

**ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG Meeting
Thursday, 21 July 2016 at 16:00 UTC**

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The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page <http://gns0.icann.org/en/group-activities/calendar>

Attendees:

David Maher - PIR
George Kirikos - Individual
Petter Rindforth - IPC
Phil Corwin - BC
Jay Chapman – Individual
Paul Tattersfiled – Individual
Mason Cole – RySG
Paul Keating – NCUC
Gary Campbell – GAC
Lori Schulman - IPC
Kathy Kleiman – NCUC

Apologies: none

ICANN staff:

Mary Wong
Steve Chan
Berry Cobb
Terri Agnew

Coordinator: The recordings have started.

Terri Agnew: Thank you. Good morning, good afternoon and good evening. Welcome to the IGO INGO Curative Rights Protection PDP Working Group call, taking place on Thursday, 21 July 2016.

On the call today we have George Kirikos, Jay Chapman, Petter Rindforth, Paul Tattersfield, Mason Cole, David Maher, and Phil Corwin. I have no listed apologies for today's meeting.

From staff we have Mary Wong, Steve Chan, Berry Cobb and myself, Terri Agnew.

I would like to remind all participants to please state your name before speaking for transcription purposes. Thank you very much; I'll turn it back over to Phil. Please begin.

Phil Corwin: Well good morning, afternoon or evening to everyone wherever you're located. Phil Corwin here, cochair of the working group along with Petter Rindforth. I'll be leading today's call. And we are now having received Professor Swaine's memo and having heard - gotten some input from our guests, you know, from the IGO several IGOs, last week. We're now ready to embark on the final part of this journey, which is to begin deciding on what we're going to recommend in fulfilling our work requirements under our charter. And so that's the beginning of the final discussion, starts today, and we're going to get into it. So and I appreciate everyone being on today's call because now we finally get to the most important part of our labors.

So with what we have on the screen now, let's stick with Slide 1 for the moment, let's go through these slides quickly and then get into the discussion. We have four basic options as laid out. We can - we could - well, Number 3 is one I'd start with, we can make - we could recommend no changes to the UDRP or URS. Speaking personally, that's not the one I favor. I think some tweaking at a minimum is required.

Option 1 is to make some modification to the UDRP or URS to make them more useful for IGOs with - who believe their names or acronyms are being infringed online. Number - the next one is to look at the suggestions in the Swaine memo for some alternatives. And Number 4, which is the most extreme one and would require the most additional work, would be to develop a new narrowly-tailored curative rights process solely for IGOs.

And I think we'd have to, if we have any interest in doing that, believe it's required in any sense, I think we'd have to discuss whether we differentiate between IGOs. Would that only be for the UN agency IGOs or for all IGOs? So I think that would be involved.

Dependencies, well, the Council GAC Board discussions the problem there is that the Board has been discussing this with the GAC and the IGOs for two years now. And to the consternation of many, including GNSO Council at the Helsinki meeting, there's, Number 1 they've only been talking to the GAC and the IGOs and not to the GNSO Council members on the differences between those groups on permanent protections.

And, Number 2, it would be extremely helpful to this group in fashioning curative protections to know what those permanent protections are going to be for IGO acronyms. And we still don't know, so I think on today's Council call, which I'm going to be involved with - I'm going to be urging that we really urge the Board to come to a decision ASAP on what those permanent protections are going to be. So we can make our final decisions in that context.

The new review of all RPMs in all TLDs, I'm a cochair of that group. I really don't think whatever is going to come up with in that group in terms of any potential changes in the URS or the UDRP will impact our work. I'm open to other points of view. But I think URS won't be discussed by that group until spring of next year; UDRP discussion won't kick off until early 2018. We're certainly not going to wait on that discussion.

And again, whatever, if any changes are made in either URS or UDRP, I don't think - and again personal opinion, not trying to impose my views on anyone, and I'll get to you in a second Mary, I see your hand up. I think most of the changes we'll be discussing potential changes or UDRP or URS relate to standing, although of course it could relate to appeals process which is more substantive.

But I don't think anything in the RPM review might be doing would impact whether or not IGOs can or how they should be able to use those processes. Mary, speak up.

Mary Wong: Thanks, Phil and hello everybody. This is Mary from staff. I just had an update on the first possible dependency, Phil, and an observation on the RPM PDP.

Phil Corwin: Okay.

Mary Wong: So if I start with the first dependency, the Board and the GAC had a call yesterday as - I'm not sure if you had a chance to check your Council emails, Phil, but I've sent a note about that. That call was recorded and that recording is available. I can actually send it around, although it's perhaps of limited to interest to this group.

But in relation to the IGO acronyms issue, several points emerged that may be of interest to this group. One is that it seems clear that the GAC, from its communiqué in Helsinki, also wants to see a resolution of this longstanding issue. Secondly, Thomas Schneider, the GAC chair, seemed to emphasize on the call that it is important to have the GNSO at the table in concluding this resolution of the IGO protections issue.

And thirdly, Chris Disspain from the Board, in response to a question said that the Board intends to respond to the GNSO Council's letter following the discussions in Helsinki and that response should come soon.

So are the three points I thought may be of interest to our working group. And on the RPM PDP, staff agrees with your view on this. What we think would be helpful is that once this working group comes to a resolution in terms of what recommendations we might make for the UDRP or URS, then obviously we will notify the RPM group and it is very fortunate, obviously, that you are the cochair of that group and we have some members in common including Petter and others as well.

So just wanted to inform the group on both these points. Thanks.

Phil Corwin: Mary, could you, on the GAC Board call, could you repeat what you said on Point 2, what Thomas Schneider said? I missed part of that.

Mary Wong: Sure. So without having the recording in front of me I can't quote. But to paraphrase essentially what he seemed to emphasize is that the GNSO needs to be at the table in concluding resolution of the IGO issue.

Phil Corwin: Oh okay, well I'm sure the GNSO would agree with that. And I think as a matter of practice and prudence that's the way to go. But the most encouraging thing is the statement that we should have a - something concrete from the Board soon from Chris Disspain. So we hope to see that certainly before the end of the summer, it would make our job here substantially easier and more coherent.

All right, continuing through the slides, possible alternatives. I'm not going to read you all these points. One would be to allow an IGO to assign its right to file a UDRP or URS to a third party so that it's not technically violating its whatever sovereign immunity it has. And as we know there are different

views on what that sovereign immunity is depending on jurisdiction and type of IGO.

Allow use of an arbitral or third party non-judicial process, I think this one is - this would be - could be for a new CRP or it could create on the existing URS or UDRP it could say the appeal rather than to a court of mutual jurisdiction is to some identified arbitration panel. And we'll get back into each of these. Let's get the details and just list them now.

Third, make a distinction among different types of IGOs. And that's what I mentioned before, the UN versus the others. And last, rewrite the mutual jurisdiction clause without prejudging immunity. Well basically leave it to the courts to decide whether or not an IGO is being pulled into something that violates immunity. Which personal comment, that's probably what would happen now if a - in the rare instance where an IGO prevails in a - of course if an IGO loses in a UDRP or URS and decides to seek court review, it is voluntarily waiving its immunity.

If it wins and the registrant uses the - goes to a court of mutual jurisdiction to question the decision, that's where the IGO would assert the fact that it shouldn't be in that forum, that being there against its will violates its immunity. And it would be up to the court to decide under the view of that jurisdiction on sovereign immunity whether or not that's a valid assertion, which I think we could write something on that but I think that's probably would just be stating what actual practice would be under the current rules.

And what I don't see - well these are just on policy options. Frankly, I think - and I should have stated this when I reviewed the slides - the other option of course is to tweak the current procedures on the issue of standing to clarify that IGOs, which have asserted their rights under Article 6ter of the Paris Convention will be viewed as having standing even to bring an action under UDRP or URS even if they have not registered trademark rights in their full

name or acronym. So I would add that to the list even though it's not on the slides.

So how do folks want to proceed now? We're quarter hour into the call. And I don't know - do we want to get into each of these or should we first deal with the very basic question of whether we believe we're going to be - well I'm going to ask for a show of hands at the risk of stepping off the cliff here. How many in this working group - oh and, Petter, go ahead and talk and then I'll ask for just a straw poll here among members. Petter, go ahead.

Petter Rindforth: Hi, sorry to interrupt. But I have it in my mind. There is - first there is more of (unintelligible) question to Mary I think but also for all of us. If you go back to the first - the options for discussion, there are four points there. But if you take also this Disspain memo I see there's at least two, three, possible suggestions there.

So when we proceed with our initial report my question is I presume that we should make a short presentation of all possibilities that have been discussed. But I would prefer if we could at least recommend if not one but limited to two for that, you know, make the discussion completely open for six or seven different variations.

And also, one thing I just thought about it's - maybe that we need at least to have some kind of obligatory second step, so to speak. Because if an IGO, as you said, loses a case or the case is coming to a call because of any third party, and the court can say that, no, we can't handle this because the other party is an IGO. And vice versa if the IGO wants to interfere they can do it because then they have accepted to have it handled in the court.

If we use that system with no specific regulations that actually will automatically give more power to IGOs than I would say any other domain name dispute resolution partner or domain holder. So we need, in fact, to find a solution for that. Thanks.

Phil Corwin: Okay. Okay, thank you, Petter. I'm just looking at the Swaine memo now so we can get those other things just on the list on the right side of the screen. And I believe that's all in the final portion of the Swaine memo on UDRP. And it's alternatives. And there he lays out maintaining the status quo. That of course is already listed for us.

The next is non-judicial alternatives, UNCITRAL or some other arbitration body for appeals from a UDRP or URS decision. And other possible UDR forms, and here he has distinguished among IGOs permitting particular IGOs to elect to submit an arbitration rather than to court action. And he lists UNICTRAL as a possible.

Second, rewriting the mutual jurisdiction clause to be - rewriting it to address the special case of IGOs without prejudging the question of their immunity. That's one which would essentially leave it to the court to decide whether or not it's entitled to immunity, which again, as I stated earlier, I think that's practically what would happen anyway under the current system but we could clarify that and, you know, just recognize it as a valid possibility.

And third is ameliorating the hardship of the non-judicial process by having IGOs permitted to elect arbitration if they agree to bear some or all of the costs. So we can list that but given the message we've gotten from the GAC on behalf of the IGOs that they should have their own CRP which is either free or at very low cost, I think, proposing that they pay for arbitration for the other party, maybe a nonstarter for them, but we should still - we should discuss all of these before finally accepting or rejecting them.

And that's everything I saw on this paper. Did that cover everything as far as you're concerned, Petter?

Petter Rindforth: Yes, I think that's just excellent.

Phil Corwin: Okay. Okay, I'm just taking a look at the chatroom for a second to make sure there's nothing relevant being said that I should address. Okay, all right I don't see anything directly now. So let me lay out three options here. I just want a general show of hands. We've all -we've been working on this a long time. We've all read and analyzed the Swaine memo. We've all heard from the IGOs both in Helsinki and on a dedicated call last week.

Let me just see - nobody is bound by this, we're going to discuss all of these options in detail anyway but I just want to get a sense of where this group is going. How many members of this group believe everything is just fine and absolutely no change, not even clarifying standing, is required under the current UDRP or URS to address IGOs?

I'm going to refrain from voting on any of these right now, and I'd urge Petter to refrain so we can see what the membership believes. So we've got - I see three members who believe we should recommend no change in anything.

Let's go to the other extreme which is - so you can take away your checkmarks now. How many believe that the analysis of sovereign immunity that we've gotten from Professor Swaine and the arguments we've heard from the IGO representatives, require us to - that we're legally obligated, under existing views of sovereign immunity for IGOs, to create a new curative rights process if not for all IGOs, then at least for the UN agencies? I'm looking for any checkmarks on that one. And I don't see any.

And third option, the middle option, is how many believe that the information we've taken in the legal analysis and policy considerations that as a matter of policy we should - we should amend the UDRP and URS to at least address - to clarify standing and perhaps appointing an agent as ways that IGOs can access, clarify their standing under Article 6ter, clarify that they can bring a complaint through an agent if they want to step back and not, you know, impugn their sovereign immunity through that avenue, and perhaps just

recognizing that courts will be the ultimate deciders of sovereign immunity if there is an appeal to a court.

There may be other tweaks but those are the three that call readily to mind. How many think we need to at least tweak UDRP and URS on those or similar points to respond to our charge under our charter? I see Petter's voting. So that's fine.

Well, folks, three voted for Option 1, no change and only Petter is voting for tweaking, which means a lot of people haven't voted at all. And that's not very helpful in terms of guiding the chairs. Yes, Paul, I see your hand up. Go ahead. Paul Keating, if you're speaking we're not hearing you. I'm recognizing you to speak. Are you on mute? Paul, do you need a call out? If you type your number in the chat box, we can have someone call out to you. Well now I see your hand down. So I'll go to Petter.

Petter Rindforth: Thanks. Just a quick comment as I was the only one who voted on that option. But I'm not so sure that we need to do each of these suggestions. But I'm sure that we need to make some clarifications hopefully without in fact changing the URS or the UDRP but some more administrative changes or clarifications. So that's what I support. Thanks.

Phil Corwin: Yes, and now that the straw poll is over and incomplete I'm going to - I agree with you, Petter, I think my own personal view, and of course members are free to go whichever they want, we're going to operate by consensus. And we're going to discuss each of these options in detail even the ones we - even the new CRP, which was there no support for, we're still going to have a discussion of that to handle all this in a responsible fashion.

I think on the - that the current procedures we should both based on the input we've gotten, the analysis we've done and frankly, I think it would be more credible for us to come back with some tweaks to deal with the Article 6ter issue, the agency - agent appointment issue, recognizing that courts will be

the ultimate arbiters of a IGOs claim of immunity if it is pulled into an appeal in a court of mutual jurisdiction. And possibly other points, I don't want to limit.

But I think that would be the one I favor going forward. But it's going to be a consensus decision by this group. And I see George stating that clarifications need not be done via tweak, they can be done via WIPO views on various questions.

Well, we're not just dealing with WIPO here, George, we're dealing with all the providers. But I think we can - we can discuss in - on all of those issues whether they require formal amendment of the UDRP policy or whether they can be accomplished through some other means by just a communication to the providers of this working group's views on those. I think that's a valid thing we can discuss. But that would still be different than saying nothing has to be clarified at all.

Okay. I don't know - I know they're dialing out to Paul. Is Paul able to speak now?

Terri Agnew: Hi, Phil. This is Terri from staff. The number provided we're not having any luck with it but we're continuing to try to reach him.

Phil Corwin: Okay. Okay well, Paul, I'd ask you to - if you can hear us to check that number and make sure it's the correct one. There's nothing missing in terms of country code or anything. They'll keep trying you. If not, you know, if you can type in some comments in the chat room we'll - we're happy to have your input. And also, Paul, you still have a checkmark by your name, which is no longer needed. We've completed the straw poll.

Mary Wong: Phil, this is Mary.

Phil Corwin: Yes, Mary.

Mary Wong: Hi. While we're trying to get Paul to come on the line, maybe staff could just offer a couple of observations/

Phil Corwin: Sure.

Mary Wong: Without opining on, you know, whether tweaks, modifications, outright changes or a new procedure needs to be developed, which is a - for the working group to decide, just in looking over the deliberations of this group, it looks like we have identified at least two substantive challenges from the IGOs' perspective.

One of them is of course the one we've been discussing most recently, the question of jurisdictional immunity. And we have these various options ahead of us to discuss. The other is the fact that the UDRP and the URS at the moment, is - are limited to them having trademark rights, which are not the same obviously, as the rights under the Article 6ter of the Paris Convention or rather just the - I guess privileges or rights under that convention.

So if we are going to be looking at any tweaks or modifications to either or both of those policies, not only will we need to go back to our first discussion on Article 6ter, but really look at what the approximation, if any, of trademark rights would be and also the actual grounds basically the other two grounds of the UDRP and the URS. And whether those would be suitable in this environment as well.

And in that regard the final comment that staff would like to offer on this is that hopefully the timing of our discussions will be such that we can see what the Board's response to the GNSO is on the overall question of IGO protections, and we might also, as a group, perhaps through the Council or if it's possible on our initiative, to engage with the GAC or some subset of the GAC with regard to the possible direction in which our group is going. Just a discussion and we might be able to do that through Mason as well. So just some observations and suggestions for the group.

Phil Corwin: Okay, well let me just respond to that and then I'm going to let Paul speak but I want to respond to this while it's fresh in my mind. And I'm speaking personally here. And I've tried to keep an open mind on all these issues as this working group has proceeded.

I believe strongly that if this working group came back and said everything is fine, and we don't have to make any changes or even make any - provide any guidance to the providers on these questions, I don't think we'd be fulfilling our charter and frankly, I think if we did that the GAC and the IGOs would characterize our group as a failure as failing to deal with their issues and that the Board would be more amenable to what they propose than if we put out at least some recommendations for guidance if not actual changes to the current RPMs.

On the issue of immunity, we've heard from the IGOs repeatedly that they have immunity but I have found that while I don't disagree, they clearly have immunity, we have very detailed guidance from an expert in this now that there are different types of immunity and that different nations would answer the question of how much immunity do they have for this purpose in different ways. So I don't view it as IGOs as having absolute immunity which requires us to create a separate CRP for them with an appeals process that avoids courts of national jurisdiction. That's my personal view.

Third, I agree with them that they should have a right to bring an RPM action, even if they haven't trademarks, if they've asserted their Article 6ter rights. I think there's consensus within this group on that point but we'll see.

And so I'm going to stop there. I see hands up from Paul and George. And let's see what they have to say.

Paul Keating: This is Paul Keating for the record. Thank you, Phil. Sorry about the voice communication problem. I agree with you that there are most likely rights to

be established for standing purposes under 6ter for an IGO. They can sustain the burden under the Paris Convention.

I think that the immunity question I also tend to agree with you, is a far more nuanced question. I think that the argument could, depending upon what judicial body is hearing the dispute, find either way. But I'm less - with that as an opening I'm going to join Petter in terms of his view of tweaking the UDRP in this regard to recognize 6ter as a means of providing trademark rights, to acknowledge that, you know, the signing of the complaint might be a waiver of their sovereign immunity.

But to state emphatically in a part of the UDRP policy that if there is subsequent litigation following a UDRP, in which the IGO requests and is granted or the court on its own grants immunity, then the UDRP decision itself should become a nullity.

And the reason is, is because otherwise you're leaving a respondent with no ability to challenge a contractually appointed panel. The quality of which is not always very good. I mean, if you look at the statistics for post-UDRP litigation, the vast majority of them are overturned. And I think that to leave a respondent solely with the UDRP as their only means of addressing the issue and nothing else, I think that that's patently unfair to the respondent.

So I think that the proper choice is to place the decision at the level of the IGO. If they wish to proceed with the UDRP they're running the risk of waiver of their immunity claim. If they win and they subsequently argue immunity, and are granted immunity, then the UDRP decision becomes a nullity.

That gives them the freedom to act however they wish. If they wish to act through an agent, they can act through an agent. If they want to stand up and say that - say that yes I understand, I have engaged in trademark activities, I'm coming in to protect my rights and I'm fine with what the court post the UDRP might decide, then that's a decision that they are able to freely make

and they have as long as they want to make that decision because there's no time limitation on making UDRP claims.

So that's the tweak that I would like to see regardless of what the outcome here is. And I think that that satisfies your concern, Phil, which is legitimate, that if we come back - and we have to come back with something to recognize the 6ter issue. But having recognized the 6ter issue it now puts forward another issue which then needs to be resolved and my suggestion is resolving it as the way that I suggested, which is if immunity is substantiated then the UDRP decision becomes a nullity. Thank you.

Phil Corwin: Yes, thanks for that input, Paul. Let me just ask - and I think what you put forward should be discussed by the group as we move toward report and recommendations. If that - let' say there's a decision, it goes against the registrant in the UDRP. Transfer is ordered. Registrant files in a court of mutual jurisdiction. IGO goes into that court and says they - we shouldn't be here, we're immune. Court agrees with them, would the IGO then - then the - under your scenario, the UDRP decision is also vitiated.

So it's the status quo ante if the UDRP had never been brought. Would the IGO then be free, somewhat ironic, but would they then be free to bring an action in that same or another court of mutual jurisdiction, a trademark infringement? Or would they have prejudiced their right to do so by claiming immunity from - if that's the only court available to bring an action against the registrant? Will they have lost any right to go after the infringement?

Paul Keating: I would think that they would prejudicing their rights, yes, because they are in the same factual pattern contesting that they have rights, their rights to the mark are being contested, their rights to the domain name. If they then come back in and say no, we don't want any part of this argument, we're not going to file a cross complaint for trademark infringement, we're not going to do anything. We're going to claim immunity. I would think at least the US court

would probably say that's it, game over, you can't come back and have a do-over.

You know, but I'm less worried about that. If they want to file an action in and of themselves, once they're in the court seeking that remedy, I don't think that they'd be in a very good position to then assert immunity as against a counter claim for declaratory relief by the respondent, the registrant of a domain name.

Phil Corwin: Yes.

Paul Keating: I mean, and I've also - I made a - I'm sorry, I just want to continue on one more point is I made a proposal during the last call when we had the IGOs on and nobody responded to it, which was well, you know, I'm also willing to say that in the case of an IGO that the only claim that can be brought is one to recover the domain name, that there is no damage claim against the IGO. I'm happy to say, okay, the IGO can perhaps preserve their immunity as to monetary damages, but as to the issue of the domain, and I think that that's already going far.

And I don't know that many people on this phone call would agree with that - with going that far. But I'm willing to go that far to put this to rest.

Phil Corwin: Well one quick response and then George has his hand up and made some comments. Just as I'm concerned that if we had decided or were to decide that a domain registrant unhappy with a UDRP decision involving an IGO as complainant, was - could only go to arbitration and not to court, I've questioned whether we could really enforce that, that the registrant would still - if the registrant's in the US and files an action under the anti-cybersquatting act and seeks to enjoin the registrar from transferring the name while that action is pending, I don't think we, you know, it'd be up to the court to decide whether he's waived his judicial rights or whether that was some unconscionable provision.

Similarly, I'm not sure that in some, you know, consensus policy that ICANN has can prevent an IGO from seeking monetary damages under a law when it brings an appeal or is involved in an appeal. That the court would recognize that limitation. Just wanted to get that thought out there.

Paul Keating: Well the way - sorry, I know George, you're waiting, one second, I just want to respond. This is Paul Keating again. But the way that the UDRP is written now the respondent is not restricted to any particular court of law. The only benefit of filing in a mutual jurisdiction is you get the automatic 10-day stay - the automatic stay without having to file for an injunctive relief.

But you could march into a federal district court the day of and possibly get a TRO issued by a federal court. That wouldn't stop you. As long as you could satisfy the other jurisdictional requirements you could do that.

Phil Corwin: Right.

Paul Keating: So we could, in a way, say that the only way that you get the free stay is if you follow through with an arbitration provision. We couldn't prevent them from suing independently, nor would I want this, nor would I want to.

Phil Corwin: Okay.

((Crosstalk))

Paul Keating: You know, it's kind of like your last question, Phil, which is would they waive their claim if they wanted to subsequently bring a trademark infringement action? I don't care, it's not part of the UDRP. It's none of our business to say that. That's up to the court to decide. What we can do is deal with remedies under the UDRP. That's the only thing we can deal with. So we say if you're going to argue that and someone comes back, the UDRP decision is a nullity.

You know, you present the copy of the order that grants immunity, UDRP decision becomes a nullity, domain stays where it is.

Phil Corwin: Okay. And just before George speaks I wanted to note Mary had put in the chatroom - pointed out that in regard to recognizing the Article 6ter rights as a basis for standing, that might require an actual amendment to the UDRP to note that - because right now your right to bring a UDRP under the policy is restricted to trademark rights. I'm not sure we could - that - we could strictly through guidance clarify that Article 6ter should be considered trademark rights in the same way as trademark registration.

So we might follow a route of some tweaking of the UDRP and URS and in other places simply providing guidance to examiners in our report. Go ahead, George, I know you've been waiting.

George Kirikos: Yes, I agree with most of what Paul had already raised. I wanted to look at the bigger picture, though. You'd mentioned before that it would be considered a failure if there was not a policy change. And I just wanted to sharply disagree with that because what we're really talking about if we made a change is a deprivation of a registrant's right to national court of laws - national courts of law.

And if you could imagine right now we're in the IGO, you know, CRP working group. If you imagine we had a different working group called the Registrant's Rights - Curative Rights Protection Mechanism where, you know, we had made a change and then registrants came and said, you know, we don't have access to national courts, you know, we need a PDP to address this. Would it be considered a failure if, you know, we did no change at all in that PDP? I would think, you know, it's something where in this PDP we're weighing multiple parties' rights.

And in that weighing process we could vary, you know, we could come to the conclusions that the UDRP already properly balances those rights that, you

know, we're not going to make a policy that deprives somebody else's rights in order to give somebody else a right that doesn't exist in law. And we already know that, you know, that the IGOs have been asking for is not recognized in law. We have the State Department letter that addressed that where, you know, the State Department said we don't have to do anything, you know, go sue them in a court of law. So IGOs are not being deprived of anything through no changes so I just wanted to stress that point.

Also I wanted to mention that I did send a couple of emails to the mailing list just wanted to point out briefly the PDDRP - sorry the PDDRP, which is a post delegation dispute resolution process, which we're talking about in the RPM working group, which many of us are also on, it has the exact same issue of waiver of immunity. And so are we going to be changing every single ICANN policy when that waiver of immunity exists? I don't, you know, think so.

Also, the World Bank in their comments yesterday - sorry, last time - last week - gave us the quantitative magnitude of the issue. They said that there were 50 or 60 domain names at issue and most of them were handled by a cease and desist. So we're talking about a very, you know, miniscule problem, you know, I would characterize it as a minor irritant. While they've pointed out a lot of theoretical concerns, they've not really, you know, demonstrated harm to the extent that it would be a major policy decision for the first time to deprive registrants of a fundamental right, you know, the rule of law in their nation.

Every other ICANN policy, you know, definitely doesn't deprive somebody of their legal rights, you know, these are optional, you know, alternative dispute resolution mechanisms that complement but don't replace national law. If we had mandatory arbitration outside of the national laws, that would obviously be a huge departure from all previous ICANN policies with regards to registrant's rights. So I think, you know, we need to be aware of that danger.

Also the World Bank said that, you know, the cease and desist letters exist, you know, I posed the question, you know, what are these IGOs threatening those people with? Are they threatening, you know, they're obviously threatening some implicit legal action. So why they would use these cease and desist letters and claim, you know, we can't go to court, just doesn't make sense.

I'll give up my time so other people can talk the last 12 minutes.

Phil Corwin: Okay. Okay. Thank you, George. And, George, let me ask that you and Paul, if you're done for now, lower your hands just so I don't think you're - still have something to say at the moment.

Just to clarify an earlier statement, what I meant was if we came back and said nothing needs to be changed or clarified, including the standing issue of Article 6ter, I think that would lack credibility. I think we need to address - we need to, in my view, turn out a report which shows that we carefully considered all the questions and responsibilities that we have and gives a rationale for our decisions. In each, I think, there is consensus with our group to address the standing issue in some way, maybe the agency issue, to have some discussion of the immunity issue.

So we need something that's just, you know, credible, well-reasoned and whether we do it by - whether we recommend explicit change to any of the language of the UDRP or URS or simply provide guidance to the examiners on what constitutes trademark rights, whether an agent can be used, we can decide that. But I think we - what I think would be not the best course would be to simply say everything is just - after two years of work we've decided everything is just fine and we don't have to clarify anything at all. But I don't think we're going to wind up in that place.

Miss Schulman, I see your hand up.

Lori Schulman: Yes, hi. I'm sorry, I had trouble getting into the Adobe for the first half of the meeting so I missed the straw poll but I'll contact Terri separately because I'd like to vote. But I have comments about what I'm hearing so far. And I'd like to, for a moment, the excellent legal arguments notwithstanding on this discussion, to play a little bit of a devil's advocate.

Having defended the rights, not of an INGO but an IGO, it is my practical experience that sending demand letters typically does work. So that is I think what - the statistics we've seen bear out just from my own practical experience practicing in that particular arena. Typically, registrants don't want to hassle, particularly with internationally known entities, because just practically speaking, they end up looking like bad guys even if they're not. So that's just a practical real-world example of where cease and desist letters usually I've found more effective from an INGO or an IGO than even the corporate entities.

That being said, given that we understand that the magnitude of the issue is relatively small, very narrow, and understanding that we have to balance registrant's rights, but also understanding that there is - we're not talking about a huge swath of registrations here. Are we going down a slippery slope? Or would it be harmful or unreasonable to at least consider giving some sort of - I don't know - administrative appeal right as suggested as opposed to a court, you know, a judicial appeal right to the INGOs simply as a good global citizen?

I know this is not a popular position. I'm not even sure it's a position I personally hold. But I do think it is worth discussing.

Phil Corwin: Lori, like me clarify. Are you suggesting that if the UDRP decision goes against the registrant, they could appeal to a court of mutual jurisdiction?

Lori Schulman: No, it would be...

((Crosstalk))

Phil Corwin: ...against the complainant they would be restricted to going to an arbitration body?

Lori Schulman: Right, exactly, rather than to an actual court of law. In other words, give them a little - give the INGOs a piece of what they want an appeal - an appeal to an administrator rather than an appeal to a national court. Because it seems that's where their issue is.

And given the small amount of files involved, would it be so harmful to the community? Or do you think if we set this precedent then we're going down some sort of slippery slope in some other instance? Although I can't think of another instance that's quite as unique as the INGOs, not the - not the - I mean, the IGOs, not the INGOs. The OECDs of the world, the WIPOs of the world. That's what I'm talking about.

Phil Corwin: Yes, well I see George and Paul want to, I think, respond to you. I do want to say, George, in the chat box, you put that's exactly what the IGOs asked for. I don't think it is. I think the IGOs said they don't want to be in court in either scenario. That they don't want to - a registrant who thinks the UDRP decision that's ordered a transfer of the domain to the IGO and thinks it's a wrong decision. My understanding is they don't want that registrant to be able to pull them into court of mutual jurisdiction.

Lori Schulman: Right, that's what I...

((Crosstalk))

Phil Corwin: And Lori's proposed that the appeal to the arbitration body would only be when the IGO is unhappy with the panel decision.

Lori Schulman: Yes, you know, I don't know. I just - I see Paul's comments in the chat. And, you know, we're all thinking this through. And I think a lot of us here are trained legal professionals. But thinking it all the way through, I agree, registrants need a right of appeal. I don't think that the UDRP should be the be-all and end-all of a decision making process. That I'm 100% in agreement with.

What I'm just having some difficulty is if there is a fair appeal process that keeps this decision out of national court, which to me seems the bigger issue with the IGOs, and there is just a second level that registrants can go to to have something reviewed, why - I guess I don't understand why we wouldn't just consider it outright.

Phil Corwin: Okay, well I'm going to ask you one devil advocate question of my own before letting George and Paul speak. In your scenario, IGO brings UDRP. Loses the UDRP. Appeals to an arbitration body. Let's say UNCITRAL, it's a UN agency, appealing to another UN agency, UNCITRAL. UNCITRAL decides the UDRP was decided wrong and that the IGO should - the domain should be transferred to the IGO.

If I'm the registrant in the US, what's to prevent me from going immediately to federal district court and asking for a TRO under the ACPA saying I'm being screwed by a process that's at odds with US law. This is a valuable domain. And I have not cyber squatted under US law. Have you really solved the problem?

Lori Schulman: No, you're deferred it. You've deferred it.

Phil Corwin: Okay.

Lori Schulman: I mean, I'm going to - I'll own that. I mean, I just - I don't know. I just don't want to see us dismiss out of hand, that's all. I get a little concerned, you know, that we - that sometimes, you know, in this balancing and perhaps

registrant's rights are important. But the IGOs, I think they're concerns are legitimate. And, yes, they have valuable - they have valuable acronyms. I'm not going to argue that either.

But I really from, again, a practical perspective, when you're looking at decisions and they're contextual decisions, even within the domain name space, there's a certain issue of context. Simply registering a W - and if I'm wrong, if people have case examples that say something different, I'm open to that because it's been a while, it's been two years now almost since I've been in UDRP-land.

But that is, you know, even if I were to delve - give you a WHO - that' frozen now - but hypothetically it wasn't. If I did a WHO.biz and my biz was finding people or my biz was something completely unrelated to health or anything like that, I'm not going to lose the UDRP. There's no bad faith here.

Phil Corwin: Okay.

Lori Schulman: So...

Phil Corwin: Okay, Lori, I'm going to ask you to desist because we're three minutes from the top of the hour. I'm going to ask George and Paul to each make statements of no more than one minute to try to be brief and then we're going to note the next call and then Petter and I will get together with staff and before the next call propose a systematic method for reviewing all of these options so we can reach reasons, decisions in a final report.

George, go ahead. One minute, max.

George Kirikos: George Kirikos for the transcript. Quickly, yes, just disagree that we want to go down that route of forcing people to go through binding arbitration and to allow people to appeal to a national court. It would deprive the registrants of, you know, their legal rights. And we should not be taking that position. We

should consider the possibility of getting rid of the UDRP entirely rather than allow for that option. If we got rid of the UDRP entirely there'd be, you know, a clear path. People would have to go to court to get, you know, justice.

And so creating the UDRP in order to allow certain people to get results that are different from law, you know, would be a, you know...

((Crosstalk))

George Kirikos: ...we're talking about multimillion dollar domain names. You know, some of these domain names are worth more than \$100 million. You know, cars.com valued at \$872 million. And, you know, these acronym domain names can be, you know, worth more than \$10 million. Why would you - why would a person rational to give up their legal rights to allow some, you know, some arbitrator - some international arbitrator to make that decision rather than have the protection of their own national courts, you know, it just doesn't make sense. And, you know, I'll give up my time so that Paul could speak.

Phil Corwin: Okay. Thank you George. Paul, quick comment and then we'll note the next call time.

Paul Keating: Well, I'm just going to reiterate - thank you, this is Paul Keating. I'm going to reiterate what I wrote in the chat which is I acknowledge the concern but my problem is exactly as George laid out, that these - this small universe of domain names is disproportionately representative of the large value in the industry. So it might be a small number to you but to the IGOs and NGOs, but they represent a significant amount of asset value.

Secondly, my problem with turning it over to an arbitration provision is that now we've got yet another layer of judicial process, quasi-judicial process and who knows what law which is going to be applied to the process. And so I come back to the comment that George reminded me of, which is that, you

know, the UDRP was created as the shortcut to make things easier than processing a legal complaint, which is all you could do before 1999.

And I don't see a rational basis for expanding that further in favor of certain litigants. Right? If the UDRP didn't exist, then the NGOs and IGOs of the world would be faced with having to go to court to protect their trademark rights or asserted trademark rights. So, you know, I have no problem with them asserting it, but I do have a problem with them relying entirely upon panels which don't always make legally logical decisions or they don't. I read them every day and some of them just cause my mouth to drop open. Okay?

Phil Corwin: Okay. Paul...

Paul Keating: So thank you.

Phil Corwin: ...we're now at the top of the hour so Mary, when is our next meeting? Is that one week from today, same time?

Mary Wong: Phil, that's our understanding. Unless the group wants otherwise, our time and dates are now Thursdays at 1600 UTC for an hour.

Phil Corwin: Okay. That's that I thought. All right so mark your calendars folks, we've got an indication in the straw poll today, although it was incomplete with some members not indicating any preference that there's some support for not making any changes to the UDRP or URS. I'm not sure from the way I posed the question whether that would preclude guidance to WIPO and the other arbitration panels on how they should treat things like Article 6ter, use of an agent, etcetera.

There's some support for modest tweaking. There was no support for creating a new curative rights process solely for IGOs or some subset of those. Having said that, the cochairs and - we'll get together with staff and I would hope propose, before the next meeting, a systematic approach to

discussing all the potential outcomes, including the CRP, I think we should at least have a final discussion of that before concluding on that point, to get us from this point to a final report and recommendations.

And again, it's our hope to have that out for public comment before the Hyderabad meeting, which is in early November. Which I think is quite doable when I think we're close to final decisions here. And we've got August, September and October to meet that deadline. And I have the feeling we can probably get to agreeing on positions and then working with staff to draft a report by September based on what's going on here.

So any objections to that approach? And if not I don't see or hear anyone. Paul's suggestion, we'll start with an outline report. Yes, certainly, Paul, before we start drafting we'll have an outline. I think we still need some final discussion and indications of whether it's consensus on individual points here that are going to come before us. But, yes, we'll have an outline before we start drafting, that would be the prudent way to go.

So thank everyone who participated today. And we look forward to reengaging one week from today at the same time. Thank you.

Lori Schulman: Thank you.

Petter Rindforth: Thank you. Bye.

Terri Agnew: Once again, the meeting has been adjourned.

END