

**ICANN Transcription
IGO-INGO Curative Rights Protection PDP WG
Thursday 12 May 2016 at 1500 UTC**

Note: The following is the output of transcribing from an audio recording of IGO-INGO Curative Rights Protection PDP WG call on the Thursday 12 May 2016 at 15:00 UTC. 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/gns0/gns0-igo-ingo-crp-access-12may16-en.mp3>

Attendees:

George Kirikos - Individual
Paul Tattersfield - Individual
Phil Corwin - BC
Jay Chapman – Individual
Nat Cohen - BC

Apologies:

Mason Cole - RySG
Osvaldo Nova – ISPCP
Paul Keating - NCUC
Petter Rindforth – IPC

ICANN staff:

Steve Chan
Berry Cobb
Mary Wong
Michelle DeSmyter

Coordinator: The recording has started.

Michelle DeSmyter: Great thank you. Good morning, good afternoon, good evening. Welcome to the IGO-INGO Curative Rights Protection PDP Working Group meeting on the 12th of May at 15:00 UTC.

On the call today we have Philip Corwin, George Kirikos,,Jay Chapman, Paul Tattersfield. We do have apologies from Petter Rindforth, Osvaldo Novoa, Paul Keating and Mason Cole. And from staff we have Steve Chan, Berry Cobb, Mary Wong, and myself, Michelle Desmyter. I'd like to remind you all to please state your name before speaking for transcription purposes. Thank you. I'd like to turn the call over to Phil Corwin at this time.

Phil Corwin: Well greetings everyone, whatever time of day it is for your calling in from. Phil Corwin here. We don't have a detailed agenda today; we're just going to continue our discussion of Professor Swain's memo in preparation for a call next week in which he expect him to join us.

I supplied some thoughts, questions, and comments regarding his memo. I distributed that late yesterday to the group. I know George Kirikos did something similar. We got some limited comments from (Paul Keating), who was not able to join us today. Hopefully some of you, even if you didn't provide anything in writing, have thought about his memo some more.

May I ask staff, I see this Adobe presenter, are we having a PowerPoint going on? Because I wasn't aware of any. What is that about?

Michelle Desmyter: No. I can go ahead and clear that out if you'd like.

Phil Corwin: Okay yes. It's just kind of distracting. I didn't know if there was a PowerPoint we didn't know about. So the way I propose to handle this is, you know, George and I are the ones who provided extensive comments. (Paul Keating)'s comment related to he thought there should be more attention to the contract issue, which I think would probably relate more to the waiver issue and whether it was voluntary or involuntary, proper or improper.

Well why don't we - I don't think we have to review everything said in those written memos but I'd suggest maybe you start out, George, with what you think was a key point you raised and then I'll switch to me, and then we can have people chime in on that or add other issues and see how much time that takes but just go through those points and help - Mary, you put them all in a single document. Okay. So let me - that's the document on display now?

Okay. So why don't we do this, George? Rather than jumping back and forth. Let's - it's 12:05, why don't we go through some of what you think is most important in your comments, not every one, we all have the written document. Let's do that for 10, 15 minutes then switch over, then look at (Paul Keeting)'s and switch over to mine and then see how long that all takes and just have a discussion among the group that's on the call today. Is that an acceptable format for handling this call? Any objections?

George Kirikos: George Kirikos here for the transcript. Given that we've all, you know, I've already written submitted comments I was wondering maybe if (Jay) or Paul Tattersfield who are on the call might want to go first if they have any written - sorry, if they have oral observations that they might want to share before we go through our written ones.

Phil Corwin: Sure. I think that's a good suggestion and why don't we - (Jay) or Paul Tattersfield, if you want to speak at this time just raise your hand and we'll call on you. And by the way while we're waiting, Michelle, there was no one on the phone line and not in the chat room, was there?

Michelle Desmyter: No.

Phil Corwin: Okay. All right. Well I'm not seeing any hands raised from (Jay) or Paul, so George why don't you get into yours and then we'll invite their comments as we go along?

George Kirikos: Okay. George Kirikos speaking again. I guess the one - the concern I had the most was -- I numbered it question B1 -- which was the issue where he tried to isolate an issue, and I kind of disagreed that the thought experiment that he took - that he made didn't actually isolate the question by focusing on one because of the asymmetry.

So he said that, you know, the legitimate expectations of the IGOs could be isolated if you look at what would happen in the one scenario, but it's not the same if they're the ones initiating a court case. So I think that was kind of a very big issue. I don't know if people - well they see it on the screen. But if people had any comments on that, I'd appreciate it if they shared that concern.

Phil Corwin: Okay. Give me a moment here, George, as I read through because the memo and the comments, none of them are simple.

George Kirikos: He said that he would imagine that that scenario that it isolates the question as to whether an IGO has legitimate expectation that it would be entitled to immunity absent the UDRP. And the scenario he gave though doesn't properly isolate that question because if the UDRP didn't exist then an IGO going to court wouldn't necessarily waive their immunity, so what he wrote in his paper wasn't useful at all because, you know, he was looking at it - the immunity only exists as a defense mechanism to an action brought by somebody else.

And so he thought, you know, I'll isolate this defense mechanism and say, you know, do the IGOs have an expectation of immunity, but that's not what would happen absent the UDRP. Absent the UDRP, they'd be initiating some action in court and so they wouldn't have any legitimate expectation of immunity because it's no longer a defense to an action that somebody else brought, it's an action that they brought in court. So that was my big issue with what I numbered as B1. And you have to go back to Page 8 of his written

paper. He didn't number the paragraphs, which was a bit hard to cite every text that he used, but it's the top of Page 8.

Phil Corwin: Right. Yes I think that's certainly something that we can respectfully bring up with him next week when he's on the call. I get your point. In the absence of the UDRP, the only way the IGO could directly litigate would be to bring a court action, which would involve a waiver right up front. There is a possibility they could appoint an agent to bring it on their behalf, and as he discusses in the paper that might be accepted in some jurisdictions and not in others.

If they were to use infringement, they could try to assert the immunity defense in a court situation. But - so yes. I think that's a legitimate comment and we can raise it with him on the call next week and see what his response is.

George Kirikos: George Kirikos here again. I consider it important because he actually wrote on Page 8 if such immunity is minimal or uncertain, then any compromises required by the UDRP loom less large. So that's why, you know, if the principal scenario is that there's no expectations of immunity then the UDRP is fine as it is. It argues for the status quo.

I know if you jump to Page 23, which I mention on Page 1 - sorry, on point B1, he actually, you know, mentioned that scenario of them going to court and, you know, not expecting immunity. So I was kind of perplexed that he had that, you know, different statement on Page 8. We can talk about some of the other points I raised, but that was I think the most important one because it really argued for the status quo.

If we look at the other examples, on B2 I talk about various scenarios where even if the immunity existed or the IGO against the registrant, you know, the registrant can still do other things like doing, you know, going after the registrar or going after ICANN, going after the domain name itself, like you do have this context of interim lawsuits to go after, you know, the property itself. And the fact that, you know, there's also the immunity aspect in the

registration agreement, that, you know, being the registrant of a domain name has a waiver of immunity because, you know, people are specifying the jurisdiction for lawsuits, et cetera.

Phil Corwin: Right.

George Kirikos: You know, if we actually made any changes we'd actually have to recommend that the RAA be renegotiated, that all the registrars would need to agree to new things, which they may or may not want to do. We don't have any registrars present on the call, but I know that the RAA negotiations are, you know, quite stressful from, you know, and long, you know, long-standing. So I don't think that one could trivially insert changes to it without it having to be renegotiated in full.

Phil Corwin: Yes. Phil here. I think, you know, if this working group were to reach any conclusion that for any class of IGOs some alternative appeals process was required or advisable, I think we've already had some discussion that we would not undertake to establish that new policy, we would simply recommend that and note what additional changes would be involved, which if it would also require RAA changes, you know.

It would obviously require an exception in the UDRP. It would require the creation of a whole new possibly an agreement, an alternative to the UDRP. It would require a designation of an alternative dispute resolution provider. It would probably require RAA changes. So we - I think that's as far as we would go. We're not contemplating actually even in the event that we were to reach that conclusion to create that whole new system. I think we discharge our duty with our final report and recommendations.

George Kirikos: George Kirikos speaking again. I noticed that Nat Cohen joined the chat room. I don't know if he's on the call itself but I'd be happy to give up some time to him if he had any comments before talking about the written comments that I have.

Phil Corwin: Yes. Phil here. And welcome, Nat. Are you on the phone line, Nat?

Nat Cohen: Yes (unintelligible).

Phil Corwin: Okay. Well if you if you want - what we did before you got on, we're discussing some of the comments put in writing by myself, George, and Paul Keating, not all of them, just the most important. We gave (Jay) and Paul a chance to speak at the beginning of the discussion if they had any particular point they wanted to raise and we extend the same courtesy to you now, or of course you're free to chime in at any point during the discussion. So did you have anything in particular you'd like to say now, Nat? Or if not we'll just proceed as we're doing.

Nat Cohen: Thanks very much. No I was just going to just listen in.

Phil Corwin: Okay thank you.

George Kirikos: George Kirikos speaking again. B3 was I guess the question of alternative mechanisms beyond the ones that he mentioned himself. And the example I gave really has to go with, you know, who has standing to bring a UDRP. We know that the trademark holder or the mark holder has standing, and we kind of agree that somebody that's in the (unintelligible) database would likely have standing to bring it.

We've seen examples where that right can be assigned to the law firm. That's the example that the professor considered that we'd brought up previously in the working group. But then would law enforcement or an attorney general have standing to bring conceivably that's something that a UDRP panel might consider or, you know, might want to consider that as solution. Because I think it would definitely solve the problem of immunity because let's say, to give an example, I'm in Ontario, Canada.

If the Ontario or the federal authorities in Canada saw that there's a registrant who's, you know, violating the marks of the World Bank of UNESCO or whatever, let's say it wasn't for domain names, it was for something else, conceivably they would sue that person in court, you know, either criminal or civil court to get them to stop what they're doing.

And so it wouldn't be a great leap or extension to say that, you know, they could use the UDRP as an alternative dispute resolution mechanism compared to the courts. And because the attorney general or the authorities are obviously in the same county as the registrant, an appeal to that - of a UDRP decision to the courts wouldn't have any issue with doing that.

Phil Corwin: George, Phil here. Let me respond on that. On the issue of standing, this group has already reached a preliminary conclusion that IGOs which have asserted their protective rights under Article 6ter of the Paris Convention should be - should have standing, and we're probably going to recommend clarification of that for UDRP filing purposes.

We could also consider whether we would recommend clarifying that an IGO can appoint private counsel or another party its agent or assignee to bring out a UDRP on its own behalf. That's something we can consider. And that would be an advantage over a court filing because, as the memo discusses, not all courts would recognize such an assignment. It's dicey on that.

Speaking as a Nater of first impressions, just speaking of myself, I'd be somewhat reluctant to permit any prosecutor or law enforcement agency of any nation in the world to assert rights on behalf of any IGO, you know. If the IGO requested, they'd be - it would almost be a waiver of immunity because they'd be asking a national law enforcement official to assert their rights. And if they didn't, I'd be a little concerned about letting law enforcement have that independently. We can discuss that further. But that's an initial reaction on my part.

George Kirikos: George Kirikos speaking. Yes I agree that yes they're very important safeguards that would have to be in place, and it's not necessarily something that we would want to do but I just put it out there as a thought experiment, because we have seen law enforcement and government authorities just unilaterally seize various domain names for copyright - sort of counterfeiting and other things. We've seen that happen time and time again. It's very controversial when they do, and it's not even clear that they've gone to the courts to do that.

So I guess the UDRP and lawsuits, the courts in general, it's all about due process and there'd have to be, you know, safeguards in place if we did make that extension. And, you know, I don't think that there's any consensus that we would want to do that. But I wanted to throw that out there because he was putting in, you know, binding arbitration and other things that, you know, something that a registrant wouldn't agree to but court actions by authorities is something that does exist. If the alternative was to do a UDRP instead, you know, the registrant might be amenable to that.

Phil Corwin: Yes. But - Phil again. You know, there has been a lot of criticism of cases where agencies have just seized domains by in camera court order. And I can imagine a scenario where there might be a criticism website that incorporates the name of an IGO and is criticizing the fact that certain governments are participating where a law enforcement agency is one of those governments brings an action in one of its own national courts to seize that domain name or to initiate a UDRP against that domain name, you know, without even consulting with the IGO. So we're going to have to look at that idea more closely even as a thought experiment.

George Kirikos: George Kirikos speaking again. Looking at Mary's comment in the chat, I didn't say this would be something that they would want to compel IGOs to make that kind of assignment, this would be, you know, some option. If, you know, immunity was such a grave concern to them, then, you know, it would be an alternative, you know, tool that they could use just like they already

have the existing tool of assigning things to a law firm, the example that's already on the record, because you know, even the UDRP itself is another tool, an alternative to the court.

And I think we saw from the State Department letter that the existence of, you know, the ability to go to court in itself should be sufficient to satisfy the obligations that the states have under their Article 6ter treaty obligations. Just to jump to the other points I made in the written comments, before I was just, you know, looking for specific examples where...

Phil Corwin: Hey, George, could you just note which one on which page you're discussing?

((Crosstalk))

George Kirikos: ...on Page 4. Page 4 of the six pages.

Phil Corwin: Page 4, which point?

George Kirikos: I labeled it 4. It says starting, "While the professor provides examples where parties entering into a contract of an IGO."

Phil Corwin: On Page 4 of your document? Are you looking at the document on the screen?

George Kirikos: On the document on the screen it would be one, two...

Phil Corwin: Yes let's refer to that one for pages.

George Kirikos: ...three. It would be on Page 3, the bottom of Page 3. Sorry about that. I printed it out on my own printer.

He gave the example of Apple entering into a contract with IGOs, you know, offering various, you know, arbitration mechanisms. He hasn't really provided an example though, of you know, totally unrelated third parties entering into arbitration on a compel basis simply because an IGO wants it to be arbitration. So like if he has any examples of that, because that's why we're really asking. We're asking for registrants to have a right to go to national courts, giving up that right in a compelled manner, and having it decided by binding arbitration against their will. And so if he has examples of that where it's occurred, I'd love to see it.

Phil Corwin: Yes. They may not exist given the uniqueness of the UDRP, which is kind of a trilateral arrangement on a bilateral contract.

George Kirikos: I'd give the example if someone was selling - sorry, George speaking again -- of UNESCO or World Bank cookies or things like that where there's clear and obvious trademark infringement, if they're somehow able to compel that infringer to go to, you know, some United Nations tribunal rather than their own national courts, I'd love to see the mechanism where he believes that has happened anywhere in history.

Because immunity is really just a shield, from what I understand. You know, it's a defense to an action. It's not something where the IGO is, you know, initiating the action but somehow dictating, you know, the venue that it's going to be decided in or the crux of, you know, the immunity issue.

Phil Corwin: Yes. That's just axiomatic. Obviously if a IGO is the plaintiff and not a defendant, it's decided to go into court and it's essentially waived its immunity?

George Kirikos: And then I think the most - the rest of the document that I submitted was more about, you know, general comments and takeaways. I did have some issues with some of the non-neutral language, which (Paul Keeting) mentioned as well, and so I don't want to take up any more time. If anybody

had any specific questions, I'd be happy to elaborate. But I'm free to give up my time to you and anybody else who wants to make comments or suggestions.

Phil Corwin: Okay. Well thank you, George. And we thank you for the - obviously the considerable time you put into writing up those thoughts. I'm going to - I'll take the liberty to read (Paul) - we already - you raised the non-neutral language. I'm less, you know, it's the professor's memo. I think the legal analysis is pretty neutral and isn't slanted one way or the other. He tries to look at both sides, or all three sides, of every issue.

And, George, (Paul) - George in your comment, if you scroll on the screen to Page 5 you'll see (Paul Keeting)'s comments. It's all there in one single document. Mary's combined it. This is a combined single document that she's created for us. So my own view on the non-neutral language is that, you know, it's the professor's memo and I don't find it, you know, overall to be biased. I think it's factually it's an excellent memo for our purposes and we know more than we ever wanted to know about IGO sovereign immunity from reading it.

So I'll, you know, having disposed at least my comments - and anyone can raise their hand and speak up on any of this as we go along and I'll stop talking and defer to them. (Paul)'s first comment he thought there should be some - perhaps some analysis of contractual analysis that the UDRP exists as a Nater of contract, a registrant agrees to it, to be bound by it when they register a domain and that includes the mutual jurisdiction language and that kind of writing in - some kind of immunity after the fact might render the entire registration agreement, or at least the part pertaining to the UDRP, open to invalidation.

And, Mary, I see you have a comment. I'll get to that in a second. I think that's a point worth considering if we ever decide that in any case it would be, you know, incumbent to recognize the immunity of some class of IGOs and to

create an alternative appeals process. We'd have to decide when that would become binding on the registrant. The registrant has agreed to a particular contract when they register their domain. If they've - can that just be imposed on them after the fact.

And I guess I think again that this points out that we'd probably need some modification of the RAA to recognize all this and some notice process to registrants that this has now been changed. I don't know if those contracts bind registrants to any future changes in the contract or in the UDRP. It probably binds them to changes in consensus policy, which would include I think the RAA. But I'll stop there.

Mary's question was whether any comments or questions I don't think need to go to Professor Swain. I don't want to play the editing role and saying this particular comment isn't worthy of going to him. I think it's fine. You know, he's an adult. He's professional. These are all meant to - he's used to the Socratic Method and to questioning and law school classes and looking at things from every angle. So I don't think he'll be offended in any way. I didn't see any question that I thought was disrespectful or lacked any merit. So that would be my personal view.

George, you have your hand up.

George Kirikos: George Kirikos speaking. Thanks, Phil. I'd agree with you on that point that you just made. I had a different point I wanted to make with regards to (Paul)'s statement. If we actually did make a change, which I'm not saying we are going to make any changes, one thing we might have to do is, because of that point that (Paul Keeting) raises, is that existing domain name registrants might have to be grandfathered in that, you know, perhaps, you know, there'd have to be some list of IGO names where any binding arbitration would only apply to a specific set of examples.

For example, we have the reserve list that IGOs have for the new gTLDs. There's a list of, what, 100 and something domain names. In case there's a domain name registrant change, you know, the new owner might have to be on notice because of that list that these names in particular, you know, would be subject to binding arbitration if they're misused in a certain way.

But you can't give them, you know, in the middle of the game, so to speak, without proper notice would be unfair to existing registrants. So that's I think something that, you know, from what I read of (Paul)'s statement, (Paul Keeting)'s statement, is something that, you know, we might have to consider like a grandfathering mechanism, plus a call notification period of the specific domain names that they are concerned about.

Phil Corwin: Thank you, George. And Phil speaking again. Yes clearly if we ever get to that point we'd have to think about how you do this transition legally. You've got a registrant who's agreed to a contract that says that if they're accused of infringement they can be the respondent in a UDRP action, and that if they're not happy with the decision they have a right to appeal to a court of mutual jurisdiction on a de novo basis.

And if that policy were to change, I think as a legal Nater, contractually they'd have to - there'd have to be some process to bind them to the new change and to put the registrars on notice of that change and have them rewrite their agreements to reflect it. So all of that would take time. There'd have to be a transition.

It might be triggered when a domain name is renewed, but if you've got one that's renewed for the full ten-year maximum period, could you impose that in the midst of that ten-year period when the contract that was agreed to at the time of the ten-year registration had nothing about IGO immunity. So those are all questions we'd have to deal with if we get to that point.

Also one thing that just occurred to me in this discussion, and anyone on this list including staff can disagree, but I think we're at the point now where this working group is really not contemplating - well as I said, we wouldn't write it, but we're not - I don't think we're contemplating recommending an entirely new curative rights process created solely for IGOs to file complaints. I think we've narrowed this down to whether certain classes of IGOs should have an alternative appeals process from a UDRP.

And I'll stop there. If anyone thinks that wasn't clear, please ask a question. Or if anyone disagrees, please ask a question. But I think we've agreed that sovereign immunity issue, which is the only reason for any change in the current system, only arises in the very narrow circumstance of an appeal from a UDRP decision.

George Kirikos: George here. I don't think that's 100% correct because the respondent in the UDRP, the domain name owner, can file a lawsuit during the UDRP before the panel makes its decision. That's exactly the scenario of the case that my company was involved in (pupa).com. We filed a lawsuit in Ontario court during the UDRP itself and the panel, you know, deferred its judgment to the courts. So there wasn't any - the UDRP decision doesn't necessarily appeal from, it was just deferred entirely to the courts.

Phil Corwin: Okay. Yes good point, George. And when I say appeal, I mean initiation of a legal action which, as you point out, the respondent is always free at any point during a UDRP to file a lawsuit, and panels are split on whether the UDRP should stop at that point or whether the panel is still free to continue and reach a decision when a lawsuit is filed in the midst of the UDRP.

Okay. Yes and technically it's not a - while we call it an appeal because we don't have a very clear alternative word to - for designating the situation where one of the parties to a UDRP is unhappy with the result and wants a de novo court review. That's what we mean when we call a - when we refer to something as an appeal from the UDRP.

Hold on one second. I'm just going to take a sip of water. Excuse me. Okay thank you. And, George, yes I note (Jay)'s comment in the chat room. I note Mary's comment that there's - we could differentiate between the types of IGOs. Clearly the UN agencies have the strongest claim to immunity based on a memo. The others - the claim of the other organizations is - vary from organization to organization depending on lots of different circumstances.

And noting also Mary's comment that any changes to the system could be implemented, not necessary would require consensus policy but would certainly require contractual changes in the RAA. And George asked whether we know if the IGOs are planning to give feedback to the Swain report. They've - I believe they've received that now, they and the GAC have received it and we've invited their feedback. I don't know. Mary indicated we don't know if they're going to continue to pretty much not be responsive to this group.

So we'll now proceed to the questions and comments I provided. There's no need to go through all them. I think - let me - as I'll scroll I'll just get into the ones - okay. Yes under item two on Page 6 of the combined memo, I asked a question, which we can explore with the professor next week, about whether the jurisdiction in which the IGO has chosen to be domiciled if it affords IGOs absolute immunity whether that would have any bearing on our considerations.

And I also noted I think a more relevant question under item three there, 3a, scope of IGO immunity and varied basis for the immunity, I asked - I think this is quite a relevant questions, others can agree or disagree. We've got, you know, ICANN is a U.S. government creation. It's non - California nonprofit corporation, subject to California and U.S. law.

The United States has not ratified the convention on the privilege of immunities of the specialized agencies, which is the one that gives the UN

agencies heightened immunity in other parts of the world to some extent, and instead has passed its own law on that subject. So whether the fact that the UDRP is a creation of a U.S.-based nonprofit corporation should be factored into our consideration.

I'm just going to click through these as the ones I think are important, and if anyone has any comments at any point, raise your hand. If not, I see some stuff in the chat room. We'll get back to all of that when I complete this quick review.

I did note that UN affiliated IGOs are differentiated from other IGOs as a matter of law. I noted that in the discussion that in terms of restrictive immunity, which is the view adopted by some U.S. courts, that immunity gets less favor when the dispute relates to a commercial matter, and trademark disputes are generally, you know, viewed as commercial matter, trademark being a species of commercial law.

Although later in the memo I noted that Professor Swain said that there might be some argument that defensive in IGOs name related to one of its core functions, and of course we've got the waiver issues, which whether by choosing the UDRP route, the IGO is effectively waiving it. Of course we can argue about whether that waiver is voluntary or involuntary.

A comment on functional immunity, but that's not one regarded by U.S. courts but we don't know what particular court an appeal from a UDRP would wind up particularly with the - now that we have all the new TLDs, which are based all around the world.

Okay. I saw his discussion. It's moving on to the waiver of immunity, beginning on Page 7 into Page 8. My own view was that the benefits of access to the UDRP process, which is a low cost and rapid resolution, in my view would outweigh the potential cost including the potential waiver of immunity on appeal to engaging - for an IGO engaging in a UDRP.

And okay. And then at the page of Page 9, top of Page 8, excuse me, I thought his discussion was helpful in making clear that ICANN's requirement of exceeding to an appeal through a court of mutual jurisdiction couldn't be compared to state mandated duress against an IGO, that it was more of a voluntary waiver. And you can read the rest of that. But it seems to weigh in favor of being not so troubled by the waiver of immunity required of an IGO entering into - initiating a UDRP action.

Finally, on the alternatives, beginning on Page 8, yes I thought this was helpful in maintaining the status quo discussion where he said that, you know, affording them a means of surrendering their immunity via a mutual jurisdiction provision is not a direct infringement of their immunity, that the current UDRP as it's constructed is not an infringement and that the - he said it was unlikely that the mutual jurisdiction concession establishes or occasions for a violation of IGO immunity.

And the conclusion I drew from that that what's before this group is really - we're not confronted with a clear violation of any legal principle and therefore we have more discretion, because what we're really debating is a policy issue and whether it's proper to have the IGO consent to that waiver of immunity and the possible circumstance of an appeal to a court of mutual jurisdiction by initiating an IGO. I thought that was a very important point that he made.

And then he talked about designating an assignee or agent. I talked earlier about that might be something we'd want recognize as having - that assignee or agent having standing that there be no question about them having standing to initiate the UDRP on behalf of the IGO, which would be a way for the IGO to isolate itself. We can't control whether the court of mutual jurisdiction would recognize the assignee or agent in the appeal, but that's something beyond our powers.

And wrapping on Page 9, I'm a little concerned about the notion of UNCITRAL being the designated arbitration agency if we ever were to go that route and saying there's an alternative arbitration forum, not a court forum for appeals, based on the fact that ICANN - UNCITRAL is itself -- and again it's UNCITRAL -- is a UN agency. So you have to question whether there would be some bias on behalf of other UN agencies in an appeal situation.

And wrapping up, yes - so yes last point, item three on Page 9, he proposed illustrative model language from what might be inserted as a provision in the UDRP to provide an alternative jurisdiction for IGOs. And I think his very language illustrates kind of the conundrum we're faced with in all this. The clause in that, which says that, "Except that in the event the action depends on the adjudication of the rights of an IGO that would but for this provision be entitled to immunity from such judicial process according to the law applicable in that jurisdiction as established by a decision of a court in that jurisdiction."

Well the problem is there's probably no jurisdiction in the world that's ever decided on whether an IGO has immunity in an appeals situation in a UDRP. So it'd be a de novo determination in just about every jurisdiction. And so you get to the situation where in trying to shield IGOs from being exposed to a court decision, you would throw the ultimate question of their immunity into a national court of mutual jurisdiction.

So it makes it very hard to escape getting courts involved. And for our own purposes, it's very unclear. The UN agencies would have the strongest claim to immunity, but the fact is that we couldn't stop respondents from independently trying to assert a right and initiating a lawsuit in which they tried to block that alternative arbitration. And we have no idea how that, you know, request for intervention against the transfer of their domain would be adjudicated. And in fact in the United States, depending on which appeals court circuit you're in, the result might be different.

So it's very difficult to decide which IGOs have immunity for what's essentially a trademark infringement action in an arbitration situation without asking the court whether they have immunity for that purpose. So you wind right back up in court on the immunity question.

And the final - his final suggestion that if an IGO elects arbitration they should bear the cost for the respondent, my own observation is that would probably not be welcome by the GAC or the small IGO group given that they've already advised us that they want an alternative process which is either free or a very nominal cost, though they haven't identified what threshold would be the limits of nominal cost.

So I'll stop there and let's see what comments we've gotten. Yes, George, go ahead and comment early while I'm reviewing the chat room.

George Kirikos: George Kirikos speaking for the transcript. Yes I want to echo the good point you made with regards to the UNCITRAL arbitration. It kind of echoes my own comments on Page 4 of this document, which I numbered C1, where, you know, the merits of an action are going to be quite different in different jurisdictions. That was the point that the professor himself made, and the results will vary of course by jurisdiction.

And I think that was one of the most important statements that they put in the document, important takeaway, because if we take this instead out of the hands of the courts and into, you know, a UN arbitration, we don't know how that arbitration will even be held. I was reading the UNCITRAL, you know, rules, which are about 30 pages long, on their website and I'm not even sure that they offer all the due process protections that exist in real courts. Like, would they be able to subpoena witnesses, you know. A real court could subpoena witnesses.

You know, there could be discovery documents where people are compelled to produce evidence that's, you know, not the evidence that they voluntarily

submit to a court but, you know, that they're compelled to produce that might against their, you know, narrative that's detrimental to their case. So we have, you know, adversarial court system, at least in Canada and the United States which have due process protections to try to get at all of the facts, and I'm not sure that, you know, an arbitration will even have those protections.

You know, in Canada or the United States, you know, if you lie in court, you know, you're subject to perjury. In an arbitration, you know, you basically lie with impunity because what can an arbitrator do. They have, you know, authority against, you know, people who perjure themselves. Whereas they can go to jail if, you know, if the perjury is high enough. So.

Phil Corwin: Yes. Well thank you, George. And I'm going to get - Mary, I'm going to get to you in one second. I'm just noting Paul's comment in the chat room. Certainly next week or on the phone with the professor we can ask him if he knows of any alternatives to UNCITRAL that IGOs might find acceptable.

I was - personally I was surprised, and I assume it's based on some knowledge of the UNCITRAL process, by his view that an UNCITRAL arbitration could be more expensive than even judicial litigation, knowing what the costs of litigation are, which is why he suggested the cost burden be placed on the IGO.

Mary, why don't you go ahead and speak up?

Mary Wong: Sure. Thanks, Phil and everybody. So I just wanted to go back to the UNCITRAL rules issue and not so much educate this group, because I think you already know, but just to put it on the record for others who may be reading the transcript or listening to the recording of this call after the fact that - for the UNCITRAL rules to apply, you know, like with many rules of arbitration, the parties to the dispute first have to agree to the application or the applicability of those rules, whether through an arbitration agreement or, you know, after the dispute has arisen.

One potential benefit of the UNCITRAL rules is that they do apply to a wide variety of international commercial disputes. What we don't know, because I noted in an e-mail that Phil you replied to that, is the match of that kind of scope with domain name disputes.

Secondly, in terms of the application of the UNCITRAL rules, it probably is not so much the fact that UNCITRAL is a UN body because the place of arbitration for applying the UNCITRAL rules, you know, could be a number of different venues, whether it be London, Singapore, or anything like that.

So the point here I think is that, as I said to Paul in the chat, there are various options such as the ITC rules, which - many of which actually are similar to the UNCITRAL rules in terms of just general applicability and principles. But they do require an agreement to have an arbitration subject to that. And then you get into things about the place of arbitration and the fit of those rules.

And then the question as to cost, I mean certainly some of these could prove quite costly because simply the fact that an arbitration is an alternative to litigation. But that doesn't necessarily mean that it always cheaper or, you know, less complex, because an arbitration under any of these sets of rules would be a binding decision on the parties that agree to it. Thanks, Phil.

Phil Corwin: Okay. Thank you, Mary, for your always excellent interventions supplying us with additional knowledge. George, I see your hand up.

George Kirikos: George Kirikos speaking again. You know, maybe I didn't make my point very well earlier but I guess my concern was that either under UNCITRAL or the ICC or any other arbitration whether they can actually produce the same result that would have happened in a national court, like under, you know, would the UNCITRAL panelists be equivalent to a Canadian judge who would know, for example, all the Canadian laws and all the Canadian defenses that are available to them, or would they be applying some other legal standard.

I think that's the concern for our registrant that they would want to have available to them all the same protections that they would under their own national laws to get to the same verdict. And I'm sure that that would be the case. I think if it went to arbitration, both sides would have to agree on what laws apply and what the appropriate legal task is, and that's what you kind of get when you have some commercial contracts between, you know, Microsoft and IGO and a UN nation agency or whatever, which I don't think you necessarily have under the UDRP.

Because the UDRP, you know, gave a, you know, a simple three-prong test and it gave, you know, a specific remedy, you know, either transfer of the domain name or cancellation. I think in a real court of law, you know, you'd get a wide variety of possible outcomes. You could have, you know, the transfer of the domain and the cancellation but you could also have, you know, money damages, you could have an agreement to, you know, stop doing the infringement - infringing action but not transfer the domain name.

So it's not clear that, to me, that you're going to get the same outcome as the national courts. And from my perspective, you know, the national judges of those national courts are in a better position than some other arbitrator to make that decision.

Phil Corwin: Okay. Phil here. Thank you, George. We're four minutes from the top of the hour. Does anyone else have anything they want to say as we near the conclusion of this call?

Okay well let me just say in closing, these are personal views. I think overall, you know, I might have some quibbles with the shading of some language in the professor's memo but overall I think it's an excellent document that has very well informed this working group in as clear a manner as such a complicated subject can be described as to the present state of the law on IGO immunity.

My own personal conclusions at this point are, one, I think this working group is now probably not looking at the possibility of creating an entirely new curative rights processes for all IGOs. What we're looking at is whether there should be an alternative appeals process from a UDRP decision for some class of IGOs that we believe has such a strong claim to immunity that they deserve it.

Other key takeaways from the memo for me was that the existing UDRP policy of having an appeal to a court of mutual jurisdiction does not impinge on any legal rights. We're not compelled to change it. We're dealing with a policy question rather than a question of legal compulsion and that while UN agencies have the strongest claim to immunity, even for them in the context of a trademark decision which can be characterized as a commercial dispute, not necessarily within the framework of their core functions, that's it - if we ask different courts around the world or even within discrete nations whether that particular dispute is deserving of sovereign immunity, we would get very different answers depending on the forum, which makes it difficult for us to create some universal rule for any class of IGOs.

So I'll stop there. Those are my own personal thoughts. And Mary's having a conversation with George back and forth in the chat about UNCITRAL versus court decision, and George asked about Professor Swain. My understanding -- and staff can correct me if I'm wrong -- is that we do have a pretty good commitment from Professor Swain to join our call next week and engage in a dialogue and answer questions.

So that's all I had to say. Does anyone else have anything they want to raise before we adjourn the call at 12:59 Eastern Time?

George Kirikos: George here. Are we going to get anything written from Professor Swain before next week? And also, you know, we will get anything from IGOs? Like

maybe the IGOs should be invited to next week's call to participate because we haven't really heard from them through the two years of our work.

Phil Corwin: Yes as co-chair I have no objection to inviting, you know, IGO representatives. They have always been free to join this group; they've chosen not to. But we can make them aware. I have no problem with staff sending out a notice to the chair of the GAC and to the IGO small group that we're going to have this dialogue with Professor Swain. They've got the memo, and if they think there's anything legally incorrect in the memo or if they want to engage in a dialogue and ask any questions on that call, they're welcome to join us. I don't see any reason not to do that.

I see Mary's hand up.

Mary Wong: Yes thanks, Phil, and thanks, George. We can certainly write to Thomas Schneider along the lines that you've just outlined, Phil, about next week's call following confirmation from Professor Swain that he will indeed be available.

To George's question about whether we'll be getting anything in writing, I think that's something that staff will seek a reply from Professor Swain about, since he actually seen these comments and questions. So it may well be that he either is in a position to provide written comments to some of not all of those questions an perhaps choose to answer others on the call, or he may choose to first engage on the call and provide written follow up shortly thereafter. But certainly we will check that with him. Thanks.

Phil Corwin: Yes. Thank you, Mary. And I think for the call next week, you know, I don't know if it's realistic to expect the professor to answer any of these observations or questions in writing in the coming seven days. But I think, you know, my view is that if the professor comes away from receipt of these questions and observations and decides that he wants to rephrase anything in the memo based on them and the discussion next week, he should be free

to before we deem it a final and closed document but that we should not be asking him to change anything. I think it - for the integrity of the process any additional changes should be on his own volition and not at the request of a demand of this working group.

Because as George points out, it's his report. His name's on it, and we can read it and take what we wish from it as a working group. That's our part of the deal. All right. So thank you all for participating today. I hope you found the call useful in furthering your own understanding of the legal memo.

And we hope we have better turnout next week and then we'll have staff emphasize to all the members of the working group that next week will be a very important call. It will be our one and only opportunity to engage not face to face but one on one, working group to professor with the author of the memo and raise questions and comments about it. So thank you all and enjoy the rest of your day.

Bye-bye

George Kirikos: Bye everybody.

END