

**ICANN
Transcription
IGO-INGO Curative Rights Protection PDP Working Group
Thursday, 27 July 2017 at 16:00 UTC**

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at: <http://audio.icann.org/gnso/gnso-igo-ingo-crp-pdp-27jul17-en.mp3> Adobe Connect recording: <https://participate.icann.org/p1y6ocl8o/> Attendance of the call is posted on agenda wiki page: <https://community.icann.org/x/gAhB>

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

Coordinator: Recordings have started.

Terri Agnew: Thank you. Good morning, good afternoon and good evening. And welcome to the IGO INGO Access to Curative Rights Protection Mechanism Working Group call on the 27th of July, 2017.

On the call today we have George Kirikos, Petter Rindforth, David Maher, Paul Tattersfield, Phil Corwin, and Osvaldo Novoa. We have listed apologies from Jay Chapman, Mason Cole and Paul Keating. 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 to please keep your phones and microphones on mute when not speaking to avoid any background noise.

With this I'll turn it back over to our cochair, Petter Rindforth. Please begin.

Petter Rindforth: Thanks. Petter here. So I'm glad that you - that are participating today had the possibility to do it because we have some remaining issues from last

week and I hope that we can make some conclusion, summary for today so that to start with Phil and I have the possibility to work with the topic and then we will make a presentation on the - some kind of summarized conclusion from both the comments that we got during the (unintelligible) but also from the internal comments on discussions we had in our working group.

So we will end with going through the proposed time - new time schedule so I will come back on that topic. So start with the question of if there is any update of statement of interest? I see no hands up. And we have these three new proposals that we discussed last week. And what we then had the possibility to discuss then was Paul Keating's alternative proposal.

And then I see that Paul is not here today but if we can get it up on the screen just to go through it. I see nothing there yet but I can start with because we all have also got it by email.

So the alternative proposal from Paul Keating - and I have this summary here, we stated that we need to do nothing in this case at all. George, yes.

George Kirikos: Sorry. Yes, George Kirikos for the transcript. Sorry, I thought I was muted for a second. Yes, I think the premise of that proposal is actually incorrect because you could see the first section of the - in the summary it says, "There is no similar provision for the respondents regarding waiving claims against the ADR provider," and that's just factually incorrect, as I pointed out in the email, it's not in the UDRP rules but it's in the providers' supplemental rules. So since the entire premise of the proposal is flawed, I don't know how it could survive any scrutiny. That's why I invited Paul to withdraw it but he's not here to defend it.

Petter Rindforth: Yes, thanks, George. Phil.

Phil Corwin: Thanks, Petter. Phil for the record. You know, I'm not going to disagree with George's assertion that the premise was wrong. On the other hand, Paul has

great experience in UDRP practice and tended to think this was important for us to consider and perhaps, you know, if there isn't such a waiver by the respondent now perhaps Paul would want to amend his proposal to require a mutual such waivers. So I guess I'm saying it may have no merit, it may have some merit. I'm a bit reluctant to dismiss it without Paul having any ability to provide input though we can't wait forever on him.

So I guess I'm going to suggest that we advise him of George's belief that, you know, he's already seen that email but reiterate that ask - and ask him formally whether he wants to keep the proposal in play or amend it and give him a deadline to let us know by next week. I just want to be fair to him and make sure that we're not tossing something away that may have some merit. And I hope that's an acceptable position. Thank you.

Petter Rindforth: Thanks, Phil. And I think that's a good way to handle it to give Paul at least the possibility to come back to us written with comments. What I wanted to do although is to just briefly go through it and see if we have from that some additional questions or remarks. And then I may not just - to state that it's not correct proposal.

So let's just briefly read it through. And although I still see nothing on my screen, but I have it here in front of me. So if we - if we pass further on after the summary, I think that's what he correctly written here is the current UDRP provides for mutual jurisdiction all complainants must certainly - a court in either the location of the registrar or the location of the registrant that's stated in the Whois.

And those of you that have dealt with domain disputes know that when you file a complaint you have to make a note on what you - first of all that you agree to this. I haven't seen any case where the complainant has not agreed to it. And frankly I'm not sure how the dispute resolution provider would act by then, probably not accept the complaint. But at least to note that if it's either the location of registrar or the location of registrant.

There is the possibility to also choose if there are, let's say, two different countries here, where you can choose the jurisdiction that you trust most as a complainant. But as we also know that there are - also when we talk about the traditional domain dispute cases, there are very rare that a decision is actually taken to a court.

So then he further states that there is some uncertainty as to whether the mutual jurisdiction selection constitutes a waiver of sovereign immunity. And I think that we already have some comments from our professor on this topic in order of an ADR provider must be complied with unless a losing respondent commences a legal action in the mutual jurisdiction with a 10 business day period. And the issue with NGOs is that they do not wish to subject themselves to potentially liability of national court sovereign immunity, yes. So that's the initial summary.

And then he says that legally there are three potentially interested parties, respondents, complainant and the ADR provider. A court may generally only issue orders directing an interested party to do or refrain from doing something. This might be pay the claimant damages; it might be refrain from doing XXX, very few courts will order a person to do something other than pay damages. Courts are most likely to order an interested party to not do something. The reason for this is that the standard for ordering a person to do something is higher than the standard to actually not to do something.

This bears relation to unique legal issues like a specific performance in order that the party must do something. Such remedies are rare in the US, although more normal (unintelligible). And here I can actually quickly refer to recent European or even Swedish case we had with a well-known infringer was selling pirated goods on the Internet, the Swedish pirates. And it was actually - it was brought to the court and the - it was a dotSE registration so the government also used initially the dotSE registry in order to make sure that they could actually get the domain if the court decided on that.

And well the court stated that the registrar was not guilty for anything. They registry thousands of dotSE domains or they administer the registration, they have no responsibility for what they are used to - used for. But what's interesting was that the court also decided to transfer the infringing domain name to the complainant that in this case was actually the Swedish Ministry of Justice.

So I'm not sure what they will do with these two infringing domain names that just going for their names you can actually see that they are to be used for pirated goods. But that's an example when the court actually decided to transfer. Yes, Phil.

Phil Corwin: Yes, Petter. I just wanted to focus on the sentence in Paul's proposal here which he hasn't had time to update, stating the current UDRP obligates the complainant to waive claims against the ADR provider to protect the ADR provider from damages resulting from its decision.

Now, looking at the text of the UDRP, and of course this is - relates - I think this is referring to the registrar rather than the ADR provider. Section 6 says, "Our involvement in disputes we will not participate in any way in any dispute between you and any party other than us regarding the registration and use of your domain name. You shall not name us as a party or otherwise include us in any such proceeding. In the event that we're named as a party in any such proceeding we reserve the right to raise any all defenses deemed appropriate and to take any other action necessary to defend ourselves."

That's the complete text of Section 6 of the UDRP which says this policy is between the registrar and the customer. Now this may have been what Paul was referring to. And if that is what he's referring to it's an agreement between the registrar and the registrant, not between the registrant and the ADR provider. But it does provide a precedent for a broader waiver of - and a

possible change in the policy to include a waiver by both parties against the ADR provider. If we thought that was an advisable policy.

So I just wanted to point that out as we were passing by that passage of the proposal and that's all I had to say. Thank you.

Petter Rindforth: Yes, thanks, Phil. Petter here. Also when you file a complaint you also have to click that part where you say that you will not sue the dispute resolution provider or in fact any other parties than the domain holder. So it's an agreement you make before you can actually use the UDRP or the URS, otherwise you have to take it directly to - or in any time of the dispute take it to a court for decision. But I mean, as long as you use the dispute resolution procedures, it's just between the two parties.

So Phil, I see your hand is up.

Phil Corwin: Sorry, old hand.

Petter Rindforth: George.

George Kirikos: George Kirikos for the transcript. Yes, what Phil was saying was actually incorrect and what Petter said was more correct. Paul Keating was referencing Paragraph 3b xiii that's the Roman Numeral 13, which I linked to in the chat room. And that provides a certification by the complainant. And Paragraph 5c viii is for the respondent. And Paul Keating's premise was that because a certification is different for the respondent and doesn't mention the UDRP provider or the ADR provider, then there was a potential flaw that could be exploited.

But the premise is entirely wrong, as I pointed out before, because the certification that he thinks is missing is actually appearing in the supplemental rules so I guess the ADR providers recognize that the UDRP rules had that

missing element and they basically corrected the situation via their supplemental rules. So the entire premise of this document is just incorrect.

So I don't know - as I pointed out there was actually one potential way to exploit the issue which was to the respondent not to actually respond to the UDRP and thereby not agree to that certification by the supplemental rules. In that case you know, they just sue directly and then conceivably they could name the UDRP provider because they hadn't agreed to that certification. Thank you.

Petter Rindforth: Thanks, George. I think that that was also good summary why it may be that Paul based also from our meeting last week, will reconsider this alternative proposal. So we'll see what he will come up with on this issue. One interesting thing here and that's not included in our working group, but as you all know there is another working group dealing with I don't know, somewhere in the future, it will also have a look at the UDRP and see what may be necessary to change there.

And this may be one topic where we need a clarification. It would be good to have in the same document if the clause is referring to both the complainant and the respondent when it comes to this specific topic.

Okay, then I've - Phil, you have any further comments here?

Phil Corwin: Yes, I just wanted to add that if Paul in fact - we're not sure what Paul was referring to because his statement says refers to the current UDRP and he didn't specify the policy, the rules or the supplemental rules. But if in fact if all the UDRP providers in their supplemental rules are requiring the respondent but not the complainant to waive any rights to bring actions against them, then he may be in fact partially correct.

If practically respondents are always being required to waive the rules and waive potential claims for damages in supplemental rules, and if that's the

case the question would arise why aren't the complainants being similarly obligated to waive any actions they might take after a decision is made.

And also in regard to the review of the UDRP, I'm cochair of that - one of the cochairs of that working group. It will commence its UDRP review sometime next year probably in the second half of next year, the substantive review. We may well look at whether these supplemental rules of the different providers are consistent and also whether they're addressing things that should not properly be addressed in supplemental rules. But that's a long way down the road for that other working group. Thank you.

Petter Rindforth: Thanks, Phil. Yes, as said, we have recognized some topics during the working time here that often may be better related to other working groups. Okay, I think we have some - yes, I see from the notes Paul Keating should have the opportunity to write other an amended proposal or respond to George Kirikos feedback that the premise of Option 5 is not accurate. So let's give Paul the suggested extra days to send us comments and notes on that.

And by then I think we can leave the alternative proposal and actually go back to - let's see here. Well we have made some amendments to the Option 2 to Recommendation 4. And I think - it would be good to go through that. Mary, yes.

Mary Wong: Hi, Petter, everyone .this is Mary from staff. So in terms of next steps with the various options that have just been discussed, would it be a good idea to send a note to the mailing list since we don't have a lot of attendance especially today, to ask not just Paul Keating for his further feedback given the discussions to date but to see if anyone has any other comments or preferences with respect to any of them?

Petter Rindforth: Yes, thanks, Mary. It's actually a good time to - after this meeting to send out some kind of summary and remaining questions that we - and also ask for a feedback within a certain time so that we can complete them, go through

them and come up at our next meeting with some summaries or conclusions of that.

George.

George Kirikos: George Kirikos for the transcript. Two things, just to answer Phil's question about why the respondents are being required to waive the - waive via the supplemental rules and the complainants don't, that's because the complainant's waiver is specifically mentioned in the UDRP rules itself so they don't need to waive it twice, like it's already waived by those rules.

Maybe just to change topics now, when analyzing these four or five options, depending on how many actually survive, I was wondering whether it might be useful to go back to the analysis - the risk analysis that Steve Chan had started our working group on, maybe it was five or six weeks ago, there was a document that had like a risk analysis from different stakeholders perspectives, and so I don't know if that might represent a more structured way to analyze the four proposals that people can decide which ones they back.

And when it gets time to backing the options it might be wise to consider allowing each of the members to rank the proposals in order. And once we have all the rankings in place, then it perhaps becomes more clear which options are most preferred and which are secondarily preferred and where the consensus might lie. Thanks.

Petter Rindforth: Thanks, George. Yes, that document is one of the good summarizes we have since before and thanks for reminding me of that. I see no reason to discuss it today but I'll send it out to the full group as one basic information also about the - as you said, the plus and minus on each topic so that we all can also refresh our memory from the discussions and from the inputs.

And that of course also includes Option 1 to Recommendation Number 4 even if I'm pretty sure, and sorry if I take some wrong conclusions here, but it seems to me that we have not discussed that option for a long time. And to seems to me that that may not be the one that can be fully accepted by all groups of interest here. So if we consider some kind of taking the notes that we have got from our recent discussions also and proceed with the new inputs and work further with - as I see it personally at least - what we can change in Option 2 in Recommendation 4 to have something that can be acceptable.

And thereby - yes, (unintelligible) was already started for Options 1 and 2, yes. Option 2, amendments, I think what we see here on the screen is not - no amendments based on the further recommendations we have discussed. It's more based on the initial discussions that we had after the first comment periods. So I got just going through it quickly I see what we - what's added here on the preliminary notes that none of the elements described below in relation to an arbitration scenario precludes either of the parties from going to national court at any point in the dispute resolution process.

We discussed this also briefly last week. But that's added to show clearly what is already also clear described both in the URS and the UDRP policy that actually any party can start a national court process at any time and if the process is already going on for instance with the UDRP it's up to the panelist to decide if he or she wants to conclude that work. But then as you also know, after the decision there is a limited (unintelligible) when the losing party can take the case to a court.

So one additional consideration, should the working group decide to proceed with recommending this option, is whether or not this will apply to all IGOs or only to the IGOs on the GAC list to minimize the risk or fake IGOs trying to use the process and to limit its scope.

I think that's based on the fact that we actually have - we have two different lists of IGOs and one is of course the list that is provided by GAC and is used, for instance, in the implementation of the GNSO policy for the protection of IGO and INGO identifiers in all gTLDs. But there we have the list of - the list of Red Cross and the Olympic Committee and the IGO, they are handled in the same way in that process and the list - all IGOs the list that GAC provides.

But as I've stated before, I see no reason to actually be, so to speak, claim to use that specific list. I think we have actually recognized when it comes to dispute procedures a more better and internationally court acceptable identification of IGOs, namely Article 6ter. And what we have decide and discussed when it comes to Article 6ter that is one way to - is one way to identify but also one way to show the protection as such.

But I'm not at least my personally I'm not willing to accept the GAC identification list as the pure identification of IGOs. Okay so we have elements for discussion. We point out panelists default option is a three member panel. The chair which must be a retired judge from that jurisdiction. Explore possibility of creating a standing panel from which to choose the two panelists other than the chair, for instance parties cannot choose the chair of the panel.

If I read that correctly, I think this is still something to discuss and before I hand it over to Phil, I think that - if we take a normal arbitration or mediation procedure or arbitration procedure rather, either the - if the parties can decide upon who will chair then it's okay but otherwise the organization that handle the disputes will put that person and decide about that person. And when we have a three member decision in a UDRP the parties can never decide upon who's going to chair; they can just have some preferences on one of the other two panelists.

So Phil.

Phil Corwin: Yes, Petter, and thank you and Phil for the record. On the issue of which IGOs Option 2 would apply to, if it were adopted, my personal view would be that we can provide guidance but we can't really determine the option. We could, for example, take the position that only IGOs on the GAC list should be recognized as having even - should even have an immunity claim considered by a court, but we can't control what a national court is going to do. It's really going to come down to an IGO going into a court if they assert immunity and saying, you know, presenting evidence saying we're an IGO and we have this scope of immunity and we should be dismissed out of this case even if we agreed to mutual jurisdiction for procedural purposes, we do not surrender our defenses, and we're asserting our immunity defense now.

And if it's an IGO that's on the GAC list and if - and of course the respondent domain registrant is going to have a chance to challenge that basic claim of being an IGO which is the basis for an immunity claim in the court room, but that's all out of our hands.

And if we were to say that this follow up administrative procedure was only available to an IGO - if the IGO was on the GAC list, then in the rare circumstance - within the rare circumstance of a non-GAC identified IGO succeeding in an immunity claim in a court room, the consequence of saying this follow up arbitration procedure would only be for GAC identified IGOs would deprive the domain registrant of any second review of the adverse UDRP decision.

So I think we can make a recommendation that a court might take judicial notice of, but we can't control the outcome of what a court is going to do, and I don't think we'd want to restrict the arbitration process solely to GAC identified IGOs because the losing party in that decision would be the registrant, not the IGO. Thank you.

Petter Rindforth: Thanks, Phil. Petter here. Well of course GAC would - IGOs would like to see us recommend the GAC list, but I'm not so sure that if you take the case to a court somewhere in the world, that they will automatically actually accepted that list as something that can be judicial forced in that country. That's why we decided to refer to and still having as one reference for identification the Paris Convention because that's at least something that is generally legal accepted and created.

The GAC list of IGOs, that's - I have no problem with using that within ICANN because that's the same organization and the same agreements. But, yes, I can take it as one of the possible identification systems but we also have to refer to and remind us about the Paris Convention.

So George.

George Kirikos: George Kirikos for the transcript. Yes, I think there's a little bit of confusion here. The GAC list originated only in the context of the existing reserved names, but also in the context of creating an entirely separate procedure just for a subset of IGOs as identified by the GAC. And so that's what it was intended for.

Our option - our options, you know, 1, 2, 3 and 4 under Recommendation Number 4, the only way you get to it is if the court has already ruled after an appeal by the domain name owner that an IGO showed up in court and asserted its immunity and so the court obviously found that one, it was an IGO; and, two, that it was - it was immune. That, you know, those are both required.

And so all these options are, you know, taking into account that a court has already found it is an IGO and so it doesn't make sense to then start limiting what happens after t just a subset of the GAC list because, you know, as Phil said, what happens if there's an IGO, you know, a court identifies it's an IGO and it's not on the GAC list and then what happens? You know, you're still left

with options, you know, 1, 3 and 4 or you're left with, you know, what's happening now, you know, nothing. That's the end of the procedure.

So it's, you know, the GAC list seems to be somewhat irrelevant in terms of our options because we're not using the GAC list as a means of asserting immunity, we're saying, you know, any reported IGO can assert immunity. So I don't know why we've been contemplating this as an option per se because it's not really relevant in my opinion. Thanks.

Petter Rindforth: Thanks. Phil, I see your hand's up. Mary.

Mary Wong: Thanks, Petter. And thanks, everyone. This is Mary from staff. So just to close the loop on this, this was raised by staff as a point for consideration only. And we recognize obviously all the other considerations that George and others have raised. It was simply I think as a reminder slash placeholder as George noted, that the proposal for some different process as well as arbitration came from the GAC. And the GAC has reiterated several times in its communiqués what it believes to be the proper path for IGOs and as we saw, the IGOs that the GAC referred to from 2013 really was the ones on the GAC list.

So this was just to make sure that as a working group we do consider all the options. And it does mean, obviously, that if this were to have been proceeded with, that it would only apply to a certain sort of IGOs and for the other IGOs presumably then the matter would just end if the court were to find in favor of immunity. So just to explain that we were just putting it in there to basically close the loop on these topics that had been referred to by the GAC and it is obviously the working group's decision as to what exactly to recommend and in what scope. Thank you.

Petter Rindforth: Thanks. I see George hand's up.

George Kirikos: Yes, George Kirikos. I just wanted to quickly respond to that. Yes, that would actually create the most bizarre possible outcome because consider it from the point of view of an IGO, they would actually not want to be on the GAC list under that scenario because only the IGOs, you know, if we said that the arbitration was required for those on the certain list, only the IGOs that are on that list would have to then face the next step, i.e. arbitration, those who are not on the list have the advantage of, you know, ending the process immediately and taking control of the domain name.

So it would be, you know, a very bizarre thing, you know, if you're an IGO you don't want to be on that list if it's a list that's being used in conjunction with our Option Number 2. So that's why, you know, I said from the start it's kind of an irrelevant option because you know, if you take it to its natural progression an IGO doesn't want to be on that list when it's in the context of our discussions in Option Number 2. If it's in the context of an entirely separate mandatory arbitration procedure, that an IGO can invoke, there they would want to be on that list. But in the context that we're talking about it's actually totally meaningless and it would create that bizarre result.

And just an aside, I talked to my lawyer the other day about the in (rem) option, we actually talked about the immunity aspect of IGOs and it's kind of, you know, very interesting here in Canada it's a very complicated question and there are things like whether there's an order in council by the governor general or whatever with respect to the nature of an IGO's immunity. So there's actually quite a complex topic and it's way above the GAC's pay grade. Thank you.

Petter Rindforth: Thanks. So just to summarize - up a question, shall we still, you know, final recommendation refer to the GAC list as one possibility that - in that case would be optional for an IGO to identify itself? Or shall we not refer to that list at all? For the (unintelligible) chats, not in relation to - okay, George.

George Kirikos: Yes, George Kirikos again. I was just going to say, yes, I don't see why we would want to reference it at all in that context because that GAC list is motivated by entirely separate and parallel arbitration procedure that the GAC and the IGOs desire. It has really nothing to do with Option Number 2 in the context where it actually went to court, the court found the immunity and then the question is what happens under those narrow circumstances?

So it's, you know, really I don't think necessary to even appear in our final report in the context of Option Number 2. It might appear in a separate section in relation to alternative approaches to be considered, you know, we consider the GAC recommendations and we consider the GAC list as a list of names that - a list of entities that could invoke a separate procedure. But then we decided that, you know, that separate procedure wasn't required or wasn't desirable either.

Petter Rindforth: Thanks. Phil.

Phil Corwin: Yes, let me - and I hope I can be - and Phil for the record - I hope I can be clear on this because I'm talking off the top of my head. I think it might be helpful in a number of ways to reference the GAC list in this manner, and as is stated before, in no way would I support restricting this arbitration process to be used solely if an IGO that was on the GAC list had successfully asserted immunity in a court.

But I think if in a narrative in our report we noted that while we have no control over how a court would judge a purported IGO's claim for immunity, that we were aware of GAC views and on which - and let me explain here, the relevance of the GAC list to this is that the GAC said we think there should be a separate process because of IGOs have immunity but only for the IGOs on our list. So the GAC connected immunity with being listed on the GAC list.

So if we in some way referenced that just as in a narrative form in no way controlling the application of whatever our final recommendations are, one, it might be one thing in our report that please the GAC and the IGOs, even though we weren't going the way they had asked us to go.

And it also might give a respond a domain registrant who brought the judicial appeal something to point to in the court room and saying judge, you know, right here in this report it points out that there are entities that claim to be IGOs and are not in fact legitimate IGOs and you should take judicial notice of that and this particular entity while claiming to be an IGO has not been recognized as such by ICANN, which is the party that created the UDRP and you should - that should bear in your decision.

So it might reduce the possibility of an IGO not being on the GAC list successfully asserting an immunity claim because it would call their status as an IGO into greater question. So again, I'm not arguing for restricting anything we might recommend solely to IGOs on the GAC list, I'm talking about a narrative in our report that might be useful to a domain registrant in the context of a subsequent judicial action. Thank you.

Petter Rindforth: Thanks, Phil. And may I just also note that we have the possibility - we will go through the future agenda before the end of this meeting but we have the possibility to send out for new comments or changed recommendation. And I mean, this could be one topic to put in there and see especially what kind of input we will get from IGOs. Because I don't think we have - I haven't seen that group active for a while anyway.

We have still some possibilities to communicate internally with IGO representatives or GAC to get some kind of quick response and actions to these kind of topics. Phil.

Phil Corwin: Thank you, Petter. On the question of a second comment period on the final report, my - I must admit that my general bias particularly given the length of

time that this PDP has taken, is not favorable. But I'd like to query staff on one - I believe the - and let me ask all my questions and staff can respond collectively. I believe the general practice is not to solicit comments on the final report but simply to send it onto the GNSO Council. I'd like confirmation of whether that's correct.

But also identification of those circumstances in which that usual practice has been overwritten and some additional comments have been solicited on the draft final report. And also if we were to solicit comments on the final report my bias would be toward accepting comments only on new elements of the final report that were not in the initial report and for an abbreviated comment period, not a full 40-day comment period.

So my questions to staff relate to what is the usual practice? When have exceptions been made? And if we were to allow limited comments on the final report, could we limit both the portions of the report on which comments would be accepted as well as the time period in which such comments would be accepted? Thank you. And I see Mary has her hand up.

Petter Rindforth: Yes, thanks, Phil. And before I leave it over to Mary, I don't have it on my screen now but if I remember correctly, the new - the agenda that was sent out were something included the possibility to have a new wave of comment period. But Mary, you're the best to answer to that.

Mary Wong: Thanks, Petter. Thanks, Phil. I will try. So if we begin with the rules for a PDP, I think as everyone knows, while it is mandatory to publish an initial report of public comment, as we did, it is not mandatory to publish the draft final report. That said, GNSO's rules, which is in the PDP manual, does say that while the final report is not required to be posted for public comment, the working group should consider whether it should be.

The goal of doing this is usually to maximize accountability and transparency especially when substantial changes have been made to the initial report. So

in other words, the option is given to the working group to decide whether or not it believes its final report should first be posted for public comment. And in addition, though, to that - and, Phil, I think this may go some way towards answering some of your other questions, in addition to require public comment periods, the working group has the discretion and the ability to seek public comment on any item that you think will benefit from further input.

So it does seem that we have a choice, we can post - you can choose to post a draft final report in its entirety and in doing so we can also say please focus on these sections and these changes. It's certainly up to the working group to only consider comments or at least to only consider amending its recommendations in response to comments that specifically raise issues that are new or that weren't considered. And you can also, you know, point out that there are certain changes you made in addition to some of the new items. So there's quite a lot of leeway.

The PDP manual also does say that the minimum duration of a - this kind of voluntary public comment period is 21 days. I do need to check on that because since the PDP manual was adopted, we did have some changes overall in ICANN to public comment periods. But assuming that still holds true, then it does mean that as long as we have a minimum period of 21 days, we can post the whole report, we can post certain sections, we can highlight certain sections. And I hope this helps, Phil.

Petter Rindforth: Thanks, Mary.

Phil Corwin: Petter, could I just respond quickly?

Petter Rindforth: Yes, okay. Go ahead.

Phil Corwin: Yes, thank you very much, Mary, that was very helpful. I would say two things. One, it would be premature for us to make any decision on soliciting comments on a final report until we see what's in the final report and whether

there are any material new provisions that weren't in the initial report. As stated, my bias would be to - if we allow solicit comments on the final report that such comments be restricted solely to significant new provisions in their report that were not in the initial report and to do so in a minimum time period of 21 days.

Now I think one other thing that will come into consideration is when are we going to be ready to issue the final report, in fact we're issuing it, say, let's say we wind up issuing it in late September early October, then it's possible that any narrow comment period on the particular issues would overlap with the ICANN 60 meeting and we could use one face to face meeting at the 60 meeting to discuss the new elements and inform any comments we receive.

And then finally, if we do take any comments on select portions of the final report, I think we need to commit to reviewing them and disposing of them with or without further changes in the report and an expedited fashion so that we get this report to Council in final form before the end of the year. Thank you.

Petter Rindforth: Thanks. Well, my personal summarize of that s that we may try to avoid some substantial changes because even if it had been fantastic to work with you all during these years, the - I recognize also when we talk to IGOs that are extremely interested in this topic and the GAC representatives and other groups of interest they also want to see a final suggestion, a conclusion from our working group. So looking at the proposed timeline, it's - it would be good to have the possibility to keep that timeline.

And I think we should still have the goal to come up with our final report in September. And then I don't know if it's - would be possible to - even if we got some inputs there to discuss it in minor details at ICANN 60. But I would like to keep with this proposed agenda. Yes, Mary.

Mary Wong: Thanks, Petter. And certainly Phil, as you noted, the decision whether or not to publish for public comment should probably be finalized when you've had an opportunity to see the text of the final report and edit it. What we have here in terms of the document, does contemplate a 40-day public comment period. That doesn't mean it can't be shorter, as we've just noted. It also contemplates a community session at ICANN 60 in Abu Dhabi.

So our thinking there in part was that if you are going to or planning to hold a community session in Abu Dhabi, it makes sense that you would not have finalized the final report at that point in time because then there's still opportunities to make comments, whether or not it's a formal public comment period or just a community session or both.

In terms of substantive changes, our thinking was that given the working group's discussion about I believe it was Recommendation 2, on standing and 6ter, and given the likelihood that as between the various options for Recommendation 4, the working group will likely come up with a decision that there will indeed be some substantive modifications from the initial report. So it may be worth considering publishing the report as a result.

Finally, in terms of the arbitration elements, I think staff had noted previously that we're not experts on international arbitration processes, rules or procedures, so it may also be helpful if we go forward with Option 2 and with the elements that we've been talking about, that we also call those out and seek input as to the feasibility of those possible elements as well. So that's basically the thinking behind both the timeline that we've put forward for consideration here and some considerations for the final report being published before it's sent to the Council. Thanks, Petter.

Petter Rindforth: Thanks, Mary. Well, we have to consider that. And as long as we don't extend the time of the New Year, and if we find the need to get some further inputs I think it also good and acceptable for all groups of interest that we don't use another external expert that will take - well someone but especially

some extra time. So if we have some specific topics that we want to reach out to some groups of interest.

And I understand it may be not generally acceptable to just check it out with some specific groups of interest. And if you have some specific detailed additional questions or topics, it's better to send it out in a general request for comments on that.

I also - before I leave it over to Phil, one thing - and again, that's from my personal point of view, I'm not so fair of George Option 4 but as I said, last week, one thing - and that's still again my personal view, one thing I think is a good suggestion there, is actually also to add maybe as a recommendation that there is within some specific timeline a review of our new system. I think that would be good for all parties of interest actually to (unintelligible) system for some years and then that is already in the ICANN schedule a review time where everybody can see if the system has worked or what further changes are needed. Phil.

Phil Corwin: Yes, thank you Petter. Phil for the record. I just wanted to point out that, yes, it would be useful, Number 1, I don't think we even want to contemplate the process of asking another expert to do a report on, you know, multinational arbitration. I think we can solicit community input. I don't believe it's a huge challenge to find an arbitration provider that can decide things under policy.

But the key thing here is that the job of PDP working group is to recommend for or against specific policy changes. And where specific policy changes are recommended, typically the working group provides kind of broad brush strokes of what they want the policy change to be. But there's always a follow up implementation group if the recommendations are accepted. And they could be modified by the GNSO Council, the Council has authority to modify them, I believe. But they have to be accepted by Council and then approved by the Board before they can reach the implementation stage. And then there's an implementation process where the final details are filled in.

So our task is to give some - if we're going to make policy recommendations to provide some broad principles that should be followed, but the detailed work on how those principles would be implemented falls to the follow up implementation group which I'm sad to say will probably require some or all of us to engage with that group when and if it's created.

But I just wanted to point out that we don't have to provide every, you know, every layer of detail down to the third level of how a recommendation should be implemented, that's a task for the follow up implementation group as long as we provide specific and understandable guidance and again, we're going to need to engage - some of us will engage with that implementation group because we've seen examples where implementation groups sometimes have a tendency to go off and start creating policy that deviates from what was recommended by the PDP or and also ICANN staff sometimes weighs in with their own idea, not to criticize but just to recognize that that does happen sometimes and there's need to stay engaged to make sure there's no significant gap between the adopted policy recommendations and the actual implementation. Thank you.

Petter Rindforth: Thanks, Phil. Okay, so we're on the agenda - I think that it's in our Option 2 we had just one red marked question, if it's possible to just get that Page 1 up again. Yes, and that was about the panelists that wanted to raise it again to see if there is any comments here today on that.

I think the - in all - well first of all, when it comes to both the URS and the UDRP, it's a possibility in the URS in the later stage of the dispute resolution procedure there are three panelists and there are possibility for the domain holder in the UDRP and also for the complainant to use three members. And in most arbitration cases, there are three member panelists, so I don't see any problem with that. And I think personally I think that the - as it's described here, it's a good way to use the panelists.

I hand it over to Mary first.

Mary Wong: Thanks, Petter. Not a comment from staff on the merits of any of these elements or the one just described, just a note that in terms of a three member panel and the prescription of the chair of that panel, there were probably ramifications on the costs of that proceeding, so just a note for consideration. Thank you.

Petter Rindforth: Thanks, Mary. Phil.

Phil Corwin: Yes, sorry, once again, I forgot to lower my hand.

Petter Rindforth: Okay. And I suppose it's not the same with George, your hand up.

George Kirikos: George Kirikos, that's a new hand, yes. Yes, I definitely wouldn't be in support of a standing panel from which to choose the other two panelists. As I mentioned before, we don't necessarily want to create a new system like the UDRP which can be gamed and which panelists have an incentive to be hearing cases.

If there was going to be arbitration under Option Number 2, which I don't think is a certainty, I think Option 1 or 4 might be better, but if we go down that route then we'd want to have a neutral organization that doesn't specialize in domain name conflicts at all. Even for ICANN's new gTLD program, they have an arbitration provider that isn't, you know, that does all kinds of arbitrations, that they don't just specialize in domain name disputes and have no incentive for increasing the volume of cases that they hear.

So there's fewer issues of forum-shopping and so on that are raised when these are kind of one-off arbitrations as opposed to developing an entire system. So ICANN shouldn't be in the business of certifying panelists or whatever, they should be, you know, nationally recognized arbitration providers in the countries involved.

So if it was a Canadian domain name - Canadian court case or a US court case there would be relevant arbitration providers in Canada or the US, but same, you know, if it was a French dispute in the courts that - and so perhaps, you know, the court could be the one that could identify the arbitration provider or some other, you know, mutual process of identifying you know, national - nationally recognized arbitration providers that are accredited externally like not involving ICANN. Thank you.

Petter Rindforth: Thanks, George. I have some pros and cons response to that. First, I think that yes, it's important that the arbitrator is neutral. And we have already suggested some statements and we'll see if we have to make it more clear that there is no arbitration organization that actually also handle normally disputes that could be in one way or another considered to be not fully neutral.

When it comes to the arbitrator, and this is just an idea I got right now, but in order to keep the costs down, it could be actually an online system that is more similar to the original domain dispute, but where both parties can be heard. And I'm not - I'm not so sure that there should be panelists that have no experience of Internet or domain name because I've seen some cases where the complainant actually have referred to trademarks or name protection and that a general civil dispute judge has automatically said that yes, of course, this is an infringement.

But where other judges in that panel that actually knows about more how Internet works and that the name can be treated in a completely another way when it comes online and connected to other services, have voted on behalf of the domain holder. So we can - I mean, we could have the judge could be completely neutral also when it comes to Internet related disputes. But and more focused on the general legal issue.

But I think it would be good to have the possibility to have the two other panels if the parties so would like to see to be people that actually knows about the topic and how domain names are used. But, George, is your hand up?

George Kirikos: Yes, George Kirikos again. Yes, just respectfully disagree with what you said. We want to have people that are familiar with the national laws of the particular jurisdiction, not generalists who are familiar with, you know, UDRP or domain name law or whatever. They need to be from the national jurisdiction involved.

And furthermore you threw out a comment regarding an online system, you know, I don't know if that was a serious comment or an oversight but the reason we've got here is because people are disputing the outcome of the UDRP which is a streamlined online procedure, this Option 2 is premised on the idea that it's an alternative to the courts because the court won't hear the case due to the immunity issue.

And so the idea behind Option Number 2 was that you can have, you know, full discovery, you can have cross examination just like a court, you could have all the relevant protections of due process of the court. So I don't know how you brought the issue of an online system because that seems to be antithetical to everything that Option Number 2 was supposed to have represented. But, you know, if people want to change Option Number 2 to some online system, I wasn't in favor of Option Number 2 to begin with, but if that's what Option Number 2 is, I think you're going to see people shift again back to Option Number 1 or Option Number 4. Thanks.

Petter Rindforth: Thanks, George. I was going to say that we talk about online systems yesterday so anything from the URS to actually full day mediation sessions that I've seen online. Online to me means more that the parties don't have to pay the costs for traveling to a specific part in the world to sit down and show

everything in paper form. So I think there are possibilities actually to use that also. But that's just a thought I throw out there.

Mary.

Mary Wong: Thanks, Petter. This is Mary from staff. So this comment is more for the record than for folks on the call because you guys already know this. But should anybody review the record, because we're actually talking about somewhat full blown arbitration so we're in very different territory from the UDRP and the URS. So in terms of the providers, I would imagine that it certainly would not be something that ICANN would get involved in. There's certainly options available in terms of recommending that the providers be from a certain list or leaving it to the parties.

And in terms of the choice of providers, in the arbitration world there's certainly a lot. I mean, some of the more well-known ones would be the AAA in the US, and (Jams) is also in the US, in Europe you have the (unintelligible) of International Arbitration, in Asia you've got Hong Kong Singapore. And obviously, you know, the venue, the costs, you know, the proceedings, everything would be different and then there's question also of choosing the set of rules that were applied to the arbitration.

But I just wanted to get it from the staff perspective on the record that we are talking about arbitration so we're talking about a rather broad choice of providers and rules. Thanks, Petter.

Petter Rindforth: Thanks, Mary. And, yes, that's correct. But also as we already have stated, it's important to note in our recommendations that even if we don't make a list of arbitration proceedings or some kind of example list. It's important to point out that it cannot be someone that is today, already dealing with domain name disputes. This is the, so to say, third step neutral group of (unintelligible) that had to look at the case from a new point of view and

decide independent on if there are an IGO or normally dealing with domain disputes.

And we have, as I think Mary was into, we have already made some exemplifications in our initial report. And, George, seems that you - do you suggest some specific service provider for arbitration or not?

George Kirikos: George Kirikos...

Petter Rindforth: George, your hand's up.

George Kirikos: George Kirikos. Actually I forgot to lower my hand but I can just quickly remark that, you know, both sides are going to be represented by lawyers presumably because they fought the underlying case in court so presumably both law firms would have experience with identifying suitable arbitration providers.

So conceivably it could be less than the discretion of the law firms involved, and also conceivably if they couldn't agree they could just go back to the court and say, you know, this is a contractual arrangement, you know, under contract the parties are supposed to identify an arbitration provider. They couldn't agree, please help us, you know, fulfill this contractual requirement or contractual dispute and have the court identify the arbitration provider. I think it could be, you know, a simple kind of statement like that. Thank you.

Petter Rindforth: Thanks, George. And when it comes to the complainant specifically when it comes to IGOs, I perfectly agree that they will be represented by lawyers with good long experience and good knowledge about the topic. I'm not so sure about the domain holder, it could be everything from single physical person to another huge organization or company. So we need to have some kind of at least recommendations in our final report.

Okay, I see that we have - sorry - we have four minutes left for today. Maybe we should just go back to the agenda and quickly go through that again on our time schedule.

As I said initially, we've got some inputs from today and also from the meeting we had last week. And I therefore think that we have some good inputs to further work on. And considering that is the - well some people have summer vacation. And Phil and I will go through the comments and documents we have so far. We have decided today to send out recommendations to get inputs from our members so that we hopefully can get some - I don't remember how many we are actually registered as participants on this working group, but we're definitely more than five persons.

So hopefully to get some further inputs from the rest of our working group and then we will have a good base for deciding also that, Phil says, decisions on whether to have a comment period. So we'll meet next time on August 3, sunrise recommendation for and agree on options to be included. Hopefully we will have some further comments in the meantime.

And then no meetings the rest of August - no, the next meeting after that will be August 24 to discuss draft final report and see in the agenda we have some meetings to do that. And if we don't decide on going out on a further comment period - well if I understand it correctly, this agenda is included public comment although 40 days here and we discussed that it could be hopefully restricted to a more limited period.

And even if we have the possibility to further meet and discuss it in Abu Dhabi, I frankly hope that we will have finalized it before that so that we can actually go out and make it clear by the end of November. Finalized report December 7, that - when I look at the agenda that's based on the possibility to have a further public comment period. So and as said in the chat room, we can have email discussions too.

I think that's - that will be normal when we all see inputs from other members of this group on the documents and suggestions we will send out. And that will be very good also that we can make a summary of those external inputs and further discussions to finalize our final recommendation.

And I think that's all for today. I don't know, Mary, if you have anything to add to that, but I saw that I like the agenda as it seems like now. So see you again in some weeks. Phil. Phil, sorry, I don't hear you.

Terri Agnew: And, Petter, this is Terri. Phil's audio has disconnected but I see where he put in chat, "Bye all."

Petter Rindforth: Yes, okay. Good. So that's the end of today. Thanks, all.

Terri Agnew: And once again, the meeting has been adjourned. Thank you all very much for joining. As a reminder, please disconnect all remaining lines and have a wonderful rest of your day. (Cath), if you could please stop all recordings?

END