

ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG Meeting
Thursday, 08 September 2016 at 17:00 UTC

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. The audio is also available at: <http://audio.icann.org/gnso/gnso-igo-ingo-crp-access-08sep16-en.mp3>

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page <http://gnso.icann.org/en/group-activities/calendar>

Attendees:

George Kirikos - Individual
Petter Rindforth - IPC
Phil Corwin - BC
Jay Chapman – Individual
Paul Tattersfiled – Individual
Mason Cole – RySG
Lori Schulman - IPC
Gary S. Campbell - GAC

Apologies:

David Maher - RySG

ICANN staff:

Mary Wong
Steve Chan
Berry Cobb
Dennis Chang
Yeşim Nazlar

Coordinator: Excuse me your recordings have started. Please proceed.

Yeşim Nazlar: Thank you very much. Good morning, good afternoon and good evening to everyone. Welcome to the IGO INGO Curative Rights Protection Mechanism meeting held on Thursday 8 of September 2016 at 1700 UTC. On the call today we had George Kirikos, Peter Rindforth, Phil Corwin, Jay Chapman, (Paul Hattesfield) and Mason Cole. We have received an apology from David Maher. And from staff we have Mary Wong, Steve Chen, Berry Cobb, Dennis Chang and myself (Misha Malsi). Finally I would like to remind anyone to state their names before speaking for the transcript purposes. And over to you Phil. Thank you very much.

Phil Corwin: Well this is Phil. For the record good morning, good afternoon, good evening to all of our participants and a particular welcome back to Steve Chan. Steve is we're told making a very good recovery from a recent eye surgery and is now back on the job so we're delighted that everything went well with that. Are there any revisions to statements of interest before we get into the meat of the matter here today?

Okay hearing none we're going to be most of this meeting on Agenda Topic 2 which is initial discussion of the draft text proposed for Section 6 which is a key section of the draft report and recommendations we'll be developing and submitting for community comment. And this is of course the result our findings and recommendations as a result of our work over the past two years. Okay and we just got that unscrolled so we can scroll through that.

What I would suggest we do today and let's see if there are any objections. This draft of Section 6 consists of recommendations and explanatory language regarding why we reached these recommendations. And I would propose that we start today. And this is what the co-chairs have done so far is focused just on the recommendations. There's no point getting into a deep dive on the explanatory language unless we're all have a consensus on the recommendations we're teeing up here.

So I propose we proceed that way. I think that'll give us plenty to discuss. So any comment on that procedural matter of proposing that we proceed today by focusing on the draft recommendations in this draft section and then get into the explanatory language for each of them probably in a later call because I think just going over those recommendations will probably take up most of today's call or all of it.

I see some checkmarks and some supportive language in the chat room so I'm going to proceed on that manner. So let's start with Recommendation 1. It seems like a good place to start which is a recommendation that no changes to the UDRP and URS be made and no specific new process be created for INGOs. That's International Non-Governmental Organizations including the Red Cross movement and the International Olympic Committee and to the extent that the policy guidance document referred to elsewhere in this set of recommendations is compiled the working group recommends that this clarification regard INGOs be included in that document.

So let's open the floor for a discussion of recommendation one. And just let me say I'll call on Peter in a sec as committee working group members should recall we went back to the council at one point and asked for and got an approved revision of our charter taking INGOs out because we had reached this conclusion fairly early on in our work. So Peter go ahead.

Peter Rindforth: Thanks Peter Rindforth here. Just a quick note that I think this as it is written today is perfect summary of what we have concluded earlier in our work. So I

at least I personally see no reason to make any further changes. It's a very good summary of what we concluded during our work. Thanks.

Phil Corwin: Okay thank you for that comment Peter. I see George and Jay have come in the chat room that they approve of the current language of Recommendation 1. Anyone else want to speak to Recommendation 1 before we close out discussions of the basic recommendation? In a later call we will address the explanatory language around that. Okay seeing no hands up and no requests and hearing no one on the phone line, By the way is there anyone on the phone line that's not in the chat room? I guess not. Okay so...

Yeşim Nazlar: Hello this is Yeşim. So (unintelligible) on mute. There is no one just on the conference line. Everyone is on the AC as well.

Phil Corwin: Okay great. Okay now okay Recommendation 2 we're going to spend a little time on this. And I'm going to provide some background when we get into it. Recommendation 2 for IGO standing to file a complaint under the UDRP and URS can in addition to trademark rights - and I think the red language or orange language -- at least that's what it is in my display -- is language that I added in an initial review of this. Is that correct Mary that the red stuff is my suggested changes?

Yes okay Mary agreed in the chat room. Yes and I've only had a chance to go through the recommendations, not the full text of this entire draft so far that in addition to trademark rights be demonstrated by IGOs have complied with the requisite communication and notification procedure in accordance with Article 6 Tier of the Paris Convention for the protection of industrial property. For clarity the working group recommends further that a policy guidance document pursuant to the UDRP and URS be prepared and issued to this effect for the benefit of panels. And there's a comment from staff there from Mary. Staff has some misgivings about this recommendation. Mary rather than you elaborating let me - I do have your email that you sent to the

co-chairs I'd like to address that in a personal capacity and kind of tee up the issue for working group discussion.

And in a email sent yesterday by Mary to the co-chairs she outlined the four reason for staff concerns on this. I'm going to go through them and indicate my own personal views on this. Any and my personal view is I'm comfortable for where, personally comfortable where we're coming out with this draft recommendation. And if we don't have a consensus on this recommendation it means that we would essentially be requiring that for standing the only way IGO could have standing would be to show a trademark in the name or acronym that they're addressing through the curative rights process.

First staff noted that an Article 6 Tier communication the WIPO polo simply means an IGO is notified its name - it's an acronym to WIPO, doesn't mean that all member states have automatically agreed to be recognized as an IGO name or acronym for purposes of the Paris convention protections. States have 12 months to file an objection to a notification. And each state has its own sovereign discretion as to how to implement the Article 6 Tier protection.

My personal reaction on that is that - excuse my throat, my hoarseness that - and this we'll get into this in a second, that enough states do automatically agree since you only need one trademark registration in any nation to assert a right to file in an ICANN approved CRP. I think it's sufficient and it's sufficiently related while it's not identical to the rights conferred by a trademark registration it is a right - a protective right within the trademark system. For me personally that's close enough to justify standing.

Staff next point was that there's a disparate handling of six tier notifications among Paris member states. Some member countries automatically accept the notifications. And I'll stop there and note that that would mean that at least some member countries automatically except the registration with WIPO was sufficient to confer the Article 6 Tier protections. Staff note goes on other member countries perform a review process to determine whether to accept

them. I still my impression is that and the vast majority except most of these. That is a rarity for states to reject an Article 6 Tier notice to WIPO.

So staff is concerned that it would be awkward to conclude that a 6 tier notification by itself would be equivalent to Phil filling the UDRP URS standing requirement in all cases much less it serves as procedural notification, creates an enforceable right equivalent or similar to trademark rights. Again speaking personally it's not equivalent. Well we'll stipulate for that the record but it is a protective right within the trademark regime of the signatory countries to the Paris convention and in WTO nations. It's a protective right within their national trademark system. So I again I'm comfortable with having that as grounds for standing.

The third point that staff raised well we're only talking about remedies under UPRS, UDRP and URS. This may set a precedent for us going down a slippery slope of allowing these standing rights to be expanded, that it might drag into geographic indicators issue. Yes I'm always we're - again speaking personally I'm always leery of proceeding down slippery slopes. But protection for IGO names and (acronyms) is something that we've got very strong advice from the GAC on this point that they want to see better protection whereas the GAC has not been able to reach protection on geographic indicators. So for me that's sufficient differentiation to be comfortable with this.

And then the fourth point related to historical documentation about Article 6 Tier and a particular the - there's a quote here that the purpose of Article 6 Tier is not to protect the official size or hallmarks mentioned above as subjects of industrial property but rather to exclude them from becoming such subjects in certain circumstances.

So yes the purpose is somewhat different from trademark rights again speaking personally but it is a protection again within trademark regimes. So I've now conveyed to the full group the discrete concerns raised by staff. I

see Peter's hand up and we're going to open up Recommendation 2 now for general comment on the recommendation that Article 6 Tier registration be sufficient to confer standing and also to address if anybody wants to any of the concerns about this potential recommendation raised by staff. Go ahead Peter.

Peter Rindforth: Thanks. Just wanted to say that I agree with your comments and replies when it comes to the IGOs in Article 6 Tier. B, we need to have in mind that it's only the first step of the dispute resolution procedure we're talking about namely to identify if the complainant has any kind of name rights. And as you said compared to trademark rights that you raised in the UDRP it could be a registration in a very small country in a faraway part of the world but it's still enough to show that you have trademark rights.

And then it's up to the parties to convince the panelist on their next two steps. And when it comes to IGS it is the same. I mean you can - we - in this way with Article 6 Tier we have at least identified some kind of name rights making it acceptable that the complainant start the procedure. And then it's up to the complainant also to show the bad faith steps. So I think that Article 6 Tier is - it's better than to do nothing for IGOs and it's a fair way to solve the problem that we identified in United States. Thanks.

Phil Corwin: Yes thank you Peter. And I agree with you on those points you just made. I also at this time I note that Lori Schulman is online. I don't know if Lori heard the whole exposition on this recommendation number two and some staff concerns about it but welcome. Lori I also note that George Kirikos filed in the chat room a reference to UDRP rules that the reference to under applicable law could be referenced as further buttressing standing from Article 6 Tier registration.

And I would also say that on the slippery slope when we get around the working on the actual explanatory language in this draft report we should make it very clear that our views on this relate only to the unique

circumstances of Article 6 Tier and should not be taken as precedent for any assertion that any other rights out there including geographic indicators would trigger said standing. So obviously if someone has a trademark registration in a country that recognizes that that's a different issue for the panelists to deal with. But do we have further discussion on Article 2? This is an important recommendation. It's the one that explicitly provides standing for IGOs in the UDRP and URS based on Article 6 Tier registration. So if we have views on this let's hear them now. George?

George Kirikos: George Kirikos for the transcript. I noticed that the very end of the recommendations says for the benefit of panelists. Should we perhaps amend that slightly to also make it clear that it's also for the benefit of potential complainants? I - so that the IGOS are - themselves are educated on that point? It's kind of like indirectly saying that already but...

Phil Corwin: Yes. I don't have a problem with that George. And that was just when I inserted that phrase. You know, I have no authors pride in changing that or expanding that. I just wanted to make clear that we wanted that policy guidance to go to the dispute resolution providers so that their panelists are informed on this point if we - if this becomes something that's adopted down the road by - in a final report that's adopted by the board.

Okay. Any further discussion on Recommendation 2? Okay seeing no hands and hearing no voices we're going to scroll down to Number 3. Okay still trying to get to Number 3.

George Kirikos: It's on Page 5.

Phil Corwin: Okay. I must have missed it. Thank you, going right past it. Okay Recommendation 3 for IGOs the working group does not recommend any specific changes be made to the substantive grounds upon which a complainant may file and succeed on a claim against a respondent. And then it references the applicable session of the UDRP.

In relation to IGOs however the working group proposes that the limitation enshrined in Article 6 Tier 1C 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 a respondent possessed no legitimate rights in the domain name that is identical or confusing similar to an IGO's name or acronym and is registered and used the domain name in question in bad faith.

And then I had put in a initial comment on that that we need to discuss a portion of that language more fully to consider its import and discuss whether it should be modified. And to do that we're going to have to look at the actual text of the - of Article 6 Tier because its description of the rights is similar to but somewhat different than the UDRP. So we're going to have to see if we need some conforming language there. So with that introduction I open it to discussion on Recommendation 3.

I hear someone typing. If that person could mute their phone it would be appreciated. No discussion on this very important recommendation which basically says that once the IGO is standing they've got to show that the name or acronym that they've either trademarked or registered for protection under Article 6 Tier is being essentially infringed by a domain registrant who registered and is using the name or acronym in bad faith. Yes I see some comments by George in the - okay I see your hand up George. Go ahead.

George Kirikos: George Kirikos for the transcript. Yes I just want to reinforce Phil's argument and type the words from Article 6 Tier 1C. Is that the language that you intend to capture that the use or registration is probably not of such nature as to mislead the public as to the existence of a connection between the user and the organization? Is that...

Phil Corwin: That sounds it George but I don't have the full text in front of me so I wouldn't be in a position to say that only - that's the only language in 6 Tier but we're

going to have to focus on that as a group and see which language we're going to reference.

George Kirikos: Yes. Just to follow up I agree that the Recommendation Number 3 as it stands is solid so I'm in agreement.

Phil Corwin: Yes and I note that there's only right now one short paragraph of explanation for this recommendation so we're probably going to want to flush that out to be more extensive when we work on the full language of this section of the draft report. Okay is there other commentary on Recommendation 3 or is there - the group basically satisfied? And of course we've never discussed making any changes in the substantive grounds for determining a UDRP or URS complaint. I'm not even sure that that's within the - I think that's probably outside the scope of this working group to suggest that but we're not suggesting that. We're just affirming that the grounds remain the same in terms of what the complaint has to prove to prevail.

All right seeing no hands, hearing none, no assertions let's go on to Recommendation 4. And this will probably be the most controversial recommendation in terms of GAC and IGO reaction, potential reaction. Recommendation 4 in relation to the - and I'm going to read this including placeholder language that I put in on initial review of the recommendations.

So Recommendation 4 in relation to the issue of jurisdictional immunity which IGOs may claim successfully in certain circumstances but not paren but not INGOs closed paren. The working group recommends that A, no change be made to the mutual jurisdiction clause of the UDRP and URS. B, IGOs be notified that they have the ability to elect to have a complaint filed under the UDRP and/or URS on their behalf by an agent or a licensee such that C claims of jurisdictional immunity made by an IGO in respect of a particular jurisdiction will fail - will fall to be determined by the applicable laws of that jurisdiction.

All right. And now continuing on to my placeholder language. Where an IGO succeeds in asserting its claim of jurisdictional immunity in a court of mutual jurisdiction then - and I put in two options, option one the decision rendered against the registrant and the predecessor UDRP or URS shall be vitiated or option two, the decision rendered against the registrant and the predecessor UDRP -- and it should be or URS -- may be brought before the insert name of arbitration entity for de novo review and judgment.

I'm going to come back and explain that after reading the last sentence. The working group recommends further that a policy guidance document be prepared and circulated to the Governmental Advisory Committee and the IGO representatives of an active on this issue at ICANN that outlines the specific options available at IGOs who seek to suspend, cancel or transfer a registrant's domain name.

Okay to explain the sentence I inserted then we'll open it to general comment, we dealt with two hypotheticals. One is that a IGO brings a UDRP or URS, the registrant prevails, the complainant fails and to meet their burden of proof. And the IGO complainant then exercises their option under either CRP to seek a de novo review in a court of mutual jurisdiction. By doing so the IGO would have waived their sovereign immunity clearly by going to the courts. So this issue doesn't come up there.

The other hypothetical is IGO prevails as complaint and domain registrant thinks that a mistake has been made by the panelist and exercises their right to go to the court of mutual jurisdiction. IGO then comes into court and said, "Court we have sovereign immunity and we - this proceeding should be stopped right now because you can't bring us before your court. You have no jurisdiction."

And as we know from Professor Swaine's memo some courts will disagree and the case will proceed. Some will agree and the IGO will be dismissed out. At that - in that second circumstance the question what happens to the

registrant who lost the UDRP or URS? If that's the end of the story and if the decision of the panelist stands they have no effective right of appeal. So we then have to decide whether in that circumstance we're going to give them a right to appeal to some arbitration group since they don't have a right of court appeal in a applicable mutual jurisdiction.

So that's my explanation for the placeholder sentence. And this is the big issue. Jurisdictional immunity is the one that stopped our work for a year while we went on a search to find a legal expert and then waited on Professor Swaine's memo. And this is the one that we can anticipate some dissatisfaction from the GAC and the IGOs, particularly the IGOs. So George I see your hand up. Let's start a discussion on this recommendation.

George Kirikos: Thank you. Sorry I was muted. George Kirikos for the transcript. Yes I'd like Recommendation Number 4 with Option Number 1 though, not Option Number 2. And as I mentioned in the chat the reason why I prefer Option Number 1 is it more closely reflects what the status quo would be if the UDRP never existed. And what would happen would be that the IGO would waive its immunity, file a complaint in court and, you know, things would just go on as if it was a normal complainant.

Option Number 2 creates problems and Lori asked what do I mean by gaming? Option Number 2 where you have to set up a separate tribunal process or arbitration process it's kind of like we created our own problem by having have the - have the option of using UDRP in the first place. And so we're creating a solution for our own problem.

And in that in creating the kind of solution we're like basically creating a whole new law and a whole new kind of gaming procedure where the complainant uses the UDRP in order to avoid waiving its immunity which it would have to, you know, do by definition if the UDRP didn't existed.

So that's my reasoning the, you know, imagine the UDRP never existed in the first place what would happen? And then we shouldn't be creating new law just because we created the UDRP. Like their whole reason the UDRP was created was as a complement to the law only if both sides agree because they can obviously overturn it to the courts. Creating Option Number 2 means that the courts no longer have that jurisdiction which is something that was not contemplated by the UDRP and shouldn't have - shouldn't create their own mess by creating this, you know, supranational court that isn't accountable to the national courts. And I'll leave the floor to others if they want to comment or I noticed Jay had some comments.

Phil Corwin: Okay I'm going to respond. This is in a devil's advocate position, not necessarily my personal views but I can anticipate that if we go with Option 1 that the IGO response would be you've placed us in an impossible position between - you've given us access to a CRP where if we assert our sincere belief in sovereign immunity we could lose the benefit of the curative rights process. And essentially you're forcing us to either use the available remedy and thereby give up any claim to an immunity we think we have. And also that if the decision is vitiated we have a right whether it's a trademark right or a right under Article 6 Tier without an effective remedy.

So I'm just again that's devil's advocacy but I think we can anticipate that. I see Ms. Schulman and from INTA and please enlighten us Lori. Lori go ahead. We're not hearing you. Lori is typing. Yes you may be on mute.

Lori Schulman: I know. I couldn't get off mute. I apologize.

Phil Corwin: Now you're off mute.

Lori Schulman: Yes I'm on my iPhone. It locked in it would unlock and get me out of mute and I apologize. My Adobe Connect audio is not doing so great today.

Phil Corwin: Okay. Well go ahead Lori.

Lori Schulman: Yes so I agree with the devil here. I am the devil right? Maybe? I don't know but I do agree that this argument in terms of Option 1 becomes circular and I think circumvents the whole task that we were put to in terms of figuring out what can we do, what should we do, what is right on both sides of the argument regarding what options IGOs may have. If we tell them they are going to be forced into the court system by the mere fact that they own a domain and now want to assert a right I do think that's a problem. I'm much more comfortable with Option 2 and recommending a fair way of arbitration. I think you still get to the issue of what happens on appeal but I'd rather see that second step in their than just go with Option 1 and not have that there.

Phil Corwin: Yes thank you Lori. Let me point out that if we - if there's any support for Option 2 we're going to have to do some more work on, you know, who would be a qualified arbitration group and under what rules they would proceed and who would pay for it. We've got Professor Swaine's suggestion that if IGOs want an arbitration option they're the ones who should pay for the domain registrant to participate in that. So there are unresolved issues in regard to Option 2.

Let me say that we also have the option as a working group to lay out both possibilities in a draft report and as for community feedback and then choose one for the final report. I know that's unusual but I don't think it's outside permissibility. So George and Lori I assume those are old hands so I'm going to call on Peter.

Lori Schulman: No okay, no I - I'll get back in the queue.

Phil Corwin: Did you have a quick follow-up and then I can go to Peter?

Lori Schulman: Yes I do because I am taking issue with this and I believe it's a bias we've dealt with all along. And I understand where it comes from that registrants don't want their names yanked arbitrarily. But I don't see that we see

evidence of this and I don't see that the volume of what we're talking about creating that kind of issue from a public policy perspective. And so I am not comfortable with just well that's the reason because registrants cannot be just have their property yank at any time by the limit in IGO. I don't think it's that simple.

And I think this issue of due process is extremely complicated when it comes to governmental agencies. That's the issue in a nutshell. I mean there's whole bodies of law in the US about what to but when you can actually sue an agency because they do enjoy the privileges of sovereign immunity. And I - I'm not - I could not support one.

I know we've been discussing this for two years I've been on I think a majority of the calls. I understand the concerns of the domain investors and registrants. But out here I've got a side more with an Option 2. Thank you.

Phil Corwin: Okay thank you Lori. Peter?

Peter Rindforth: Peter here. I'm a little bit split here. I still from what I would like to see support Option 1 because it's more of what it is in fact. And it's also if you choose Option 1 if you don't give IGOs more power than other right holders which is also something that we have both from the ICANN board and from other groups from GAC that they don't like to give to - to give IGOs too much power compared to other right holders. But on the other hand Option 2 is exactly what IGOs especially from WIPO but also from others that we have discussed this topic with would accept and even accepted that we referred to Article 6 here and other topics if we use the B version here.

So if we - and that's why I'm split. It's if we choose B version then we will have a suggested solution that IGOs most likely will accept and that did work for them. So it's a little bit of shall we follow their lines and thereby also creating something that would be accepted in a way or shall we hold the

other line and pick to one to a conclusion that the IGOs don't have more protection in this way than trademark earners. Thanks.

Phil Corwin: Yes. Thank you Peter for that. Let me, you know, thinking about this a bit more no matter what we eventually decide on this split between Option 1 and Option 2 I think the report's going to have to lay out our thinking on this very clearly in the final report and why we chose whatever - whichever one we chose. I also thought of one more devil's advocate argument while this discussion was going on is that IGOs if we recommend Option 1 let me tease it up by saying right now under the UDRP if an IGO brought a complaint based on a trademark registration or a common law trademark for trademark rights the actual - we're really talking about such a hypothetical situation it's hard to imagine an IGO asserting that a Web site is in effect imitating the IGO and confusing the public, you know. And I'm taking out criticism Web sites where someone might be criticizing a UN agency and have the name and the name of the Web site which would be permitted at least in the US as a first amendment right. But if someone was just trying to pretend they were UNESCO or WIPO or the World Health Organization it would be probably be pretty clear or not from the Web site if they were doing so. And the odds of a domain registrant, the odds of an incorrect decision on that are probably very low and a domain registrant who was actually engaged in the type of behavior appealing would be extremely low given the cost and the lack of probability - well probability success.

My - could the IGOs make an argument that by stating that if it's appealed and the IGO asserts immunity -- and many of them will assert immunity rather automatically just to not set a precedent for another situation where it could be pointed out that they didn't assert immunity -- that we'd be incentivizing bad actor registrants to appeal in the belief that the IGO would be boxed in with well assert immunity and that would vitiate the decision and allow them to retain the domain name. So that's one more devil's advocate argument we might see if we go with Option 1.

I'm still personally divided in my own mind about which way we should go on this although I am very clear in my own mind that we're talking about a hypothetical situation which will be very rare if it ever occurs where a registrant of an IGO infringing domain appeals. And I see hands up from George and Lori and Peter again. I'll call on George assuming that's a new hand.

George Kirikos: George Kirikos here. Yes, we've been talking about the devil's argument. Yes I want to propose this thought experiment what Option 3 which is what you get rid of the UDRP entirely. And so what would happen there? What would happen is that IGO trademark holders, et cetera, would have to go to court. You know, there would be no, you know, streamlined quasi-arbitration procedure like the UDRP. People would just satisfy their disputes like they do over, you know, copying of Web sites, you know, copyright infringement, you know, liable, you know, every other cause of action that exists in the off line world. You know, there's procedures for those. They would just do the same thing for trademark disputes. That's, you know, what my devil's argument would be for Option Number 3.

And then tagging back to what Lori was saying that that's not acceptable to trademark holders. Well the whole reason if you go back to why the UDRP was created it wasn't created to replace the law. It was to create an alternate route to try to get to the same decision. And as part of that grand bargain both sides, either side could go to the courts to make sure that, you know, the correct decision was rendered if the - if either side believed that the panelists got it wrong. And Lori said she didn't see evidence of problems. We posted, you know, mountains of evidence of cases where, you know, A3, you know, a three to nothing arbitrator makes a decision, you know, awarding a name and then the courts give a completely different result awarding, you know, damages against the trademark holder who asserted the claim in the UDRP for bringing such a frivolous dispute.

We're talking, you know, the palace getting it completely wrong. And I don't know how Lori missed that, you know, when it's been posted to the mailing list, it's been posted to the chat room. So I don't know how she doesn't believe that the court system has a check - checks and balances step isn't, you know, effective or, you know, isn't make - isn't correcting the mistakes that these arbitrators are making. It definitely exists.

And so to remove that checks and balance - check and balance system of the court would be, you know, a violation of the 1999, you know, grand bargain that was made. And so Option Number 3 where it just goes to the court without having a UDRP would be, you know, preferable to me rather than setting up a system that can be gained by complainants.

And Lori says, you know, she's talking about it's - there's unique problems related to the IGOs well IGOs don't have any special rules saying that if they, you know, if I throw a rock in their window just you have to take me to a special tribunal. They still have to work with the framework of, you know, each national law. So I'm not sure, you know, (unintelligible) get on your spot but if I start making UNESCO cookies, you know, UNESCO can't say, "George stopped doing that or will take you to the UN." There's, you know, they would have to sue me in a Canadian court. That's, you know, I just don't understand where she thinks this parallel legal system exists and I'll leave it to her.

Phil Corwin: Okay, all right. Thank you George. I just want to state and then I'll go on calling on the upraised hands. My personal view would be that the one option that would be unacceptable to me would be to have a registrant lose to make an appeal, have the IGO successfully stop the court by asserting immunity and then leave the registry without any appeal mechanism from the UDRP or URS determination. That option which is not be forced but I just want to get on the record personally is the one that I would find unacceptable.

I'm going to ask I see Mary's has had her hand up for a while so I'm going to ask for her input before I go on to working group members again. Thank you. Mary?

Mary Wong: Thank you Phil and thanks everybody. Hopefully you can hear me because my connection is not the best. But we wanted a staff to address the sort of fundamental question not so much where the Option 1, Option 2 is preferable but the connection between a successful plea of immunity by an IGO and Option 1 where this means Phil I assume the way it's written - and it follows on earlier working group discussions that when the IGO is successful in saying we have immunity that, you know, therefore the prior panel decision is vitiated. I think our concern here is that in some ways the plea of immunity is simply the (unintelligible) ability and it can be procedural or something close to it to get something before a court. It's not the same thing as the court itself then resolving whether the initial decision was right or not and therefore can or cannot be vitiated. So I just wanted to state for the record that that in staff's view at least at this point having, you know, thought about it for a little bit we are a little bit concerned at that connection being made if Option 1 is adopted.

This is not to say that we think Option 2 is necessarily better or it doesn't need more work but we just wanted to point it out. And secondly with respect to I think George's thought experiment of Option 3 what we wanted to point out here is that this may be actually outside the scope of our charter which actually it asks us to decide whether or not the UDRP and URS should be amended or the new process should be created. So to the extent the working group would like to go down that path I think we might need to go back to the council to get some better direction in that way. And finally Phil...

Phil Corwin: But Mary could you - I lost you on that last statement. Where do you think we might have to go back to council?

Mary Wong: If we actually pursue an Option 3 where, you know, I know George is a thought experiment but if we're going to recommend something about the

UDRP other than an amendment or no amendment we might need to go back to the council.

Phil Corwin: Okay. Yes personally I took George's Option 3 as just a thought experiment and not an actual proposal that we include that. I wouldn't support including that. I think we are where we are. But go on there. I don't want to cut you off. I think you had more to say here.

Mary Wong: Thanks Phil. And that's right as well so we just wanted to note that for the record. I think the final point was just to say that if we have time at the end of the call if we can go back to Recommendation 2 because we have one additional point from the staff side would like to make. Thank you.

Phil Corwin: Sure, okay. Let me call on Peter and then Lori and then we'll get back to Mary for that additional staff thought. And we just note in the clock we have nine minutes left on this call today.

Peter Rindforth: Thanks Peter here. There's another thing on Option 3 I saw. George was actually writing in the chat room I see was not seriously proposing Option 3. I think that's a good attestation also but it was interesting to discuss it.

Just a quick question to the group and but, you know, frankly specifically to Mary. As we have a lot of plus and minus comments both for our Option 1 and Option 2 do we in our initial report have to support from the group one of the options or is it - could it be acceptable if we more inform stating this two options (sic) and then in a way also describes the minus and plus to give the public the opportunity to come back with comments that could lead as to which of them would be the best? Thanks.

Phil Corwin: Yes, thank you Peter. And of course I suggested that earlier in the discussion that one way we could go particularly if we don't have a clear consensus within this working group on Option 2 or 2 would be to lay both of them out as possibilities for public comment and base a final report on the comment

received. We'd have to be very clear about the pluses and minuses we see of each of them and the issues involved. Option 2 would involve as I noted issues of who would be acceptable arbitrators under what set of rules and who would pay among other potential questions.

So I also want to note that in the chat room I believe Jay had posited that as a if an IGO had brought the initial UDRP or URS action through an agent or a licensee then they may not have to and may not be in a position to assert sovereign immunity. In that case we make it into the other possibility laid out in Professor Swaine's paper that some courts somewhere might say we're not going to hear this because the agent or licensee is not the entity that assert - that registered the trademark or that asserted the Article 6 Tier right.

I don't know that we should even deal with it. I mean we can deal in our report and recommendations for changes within the world of ICANN every potential way in which a court might deal with a don't over review and asserted claims relating to that so but I just want to note that possibility.

But I think Jay is right if the IGO protected their immunity by bringing the complaint through an agent or licensee that might - would likely prevent them from raising the issue because the party in the appeal would be the agent and the licensee, not the IGO which would be much more difficult argument for the agent and licensee to make to assert immunity on behalf of that party that licensed them or that they're an agent for. Mary what further input did staff have and then we're going to talk about next steps and next meeting?

Mary Wong: Thanks Phil. And I apologize I should have sent this note to the full working group before the call today. But in going through some of the background documentation to our work staff came across a January 2015 letter from I believe it was the NGPC at the time to the GAC which essentially says that the NGPC understands there may be differing views within the GAC about the nature and extent of IGO rights and that some GAC members may be concerned that resolving the issue of curative rights in the ways currently

been discussed. They don't go into detail about what the ways currently discussed our but that the concern here is that this could result in the creation of new rights for IGOs.

So while I don't have the, you know, information to know exactly what this was referring to we just thought we would highlight this for the working group certainly for purposes of Recommendation 2 and more generally. And I will send the letter to the working group list after this call for everyone to look at it that's all right?

Phil Corwin: Sure. Sure yes thank you Mary. I'm just guessing but I wonder if that concern doesn't relate to concerns by some GAC members about the geographic indicator issue, on - an issue on which the GAC never reach consensus and as we well know and particularly in regard to .vine and .wine.

And one reason why we have to make crystal clear in this draft report that whatever we're recommending goes only to IGO rights under Article 6 Tier and does not create a precedent in our view for any other asserted rights in any trademark, national trademark regime. Also there's a difference I think between Article 6 Tier which is a Paris convention. It's a widely subscribed international treaty as opposed to geographic indicators where there's no overarching global agreement on that.

And finally I noted that Lori stated in the chat that she favors IGO immunity. Well so do I personally but as Professor Swaine pointed out there is no clear demarcation of what the limits of that immunity is other than its many jurisdictions considered to be less than absolute and based on particular facts and circumstances and functions.

I'm going to - it's 158. We've got two minutes left. Item 3 was working group discussions to were there any open questions remaining topics not currently addressed by the draft need to be included? The one I would note that if we go anywhere down the road of Option 2 on the IGO immunity we're going to

have to give some more thought to acceptable arbitrators, arbitration rules and costs - cost bearing in the final report and recommendations. I don't know of any others right now.

But what I'm going to propose is that members of the working group think about Item Number 3 and between now and the next meeting next week decide please get in comments on the email list if you believe there's any open - other open questions remaining topics that are unaddressed so far in the draft report.

Also I'd invite all working group members what we're going to start doing next week is we may circle back to these recommendations but we pretty much adopted all but four. We still have some open issues on four. Start reading the full draft report. And is there a wiki space Mary where people can insert chats and suggested revisions of the language because I think next meeting we're going to go start recommendation by recommendation and probably just get no further than one and maybe two on the explanatory language and start working on actually editing and adding to the explanatory language justifying the recommendations. So does that seem like an acceptable way to proceed in preparation for our next call?

Mary Wong: Phil this is Mary.

Phil Corwin: Mary go ahead.

Mary Wong: Thanks. So we haven't posted this draft to the wiki. We can and in addition if folks would like editing rights we can also put it in the form of a Google doc if that would help.

Phil Corwin: Yes I'd be open to that. I think that is the best way to proceed to let - give people the opportunity to review it and to propose edits and additions. And then we can go over all of those starting with the next call because as you can see we're now on the march to putting together a final report and

recommendations. And I don't know if we'll get it out for comment before Hyderabad -- that's our goal -- but I think right now it's possible. It's early September and that gives us seven or eight more meetings.

Okay any comments on that? Does it - it's 2:01. We're one minute past time. Yes what is our call time next week? I believe we're back to regular time at 12 noon Eastern? Does staff any conflicts on that time next week? Mary's saying no.

All right so let me Mary, let me ask this. Can staff please circulate an email after this, post this to - post this document to the wiki, create a Google doc and then notify staff members of the ability to please ask them to review it in preparation for our next call where we're going to get into the explanatory language and notify them that the Google doc is available for any suggested edits and additions.

Okay Mary says she will do. And with that if you have any last comments or questions please raise your hand. Otherwise please spend a little time on the reviewing the document between now and next week. And next week we'll plunge into the actual language, the explanatory language surrounding each recommendation. And meanwhile please think very hard about Recommendation 4 and Options 1 and 2. We're going to have to come down on one or the other or put them both out for community comment. But we need to decide what happens where a registrant appeals a decision and the IGO successfully asserts immunity in the court of mutual jurisdiction. And with that I'm going to bring the call to a conclusion. Thank you all for participating today. I think we made some good progress.

Mary Wong: Thanks very much Phil. Thanks everybody.

Phil Corwin: Bye all.

Man: Thanks.

END