

**ICANN
Transcription ICANN Hyderabad
GNSO IGO-INGO Access to Curative Rights Protections Working Group –
Presentation of Initial Report
Monday, 07 November 2016 at 09:00 IST**

Note: 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.

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Man: It is November 7, 2016 in MR103 for the GNSO IGO-INGO Access to Curative Rights Protections Working Group presentation of initial report, 09:00 to 10:30.

Phil Corwin: Good morning, good evening wherever you are. This is Philip Corwin. I'm co-chair of the working group on curative rights processes for IGOs and INGOs, which are international governmental and nongovernmental organizations. And excuse me for the delay in starting, but I'm having a laptop issue so I'll be reading these slides off the screen. And my co-chair, Petter Rindforth of Stockholm, Sweden from the IPC, is not with us here in Hyderabad but he is - has joined us online.

And since my laptop is not working, Mary Wong, sitting next to me will advise me whether anybody has hands up at any point to ask questions or whatever.

So let's go past the first slide and get into the content of describing the progress of our working group. Okay, let's see, this is the - so our agenda today we're over - go through an overview of this PDP and its current status, which is close to completion, describe where this PDP fits into the overall work on IGO and INGO protections, present - and we're going to present our likely recommendations, we're going to unveil our near final preliminary draft report and recommendations. That's the portion of our final report that's been completed just about, and we anticipate completing the rest over the next 30 days or so.

We're going to compare our recommendations to those that are contained in the recent proposal of the so-called IGO small group, and that was conveyed to the GNSO last month by the board. I note that those - that proposal, while conveyed by the board, has not been formally endorsed by either the board or the GAC so far as I'm aware. And then we're going to have community discussion feedback, which let's all of you weigh in if you're still awake, and then we're going to describe next steps and our timeline to completion.

So next slide, please. Okay so this PDP was chartered by the council in mid-2014. I believe our charter was approved in June 2014 to develop policy recommendations regarding, quote, whether to amend the UDRP and the URS to allow access to and use of these mechanisms by IGOs and INGOs and if so, in what respects or whether separately to a DRP, dispute resolution procedure, at the second level modeled on the UDRP and the URS that takes into account the particular needs and specific circumstances of IGOs and INGOs should be developed.

And early on in our process we concluded that INGOs did not need further consideration because the reason that IGOs require particular analysis separate from most potential complainants in the UDRP or URS is that many of them are created under international treaties. Governments are part of the organization. They have claims to some degree of sovereign immunity in judicial proceedings, and that became a major issue for our working group.

But INGOs are just private organizations, generally tax exempt under various government laws, but they're just private parties. For purposes of bringing a DRP, there really is no meaningful distinction from any other private party whether it's for a nonprofit.

The working group then considered issues of IGO standing. That is what they needed to bring an action, whether it required registration of the trademark and their names or acronyms or it could be a broader basis of standing. And the implications of potential jurisdictional immunity issues in national courts and impact of that in filing under the UDRP and URS. And that became a major issue for our working group and in fact required us to basically suspend our work for nearly a year while we sought out the input from a recognized expert on international law to advise us on the generally recognized scope of IGO immunity.

So next slide, please. Watch your water, Mason. So as I said, we planned to publish this initial report for public comment by the end of this calendar year. That should be doable because the most critical part, the draft recommendation section is where - it's basically the draft is nearly complete. We've - it's gone through several edits. I don't anticipate much further editing on that.

So the final report will consist of that. It will consist of the - by the way, the final recommendations about 25 pages in length. We're also going to have the legal memo from our outside legal expert, which is another 25 pages or so, and then the remainder of the report with the typical - the charter, the history of the working group, the members, all that kind of background information. But that's not going to require the same kind of work as the recommendations section did. So the big job has already been done.

There are two other ongoing efforts that relate to the work of this working group. One is the implementation of board-adopted recommendations from

the original PDP that preceded us. That was a PDP regarding preventative protections, basically blocking protections for certain IGO and INGO names and acronyms. Our PDP, this working group, was not concerned with the preventative protections; we certainly looked at the work of that prior group and its conclusions.

We were simply tasked with not the question of what terms should be blocked from ever being registered but when a domain was registered by a third party that an IGO believed essentially infringed, imitated it to mislead or abuse the public, what mechanism they would have to go after it and shut it down or obtain possession of the domain, similar to the UDRP or the URS, which is rapid suspension of an ascending domain.

There is also this IGO small group which was established. We do have a timeline slide here. We'll get to when it was established. That was a group of not all IGOs that are established around the world or active in the GAC but a small representative group, including WIPO, OECD, World Bank are the three that I know of in that group, there may be others, which has developed its own proposal which involves both the preventative measures and the access to DRPs.

I should note the prior PDP, it delivered its recommendations back I believe in early - late 2013 or early 2014. The GAC gave advice on the subject of preventative protections, much of it based on IGO recommendations, some of which was consistent with the prior PDP's recommendation, some of which was in conflict.

For the new TLD program, the provisions that were similar were identical from both groups were implemented by ICANN, and the board has been considering how to reconcile the conflicting recommendations on the preventative measures for the last two and a half years and has not so far either accepted or rejected in whole or in part either the PDP recommendations or the GAC advice, which is the source of some significant

consternation at the GAC and has created some issues overall for the atmospheric on this issue.

So next slide. And I'm just going to take a sip of water. So this a timeline which helps demonstrate how this PDP fits into the overall ICANN work. As I noted in November 2013, fall 2013, about three years ago, council adopted the recommendations of the original PDP on preventative measures. In April 2014, the board adopted those PDP recommendations that were not inconsistent with the separate GAC advice on preventative measures. In - shortly after then, June 2014, the charter for this working group was adopted and we began our work a few months later.

I believe in September we populated the working group and kicked off early fall 2014. So we've been up and running just over two years. We expected to be done earlier than this but we didn't expect to have to suspend work for nearly a year to locate a legal expert and get advice from that legal expert.

The - excuse me. It's that healthy Hyderabad air that - so you can - anyone following this in the Adobe or in the room here physically can see the rest of the chart. I think we covered all the main points.

And next slide, please. And oh here's the - another timeline which again shows the delivery of November 2013 of the original PDP working group recommendations on preventative measures, the board adoption of the non - of the recommendations that were not inconsistent with the GAC advice. The rest remain in limbo, as does the inconsistent GAC advice. This PDP, the present one was initiated in June 2014 with adoption of the charter, and we kicked off the actual work a few months later in September.

In - we sourced input from supporting organizations and advisory committees, including the GAC, in the first part of 2015. We did get input from a number of them, as well as the IGO representatives. And that brings us up - in that box

down in the lower right-hand corner you see that in October 2015 after a search process we engaged the work of a legal expert.

That legal expert who was expert in this subject matter and willing to do the work for the very modest stipend that ICANN funded for this work was Professor Edward Swaine of the George Washington University Law School. Prior to that he had been with the U.S. State Department and is well recognized as having significant expertise in this area.

And that brings us up the present day, November 2016. Here we are at ICANN 57 and we're unveiling our draft report of recommendations, and we anticipate publishing the entire report and kicking off the public comment prior to December 31 of this year. It should be the standard 40-day comment period, which would carry us into early February. We'll consider all the comments that are received, and I would anticipate publishing our final report probably in March or April.

So we should - we will have - the comment period will have closed and we'll have all the comments and be analyzing them by the time of the Copenhagen meeting, ICANN 58, which is mid-March next year. We probably won't have published the final report and delivered it for council recommendations by Copenhagen but it should happen within a month or so after that, unless something unusual happens.

Next slide, please. So here we are, the big unveil, our likely recommendations. We recommend -- and we'll explain this but this is the high points -- we didn't see a need to change the basic substance of the policy in the UDRP and URS. By the way that policy may change due to the work of a separate working group that's underway now which I'm one of three co-chairs, which is the working group to review all rights protections and all gTLDs which is reviewing the new gTLD RPMs now, expects to complete that phase one of its work by the end of next year, and then in early 2018 begin

the first ever review of the UDRP since the creation of the UDRP 20 years ago.

So that group may change some elements of either the URS or UDRP, but that's not within our bailiwick. And we didn't think any, as I said, we didn't think anything new had to be created for INGOs, including the Red Cross and the Olympic committee because they're - they don't have particular immunity issues and stand for standing and decision purposes in the same shoes as other private parties.

By the way, we had the law firm who represents the Olympic committee participating in the working group and they were fine with that decision. In fact they encouraged it. So this - to the extent that this policy guidance document referred to elsewhere in this set of recommendations compiled the working group recommendations recommended this clarification be included in that document.

So next slide. And that was that recommendation number one. Number two, and this got to the standing issue. Right now for the UDRP/URS to be a complainant, you must have a trademark registered for your name or acronym or other term, you know, any trademark that's being used in commerce, and we came quickly to realize that many IGOs, while we did find evidence of IGOs that had used the UDRP that had trademarked at least their name, we're aware that not IGOs have done that.

And what we also found was that the global community, the nations of the world, have established a system for the protection of IGO names and acronyms in national trademark law systems under Article 6ter -- I've never understood what the ter means, but it looks good -- Article 6ter of the Paris Convention. I guess we know that because it's French and they needed something fancier.

The Paris Convention is for the protection of industrial property, and you might ask what does industrial property have to do with names and acronyms? Well within that document in Article 6ter, it says that any international intergovernmental organization may claim protection, which is basically blocking the registration of their names and acronyms in the trademark registration systems of any relevant nation.

And the way they do that is like barely a speed bump in terms of obstacle. All they have to do is send a letter to the World Intellectual Property Organization, WIPO, saying we are invoking our Article 6ter protections and here's a list of our names and acronyms. And then WIPO conveys that, and that conveyance goes not just to all the signatories of the Paris Convention but due to some changes, I forget the year, but the Paris Convention now also is adopted and governs every nation that's a member of the World Trade Organization, which is a broader group than the signatories to Paris Convention.

So when you put the two groups together, Paris Convention signatories and WTO members, it's pretty much every - close to every nation in the world, and the ones that aren't in that list are not, I don't want to, you know, disrespect them, but they're not the most important countries or the ones with large populations or large economies.

So what we said is that you don't need any trademarks, IGOs. If you've done that WIPO notice, you've got standing. Just show us that you sent the letter and you have standing to use the UDRP or URS even without trademark registrations because we felt there was enough of a significant relationship of those protections to national trademark regimes that it would be adequate for standing purposes.

I want to note because it's somewhat relevant to our coming discussion on jurisdiction that any nation which is a signatory of the Paris Convention or a WTO member, upon receiving that notice from WIPO can - has the discretion

under Article 6ter to say hey for this particular IGO we're not going to give them protections in our trademark law system. We don't believe that happens very often, but that just shows that individual nations can, if they want to, ignore those protections. It doesn't happen much but it does show that there's a relationship between governments and IGOs in which governments have the superior position in terms of recognizing the protections.

We have a hand raised in the physical room from Donna Austin. Go ahead, Donna.

Donna Austin: Thanks, Phil. Donna Austin. I mean this seems like a reasonable recommendation but I - have you done any investigation into whether this is an easy process to undertake or, you know, maybe why it hasn't been taken up by some of the IGOs? I mean, as I say, it seems like a reasonable recommendation.

Phil Corwin: I think you came into the room after I covered that part, but all that's required to invoke Article 6ter protections is sending a letter to WIPO. It's a very easy lift.

Donna Austin: So I understand it's an easy lift from the perspective of the working group, but have you concerns with some of the IGOs whether it actually is or not is my question.

Phil Corwin: I'm going to defer to staff on this one. I don't recall if we asked that particular question. We - I don't recall a single IGO ever telling us that it was - there was some difficulty invoking Article 6ter protections but I'll let Miss Wong weigh in for.

Mary Wong: Thanks, Phil. This is Mary from staff. And thanks, Donna, for the question. We have not specifically asked your direct question of the IGOs but what we can say is that the possibility of using this particular provision of this particular treaty in general was first raised by the IGOs when they first wrote to ICANN

with their request. We do go in the report into some detail as to what is required under the procedure. Thank you.

Phil Corwin: Yes. And just to add to that, of course once we put out our preliminary report and recommendations there's a 40-day public comment period, and if we've missed a significant problem, you know, we expect that someone, one or more parties will comment on that. Yes, (Edmond)?

Man: Just to clarify with Mary what you just said. You mean when they first came to us that was the cause that they actually identified and therefore we are thinking that they probably know about it and have done it. Is that the thinking? I just want to clarify how it - what you meant by saying what you said.

Mary Wong: So for folks who don't quite know the background, the - a number of IGOs wrote to ICANN I believe in December 2011 with a request that their names and acronyms be given protection in the new gTLD program. (Edmond), I think you remember that. So it was in that letter or at least related documentation at around that time and following that this particular treaty and the provision was raised, as I said, not at the time specific to this issue of standing under the UDRP or URS.

So when this PDP was started, we had that background information together with other historical materials and other research that the working group did ,and so as the working group proceeded with deliberations and once the working group looked specifically at potential problems that IGOs might have with using the existing UDRP, then they looked at the first part of the UDRP, which is that you need to have a trademark, and then considered if instead of a trademark, because an IGO that has a trademark could, in the absence of other problems and challenges that Phil will talk about, leaving those aside, we're just looking at standing to follow UDRP, typically you need a trademark.

So if an IGO has a trademark, they can go that route. But then what of IGOs that don't have trademarks? And then at that point, the working group looked at Article 6ter and thought that this could be a reasonable alternative for those IGOs without trademarks, if that helps.

Phil Corwin: Yes and just to add to that, I don't remember the exact details because this portion of our work preceded our suspension to - further location and receipt of the report of the legal expert, but it was our impression at that time that most, if not all, IGOs had invoked their Article 6ter protection. If there are some that have not, they're a small exception to the rule.

And so for clarity, continue on the slide, we're going to recommend that a policy guidance document be, pursuant to the UDRP and URS, be prepared and issued. And of course it will be issued to all the dispute resolution providers for those two processes for the benefit of panelists and registrants making so they understand that they should permit IGOs to have standing as complainants for those processes even without trademark registrations if they've invoked their Article 6ter protective rights.

And down below we have a quotation from Article 6ter noting that states, "Agree to refuse or to invalidate the registration and to prohibit by appropriate measures the use without authorization by the (unintelligible) either as trademarks or as elements of trademarks of armorial bearings" -- in case there are any IGOs going around in suits of armor -- "flags, other emblems, abbreviations, and names of international intergovernmental organizations." And it's the last two references, names and abbreviations, which would be similar to acronyms, that would cover everything that IGOs want to have standing to bring complaints about.

So next slide, which is - brings us to preliminary recommendation three. We didn't - we're not recommending any specific changes to be made for the substantive grounds under the UDRP or URS upon which a complainant may file and succeed on a claim against as respondent as the bad faith clause. Nd

for both the UDRP and the URS, the complainant must show bad faith registration and use by the registrant of their usually a trademark, in this case it would be the name or acronym.

The bad faith concept is a broad concept and we felt it was inclusive of frankly the narrower grounds in which IGO wanted to have standing to bring complaints and to succeed. So we thought bad faith was such a broad and flexible concept it would serve the purpose of the IGO. In fact it would cover some things that might not be covered by the Paris Convention, the language of the Paris Convention, which is a little bit narrower.

And we're proposing that a policy guidance document, the same one referenced in recommendation two, include a further recommendation that UDRP and URS panel should take into account the limitations enshrined in Article 6ter in determining whether a registrant against an IGO has filed a complaint as registered and used the domain in bad faith.

So what that means is the IGO is bringing it - the action based on trademark rights. It would have the full scope of UDRP and URS protection, and if it's bringing it based on Article 6ter prevention that the panelists should look at the grounds under which states provide protection per Paris Convention, which are somewhat narrower but frankly - it's basically - and we have the quote below so you can see what it is in the Paris Convention that - well it says there's no state obligation when the use or registration of the domain or, of course it's broader under the Paris Convention, there's other uses as well, "Is not of such a nature as to suggest to the public that a connection exists between the organization concerned" -- the IGO concerned -- "and the abbreviations and names were of such use or registration is probably not of such a nature as to mislead the public as to the existence of the connection between the user and the organization."

Now putting that in real world terms and taking at the not and saying well if a bad faith registrant was - had registered a domain and the domain name was

such that it suggested to the public using the Internet that there was a connection which is similar to the identical or confusingly similar standard of the UDRP between the organization and the domain registrant and that it was done to mislead the public.

And this is usually done frankly in charity scams where people set up domains to pretend that they're some IGO that people give charitable contributions to for - in good faith to assist them in performing their services to the world. So it's similar to and somewhat narrower to but it's certainly encompassed by the bad faith standard, so we didn't see any reason to create a new standard because bad faith encompasses and is broader than the language in 6ter.

So next slide. I guess we're saying our working groups decided there was no reason to reinvent the wheel when the existing wheel would carry forward the ability of the IGOs in a reasonable manner. So on jurisdictional immunity, and this is the part where we suspended our work because while we have people within the working group have lots of expertise in other fields, including in trademark law, we didn't have any international law experts in our group and we didn't know what the general recognized view among legal experts is of the scope of immunities for IGOs.

We also proceeded from a general viewpoint that ICANN has an obligation to protect existing legal rights through its curative rights processes but has no authority to create new legal rights. So we needed to understand what the existing legal rights are and we didn't know that so we went through a process of -- with the assistance of ICANN staff -- to securing, as I said, some very modest funding from ICANN and then conducted a broad search for a legal expert willing to undertake this work for the funding available and within the time period required.

We found a number of experts who would have done it for the funding but would not have met our time requirements because they had other projects

going on and would not have been able to get to the work in a timely manner. And a result of that, basically the Swaine memo will be part of our final report and recommendation, but basically the question was what is the scope of IGO immunities in terms of in the adjudicated format in the courtroom?

And the answer was it depends, that there's no universal rule at all. It depends which nation you're in. In fact in some nations like the United States, it depends which court circuit you're in because different appeals court circuits have adopted somewhat different views on the scope of sovereign immunity generally under United States law. Our decisions were not based just on U.S. law but our expert identified - and really the only way you'll ever know what - let me back up.

Under the UDRP in particular, and this is really invoked but it is available, once an appeal - once a decision is rendered by the panel or panelists, the losing party has a right to appeal in the UDRP to a court of mutual jurisdiction, which is generally the jurisdiction in which they're domiciled or the jurisdiction of the registry or registrar of the domain. And the - you really wouldn't know the answer to the question for a particular dispute until you go to that court of mutual jurisdiction and the IGO says to the judge, "We shouldn't be here, we claim jurisdictional immunity from legal process in this national jurisdiction." And then it's up to the judge to decide.

So we - ICANN - we thought ICANN had no ability or authority to hypothetically decide what a particular judge might decide in a particular dispute, and there's no rule for IGOs generally because sometimes it depends on the treaty rights, the rights contained in the treaty establishing the IGO and it might result in a different decision for that IGO than a different IGO that didn't have the same scope of treaty rights.

So there's really - there's no uniformity and so we decided, A, that no change should be made to the mutual jurisdiction clause of the UDRP or URS as ICANN's curative rights processes are not a substitute for established legal

process but they're an additional alternative and they're made available to give parties who thinks their trademarks or their names or acronyms have been abused, give them access to a much quicker and lower cost way of dealing with that abuse. But it doesn't take away the existing legal rights of either party, and ICANN has no ability to do so.

And so we didn't think that ICANN could declare that registrants have no recourse to courts of mutual jurisdiction when an IGO is the complainant, one, because we would have thought that was outside ICANN's authority, and, two, we also questioned even if we had recommended it whether it would be effective.

And to give a hypothetical, if I were to register a domain say - let's say `whowantstostayhealthy.whatever` and the word who is in there, and if the World Health Organization brought a UDRP or a URS action complaining that I was infringing upon their name or acronym and they won, you know, I wouldn't do anything bad but let's say the panelists made a mistake and that happens in a small number of cases where panelists make mistakes and there's a judicial appeal where it's reversed.

If I then, being a resident of the United States and if I had used a U.S. registrar, a U.S.-based registrar, I'd have the right to go to court. And if the IGO went into court and said ICANN has said the registrant has no access to this courtroom, the judge would probably who is this nonprofit corporation in California to tell me that I have no authority over this matter or to tell me that his California nonprofit corporation can take away what the U.S. Congress has granted through enactment of the statute.

So these were the issues we were facing. So we didn't recommend any changes in the mutual jurisdiction clause. We are recommending that the policy guidance document, which is going to go to all CRP providers and be conveyed to their panelist, include a section that outlines the various procedural filing of options available for IGOs. And what we did do out of

respect of and to their claims of jurisdictional immunity is say we'll provide you with a way to insulate yourselves where you're not taking an action where you're basically would be compelled to admit that you don't have jurisdictional immunity.

So you don't have to bring the action directly if you're an IGO. You can designate an assignee, an agent, or a licensee, any of those parties, and in most cases it would probably outside their law firm if they have an outside law firm but they could pick another party to bring the action on your behalf. You don't have to bring it directly. You can get that degree of insulation by using a third party and therefore you're not forced to concede any diminishing of your claims of jurisdictional immunity in bringing this action.

So we tried to be respectful of both the IGO's claims of jurisdictional immunity and whatever the existing legal rights are of the domain registrant who would be the target of the action. And as I described, if there was an appeal and there's - the fact is there's a very small percentage of UDRP decisions ever go on to appeal. It's usually only those which have significant secondary market value where the registrant believes that the panelist or three-party panel has made a real error in judgment or - and/or they don't want to be labeled as a cyber squatter, which can count against them in any future action.

And that's a very small number of cases that we know of in which has ever judicial appeal. I don't know what percentage it is of total - I think of total UDRP cases, it's probably less than 1% of UDRP cases in which the registrant responds, which is a minority and in which the registrant loses, which is about half of the cases in which there is a response from the registrant. It's probably still a very low percentage. So we're not talking about a very large number of cases that would ever raise this jurisdictional issue.

So next slide, which is - continues to discuss recommendation four. So then we said okay what happens when a, you know, in the instance of where the

IGO has brought the action through an agent, assigning a licensee to insulate themselves and they lose, they don't succeed and they think a mistake has been made, they can just have that third party file the appeal. But what happens when the registrant is the loser and the registrant thinks a mistake has been made, a bad decision by the panelist, and they want to appeal?

And the IGO then goes into the courtroom and asserts its jurisdiction either directly or through its third party assignee, agent or licensee and the judge agrees. What should happen then? And this is where we have not made a decision yet and we're inviting specific public comment. Option one is based upon the view among some of our working group members that since the UDRP, URS or alternatives to existing law and not substitutes for it that where the registrant is essentially denied their ability to appeal a court of mutual jurisdiction because the IGO successfully asserted its immunity that basically it should go back to the status quo before the action was brought and the decision of the panel should be vitiated.

There are others who feel that, you know, if the IGO has won at the initial level there may well be suspect activity going on and it shouldn't be allowed to continue just because the IGO successfully asserted its jurisdictional immunity. And in that very narrow instance there should be the creation of some non-judicial arbitration process for the appeal. And so that's where it is. So we haven't made a firm decision on that issue and we set out the two options, and we're inviting specific public comment on which way we should go on the final report and recommendations.

And Steve Chan has raised his hand in the physical room. Go ahead, Steve.

Steve Chan: Thanks, Phil. This is Steve Chan from staff. I just wanted to read a comment from the AC room from George Kirikos. His comment is in regards to I guess actually the previous slide in regards to assignee and licensees. So the comment reads, "We might want to note that WIPO has specifically in their

WIPO views endorsed the assignee and licensee workarounds for disputes. And an IGO already took advantage of one of those approaches."

Phil Corwin: Yes, thank you, Steve, for reading that. I've been focused on the slides, not the chat room. Mr. Kirikos, a very active member and a very helpful member of our working group, and we thank him for adding that information to this discussion.

So let's go on to slide, next slide, which gets to our final policy recommendation. And this goes - the GAC at one point in the process, I believe it was in the communiqué at the end of the second Buenos Aires ICANN meeting, sent advice to the board. Now that GAC advice I note is to the board, it's not to this working group. The way to influence this recommendation of this working group is to participate or to submit comments to it, but we nonetheless took note of all the GAC advice that has gone out that's relevant to the issue of IGOs and INGOs.

And at one point they recommended that access to curative rights processes should be at no cost or at nominal cost. And we actually did follow up with the GAC and asked the GAC whether the filing fees for the UDRP, which begins at \$1,500, about \$1,500 administrative filing fees for a single panelist, it's somewhat more if either party invokes the right to a three-member panel, for the URS it's very nominal, it's about \$500.

We asked the GAC whether they considered those price levels to be nominal. I don't remember the exact word of the response we got from the GAC but it really wasn't particularly helpful in setting forward a definitive view upon the part of the GAC of whether that satisfied the nominal test. So far at - so far as no cost, which would basically require ICANN or some other party to pay the administrative fees because the - whoever the dispute provider is, whether it's WIPO or (NAF) or the Czech Arbitration Court or the Asian Domain Name Dispute Resolution Organization, they're going to want to be paid by both parties for that action.

And our working group has no authority to obligate any, ICANN or any other party, to pay those costs, so we're recommending that ICANN investigate the feasibility for at least some IGOs, you know, some IGOs are very well financed, others not so much, whether they're willing to provide a subsidy for the bringing of these actions. But we really felt it was outside our authority to recommend. And again, we - I think the members of our working group believe that the current administrative fees for the UDRP or URS should be viewed as being nominal.

They're certainly far less expensive than the cost of filing a judicial action, but we don't have firm GAC response on that so we'll leave that to ICANN. If they think 500 bucks is not nominal for a URS and it should be less, they can consider whether they should subsidize that. But that's beyond our authority in this working group.

So let's go on to Slide 15. Okay now as I noted, let me give a little background here. Let me check the time. We end at 10:30, so we've got another 40 minutes, and we should be done with this in about ten. So we're fine. We referenced the prior PDP which gave in some cases consistent advice and in some cases inconsistent advice to the board compared to the GAC advice on preventative measures.

In mid-2014, the board, for whatever its own reasons, set up a discussion not - which did not include the GNSO in which is provided a recommendation but solely with the GAC and what's referred to as the IGO small group to discuss how to best resolve the differences between the prior PDP recommendations and the GAC advice on preventative measures.

At some point in those discussions, it's my understanding the IGOs also raised the issue of access to CRP relief, access to dispute resolution providers. And we were aware of those talks. We really didn't know what the content was. They were not transparent discussions, they were non

transparent and only involved the GAC and IGOs and not - the GNSO knew them. There was some - the GNSO's GAC liaison had some understanding, but we really didn't know the details being discussed.

But last month the board conveyed without endorsing the - a more detailed IGO small group proposal, and now we're going to point out the differences between our preliminary recommendations and what's in that IGO proposal, which, depending on the final content of our report and recommendations which will be delivered next spring, there may well be inconsistent GAC advice and once again set up another situation in which the board will be asked to resolve the differences.

So let's go on to the next slide, which views the IGO. Okay so that first bullet covers what I just said that the board asked for time to consider the differences between the conflicting GNSO recommendations and GAC advice on the prior PDP.

Then the board's new TLD program committee requested they develop a proposal for board consideration, and that resulted now, two years later, in the IGO small group proposal and also kicked off the formation of these discussions between the IGO small group and GAC representatives with some members of the board to facilitate the proposal for submission to the GAC, which the GAC has now received that IGO small group proposal. I don't know if they're going to say anything about it in their communiqué coming out of this meeting, a full or partial endorsement.

And the GNSO received it and immediately forwarded it to this working group and we have - we spent two working group sessions discussing the substance of those - that proposal and whether we should change any of our recommendations as a result of it. So that came last month. It hasn't yet been endorsed by either the GAC or the board. The GAC may endorse it in whole or part at the end of this meeting.

And it contains certain suggestions relating to non-curative rights. That's the preventative part. But - and also notice to IGOs. IGOs (unintelligible) would like a notice system when anyone registers a domain that contains in whole or in part the IGO's name or acronym that they get notice of that, similar to commercial notice systems that trademark owners use. So they can look and be aware of the domain and take a look and decide whether they want to initiate a CRP if they think it's abusing their name or acronym. Again, that's not within the charter of this group. Speaking personally, taking off my co-chair hat, I don't have any personal issue with creation of such a notice system.

And so let's go on to the next slide, which I think it's the heart of the IGO proposal. Okay the IGOs continue - the IGO's position and the basis for their position on all of this is there's two pillars, two key principles, that they rest their proposal on, which is, one, their rights are separate - are not the same as trademark rights, and, two, that they have very broad jurisdictional immunity.

On those points, we understand that their rights without trademark registrations are not trademark rights but after taking note of and gaining an understanding of Article 6ter and the protections it creates in national trademark law systems, we thought that was close enough to provide them with standing, as I previously described.

On the immunity issue, we suspended our work to get expert advice, and our expert told us, as I described, that the scope of their immunity depends on the particular IGO, the nature of the dispute, and the jurisdiction in which the appeal takes place. But it certainly was not absolute immunity in every nation of the world. It was narrower than that.

And so they wanted a separate process for UDRP-like purposes and URS-like suspension purposes, and we did not see the need to create that because we thought the current processes were robust enough and broad enough to provide them with exactly the same type of relief that they're

seeking. And they wanted appeal solely to an arbitration process, and as I described, based upon both the legal advice we got on the recognized scope of their immunity as well as the belief that we had - that ICANN had no authority to extinguish existing statutory rights for registrants, that that wasn't the way to go.

So again, I've just gone through the IGO small group proposal, and everything in the other half of the slide was already covered in my previous remarks. So let's go on to the next slide. They also want a rapid relief mechanism where if the domain is identical or confusingly similar to their acronym -- let me stop there. They just want the acronym; our proposal gives them relief when - under the URS for the name or the acronym. So our recommendation is broader than what they proposed.

And registered and used in a situation where the registrant is pretending to be the IGO or that's otherwise likely to result in fraud or deception, and again as I previously described, we felt that the bad faith provision of both the UDRP and URS is broader than those grounds, and again when they bring a dispute based solely upon Article 6ter registration for protection and not upon a trademark, we're recommending that a policy document be conveyed to all the dispute providers and their panelists saying in that case make sure that to succeed that they should have to show to succeed what's within the range of protections again under the Paris Convention.

But again, that range of protection is within the broader scope of bad faith. So their - if they can show that someone had registered a domain name which contains their name or acronym in whole or are in part and that the purpose when you look at the use of the domain that the registrant is imitating the IGO for purposes of fraud or deception, they're going to win the process. So an obvious risk of imminent harm from abuse of the domain, well I think that's beyond the Paris Convention. Imminent harm is beyond the Paris Convention requirements.

So under our proposal, they wouldn't even have to show imminent harm, they just have to show abuse for the, you know, that it contains a name or acronym and it's being registered to mislead the public. So they - what I'm basically saying is that what they've asked for, while we haven't provided a totally separate process and we haven't extinguished a registrant's right to appeal to a court, which is where the IGO could raise its jurisdictional claims, otherwise our recommendations are in fact somewhat broader than what they've requested and not narrower. So it provides all the protections they've requested and then some.

And again, the yellow right side of the slide covers things that I've already described, so there's no need to repeat that. Let's go on to the last, I believe the last substantive next steps and PDP completion and the last slide. Okay, so this - let's recap.

We believe we will publish our initial draft report for public comment before December 31 of this year. Forty-day comment period would run till early February. We will then - I don't know how many comments we'll receive. It could be a handful, it could be hundreds, who knows, but we'll review all of them. We've done a very comprehensive and responsible job so far and we're not going to stop with that practice at the end.

We're going to take them all, read them all, take them under advisement. Make any adjustments that we believe are required or appropriate to the final report based upon the public comments. And somewhere towards the end of the first quarter, the beginning of the second quarter of 2017, we anticipate delivering our final report to the GNSO Council for its review and adoption.

The council, probably in that same second quarter, though it could maybe slip to the third, will take up that report and decide whether to adopt our recommendations in whole or in part and forward them to the board for its consideration. And then if the board adopts them and if, you know, it's not on the slide but at that point if the GAC gives advice to the board in regard to the

final report and recommendations which is inconsistent in whole or in part, the board will have to deal with that conflict between GNSO recommendations and GAC advice.

But at least there's some consistency we would anticipate that in the second or third quarter of 2017, the process of implementing those recommendations adopted by the board would begin and that the implementation would integrate with the previously adopted recommendations on preventative measures and broaden the scope of IGO protections within the ICANN ecosystem.

So I think that's our last slide, right? So I hope that's been informative and we're going to stop now and take questions from people in the physical room here in Hyderabad, questions or comments and also from anyone online. And let's open it up for questions or comments. Thank you.

Mary Wong?

Mary Wong: This is Mary from staff. It's not so much questions or comments on the last part of the presentation, Phil, but I just wanted to note for the record that there is a discussion going on in the Adobe chat, which obviously will not be captured in the official meeting transcript but that we will take a copy of the Adobe chat so that that discussion, which is fairly substantive, that's going on can be referred to the working group and published as well.

Phil Corwin: Mary, have you - I haven't been following the chat as I've been delivering this commentary. Is there anything in the chat you think is significant enough that you want to raise it now?

Mary Wong: This is Mary again. We probably want to take a moment to look at the comments, if you don't mind Phil, but since they don't pertain directly to the differences between the small group proposal and what this working group is

likely to recommend, maybe we can go to any discussion on those points while we review the chat comments.

Phil Corwin: Okay. Rubens?

Rubens Kuhl: Rubens Kuhl, (unintelligible). If I understand the slides correctly the actual implementation of the work group recommendations would be some policy guidance documents, right, and only that?

Phil Corwin: Yes, it would be policy guidance sent to all the dispute resolution providers for the UDRP and URS with notice that they take notice of it and incorporate the recommendations and convey them to their panelists in regard to the standing issue, standing based on the Paris Convention protections, invocation by an IGO of those and that they should accept filings filed by agents, assignees or licensees of IGOs.

So it's more procedural than substantive. Again, we didn't feel there was any need to change the substantive provisions of the UDRP - substantive policy provisions of the UDRP or URS. And again, those are being reviewed in the other ongoing working group on RPMs in all gTLDs.

Rubens Kuhl: So basically those IGOs would actually have somewhat to gain from the implementation of this guidance even if they don't like what they have not gained. But what's actually in the recommendations would be a gain for them. Is that (unintelligible)...

Phil Corwin: Yes, we do think it would be a substantial improvement. It would clarify - it would eliminate any confusion that they don't need to register trademarks to invoke these curative rights processes. They can do it simply if they've asserted their Article 6ter protections, they have standing. And they don't have to concede on the jurisdictional immunity. They can bring the action through a third party and insulate themselves in that manner. You know, we

do believe these would be beneficial to IGOs and provide clarity which is not presently available.

Rubens Kuhl: So I just had one (unintelligible) question then, just my personal interpretation that it would be very hard for ICANN board to find the workgroup recommendations to not be in the public interest, which is the only reason they can - they could use to reject those recommendations. So I don't see either the board not accepting those or even GAC making advice against the recommendation. They might make advice for more than you gave them, but I think you have a pretty good road towards being implemented.

Phil Corwin: I generally agree. I'm going to sidestep providing any opinion on what the board will do in regard to our ultimate recommendations, which could change somewhat based upon the public comment. What I've described is not final in any way, nothing's locked down. But I agree, I don't think anyone could fairly characterize these recommendations as not providing substantially more clarity and improvement for IGOs. It's not everything the IGOs have proposed and the GAC may well provide advice that's based on the IGO small group proposal and the board will consider that, but it would be in addition to our recommendations. So I agree on that point.

Mary, go ahead.

Mary Wong: Thanks, Phil. Thanks, Rubens. This is Mary from staff again. So not opining at all on the substantive merits of this discussion but on a pure process point that obviously the GAC would be issuing advice and that advice goes directly to the ICANN board usually through communiqués, as Phil noted earlier.

But just in relation to this particular slide, I wanted to highlight, especially for people who are not and may have no reason to be familiar with the ICANN bylaws, that assuming that the council adopts the final recommendations from this working group and on that point, as Phil noted, the form and nature

of those final recommendations could likely change or not depending on the nature of the public comments received through the initial report.

But once those final recommendations are done, assuming that the council adopts them and forwards them to the ICANN board, which you see is the lower left-hand box on this slide, the ICANN bylaws do require that there's the public comment opportunity which includes the possibility of the GAC providing advice should the GAC feel that there are public policy implications with the final recommendations. Thank you.

Phil Corwin: Thanks, Mary. I don't see anybody with a hand raised in the chat room. Anybody in the room here in Hyderabad have any further comments or questions? Yes, sir? Please state your name for the record.

(John Rodriguez): Hi, good morning. My name is (John Rodriguez) and I am with the U.S. Patent and Trademark Office. Thank you very much for the informative presentation. It's very helpful.

Phil Corwin: You're welcome.

(John Rodriguez): I did have just one general high level question for the working group. I was curious to know, I know you were mentioning that 6ter - I'm sorry, protection under 6ter was a basis for standing, if I'm not mistaken. I was curious to know whether the working group took into consideration the protection in quotes, whether it kicks in at the time that a notification is submitted to WIPO or whether it kicks in once it's disseminated to all of the Paris Convention member countries and whether they decide whether or not to reject or not reject that notification. I wonder if that's a question that the working group considered. Thank you.

Phil Corwin: Okay. I don't think we parsed it quite that fine, but I do want to address this. Our understanding is that there's not a large time gap between the time WIPO receives a letter from an IGO and the time they notify the relevant

countries, all the signatories of the Paris Convention and the members of the World Trade Organization. There's not a big time gap.

So for our purposes, one, I think - our view would be once you've sent - if you're an IGO, once you've sent the letter, you're going to have standing for these, you know. We're not going to say "gotcha" because you just sent the letter and, you know, last week and ICANN - and WIPO's not going to notify the nationalities for another few weeks or a month or two. Once you send the letter, you have standing.

And two, for the standing purposes of CRP, it's relevant whether any particular nation, including the nation in which the registrant might be a registrant or the nation in which the registrar may be a resident, has adopted or refused to adopt the advice on a particular IGO, we're just saying once you've filed for your protections, if you're an IGO and you've invoked your protections, you have standing, period. And the fact that a particular nation for some reason has not recognized that in its national trademark law system is not relevant for standing to bring a curative rights action within ICANN.

Okay. I'm not seeing hands raised but I'll take your word for it. Okay, there we go. Oh I see. We'll take a question online from my co-chair Petter Rindforth. Go ahead, Petter.

Petter Rindforth: Thanks. Petter Rindforth here. The stuff we just - the fellow from the last question, of course an IGO when they start the dispute resolution process they need to show (unintelligible) Article 6ter protection in the same way as when a trademark holder needs to show in a different way that they have registered one of their trademarks to base their dispute on. So it must be there from there start.

I just wanted to go back a little bit in general and say that with it would of course had been much better if we would have more of a co-working group between GAC I guess and GNSO. We have informed GAC several times

during the time and we had got some informal meetings with IGO representatives and those inputs we have got from the informal meetings we have considered, as you can see in our report. But we also noted from the start that we wanted to have new input on our continuous work within our working group to - from IGOs and from GAC to make as good a job as possible to get in all in-person comments in our general and first proposal.

So we - I think we have done what we have - could have done from our working group's point of view inside to get input from GAC, and we have also noticed the new GAC advice from the small group. But as you can see, it was presented to us in a late stage and we also feel that it would be good now to as soon as possible come out with the public comments for all of you to consider and give us feedback on. Thanks.

Phil Corwin: Yes thanks for those comments, Petter. And just to add to that, I want to make clear that the co-chairs we were not passive in this regard. We actively reached out to WIPO and other IGOs very early on in our process. Petter and I also had a face-to-face meeting with the chairman of the GAC and two vice chairs early on in this working group's process to encourage them strongly to engage with us and made clear that we wanted to help IGOs make sure they had robust access to effective curative rights protections and hope that they would engage as members of this working group.

For whatever reason, they chose not to. There were these separate discussions with the board going on, which I think may have been one of the reasons why that didn't occur, and that might be something for the board to take into account in the future. But nonetheless we did, at least in regard to the IGOs, we did receive informally input from them from their legal counsel of some IGOs in the course of our work.

We also held a working group session at the Helsinki ICANN meeting in which several legal counsel for IGOs appeared and interacted with the working group, though making it clear they were doing so in their personal

capacity and not as official representatives of their IGOs. So we have - we did undertake the outreach and we certainly hope that the IGOs and governments that wish to will provide comments on the preliminary report.

And finally while the recently received proposal provides additional details from the IGOs in terms of the basic request, which were a separate processes and no appeal to national courts, those haven't changed. We've been aware of those requests from the beginning. We gave them thorough review but - and in the end we just didn't feel that they were required or justified and that substantial additional relief could be given to IGOs through the recommendations we are coming out with.

And I see George Kirikos with his hand up in the Adobe chat. Go ahead, George.

George Kirikos: George Kirikos for the purposes of the transcript. I just wanted to follow up on the question raised by the gentleman from the USPTO. He asked about the rights kicking in when the Article 6ter registration occurs. I wanted to point out though that the standing issue is about having a mark, it doesn't necessarily need to be a registered mark. It could be a mark that is a common law mark that just accrues through usage. So to bring a UDRP or a URS, you need not to have a registered trademark at all or have Article 6ter registration at all.

As long as you have the usage of the mark, that's sufficient. However the registration simply allows one to have, you know, basically evidence of that standing, evidence of that mark. You can still have the - you can still bring the case though without having a formal registration just like you could have a trademark dispute in the courts of the United States without any registered mark in the USPTO office. It just simply simplifies the evidence. So an IGO could obviously bring a UDRP without having the Article 6ter registration. Thanks.

Phil Corwin: Yes thank you, George. And as I mentioned early in the presentation, we did find some evidence that even without our recommendations some IGOs have already successfully utilized the UDRP either because they had trademarks or common law marks and successfully asserted that theirs were being abused.

So I don't see any hands raised online. Any further comments or questions in this room here in Hyderabad? And if not, we can wrap up ten minutes early. Well seeing none, thank you for all attending, for being up and attending this first session of Monday morning in Hyderabad. And I hope you found it informative and if you have an interest in this subject and you believe we've gotten anything wrong or misstated anything or that there's additional information we should consider, please weigh in with a comment when we issue our report next month. Thank you.

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