

**ICANN Transcription
IGO-INGO Curative Rights Protection PDP WG
Thursday 19 May 2016 at 1600 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 19 May 2016 at 16:00 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://gnso.icann.org/en/group-activities/calendar - may>

Michelle DeSmyter: Great thanks, (Carrie). Good morning, good afternoon and good evening. Welcome to the IGO INGO Curative Rights Protection PDP Working Group on the 19th of May at 1600 UTC.

On the call today we have George Kirikos, Jay Chapman, Petter Rindforth, Paul Tattersfield, Phil Corwin, Mason Cole and Professor Edward Swain. We have a tentative apology from Paul Keating. And from staff we have Mary Wong, Steve Chan, Berry Cobb and myself, Michelle DeSmyter.

I would like to remind you all to please state your name before speaking for transcription purposes. Thank you and over to you Petter.

Petter Rindforth: Thanks, Petter here. Well I'm not sure if Phil has managed to log in yet. But let's proceed with...

((Crosstalk))

Petter Rindforth: ...yes, updates on – if here are any updates on Statements of Interest. I see only Mary's hand so I guess it's not on this topic. Okay. So – and I'm sorry I couldn't participate in last meeting but it's just wanted to note that it's good to have Keith Drazek on our group as the liaison to Council.

And then let's proceed to the main topic of today, the discussion with Professor Ed Swain on his report. And welcome, Ed. And it's nice to have you hear online and thanks for a very good work. I think – okay I see – I plan to turn over to you to make some initial comments. I don't know if, Mary or Jay, has something special. Okay, Mary.

Mary Wong: Thanks, Petter. And thanks, everybody. And I think Jay had his hand up for the comment that he made in the Adobe chat about an update to his SOI so thanks for letting us know, Jay, and thanks for updating your SOI.

Petter, I think what all I wanted to say was that we did have some brief exchanges as you and Phil know, with Professor Swain. And as you noted, it probably will be best to hand it over to him to deal with the two sets of things that we sent to him. One is obviously the questions that a few working group members and, and another is a set of comments related to the memo which you see up in the Adobe screen.

So, Ed, you probably can't see the Adobe if you're not in it but we have your final report up now. If you would like at any point for us to stop displaying that and to maybe display the sets of comments and questions, we can do that as well, just give us a shout. Thank you.

Edward Swain: Sure, and I apologize for being out of sync with the platform. I will try to sign in as I'm speaking and perhaps that will allow me to both participate via this handset and also see what's going on online. But I apologize for being out of sync.

So should I give some introductory remarks now, Mary?

Petter Rindforth: No, please go ahead.

Edward Swain: Okay, thank you. And I...

((Crosstalk))

Edward Swain: I very much appreciate the comments and questions on the memo. They show really a terrific amount of engagement with the issue and a great knowledge of some of the issues that I addressed and so I really appreciate them.

I think that the most – one of the things that I wanted to say at the beginning was a recurring theme that I saw in both the questions and the comments concerning let's just say the rhetoric or the framing that was done by the memo. And I think both of them touch upon the same theme.

In my view, the memo winds up in a position based upon my analysis of the legal questions, that's not particularly or strikingly indulgent to the potential position that might be taken by IGOs and indeed maybe perceived by them, I think perhaps unfairly, this is speculative, as hostile. So I think this is more a question of execution or consistency in language than anything.

As I understand it, some of the questions just sort of start in a different place. And I think it's an understandable and entirely reasonable place that they're starting. And that place is that the IGOs go through the same dispute resolution procedures as anyone else, they make the same concession to follow on litigation as anyone else, and so this should be uncontroversial.

And indeed any special treatment given them would be unfair both relative to other UDRP complainants and to the registrants they're opposing in any complaint ah the IGOs have initiated. And that might be seen as particularly ungrateful given that the UDRP gives them, and everyone else, a benefit in

addition to the judicial procedures that they are concerned about. And as I said, I think that's a completely legitimate perspective and one that I've tried to appreciate in the scope of the memo.

The IGO perspective on this is – or may well be somewhat different. And so I think the memo tries to take that seriously before asking what I hope are good questions of that position.

The premise of IGOs is that they're peculiarly vulnerable in judicial proceedings because of the number of jurisdictions to which they're exposed and because wherever they are they have no one that is necessarily in their corner, they're neither home state nor its citizens and they can't steal the march by initiating suit or choosing a jurisdiction in which they're the home team, because they have no particular home team.

And the result of this is that they are often asserting immunity and circumstances that have apparently unfair consequences, either for employees or for Haitians who are subject to cholera or what have you.

So one could react to that and basically say well here immunity has been waived, end of story. But I think the IGO perspective might be that they are – they should be given special treatment of some kind in order to reflect their immunity.

And this claim to special treatment is not uncommon and it's not unusual to maintain it even if you are being given a privilege. So if the District of Columbia, where I'm now calling from, said you have to follow this administrative process, IGO, in order to maintain the street, but only if you sign this piece of paper waiving your immunity, IGOs would be concerned.

And so their perspective I think might be that however apparent the symmetry might seem to be, they're being asked to give up something, immunity from suit, that others never had to give up. And so the others are giving up just

their rights to contest venue but not their rights to contest the availability of a judicial proceeding at all.

So what the memo tries to do is ask first, well, how robust is that immunity that they're really giving up? And only then can we really assess whether this is a big sacrifice. Once we establish that the scope of that immunity is not altogether clear, I think that shapes the perspective on waiver and all the alternatives.

So I think I understand the contrary starting place. And I want to review the memo to make sure that there isn't excess indulgence through poor choice of words or something like that of the contrary perspective. But I think it's fair to express the contrary position as forcefully as someone else might, in order to fully evaluate it.

So I just want to sort of say I understand where the comments about tone are coming from, I think there's a reason why that tone is there but I want to make sure that it doesn't go into excess. And so I will gratefully accept these comments and look over it in that regard.

Petter Rindforth: Okay thanks. Do you have any other specific comments, no, from – or replies to – or notes?

Edward Swain: I have – I can respond to a number of different questions but I don't want to exhaust people's patience. So would you prefer that I go down the questions that were mentioned and sort of provide my reaction...

((Crosstalk))

Petter Rindforth: I presume they're not online but I see no hands up. I see only a question from Georgie Kirikos that I suppose the idea is to submit any comments to us today. And Mary replied no, we're not receive anything. Phil, your hand is up.

Phil Corwin: Yes, thank you, Petter. And thank you, Professor Swain, for the excellent document and for participating in this call today. There are two main points I wanted to explore with you. One is that kind of the Mobius trip here that we seem to be on is that you did a very good job of considering the different analyses for the views of – and you make clear that different jurisdictions view the IGO immunity differently, some are accorded absolute immunity, some functional, some restrictive.

But ultimately, for this particular – since there's no case law on this subject we get to the situation where the only way to be certain of what – there's certainly no absolute global rule that's a clear black and white consensus so it becomes a matter of would the IGO be viewed as having immunity for this particular purpose and this jurisdiction and you wind up with a situation where the only way to be sure whether to know – whether or not the IGO would be able to successfully assert immunity in the UDRP waiver situation and saying this was coerced and shouldn't be binding because it trespass on rights, would be to actually go into the courts and get a determination.

So you get this conundrum where the only way to be sure of what the treatment is in a particular jurisdiction and whether an IGO shouldn't be pulled into court is to go into court and ask them the question of what immunity does the IGO have.

Is that a fairly correct interpretation of the situation given that there's no global rule on this?

Edward Swain: There is some uncertainty that's going to plague this, but I think the perspective of the memo is to say that if the status quo is maintained in which the IGOs continue to sign or participate by initiating the UDRP proceeding, they continue to make this waiver of their immunity that that largely moots the question of whatever immunity they would otherwise assert.

And so what the memo is basically saying in the perhaps over-long initial part, is that in the absence of such a waiver, there would be a variety of answers one might get concerning their immunity particularly in this commercial or quasi-commercial setting. You might get a different set of answers depending upon what the IGO is and what the jurisdiction is.

This is largely resolved, however, by the waiver which they effect by initiating a UDRP proceeding. So my understanding of the state of play is, though, that they are objecting to the continued presence of that waiver, that they would like their concession to be less or they would like to maintain their immunity by constructing some alternate procedure altogether. And so that would make it – the only way to evaluate that is to say what immunity are they otherwise entitled to?

Phil Corwin: Right. And but the only way to know what – there's no like – there's no principle, there's no legal rule which says they are entitled to absolute immunity for purposes of the UDRP in any jurisdiction in the world. It comes down to the – how would each individual jurisdiction answer that question. Am I correct in that?

Edward Swain: Yes, that's right except that I think that the waiver in the status quo, the waiver is fairly clarifying in that regard. It is possible, I suppose, that – and you alluded to this in your question – it's possible, I suppose, that a particular jurisdiction might say that IGOs are given absolute immunity within our jurisdiction. They appear to have waived in this circumstance, and that was inappropriate and amounted to a compelled waiver.

I don't think that that argument, though, is especially strong. And this is something that I mentioned a couple times in the memo and perhaps can make sure is adequately highlighted, because the reason why I think that argument about compelled waivers isn't especially strong is, it's my understanding there's nothing that really compels an IGO to initiate a UDRP versus just avoiding the whole process and starting a lawsuit somewhere. Or,

for that matter, tolerating the continued compromise of whatever trademark-related rights they have.

And so I think the argument that an IGO might make that we are entitled to continued immunity because we haven't genuinely waived this, I think that argument is not terribly persuasive.

Phil Corwin: Right. And not wanting to monopolize this, but just to close the loop on this, you do observe in one point in the memo that – I'm quoting here – “assuming a national court would find that the mutual consent commitment effectuates the waiver of IGO immunity the issue confronting ICANN,” which of course is the issue we're confronting in this working group, “is a policy question infused with legal principles.”

So parsing that hypothetical IGO files a UDRP, when does the UDRP – the registrant files in a court of mutual jurisdiction for de novo court review, IGO – let's take two different cases. In one – in both the IGO comes in and – with a defense saying we can't be hauled into court, we have sovereign immunity. One court says well that's true in our nation, you have absolute jurisdiction, and we're going to dismiss the lawsuit because you can't be pulled into our courts. So that's the end of story, although it did take at least a court appearance to get the acknowledgement that they're not, you know, liable to that jurisdiction.

In another jurisdiction they're pulled in the court says, in this type of trademark commercial transaction where you're getting a benefit in terms of faster and less expensive process we have no problem with the waiver of the immunity. The point I took away from that is for this working group we're not dealing with any universally-recognized global prohibition on asking IGOs to waive their immunity for the very small possibility of being pulled into an appeal from a UDRP decision.

We're really confronted with a policy decision in which we have discretion rather than a strict legal rule where we say, well, the recognized global rule is that they have immunity, therefore, we should get rid of the waiver for IGOs.

Edward Swain: Yes, I think that that's right. And the way you put it is, I think, the right way of thinking about it. Is there anything that is legally violative in asking a body that has immunity but has the capability of waiving that immunity, is there anything wrong with asking it to waive that immunity? And I think the answer to that generally is, no, one can imagine circumstances in which the – simply to frame the question is unfair because you're compelling them to say yes. But I don't think we have that circumstance here.

And so regardless of the nature of the underlying immunity to which the IGO would be entitled in the mutual jurisdiction state, if it has said no, we want to start this UDRP process and we accept that as a consequence we will be vulnerable to judicial jurisdiction in a follow-on proceeding, that's okay.

And so it's, in my view, a policy question as to whether you want to recognize the differentiated circumstances of an IGO by giving it a somewhat different deal or whether you want to say no, by beginning the UD, you are basically asking to be treated like any other party that would object to a registration.

Phil Corwin: Okay.

Petter Rindforth: Just, sorry, Petter here. Just a follow up question there. And now I'm talking generally. Is it possible for an IGO to waive their immunity in a first step and then depending on how the case goes on, take back their immunity during the case? Or if it's the same case and they have waived their immunity it's still – it will be waived until a final decision. Is there any general policy or practice on that issue?

Edward Swain: I mean, the general – this is one of those many situations, and I don't want to be ducking the question too often by saying the law varies. But as a general

matter if you open the barn door by participating in a judicial proceeding you have waived your immunity. And likewise, if you have in a contractual document said, we are subjecting ourselves to the jurisdiction of the court, you're not usually able to, you know, change your mind once you see the proceedings are going against you.

I do want to be clear, there are a couple of different forms of waiver that the memo discusses. In one set some IGOs, particularly international financial institutions have in their governing instruments waived in advance their immunity so that – so as to enable their participation in certain kinds of transactions. But that's only a limited class of IGOs.

The other ones generally are regarded as having the capacity to waive if the circumstances are to their liking. And so that's what we're really concerned with here. And if they've done that by the UDRP concession, that's fine.

The third kind of waiver is if they initiate suit themselves, available themselves of the jurisdiction, they are not able to say well we just want to be the plaintiff, we don't want to be the defendant. Or if they are just sued and they show up and they start participating and after a while decide they don't like the way the judge is looking at them. Again, they can't change their mind halfway.

Petter Rindforth: Okay thanks, that was – reply to my question. And as said, I think it's important – and also Phil points out that we get the general practice and legislations. There are some local differences in everything.

Edward Swain: Right, right.

Petter Rindforth: Okay I see no – oh yes, George.

George Kirikos: Hi. George Kirikos for the transcript. First I'd like to thank the professor for doing a very good job on the memo. My comments might have seemed a little

bit harsh but I know that he did a lot of work because I read all the footnotes and I saw that he did go through our mailing list in quite a great deal of detail.

I had obviously my written questions that are on the screen but just generally I was curious about the scenario in the US State Department's letter where they said that, you know, they fulfilled their Article 6 obligations simply by allowing the lawsuit of an IGO to be able to be, you know, initiated. Is that his understanding of other jurisdictions around the world or would that – is that the only knowledge that we have, the US State Department?

And my second question would be to the issue of immunity as a defense versus kind of like an offense. I give the example, I don't know if it's on the written memo or if we talked about it last week, let's suppose somebody, you know, forget about domain names, if we have somebody filing World Bank Cookies or UNESCO Cookies and the World Bank or UNESCO wanted to do something about it, can they use that immunity to somehow drag that trademark infringer into some international tribunal or is that something that they have a power to do or is, you know, just a defense mechanism if they were, you know, to be you know, sued by somebody else? So if you could comment on that I'd appreciate it.

Edward Swain: Of course. And thank you, by the way, for your written comments. I thought they were very acute and quite helpful. As to taking your questions in reverse order, I understood from the memo the cookie scenario to be pressing on something that I wanted to be clear on in the memo, and perhaps wasn't sufficiently. You were asking about the oddity of the fact that we are envisioning here the possibility of an arbitration alternative when the – there's not a contractual relationship between the parties. Is that consistent with the question that you're now framing?

George Kirikos: Yes, exactly.

Edward Swain: Yes. And the point I wanted to be making in the memo, and I'm going to review to make sure I make it successfully, is exactly this, that the – exactly one that I think your question is pushing on. We see the arbitration mechanism being successfully used by IGOs when they are in a one to one, you know, privity of contract with an employee or a supplier or someone else and the parties sit down and agree, well instead of going through this – having any disputes that arise being heard by a court, let's have it heard by this arbitration process, is that okay? The parties both sign on that.

What I'm trying to highlight here, and this touches on another question that was posed in the written comments, I'm trying to say that that doesn't fit very well, this scenario, where the domain name registrant has never acquiesced in the creation of an arbitration mechanism unless ICANN starts making them acquiesce in that way.

And it's also unusual in that usually no third party, like ICANN, is necessary to facilitate that arrangement. Again, in the normal course what happens is the IGO and its counterparty just agree on the arbitration mechanism. Here, as I understand it, the IGOs may be considering asking ICANN to impose this as an alternative on domain name registrants.

And what I want to get across in the memo, and I'll have to make sure that I do so successfully, is that this is unusual. And so the arbitration alternative on which they frequently rely quite successfully, doesn't fit too neatly in this box.

Please interrupt me if that is not adequate answer.

Petter Rindforth: Phil.

Phil Corwin: Yes, Phil Corwin here. Professor, just trying to parse it, when a domain registrant, you know, registers a domain they do that through – they establish a contract with an accredited registrar. But that contract is always required to have a provision in which the registrant agrees to be subject in a case where

the domain is alleged to be infringing trademark in a certain way to be subject to the UDRP process, which is, whether you call it an arbitration or not, it's an alternative dispute resolution process that they agree to be subject to. Does that change the analysis at all or is it consistent with what you just said?

Edward Swain: Well, so, I mean, I could imagine a world in which the ICANN tries to fully simulate the arbitration alternative by saying like for a domain name registrant, you are agreeing to not only this initial UDRP alternative, but also as a back stop to that something like UNCITRAL arbitration in order to review the merits of the UDRP proceeding like you presently have it set up so domestic courts can review the adequacy of the inquiry.

Admittedly, they change the inquiry somewhat but it's approximately a review mechanism. So I could see – you could create something like that. But again, that's still somewhat different because ICANN is saying you only get this, the privilege of registration, if you do this. That's different than a simple bilateral contractual arrangement.

Phil Corwin: Right. And just to take it one step further, we're not talking here about the possibility of changing that standard registry – registrar contract where the registrant says, well if an IGO brings an action against you it won't be heard by a UDRP provider, it'll be heard by UNCITRAL. What we're saying here is that if an IGO brings a UDRP against you and there's an appeal, the appeal will be to UNCITRAL or some other designated arbitration group, and you hereby agree to forfeit your right of judicial redress, which is a whole different deal. And as we know, many national courts wouldn't enforce such a provision.

Edward Swain: Well, yes, it's kind of a matter of speculation as to whether they would enforce it. But I agree with you that is a different question. And one of the other questions that you posed, I think it was George Kirikos posed it, is isn't there an inconsistency in principle between an IGO opposing the mutual jurisdiction aspect of the UDRP process and not opposing it in terms of the

registration concession. And there may or may not be such an inconsistency, I can't really speak to why they would oppose it in one context and not the other. That's a question perhaps better posed to them than to me. But somewhat similar but not precisely similar issues are raised.

As to the question about the State Department comments, I don't want to lose sight of that entirely. So that's an unusual situation because the US has basically said we are being consistent with the Paris Convention by opening up these proceedings in principle to the relevant parties without changing our laws to reflect the different ways that they might perfect their trademark interests.

And so the answer from the State Department, as I understand it, is largely we've done enough if we have opened up the opportunity for initiating suit. Beyond that you're sort of on your own; you have to maintain your own proceedings, and, you know, good luck.

That is, I think less indulgent than some other jurisdictions have been. It raised the question, and I think this – I don't remember where precisely in the comments this was so apologies if I'm misattributing it. But one of you raised the question, well, doesn't that same principle suggest that attorney generals say, in the same country as the domain name registrant, might bring a UDRP action on behalf of the IGO and thereby meet its obligation?

To which my answer, you know, as to whether that's a viable alternative, you know, my answer I guess that it would be better than nothing from the IGO perspective. But that an IGO would probably not regard that as appropriate as an exclusive recourse because one of the principles of their immunity is that they don't want to be dependent upon a particular state for espousal or protection. And they're likely to be especially skeptical, I would think, of whether the home state of a domain name registrant is likely to be an effective representative of their interests.

And so to me it's probably, though it's a very complicated scenario, it's probably more appealing to imagine them assigning their right to proceed in the UDRP to some private party, you know, a law firm or some other agency, than it is to depend upon the intervention by a state government.

I don't know if that answered the question.

Petter Rindforth: I take the silence as it was...

((Crosstalk))

Edward Swain: I'm sorry, I didn't catch that.

Petter Rindforth: I take the silence that it was perfectly replied to the question.

Edward Swain: Great, thank you. You know, there were a number of other questions that were posed. And some of them involved alternate sort of factual complications or scenarios. And I guess the question – and I can discuss this with Mary and others if they want, there are other scenarios in which we could imagine immunity type issues arising other than the principle scenario that we – that I discussed in which the IGO was initiating UDRP and then winning is subject to suit as a defendant in a national court.

There are other scenarios I could, I suppose, address but it will depend upon your evaluation of how likely those scenarios are and whether they're something that the working group is particularly concerned about.

Petter Rindforth: Petter here. I think the report is such – is pretty good covered. And as we say, we also discuss very few, if any, cases yearly. So it seems that we have pretty good summary in covering in the report as is. But of course we can discuss it quickly in between on the next meeting also. I see no one that has any other – given that. Phil.

Phil Corwin: I have just one last thing I'd like to explore for just a moment and then we can let the professor go. In the paper, in its discussion of the different forms of immunity – absolute which of course is absolute, if you're an IGO you can't be brought into court period; functional which says, well, it's – you're asserting it in regard to something that's similar to a sovereign immunity power you're okay but if it's more commercial in nature it doesn't get immunity. And then the functional where you have to show that it's essential to your function.

You got into – there were some statements that certainly under restrictive immunity that bring a UDRP, which is basically a trademark dispute, trademarks being essentially commercial in character, wouldn't be entitled to immunity whereas into the restrictive whereas in functional it's more arguable that in defending its name it might be entitled to immunity.

Is that a correct interpretation and do you come down one way or the other as to how it should be viewed or is strictly a matter of which jurisdiction you're in and which rule they choose to apply and how they choose to apply it?

Edward Swain: You know, as to the basic question I think there is potentially daylight between the scope of immunity under a restrictive approach that makes a distinction between commercial and noncommercial and this functional approach. And so there are circumstances in which it may be part of the function of the IGO to preserve its – the character of its mark interests against commercial encroachment, for example. So there is potentially that.

It's very hard for me to say, you know, concretely too much about this because of the state of the law in the question. There are some cases that are discussed in the memo concerning the scope of functional immunity, because that's, I think, a more common approach outside the United States. And those are little hard to predict to be honest with you. They engage in some interesting line drawing concerning what is a – within the function of the organization and what isn't.

By and large, restrictive and commercial should overlap when an IGO is doing something that's commercial in character that's likely to be outside of its proper function as well. But I can see some possible distinctions between the two. And if an IGO is essentially saying all we're doing here, folks, is defending the distinctiveness of our mark against attempts to exploit it so that people interested in what we do and the – our activities as an organization can come to a Website and find out about them, that's an argument that has some appeal under a functional approach.

Phil Corwin: Okay. And I know I said that would be – thank you for that. And one last inquiry, which is that, you know, ICANN is a – is headquartered in the US, it's a California nonprofit corporation subject to US law. The UDRP exists as an ICANN consensus policy but it's imposed on registrants as a contractual matter, as a contractual requirement.

Does the fact that ICANN's headquartered in the US and that the US has not ratified the convention on privilege and immunities of the specialized agencies, but has a different legislative approach that adopts the restrictive immunity view, should that have any bearing on our consideration toward a bias toward the US view or should we be more open to alternative points of view?

Edward Swain: You know, I view that as largely a question for you rather than for me, but I don't see that the position of ICANN as, you know, a California nonprofit and the entailments of, you know, what conventions the US is a party to or not, I don't see why that necessarily should change your perspective.

The claims of immunity are really ones that are germane to US courts and not so much to private entities, nonprofit or otherwise, in the – that operate in the United States. And so I view the question, and this is, you know, just my instinct, my instinct is the question for you is, you know, what is a sound policy that respects the various interests of the parties concerned, both the

IGOs' interest in preserving their immunity and the interests of everyone else in a level playing field and a fair procedure.

And that's informed by the international law of immunity but not solely or not especially tilted towards the United States except as a predictive matter that that's where suits are likely to arise.

Phil Corwin: Okay. Thank you and that was my last question. I think George has his hand up for a final...

((Crosstalk))

Petter Rindforth: ...I saw Mary was first but...

Phil Corwin: Mary too. Oh Mary's gone.

Petter Rindforth: Okay. George, go ahead.

George Kirikos: George Kirikos here for the transcript. Just from, you know, looking at things at 40,000 feet, you know, we probably can just stay with the status quo, that seems to be where the memo is leading us. But I just wanted to, you know, as a kind of devil's advocate kind of argument say if we were to change the UDRP, which I don't think we have to, pragmatically what are the benefits that the IGO receives at, say, UNCITRAL, versus the court? Like would it be – because in a court you would obviously hope that the UNCITRAL would deliver the same verdict that there wouldn't be some advantage to going to UNCITRAL.

Like what are the advantages? Is it just the freedom from, you know, producing certain, you know, discovery of documents or like what exactly is it buying besides having the jurisdiction of that court? Because you could still go to the arbitration and say, you know, Canadian law would apply if it was a Canadian registrant and you would think that, you know, Canadian courts

would be the best place to decide that because Canadian judges would obviously be more familiar with Canadian law than some UN arbitrator from Switzerland or Africa.

But I guess what I wanted to say is there's a certain benefit that the IGO derives from having access to the arbitration panel relative to the courts, is there a way to say okay the registrant can still take it to a Canadian court but they'd have to give up something? Like let's say that the benefit was, you know, the IGO wouldn't have to pay damages or something, if they lost. Could we say the registrant could still take it to the court but the IGO has, you know, immunity from, you know, cost damages or something like that? I don't know if the professor understood my question but I guess what I'm trying to say...

Edward Swain: Yes.

George Kirikos: ...think about.

Edward Swain: It's a very interesting question. And so as to – so I don't lose sight of it, as to the last part, if I were the IGO making that tradeoff and saying, yes we agree to follow on review in Canadian court but here's the way in which the Canadian court has to tie its hands, it can't order discovery or it can't provide damages or something like that, I would be a little cautious if I were advising the IGO, as to whether all those compromises would be enforceable within a Canadian court, which is not likely to view very kindly attempts to constrain the operation of its normal proceedings.

It's – I'd be much more comfortable if I were the IGO in either saying we're all in or we are excluded from the court proceedings altogether, it seems to me that's the clearer and more determinate option.

As to your initial question, what are they getting by preferring that the matter be diverted, this is – that's a complex question. They are certainly not going

to go through the same discovery process, they would, I think on the whole say, that the merits of the question would be treated just as well as they would in the court but without some of the compromises of procedure that the judicial proceeding might conceivably require of them.

It's harder to test the comparison because here what we have is, in theory anyway, the resolution of a trademark related dispute that is quasi-private, quasi-public in character and not an ordinary kind of breach of contract suit. And so it's a little hard to test whether the relative appeals of these two mechanisms would be the same in this context as against another one.

Critics say that the arbitration proceedings that the IGOs tend to favor are expensive, throw up barriers to legal representation and are just more difficult to commence and conclude. IGOs say, on the other hand, that they are perfectly adequate. I just don't know whether that follows very well in this setting.

George Kirikos: Then you don't think then if we were going to drop the UDRP that making, you know, certain concessions to address the vulnerabilities that IGOs are concerned about would be – it would probably be a dead end if we tried to go that approach.

Edward Swain: Well it's an interesting question. And one that I hadn't really given much thought to. I just would have that – if – my initial reaction is if I were an IGO I would be skeptical that this would be – that the constraints that such a document tried to impose on say a Canadian court, would be fully enforceable. There might be a tendency on the part of the court to say in for a penny, in for a pound, you have waived your immunity to the proceeding and we will decide what is appropriate procedure, thank you very much.

So I would be a little wary of that. That's at least my seat of the pants reaction.

George Kirikos: Okay and just to frame it the other way, from the – protecting the domain registrant who wants to go to court, one – if one was going to say okay, you can go to UNCITRAL or arbitration but there would be discovery or there would be costs or there would be things...

Edward Swain: Yes.

George Kirikos: ...you would get in a Canadian court or a US court, that would be stuff that I guess the IGOs would persist about because it would expose their vulnerability, the stuff that they're trying to avoid, is that your understanding or...

Edward Swain: Maybe – I mean, maybe but I would be more confident where I they that those sorts of concessions that would be made would be enforceable because arbitration is a little bit more inclined to just follow the scope of the contract in effect or the scope of the jurisdictional grant. And so I mention I think in the memo the possibility that, well, if you are really advocating an arbitral alternative maybe you pick up the costs.

Now that may not be politically feasible. They may not view that as a welcome option. But it might be one way of sort of splitting the baby.

George Kirikos: I think from a registrant's point of view though the costs would not be a sufficient safeguard because who cares about cost if, you know, you've lost the ability to fully defend the asset because some of these domain names are worth, you know, many millions of dollars and if I was a registrant I would want the protection of my courts where it could make all the appropriate legal arguments, have discovery, have, you know, the ability to cross examine witnesses. If you give that up then, you know, it's really, you know, a whole different, you know, it's not a level playing field from the domain registrant's point of view.

And so trying to balance those out I think it's, you know, a very tough policy question. And the way the UDRP was designed in the first place back in the 1990s was that okay we have this policy but in the end they can go to the courts so the policy isn't really binding on anybody unless they actually, you know, decide that it's binding by not appealing.

And so it'd be a big policy change to start making it binding because you could get that deviation from the court system that people are worried about. You have a panel deciding one thing whereas the courts would decide something totally different and there wouldn't be that – those checks and balances.

Edward Swain: Yes, I think that that's a fair point. You know, the other thing that's really unresolved at this point, at least in my understanding of the case law, is – and I think it's a subject of legitimate concern for IGOs is that their ability – the scope of the rights that they might defend in a national court proceeding is not necessarily the same as the scope of the rights that they might protect in the UDRP.

And so this is sort of the Barcelona problem that we've encountered in the United States. And so I think that may be behind some of the concerns they have about judicial proceedings is that the – whatever they would be able to actually invoke as a legitimate interest favoring the cancellation of a registration in a domestic proceeding, may not be as broad as that which they successfully invoked in the UDRP.

George Kirikos: George Kirikos again. So you'd be saying then that there'd be a forum shopping issue if we changed the UDRP, that the IGOs demanding that binding arbitration would in effect be saying we expect to get a different result through that procedure than we would through the courts so we're going to take that route.

Edward Swain: That is one possible implication. The other implication though, is that in the status quo the IGO may think we are being drawn into a jurisdiction that is primarily the result of the choice of the registrant and the registrant may have the ability to tilt that to basically limit the forum shopping unduly by choosing a jurisdiction which IGO rights are less broad than either Paris or the UDRP would suggest.

Petter Rindforth: Okay thanks a lot, Professor Swain, for a very interesting discussion of information today.

Edward Swain: Of course.

((Crosstalk))

Jim Bikoff: Petter? Petter?

Petter Rindforth: Yes.

Jim Bikoff: It's Jim Bikoff. I'm on – not on the – not on the link, I'm on the audio. Could I just raise one thing?

Petter Rindforth: Yes, please.

Jim Bikoff: I wanted to thank Professor Swain for his opinion. And I just wanted to raise a point about a recent decision that came down May 10 from the US District Court, Central District of California. It doesn't talk about IGOs but it talks about Native American tribal immunity. And it interprets the UDRP policy and the court proceeding that followed and tries to – I think it takes the position that the UDRP, you know, when the tribe was involved in the UDRP that it waived its immunity. And then in the court action that the unsuccessful party brought, that the claims that related to the UDRP there was also a waiver. But on other claims that went beyond the UDRP jurisdiction they still could – or may have not

waived their immunity. It may be good to take a look at that opinion just because there is a lot of content on interpretation of UDRP and court decisions with immunity.

Edward Swain: Excellent. Yes, thank you very much. And that's May 12 Central District of California?

Jim Bikoff: It's actually – the decision came down May 10. I don't have the cite but the – you can find it – I found it on (Pacer). It's Virtual Point Incorporated versus Porsche Band of Creek Indians.

Edward Swain: Okay. We'll look at that. Thank you.

Jim Bikoff: Okay.

Petter Rindforth: Jim, can you send it to the mailing list?

Jim Bikoff: Sure.

Petter Rindforth: I heard you say you don't have the case but at least the...

Jim Bikoff: I have the decision.

Petter Rindforth: ...information that we can identify it and find it.

((Crosstalk))

Jim Bikoff: I actually – I have the – it's a 12-page decision. I have the decision.

Petter Rindforth: Oh perfect.

((Crosstalk))

Petter Rindforth: Perfect. Okay so thanks again, Professor Swain, for all the work you've done for us. And also for participating in this follow up question session. It has been very interesting and good to have...

Phil Corwin: Yes.

Petter Rindforth: ...these replies and discussions.

Phil Corwin: Petter...

((Crosstalk))

Phil Corwin: Petter, Phil here.

Petter Rindforth: Yes, from the list but when we will get the final memo?

Phil Corwin: Yes.

Edward Swain: I'm sorry, this is a question to me?

Petter Rindforth: Yes.

((Crosstalk))

Edward Swain: I will be – why don't I follow up on that. My timing over the next week is extremely bad but after that it clears.

Petter Rindforth: Okay good. That also give us a week to cooperate and see what further questions and (unintelligible) that comes up from after this discussion today.

Edward Swain: Okay.

Phil Corwin: Petter, Phil here...

((Crosstalk))

Petter Rindforth: That's a useful time – yes?

Phil Corwin: I just want to add for the professor, again, thanking him and looking forward to the final memo which takes these – the input and the discussions into – into consideration. We would certainly hope to have the final one, and it sounds quite possible, before we meet in – at the ICANN meeting in Helsinki, Finland, which is the final week of June. So...

Edward Swain: Okay.

Phil Corwin: ...if we can get it by mid-June that would give everyone on the working group time to digest it and have it for discussion purposes in Helsinki.

Edward Swain: Super, okay. Thank you all.

Phil Corwin: Thank you.

Petter Rindforth: Thanks.

George Kirikos: Thank you.

Petter Rindforth: And then we have slowly slipped over to the last point of the agenda, next steps, and I saw Mary noted that our working group meeting is scheduled on June 27 for Helsinki. Is there any other notes on that meeting, Mary, possibilities to meet with other groups also to discuss topics especially can have updates from GAC if there is any or IGOs. Mary.

Mary Wong: Hi, Petter. Yes, and I'm just looking at the schedule now. One benefit of the Helsinki format is that the board and other SOs and ACs are supposed to be

free to comment or participate in work of the other groups which of course include GNSO PDPs like ours.

The GAC does have a fairly full schedule but looking at what we're scheduled against in Helsinki, which as I noted in the chat is the afternoon of the first day, the 27th of June, like I said, the board is supposed to be free so we might want to reach out to interested board members.

The GAC has a session on country and territory names and I think on the effectiveness of GAC advice. So I'm not sure how many people from the GAC we might get but it may also be worth reaching out to the IGOs, many of whom are observers to the GAC, and who may not be as interested in some of the topics on the GAC agenda that are scheduled across on ours.

So we can reach out to all of these folks that I mentioned on the working group's behalf, if you would like. Obviously then we would need to plan an agenda for that working group meeting that allows for the sort of maximum interaction that we would hope to have by having these additional participants present. I hope that helps, Petter.

Petter Rindforth: Thanks. I was just asking also that George in the chat line do you know which members' country for the GAC have the ear of the IGOs? There is a group within GAC that deals with this specific topic. And I think they also have connections directly with IGOs. So is it possible to reach out to this group and this GAC members specifically to see if they can participate and we can have a follow up with them. And I also see Phil's hand is up.

Phil Corwin: Oh thank you, Petter. Phil here. I just want to make in terms of next meeting I just wanted to clarify that we haven't discussed it, but I would think that if we receive the final memo prior to the Helsinki meeting we may want to hold another call of this group before Helsinki to discuss that before we start traveling. So I know there's certainly no meeting next week because of INTA and because there's no final memo from the professor, but if we get

something in early June I think we should just probably keep up on the possibility of having another call before we meet in Helsinki.

Petter Rindforth: Thanks. Yes, and thanks, Mary. I see your reply to my question on the chat that we can – you can certainly reach out to our contacts for the IGO GAC small group and it may be just as important to our board members participate in our Helsinki session frankly.

And I think that's a good idea, very good. As you may remember, we had a long time ago a small breakfast meeting with the GAC members that – with a specific issue. And although nothing happened after that but that specific meeting was quite good and interesting. And also gave us both parties frank and direct input from our topics. So if we can have those representatives up again and especially now when we have the Professor Swain support.

I will not hold you over time too much but just to follow up and sort of summarize if we can – if we can by next week – oh yes, we have many of us have something, other things to do during the next week. But I think we – if we can summarize the meeting today and see what necessary to amend and add into Professor Swain's support and if I remember it correctly he could make a final draft within two or at least three weeks from now so then we will have an extra working group meeting before Helsinki. I think that's a working plan that we can arrange.

Yes, so Professor Swain gets out his final memo by mid-June and we can shoot for pre-Helsinki working meeting on June 23. Okay good. I was just saying that I see no more comments or hands up but George, okay, George just said great work everyone, have a nice day. And the same to you all. Thanks for today.

Jim Bikoff: Thank you.

Phil Corwin: Thank you.

Petter Rindforth: Thanks, bye.

Michelle DeSmyter: Thank you, all. Today's meeting has been adjourned. Operator, please stop the recordings and disconnect all remaining lines. Have a great day, everyone.

END