. What has changed from last week is the accompanying text that adds more context to the bold recommendations.

Philip Corwin: Yes, I'm having trouble, I'll admit. As co-chair I'm having trouble with figuring out how to proceed because there's nothing - we don't want to spend the entire hour reading through every word of this but there's nothing to indicate on this PDF where we're looking at new language. So in a discussion of whether we're comfortable with the new language, I don't know how to identify it.

Mary Wong: Phil, this is Mary. If you want to look at just the options, then that would be the old language, but if you'd like to review the changes that were made to the preceding text, we can try and see if we can get a redline version up in PDF (unintelligible).

Philip Corwin: Yes I do have the - yes on my desktop I do have the redline version that you sent, the version of October 4, which does show changes and comments. So let me, you know, let me reference that and take the group through the ones - I'm not going to go through the comments right now, but let me discuss where there's significant changes and let me just - whoops, okay. All right let me see what's being uploaded here. It may be the same document as the one I'm looking at.

Mary Wong: Yes, we're trying this again, Phil. So it should be coming up and - oh there you go. So you've got the redline up in PDF, if that's helpful.

Philip Corwin: Right. It is un-scrolled. Let me zoom it up a little bit. Okay. So if everyone - this is much more useful. There's, as you can see on Page 2 here, there's some significant changes to the language in the first full paragraph, which is an explanation of our rationale for our conclusion that the UDRP and the URS

do not need amending in order to address the needs and concerns of INGOs and that a new curative rights process is applicable to them, if not necessary.

So - and then the changed languages in point two, unlike IGOs who may claim jurisdictional immunity in certain circumstances, INGOs are not hindered from submitting to the jurisdiction of national courts, et cetera. The group's research indicated that some INGOs regularly use the UDRP to protect their rights.

Point three, there's the other substantive rewriting. Although some INGOs may be concerned about the cost of using the UDRP and the URS because enforcement through these RPMs involve some expenditure of funds, this is not a problem for all INGOs nor is it unique to INGOs as rights holder. Furthermore, the issue of ICANN subsidizing INGOs to utilize the ERPs is outside the scope of the working group charter. That language looks fine to me, the revised language. Anybody have any comments on that? Okay.

Mary Wong: Hi, Phil, this is Mary again.

Philip Corwin: Yes?

Mary Wong: So just to note that we left Paul Keating's comments in the document, and really it was just to be sure that the working group had considered the comments and the text and are fine with the text as is. Thank you.

Philip Corwin: All right, I'm just looking at those comments to see. And everybody else take a look if you think there's anything that Paul has said -- he's not on the call with us today -- that we should be discussing. All right, let me open it up. Does anyone see anything in Paul's comments that isn't incorporated in the new language that they believe should be? I'm going to leave that question out there for about 20 seconds and then move on if there's no input. Yes, Mary?

Mary Wong: Sorry, this is Mary again. So just from the staff side, it seems that most of his comments were about the phrasing, and we've tried to be as accurate as possible. The other comment that he had related to adding more context. For example, what is the (unintelligible) list and what are the organizations on it. And we plan to deal with that in the deliberation section that we're still drafting.

Philip Corwin: Yes. And I - thank you for that input, Mary. I think that is more appropriate for that kind of technical detail to be in the introductory sections rather than the recommendation sections, would be my view.

So let's move on to the next area. Page 3 is pretty well untouched. Page 4 there's some new language at the top under the UDRP and URS. The first substantive element that a complainant must satisfy under both procedures is that the complainant has rights in a trademark or service mark. So that's a little clarified. And there's some new language below that in red. It's generally accepted that the threshold may be satisfied by establishing either ownership or exclusive license rights in the trademark or service mark. So.

Any comments on that? Okay. Then at the bottom there's - it's suggested - well it's in there, so that addition, the Paris Convention doesn't establish procedure, et cetera. My only question is why that stops there rather than being integrated into the full paragraph that starts right after it. It seems to be a little strange for it be a standalone sentence.

Mary Wong: Hi, Phil, this is Mary. Are you talking about the bottom of Page 4, the single sentence?

Philip Corwin: Yes, the single sentence.

Mary Wong: So I think here what we can do is include the procedure here or maybe a footnote to that procedure and we can either, like I said, include the procedure here or it's something that we could put in the deliberation section

as well. But in either case, what we can do is look at making the change less abrupt.

Philip Corwin: Yes. There's something where it's just not sitting out there as an isolated sentence, masquerading as a paragraph that needs to be connected to something else.

All right, moving on to Page 5, there's some revised language in the first paragraph, as discussed further below. And then a parenthetical in, and there'll be a cross-reference. The working group believes that this limitation reflects the other substantive grounds of the UDRP and URS which require that the respondent have no legitimate rights or interest in the domain that is identical or confusingly similar to the complainant's mark and his register and used the domain name in bad faith.

And that's a comment on the proceeding sentence, which is about substance of the Article 6ter, which references names, among other things. Continuing on, I'm just going to - is this another comment, Mary?

Mary Wong: Yes it is, Phil, if I may. And this ties in to the further discussion below under recommendation three. And I think some of Paul Keating's comments here are basically that the point that we want to have a conclusion as to whether or not the - there is a match, more or less, between those remaining substantive grounds on the UDRP with the limitation in 6ter about the confusion caused by the use of the IGO's name. So depending on whether there's any additional text or changes to that, then we will need to conform all the references to that specific point.

Philip Corwin: Okay. All right. I'm looking at Paul's extensive - are these all Paul's comments in comment 10 and 11?

Mary Wong: Yes they are. Essentially the only comments that we've retained are Paul's, and I apologize to Jay that we haven't looked at the comments he lately

made to the Google Doc. We didn't know you had, and we will look at them later today.

Philip Corwin: Okay. Okay. Well Jay's on the call. If Jay wants to bring up anything at any point when we get to something to comment on, he should certainly intervene if he wishes to. So. All right so from Paul's comments, is there anything we incorporated in the language or has most of it been left out? The first part of his comment makes the statement that 6ter doesn't provide for any trademark rights.

You know, it's difficult to describe the 6ter protections. They're not trademark rights but they are protections within trademark systems. So I don't know if that first paragraph we could - want to move some part of it into the full discussion just for further clarification. I don't think we need to reference all the language here. It might be footnoted the actual language of 6ter.

Okay. And then let's move on to the next - the rest - his comment on 11 isn't relevant to the refined language in the middle of the page. So as to enshrine this recommendation as part of a binding consensus policy and contractual agreement with ICANN's contracted parties, the working group recommends that a binding policy guidance document be prepared that will describe the scope of the standing issue for IGOs as well as any other points that may warrant clarification, should the council and the ICANN board accept these recommendations.

Paul's comment says he has difficulties agreeing no additional documentation is required. Well I don't know that we're saying it's required, I think we're recommending that it be done for guidance. I really personally have a difference with Paul on that. I see no harm in providing an additional guidance document to give guidance to the many IGOs out there regarding their standing to utilize the curative rights processes.

Paul thinks the UDRP language is sufficiently broad and it's also in the URS. I agree, but what's the harm in having a guidance document that points all that out and that then explains that the 6ter registration should be sufficient to a third standing? So, I'm fine with the recommendation as is, and we might add a sentence indicating that the clarification should reference the existing language of UDRP and URS and related to the language of Article 6ter, would be my suggestion.

Okay? No comments from the group, so I'll continue to narrate. Recommendation three, for IGOs the working group does not recommend that any specific changes being made to the substantive grounds upon which a complainant may file and succeed on a claim against a respondent. In addition to IGOs - in relation to IGOs however, the working group proposes that the limitation enshrined in Article 6ter of the Paris Convention be considered an approximation of the remaining substantive grounds of the UDRP and URS with respect to the required findings that the respondent possess no legitimate rights in the domain name that's identical or confusingly similar, and has registered and used the domain name in question in bad faith.

Now Paul has commented that it could be argued that paragraph C operates as a condition for the recognition of the right and this condition presents a higher burden for the complainant because it's not merely a text-versus-text comparison but necessarily includes establishing an element of confusion at the level of the public. I guess he means among the public.

Well the confusion, you know, my impression is that the panel doesn't look at the actual use of a domain name to see whether the confusingly similar domain name is being used in bad faith. So I think it's covered in that way. We might add a sentence relating those two things, but I don't think there's a higher burden of proof on a IGO complainant than there is on a non-IGO UDRP or URS complainant. Any opinion on that from the group?

Mary Wong: Phil, this is Mary again. May I follow up?

Philip Corwin: Yes.

Mary Wong: Thank you. And this is something that we would, on the staff side, appreciate some guidance from the working group. We put in this language really to draw the group's attention to this substantive point, because we don't believe that this is something that has been discussed in as great a level of detail as some of the other issues that we've been discussing.

One thing that we wanted to be mindful of is that our recommendations, as I think we'll all acknowledge, should not confer or create additional rights beyond what's already available. So given that 6ter seems to have this limitation, as we're calling it, and there are other substantive grounds under the UDRP and the URS, this is the reason why in the text that you see before you use the word approximation, we agree with Paul that it's not a text-for-text comparison. We don't have an opinion as to which is the higher or lower burden.

But we just wanted to get a sense of the working group as to whether or not the fact that there is a limitation in 6ter and there are these other conjunctive grounds under the UDRP and the URS where they're taken together, that's kind of a similar limiting universe and doesn't create additional rights, if you get what I'm saying.

Philip Corwin: Right. Well - again, all this is talking about standing. We're saying that an IGO which is not registered its name or acronym as a trademark can still go after an alleged infringer through UDRP or URS if it is registered and identical - a domain that's identical or confusingly similar to the name or acronym, provided that the IGO has registered for Article 6ter protection, which is protection within national trademark systems of all the signatories to the Paris Convention as well as all World Trade Organization organizations.

By the way is that - is the signatory and WTO coverage mentioned here? We've been skipping over portions. If it's not mentioned, it should be to make clear that virtually, not all virtually all of the nations of the world have - are tied to Article 6ter one way or the other. Is that in the text yet? If not, I would suggest it be added.

So anyway, we're basically telling the UDRP and URS providers that if an IGO files and they don't have a trademark but they're asserting standing based on Article 6ter, the complaint should be allowed to proceed. I can't imagine that any of those providers is not going to do that. It's going to say it's insufficient.

And then we're saying that they decided under the normal course of the UDRP or URS, which both require a finding that there's no legitimate rights or interest in the registrant in the domain name and that it's been registered and is being used in bad faith. And the use in bad faith, I would think and maybe we need a sentence to point it out, if you're using it in bad faith, you are trying to confuse the public as to the identity of the owner of the domain and trying to confuse them that the domain is one of the IGO rather than one of the actual registrant, who is not the IGO.

I don't see a big - a lot of daylight between those two. Even though there's somewhat different language in 6ter and in the language of the UDRP and URS policy, I don't see a lot of daylight between them in terms of actual application by panelist. Does anyone else - does anyone think there is and that we need to say anything more about that? Is everyone still awake?

Well - Mary go ahead.

Mary Wong: Phil, this is Mary.

Philip Corwin: We know you're awake. (Unintelligible), I'm just trying to encourage some input from participants.

Mary Wong: I see that Reg has her hand up and so I'll defer to her. You can come back to me after Reg has spoken.

Philip Corwin: Okay sure. Go ahead, Reg.

Reg Levy: Thanks. Sorry to take your spot, Mary. I confess that I have not been following this very closely, but I wanted to know if we think that this going to be an appropriate substitute for simply reserving all IGO/NGO (unintelligible).

Philip Corwin: Excuse me, what's the question?

Reg Levy: Do we think that this is going to be a replacement for reserving all IGO/NGO names at the second level? Because currently a lot of them are reserved.

Philip Corwin: Well if they're reserved, anything that's reserved couldn't be registered as a domain name. But the reservation may only be for their full names, it may not be for an acronym and it certainly wouldn't be for typos of either. So we still need - it's not a complete substitute. Reservation accompanied by blocking provides some degree of protection but not total protection. That would be my view.

Reg Levy: Okay. So the massive list of IGO/NGO names that registries are forced to reserve is not going away? This is just in addition to that?

Philip Corwin: Well let me mention here -- it seems like an appropriate time -- staff just advised the co-chairs very shortly before the call that we expect within the next 24 hours to see actual text from the board reflecting some final outcome for their talks they've been having for well over a year with the GAC and the IGO small group on permanent protection for IGOs. We have no idea yet what the content is.

So what the board wants to do about reserved names will probably be reflected in that document. Unfortunately as a consequence of the timing, we don't have that document before us. I'm sure as soon as it is available that staff is going to share it with the entire working group, and we'll probably want - going to want to devote our next call to some discussion of that document to see whether and to what extent it impinges on our work and what we want to say about that. But we don't have it yet.

But yes, blocking - reserved names and blocking is different from ability to use the current curative rights processes. When an allegedly infringing domain is registered and even if both the acronym - full name and acronym are blocked, that wouldn't affect the possibility of a typographical variation being registered and used in bad faith. So they still need something beyond blocking because we're not going to block every typographical variation of full name and acronym. I would hope not, but we'll wait to see what the board recommends.

Mary, let's go back to you.

Mary Wong: Thanks, Phil. Actually let me follow up on your discussion with Reg. So for the record and for those working group members that may not be following the whole topic beyond just the scope of our working group, the list of IGO names and abbreviations that are currently under reservation at the second level, those are interim in some way in the sense that for the acronyms this remains an outstanding issue.

So depending, as Phil says, on the outcome of the small group's work and its review and reception by the GNSO and the GAC, that could go away. Under the GNSO policy that was adopted by the board, the full names would still remain reserved.

So in essence, when we get to the end of this process, we could end up with a combination of blocking type protections, for example for the full names at

the second level, and certain different types of protection for acronyms at the second level, which Reg I think goes to the essence of your question. So it would be I guess a holistic sense as to whether or not those are adequate, objectively speaking, and whether or not they are a replacement I guess would be a matter of opinion at that point.

Then Phil, going back to the question of this approximation between 6ter and the UDRP and URS, like I said, you know, we put it in there just to make sure that it got discussed. As you noted though, you know, we're using 6ter for the purposes of standing. So, you know, essentially what we could do with this particular recommendation three is simply to just leave it as the - basically the first sentence.

So essentially we just say look, we're not recommending any changes to the UDRP and we're certainly not recommending any changes to the substantive grounds, we're simply saying that for the first ground for standing, here's what would apply for IGOs. Then question as to, you know, whether or not the remaining substantive grounds of the UDRP are the same or are not the same as 6ter, is not something that we would address but presumably that is something that as the jurisprudence evolves, then, you know, we would see what the limitation of those are under the UDRP. So this is just one other way that we can deal with this question as well.

Philip Corwin: Okay. Yes thanks, Mary. And maybe, you know, a thought to give staff a little more to do, because I know they don't have enough to do, maybe we could add a sentence to the follow-up paragraph which just I believe is the view of this working group that the, as I discussed before, the language in 6ter which requires establishing that the public was actually confused, that it's the belief of the working group that that would already be part of a finding of use and bad faith under the existing standards in the UDRP and URS.

Clearly it would be hard to say that a domain was being used in bad faith if you looked at the domain and there was no - nothing to convince you that

anyone in the public would confuse the domain with the complainant. Whereas if it's got content that includes the name of the complainant or has the logo or mark of the complainant and talks about activities of the complainant, well of course it would be confusing.

So I get - the fact that there's that additional little requirement in the - in 6ter I think is covered in the actual examiner practice when they have a UDRP or URS before them. All right. So I have nothing more to say on it. So again, I was saying maybe one little sentence in that follow up paragraph between the bold face of recommendation three and the bold face of recommendation four just clarifying that we think that's going to be found anyway if there's a finding of bad faith use of the domain.

So moving on. We have some new additional language now, which is under recommendation four, which would have been the most difficult of our recommendations to work out consensus on and work out language on. And so I'm going to start below the bold face, and this is on Page 6. In presenting options one and two above, the working group acknowledges that it has yet to conclude which of the two options represents the optimal approach. I think that's just good clarifying language.

Dropping down to the next paragraph, there's a new sentence. The working group notes that one reason for the belief is the fact that, as noted above, IGOs are able to file complaints through a assignee, licensee or agent. So. And okay. And that's going to be prior discussions, referencing prior discussion how that can insulate an IGO from having to surrender its sovereign immunity if it believes that its sovereign immunity would be offended by bringing a CRP action directly.

Continuing on, there's a new paragraph. The working group also notes that where a losing registrant proceeds to file a complaint in a court against the UDRP or URS decision, one threshold question that the court will have to decide is whether or not by submitting the mutual jurisdiction clause an IGO

will be deemed to have waived any jurisdictional immunity it may otherwise have.

Okay. I think that language is fine as is. I wonder if we should add an additional clause or an additional short sentence which - something to the effect that it just points out again that the decision on a claim of sovereign immunity will always be one that individual courts will have the decision on. That is outside our purview to control what courts are going to say about that. And as our expert has instructed us, different courts are going to come out differently in regard to that.

Okay. And welcome Lori Schulman, who I see has joined us in the chat room.

Lori Schulman: Yes.

Philip Corwin: Okay, then further discussion of option one, that's just a little grammatical thing there. A new bullet point. Will introducing this option -- and this is the option - okay. This is about option one, where if there's a successful assertion of sovereign immunity, the original UDRP or URS decision would be vitiated. A new bullet point, introducing this option will also mean that an IGO has no choice other than to either risk giving up any jurisdictional immunity it may otherwise have in order to fight the appeal in court, or allow the infringing conduct to continue by not filing the complaint in the first place.

I'm okay with that language. Lori, your hand is up.

Lori Schulman: Yes. I have this radical idea, and I don't even know if it's feasible. But, you know, I'm looking in the chat and I've entered late, but, you know, to Reg's point, and I think it's a valid one, to say it'd be terrible if (.eco.fashion) were somehow to be reserved when we're talking about a UN agency that's devoted to relief. Or a great example that Kathy Kleiman has used often is WHO, who, when who is a common dictionary word.

And I, you know, (unintelligible) this isn't about the protection of names encompassing every single, to your point Phil, iteration, spelling, meaning, whatever. What this is about is context. And I believe what we're really pushing at opposite ends here is that in order to put any protections in place, it requires modifying programs. Programs don't think. Programs simply have rules that they follow.

Whereas proper name protection and proper trademark protection, proper protection under Article 6ter all require some evaluation of context. What is the context. So on one hand, to George's point, it all, you know, it's prior restraint, in the broadest possible sense, maybe yes. But I keep going back to the fundamental protection of certain names used in particular ways has been part of the ICANN dialogue since ICANN's inception.

And what I get nervous about and what I feel is not fair to brand owners, and I'm absolutely speaking with a trademark hat on, is that I feel that somehow this idea of context has gotten completely blown out of the water or ignored. And wouldn't it be a wonderful world if we could figure out some sort of methodology where we could consider context.

And I don't know what that is, but I feel like (unintelligible). We've been together now for us is it going on three years I think. That when we take these final steps about what we're recommending, that if we take such broad - a broad path to say well, you know, in the case of IGO, which is entitled to a protection of its name to a certain degree, and then we add on top of that and ask that the IGO does have a degree of immunity that is a decision by the court, but to go and then have that right asserted, win, and then say if you're not willing to give up sovereignty, well we go back to square one, to me that just seems fundamentally unfair and it gets to the spirit of what we've been actually asked to do.

And I've heard George and I've heard Paul, and I do understand their points. I'm not sitting here blind to some of the things you've been saying. But I think

there is a blindness sometimes to what we've been actually asked to do. And it's not an easy question and I'm not saying it is, and I'm not even saying I have an answer. But I want to throw it out there again. Is there a way, can we continue to explore how we can fix the problem that requires formulas versus human evaluation, in terms of like reserved list or in this case, you know, the issue of immunity. I don't know but I'm throwing it out there because I feel that's my job.

Paul Keating: Phil, this is Paul Keating.

Philip Corwin: Okay. Who's speaking?

Paul Keating: Sorry, I can't raise my hands. This is Paul Keating. Sorry, I can't put up my hand because I have (unintelligible).

Philip Corwin: Paul, we didn't know you were on the call.

Paul Keating: I'm sorry. I agree with the sentiment 100 and - 1,000%, okay? I believe that that was the original intent behind the first element of the UDRP, okay? But the first element of the UDRP has been watered down this quote, unquote, standing concept. Okay? Because what you're noting is that properly trademark rights are viewed in context, okay, but unfortunately the way the UDRP has developed and every other curative rights process it developed is - has been to ignore that very concept which I believe that Kathy and others, when they first drafted this, at least all the drafters of the original UDRP, I honestly believe that's what they had in their mind when they drafted that language.

And unfortunately it's been wiped off the planet. So for us to build that back in I think is not the confines of this working group but perhaps the confines of the review of the curative rights process, which Phil is also a co-chair of and which I'm a member of, okay? But I - given where we are, I believe that the - if you're going to - the concept that if you're going to assert sovereign

immunity and thereby preclude the registrants from realistically having their day in court, you cannot rely upon this UDRP process because it was never intended to be that. Okay?

So you have a choice, Mr. IGO or Miss IGO, you can proceed with whatever rights you have. And if you're not willing to do that, then you have to live with the consequences of that choice. That's your choice, okay? That's how I feel, okay? But I really applaud your -- unless I misunderstood it -- I really applaud your concept of trying to bring in context back into the UDRP process.

Lori Schulman: You did not misunderstand me and you're probably going to have some of my members maybe argue a different side, but I don't think so. Because those who are frequent practitioners of trademark law understand that you don't have universal rights to everything on the planet ever - forever and always. My understanding was the UDRP was about is creating this carve out, a small carve out, a carve out that requires bad faith (unintelligible).

Paul Keating: And is speedy.

Lori Schulman: Right. And it's speedy and not only does it keep brand owners out of court but it keeps registrants out of court too. And that's always been, you know, one of my issues -- I think George and I will probably have to agree to disagree on this issue till the end of time -- but I don't see courts necessarily as better deciders. I mean my experience as an attorney, courts make mistakes, administrator law judges make mistakes, but a lot of times the right decisions are reached. And if you have a decision with good processes and well educated deciders, not matter what the forum is, you should have a reasonably predictable outcome of what - of a dispute. End of story.

Philip Corwin: The co-chair's going to intervene at this point to clarify something.

Paul Keating: Go ahead.

Philip Corwin: Just - and this is a good discussion. We want to get back in a minute to our review and also hear from Jay. I haven't forgotten you, Jay. Lori, what I seem to hear you saying is that the blocking, which is kind of a blunt instrument approach, we need a more sophisticated approach than that. I hear Paul saying that a lot of the context that Lori would like to see considered is not being considered in the current UDRP practice and correctly notes that there's an RPM review working group which is going to be looking at the UDRP starting in 2018.

Also for both of you, I don't know if you were on the phone when I mentioned a little bit ago that we got word just about an hour ago that later today we expect to see a communication from the board on the output from these discussions they've been having with the GAC and IGOs on both blocking and CRP for more than a year now. We have no idea yet what the substance of that is going to be and - or how we should react as a working group or how the GNSO Council may react to some of it because it was a discussion undertaken by the board when the council and the GAC came out quite differently on some of these issues.

So it's all in the mix but our working group has no authority to deal with blocking mechanisms, whatever we - I guess we could have some (unintelligible) in this report on the - in discussing the context we're operating in, which includes blocking of certain terms and acronyms at the new TLDs, but we have no authority to change any of that.

And I'm going to call on Jay and then see who else want to follow up with more commentary on this. Jay?

Jay Chapman: Thanks, Phil. This is Jay Chapman. I - just getting back to the text and kind of where we are, again appreciating the discussion that we've just had and definitely would, you know, will take that to heart and want to, you know, consider how and ways we might be able to, you know, to bridge some of

these original intentions and things of getting things to where they can be considered in proper context.

Back to the text though and in the specific new I guess paragraph bullet point that was added here that begins with, "Will introducing this option also mean that an IGO has no other choice, et cetera," it seems to me that this particular bullet point is almost a restatement of the prior bullet point, at least the back half of that - the last clause of the previous bullet point. It seems to say the same thing, maybe add a little bit there.

I just have a couple of comments on this specifically. One is that it seems to me that the, you know, when we're stating, you know, does the option - does introducing the option one mean that an IGO has no choice. Well as George I think pointed out in the comments, there's clearly still the choice of being able to, you know, find, you know, an assigning agent, a licensee, et cetera. And I don't want to just make that particular option passé. I really think that needs to be specified and empathized as being a resolution to all of these, you know, potentially all of these issues.

And so to say in this comment, this particular part, to comment that there's no other choice, well there certainly is one that would be available to an IGO there. That's with regard to I guess just part of that new bullet point. As to the end, the final clause where it says, "Or allow infringing conduct to continue by not filing the complaint in the first place," it seems to me that that's somewhat inflammatory, if not unnecessary.

I mean we're not using similar language in option two for domain registrants. I mean we're not asking, you know, we don't have a comment in option two about would introducing option two effectively force a registrant not to oppose a UDRP or an arbitration appeal, and thus allow their domain to be hijacked. I mean we're not asking those kind of - you know, I'm not sure that that really helps per se. So I don't have a resolution necessarily what they should be, but I just question whether or not that, you know, if that's particularly helpful.

With regard to the prior bullet point, there's - we've already discussed this before, but I've really been chewing on it now for two or three weeks and just decided it was time to, you know, to just I guess make a comment about that. The bullet point says, "Would the possibility that a decision against the registrant be vitiated in the circumstances where the IGO has successfully claimed jurisdictional immunity, would that create a greater incentive for a losing registrant to seek relief in the courts."

I think the issue that I have here is if vitiation is posed as an incentive for a registrant, then it's just as likely that the lack of vitiation should, you know, should likewise be determined perhaps a greater deterrent to a losing registrant for seeking relief. And I don't think that's the intention here. So I just wonder if we want - if we might want, you know, want to think of different language that's not quite so - I mean to consider an appeal process or, you know, utilizing an appeal as an incentive, I don't think the option here really - I'm not sure that's particularly relevant. Thank you.

Philip Corwin: Yes thank you, Jay. And I'm just going to comment. Those are good points. You know, looking at this new bullet point, I'm thinking it needs some additional work. It seems a little too almost saying that we put the IGO between a rock and a hard place, when in fact we haven't. We found that the IGOs have standing under Article 6ter, even if they have no trademark rights independent of that, and that they can avoid any jurisdictional immunity issues in the first place by bringing their complaint through an agent, licensee or a signee. So we've done a lot here.

So this - you know, an IGO which has chosen to avoid those options and file directly where it says, "Give up any jurisdictional immunity that it may have," really that it thinks it may have. It has no - it only has the immunity that the court says it has. And I don't think it's - I think the last clause, "Not filing a complaint in the first place," if there's a clear case of infringement, it's going to file the UDRP or URS. It's going to win if it's really clear that there's bad

faith use and registration going on. And at least 99 out of 100 places there's not going to be a registrant appeal to a court of mutual jurisdiction.

In fact in a majority of the cases, there may not even be a response from the registrant in the first place. That's the rule in the majority of UDRPs and URS case. They're default cases. So I think this needs to be rewritten to be more balanced in the way it states the situation. So the chair took his prerogative to make a statement there.

Paul, I'm going to call on you again. Your hand's still up. Please keep it brief. We've got four minutes left. And the Lori again.

Paul Keating: I will do so. Thank you. This is Paul Keating. I would take away all of these comments and replace it with a simple comment that just simply said that - let me back up. Everything that you just described about standing and the ability of the IGO to put a standing character in their place, okay, to preserve their immunity, those are things that exist right now today under the UDRP, widely recognized. Okay?

So there's nothing in - my view is now exactly the same as it was in the beginning, which is there's nothing that we need to change in order to deal with this issue, because the IGOs have - to the extent that they have a philosophical problem with - or legal problem with sovereign immunity, they can - there's an easy, simple work around that a clerk in their office can deal with. Okay?

Now in those cases, Phil, where you clarified that it's clear that they have rights under the UDRP and it's clear that they're going to win, fine, but those are the kind of cases that I want to promote in the UDRP. What I want to - or want not to promote and to (unintelligible) and to dis-incentivize are the cases of overreaching under the UDRP, okay, where they say, you know, WHO, okay, all right, a classic example, all right, okay? So they need to be darn sure that they're correct. Okay?

So I have no problem with going overboard in order to make sure that they are incentivized to ensure that their claims are not, you know, are bullet proof. They're really good claims, all right? There are really a lot of bad domain registrants out there. I completely agree, right, but there's a lot of good ones out there who…

Philip Corwin: Paul, I'm going to have to ask you wrap it up. We've got two minutes left.

Paul Keating: Okay. So I would eliminate - I agree completely with Jay's comment. I would eliminate all of these bullet points. I would state the obvious that they have a simple workaround to the problem. And if they don't opt for the workaround of the problem, then they are no - then in essence they are in the same position that they would have been had the UDRP not existed. We do not take away any rights, substantive or otherwise that they would have. Okay? Thank you.

Philip Corwin: Okay. Paul, I'm going to, just for the record, disagree. I think it's useful to have these bullet points explaining, fleshing out this option. It might be worth adding some of your thoughts to them, but I would not be comfortable with just eliminating them. I think parts of our report are going to be controversial. We also want to guide comments on the preliminary draft, and I think this explanation will be useful for that. Lori, it's 12:59 so be brief please, and then we're going to talk about - we didn't get that far today but we're going to talk about next meeting. So go ahead, Lori, a quick comment.

Lori Schulman: All right, very, very quick. I did talk to Brian Beckham and in terms of those three options, he said that he essentially agreed with what I thought, and I wanted to share that with the group. In the agency situation, that would not be a workaround because an agent is simply stepping in to the IGOs shoes and any liability or waivers would absolutely attach to the IGO, according to Brian.

Licensee might work but then you would need some sort of a holding company (unintelligible) and that it does require - it's not a simple one-page

letter. I'm not clear about what George is referring to, and of course I will look at it as George is always good at supplying. But from the IGO perspective, this creates a level of corporate involvement that is typically reserved to private companies like Dupont, as opposed to intergovernmental agencies that don't have the same legal departments, resources, or legal strategies as being in the private sector. And I'm just going to stop there.

Philip Corwin: Okay, Lori. I'll just comment that this group can only look at issues relating to the curative rights processes. We can't deal directly with the economic or legal capacity of various IGOs. That's outside our purview.

Lori Schulman: I understand that, but if we're saying there's simple solutions and from the point of the IGO they're not, I think we should note that. Why do we assume it's simple if we have an IGO challenging the simplicity, that's all. I would just note the conflict, not make a judgment on it because I agree, we can't judge.

Philip Corwin: I have to think, Lori, that most IGOs are going to have some legal counsel that they could call on to file on their behalf. It's - but again, it's not - that's just - it's a general problem with any adjudication system that to utilize it you have to have some resources to make use of it. And if ICANN wants to set up - if some party wants to propose that the last resort auction fund that some part be put aside for IGO support for CRP filings, that's one more idea that may pop when they get ideas on how to use that money. But we don't have any authority there.

I'm going to have to call this discussion to a close. We're two minutes past the hour. Staff are we…

Paul Keating: Phil, one second because I want to bridge - I want to bridge a gap. Lori, can you please e-mail me at (paul@lobades) with your contact details, because I want to continue this conversation with you?

Lori Schulman: Absolutely, Paul, no problem.

Philip Corwin: That's great. And if Paul and Lori can…

Paul Keating: It's (paul@lobades).

Philip Corwin: …bring something together back to our attention, that would be great.

I believe our next meeting is at the same time next Thursday, the 13. Is that correct, staff?

Mary Wong: Hi everyone. This is Mary. Phil, that is correct. And we did have a question for you and Petter about the timing of the following meeting, but essentially we would have two more working group meetings before the planned one-week break right before Hyderabad. So given that - given where we are with this draft document and the likelihood that we will see the small group proposal, I think in planning for the next two meetings, we probably want to look ahead to our session in Hyderabad as well.

Philip Corwin: Right. And Mary, I just saw a draft calendar for Hyderabad. I saw that on one day there's like a 30 minute, this working group and a lot of others, have a 30-minute session, which I guess is a - the view from 20,000-feet session. Do we have both that and a much more focused working group, actual working group session in Hyderabad, do you know?

Mary Wong: I - yes. I believe that short session may be part of the update to the GNSO. And I think the idea of giving working groups state of progress is that we would talk about our preliminary recommendations. But yes, we did put in a separate request for separate session. I apologize, I haven't looked at the latest version of the schedule to figure out where that is, if it's there at all.

Philip Corwin: Okay, okay. And so far as the focus of our meeting next week, I think that'll up to the co-chairs in consultation with staff once we see this letter that's supposed to emerge from the board later today regarding issues that are

relevant to our work. So we're going to have to - we're going to need to get back to this section and to the broader report and finalizing a preliminary report that can be put out for public comment, but we're - we may need to devote this session to discussing that board letter once we see it.

So any last comments or any other business before I shut down the meeting at five minutes past the hour?

Mary Wong: Phil, this is staff, we just wanted a really quick one to ask the working group to look again at the policy options especially and just make sure that you're comfortable with what it says. Also if you have an opinion as to, you know, further text we need to add there and also consideration of the UNCITRAL rules, which I think we said a couple weeks ago we may need to spend a little bit more time on. So just a request that between now and the next draft if folks could take a look at that, that would be very helpful.

Philip Corwin: Okay. And Mary, I think since not everyone in the working group is on this call, it'd be good for staff to send out a note to that effect to all members with reference to the exact material you were talking about, okay?

Mary Wong: Will do, sure. Thanks everyone.

Philip Corwin: Okay I'm going to pull the plug on this meeting. It's six minutes past. Thank you for (unintelligible).

Paul Keating: Thank you, Phil. All right, bye-bye.

Philip Corwin: Bye-bye.

Man: Bye.

Michelle Desmyter: Thank you so much. Again, the meeting has adjourned. Operator, stop the recordings and disconnect all remaining lines. Have a great day everyone.

END