

**ICANN  
Transcription ICANN Copenhagen  
GAC GNSO Facilitated Discussion IGO CR  
Sunday 12 March 2017 at 18:30 CET**

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(Bruce): Okay. We'll get started. We've got a few people that are coming just from another session but I'll get started with just some of the more tutorial and context material before we get into the detailed discussion.

So first I'd like to thank everybody for joining after a long day this session to look at the issues of protecting the acronyms of intergovernmental organizations. And before we sort of get into where we see some differences between the government advisory committee representatives and the GNSO representatives, I'd like to start briefly with just getting each of you to just state your name for the record. This session is being recorded and there will be a transcript created at the end of the session. So perhaps just starting with Becky.

Becky Burr: Okay, we're not talking. We're not identifying (Bruce).

(Bruce): I'm sorry. My name is (Chris Duspane). For the record, I'd like to be known as (Doris).

Becky Burr: Becky Burr, ICANN board.

(Mark Schoomer): (Mark Schoomer), ICANN board.

Philip Corwin: Philip Corwin counselor for the IBC and co-chair of the working group on IGOCRP.

Man: (Unintelligible). IBC and data co-chair.

Man: (Unintelligible), ICANN board.

Woman: (Unintelligible), ICANN board.

Man: (Unintelligible). GNSO

Donna Austin: Donna Austin, GNSO.

Heather Forrest: Heather Forrest GNSO Council.

James Bladel: James Bladel. GNSO.

Man: (Unintelligible). I happen to be the chair of the IGO INGO PDP.

Susan Anthony: Susan Anthony, United States Patent and Trademark office.

(Ashley Heineman): (Ashley Heineman) U.S. GAK representative.

(John Rodriguez): (John Rodriguez) also U.S. Patent and Trademark office.

Brian Beckham: Brian Beckham, World Intellectual Property Organization.

(John Pasaro): (John Pasaro) OECD.

Man: Hello. (Unintelligible) GAK Switzerland.

Man: (Unintelligible).

(Mark Ovo): (Mark Ovo) United Kingdom GAK representative.

Mary Wong: And Mary Wong, ICANN policy staff.

(Bruce): Okay. Thank you. If you could drive the slides for me, Mary. Oh, there's (Nigel).

(Nigel Hickson): Sorry, (Nigel Hickson) government engagement staff.

(Bruce): Excellent. So what - in terms of the agenda for the session today, I'm going to provide a little bit of context for this conversation which is sort of granted in the bylaws and relevant laws and then we're going to really deal with sort of four topics.

One is the topic of reservation. What names or acronyms should be reserved. The next is notice, which is why would be notify IGOs of the registration of a related name. The next topic then after notice is there a dispute resolution mechanism that could be used to resolve potentially competing legal runs. And then finally, if we do have a dispute resolution mechanism, what's the appeal mechanism if the parties disagree with the results of that dispute resolution.

Next slide. So I think before we look at any policy development process, it's always good to ground us in what is ICANN's mission and it's fairly narrow. I mean ICANN's mission is basically with respect to domain names is making sure that the domain name system is stable and operating at a technical level and ICANN will coordinate the development of policies that concern the registrations of second level names and these policies are those policies for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security, and stability of the DNS.

Next slide. So in addition to the mission, ICANN makes some commitments in the bylaws and one of those commitments is that ICANN must operate for the benefit of the internet community as a whole so that's a principle for all of us here today and that ICANN must carry out its activities in conformity with the relevant principles of international law, international conventions and applicable local law. And as part of those commitments, ICANN commits it will use a bottom up modest stakeholder policy process but also it commits to duly take into account the public policy advisor governments and public authorities.

Another commitment is that we ensure that those entities that are most affected can assist in the policy development process. So for example, we have up the front here today representatives from the OECD and (Wybo) which are both intergovernmental organizations.

Next slide. And then we also have core values that are intended to help guide us in coming up with solutions to problems. One of those core values is that we're using the multi-stakeholder development process to ensure we involve as many parties as possible and that's used to assess in the global public interest.

We're also committing to operate with efficiency and excellence so any solution needs to be efficient and the whole policy process itself should act as a speed that's responsive to the needs of the community and certainly on this topic in particular, we've struggled with the speed element. It's obviously not something that we've delivered. And finally ICANN as part of its values recognizes that governments and public authorities are responsible for public policy and our role is to duly take into account the public policy advice that we receive through the government advisory community.

Next slide. So one of the things that's fairly unique about ICANN is that ICANN itself is not a government and so the way it makes changes to the

operation of the system is through the agreements ICANN has with its GTO registrars and GTO registries. And what's fairly unique about those agreements is once they're signed, the parties that signed those agreements are committing to adhere to future policies that they've never seen before as part of the operating for those contractual agreements.

But these - these new policies that are called consensus policies that in the future registries and registrars must adhere to are limited for the narrow scope and in the industry that narrow scope is often referred to as a picket fence. And in simple terms, these consensus policies must represent a consensus of the internet stakeholders.

They must relate to issues for which uniformal coordinate resolution is necessary for the stability of the DNS and it also has, on this last row in particular, policies that relate to the resolution of disputes regarding the registration of domain names and that's essentially what we're here talking about today is policies that relate to disputes around parties that might have a share interest in a name.

Next slide. Now also in these contracts that ICANN has with registries and registrars, there's two specific dispute resolution mechanisms that exist today. One is the uniform domain name dispute resolution policy or UDRP and the other is the uniform rapid suspension procedure. And essentially what this means is that when these disputes happen between registrants and other parties that have an interest in the name, the registrar and the registry basically must comply with the results of that dispute. So if the result of that dispute is that a name that should be transferred from one party to another, it's the registrar that actually does that transfer and so the registrars are committing to implement the results of these disputes.

Nest slide. Now also when domain name owners or registrants register a demand name, they're also making commitments as part of registering the domain names. They're actually entering into a contract with a registrar and

that contract has set minimum provisions that every person registering a name must adhere to. And one of those is the name holder is representing, to their knowledge and belief, neither the registration of the name nor the manner in which it is used, directly or indirectly infringes the legal rights of any third party. So that's a commitment that the registrant must make.

Then the registrant is also accepting that the registration of the name can be subject to suspension, cancellation or transfer as a result of the dispute resolution policy. So effectively in advance the registrant is committing and accepting that if a dispute policy says that the name should be transferred, then the name can be transferred from that party.

Next slide. Now this is one of the things I talked about early was applicable laws and one of the topics of some of the policy development in the GNSO has been looking at a particular article of an international convention, which is the Paris Convention for the protection of industrial property. An Article 6 tier, which is part of that convention does have some specific provisions that relate to the names and abbreviations of intergovernmental organizations. And interestingly what Article 6 tier does is it basically stops somebody getting a trademark using that name. And what's interesting about that is this almost protects the IGO organizations that might have domain names from being subject to a UDIP using a trademark. Because without that, it would be possible to get a trademark that might match the name of an IGO and then someone could actually launch a (UDIP) and try and get the IGO - or maybe the IGO has the IGO name dot org and then someone could actually say, well, I've got a trademark on that name and launch a process but this prevents you from getting a trademark against those names.

So that's essentially what that does. It's only applicable to trademarks and the purpose is to prohibit the registration and use of trademarks that are identical to or present certain similarity with the (emblem) or official signs of the IGO. There's also provisions in the Paris Convention that says that countries are not required to apply these provisions when the use of the registration is not

of such a nature as to suggest to the public that a connection exists between the organization or that the use is probably not such in nature as to mislead the public. And then to take advantage of this article IGOs must communicate essentially to Wi-Fi, which Wi-Fi then communicates through the states of that convention.

So that's basically what Article 6 tier is and really just presenting that just a little bit of background information because you may hear in some of the discussions in typical ICANN terminology if you're working heavily in this field, you just the term 6 tier and everyone is supposed to know what that means but, you know, most other people in the room will probably not know the meaning of 6 tier.

Next slide. So why we're here today, basically we're here because the intergovernmental organizations are concerned about the reputation or risks associated with fraud in the DNS and they want to minimize the risks to the public who may be targeted by individuals posing as IGOs or IGO officials.

So certainly is we use an example like the World Health Organization certainly people wouldn't want to see a website which purports to be the World Health Organization encouraging you to drink lots of beer and wine at the end of the evening and it might not be considered to be consistent with good health.

So essentially we want to make sure that the public is not deceived into believing that they're getting some kind of an official message on an important topic like health that hasn't actually come from the World Health Organization.

Next slide. So one of the things that the group here really, both the GNSO representatives and the GAK representatives have been working on is actually getting the problem statement defined and if you go to the ICANN schedule for this meeting and you go the session here today we have a copy

of the problem statement and we also have some briefing documents that list all the different steps, the sort of three years of meetings, et cetera, that have happened on this topic or maybe even five years of meetings are listed in those documents but the core is here that from a problem statement, the allocation management and operation of domain of (GTOD)s must take into account the need to ensure that neither the registration of the name at the second level nor the manner in which it uses infringes the legal rights that international intergovernmental organizations have.

Also the development of any policies in relation to the registration of domain lines mentioning IGO acronyms at the second level need to include consideration of the legitimate rights and interests of other domain name registrants. So it is possible to have legitimate legal rights that are exactly the same string of characters.

So what we're faced with today as we receive GAK public policy advice to the ICANN board and GNSO policy recommendations to the ICANN board in relation to the protection of both names and acronyms of that should say international governmental organizations and at the second level and these two positions are in conflict.

Next slide. So coming back to the agenda, the first topic I'd like to talk about is the reservation and then hear some views from both the GAK and the GNSO side on this particular part. So if we can go to the next slide.

What I should say here is that two of the topics today are related to a PDP that's essentially completed and has completed its policy recommendations and this is the policy process that Thomas Rickert has shared which is IGO and INGO access - that is wrong. My apologies. That should say rights to the PDP. What's the name of the PDP, (Thomas)?

Protection of names in all (GTO) names and then dispute resolution appeal mechanisms being worked on as part of our current PDP, which is looking at

access to curative rights and that sets the stage for an initial report that has been produced and that's currently out for public comment.

So we'll try and cover all of these topics today. Just wanted to identify, though that some of the topics relate to policy recommendations that have been approved by the GNSO Council and some of the material relates to drafts that are recommendations that has been produced by that working group.

Next slide. So reservation. The ICANN board has actually approved permanently withholding from registration at the second level in the (GTOD)'s. The four names of intergovernmental organizations and the reason why the board has permanently withheld these from registration is that these four names are unique. And there's no other legitimate purpose for using these four names for other purposes. So it's not - if the four name is World Health Organization, there's no other legitimate reason for someone else to say that they're the World Health Organization.

In addition, the board has approved interim protections for the acronyms in (GTOD)s but it's important to note that both of these provisions so far don't protect names in (GTOD)s registered prior or top level names created prior to 2012. So that means there's no current protections here for com, net, org, bizinfo, name, moby. There's 20 or so (TOD)s with (GTOD)s where these protections don't yet exist. And one of the reasons for doing policy development process is the policy process is applied to all (GTOD)s and not limited to just new ones that get created.

The other thing here that's worth noting is that when we get into acronyms, they're not unique and I'll just go over a couple of examples here. AU is the acronym for the African Union and that is also the country code for Australia and in fact we had registered at the top level dot au and we used that to mean the country code of Australia and then at the second level, many companies use AU as a designation to indicate their Australian operations.

AU I think is also the periodic table abbreviation for gold and numerous other things that AU is used for.

Another one here is PAM, program (unintelligible). PAM is a pretty common name for people around the world, particularly woman, so again it's not a particularly unique name. It's in common use for many other purposes.

What might be useful if you can just show us the list of IGO names. I thought what might be useful is these are the protections that are there currently. So as I said the ICANN board they've agreed to permanently protect the names of the internet governmental organizations and so you will see for example African, Caribbean and Pacific group of states, African development bank, African Union, African Petro Producers Association, so these are all names that the ICANN board has agreed to permanently protect and they're part of a specification in the agreement that new top level name operators agree to and in addition here, you also see the acronyms.

So these are - have an interim temporary protection subject to the outcomes of this policy process and you see here we have (ICP), (OCS), (IDB), et cetera and then Mary if you can just sort of scroll just down through the screen here a little bit just push the scroll down button. There you see AU for example which is the Australian acronym. Keep going down the page. You see (CAN). (CAN) is a pretty common word in English. It's used for many things.

Keep going. There's obviously acronyms that are fairly well known like (SERN) for the Swiss group. This probably may not - most people probably when they hear (SERN) are thinking of the research center. Keep going. I just wanted to sort of give a bit of a flight of what's there. ECHO. ECHO is actually I believe a top level domain name at the moment for ecology issues, environment issues.

Keep going down the screen. AU, AU is also a top level domain name. Go down the screen. Keep going. So there's quite a few names there. I'm not going to try to go through the whole list but just giving people a sense of we have the full names and we also have acronyms. So if you just go back to the presenter.

Okay. So what I thought would be useful just on this topic is if we could hear from the chair of the GNSO, not the chair, the chair of the original ADP working party on how you consider the topic of reservation and what your sort of views were around the reservation of IGO acronyms or (James) either one.

(James): Yes. I'll hand off to (Thomas) here in just a moment. I think one of the points that came out of our discussion earlier today in the council was to emphasize our agreement with the problem statement that these organizations are performing noble work and deserving a protection and then like the Red Cross in our discussions yesterday, it's particular heinous type of abuse when someone craves upon a disaster or humanitarian relief program for fraudulent purposes and I think that was something that we needed to - we were asked to convey yesterday and again today as part of these discussions. But (Thomas) as we mentioned, we have two PDPs.

One was concluded in November of 2013. Its recommendations are in a pending state before the board and have been since that time and one that is currently underway. The reservation topic and the notification topic fall into the first and then the access to curative rights would fall into the second.

And (Thomas) was the chair of the first. So bear in mind when we start to grill us and (Thomas) that, you know, that a number of years have elapsed since that time and so digging through the archives and the records and the transcripts might not be an instantaneous real-time process but he has a mind like a steel vice so I'm confident that he'll be able to, you know, recall any particulars of the rationale or the decision making or what factors were

considered during that time but if not at least laying the groundwork for the possibility that we might have some homework.

(Bruce): Thanks (James). So (Thomas) if you can just sort of comment on how the working group considered the topic of reservation and whether it was appropriate or not for acronyms and IGOs.

(Thomas): Sure. Thanks very much, (Bruce) and for those that have not been present during the discussion yesterday, I'd just like to refresh everyone's memory that the original PDP not only dealt with IGO names but it also dealt with IGO names and whether they should be protected or not and also the Red Cross, Red Crescent names. We were looking at protection at the top level as well as at the second level so it was quite a huge task.

In the concept of time and with respect to the IGOs our results were, you know, very briefly that we did recommend protections, i.e. reservations for the exact match four names at the top level. We also recommended that an exemption procedure should be established should one of the organizations that are being granted these protections wished to apply for their own top level domain name and for the second level, we've recommended to reserve exact match full names or so called Scope 1 identifiers, which again would be the full name of the organizations.

Also we recommended that there should be an exemption procedure should the organizations in question wish to register their full names as second level domain names and then for second level exact match acronym, i.e. what we've called Scope 1, strings we recommended that these be added to the trademark clearing house and that there should be sunrise service for these strings and a 90-day cleanse notification. And the reason for that was that we not establish that there was a legal foundation for granting further privileges if you wish for acronyms.

You have outlined earlier (Bruce) the way 6 (unintelligible) works and also the fact that a lot of the acronyms are being used already or that there is a lot of legitimate use possible with those names and therefore, you know, we limited or the recommendations were limited to what I outlined now.

(Bruce): Thank you, (Thomas). Now on the GAK side of it, sort of questions or concerns around that particular part of the policy - particular reservation piece.

(Thomas): I'm sorry, I've been distracted by some other urgent thing but I guess maybe the IGOs can help me out as they were participating in the PDP and the whole exercise.

(John Saro): So this is (John Saro). I think first we had a process issue with the way that the PDP was carried out and also specifically the way that the views of IGOs were addressed in the issues report and there's a description of whether or not there was a consensus or lack of consensus or divergence.

Specifically with respect to the fact that we had been, we the OECD had been working with a number of IGO's. It was I think about 40 IGOs plus another dozen or so UN agencies and we decided to submit our comment to the group and effectively our comments were counted as one voice which we found pretty problematic.

So our view of the process was that our views were essentially not taken into account, which we found pretty problematic.

(Bruce): Can you elaborate that because that's really what we're trying to say. So we agree that the process could always get better. So not having a process argument but on the substance of the issue what - what aspect of the (IGI) was not taken into account with respect to the decision not to reserve names, the acronyms. I guess that's really what we're trying to identify.

You feel that they weren't taken into account. Can you elaborate.

(John Saro): I'm not in a position right now to re-hash all of the legal arguments and all of the public policy arguments that we put forward through the PDP. Furthermore as an aside too, you know, I'm heartened that we're talking about the reservation issue because it does seem to be the easiest way to deal with this problem and the easiest solution to implement but we've all kind of moved on in some way and in a different state of negotiations. But we just felt that again our arguments as to why this was an important issue from a public policy perspective and our explanations as to the legal bases that we felt were there for protecting (IG) domains were not fully taken into account. And another aspect, you know we're talking about a handful of names that potentially have conflicts with other names or common uses.

It seems a bit of a situation where we're just throwing the baby out with the bath water because again we had always said that we would abide by coexistent principles and that we'd be willing to work with rights holders and work with the ICANN community to make sure that these protections if they existed were implemented in a way that made sense for everyone. And so, you know, IGOs as non-commercial parties, as, you know, what we like to think of as reasonable entities would be willing to make sure that we would allow the use of our acronyms if ever there were a conflict that existed where there was no risk of confusion and that also goes back to this - this point about 6 tier and when there's a potential exception to 6 tier and the fact that we would be willing to live with people who are using are acronyms where there is no risk of confusion, we seem to be totally in line with that.

(Bruce): Okay. Any comments, thoughts?

(Thomas): Just very briefly and I think I've said something along these lines yesterday when we were discussing the (RCRC) topic. I'm not here to defend the recommendations that were originally made. I was the chair of the group and it was my task to follow through the process according to our charter and the

PDPs guidelines and therefore I have a huge interest in explaining how the process went at the time and we got feedback from various parts of the community.

We asked for legal assessments from the various part of support our analysis. This was all discussed by the group and also when it came to input both during the group's deliberation as well as during the public comment periods, one of the things that the chair needs to do is not only to determine who says what but also where the views I expressed our coming from, so you can be rest assured - can rest assured the substance and the weight of the individual inputs that we received were adequately reflected in the consensus call and during the public comment period for example, there is a tool, which is the public comment tool where all the comments are put in an then analyzed as a group exercise.

In addition to that, the PDP guidelines specify that if the group has doubts about the correctness of the consensus call by the chair can be challenged and there was no such challenge at the time.

(Bruce):

Okay. And I want to kind of move into the next topic but I guess what I'm hearing in summary is the - at least what I'm hearing from the GAK representatives is there was a desire originally to reserve the names and the original concept was reserve the names and then seek permission from the IGOs if the names were to be allocated to someone else is kind of what I was hearing but that would be implying that you've got some automatic right to the name and no one else does so I think that one of the challenges in these things is that there are multiple people with rights to the name and so, you know, if they're reciprocal, you should ask them if you're allowed to use their name as well, so generally from a (DNS) point of view, we take the view that the name should be able to be registered and then it's through the use of that name that dispute mechanisms come in.

(John Sero): I'm sorry, (Bruce) and again, I wasn't a member of the PDP, so I'm catching this but I think we're using name and acronym interchangeably in our conversation and I would ask for a little bit of precision here because I'm trying to catch up and I think you said that other folks would have rights potentially to the name. That's not correct. They would have rights potentially to the matching acronym.

(Bruce): Acronym.

(John Sero): Okay. Thank you and I don't mean to pick on you ...

((Crosstalk))

(John Sero): ...for my own benefit here because I'm getting lost.

(Bruce): Well, I'm using that word in a generic sense but you're right. So I guess where we've landed so far - I'm sorry?

(John Sero): Maybe string?

(Bruce): Yes.

(John Sero): To differentiate between name and acronym. There both strings.

(Bruce): They're both strings, correct. That's probably a better technical sense. Yes. That's good, I like it. I'm an engineer too. So ....

(John Sero): Remember when you'd have to put a dollar sign in front of a string.

(Bruce): That's right.

(John Sero): Do you go back that far?

(Bruce): Exactly. So I guess where the community seems to be at the moment is there's acceptance of reserving the full name of the IGO at the second level and the board has actually gone ahead and actually approved that and then there - at this stage, the current view seems to be that acronyms have multiple uses, not owned by any one party or another and therefore it's not appropriate to reserve them in advance for any one party and then to shift the focus of the GNSO, sorry, that seems to now moved and I believe the recent GAK advice that we received in (unintelligible) is now moving into - sorry, one of the processes that an (RGR) can use if abuse happens or if abuse is likely to happen and how do you actually stop that abuse happening.

So if we go to the next topic then, which is the (unintelligible) topic. So the first step, which is challenging for an IGO is how do you know when something like this happens. How do - there's now a couple of thousand top level domains, how would you know when somebody has registered that name and is perhaps using that name inappropriately and how would you be able to respond fast enough because if using the health example, the name is registered and it starts giving bad health advice that could potentially endanger someone's life, you know, what are the mechanisms of being able to stop that relatively quickly.

So the first step in that is (unintelligible) and there is a difference here, and I've tried to highlight in simple terms the two approaches. The GNSO policy recommendation on this topic was that there would be a 90-day claims process and claims so I guess a mechanism, it's an existing mechanism that is used in the registration of names during the first 90 days of the creation of a top level name and the concept here is that a - during this period if a registrant went to register a name that was subject to an IGO acronym, they would be notified that there is an IGO that uses that acronym and that if I went ahead and registered the name that the IGO would then get notified that that name has been registered and you'd be notified as to who it's been registered to, so the party and then presumably then check if it was a website, look at the website and look see what content was on that site.

That's the GNSO recommendations. The GAK public policy advice on this that we received in Hyderabad communique was more generic. It was a procedure to notify IGOs of third party registration of their acronyms. I'd like to perhaps first hear from (Thomas) as to I guess the rationale for choosing this particular mechanism and perhaps the rationale for the 90 days and then hear from a GAK representative as to whether they feel that that's adequate and taken into account their need for notice. So (Thomas) first.

(Thomas): Since the group has not been able to establish a legal basis for permanently protecting and reserving the acronyms and we're just talking about acronyms.

(Brue): Just talking about acronyms again.

(Thomas): We were of course aware of the GAK advice that was in place so the 90 days claims notice seem to be sort of the middle way that we could offer so that these organizations in question would be notified in case of registrations of identical strings for the acronyms. But I should also note that the group discussed at length what the best mechanism would be to help the organizations because particularly when you look at the use for legitimate purposes, the question whether or not an infringement or fraudulent activities in place can only be determined if you also look at the website or the services or contents of it under the domain name and therefore we were recommending at the time that this preventative or that this (GMCH) base, claims service should be accomplished by curative rights mechanisms that could potentially be deployed by the organizations in question.

(Bruce): But that's separate from (NIDIS), right? Is that right? So irrespective ...

((Crosstalk))

(Thomas): But part of the rationale for - for what's been done at the time is that we could not establish a legal basis for granting reservations for - and therefore the 90

days claim, which was a mechanism that was in place was offered knowing that this should be accompanied by curative approaches.

(Bruce): Okay. (Thomas) do you want to perhaps comment on whether that GAK feels that that's an adequate implementation of that advice?

(Thomas): Thank you. Well, I think the - the idea that there is a notification is something that I think we share. The question is how, to whom and how long and so on but that is where the difference lies and I think from a point of view from the GAK, the 90 days period after a new (TTL) is launched, so sunrise or whatever it is exactly, does not necessarily make sense because it's unlike somebody who is considering whether or not to use a trademark for a business activity and you decide this at the beginning when something is launched but to - an abuse case can come up at any time in the existence of a (TTL) and so it may probably not even be more likely to come in the first 90 days but after some time when somebody realizes that there is a chance or an opportunity for abusing a name that that probably most likely be coming after the 90 days at any time.

Hence the idea that or the view of the GAK that it would make sense or it would be necessary to have a permanent notification mechanism that when something or somebody's registering an acronym that corresponds of an acronym of an IGO that there is a notification and not just in the 90 days because that wouldn't solve the problem that they have or would solve it for 90 days but what about the years to come. Thank you.

(Bruce): Okay. Do you have any response? So what I'm hearing then from the GAK policy advisors that this advice here which was just going to a procedure to notify the intent is that that's an ongoing - there's some ongoing process of notification and the 90 days is too restrictive because the feeling is that, you know, abuse could happen sometime into the future. Heather?

Heather: Thanks, (Bruce) and (Thomas) will correct me if I'm wrong here but as I recall one of the concerns that was raised in the initial PDP was that there really wasn't a legal distinction to be made between let's say what the IGOs were asking for and what at the time trademark holders were asking for. I mean we're going to back to the archives in terms of the - the origins of trademark claims essentially and it was said then that, you know, trademark rights will exist long after the 90 days.

It's not as if those rights are a finite period so that the timing in that sense isn't - is somewhat irrelevant but as I recall, just thinking about the rationale from the original PDP, that was a concern that was raised then was, you know, we've given trademarks at that time hadn't given - were contemplating given trademarks a 90 day period of notice and those rights will persist beyond those 90 days. Why shouldn't we be offering a longer period for IGO's. Thanks. Just recalling the rationale.

(Bruce): Yes, I think one of the reasons why there is a 90 day - because we're trying to re-purpose something that's built for something else and I think that's one of the challenges here. So I think what the GNSO has tried to do and I guess it matches one of the core values is trying to be efficient and use things that have already been built.

So that process is really built around essentially the trademark protection process and it's specifically related to the sunrise process where when a new generic name is created like, you know, if someone wants the equivalent of dot com in the first 90 days, there's going to be a barrage of new registrations in that name and there's a quiet complex procedure then that the registrar uses to actually send requests to the clearing house, check what trademarks are there, send all the trademark information to the registrar and predominantly it's there so that the registrant is aware that those trademarks exist in their first 90 days but then beyond that, it's a much more streamlined process.

The registration is almost instant and so I think we're looking at a process that is really built around the registration process, probably more so than the (NIDIS) process, (James).

(James): Yes, thanks and I think to build on that last point and a question for the GAK regarding their advice in Hyderabad the trademark clearinghouse presents a claim notice to the registrant as (Bruce) described and then it captures the acknowledgement of that claims notice.

Am I correct in understanding that was not part of the GAK advice? That the GAK advice was solely for notification of the IGO that you were not seeking a claims notice or an acknowledgement of a claim by a potential registrant? It was not part of the advice.

Brian Beckham: Brian Beckham for the record. So in the Los Angeles and the (unintelligible), the GAK's advice was for the notice of a match to an IGO name or acronym to perspective registrants as well as the consent IGO should be mandated in perpetuity for the (unintelligible) and acronym in two languages and at no cost to the IGOs and maybe just in fairness to kind of round out the discussion on this because of course (Bruce) mentioned earlier in the bylaws there's a requirement to look at how policies would impact the parties and one of the things that we understood was a concern was from the, I believe it was the registrar perspective was how to apply that claims notice beyond 90 days.

As I understood, it might require some re-engineering of systems so we kind of struggled with on the one hand the claims notice is mandated for trademark owners for 90 days. The GAK advise requested it for IGOs beyond that 90 days and then on the other side the notice to the trademark owner in the case of registration after that 90 days is provided by the trademark clearing house and so that requests from the IGOs because - sorry, the trademark clearing house isn't applicable for IGOs.

It was another related question of how to apply that to the impacted IGO beyond those 90 days as well.

(Bruce): So one possible solution that occurs to me here is maybe decoupling the use of a system that was built around trademarks or a system that is built more around (NOTIS). And commercially there are a lot of (NOTIS) services out there. And the way those (NOTIS) services work is I could just be notified when someone registers (Brue). And essentially what happens is there's a requirement in the contracts with the registry operators that they produce what's called a zone file which is a list of names that's in the DNS that relates to that particular top level name. And I produce that file every day and what commercial operators do is they read in the file from all of the (JTOD) domain names and then I do searches against that file for names that their clients are interested in.

That's a very common and commercially valuable service and so having sort of thought about this a little bit, it would be possible for ICANN for example to either contract with one of these commercial services or even build its own service that would basically, if the IGI supplied the list of IGOs that you wanted to be IGO acronyms I should say, if you provide a list of IGO acronyms that could just be basically put through a search against the daily file of the names that are lodged in the (DNS) and then on a daily basis could notify any of the (IGI)s of the registration of the domain name and that could be permanent as it is commercially for anybody that wants to purchase that service today. Is that something that could be useful or (unintelligible)?

Brian Beckham: Thanks, (Bruce). I think that makes sense on the notification to the IGO and maybe it still leaves a question of the notification to the perspective registrant and so I think there's a question about if and how that could be accomplished. That would mean for registrar systems.

(Bruce): Yes, (Bruce) if I could - so we have discussed this in the - I don't even know if I'm allowed to refer to the small group of people that have met to discuss this

but anyway, we have discussed this at some length and the view that sort of the ICANN people took was that it would be extremely - this is just our view, I think, extremely challenging to be providing notice to registrants, not least the question arises what would you actually tell them.

In the case of a trademark, you can say, we're just writing to let you know that you are registering a name that is subject to a trademark. I'm not clear - and you could end up in trouble I think. I'm not - no one's been able to come up with sort of clear messages that you would be delivering in respect to IGOs that would be meaningful to anybody. By the way, hi, you're registering an acronym that is the same as an IGOs isn't really very helpful.

The second thing is that we felt I think the whole point about perpetuity and we work from a cost point of view and from an ongoing margin point of view if you do it purely as a notification, the name is being registered rather than trying to notify registrant that there have been - that they have registered a name.

So that was the sort of the - one side of the discussion that we talked about, just thought that might be helpful.

(Bruce): It seems to me, certainly the (unintelligible) of the notice could actually be done without any policy development process because it's not something we sort of relay that in terms of the policy development process. You're creating policies that are things that a registry and a registrar must do or new things that a registry registrar must do but today a registry already must provide a list of names (unintelligible) public. I have what's called a zone file access process so any IGO actually can take advantage of that themselves if they wanted to write a little bit of software and there's no charge for these files but certainly something that I could undertake to do to meet this - the requirement I guess coming from the GAK around the notice would be to either implement a (NODIS) process itself or, you know, contract that out to a commercial party

to actually at least meet the notice provision that the GAK advice and that probably doesn't require opening up the PDP to do that.

This is just an idea that I came up with today so I'm just spitting it out looking at all of this stuff. I'm now becoming an expert on my website by the way.

(John Sero): Just - just a note that, you know, having not discussed that with anyone but you that I agree that would be more of an implementation consideration and not require re-opening the PDP. It would either be setting up the service like this or providing access to a service like this and they already exist and the data is already public.

(Bruce): Yes, so I think we could - does that sound fair? You know, as part of an outcome of this discussion is that we can at least implement, there's a way of implementing the notice provision.

(Thomas): Thank you. I think if we can implement things that are feasible and more or less with resources that can be legitimated and won't change the world in terms of scarcity of resources without having to go through the exercise of going back in history and consider this an implementation issue, that is, of course, something that I think would be in terms of efficiency of moving forward that would be to - one reply to (Bruce) remark seeing that apparently notifications are done to register under trademarks and then his question about well but how can we do this with IGOs because IGOs actions may not be meaningful to a registrant. Well, I'm not sure whether every trademark is meaningful to a registrant so I think if it's possible for trademark to send a notification to the registrant and for your information, you're about to register is something that is a trademark why should not be possible to tell the registrant that is about to register an acronym that that is also an acronym, a string that is an acronym to tell him for your information, this is also an acronym of an IGO so that was interesting.

(Bruce): So I think that the GNSO policy is saying you can - their recommendation is to actually do that for the first 90 days because that's part of the system that's already there and then what we're saying is past the 90 days and all it would be as (Bruce) was just saying, he's in IGO and this is what (unintelligible) is, trademarks a little bit different because you're actually saying this party has a trademark in a specific class and there's information about what that class is so that you actually would have to make a decision about what legal rights the trademark holder has. (James).

(James): So just another thought here relative to your brainstorm, which again needs to be baked a little bit more.

(Bruce): I'm just trying to throw some pins that we're not ...

((Crosstalk))

(James): But it has an advantage over even the trademark clearing house because if you recall incumbent (GTLD)s were not required to connect to the trademark clearing house so (Bruce)'s statement earlier about consensus policies applying to all (GTLD)s is actually - needs a big disclaimer attached to it when we talk about trademark clearing house whereas referencing zone file notification would cover all active (GTLD)s and (CCTLD)s that publish its own if that's available but none of them do.

(Bruce): Yes, that's right. That 90 days claim process applies specifically to the correction of a new name and for that first 90 days of operation whereas the process that I referred to as notice could apply to all (OGD) days. That was pre-existing 2012 and in fact that's where the bulk of the registrations are and when you're hitting towards 200 million registrations in the existing names and then a few million in the new names.

We probably should for the record but I think people are starting to transcribe as we're staffed to recognize our accents but if it's a new speaker, it's

probably helpful to say your name but I know (Jonathan), you've already spoken so please go ahead.

(John Pesaro): (John Pesaro) OECD. Just to go back on the reported difficulty of crafting language for notification, I don't think it's an unsurmountable difficulty. We never actually discussed specific language. It was always just a proposal that was kind of rejected out of hand so I think that there are a ton of a smart people sitting in this room.

I am sure that we could craft some sort of language that would be both clear and appropriate and would reflect the kind of rights that I'd use to have in our acronyms.

(Bruce): Okay. So that's language that can apply in this first 90 days and then I think what we're suggesting in our outcome today is that we also, you know, commit or ICANN commits to be at a provider's service for notification based off the (unintelligible) and this is notification that the name has gone into the (DNS) is essentially what that is.

Okay. Comfortable with where we've landed on that? Okay. Next topic which so far we've been talking about ...

(Thomas): Just to be perfectly clear if this is sort of trading the 90 days claims which were recommended in the original PDP against this...

Man: No, I'm suggesting ...

(Thomas): There's certainly nothing that I can speak to, you know, the original recommendation stands so this new proposal that you made is something that is entirely disconnected from the community ...

(Bruce): It's in addition, (Thomas). So we're saying that that recommendation that you had stands which is using this 90 days claims process but we're saying in

addition, because GAK advice, which was recent advice from the Hyderabad communica was a procedure to notify (IGI)s of third party registration and what (Thomas) has done is clarified that that is intended to be, you know, for the generation of the registration rather than just in the first 90 days. I'm saying we can meet that GAK advice by providing that notice first. So it doesn't change the recommendations.

(Thomas): I just wanted to clarify this because I don't have any authority whatsoever nor anyone else at the table to change consensus policy.

(Bruce): And (Thomas) we are offering this as a brainstorm to help augment the PDP recommendations as a separate service, a separate implementation of a separate idea but not as a replacement and not something that we would trade one for the other because that would require us to re-open the PDP.

(Bruce): And as much as possible avoid doing that if we can because it (unintelligible) we're trying to be fast and efficient and so I think if we can move forward on this suggestion that could be implemented relatively quickly.

Do we have board members? I don't know if we have any board members. They've already run away. Sound reasonable to you from a board perspective, the notification process?

Man: Not an expert but from what I heard it seems reasonable, so I can't say anything else.

(Bruce): Reasonable is a good start. Well, (Asha)?

(Asha): I agree. I think it sounds very reasonable.

(Bruce): Okay. Next one, please, Mary. Just hold on one second.

Man: I think we lost them.

Woman: (Unintelligible).

Woman: Can't we just...

((Crosstalk))

(Bruce): Okay. Sorry.

(James): So can we back up a little bit just a moment here because we've got a little bit of apprehension on the GNSO side as to what we're proposing, what we're agreeing to, what we're encouraging or recommending and so let's just be very clear is that if the board and the GAK were to proceed with your idea that we don't see the GNSO necessarily as a party to that discussion that that would require in essence the board to accept the PDP and the GAK advice ..I.

(Bruce): Yes.

(James): ... and use this mechanism as essentially way to ...

Man: Maybe not entirely.

(James): ... close of reconcile those two conflicting ...

Man: Correct.

(James): ... and that would not necessarily be something that we would be involved with.

(Bruce): Other than obviously giving (unintelligible) it's not going to cause a problem.

- (James): Well, we're just kind of helping you brainstorm at this point but we're not horse trading there. I want to be very clear.
- (Bruce): You keep saying that (James) what we're trying to do is resolve. We've got two positions and we're trying to find ways of resolving the conflict. We're not doing some sort of horse training.
- (James): I understand that.
- Man: Yes.
- (James): The people who are crucifying us on Twitter don't really understand that so we're making sure that we are being as clear as possible, thanks.
- Woman: We're just addressing perception.
- (Bruce): You summarized it correctly in the sense we're saying that the policy recommendation is still standing, which is the 90 days claims process and we haven't heard anyone say that that's not a good idea. What we have said is the GAK is saying in addition to that, we want something that is a permanent notification process and I'm saying that's possible to build that as a notification process without requiring any new activity from a contracted party and therefore you don't need to go back into a PDP to make that change. Is that clear? Not all things need to be solved with a PDP.
- Man: Just a question for the sake of information and transparency. What is the Tweet that we should follow to see - no, I'm serious.
- (James): I'll talk to you later. It's probably not family friendly but ...
- (Thomas): No, but we are very hard in taking so don't worry.
- (James): We can talk chat about ...

(Thomas): So other tweets now about (unintelligible).

(James): You know I think it was just a general - I can show you later. I blocked ...

(Thomas): We're all open for transparency so we would like to, of course, be informed.  
Thank you.

(Bruce): Thank you, (Thomas). Next topic. Dispute resolution. So they - in the last  
communica in Hyderabad, see how we're going for time. Not too bad. The  
GAK public policy advise that we received in the Hyderabad communica  
stated that a dispute resolution mechanism modeled on but separate from the  
(ERDP) to include the possibility of an appeal to an arbitrary tribunal instead  
of national courts in conformity with relevant principles of international law  
and then further the GAK policy advice was that there should be some form  
of emergency relief within 24 to 48 hours, a demand on suspension  
mechanism to combat risk or eminent harm to an IGO.

So that was the advice that the GAK issued in Hyderabad. Since that advice,  
there has been published, I think it was in January this year the working  
group is looking at curative rights around this dispute process, had a draft  
recommendation and - or draft recommendations. And the first  
recommendation is that they're recommending no change to the (EDIP) and  
no change to the rapid suspension process.

So there is a rapid suspension process that exists today for new (GTOA)s  
which I think is intended to deal with your second piece of advice from the  
GAK there but the difference here seems to be the GAK is suggesting a  
separate dispute mechanism being created and the GNSO is currently and  
this is draft is suggestion no change and then the current (EDIP) to have  
standing to file a (UDIP) you basically need a trademark.

So what the GNSO is suggesting here is that to demonstrate standing to filing a complaint under the (EDIP) or the (URS) it should be sufficient if the (IGI) doesn't have a trademark to demonstrate that it has complied with the requisite communication and notification procedure in accordance with Article 6 tier of the Paris Convention.

So in other words, if an (IGI) was notified, (unintelligible) was part of Article 6 tier and the IGO that wants to launch a (UDIP) or launch an (ERS) can then point to the fact that there's an official notification which is public. That that should be sufficient standing.

Just again just so people are familiar with how the (EDIP) process works just so that you have a sense of what that is. The standard for dispute resolution that exists there today to be successful in an (UDIP), you need to first show that the domain name is identical or confusing similar to a trademark or service mark in which the complainant has rights and you need to show that the registrant has no rights or legitimate interests in respect to the name and you need to show that the domain name was registered and was being used in bad faith. And then the bad faith provisions are basically examples of bad faith.

So bad faith is if a registered name holder intentionally attempts to retract for commercial gain internet users to the websites by trading a likelihood of confusion with the complainant's mark as to the source sponsorship affiliation or endorsement and then circumstances indicating that the domain name was registered primarily for the purpose of selling, renting or otherwise transferring the domain for valuable consideration in excess of documented out of pocket costs.

So that's basically what the (EDIP) does today but as sort of pointed out that (UDIP) was built around trademark law and it is basically intended as a dispute resolution mechanism that's cheaper than actually going to court around the trademark. So that's what (UDIP) was created for and I guess

what I'm seeing in the draft GNSO report is trying to use what's there and then trying to adjust it potentially by changing the standing provisions but perhaps if I can start with (unintelligible) if you'd like to just sort of comment on the rationale because you would have seen this public policy advice that was in Hyderabad in November. How did your working group sort of take that into account and perhaps why did you feel that there was no need to change the existing or no need to create a new dispute resolution method.

Man:

Well, it was for - I would say for two reasons. And again this is initial report and we're getting a lot of comments already and we've extended the comment period to the end of March at the request of the GAK so that GAK members would have additional time and could base their comments upon discussions and other information gained at this meeting. But one was a pragmatic reason.

The challenge is creating an entirely new curative rights process for a few hundred organizations as opposed to a whole world of trademark owners. In other words, legally reason that the separate process was tied to a recommendation from the (unintelligible) small group that the - if a domain name registrant lost in the initial curative rights process, they wouldn't be denied their right of access to appeal to a court of national jurisdiction and we had a very long discussion and a very long legal memo that I'm not going to get into here for not accepting that advice but we did want to make it easier for IGOs without having trademark domains or acronyms to access the existing process and when we looked at Article 6 tier we said, well, it gives you protections and national trademark law systems just by filing the letter with white bill and that's close enough to trademark protection to be a basis for standing and we went beyond that and said the language in 6 tier is a little bit different but it basically says if you can show that the - it talks about a trademark registrant but in this case the domain name registrant.

If the registrant has tried to mislead the public and confuse them to pretend that they're the IGO when they're not we basically would say there would be

guidance to panelists saying that if that alternative additional ground that would constitute another ground for finding bad faith registration and use of the domain name.

So the whole effort was based on the relationship of Article 6 tier to the Paris Convention and an attempt to make it easier and less expensive for IGOs to use the existing processes but our reluctance based upon the legal advice we got to deny domain registrants their right to appeal to a court of mutual jurisdiction and in particular that's because ICANN provided curative rights process. It's not a substitute for existing legal rights but an attempt to provide a lower - much lower cost and must faster alternative to legal rights. I hope that was a sufficient explanation. Petter may want to add to that.

Petter Rindforth: I'm Petter Rindforth. Initially I say that I really appreciate that we are sitting here today with all groups of interests in the same room. We have actually during our work that has been going on now for a couple of years just wanted to have this situation to be able in the initial stage to discuss directly with both GAK and IGO's so we can come under like GAK from their start but it's good to be here and it's also interesting to see and we really appreciate the working group to see that there is a lot of comments already filed by IGO representatives and we have two of them today that a number of the other IGO representatives have actually referenced and said that they support these comments from (Wyco) and OEDC and I just also wanted to also add that what we had initially was to - two possible ways to deal with this topic.

It was either to change the current dispute resolution procedures and also must have in mind that there is another working group that will actually deal with this, an overview of the (UDIP) and the (URS) well the UGIP will start sometime next year and we wanted to actually avoid making any changes in the current policies and we also wanted to have a quick and decent and acceptable solution as fast as possible and that's why - and then we realized in some states that maybe there is no need to actually plate a fully new dispute resolution procedures for this topic. The limited number of cases that

will be. So that's why we considered and had concluded that it should enough to have a police guidance added that refers to Article 6. And Article 6 is also the identification that we noticed that would probably have the best way to be accepted by all parties involved. There are other list of IGO's but there is actually a legislation that also counterparts and national courts and other (unintelligible) could accept in a general way. Thanks.

(Bruce): Thank you to both of you to summarize that and if I can - I'll try to summarize back some it what I'm hearing. So one thing I'm hearing from you is you felt that you didn't want to create a new dispute resolution mechanism or several hundred organizations are hired to create a new separate mechanism, is that correct?

Man: Our view was that unless the legal analysis required, the immunity issue required us to create a whole new system it would be more pragmatic to give easier access to the existing improving system.

(Bruce): So you're saying that the only reason, and this certainly maybe able to clarify here as well, it sounds like the assumption you made is the only reason to create a separate mechanisms was that there might be a different appeal approach.

Man: Basically while there is a slight legal different between a dispute based upon trademark and a dispute based upon standing, based upon 6 tier, a solution of rights which gives protection in trademark regimens that there was no rationale for creating entirely separate system unless we had found that the right of appeal to a national - court of mutual jurisdiction was not appropriate for a dispute involving an IGO and based upon the advice of the legal expert we retained, we did not reach that conclusion.

I did want to stress that again we have an initial report out. The best way for people to influence our final report is to use the comment period and engage with our working group. We're several months away from a final report and I

can assure you while Petter and I don't control the final outcome of our working group, we can assure you that each and every comment will be taken very seriously and examined and, you know, but the ultimate decision on the final report is up to the full membership and the consensus achieved within the working group. And then of course whatever we recommend will be reviewed by GNSO Council before it ever goes to the Board.

(Bruce): Thanks, (Phil) and then the other thing I heard is I guess two things about the Article 6 tier one of which I didn't quite understand but one thing I heard was that it is a list of names that has been notified, so there's a defined list, if you like, of names and you're using that as a defined list of names that have access to this dispute process but then I thought I heard you say because I have (unintelligible) but I don't think that's true but it's almost the opposite, that I have tried my rights, so I'll just stop somebody else getting trial rights.

(Phil): No, I didn't - if I implied that, I was misunderstood. We found in our work that many IGOs have trademarked their names and some have trademarked their acronyms. We also know that many have not. But assertion of Article 6 tier (unintelligible) to a notification of (unintelligible) provides a protection within national trademark law systems. It doesn't give framework rights but it gives protection within trademark law regimens to the names and acronyms provided to (WIPO) and so it's certainly related to the trademark system and we felt for purposes of standing to file a complaint that would be sufficient and would relieve those IGOs which haven't registered trademarks, names and acronyms to have access to the existing systems without taking that step.

(Bruce): Okay. So I want to deal with immunity. You mentioned immunity a couple of times. I want to deal with that under the appeal mechanism but if we could just talk about just the dispute mechanism itself, the advice was that a dispute mechanism be modeled on but separate from (UDIP). Is the - is your mind the - approach taken here to use the existing stand, is that something that is feasible from your perspective, (Thomas)?

(Thomas): Thank you. Just to inform you that actually today, first of all thanks to the coaches of the PDP for extending the deadline because we were quite overloaded and we were quite happy that we could start preparing GAK input but we finalized it today or adopted it today as a GAK consensus and either you have received it already or you will receive it in the next few hours so that was basically, we'll be happy to. Earlier in the process where the GAK can avoid, as nice as it is to be here with you but if we can avoid future meetings on Sunday evenings about these similar issues. It has already gone out or it will be going out very soon and the answer is and I'll give the floor to those who know things better than I do in detail but actually it is still the view that the mechanism should be modeled on but separated from ...

(Bruce): So I accept that view but what's different. And maybe your colleagues can explain that, so you're saying it's modeled on but separate so I guess which bits of the (EDIP) work and which bits don't might be helpful. Essentially what I'm hearing you say is that the (EDIP) in its current form doesn't work or was not working for you and I think, you know, the (unintelligible) policy (unintelligible) want to understand why, I guess.

Man: Yes, I'd like some clarification on this as well because I think we specifically tasked the PDP to examine and rule out existing mechanisms before developing a new mechanism.

So if the GAK advice is saying that only a new mechanism will work, I think that's, you know, okay but we've got to understand what the compelling case is for building something from scratch particularly given that it's a finite set of affected strings.

Brian Beckham: Now, I'll look to my friends in the (USPTO) to correct me if I misstate this but what you'll see in the GAK's public comments, which comments mentioned have just been submitted really signals a shift from looking at this through the lens of trademark law and Article 6 tier of the Paris Convention which can lead us down the path of some fairly detailed discussions to looking at this

more through a public policy lens and so the idea was rather than complicate things by looking to make amendments to the existing (UDRP) a standalone mechanism which didn't drag up some of these complicated discussions about the nuances between trademark rights as under existing (UDRP) and the way IGOs have their names and acronyms reflected under the Paris Convention, it was simpler to create a standalone mechanism which used the EDRP as a foundation but specifically went to that - that fork in the road on trademark rights on the Article 6 tier and public policy grounds on the other hand.

(Bruce): So Brian, what are those rights, though. Say 6 tier doesn't confer additional legal rights. It just stops somebody getting a trademark. So one of the things that I've struggled with if we and perhaps you can elaborate on this a little bit for me, if and I'll just create an example here.

If we created a magazine that had nothing to do with domain names, you created a magazine and you called it WHO and let's say the magazine happened to be about health and the magazine has no trademarks on that magazine at all but it hasn't applied for a trademark but the magazine is called WHO and it talks about the health effects of drinking lots of beer.

What legal right does WHO has against that magazine operator, the publisher of that magazine. What's the - if you then took that to court, what's the actual law that you're using?

Brian Beckham: Well, this sort of precisely, this question gets precisely into this more complicated question of what is the difference between a grant of trademark rights versus the application of the Paris Convention and its - I think the simplest way as I think you alluded to earlier was that it's sort of a negative grant of a trademark right that prohibits third parties from using that.

(Bruce): So come back to my example. So I've published this magazine. It's called WHO and it's about health and it gives some really bad health advice. What

actual law, use Australia for example. What law - what's the legal right you're using to challenge that? How do you stop me publishing that magazine?

Man: I think again this is one of the issues that makes this problem of IGO productions more complicated than most of the things that we're used to dealing with is that this is an international treaty that puts obligation on - they're going to interpret that and apply that in different ways. So I can't give you and I don't think Brian can give you now ...

(Bruce): (Unintelligible) the treaty, that treaty, the Paris Convention is about industrial property rights.

Man: Mm-hm.

(Bruce): It's about trademarks but I'm creating a magazine. I don't have a trademark. I've just called this magazine WHO and I don't have a trademark in it and I'm giving really bad health advice. So you can't challenge me - you can't challenge my trademark but I can think of some laws but I'm just trying to understand from your - you're the experts in this field, what law would you use to stop me publishing that magazine.

Man: So again.

(Bruce): What's your legal right there?

Man: So different jurisdictions are going to apply and interpret their obligations under 6 tier in different ways.

(Bruce): But 6 tier is basically just saying I can't have a trademark. I don't have one. I haven't even applied for a trademark. I don't see how 6 tier helps.

Man: Well ...

- (Bruce): So 6 tier is basically a mechanism that means that WHO can stop me registering a trademark for WHO but I haven't registered a trademark for WHO.
- Man: The way that difference (unintelligible) parties to the Paris Convention decided to interpret and apply their obligations under 6 tier is going to vary. So I can't give you a rundown how every different party ...
- (Bruce): Just pick one. Pick one state. Whichever jurisdiction you want to take.
- Brian Beckham: I'm sorry. (Bruce), we've sort of in the reaction to public comment period of the GAK advice, I'm sorry the GAK public comment really tries to address through a public policy lens and it gets us into a fairly complicated conversation. I think the simple answer to your question is that potentially there would be a cause of action under a trademark law potentially under passing off, potentially under unfair competition, deceptive trade practices.
- It would depend on the relevant jurisdiction but this is precisely the type of discussion we've sought to avoid by looking at a mechanism that's modeled on the (EDRP) that addresses potential fraud or deception on the back of an IGOs reputation without getting into these discussions about the applicable relevantness and the laws.
- (Bruce): So I think that's one of the struggles. So the reason why (UDRP) works is that it's actually based on really clear laws. So we have the Paris Convention that relates to trademarks. Each country has laws relating to trademarks and so if - if WHO did have a trademark using a different scenario, if you did have a trademark for WHO, then I could publish the magazine that was called WHO.
- The trademark law would give you really clear legal method, so you just stop me publishing that magazine if you actually had the trademark but I think - and that's how (EDIP) is designed is sort of basically saying if we didn't have - if you didn't want to go to court, here's a fast dispute mechanism but it's very

clear to all parties that there is this clear law that you can then go, which is trademark law and if you had the trademark, you could then use that law and presumably stop the use of that name.

So that's one of the things I think that struggles a bit, that creating a new dispute mechanism is you've got to be clear, what's the law that you're relying on that you then create the dispute mechanism around. And I'll give you an example in Australian law. In Australia there used to be called the (unintelligible) I think it's called something different so it's not (unintelligible) law but it's a law to protecting consumers about misleading and deceptive conduct. And so if you actually wanted to do that in Australia, you would use the consumer protection law around the misleading and deceptive conduct. And if that was the law that was going to be applied in the U.S. there's a different law I've been asking about this today.

I gather there's (unintelligible) practices, sorry, there's consumer law in the U.S. that could be presumably used. So if you sort of said, well, we're going to use consumer protection law and then we look at how that's dealt with in different countries, then I think you could build a new mechanism but it's complex because consumer protection law probably varies widely. Heather.

Heather: Thanks, (Bruce). I think the answer to this is at an international level what you're describing is unfair competition law and the Paris Convention does contain an obligation or obligations on member states to take steps within domestic law to prevent unfair competition, to regulate against unfair completion. The problem with that is that, you know, there is a divide between how civil and common law countries deal with it.

Every country deals with it its own way and the Paris Convention, I'm - it has some very high level principles that say, you know, you need to make sure that your domestic law achieves the following aim as opposed to the very clear harmonized framework that exists for trademark law. So every - in the Paris Convention the way that it does this says you can do this however you

want. If you want to do it through caselaw, if you want to do it through tort law, if you want to do it through any number of things, a specific (unintelligible) and that's where we struggle with this.

If you try and rely on unfair competition law, everyone has a different approach to it and some of those approaches have different purposes. Some of them are to protect consumers, which the old trade practices act had that as the same. Some of them are to prevent confusion within the marketplace. Some of them are to prevent or protect the rights of a particular player in the market, so on and so forth, so you're right. It's a very complex area. To rely on that part of the law, makes this challenging.

(Bruce): (Phil)?

((Crosstalk))

Man: Thank you, I think this is very helpful what Brian says and what Heather also said and your case with the magazine, that probably would be an online magazine and not a paper magazine of course in the 21st century. No jokes aside, in my country, I'm not an expert. What I understand in my country, these names are not trademarked because in Europe there's a difference between this doesn't go - it's not implemented by trademark law. So my country it would be completely irrelevant whether somebody abusing let's say that name would have a trademark or not there is some kind of protection from abuse and that's the idea that ascends from what Heather is saying.

The idea of (unintelligible) is actually prevent other people from abusing these names if they have purposes that are not to the damage of these organizations but from abusing these names and then whether it's consumer protection or whatever the (unintelligible) on national level, the legal basis, it (unintelligible) is the public policy goal to avoid, minimize, prevent whatever, abuse, that is the thing I think we should hook on and that is also the reason why I think this should be separate from behind the scenes.

It can be the same technology, it can be similar algorithms but it should not be formal part of the trademark since the protection system for trademarks because it's a different thing, comparable but different public policy issue and I think that's maybe the logic that we could follow.

Man: Well, I think that's right.

(Bruce): Comparable but different. I think what I'm hearing (unintelligible) that's why you - what I'm hearing the (unintelligible) that's why what I'm hearing the (unintelligible) side is comparable but I think is similar and then what I'm hearing on this side, it's different and therefore there should be a different dispute mechanism.

Man: And just so to add one thing, it's very appreciated the (unintelligible) tries to be efficient and cost saving and not develop unnecessary mechanism coming from an administration where we are under constant accountability of about how we spend the money. I have the full understanding that you try to be cost efficient. So this is where I think in this case probably the risk of confusion and additional costs through confusion and blah, blah, blah is probably easier and in the long run more cost efficient to just develop something on the basis of something but call it differently and keep it formally separate in the hope that clarifies the situation and we're fine at some point in time. Thank you.

Man: First, let me just make a few points and I'll try to be as precise as possible given that this is a very complicated legal and policy area. My work day started 11 hours and 10 minutes ago. Remember, we haven't seen the GAK letter yet but we will take it very seriously. In fact I plan to confer with my co-chair and staff and talk about whether we should begin to reconvene the working group even before the comment period closes to start reviewing the many comments we've already received.

Second Article 6 tier basically presents registration of the corresponding trademarks for what's essentially bad faith use, which is very close to the (UDRP) standard and it's why we kind of said that will be additional standard for bad faith use if it's based on Article 6 tier.

Article 6 tier registration provides that protection not only on nations which signed the Paris Convention but in all nations which are members of the World Trade Organization. So between those two bodies, it covers most - the vast majority or national government in the world and finally I can't help but note with some irony that in the hypothetical that you gave of an Australian magazine called WHO about health issues that if the World Health Organization wanted to bring legal action to cause it to cease publication by bringing the legal action, they'd be waiving their immunity from judicial process in Australia.

(Bruce): That will be the next topic. I think it would help - it sounds like perhaps the maybe the representative from the U.S. trademark, whoever has dropped this advice from the GAK because none of us have seen it but if you could just summarize, that would be helpful.

(John Rodriguez): Oh. Well, just before we get into that point. Sorry, my name is (John Rodriguez) from the U.S. Patent and Trademark office. Just for purpose of clarification, I did want to highlight the fact that from the U.S. perspective, we did submit comments to the working group in this report so we thank the working group for that opportunity.

Again from the U.S. perspective, we do have an issue with basing any type of focusing on Article 6 tier. I know in recommendation two of the working group report the recommendation was basically just by the completing the notification and communication of the 6 tier notification, that that would provide standing. We did take issue with that conclusion basically because from my perspective it seemed to establish some form of legal right just by the mere notification and communication when in fact that is not the case.

One element of the Paris Convention and in Article 6 tier is that it is not a self-executing treaty and so it requires Paris (unintelligible) members to enact national legislation to fulfill and implement the obligations of the Paris Convention and so it's only after that notification is made to the Paris Union member, so the countries and that countries make determination whether to object or not to that notification, then in essence that designation or that sign, whatever we want to call it, does then receive the benefits of what's found in 6 tier.

So that was the issue that we had initially was the conclusion that the recommendation that the working group had in regards to recommendation 2 and it was something that again we didn't - from this side here, we didn't know whether it was - we didn't feel like it was something that we needed to focus on specifically and whether there needed to be some type of consensus on whether what 6 tier does, how it's implemented but we did have to react to the recommendation that the working group had in regards to Article 6 tier but then in regards to the comments from the GAK as a whole, if you'd like to ...

(Bruce): If someone can tell us what those are, that would be helpful, yes. Have you got them in front of you?

(Thomas): You mean the comments that we've adopted today. I can read them out to you. I think they are apparently they are published already on the website.

(Bruce): Yes, specifically what I'm talking about (Thomas) is the draft initial report is the existing mechanisms and the GAK advice at the moment is some new mechanism is created and I think what we heard from (James) and others is what's basically wrong with using the current mechanism, try to articulate that and you had some advice.

(Thomas): I can read the introduction aside to public policy rationale and just go through the considerations and that says ICANN should establish a dispute resolution mechanism modeled on but separate from the (UDRP) which provides standing for IGOs which need not be expressly ground in trade as such as IGO are created by governments under international law and are in a different category of (unintelligible).

This is something that you've seen before because that was part of previous GAK advice. There are two issues with working group recommendation two, which suggests issuing policy guide and new (unintelligible) standing. First and actually some footnotes that I'm skipping now because otherwise I will be reading for too long.

First and so far as the recommendations (unintelligible) alter an existing consensus policy, no amendment of the (UDRP) it did properly bypass the (unintelligible) bylaws (unintelligible) development process bracket is should therefore be described merely as some form of policy and (unintelligible) guidance.

Second, aside from failing to adequately account for GAK advice on this subject, this recommendation disregards the plain language of the (UDIP) which requires trademark rights for standing to file a case. For the same reason, the GAK cannot agree to Recommendation 3 which provides that the policy guide documenting Recommendation 2 should reference article 5 tier, blah, blah, blah.

Such dispute resolution mechanism should also provide for appeal to (unintelligible) tribunal instead of national courts and conformity with relevant principles of international law concerning recognized privileges and immunities conferred by governments and IGOs and then the last one working group Recommendation number 4, which is (unintelligible) immunity which suggests a form of workaround is incompatible with the position

conveyed by the league of councils of IGOs which was provided to to the working group at its request.

Again for the same reason, Recommendation 4 does not adequately account for GAK advice in the subject which recognizes international norms regarding IGO status as (unintelligible) organization. I'll leave the rest. The GAK notes that finally then that Recommendation 5, I think that there is no problem with that one. You can read the rest in the communication that you find but that's the key elements in 2, 3 and 4.

(Bruce): Thank you so much. So I guess what I am hearing then, at least from the GAK advisory or I guess summary of the discussion, the Paris Convention (unintelligible). I think everyone's agreeing that we wanted to stop deceptive and misleading conduct without using names and IGOs. I think that problem is something that we are all collectively trying to solve. Then the question is what are the mechanisms for doing that.

One mechanism that had been proposed by the GNSO was to actually use the mechanisms for trademarks, which was (UDRP) and there was a whole (unintelligible) around that. What I'm hearing from the GAK side is that because the Article 6 tier is not actually creating a trademark, there's no trademark right there but in the Paris Convention, there is a requirement for states to have some mechanism of protecting against the bad conduct and Heather pointed out that different states do that in different ways. So there's Australian consumer protection law, there's U.S. and so on and there's a lot more variability about how to achieve that compared to how I protect trademarks, I guess. And so then the advice from the GAK is then saying we think you need to provide a separate mechanism that's not trademarked based but based more around the broader protections in the convention of the border requirements perhaps in the convention and you also saying and we're coming to in the second is around the immunity thing which is different as well.

Is that a fair summary?

Man: I think it might be a little bit more accurate to say that the primary basis for this mechanism would be the public policy rationale.

(Bruce): (Unintelligible) I think everyone agrees the public policy rationale which is protecting consumers against misleading conduct, yes.

Heather: (Bruce) precisely. (Heather Foss) by the way. For precisely the reason that you've articulated and I think our GAK representatives have made a good point to say this a number of times that they're not relying on trademark law for that very reason.

I have a great deal of discomfort on relying on 6 tier for any of this. I have a great deal of discomfort with relying on the Paris Convention to justify what we're doing and particularly 6 tier, which you said a number of times doesn't give positive rights. It simply stops others from gaining those positive rights. So I - we need to find another justification for what we are doing, then 6 tier.

(Bruce): Okay. Let's - I think where we're sitting is that we're in the middle of a policy development process around whether we can use the existing dispute mechanism or whether we need a new one. Clearly the draft recommendations are to use an existing one. The public policy advised that sounds like we're going to get what we've got today saying that they don't believe that is a good idea and articulated why and then all of that for the working group I guess to take that on board. (Phil)?

(Phil): First I want to say as we're six minutes away from the projected closing time of this discussion and we will I think the coach chairs can assure you that we will take all the comments every seriously. We will make sure that our working group members carefully analyze and consider them and debate out the points and the working group will adjust the final recommendations as we view. Justified, I think we're not here, of course, to negotiate.

There's an open PDP but I think it's been very useful exchange of ideas and information and useful process and so we can assure you as we've been up to now as provided by the example of stopping our work for almost a year so we could get expert legal input on scope of IGO immunity and domain disputes, we will continue to be very careful and very deliberative in our work and take all the comments very seriously.

(Bruce): Thanks, (Phil). And (Thomas)? I did want to briefly talk about appeals just in the last five minutes but go ahead.

(Thomas): I will only take one minute just to say that first of all thank you for this discussion for taking this into account and for my stance as a non-expert, on the record as a non-expert in this, I think we are fairly close. We agree what the public policy objective is, we know about the sensitivities of let's say what to hook it on and so on and we agree that the model should be based on modeled on, similar to, whatever we call it but maybe not called or not be in the same case, like the trademark protection system.

So I think we are fairly close on a number of things to question. Looking from the outside, it's actually details but we'll need to solve in terms of getting it done, to maybe exaggerate it will be a little late but I think we are very close and I think if we continue this dialogue, I think it should be possible to come up with something in the PDP that then would not trigger GAK advice. Thank you.

(Bruce): It is complex, isn't it but I think what you're saying is both parties agreeing that something modeled on the process that we have and then the question is do you sort of change the existing process itself or do you mork it into two processes but there is agreement that's going to be modeled.

Okay. Next slide if I can. Sorry, go ahead.

Susan Anthony: Thank you, (Bruce). Susan Anthony United States Patent and Trademark office. I just had a very quick point of clarification or question regarding clarification. I think we've all agreed that this evening's discussion has demonstrated the complexities of 6 tier as Brian Beckham has alluded several times.

I also appreciate the GNSO obtained the guidance of Professor Swain from George Washington University National Law Center on the jurisdictional immunity question. I wondered whether the GNSO had expert legal advice on the question of 6 tier as the basis for standing for the (UDRP).

(Bruce): Do you care to answer that one, (Phil)? The question I think was did you get legal advice on the use of 6 tier for standing. Is that the question? Yes.

(Phil): No, the legal advice we got was on the consensus views on the probable scope of IGO on immunity and a domain name related dispute. We did not ask our legal expert for input on Article 6 tier as a basis for standing to bring an action. (James)?

(James): Yes. Just to follow up and to confirm, did we - we - the PDP engage ICANN legal on any of these questions? Because I know that sometimes they're consulted as opposed to outside experts.

(Phil): We - you know, this is quite awhile ago but we had discussions with policy staff. We originally got an opinion. I forget the individual gave us an early opinion that we found totally insufficient but I believe in our discussion with policy staff a - we concluded, the working group concluded that ICANN legal staff did not have the type of very high level understanding of international law that we felt was necessary to base our conclusions on and that's why we sought and received very modest funding from ICANN to secure a legal memo from an outside and recognized expert in international law.

(Bruce): Okay. So it could be possible to get some additional legal advice on some of these questions that have arisen out of the current public process.

((Crosstalk))

(Phil): Well, sure, I mean if it's from another outside expert it would take additional funding. I think from - if it's from ICANN legal staff, it has to demonstrate that they have real expertise in this very complex area.

(Thomas): This is complex. It's not going to come from ICANN.

Man: I presume that if you ask for it, you ought to agree that we can get the money for that so. Thanks in advance.

Brian Beckham: Thanks, (Bruce). Brian Beckham again. I think without being clear about this, I think probably we have a sufficient understanding of the legal basis from the interventions from Heather and (unintelligible) and myself. And I think it's important while we're still here tonight that we spend a little bit of time talking about the immunities and appeals aspect. So if it's okay maybe we can move to that topic.

(Bruce): Excellent. So the other thing and look I think I know it's getting late. We've just about run out of time but I think as Brian said it's useful to at least have this on the table as another area of difference. The - in the GAK advice, I've just highlighted in red, it talks about the possibility of an appeal to an arbitral tribunal instead of national courts. And currently if we use the existing (EDIP), existing (EDIP) has the ability for the parties to actually go to a national court if they're not happy with the result of the (EDIP).

The GNSO initial draft recommendation on this topic of jurisdictional immunity was that working group recommends that no change be made to the mutual jurisdiction clause of (UDIP) and (URS). I gather what that's essentially saying is that by entering into the (UDIP), you're agreeing to a mutual

jurisdiction of that dispute. And then the policy guide this document described in recommendations available to IGOs and so they can use an agent or assignee and if there's claims of jurisdiction.

I guess it's a complex area. Maybe the easiest way is perhaps (Phil) if you just want to comment on how you're taken into account so far and then perhaps we just hear from perhaps Brian who sounds like he's an expert on this area the view from the public policy perspective as to why there needs to be something different here.

So have you taken into account the advice?

(Phil): Well, let me be clear on this. I don't want to mislead anyone because I know the members of our working group and we've had very long and repeated discussions of this issue. The consensus here within our working group is that these curative rights processes are supplements to existing law and that ICANN has no authority to attempt to strip domain registrants or their rights under existing national law and compel them to submit to arbitration with no legal appeal.

That is would be a very dangerous precedent to do that, that I just cannot foresee any circumstance where I think on the Article 6 tier advice, I'm hearing that there's some issues here and I would say there's some possibility - I don't know what the adjustment would be that the final report would be different than the initial report on the Article 6 tier standing issue but in terms of telling a domain registrant that and would require somehow changing the (RAA2) to say that if they're an action under this new - if there was a new process established, I guess there would have to be some notice in the (RAA), some change in the notice to registrants, that if an action is brought against you by an IGO it would be under this new process and you'll have no right of appeal.

Any right of appeal would be to another arbitrator not to your court. There's no basis for believing the members of our working group will ever ascribe to that view and there's also great skepticism that national courts would agree to that. If I was a domain registrant in the United States and an IGO brought an action against me and I felt against particularly an acronym domain might be a very valuable domain and I felt that the initial decision was wrong and I filed an appeal in the United States under the Anti Cyber Squad and Protection Act and the (IGL) came in and said, you know, there's this policy by this non-profit corporation that this individual has no right to appeal under the U.S. statute, there's a big question about whether the federal judge would grant that or say who is this non-profit corporation in California to attempt to strip this domain registrant of their rights under U.S. law and you can imagine what the reaction might be to a judge in Australia or Denmark or China or some other place where they'd be even more skeptical of a U.S. non-profit corporation attempting to strip their citizens of whatever statutory rights they had in this type of dispute.

So really because these are - these processes are set up by ICANN an alternative, faster, lower cost supplements to and not any attempts up to now to become complete substitutes for access to national courts under applicable statutes. This would set a precedent of a CRP attempting - being - saying this is the only route you have as a domain registrant and you have no right to appeal a decision you feel is unfair to a national court.

I just can't foresee the members of the working group ever agreeing to that based on two years of conversation on this subject. I don't want to mislead anybody but the feelings are very strong on this issue. Thank you.

(Bruce): Okay. I'm not sure that that - you've taken the advice, you've looked at the advice and then your view or the working party's view is that they didn't want to take away existing statutory rights that I have under their national laws.

(Phil): Again, I repeat. The consensus here within our working group is that this would set a new and dangerous precedent where ICANN would, through a policy process, be telling domain registrants that in certain situations, they no longer have access to their national courts in domain name disputes.

(Brian): (John)?

(John): Yes, and forgive me because I'm not a lawyer and I haven't been following this as closely as (Phil) but can that even be done? I mean it would require some sort of consent or something on the part of the registrant, of all registrants just in the event that something like this would come up ...

(Bruce): Well, we're certainly still looking at arbitration.

(John): I mean walk me through this as an individual.

(Bruce): Yes. Generally what would happen is you'd want - if you have a dispute between two parties, both parties can agree as part of that dispute to agree to arbitration and to abide by the decision that arbitration.

(John): But that's not foolproof either. I mean that ...

(Bruce): Yes, yes but sort of ....

(John): ... even in our industry we've seen that ...

(Bruce): Yes.

(John): ... that has been ...

(Bruce): Often if you're entering into an agreement between two commercial providers, you might say if we have a dispute under this agreement, we agree that we're going to use arbitration ...

(John): Right.

(Bruce): ... and we agree at the time we're doing that that we'll abide by the outcome of that arbitration. I think what (Phil)'s saying is a little bit different because you're saying ICANN at positive policy levels making that decision for registrants pretty much through the contract basically.

(Phil): And let me add one thing, (Bruce). The percentage of (CRP) disputes, whether it be (UDRP) or (URS) was the mechanism or some new process where a domain registrant would appeal after losing in the initial action to an IGO would be extremely rare in my opinion.

We see very few judicial appeals in (UDRP) cases, very few. It's a tiny percentage of all the decisions but in those cases where the registrant felt that the domain was valuable enough to bring a very expensive court action as an appeal and the domain registrant felt that the initial decision was really wrong, those were exactly the type of cases where access to a neutral judicial form would be most important.

(Bruce): Okay. Yes, go ahead, (Jonathan).

(John Pesaro): (John Pesaro) OECD. So we're talking about a number of different things here. First of all I think primarily from the non-IDO perspective, we're talking about due process and whether or not due process has been assured. In a case where we provide for appeal to arbitrations of a national court.

Arbitration is a widely accepted means of dispute resolution for anything from employment disputes to commercial disputes and in this instance, we're talking more about commercial disputes and, you know, courts in jurisdiction like the United States and France and the UK find over and over again that parties due process rights are guaranteed when they have recourse to arbitration.

There's no dispute also that an (unintelligible) tribunal is a neutral forum for resolving these disputes in the same way that courts are. It's just a private means of resolving a dispute as opposed to a state court system.

I am also hearing (Phil) was talking about depriving individuals of their rights and I think in this context again it's important to also understand the argument from the IGO's perspective. So our member state governments have invested us with certain rights as well, namely and you don't need jurisdictions in national courts.

This is fundamental to all ability to act independently because we don't have our own territories like states do so we sort of act at the mercy of the states in which we operate, in which we carry out work, in which we have our physical structures and so in order to make sure that we are not unduly influenced by anyone of our member states, or that a member state doesn't have the opportunity to unduly extract rents from use, for a number of reasons, our member states have decided to ensure that we do not - we cannot get dragged into national courts when we are engaging in a dispute.

I think it's also important to remember the point about how rare a case would be in which there would actually be an appeal. I think that's a really crucial point because the (unintelligible) for IGOs is that when we take a case to the (UDRP), we have to submit, we have to agree to the mutual jurisdiction provision. So from that moment, its arguable that we have ways of immunities with respect to the national court of mutual jurisdiction.

So in order to use the (UDRP) that has to happen in every single case and I think that should be weighed against this question of well, what's going to happen in the very, very few cases where someone loses an (UDRP) case against and IGO and then wants to appeal it. And again there are safe guards and there are a number of arbitral institutions that oversee the work of arbitral tribunals to make sure that opinions are appropriately reasoned and that all of

the boxes have been checked procedurally and again courts have said over and over again that individual due process rights are guaranteed by arbitration.

So I do not see that there are these due process issues there that we're ...

(Bruce): Just a question (Jonathan). With respect to IGO acronyms, do IGOs register have they registered in existing (GTO) (unintelligible) ? Like to people register in dot org and dot com or are they mostly registered under - what's a typical IGO register their domain (unintelligible).

(John): It's usually dot org, some are dot int.

(Bruce): So on that one specifically that means they're already subject to the (EDIP) because when you've registered the domain name, you've actually agreed through the registration agreement. That's what I talked everybody through at the beginning. You've actually consented to the ability for the registrar to suspend or remove the domain name with the IGO and eventually consented to the fact that the, you know, there's a dispute resolution process and you've consented through your registration of that name already to this jurisdiction.

So every IGO that's got a dot org name is actually already subject to the (EDIP) but that's what you did by signing, by registering the domain name.

(John): I mean I think this issue has also come up of under what circumstances and to what extent to IGO's waive their immunities. I would have to look at the and I take your word for it that's it's really their dot org. You know, I don't have that particular (unintelligible).

(Bruce): Well, any (GTO) basically. So the (UDIP) applies to any (GTOD). So if you've reached in the generic country card it might be different but if you've breached it in the generic top level domain, your name is actually already subject to (UDIP).

(Thomas): I was just about to add that also alternative dispute resolution mechanisms, so country codes usually have the possibility to challenges the cases in court.

(Bruce): So I guess the struggle here is that we're talking about a small - we're hearing, I guess both sides are saying that the instance of things actually going to the appeal process are very low and we're saying that IGO sounds like generally they're already agreeing to the appeal process, the registration of the domain know in the a (GTOD) if it's dot org for example but yes I guess that's trying to work out.

On each case you could come up with scenarios where you might be feeling that you're giving up immunity but if your challenging somebody that has a domain name and you're trying to take the name from them, there's not an action against you. You're not being prosecuted against.

So there's two cases. One is you have the name and someone raises a (UDIP) against you. So, yes, there's where you might want to have some immunity from prosecution but you've already waived that by the registration of that name because you're already subject to (UDIP). The other case where somebody else has got your name in a (GTOD) and then you want to assert your legal rights as an (IGA) against the person that has legal rights. I've got the domain name and I've got legal rights and then you're saying you're not being prosecuted in that case, they are. That makes sense.

Brian Beckham: Thanks, (Bruce). Brian Beckham. I think with all due respect I think the whole question of whether an IGO has by taking a domain name registration out waived its immunity is a red herring. First of all, they're registering a domain name to put up their identify on line. So by virtue of the ...

((Crosstalk))

Brian Beckham: ... fact that that registration there will logically be no risk every of infringement so there will be no risk of a third party invoking the (EDOP) process. I think we can park that argument. But I think the most important thing to come back here is that in the - in the bylaws that you showed us earlier, there is a requirement that impacted party's considerations be taken into account.

On multiple occasions, the working group has asked the opinion of IGOs, what are the nuances of this issue of jurisdiction from immunity. The legal councils of IGOs have provided very clear answers on this topic and all we're asking is that be given due consideration in the context of this working group. So far we feel it hasn't been given due consideration.

(John): I'm sorry. You lost me on that last part here. Was this not the subject of the legal review that was - this very narrow question or ...

Man: Our answer to that is pretty complicated. Our impression after having read the opinion ....

Man: I left complicated like in my rearview mirror like an hour ago. I'm struggling to keep up with you guys. My question is that you said it wasn't a consideration by the working group but I thought - my understanding was this was over a year waiting for this legal analysis to come back on specifically this question.

(John): So just to, so Brian said that he felt and all of the IGOs had the impression that our views were not given due consideration. It wasn't that this issue wasn't considered it was that our views weren't taken into account. And what I was trying to say before with respect to the legal, with the opinion of a legal expert was that when you read this opinion, we thought, okay, great. You know, there's a clear section, you know, that says IGOs are entitled to immunities within the scope that's relevant to the analysis for this particular question and then what we saw in the draft report was something totally different from that. So that must be a bit confused and dismayed.

(Bruce): So, (Phil) and then I want to kind of round out the conversation. So the point here and I don't think we're going to solve this issue today but I just want to be clear that ...

((Crosstalk))

(Bruce): We could flip a coin but ...

(John): Do we need to get another legal analysis to tell us how to interpret the legal analysis?

(Bruce): That's usually the way with lawyers but I think, yes. So let me go to (Phil) ...

(Phil): Yes.

(Bruce): ... and then I'll try and draw it to a conclusion.

(Phil): And (Bruce) this will be my final statement of the evening because we're 20 minutes past our projected end time and it's now getting to be a 12 hour work day. Our working great was very sensitive to the immunity question and that's why we've sought out expert legal advice.

The basic answer our legal expert gave us to what is the scope of IGO immunity and domain name, we (unintelligible) dispute was it depends. It depends on the jurisdiction in which the appeal was brought. It depends on the charter of the IGO. It depends on whether a statutory law in a jurisdiction on sovereign immunity. It depends on the analytical approach used by the court.

So we felt that ICANN could basically say in all disputes by saying that there'd be no right to a judicial appeal, ICANN would basically be saying in all potential disputes in which a registrant might feel it had a decision, initial decision was wrong and sought court review that the court would accept the

assertive defense of immunity that might be raised by the IGO. So we basically said, we're going to leave it to the court. We're not going to have ICANN prejudge the outcome of every potential case but we went further.

We said if the IGO and this is an open question where we invited comment, we said well what happens if the IGO, the registrant, domain registrant goes into court. The IGO comes in and says we have immunity from judicial process and the court agrees, what should happen? And we invited comment on two alternative options. One would be that since the process was an alternative to existing law that the - that basically the (UDRP) the decision should be (unintelligible) and the situation go back to status quo.

The other option was that in that case that would be the rare case where that goes to an arbitrator.

(John): I'm sorry to interrupt and I would love to make an important and ...

(Phil): Yes.

(John): ... and profound material contribution but we are being locked in this room here like immediately. We have to be out of this room.

(Phil): But I just wanted to emphasize that we are very sensitive to the immunity issue and went as far as we felt we could go based upon expert legal advice. Thank you.

(Bruce): Thank you, (Phil), so I will draw it to a close and thank everybody for participating and at least trying to listen. Listening is important and those immunities in either one of these complex topics I think certainly the report needs to sort of give clearer rationale I think on some of these decisions for how it has specifically taken into account.

We've got new GAK advice for how it has specifically taken it into account. We've got new GAK advice on the specific topic it sounds like today and, you know, certainly, I think the working group will take that advice on board and take it into account and if they've chosen to not accept the advice have a clear rationale provided, I think that's the only progress that we've probably made is that we've looked at how we can help improve the notice process but the topics of whether we use the existing (EDIP) or create a new one is still on the table and it's something that the working group is considering and topic of whether a new or existing process is created and we change the appeal mechanism is still on the table.

You know, the dialogue needs to continue. (Thomas).

(Thomas): So without prolonging but I feel I have to say this. Actually two years ago when we entered the small group, we were hoping to get what we are getting now which is an open, fair process that creates an atmosphere of trust where we can actually lay things on the table try to understand each other with an extremely well prepared, facilitator. It is amazing. Thank you. What you're doing is amazing. How far you've brought us in very little time. I just want to conclude with saying, thank you, (Bruce).

END