

**ICANN Transcription – Abu Dhabi
GNSO IGO-INGO Curative Rights Protections PDP WG Face-to-Face
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On page: <https://gnso.icann.org/en/group-activities/calendar>

Philip Corwin: Hello everyone. My name is Philip Corwin. I'm one of the co-chairs of this working group. The other co-chair, Petter Rindforth, is standing next me. You'll hear his voice very shortly. And other than attendance of people in the Adobe chat, is there anyone on the phone line who's not in Adobe? Speak now, please. Well hearing no one, I'll assume - do we need to ask people in the room to identify themselves? All right we'll skip that.

This is a meeting of the GNSO PDP Working Group on Curative Rights Protections for International Intergovernmental Organizations. This working group started its work a little more than three years ago and we're happy that we're very near to the finish line. We anticipate delivering our final report at the end of the year - before the end of the year.

So I'll see if my co-chair has any opening remarks and then we'll right into a slide presentation that will review our work and give everyone the current state of our thinking on this working group and where we seem to be heading for our final report. Petter?

Petter Rindforth: Thanks. Petter Rindforth here. I think that during the session when we will talk about the different kind of topics, we will also refer back to the history of the working, you know, working group. So I think it's better to start. Thanks.

Philip Corwin: Okay. Thank you, Petter. So the way we're going to do this, Petter and I are going to alternate. Each one of us will read one of the slides. The other will add any additional comments, and we'll continue through them. It shouldn't take more than about 15 minutes to get through everything. And then we can open it up for general discussion and questions.

So the first substantive slide, please. Okay this is overview of our timeline, noting that in November 2013 an original GNSO PDP on permanent protections for IGO names and acronyms and INGOs, which are nongovernmental organizations, delivered its report. That's being implemented right now. But.

And less than a year after that, this PDP was chartered in June 2014 to look at the ability of international intergovernmental organization, which are mostly UN agencies, and nongovernmental organization, which are things like the Olympic organization, whether they had adequate access to curative rights protections, which is basically the UDRP, the Uniform Dispute Resolution Policy, and the new Uniform Rapid Suspension mechanism created for the new TLD program so they could safeguard their names and acronyms against cyber squatting and other bad actors. And.

Now there was quite a considerable time gap between the start of our working group and the delivery of our initial report in June 2017, which was discussed at ICANN 59. The reason for that time, you know, three-year, almost three-year time gap was not that we were slow, in fact most of our work was completed very rapidly in less than a year, but then we came up against a central issue for this working group where IGOs - and I note that throughout our work we've asked IGOs to engage with us.

They have engaged informally, though no IGO chose to be a member of this working group and I'm sorry to see that there are no IGO representatives in the room today. But their central claim, their ask, backed up by the GAC, was that a broad claim of immunity from judicial process and therefore they were urging that any appeal from a UDRP or URS should be through an arbitration and not a national court.

And we realized that we had no expertise within the working group on international law and the accepted consensus view of the scope of immunity accorded to these groups. I'm happy to see Brian Beckham from WIPO joining us here.

So we, with some modest financial assistance and outreach from ICANN, we engaged the services of an international law expert professional, Edward Swaine, of the George Washington University Law School in Washington, D.C., formally with the US State Department, to prepare a memo to inform us on that.

And that took about a year to get the funding, find the expert, find one who would do it within the timeframe for the available funds, and he delivered us a 25-page memo, which basically said that the answer to the question of how much judicial immunity IGOs enjoyed was it depends and it depended on the national court on which the question was raised. There are national laws relating to sovereign immunity and the analytical approach that they used when questioned - when immunity defenses were raised in the judicial process.

So that informed our work. We put out the initial report. We received 46 comments on that report, one of the GAC, 21 from IGOs, four from GNSO groups, and comments from other parties as well. And the record will show that the working group gave considerable discussion to all of those comments

and in particular we were looking at comments which raised new facts or new arguments that we hadn't heard up to the issuance of the initial report.

And you will see when we describe what our final report is going to look like that on one issue in particular we took the comments very much into consideration and substantially changed one of our initial recommendations relating to the weight to be given to an IGO's invocation of protection under Article 6ter of the Paris Convention.

So we - here in October we are presenting the outline of what looks like our final recommendations for feedback from the community today. We intend our next working group call will probably be in about two weeks. We don't hold calls the week after an ICANN meeting. People are still sometimes traveling and certainly recovering from the very intensive work of ICANN meetings.

And we anticipate probably not on that meeting but in the meeting after, and certainly we hope by the meeting after that, that we will issue a formal consensus call among working group members. I think we're down to about 19 members still active in the working group to get consensus feedback, but again you'll see that on almost all of our recommendations we believe there's very strong consensus. There's only one where there's some continuing discussion. And we hope to deliver our final report to GNSO Council prior to the end of December 2017 and continue and conclude this very long journey we've been on.

Now this PDP has been running in parallel to ongoing efforts to reconcile inconsistent GAC and GNSO policy advice and other aspects of IGO and IGO issues that are outside the scope of this PDP, such as protections for Red Cross names and preventive protections for IGO acronyms. And those are being dealt with separately and some of them have already been subject to further GNSO resolutions and board resolutions that are moving forward to conclusion.

So I'll let Petter see if he has any comments on that and proceed to the next slide.

Petter Rindforth: Thanks. I just wanted to add that we have indeed worked from the start to get not just to reread what has been stated before our working group by IGOs but also to get some new feedback in meeting face to face. We had - initially we had a couple of meetings where representatives from both GAC and IGOs, which was very good to speak freely about the topic and get some specific inputs, and we also on a couple of meetings we invited representatives for IGOs that could make a presentation on their point of view and we could further discuss it and understand the problems to solve.

We have two groups that we consider when we talk about this type of dispute resolutions and one - the other is the INGOs. And there luckily we had not direct representatives but we had - we have some legal attorneys that have actually worked for INGOs when it comes to domain name disputes so that we could fairly quickly and directly get input on how this topic had been handled.

And so our conclusion was fairly - they come fairly quickly on the recommendation number one is to make no changes when it comes to the UDRP and URS and no specific new process to be created for INGOs. And to the extent that policy guidance is issued, the working group recommends that this clarification is that those INGOs be included in that document so that it's clear. And...

Nick Wood: Petter can I...?

Petter Rindforth: Yes.

Nick Wood: For the record, Nick Wood. Can I just ask in the future review of the UDRP would this ever be reopened? So it's shut now. This is - so how permanent.

Petter Rindforth: That's a very good question. The - we have another working group that will in the future, so to speak, is it one year from now perhaps, start to look at the UDRP, and that working group would also look at the URS starting more or less after this meeting and the upcoming spring. And then we're lucky to have one of the three co-chairs of that working group. So I turn it over to you.

Philip Corwin: Yes. Thanks for the question, Nick. I'm also a co-chair, one of three co-chairs with the RPM Review Working Group. We have no specific charter question on this issue because it's being dealt with by this. That said, the list of charter questions we have for the RPM Working Group is not exclusive. Any other issue can be introduced at any time by working group members.

And our charter certainly contemplates that we may recommend changes to either the URS or when we get to our phase two work that we may recommend changes to the UDRP. So. This is a very narrow thing where we simply decided that no changes need to be made to accommodate international nongovernmental organizations to ensure that they had effective access to UDRP and URS.

Petter Rindforth: Okay. I'll leave it over to you for recommendation two.

Philip Corwin: Thank you. And all I would add to number one is that after the working group reached the conclusion that we didn't have to make any changes for INGOs, we went back to council and asked for formal narrowing of our charter, and the council agreed. So we did go through that procedural step.

Recommendation number two. The original recommendation was that for IGOs to demonstrate standing to file a complaint under the UDRP and URS. It will be sufficient. And this was an alternative and separate from registered trademark rights and their names and acronyms to demonstrate the compliance with the procedure under Article 6ter of the Paris Convention for the protection of industrial property.

Let me explain that a bit for - because we certainly were not familiar in the working group with Article 6ter when we started our work. Article 6ter is a provision of this Paris Convention that does not confer trademark rights upon IGOs but does confer certain protections within national trademark law regimes. This protection is obtained by the IGO sending a letter to the World Intellectual Property Organization invoking those protections.

Generally unless - individual nations can opt out of protecting a particular IGO name or acronym but if they don't opt out, then the protection within the trademark law system applies to all nations that are signatories of the Paris Convention, as well as all nations which are members of the World Trade Organization, which between the two of them is the vast majority of nations within the world.

Now we did get some pushback on this in our comments and we took them very seriously. The pushback was that trademark interest didn't want any rights to bring these - any standing to be based on anything other than trademark rights. And we also had comments from the United States of America and other nation states that there were - there's a GAC list of IGOs but there are other organizations that considered themselves IGOs that are not on the GAC list and that allowing standing based on this might permit organizations that they didn't view as real IGOs to get these protections.

So basically we dialed back our recommendation to fit within the current UDRP framework. And the recommended changes that an IGO may elect to fulfill the standing requirement under the UDRP and URS by demonstrating that it has complied with the requisite communication and notification procedure pursuant to Article 6ter of the Paris Convention, this is an option in the case where the IGO has unregistered rights in its name or acronym and must provide additional factual evidence to show that it has the requisite substantive legal rights in the name or acronym.

And let's continue to the next slide and then I'll explain this a bit more. And then to avoid any doubt, this mechanism is not needed when the IGO already holds trademark rights in its name or acronym. They don't need to go through this step. Whether or not compliance with Article 6ter will be considered determinative and providing standing is a decision to be made by the UDRP or URS panelists based on the facts of each case.

And this is not intended to amend or affect any of the existing grounds under which a UDRP and/or URS panelists have previously found sufficient for IGO standing based on, separately, on rights under statutes or treaties, which is another ground for standing, under these rights protection mechanisms.

So to make it clear, by dialing this back, what would happen now if an IGO has unregistered rights in their names or acronyms but has invoked the WIPO IGO protections under 6ter, it's up to the panelists to determine whether that is sufficient to provide standing. And that fits in with the existing UDRP and URS framework in which panelists already have the power to determine that unregistered or sometimes called common law trademark rights in certain nations are sufficient to provide standing.

So we think that this satisfies all the concerns we heard from IP interests and from GAC members and that they will hopefully find this to successfully address their concerns while still providing IGOs without registered trademark rights with a way to gain standing that's consistent with existing UDRP and URS practice.

Any further comments on that, Petter?

Petter Rindforth: Thanks. First of all I don't know if we have a slide (unintelligible) on that but I can add that Article 6ter will be recommended to use as an example of identification. And I - during the work we had some comments that wouldn't this be a little bit too difficult for panelists to decide upon no traditional trademark regulation.

But frankly for each panelist, I mean from case to case, each party can refer to national legislation and to - without doing real judicial search for the panelists, but each panel have from time to time actually to consider claims of national legislation in another part of the world where the panelists are situated and to recognize if that legislation could be seen as similar to - similar name rights as compared to trademarks.

I've personally done some cases related to personal names and gone through that national legislation to see if that could be accepted as similar to trademark rights in that specific country. So it's - to have a list of examples without saying that this is the only way to identify a protected IGO is something that we recommend that will be created. Okay. Yes, a comment? Please.

John Rodriguez: Thank you very much. Good afternoon. I guess a quick...

Philip Corwin: Please state your name for the transcript.

John Rodriguez: I'm sorry. Yes my name is John Rodriguez and I'm with the US Patent and Trademark Office. I just wanted to provide a comment, a general comment a follow-up question if I could. My understanding with this newer change regarding standing in Article 6ter of the Paris Convention is that the standing will now be made - the standing based on Article 6ter will now be made by the panelists, is that correct?

Philip Corwin: Yes.

John Rodriguez: Okay. We had submit a comment earlier in the process basically outlining the fact that just mere completion and notification under 6ter filing does not provide any type of - does not establish any rights under article 6ter of the Paris Convention. The comments that the USPTO had submitted indicated

that many of the notifications that are submitted and that go through this process frequently do not fall within the perimeters as proper subject matter.

Also many jurisdictions around the world have varied and disparate procedures for accepting these notifications that are submitted through this notification process. So we were somewhat bewildered as to connecting the establishment of rights with this notification process.

And this modified version where it's not dependent on the panelists in deciding whether or not standing is determined based on completion of the notification procedure under Article 6ter in our perspective is still - is creating this link because you are still allowing a connection to be established between this filing procedure and the establishments of rights. I just wanted to mention that for the record. Thank you.

Philip Corwin: (John), let me respond briefly, then Petter may want to respond. Before you entered the room, I noted that we had dialed back this recommendation substantially from the original initial report recommendation. I mentioned the comments of the United States as one of the comments we had taken very seriously.

And basically what we've proposed is that now is that rather than the WIPO filling automatically conferring standing, it simply become a piece of evidence to be considered by the panelists, just as they would consider similar evidence of common law or unregistered trademark rights for a non-IGO party. So it fits right in with existing UDRP practices as I understand it. But my colleague is a panelist so he can comment further on that. I think he already did to some extent.

But we don't want to say that Article - that invoking Article 6ter rights has no - should be given no consideration by the panelists because it is, you know, it's an international treaty that binds - that's been recognized in most nations in

the world and will generally, with nations free to provide exceptions, confer certain protections within trademark systems when those rights are invoked.

John Rodriguez: John Rodriguez again. Just to respond. I think there is a lot of - let me step back. I think just again the mere filing is being given too much credit because there are notifications that come into the system which may not be deserving of the protections that flow from Article 6ter. So just the mere filing itself as even allowing it as a point of evidence can be problematic.

The USPTO, when we do receive one of these notifications, we do check to see whether the matter that has been submitted falls within, from our perspective, within the perimeters of Article 6ter. Many times it does not, and that tells us that many times these notifications, these filings are for a matter that falls outside of the subject matter for which 6ter was meant for. And so again allowing for the filing just to be an element of evidence is still problematic from our perspective.

Petter Rindforth: Petter here. If I understand you correctly, that you think that even referring to Article 6ter as one of the possible identifications would be a problem because I mean we have changed from the original proposal where we looked at it as the - I mean we also have to think about the next step. If a case is taken to a national court somewhere or a mediation and identification must be accepted, so to speak, outside the specific domain situation as some kind of name protection, we're still talking about something that is similar to trademarks. It's a name identification.

And that's why we found Article 6ter as probably the one that could be accepted in the majority of national courts or arbitration organizations. But of course it's not the only, and as seen from the first draft we had to what's out now, we still refer to Article 6ter but it's definitely not the only way to identify.

And I would not - I mean once we see this system up and running, we may also see some kind of practice, even if there would not be so many cases

each year, but some practice where we can see a common and easily identified way that will be accepted in all steps.

Philip Corwin: And, Richard, I'm going to recognize you a minute. Let me just - I have a quick question for Petter. In existing UDR practice when a non-IGO party asserts on registered or common law trademark rights and presents some evidence to the panelists, what approach does the panelist generally take toward considering whether that's sufficient to confer standing? And also does the domain registrant targeted in the complaint have any ability to raise issues about the sufficiency of standing and if they file a response?

Petter Rindforth: Well maybe Brian is a better person to inform generally but from my own personal practice I would say that there is no clear case and policy. Each party refers to their name rights and then it's up to see what kind of documentation we use. I mean if someone just - even if they refer to that they have trademark rights and just print a list with their names and numbers, that's not accepted. You always have to - I - at least I want to see a documentation in the language of the dispute.

And it's the same when you claim that you have unregistered trademark rights. You have to present some documentation to show that it's used and it's used in a format and in a way that can actually be considered as established trademark rights.

And of course it's also good if the complainant can refer to the local legislation because it differs a little bit about how much an unregistered trademark right - when the right protection actually come into force. So it's up to the complainant to provide as much as documentation as possible to make clear that the rights they refer to actually exist and can be handled.

Philip Corwin: (Richard Hill) has a question and then I think we have one online question, and then I think we'll try to move on to the next slide.

(Richard Hill): (Richard Hill). No, actually I was going to respond and confirm what was just said by our two very able co-chairs. So I'm speaking as a domain name arbitrator. I think I'm up to 400 cases now. Right now I'm doing about 100 a year. Usually they are registered trademark but now and then -- please don't take my picture; I prefer not be photographed, thank you -- when I do common trademark cases or names, it's exactly as you said.

You go and check that they've done something. And, as Phil pointed out, the - if there's a response, the respondent can overturn that. And in fact in some cases, in fact in the three arbitrator panel, we decided, no, there was not sufficient evidence of common law trademark because the respondent had correctly shown that there wasn't. So.

Now turning to the matter at hand, if I understand the comment from the USPTO correctly, it's that one has to evaluate whether that notification was actually based on some valid grounds rather than somebody sends a letter who had no right to send a letter. And that's done in the US by the USPTO and I presume it's done by the other trademark authorities in other countries, and they probably have slightly different criteria for evaluating things, which is fine.

So as I see it, it's exactly as, again, our co-chairs pointed out, the panelists, whether it's one or three, will have the duty to do some kind of checking, just like, as Petter said, they say they have trademark but we actually open the file and look and see that there's a copy of a trademark registration.

So here they're coming in and they're saying we have rights under 6ter. Okay fine but the panelists may be able to ask for more information and it certainly could be rebutted by the respondent if they so wish. So it would appear to me that, speaking as an arbitrator, what's being proposed here, I'm very comfortable with it and it makes a lot of sense to me.

Philip Corwin: Thank you. And before Petter goes on to the next slide, I'll just note that this discussion kind of illustrates the what seems like a simple question, this working group has been involved with very complex and arcane legal considerations for what seems like simple issues at first.

Let's ask the remote question and then move on to the next slide.

Steve Chan: Thanks, Phil. This is Steve Chan from ICANN Org. And the question from the remote participant. It's from Paul Tattersfield. He asks, "Wouldn't any IGO mark that was acceptable have a serial number begin in 89 in the USPTO?"

John Rodriguez: This is John Rodriguez at USPTO. So he's referring to the 89 series of serial numbers that we issue to notifications that have been accepted, and then if they are accepted they are deposited into our database and will come up in our search results of our examiners. But these again, these are not trademarks. There are no trademark rights connected to them.

These are just accepted notifications that we have accepted at the US PTO when we have conducted an initial review to see if the matter is worthy of the protections. That's the letter from the Article 6ter of the Paris Convention. So I believe that's what he's referring to by the 89 numbers. Thanks.

Petter Rindforth: Okay. I think I can rather quickly go through the next slide because we have already talked about Article 6ter in the Paris Convention and, as you see, the written recommendation was that the panelist should take into account the limitation of the Paris Convention in determining whether it is against it when an IGO has filed a complaint that the registrant used the domain name in bad faith. And no specific changes recommended to (unintelligible) grounds on the UDRP or URS.

But this recommendation is no longer necessary because we have amended a recommendation number two that we just discussed. So it looks like we can

proceed to slide 4 where we come into the more interesting (unintelligible) part.

Philip Corwin: Yes this is the fun part of the program and the issue that has taken the most time for us to wrestle with and the one that we felt we must have independent legal advice on.

Let's - on the initial - our initial general recommendation on IGO jurisdictional immunity, we did not recommend any change to the mutual jurisdiction clause of the UDRP and URS. Under those policies and if a complainant brings a complaint under those policies, they agree to the mutual jurisdiction clause, which basically says that if either party is dissatisfied with the UDRP or URS decision, they can bring an appeal, kind of in quotes, really a de novo determination for a second opinion from a national court which is connected with the domain either by the domicile of the registrant or the domicile of the registrar.

And we did not change that because we noted that ICANN curative rights processes are in addition to and not a substitute for existing statutory rights and ICANN has no power to extinguish registrant rights to seek judicial redress. And let me explain that a bit more.

Number one, these rights protection mechanisms are protecting rights created in the legal system. They're not ICANN-created rights. ICANN is not a legislature with any authority to create independent rights. The UDRP and URS exist provide a faster and less expensive way to protect trademark and certain other rights.

And, second, since they are supplement to and not a complete substitute for the rights created under the laws, the working group felt that it would not be appropriate for ICANN to tell domain registrants that if a certain class of parties brings a UDRP or URS against you, you are foreclosed from seeking

a de novo review of the initial decision in a national court that you're otherwise entitled to under an existing national law.

And also we questioned whether that would even be effective. There would be no way to prevent a registrant, say, losing a UDRP from immediately going to a court of mutual jurisdiction and filing a case and seeking an injunction to stay the effect of the UDRP decision. So.

Number two, the - a policy guidance is to be prepared to outline the various procedural filing options available to IGOs, which they have the ability to file - to have a complaint filed under the UDRP and URS on their behalf by a signee agent or a licensee. That's - we didn't create that right. That's an existing right, but it does create some insulation from the IGO to later say we haven't given up.

We used this process to protect our jurisdictional immunity, and we - and see claims of IGO jurisdictional immunity be determined by the applicable laws of that jurisdiction. And again, we go back to the legal advice we got which basically this type of claim of immunity is a type of defense is one of the many defenses that a party may assert in a judicial process.

And to - for ICANN to say upfront that an IGO in every potential, you know, RPM situation would win its claim of immunity would be for ICANN to substitute its judgment for that of the individual and national courts. And our legal expert informed us that those decisions might come out differently in different national courts depending on the national laws on sovereign immunity and the analytical approach they employed.

And you can read - that legal opinions said in many cases they might win but in other places it said it wouldn't be unfair to ask IGOs to agree to forego their immunity for the benefits of speed and cost of the - or access to the RPM. So we're basically trying to keep ICANN within its remit and leave to national

legislatures and national courts the ultimate determination of the creation of these rights and the determination of immunity claims.

So let's go on to the next slide. And Petter has a comment.

Petter Rindforth: Just a quick comment on the - going back on that. Yes, the B here. Yes of course we have got during the comments periods we got some information and statements from IGOs that they would not use an assignee or a licensee in the kind of disputes for different kind of reasons.

And even if that may be the fact, we saw no reason to delete this option. It's still - it should still be seen as an option in the procedure. So it can be used and also there is a different kind of ideas in how they work also with when it comes to legal proceedings. So there may be some that take this into consideration and others will not use it.

Philip Corwin: Okay, continuing. So let's go to slide two here. No, two, we haven't done two yet. Okay, so in January 2017 we published two options for comment and initial report. The first was - and this deals with a situation that we don't - so far as we know has never occurred and may never occur, and yet we had to provide some policy advice on this as to what would happen when a losing domain registrant exercises his right to appeal to court of mutual jurisdiction and the IGO in turn raises an immunity defense and succeeds in that defense where the court says, "You're right, we have no jurisdiction over this case."

So what should happen then, was the question where - and this is the question we've spent the most time on, even though it's probably the rarest situation. And if it occurs, it may occur quite infrequently.

So the options we presented for comment on the initial report were that the decision rendered against the registrant and the predecessor UDRP or URS would be (unintelligible), that is set aside and the domain registrant would continue to have the domain. Others in the chat room can speak later to this.

But the premise of that is that the mutual jurisdiction clause means the IGO has given up its ability to raise an immunity defense. And if it does so and succeeds, then its original win in the UDRP should be set aside.

The option two is that the decision rendered against the registrant in the predecessor UDRP URS may be brought before some arbitration into the (unintelligible) review and determination, and our thinking was that would be under the - not the UDRP laws but the national law under which the original judicial appeal was brought.

Both options saw some support from various commentators. The IGOs - is this - favoring option two. Did IGOs really favor option two? I mean, IGOs pretty much wanted the original proposal, which was no judicial appeal in the first place. Certainly in comparison to option one, they favored option two because it had the arbitration concept.

The working group very carefully reviewed all the comments and conducted an impact analysis of choosing these different (unintelligible) really oppose (unintelligible) and we also considered additional - several additional alternative options which were built on certain elements of option one or two.

So, you know, why don't you do the next slide or two and I'll comment, because there's so many on this subject?

Petter Rindforth: So the preliminary consensus call conducted three options. We discussed - during the calls they came up with - working group members came up with some further options that when we further discussed those, we realized that they were basically not full solutions, but referring to part of the process.

And then we could actually go from -- I don't know if I have up to six or seven for one time -- but down to three options that is based versions of the original option, option one or two.

So option A is the most similar to the original option one -- the decision rendered against the registrant in the predecessor UDRP RUS shall be mediated.

And then option B is - the main part of option B, the main difference there is that we have (unintelligible) to option C after a while. But for domain names that was created, meaning that the original registration date of that domain and not the present registration date by the present holder of the domain name, that option A should apply for those domain names, and option C would apply for domain names that was created. And then they still need to identify the dates.

Another thing in option B is to look at the solution we have after five years or perhaps ten instances which may come first and to reach out to various dispute solution providers, including those who have administrated arbitration proceedings and doing a review.

But this is - I personally will say that independently on which option we decide upon, I presume that this is something that is including in the normal work of ICANN to - within certain time and certain, in this perhaps case, in certain cases make a review as the ongoing review of the URS and upcoming on the UDRP.

So I talked about option C, or referred to it, so let's see what it is about. Next slide please.

Option C is that the registrant has the option to transfer the dispute to an arbitration forum meeting, certain pre-established criteria for determination under a national law that the original appeal was based upon, with such action limited to deciding the ownership of the domain names. So there should not be any monetary claims or other claims involved in that. It's more similar to the dispute that was originally filed under the UDRP.

And registrant to be given - well has ten days or longer period of time if able to do - it depends on the national law in the court to either inform the dispute solution provider and the registrar that intends to seek arbitration under this limited (unintelligible) or request that the UDRP URS decision continue to be stayed as the respondent has filed or intends to file a judicial appeal against the IGOs successful (unintelligible) of immunity.

And then this is the basics, and then we have further discussed some details on fundamental elements that will need to be included in any arbitration option. And I think we have that a little bit on the next slide. Yes?

Philip Corwin: Just to quickly comment and then move on to the final slide, you'll see that option C was option two in the initial report but with much more detail. We certainly haven't gotten a level of detail that an implementation review team would do if this policy is eventually adopted by council and the board.

But we have gone with a great deal of detail. For example, we've said that the arbitration should be decided by a three member panel -- one of - one member which is a retired judge from the jurisdiction of the national law that's being decided on -- someone with familiarity with that national law.

So we've gotten to that level of detail, not the ultimate level of detail, and implicit in this option C. What we tried to do here is protect the right of the IGO to assert judicial immunity. It's implicit in this option that the consent of mutual jurisdiction does not forego all ability to assert judicial defenses when they get to the courtroom.

We've tried to preserve the ability of the registrant to assert - to seek a de novo determination from a court. And if a court then says, "You're right," to the IGO, we have no jurisdiction here.

This is to make sure that to the central issue as to whether the registrant gets to keep the domain name or whether the domain name is extinguished or transferred to the IGO, that there's still a forum in which they can get a determination under the same national law that they brought the original judicial appeal.

So this is the kind of balancing of interest that we've struggled with throughout this working group, so let's get to the final slide on this.

So yes, the IGO filing UDRP URS complaint is required to this limited arbitration mechanism when filing, so they're going to have notice that they succeed. In the immunity defense, there will still be a hearing. There will still be some appeal hearing.

And if they win the appeal and then refuse to participate in the arbitration, then in that case the UDRP URS decision would be permanently stayed, that they shouldn't be allowed to prevail if they're unwilling to participate in the arbitration, just as they wouldn't get the domain if they refused to participate in a - and no complainant would be allowed to get the domain if they refused to participate in the judicial appeal that's generally available in UDRP proceedings.

This is important. The parties -- both parties -- if they mutually agree to limit the judicial proceedings to solely determining the ownership of the domain name, so they both can consent to a limited judicial appeal that wouldn't get into such things as awarding of monetary damages or anything like that. And that might incent an IGO to not seek judicial immunity if they were concerned. That was a primary concern.

Also, the next one's important. If they - if the IGO's willing to agree to it at the registrant's option, if the registrant decides it wishes to forego the judicial appeal route and go directly to this arbitration mechanism we're creating, they

can do so, and they might well do so for cost or speed reasons, and that would somewhat satisfy the original IGO request to go straight to arbitration.

That might in fact happen as a consequence of this mutual consent, and that ICANN must be informed if there's an election of this arbitration mechanism so that in turn the registrar holding the domain can be informed and continue to lock the domain in place while this arbitration or judicial proceeding goes on.

So then I'll let Petter take over and discuss the results of our preliminary consensus call on these three options, which is not (unintelligible). We're still going to have a further discussion of these options after this ICANN meeting before taking a final consensus call on all five of the recommendations.

Petter Rindforth: Thanks, Petter here. So as you can see on option A, we had three working group members that supported and eight that did not support. Option B was one supporting and ten team members that did not support. And then option C, we had eight supporters; two that did not support it and working group member that said that he or she can live with it, so to speak.

And it's also noted that we had one respondent that indicated support for all three options and that's why it's not counted here.

And I - just to forego a question about the numbers of the voting members, it may seem a small amount of numbers, but we have in fact - I think we have a good spread of the kind of working group members, the specific interests they represent. So even if it's not compared to data working group, for instance, that's dealing now with all the dispute resolution procedures, with huge amount of active members who are also participating on each meeting, but these are the members that have been working during the time and have interest in the topic and provided continuous comments also.

So it's - and I said, they are spread out, referring to their specific interests and what they are working with when it comes to domain names and disputes.

So we will further discuss the options and the results. And as you may see, we hopefully have at least - will have at least majority decision. I don't want to go to GNSO Council with two specific options A or B and give that to the council to decide. So we will definitely be working on having our recommendation -- a majority recommendation -- in the working group.

And as I may say also, when we did our initial work and we concluded on most of the topics, there were more of our members - more active members on that period, so we have been - more that have been working with these issues. And that may also be one of the problems when the work is going on for a long time.

And the informal - from time to time, when we have discussed also with representatives of ideas on our work and specific topics, we got the input that it's better to come up with an acceptable solution that we have now in due time rather than to further work another year with this topic to - we finally have to set our foot down and make our conclusions that are best for all partial interests.

Philip Corwin: Okay, let's go to the last slide. And I just want to note that of course I said this is a preliminary consensus call we took. About two thirds of the members of the working group participated. And of course any members of the working group who have objections to any part of the final report will have full rights to file a minority statement that will be included in the final report.

So the - there was a - we're missing a slide here. This is not right. Oh, sorry, I didn't see the heading.

Yes, preliminary recommendation five, no change recommended. One of our charter issues was, IGOs had asked for a curative rights process that was either free or very little cost for the RUs.

We did inquire at one point, the GAC and IGOs, whether they believe that the existing filing fees -- which starts at 1500 for UDRP and 500 for URS -- was nominal and we couldn't get a clear answer from them.

But basically, our working group decided we have no authority to commit ICANN funds and to subsidize IGO filings. That's outside our remit as a working - GNSO working group. It involves use of appropriation of ICANN funds, so really we're recommending the GAC and IGOs and ICANN corporate engage in a discussion of this, because it's properly within the - it's a budget issue for ICANN.

I don't know how much subsidy would be sought by IGOs, whether all of them would seek subsidies or just some of them. But it's not - we can create - we have no authority to commit that WIPO or NAF or any other UDRP or their separate URS providers will provide these procedures at no cost to them. It costs them something to provide the administrative forum. So it's really outside our (unintelligible) and something for others to decide.

So that's the last recommendation. The next slide, I think, is just, you know, links to further information. And I'll stop there and see if we have questions. I saw (David Olive).

Man: Actually Sarah Deutsch.

Philip Corwin: Sarah Deutsch.

Sarah Deutsch: Yes, hi, it's Sarah Deutsch. I had a quick question for you and Petter. Do you have any idea how many of these filings you might anticipate?

Petter Rindforth: Well, we presume that there will be rather rare amount -- and now I'm talking about original UDRP or URS stat -- and even not aware when it comes to the next step, taking it to the final arbitration or a court.

But nevertheless, this is a topic that we have to solve and will be useful. And frankly there is, I think, one of other dispute or solution procedures out there. It was created - has never been used -- and I'm not talking about URS now -- but there is one out there that was created and I presume that people have worked a lot to create that one.

But it exists and it might be - needs some changes to be better used. But that's not a reason to avoid - to solve this.

So the short answer to your question is - I can't say if it's level B, one or two each year. But based on what we presume, if there is nobody specific bad guy trying to register once the system is enforced, there will be very few.

Philip Corwin: I just want to add to that. I note in a chat room that one of our working group members noted that there have been fewer than a dozen UDRPs filed by IGOs in the last 20 years.

Now we do know that some IGOs have used the UDRP. We've heard anecdotally that other IGOs would've used the UDRP if not out of concerns of surrendering their - on a jurisdictional issue. I don't know if our final recommendations as finally adopted will satisfy those concerns.

But I couldn't guess as to which - how many IGOs, post whatever happens with our final report in terms of council consideration and board consideration, would use the UDRP or the URS in the future. I don't know of any URS filings by IGOs.

And it looks like Brian might want to make a statement here. Mary Wong, Brian back in first and the (Richard Hill).

Brian Beckham: Thank you. Brian Beckham from WIPO for the record. Just a small point of clarification, I think - I'm not on the chat, but this reference to less than a dozen, if my memory serves, it was actually two cases that have been identified over almost the past 20 years, for whatever that's worth, for historical context. Correct, two.

I wanted to mention -- since we kind of covered, I think, all of the recommendations of the working group -- a comment that was made. Last week in Geneva we held on Monday our annual UDRP domain name panelist meeting. On Tuesday and Wednesday we held a UDRP training workshop for filing parties.

At that workshop was working group member Paul Keating -- I don't know if he's on the call or not -- but during a presentation on sort of what's going on at ICANN with respects to rights protection, we mentioned this IGO working group as one of the policy files that was being discussed at ICANN.

And he made a comment about whether IGOs would be amenable to accepting a Nominet-like appeals process in the context of this curative rights protection working group discussion. For those who don't know, Nominet is the provider for .uk domains. They manage a process that's similar to the UDRP. It has a few adjustments. They have a mediation component prior to the decision phase. And then after the decision phase they have an appeals phase, which is sort of a self contained appeals phase similar to the arbitral appeal request as been sought by IGOs.

And if I understood the comment correctly from Mr. Keating, there was some willingness to explore this type of a model for the context of this working group. And I don't want to purport to speak for him. I believe that the co chairs and ICANN staff have been included on some correspondence between myself and Mr. Keating, so again, I don't want to purport to speak for

him and maybe they can fill in some of the gaps. But I just wanted to raise that that may be worth exploring more. Thanks.

Philip Corwin: Let me respond to that and Petter may want to respond to that, because, Brian, I know that you wanted to be at the meeting but were pulled away, but we had a meeting with your deputy and with the gentleman from the OECD earlier today in which this was raised, and Paul Keating is respected domain industry attorney. He is a member of our working group. He has been active on some of our calls and certainly active on the email list.

And while we - Petter and I are anxious to bring this working group to a close, we are aware of the sensitivity of this issue and we're not going to prematurely end the discussion.

So what we suggested was that you folks get back in touch with Paul. And if he believes this is something that should be considered before we finish our work, that he put it in play on the mailing list and we can certainly discuss it on one of our upcoming calls.

One of the things I heard from the OECD representative was that this would not foreclose. A judicial option would be something separate from what we've already considered.

So we want to - certainly if there's merit to it, we welcome a further discussion. And if it takes a few more working group calls to give it full consideration, I think we should do that rather than to impose some artificial finish date for our work.

And I don't know if Petter has further comments. He was part of that discussion as well.

Brian Beckham: Just one brief reaction if you'll allow me. I don't want to be presumptive. We're not members of the working group. We're observers as you know. But

if it's not too bold I would like to suggest with the present interaction that maybe we simply take it upon ourselves to put it in play. Thanks.

Petter Rindforth: Well as I said, we're open to discuss it, and frankly, before I make any personal conclusions on that, I need to see the more detailed suggestion. But we'll definitely take it up for discussion.

On that hand, we also - sometime to make decision, and I think that's what all related parties are actually waiting for, even if it may not be 100% acceptable for every parties involved.

But to make a decision, a final proposal on this specific topic, we can't go on and work another year with new elements and comments coming in. And I mean, I wouldn't be surprised if we come to a conclusion here on this topic. And then when the UDRP is worked on and considered in the other working group, there could be some additional changes on that. But I don't want to sit and wait for that.

So in short, yes, we will definitely take it into consideration and listen to his full proposal and discuss it within the working group. And I mean, I also want to see final solution that has huge majority as possible in the working group. So I'm open for any detailed changes that can make us come closer to 90 or even 100% acceptance of our final proposal. Thanks.

Philip Corwin: And I just want to add one more thing just in response to Brian. While no IGOs are official members, they're simply observers of the working group, we have carefully considered IGO comments on initial report. We've invited - we've had IGO representatives speak at face to face meetings.

And so let me say, I'm not familiar with a Nominet procedure. Someone needs to put some meet on these bones for our consideration. If you can encourage Paul Keating to get something to us with a little more detail and how this would interact with our existing proposals, or if you and any other

IGOs want to put together a short paper or page or two just sketching this out, so we have something with some detail to consider. I think we can do it, but we need to see it soon.

Again, our next call will be two weeks from this week, so there's some time to put something together before we hold a next call in the working group. And if we do get something in with some detail, we'll give it full consideration.

Oh yes, (Richard), please go ahead. Sorry to keep you waiting.

Mary Wong: Thank you (Richard), this is Mary Wong from staff. Just to follow up on this specific point that - on the discussion, staff can certainly go and pull down the Nominet process for consideration if this is put forward.

I just want to note for the record, Brian had mentioned the email exchanges or that it had been initiated today following the meeting with our co chairs -- and I know, Phil and Petter, you may not have had a chance to look at your emails -- Paul had said that we should be free to share his suggestion publicly with the working group and I presume that's why Brian mentioned it.

But for fullness of the record, he had also, you know, said that this is something he's proposing, although his personal preference had been for one of the other options.

So again, we'll go back and look for the Nominet process and so now I guess, you know, with Paul's permission we've put this particular suggestion out on the record. Thank you.

Petter Rindforth: And as I said, we put it on our agenda for our next meetings. Good to see this out there.

Man: Yes, so going back to how many cases there are, so I worked for the ITU for 12 years. In those 12 years we found one situation where we thought it might

be appropriate to run a UDRP but we didn't do it because of the jurisdiction issue.

So it's an open question as to whether there would be cases if they didn't have the jurisdiction issue. And now I'm not with an IGO anymore, so I certainly can't speak for them.

My hunch is that with the scheme that you're - with the changes - well, the non changes - with the recommendations you're making, I agree with Petter, some of them will use the agent approach because that will be okay for them. And some of them will not be comfortable with the agent approach and then they won't do it because the problem is they're still having to waive jurisdiction.

And then I think the chances of their prevailing, I believe the expert said the same thing, the chances of their prevailing in a court on a claim of immunity once they've actually entered into the process would be pretty slim. And I think most of them would view that that wouldn't be likely, so they wouldn't do it. So we'll just have to see what happens, whether how many IGOs are going to be happy with this new version.

Now in terms of the Nominet thing, I'm not an expert on it. I have taken a quick look at it. I think it's still the same problem. They do have an appeal process, but I don't think that's then excluding the jurisdiction's national courts.

And as we know with the IGOs, they really want us to be excluded from the jurisdiction from the national courts up front. So maybe there's some variation of the Nominet scheme which would work. But then we get back into the same catch 22 that the other guys don't want to lose their right to go to national court. It's worth looking at, though, clearly.

Petter Rindforth: Thanks. As I said, we'll look at it. And I haven't seen it yet in details. I won't be surprised if it's quite similar to the option C and maybe it needs some detail changes. But let's wait and see and study it.

And was it (unintelligible) yet -- the proposal, yes.

Mary Wong: This is Mary Wong from staff. No, I think Paul's proposal, as Brian said, was made in a WIPO workshop last week. There was - well -- and this was brought up to the chairs today in a quick discussion -- and what Brian and I are referring to is an email from Paul where he CC'd the two of you. But like I said, it just came in, so it has not been sent out to the working group. But we're happy to follow up with him and you on that.

Philip Corwin: I would probably just check with Paul and see if it's okay to put it on the working group emails. But personally I'd want to know more about the Noment appeals procedure and understand how this would - this path would relate to our existing option C, but it's open for discussion and consideration.

Brian Beckham: If I may -- Brian Beckham again for the record -- just to pick up on (Richard's) comment, of course in some sense it does replicate the same problem, but of course the idea would be to carve out the appeal to court jurisdiction aspect of the Nominet appeal.

It was more just a signal that there's a model where appeal from a UDRP like decision is being used today. In our meeting last week we had the former chair of the Nominet Appeals Committee and the current chair of the Nominet Appeals Committee and some of their esteemed panelists and they confirmed to us that, to sort of underscore the value of the process and the stability and predictability that it engenders last year, from all of the first level cases that were heard there were only two appeals, for whatever that's worth, for context. Thanks.

Philip Corwin: Yes, well, as I - I'm not surprised by that -- Phil for the record -- because as we know, it's a very small percentage of UDRP cases in which the registrant files an appeal. And so we know we're dealing with a potentially rare situation.

And yet again, this is the central conundrum we've been most hung up on in this working group in trying to balance the respective rights of the parties as well as keep ICANN within its remit and leave legislatures and courts to do their business. And there's no perfect way to solve this, but we're doing our best.

We're ten minutes before our scheduled conclusion. Is there anyone else with comments or questions before we wrap up?

Petter Rindforth: Petter here. So Paul's note in chat that mediation would be good too, and UK is not only procedure where mediation is used as a first step, it's also, for instance, used to - in Denmark and Finland and Norway.

And I could not say generally, but my own experience is that mediation, when it comes to domain name disputes, is more of how much do you want to pay to get the domain name? And in some rare instances it could be, yes we can accept to split the web - the original webpage.

But then is when we have cases where there are two parties on the same business level, so to speak. I have no objections to use mediation, but I - as a first step for something like that, but I don't think we should trust it too much to solve disputes. Many of the mediation steps when it comes to domain industries will be just a quick step that you have to pass before you go into the real - the future solution procedure.

Philip Corwin: Okay, I don't see anyone in the room here in the (unintelligible) Center raising their hands, indicating they want to raise a question or comment. I don't see any questions in the chat room. So I think we can give you back five minutes

of your life and end five minutes early and thank everyone for their attendance and attention.

And again, we're close to the finish line here, hoping to wrap up before the end of the year, but still open to final - we're going to be considering a lot of final details as we move toward drafting a final report and putting out a consensus call on it. So the inbox is still open for suggestions. Thank you.

END