

**ICANN
Transcription**

**IGO-INGO Access to Curative Rights Protection Mechanisms Working Group call
Thursday, 06 April 2017 at 16:00 UTC for 90 minutes**

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Attendees:

David Maher – RySG
George Kirikos – Individual
Jay Chapman – Individual
Paul Tattersfield – Individual
Petter Rindforth – IPC (co-chair)
Phil Corwin – BC (co-chair)
Mason Cole - RySG

Apologies:

Oswaldo Novoa - ISPCP

ICANN staff:

Mary Wong
Steve Chan
Dennis Chang
Terri Agnew

Coordinator: Recording has started.

Terri Agnew: Thank you. Good morning, good afternoon, and good evening. Welcome to the IGO INGO Access to Curative Rights Protection Mechanism Working Group Call on the 6th of April 2017.

On the call today we have George Kirikos, David Maher, Paul Tattersfield, Petter Rindforth, Phil Corwin, and Jay Chapman. We have listed as apologies

from Osvaldo Novoa. From staff we have Mary Wong, Steve Chan and myself, Terri Agnew.

I would like to remind all to please state your name before speaking for transcription purposes. And please remember to mute all microphones and telephones when not speaking to avoid any background noise.

With this, I'll turn it over to our co-chair, Phil Corwin. Please begin.

Phil Corwin: Yes, thank you very much, Terri and welcome to all who have joined us today. Before we get into our returning to review of the comments, I just want to note that earlier today I sent out a suggested way to proceed that Petteer and I have agreed on for working group consideration which was basically to go through each of the comments for a quick first review for the purpose of identifying either new facts in support of old arguments or new arguments supported by new facts.

So, this first run through would be to identify things we haven't considered before that we should take into consideration when we decide whether to change or modify any of our initial report recommendations. And the way that would work with the table that staff prepared for us on the comments would that be we would make sure that anything new was reflected on that staff table. That's the public comment review tool.

And then when we go through it for each, then we'll come back and go through each recommendation and review all the comments relating to that recommendation. And frankly for any of the ones where if we've gotten a comment that basically says, "You didn't do what we asked you to do in the initial report," with no new arguments, no new facts to convince us to review it, we're not going to spend time on that. We're not going to reconsider things we've already considered in detail.

We are going to consider and give weight to anything new that we come across. And I've seen a mix of all of them in various comments.

So I guess I'd like to hear now from sub-committee members on the call whether that way to proceed is acceptable, if anyone has any concerns about that. We thought that to be the most efficient way to proceed. Yes, George, go ahead.

George Kirikos: George Kirikos for the transcript. I just put a checkmark to agree with you. I didn't need to say anything more.

Phil Corwin: Okay. I guess it's check not a hand. But thanks. Yes, we thought because we think we're going to see some of the same new arguments or new facts asserted in several comments and there's no use - it's better to address them in a combined form than to spend time on the initial review.

Petter, go ahead.

Petter Rindforth: Petter here. Thanks. First, of course I fully agree with you on this. Just reminded me that we discussed briefly last time on the staff report the draft idea domain name (disputes) and procedure back from 2007. And it also remind that as we may have some questions back from groups or interests outside our working group on that report, so not on today but before we end up with our going through the comments and so we also need to check that out again and make our final comments on that.

I remember we went through it briefly on a very initial base and we concluded that it was nothing that we could consider as a further base at that time for our work and for our proposal. But it would be good to spend some minutes just to update us on that report and why we have decided that we could induce it or if we change our mind, will that wait?

So maybe not today and maybe not even the next meeting, but maybe the meeting after that we should have it as one point on the...

Phil Corwin: Yes, I think we'll address that when we're considering suggestions and new arguments for creating a separate, you know, DR page just for IGOs because that's where it would be relevant. And I have some thoughts on it. But today we want to get through start reviewing the comments to identify new facts and arguments that are not previously considered. And then when we get to reconsideration of whether there should be a separate DRP, that's when that would be most relevant, that staff paper.

Okay. Anyone else have comments on that? If not, I think we want to return to the GAC comment. That's what we were on at the end of last meeting.

And by the way, I want to point out that whether we agree or disagree with anything in the GAC comment, Mason Cole, who's been the GNSO liaison to GAC for quite a while -- I think he stepped down from that position though but held that as the initial liaison -- he pointed out to me that he believed this was the first time the GAC has ever filed a comment in regard to any PDP working group comment period.

So if that's true, I think we should all be gratified regardless of whether or not we agree with the GAC position that they've engaged in the process. And deserve some credit for doing so.

So okay. So we pretty much went through this. I'm going to quickly skim this again, hoping not to bore you, to identify whether there's anything new in this that we haven't heard previously from the GAC in reviewing their advice to the ICANN board or any participation by GAC members in any way with our working group.

So they point out that IGOs are unique, treaty-based institutions and that protecting their names and acronyms serves the public interest. That IGOs

should accommodate legitimate third-party co-existence, the GAC reaffirms its position in previous communicates. That ICANN bylaws and core values point out that we should take under consideration the views of those affected by the issues we're focused on and that the GAC's specific concern relate principally to recommendations two and four and that they agree with the deletion of INGOs from the scope of our work.

So I don't see anything new there because all of that refers to things we've already seen from the GAC and GAC communicates to the ICANN board and otherwise and which we considered in our initial report. Anyone disagree with that for purposes of this first section? Okay. Hearing none, I'll continue.

Then they go on to say that we should establish a separate DRP modeled on but separate from the UDRP in which standard would not need to be expressly grounded in trademark law. And then they go on.

First insofar as the recommendation itself would effectively alter an existing consensus policy, which is no amendment of the UDRP, it improperly bypasses ordinary bylaws prescribed policy development policy process.

Okay. I think that's a new argument. I don't agree with that argument and I believe our charter clearly gives us authority to recommend modification of the UDRP if we thought that was necessary. We haven't thought that was necessary. But I think we should note that as a new argument, that somehow the recommendation bypasses the policy process outlined in the bylaws.

Anyone disagree with that? Mary go ahead.

Mary Wong: Thanks, Phil. This is Mary from staff. Not to disagree or agree but to simply to note that the GAC's points in this latter part of page one that there is some support from other commenters as well as Petter noted for a separate DRP from the IPC.

And in relation to policy guidance, I believe the IPC and possibly one or two other IGOs did note that it's not so much the concept of policy guidance but the form or the content of the policy guidance that we have suggested in our initial recommendations amounts to a modification of the UDRP.

Phil Corwin: Yes, well Mary, am I correct? I don't have the charter in front of me, but I believe our charter would authorize or give us authority to recommend a change in the actual language of the UDRP. Or the (URS) if we thought that was necessary to protect IGO rights. Is that correct?

Mary Wong: That is correct, Phil. In fact, that was the first task...

Phil Corwin: Right.

Mary Wong: ...working group to see if it would be necessary to do so and if not, whether it would be appropriate to have a separate process.

Phil Corwin: Yes, okay. So you know my personal view. And I'm glad you pointed out that other parties had the same point. That's why we're going to follow this process of a quick review of all the comments to identify new arguments and then when we get to that, we can say okay the GAC IPC, et cetera raised that point. What do we think of it? That's why we're doing it this way.

The next GAC point is that we failed to adequately account for GAC advice. And disregards the plain (wings) or the UDRP which requires trademark rights.

To me, other than the GAC communicate from Copenhagen I would say that other than a reference to the Copenhagen communicate -- which we could not have considered before filing our initial report -- there's nothing new in this assertion because we clearly went through all the prior GAC advice on this and considered it.

Again, just saying that they're unhappy that we didn't take their advice is different from presenting new arguments.

George, go ahead.

George Kirikos: George Kirikos for the transcript. Yes, on that point it's kind of a bizarre argument because we actually are taking into account their advice that it's trademark rights. We're just asserting that the common law of trademark rights is evidenced by article 6ter registration. So what we're doing is actually very consistent with what the GAC advice would be.

Phil Corwin: Okay. Well okay, thank you for that, George. So I would say for this reference to recommendation three, the only thing we're required to do is to consider the GAC advice that was filed in Copenhagen. We've already considered and taken into account all the prior GAC advice.

And I'm going to just continue on unless if anyone thinks I'm mischaracterizing anything as I go through this, just raise your hand and object. And otherwise, I'm going to keep going quickly.

On jurisdictional immunity, they say we're incompatible with the position conveyed by the IGO legal counsel. I believe we received that opinion and considered it before the initial report so I see nothing new there.

Recommendation four does not adequately account for GAC advice. Again, we can consider that nothing new there.

Same thing in the next paragraph -- they're referring to Los Angeles and Hyderabad communicates. This is just the GAC saying we gave you advice and you didn't agree with it. But no new argument for why we should agree with it. Okay?

No or nominal cost - George, just let me get to the next one. Then I'll take your comment. They say we took the GAC advice into account. And let me see what the rest of that. Okay. Well, they agree with our recommendation five, which was actually just a recommendation where we said we don't have authority. You've got to discuss it with ICANN.

George, go ahead.

George Kirikos: I just wanted to interject late in sight with the GAC saying we didn't do everything that they wanted. There's a famous song by Rolling Stones, you can't always get what you want but if you try sometimes you just might find you get what you need.

Phil Corwin: Yes.

George Kirikos: So I think we've kind of given them what they need, not necessarily what they want. Thanks.

Phil Corwin: Okay. Thank you for that reminder or the Rolling Stones wisdom. So that's pretty much it for the GAC advice and I think we identified that we need to take a look at the Copenhagen communicate and take that into account. And that - where was the other one? And we need to consider whether suggesting policy guidance to UDRP panelists oversteps the bounds of our charter. I don't believe it does, but we need to address that and come back to it.

Mary, go ahead.

Mary Wong: Hi, this is Mary from staff again. And while this may not, you know, change what you've just said Phil, I thought we should note because again this is something that was reflected in at least one other comment I believe that was WIPO is the pointing out by the GAC here of ICANN's bylaws and core values to take into account concerns and interests of the entities that are most affected by the proposal. So I just wanted to note that for the record.

Phil Corwin: Right. Okay. So noted. I believe personally that we have taken those views of the IGOs very much into account and consider them very seriously and that we proposed would substantially improve their ability to use curative rights processes. But the fact that it's not in the way they ask for is a different subject.

But I don't think there can be any valid suggestion that this working group hasn't given very intensive review to the IGO positions.

So we've identified one new issue here and one thing we have to take a look at. And I think that concludes this initial review of the GAC position. And I'm going to hand off to Petter. I don't know what staff has queued up for the next comment we need to review but this is the process we're going to follow is an initial review to identify new arguments or issues that were not previously considered in developing the initial report. And I hand off to Petter.

Petter Rindforth: Thanks. Petter here. If I see the agenda, I feel there's new discernment comments that is next up, which will be in a way rather easy because they have focused on the article 6ter and the recommendation to our initial report. When they say that referring to the working group concludes that an IGO has standing to file a UDRP (OURS) complaint or compliance with a communication of notification procedure article 6ter of Paris Convention.

Phil Corwin: Petter, can we just wait until we get that document...

Petter Rindforth: Yes.

Phil Corwin: ...on the screen? If staff could just get that displayed so we can all follow along. Thanks.

Petter Rindforth: Before it's coming up, I will say that again when we hear some organization saying that our recommendation to refer to Article 6ter that the problem with

that is it's not the same as trademark protection. And I don't think we actually have already modified that in our relation comments. And it's not - we haven't said in any text that it is the same identification. But we have referred to it as we have seen it, the best way to identify ideas.

So here are the comments and as you can see, it's focused on recommendation two. And what they are saying, if I scroll down a little bit, they say that their protection of idea of names and acronyms at the second level in new direct top level domain names has been a governmental device. So you're coming to priorities since 2012.

A disagreement between several GAC members, including US and the IGOs on whether Article 6ter of the Paris Convention provides the legal basis for the presumption of protection for idea of names and acronyms led the GAC to advance an alternative basis for protection. In existing criteria for registration at the second level in the dot INT top level domain.

And this approach was adopted in October 2012 and it has been the basis for the progressive changes between the GAC and the ICANN board. Ultimately culminating in the idea of small group report. While the IGO continues to disagree with the US and others on the implementation of Article 6ter, the IGO and the US nevertheless agreed to disagree on the applicability of Article 6ter and to move forward on an alternative basis as is reflected in the IGOs small group report.

And they also said if GAC advised that ICANN board has repeatedly emphasized that IGOs are in an objectively different category to other right holders and that the government support the implementation of the appropriate protections of idea of names and acronyms on public policy grounds.

Now this is the basic for the inclusion of IGOs under a so names list for GTLDs and the GAC has taken the position that those IGOs on the list should have access to a separate character write dispute solution mechanist.

And then they go further, explaining the purpose of Article 6ter and notification, saying that the treaty only requires members to prohibit uses of IGO names and acronyms that mislead consumers. Again, referring to WIPO and stating that this is not trademark protection and we're well aware about that.

The primary purpose of Article 6ter of the Paris Convention is to recognize symbols of national sovereignty and prevent them from being used as commercial trademarks -- not to protect commercial trademarks or indications of sorts adopted by member states or other departments.

And they also say that the notification process outlined in Article 6ter does not and nor was it intended to function as a governmental or IGO trademark registry. And that's basically what they state and also refer to the proposed expansion of IGO list. The working group's initial report indicates that by considering IGOs who have fulfilled the requirements of Article 6ter as also fulfilling the standing requirement of the UDRP/URS. This means that the range of ideas that would come within this category would be different from and potentially larger than they have sent us there, the list of IGOs that the GAC has provided.

The GAC list was the result of our protected negotiations with the IGOs replacing that list with all IGOs that have complied with the requisite communication application procedure as set forth in recommendation two is a game changer in that at least some organizations that proclaim themselves to be IGOs in fact are not.

The GAC list provides the ICANN community with the security that those on the list are in fact IGOs.

If I refer to when we first started to discuss the Article 6ter and that in fact is also in the initial proposal (unintelligible) goes back for a separate IGO due to our (P-system) so to speak. Article 6ter was also there as an identification. And it is in fact so that -- correct me if I'm wrong -- but you cannot just send in your name to WIPO stating that you're an IGO and be accepted. It's a process where you have to be considered under specific grounds to be on that list.

So, I believe it problem to see why a clear reference to Article 6ter for protection would be more legally unclear on the identification of an IGO than the list that GAC has provided.

Mary, you have a comment there.

Mary Wong: I do. Thanks, Petter. This is Mary from staff. So, before we plunge into say discussions of 6ter or other parts of the USG report, this point that I'm going to make I think was already noted by George in the chat, that US government comment does give us the background that some community members and working group members had queried before as to the origin of the GAC list of IGOs. So it tells us a little bit about how that came about.

It also confirms that that is the view of the GAC and some governments within the GAC that that is a definitive list of the IGOs.

So that piece of information along with the GAC's letter from 2013 that says the criteria for inclusion on the GAC list was, you know, three or four different things including the dot INT criteria is something that I think we had taken into account somewhat in our initial report but I don't know that this additional information would be something that we would also want to discuss here.

And in that particular context, it may also be worth thinking about further discussions with either the US government or other government reps or even the GAC itself about this list, if we were to go in that direction. Thanks.

Petter Rindforth Thanks. Phil?

Phil Corwin: Yes, I had a couple comments on this input received from the US government. I believe that the comment generally does provide some new arguments and facts that were not previously considered and that we ought to give it a more intensive review when we get to the recommendation that Article 6ter standing be a base - Article 6ter notification being basis for standing.

I'm particularly concerned by their assertion that by just doing that without any further qualifications that we might be letting false IGOs or IGOs that don't really deserve any special treatment to take advantage of that for filing purposes.

I also want to note I had some - I don't want to put any words in the mouth of the US government in regard of the final sentence of their statement that they stand with the GAC and the IGOs in support of the IGO small proposal. Hold on one second. I'm about to lose my phone. I need to switch handsets.

Hello?

((Crosstalk))

Petter Rindforth: We hear you.

Phil Corwin: Am I on the line? Good. You can hear me, right?

Petter Rindforth: Yes.

Phil Corwin: Okay. Yes, I got the low battery warning from the handset I was using. Yes, I had some talks with the US government staff before Copenhagen and in Copenhagen. I would say they're positioned more nuanced than that, but part of that statement just reflects the fact that there's no active new head of the NTIA at the moment.

The other thing I wanted to say just to put folks on notice. And this because of the multiple criticisms we've gotten -- which I thought had some reasonable grounding on just letting 6ter notification be a basis for standing -- as well as my review of the DRP staff paper from 2007, which led me to engage in some back and forth with my co-chair and with staff.

So far as I can tell, have been able to find out, IGOs have no identified legal rights in their names and acronyms other than trademark rights. And that's why 6ter provides protections in national trademark systems.

I'm somewhat leaning -- not there yet but -- the IPC suggested that 6ter registration should merely be used as evidence of common law trademark rights in the absence of a formal trademark registration. And I'm right now leaning toward that position of somewhat scaling back the use of 6ter -- not abandoning it, but saying it doesn't provide automatic standing. It provides a basis for arguing that you have common law trademark rights, which would bring it squarely within something that's already accepted within the UDRP.

I don't believe that ICANN should be creating a separate system because there are no separate rights. That would be the basis of such a system. It's very different from the UDRP, which is an alternative to a way to assert enforcement of current legal rights. It would actually in my view be creating rights that in some way are related to the fact that IGOs are created by a treaty for good purposes, but governments haven't granted them any rights in their names and acronyms other than trademark rights.

So I just want to get that on the record now, but I think the US government statement is one we need to give more detailed attention to when we get to our recommendation on 6ter and standing. Thank you.

Petter Rindforth: Thanks, Phil. And just a comment on that referring again to the official WIPO response and the further discussion having in Copenhagen that from a WIPO point of view. They also note that Article 6ter is not the trademark identification and that they are a little bit afraid of that if someone could use a reference to Article 6ter in the current UDRP system to identify a name right, that would open up for other similar name right holders to also try to use the existing dispute resolution procedure stating that we don't have traditional trademarks but we have this and that. So this is why we should use the UDFP in this case.

So I see some hands up. I don't know who was first on, but I give it to Mary first.

Mary Wong: Thanks, Petter. Mary from staff again. So it's really not staff's role to engage in any sort of back and forth or argumentation. But I think in terms of suggestion of using 6ter and how to use that, we want to point to I think the fairly robust discussion that took place in Copenhagen when we had our working group session -- and I'm saying this for purposes of members who were not present or who haven't reviewed that transcript and who aren't on our call today -- we would suggest looking at that for some further discussion.

Secondly, in terms of suggestion by I think it was (IPC) Phil you mentioned of an unregistered trademark right. I think this is something that the staff has noted before in terms of a caveat. And so looking at the US government comment, I think we have some concerns that it's still might treat Article 6ter as creating some kind of right -- not necessarily a registered trademark right obviously, but even in terms of an unregistered right.

I guess our concern here is whether 6ter can in fact be read that way. Thank you.

Petter Rindforth: Thanks. Yes, your conclusion there Mary was that it can be read or it cannot be? Sorry. Mary?

Mary Wong: Petter, this is Mary again. So again, we're very cautious and conscious of what the staff role here should be. But as this was a point that we had discussed quite extensively throughout this working group, the staff concern here is that Article 6ter can or cannot be read that way, that in terms of creating or evidencing any rights at all.

Again, we're not saying that this is our conclusion. We're not legal experts on that. It's simply a question we raise for consideration, in light particularly of the US government's comments.

Petter Rindforth: Thanks, Mary. And before I leave it over to you, George, well frankly I don't see this as new information or new comments. We're aware of the differences between Article 6ter and the trademark rights from the start. What we used it as identification and in our initial proposal, we tried to find an easy way to identify a complainant's rights that way and have it in the so to speak the recommendation rather than in the policy as such.

So again, but I heard from WIPO and others and also from our discussion in Copenhagen in general meeting each time someone says that Article 6ter is an identification cannot be used, it is each time also referred to as we continue to refer to it in the current URS/UDRP system where I've seen both from the old proposal on a separate dispute resolution process for very similar to the UDRP for IGOs where Article 6ter is in fact the way to identify.

Of course at that time, I presume there was not the GAC list to compare to it. But in Copenhagen, I heard no one referring to the GAC list -- only comments that Article 6ter may not be the best way to identify.

So, George.

George Kirikos: George Kirikos for the transcript. Yes, I was a little confused by the IPC comment because it seems to even want to water down our analysis, like we're kind of implicitly assuming that, you know, Article 6ter registration is, you know, strong evidence of common law trademark rights to the extent that, you know, other nations have refuse other people's attempt to register that name as a mark -- except, you know, to the extent that, you know, the coexistence between unconnected organizations and unconnected uses of the mark.

So we kind of like made a concession to the IGOs that Article 6ter was enough to actually, you know, check a box for the first prong of the UDRP test, knowing in our minds that there are the second and third prongs of the UDRP test that protects registrants.

So I'm not sure if, you know, the US government or the IPC is saying well, don't check that box automatically with Article 6ter, you know, have the higher hurdle and the alternative -- at least for the GAC and the US government -- is to rely upon, you know, this list that came out of nowhere, came about as a result of this, you know, secret negotiation?

I think, you know, our solution is far superior. It at least relies upon, you know, an international list that, you know, might not be accepted by each individual country -- just like each trademark in every country is only recognized in that territory. Trademark rights are territorial in nature.

So I don't think, you know, we've, you know, missed anything per se. These are all kinds of arguments that we've danced around. Maybe, you know, they're helping us to, you know, elaborate further when we write the final report. But I don't see anything drastic in, you know, what the comments and what our own analysis has been to date. Thank you.

Petter Rindforth: Thanks. Okay. I presume that we'll come back to US comments once we have all of the other comments also to see what further points we will note from that. Mary?

Mary Wong: Thanks, Petter. And I don't know if this is the right time or place to mention it, but I'm reminded of a comment I think that was made several times by a number of members of our working group and the community, which is really the purpose of the first requirement of the UDRP that has been interpreted as standing.

So maybe this is something that we can come back to when we discuss the possibility of a different or separate narrow dispute resolution procedure. Because as long as we're looking at the UDRP, whether it's a modification or some clarification of it, the fact is that the standing requirement is the first requirement is now approximated to having substantive trademark rights.

So if we're looking at something different, it may well be that we can have a different starting point as well. So I just wanted to note that for further discussion. Thank you.

Petter Rindforth: Thanks. Okay then. So let's proceed with the next one. I presume it's OECD. Will you take that, Phil?

Phil Corwin: Yes, I'd be happy to. When the staff gets it up on the screen, we'll plunge into it.

And while we're waiting for that, I note that many of the IGOs endorsed either the OECD's statement, the WIPO statement, or both. So for a lot of the comments received, they didn't have much in the way of anything new. They just said we endorse the WIPO statement or the OECD statement. So let's see what they told us.

Okay. They took no position on recommendation number one, which was to drop out the INGOs. Standing to file a complaint should be based on international law rather than national trademark law. They say they're agreeing with us. Was that something we said?

Any opinions here? I'm not sure we ever said that. We looked at international law, but I'm not sure that we ever said that standing should be based on international law unless they're saying...

Petter Rindforth: As long as they agree with us, it's good.

Phil Corwin: Yes, I'm just not - they're agreeing with something I'm not sure we ever said. But we'll take that agreement anyway. Okay.

They say that our recommendation that UDRP and URS panelists should take into account the limitation enshrined in Article 6ter in determining whether a registrant against whom an IGO has filed a complaint registered and used the domain in bad faith. They say that that would unduly interfere with panelists' decision making and provide or propose an interpretation of Article 6ter which is not in joyous consensus.

Okay. Well, I think that's a new argument. We should come back to it and note it as a new argument on use of 6ter that we should consider when we return to that recommendation. I don't think I agree with it, but we'll get into the policy aspects when we get to it. George?

George Kirikos: George Kirikos again. Sorry. George Kirikos again for the transcript. Yes, I posted a link to the actual treaty and it's kind of odd because, you know, they say, you know, it should be based on international law. And then, you know, when you actually post the text of the actual treaty, they want to take out a part of the law that they don't like -- which is the part that, you know, allows for coexistence and, you know, doesn't, you know, it allows for, you know, good faith coexistence.

So it's unclear why they would, you know, be happy with the law with one part but not the rest of the law. Bizarre. Thanks.

Phil Corwin: Okay. All right. On recommendation four where we suggested to change to the mutual jurisdiction clause of the UDRP, they say that we've misinterpreted Professor Swaine's memo, that we misapply the incorrect test -- so that's a misapplication of an incorrect test -- by applying an inappropriate legal standard through the working group's proposed register. Remedy entails a complicated legal workaround.

Well since all of this is responding to an assertion in the initial report, I think some of it's probably new. I do want to note in passing that we saw many IGOs referencing Professor Swaine's comment and about where it seems that an IGO's mission to maintain its distinctive character would be deserving immunity would be likely to prevail.

They conveniently neglect to quote other parts of his memo, particularly the one which says that it wouldn't be unreasonable to ask parties like IGOs to waive immunity as the price of having access to a much faster and less expensive remedy. So it's rather selective quoting. That's all I'm going to say at this point.

I think we need to consider these arguments when we get to the review of the substantive recommendations. I'm not sure on legal certainty, you know, I'm not going to agree with most of these personally but I think we need to consider these arguments when we get to the corresponding recommendations and leave it at that for this pass through of the comment.

Then they comment on the two options of what should happen when the respondent files the de novo appeal and the IGO is successfully asserted immunity. So, they did express opinion on that and since we asked for input on that, I think we have to consider their input. Whether we agree with it or

not in the end, it is input on a question where we asked for specific input. And they were one of the few commenters. Many did not comment on that at all. So, I will note that as something we need to look at when we get to that recommendation in the question we asked.

I'm skipping all of the policy arguments here because we're going to come back to it. We're just identifying new arguments and facts here.

They quote the convention on the recognition and enforcement of foreign arbitral awards. I'm going to ask staff, did we ever look at that document? I don't remember that reference, but we've been at this for two years. That may be a new factual consideration we should consider. Yes, Mary go ahead.

Mary Wong: Hi, Phil. I had my hand up for recommendation three, so I'll get back in line for that later. But in response to your question, we did not specifically consider the New York Convention. I think that may have been raised in passing, but we did not specifically look at the provision.

Phil Corwin: Okay. So that's definitely a new fact that we haven't really given much consideration to that we should look at with some intensity when we consider our recommendations. Okay.

And then they agree that ICANN should investigate the possibility of subsidizing the cost of IGO access to the UDRP and URS. So there's nothing new there.

So there are some new assertions of fact and reactions to our recommendations that we probably need to look at with greater detail when we get to these corresponding recommendations. I think that's it for the initial review of the OECD comment. Anyone have further comments on that before we go to the next one, which I think is WIPO? Okay. I'm seeing and hearing nothing. I'm going to hand off to Petter for review of the WIPO comment and

then we've got time here so we can get to some other comments today beyond these.

Petter Rindforth: Yes, so it seems. Petter here. Again, we have a rather short report review from WIPO and one note they give initially is that it's worth recalling that a compelling argument may be for a stronger preventative rather than curative protection. So they refer to the work that is ongoing also for the preventative protection for IGOs as well as for INGOs like the Red Cross. But that's another group.

And then they focus in on the unique status of IGOs and say that the recommendations do not account for this, referring to the need for a separate mechanism modeled on the UDRP that would recognize the IGO's unique status.

And they say the recommendations do not reflect the global public interest, that IGOs are unique institutions created by governments to fulfill global public missions. As such, identifiers warrant tailored protection by ICANN in keeping with the global public interest behind their causes.

And against such background, GAC principles on new GTLDs call on ICANN to accommodate IGOs' rights in their names and acronyms. They also say that the suggested workarounds miss the target.

The working group's suggestion to issue policy guidance on UDRP standing, and to apply agency principles to avoid jurisdictional questions, is misguided in two respects. First, such alternative guidance would contravene the plain language of the UDRP itself. We -- it means WIPO -- strongly feel that ICANN should see this as inadvisable for a number of reasons.

And second, given that fair resolution of disputes involving IGOs more generally through independent and impartial arbitration is already widely

accepted, the application of agency principles would be an artifice creating unnecessary legal hurdles.

I must say that I don't really agree with that being a panelist as from time to time, there are cases where they're referring to local national law to identify the suggested protection. And you in fact must go into local law and get some initial knowledge about laying protection, which is not even in the same geographical area that you are based.

So from time to time, panelists in fact have to see -- that we're talking on national law -- local law to identify some kind of main protection and see if it's similar to the trademark. So again, if we have - if nationally accepted, legal protection or identification as Article 6ter that would be more clear. But that was my own personal view.

And then they so to speak finalize the core question before us -- WIPO -- is a simple one. Should an unfettered DNS market prevail over appropriately protecting IGO identifiers in accordance with their international status?

And then again, they finalize that ICANN should be able to accommodate IGOs' specific needs and circumstances through a narrowly tailored dispute resolution mechanism modeled on, but separate from, the UDRP. And I think that is in fact the basic conclusion and comment from WIPO, that there is a need for a separate dispute resolution procedure.

And if I understand it correctly from this and from other comments from WIPO, Article 6ter could well be an acceptable identification of the name rights in that separate sort of big idea with the UDRP. Yes, Phil?

Phil Corwin: Yes, thank you Petter. When you say in regard to identification of new facts or arguments in this statements, other than possibly the reference to the UN Secretary General's 2016 statement or something addressing this topic with

UN member states, I don't recall -- and staff can remind us -- whether we were aware of that and then looked at it.

I have to say, I'm really at a loss to identify anything new in this document that we haven't heard or seen from WIPO before in terms of bringing new facts or new arguments. I'm happy to be contradicted on that but that was my impression when I first read it and in this review. I just don't see anything other than that reference to the UN Secretary General statement that could possibly be regarded as a new fact or new argument that has not already been considered by our working group.

And I'd also point out that other than general reference to international status, neither WIPO or any other IGO has identified any rights in IGO names and acronyms other than trademark rights that could be the basis for a separate DRP. Thank you.

Petter Rindforth: Thanks, Phil. And before I pass it onto Mary, I fully agree that this is more an echo of what WIPO had commented on this issue before. And what I think is interesting is that we have seen so many of the other comments from IGOs that is simply just referring to WIPO's comments and accept that as their point of view also.

And as we can see, it's not specifically comment on the points we have and all the suggestions we have. And also noted by George in the chatroom, the OECD one was more detailed. But these two - I think it was the OECD and the WIPO that are being referred to by most of the other IGOs that provide comments.

Yes, Mary.

Mary Wong: Thanks, Petter. Mary from staff. One quick comment and one response to Phil's question. The comment is that of course we are looking initially at the WIPO and OECD comments here -- not only because they are the two IGOs

that have engaged with our working group at various ICANN meetings, but also their comments were signed onto by a number of the other IGOs. I believe it's something like around ten for the WIPO comment and maybe as many as 15 for the OECD's.

The response, Phil is for the UN Secretary General action that was referred to in this comment. I believe that is a reference to a letter that the Secretary General sent to all UN member states in mid-2016 drawing their attention to this issue and seeking their feedback. I believe that letter was sent to ICANN and not this working group, but I will find out and circulate that to the group so that you can decide whether or not to take that into consideration at this point.

Phil Corwin: Yes, thanks Mary.

Petter Rindforth: Petter here again. Mary, I'm not fully updated on the list of comments, but have there been any comments filed by the forum? Mary.

Mary Wong: Hi, Petter. It's Mary again. I don't believe - you mean the National Arbitration Forum? I don't...

Petter Rindforth: Yes.

Mary Wong: ...believe they filed a comment.

Person: Yes.

Mary Wong: So no, they did not.

Petter Rindforth: Okay, thanks. Because I've been communicating with them and they said initially that they should work on comments and they were also in some way participating -- at least online in Copenhagen. But again, I've noticed that especially after WIPO's comments were filed, some organizations and some

groups that prepared comments either have not responded or changed their comments.

So again, that's why it's also important to have a specific look at both OECD and WIPO because there's so many others that whether or not they have comment or not, they have deeply considered what OECD and WIPO had comment on these questions. George.

George Kirikos: George Kirikos for the transcript. Yes, I have a note in the chatroom. There was something that was somewhat new, which was buried in their footnote where they talked about capture by the registration parties. So that's something that we might want to address. It was odd coming from them.

Petter Rindforth: Mary?

Mary Wong: Hi. And to George's point, I don't know this for a fact because obviously, I haven't, you know, engaged with the IGOs on this point. I think that may be a reference to something that I think one of the IGO letters to the working group last year made reference to in terms of I think not just the composition as such, but the participation levels within our working group.

Petter Rindforth: Thanks, Mary. So this means that we have gone through the four perhaps the most important comments from those that does not agree with our suggestion today.

I don't know if we have any comments to see on the screen today or what - nothing is showing so far.

Phil Corwin: Petter, can I jump...

Petter Rindforth: Yes.

Phil Corwin: ...in? I just want to...

Petter Rindforth: Yes, George. Phil

((Crosstalk))

Phil Corwin: ...quickly jump in ahead of George on the procedure. We have about just over 20 minutes left of today's call schedule. If staff can put it up, it might be worth looking at the World Bank comment because that's the other IGO comment that was fairly substantive in my recollection. Most of the others just endorsed some of the - most of the IGO comments were very brief and just endorsed one of the other ones...

Petter Rindforth: Yes.

Phil Corwin: ...we've already gone through. I think then if we can get that up, it might be worth going through. Yes, how long is this one? Four pages? Yes, we can go through this. Let's go through this and I think then we can George suggested we take a look at the table prepared by staff for comment evaluation. I think we should probably look at that for evaluation purposes.

And then one way forward on the next call might be to look at the comments filed by the different ICANN constituencies and stakeholder groups, because after all a final report will go to the GNSO. This will be good to take some notice of what the various stakeholder groups and constituencies -- which will eventually vote to accept or reject our report -- what they said.

And after that, we can go through all the rest of the comments and whatever. It can be from various types or parties or in order received. It really doesn't matter for this first round of just reviewing for new facts and arguments.

So, go ahead George but I'd like some feedback on whether that is an acceptable way to proceed, which is basically look at the World Bank comment, review the staff table, and then star the next meeting with review of

the stakeholder group and constituency comments and then return to all the other comments that we haven't hit yet. So go ahead, George.

George Kirikos: George Kirikos here. Thanks, Phil. I agree to that. That actually sounds fine with me. I just want to finish my earlier comments before I got bumped from the telephone line.

Briefly the IGO's - sorry, the WIPO position was, you know, this group perhaps was captured by registration interests, which was very bizarre given that, you know, we repeatedly made outreach for the IGOs to participate and the GAC, et cetera.

And so, you know, we should perhaps note that argument that they made because that's a somewhat new argument and it doesn't reflect well upon them, given that we, you know, invited them multiple times to actively engage with us. So, I think that should be on the record.

Phil Corwin: Yes, George I have to say that argument reminds me of the old saying about the person who killed their parents and then appealed to mercy of the courts because they were an orphan. Okay. Let's look at the World Bank comments. I don't see any hands out there to - yes, that was a naughty comment. Sometimes one has to - I hope that didn't violate any ICANN standards by repeating that saying. George, you have your hand up again. Is it on the procedure?

George Kirikos: George Kirikos again. I noticed that there were actually multiple comments by the World Bank, so which one? Because there's one from MIGA which is on March 30 which was an agency of the World Bank. And then there's one by INGO which is from the World Bank themselves.

Phil Corwin: Yes. We're looking at the one from the World Bank itself right now. The other one will be dealt with when we look at all the other IGO. As I recall, this one

from - this was the more substantive comment from the World Bank. So let's take a look at this one now.

I also wanted to mention that we did not receive a comment from the International Trademark Association. They had been planning to file a comment, but apparently some new considerations came up in the Copenhagen discussions and their decision-making process is of such a length that it did not allow them to reach consensus on a statement before the filing date. So, just noting that for the record.

Okay, World Bank -- The GNSO should reconsider its initial advice. I guess they mean this working group. They describe what the World Bank is. They say their name is often misused in frauds and scams, as are the names of other IGOs. And that funds they use to deal with that divert funds from their more important purposes.

So it says the initial report refuses to make any accommodations for IGOs and seeks to force the IGOs to choose between protecting their acronyms and protecting the immunities that allow them to operate internationally.
Okay.

They refer to our legal opinion and Annex 14 -- that's the Swaine Memorandum. But they assert that we largely rejected or contradicted the analysis. So, I'm not - other than saying we ignored our own legal advisor -- which we've seen in another comment we reviewed today -- I don't see anything in that initial introductory portion, which we haven't seen or heard from IGOs before for the purpose of identifying new facts or arguments.

So, the recommendation one -- they have no comment because they're not an INGO. And recommendation two, they think we're requiring too legalistic and technical a test before any IGOs would be able to access the UDRP or UDS. Okay.

I have to say we'll take it under advisement. They seem to be arguing here that an IGO would have to register a trademark in every nation in which it operates to utilize the UDRP or URS. I don't think that's true at all. When a trademark owner brings a UDRP, I've never seen any requirement that a global brand needs to have registered in every nation in order to bring a UDRP. But it's usually based on a single trademark registration in a major company - in a major country, I mean.

So, I think that's a new argument but I don't buy it but we'll get back to it. George and Petter, can we have some quick comments here?

George Kirikos: George Kirikos again. A bit of a strange comment coming from them, given that they actually successfully use the UDRP and also the first sentence is kind of odd because it says seeks to require too legalistic and technical a test. You know, we want rules to be very, you know, based on law and to be, you know, strictly, you know, understood. you know. They should be technical. I don't know why they want them loose asked based on what, you know.

You know, I don't know what they would want to base it on, you know -- imagination or something rather than law? It's like a really strange comment. Thanks.

Phil Corwin: Okay. Petter?

Petter Rindforth: Yes, thanks. Also I'll note on the recommendation too. I wrote it as they had no idea of how the UDRP actually works. I mean, I haven't seen any indications of them during the years. There's maybe two, three companies that can list such a long list global trademark protection. In most cases, there's one or two or three national or regional registrations not always in the same country that the main name holder is actually dealing.

So this is nothing that we have to actually take into consideration, that reference. Thanks.

Phil Corwin: Okay. Thank you, Petter. So, we're noting this is a new argument but not one that's seeming to carry much weight within this working group and seems to illustrate a lack of understanding of the UDRP.

Recommendation three -- they assert that we're attempting to mandate a second, technical, legalistic limitation on the ability of an IGO to file a UDRP or URS complaint. The mere filing would be the standing requirement. And there we try to accommodate IGOs by saying you don't need to register a trademark. You can just have standing based on 6ter notification.

So, on the ability to file, again this is a new argument. I think it's wrong, just like the other one was, but we need to come back to it.

And then again, we'll get back to this but I think there's a general mischaracterization in this understanding of what we had proposed in guidance. As I understood, we were proposing in guidance was to say to UDRP panelists hey, if an IGO has brought a UDRP based on its 6ter notification, then you should look at what 6ter protects, and that's against use of the domain name to suggest to the public that a connection exists between the organization associated with the name or acronym and that the domain is of a nature as to mislead the public. And that will satisfy the bad faith requirement.

So, I think that's what their aim - and let's get back to this argument, but I think they've got it all wrong. We're not requiring them to prove the facts of - they would have to use to prevail as a complainant a UDRP before they can file a UDRP. I think it's again a complete misunderstanding. But let's get back to it when we have substantive consideration of comment, what's noted as something we need to get back to.

On recommendation four, they adopt the OECD's comments. So, there's an endorsement of the OECD. They admit that the privileged and immunities are not a simple topic. That's why we should defer to the IGOs who are experts -- or at least the GAC.

They say that the ICANN board was correct when it agreed that this issue could be resolved according to the small group recommendations. I'd have to go back to that board later but I think that goes a bridge too far in stating what the board position was. I think they asked us to look at it, not that it should be resolved according to the small group proposal.

Okay, they say we dismissed the conclusions and opinions of our own legal expert. That's an assertion we've seen before, but it's one we have to get back to. If they say we ignored our legal expert, let's go back where they assert that and see if we think they're right or wrong. Certainly we wouldn't want to ignore or contradict that expert advice on which we rely so strongly.

They criticize the assignee, licensee, or agent standard. They say it's impossible to implement if a third party brings the case. I don't understand this comment at all. We were talking about IGOs having the ability to bring cases. They seem to be referring to a UDRP or URS brought against a website registered by an IGO.

So, we had recommended that they can file the UDRP or URS through an assignee, licensee, or agent and they say it'd be impossible to implement if a third party brings a case. I just don't understand this comment at all. I really don't think we should even come back to it in our review because it makes absolutely no sense.

We're talking about the ability to file a DRP and they seem to be referring - and we suggested that the use of the assignee license or agent would help insulate them against assertions that they completely waive their immunity if the respondent lost and came back with a de novo court filing.

So, I note that as a new argument but I think it's so off base that it doesn't deserve further consideration. That's a personal view. Others can disagree.

They don't accept our statement that the present recommendations result in substantial improvement and clarity regarding access to the existing CRPs. They say we simply defend the status quo and avoid making any accommodations for IGOs. And they that after they just criticized one of our accommodations, which was making clear that they could file through three different types of world parties.

So, and then they seem to criticize us for asking for input on a difficult question -- of what should happen if the IGO is successfully assert immunity in a subsequent court action. And then they say the small group recommendations should simply be adopted by the ICANN board. I think that statement evidences a complete misunderstanding of the policy process within ICANN, that the board has no ability to adopt the small group recommendations unless the GNSO first adopts them as a policy recommendation.

So, and then they agree with recommendation five, which is for subsidies, which they can pursue with ICANN Corporate on their own.

So there's some new assertions here. I got to say I don't think they're going to hold much weight in their subsequent consideration. But, other than the one on criticizing assigning licensee or agent filing because it's so off the charts, let's note these and come back to them with further relevant recommendations. Petter?

Petter Rindforth: Petter has just a short notice on recommendation three where they said article 6ter was not drafted with ICANN or the UDRP in mind, so that we cannot use it. And I will just say that I don't think any national trademarks act was also drafted with ICANN or the UDRP in mind. But rather than when the

UDRP and ICANN came up later on, we have decided to use some legislation trademark protections as identification.

Phil Corwin: Yes.

Petter Rindforth: So why...

((Crosstalk))

Petter Rindforth: Why not also do the same with Article 6ter?

((Crosstalk))

Phil Corwin: Yes. If we were to say that ICANN can only reference laws that were created with ICANN and IGOs in mind, we wouldn't have a UDRP or URS because trademark laws were created way before the internet -- except for some recent updates in some countries.

So, that's it for the World Bank. It's a very interesting comment. So I'm going to ask staff in one minute to just take us through and show us what they've prepared generally, what the layout is in the staff table.

But before doing that, I want to note -- because we're going to end this call in five minutes -- our next call will be a week from today. I believe it's at the same time, unless staff corrects me on that. It will be for 90 minutes. And we're going to start that call with reviewing the substantive comments received from ICANN constituencies and stakeholder groups to get an idea of what they said about our comment.

And after that, we're going to return to a general view of the remaining comments from additional IGOs and governmental organizations and from private third parties. We can decide how to proceed on that. But we'll probably spend most of the next call reviewing the stakeholder group and

constituency comments. But we could get to some of the others because we're getting through these pretty quick in terms of identifying new facts and arguments.

So, I'm going to stop talking there and let staff take us through this document and then we can wrap up this call in about four minutes. Thank you.

Mary Wong: Thanks, Phil. And this is Mary from staff. So, first of all, just confirming your note about the meeting next week. It will be the same time and for the same duration.

And then secondly about this document -- we have prepared it just to aid the working group as we noted in our email. So it is arranged according to recommendations one through four in columns in rows that show to the extent we could discern whether or not that particular commentator supported or did not support a particular recommendation, accompanied by what we considered to be the most relevant extracts from that comment pertaining to that particular recommendation.

So the additional comment I would make here Phil or two additional comments. One is that it does seem to us from the call today that certainly for some of the substantive comments, it probably is helpful to go through them in terms of the text and not just looking at the table.

So for the rest of the comments however, this table hopefully is helpful in showing what other commentators have said about the same recommendation and for gauging the level of support.

The other comment is that one thing that seems to have dropped in my very inept handling of a very difficult template is that we did have a section that showed who and which of the other commentators signed onto certain other comments -- say for the OECD, WIPO, and so forth. So we'll continue to try

and make better the formatting and when we do that, we will put back that part that seems to have dropped out as well.

But the overall format and intent of this table, it is what you see and it's how I've explained it. Thank you.

Phil Corwin: Yes, thanks Mary. And I want to thank staff for obviously very considerable work which is clear they went through in putting this table together.

I think the only thing I'd add is that as we go through this - I agree with Mary on some of the comments, like some of the ones we just went through, we're not just going to rely on the summary. We're going to go back to the actual text of the comment when we discuss whether it merits any modification of our recommendations.

And also add that in the table working group response action taken, one of the response items will be, you know, nothing new -- something to that effect -- because we're not going to relitigate every argument that we heard before in preparing the initial report. We're going to focus on new arguments and new facts in support of those arguments as the basis for modifying the final report and diverting from the initial report.

And with that, I'll stop and see if my co-chair has anything final to say before we conclude the call. And I want to - I'm glad to see we have some comments in the chat room that people felt this was a productive call. I thought it was very productive. I think we're making very good and rapid progress through identifying the new arguments and facts and that will set us up for hopefully similarly efficient consideration of whether they merit any change in our final report. Thanks. Petter?

Petter Rindforth: Thanks. Well just a couple of thoughts that came up during the meeting today and reading through the comments. I've seen that some of the comments are referring to UDRP and some are suggesting separate URS/UDRP. I have

seen no comments on the URS so I'm not sure that those that want to see a separate UDRP also think it's a need for a separate URS or if we can have our initial comments on that base.

And also, I said we have to come back to see the comments on potential showing support and see if we have missed something or at least to make comments on those that think that we have misread or mis-summarized this report.

And then thanks all of you for today's meeting. See you next week.

Terri Agnew: Thank you. Once again, the meeting has been adjourned. Thank you very much for joining. (Hannah) the Operator if you could please disconnect all recordings. To everyone else, please disconnect all remaining lines and have a wonderful rest of your day.

END